AFTER THE CONSTITUTIONAL MOMENT

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1. A moment's reflection

From its first stirrings in early 2002, and notwithstanding certain geo-political trends that in the meantime prompted a self-conscious distancing between certain European and North American elites,[1] the rhetorical discourse of the Convention on the Future of Europe was replete with references to the United States' founding constitutional event over 200 years previously.[2] The sources and implications of this rhetorical emphasis may have been many and varied, but the main point and power of the analogy undoubtedly lies in the possibility of the European Convention, for all the vast contextual differences, emulating the Philadelphian original in terms of the profundity of its impact on the body politic. If we try to pin down this rhetorical suggestion and to operationalize it as a sober claim about what the Convention might achieve, a useful place to start might be with Bruce Ackerman's path-breaking analysis of the history of American constitutionalism in terms of a number of profoundly defining and redefining "constitutional moments."[3]

What, then, might be implied by taking the rhetoric seriously, and so characterising,[4] the Constitutional Treaty produced by the Convention and drafted in the Summer of 2003[5] together with the ensuing IGC[6] and the national ratifications which may follow as a "constitutional moment"? In Ackerman's original formulation, a constitutional moment was a brief

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1 In academic circles, the arguments of Robert Kagan in particular did much to trigger this opposition and, indeed, to frame the ensuing debate. See in particular his *Paradise and Power: America and Europe in the New World Order* (London: Atlantic Books, 2003).

2 Valery Giscard D'Estaing himself, as Chairman of the Convention, led the way in a number of public pronouncements. For a detailed version of his thoughts on the Philadelphian analogy, see his Henry Kissinger lecture in Washington February 11 2003, available at http://ue.eu.int/pressdata/EN/conveur/74464.PDF.

3 See in particular B. Ackerman, "Constitutional Politics/Constitutional Law": (1989) 99 *Yale Law Journal* 453; *We the People: Foundations* (Harvard: Harvard University Press, 1991); *We The People: Transformations* (Harvard: Harvard University Press, 1998). The Ackerman thesis has engendered a huge secondary literature. See, for example, the Special Issue of the *Yale Law Journal* (1999, Vol. 108(8)) on "Constitutional Change and the Politics of History," including Ackerman's own contribution, "Revolution on a Human Scale," at 2279.

4 The value of beginning from the Ackermanian model is underlined by the fact that some contributors to and commentators upon the European process have adopted not just the general US analogy but also the specific language of a constitutional or Madisonian moment. See e.g. n2 above See also, D. Castiglione, "Reflections on Europe's Constitutional Moment," paper to the CIDEL Conference on "Deliberative Constitutional Politics in the EU" Zaragoza, 19-22 June 2003. The idea of a constitutional moment is also a recurring theme in E.O. Eriksen, J.E. Fossum and A.J. Menendez (eds) *The Chartering of Europe: The European Charter of Fundamental Rights and Its Constitutional Implications* (Oslo: Arena, 2003).

5 OJC 189, 18 July 2003.

6 Which began in October 2003.

and rare (only three in the 200 year history of the United States) constitutional episode, a short period of "constitutional" politics which should be sharply distinguished from the "ordinary" politics which precede and succeed the moment in question. As well, however, as standing out from what came before and what came after, the constitutional moment is also characterised by its role in altering the framework within which ordinary politics unfolds. That is to say, not only should the constitutional moment itself be sharply distinct from the ordinary politics which came before and after, but it should also ensure that these two phases of ordinary politics – before and after – are sharply distinct from one another. The Constitutional moment, thus, is marked both by *discontinuity* and by *transformation.* In transcending the limits of the previous ordinary politics and marking a phase where the political life of the polity is preoccupied with polity-generative questions rather than policy-programme questions, it is clearly discontinuous with what came before. Yet in changing the frame in which policy-programme questions are addressed in the future, it also marks a lasting transformation in the body politic.

If we accept this framework analysis, we are already making some claims about what the constitutional moment is, and, perhaps more clearly, about what it is *not*. We are claiming that the constitutional moment is a highly infrequent event, one restricted to foundational episodes or other similarly abrupt shifts in the constitutional landscape.[7] We are thereby also claiming that the constitutional moment is not constitutionally trivial, otherwise it would be neither discontinuous with nor transformative of ordinary politics. Further, in claiming that the constitutional moment is of considerable constitutional significance, we are asserting that that significance is not merely ephemeral or transient. If it is transformative, then its significance clearly has lasting effect. But while the effects are lasting, the constitutional moment itself is not. It is merely a bounded episode with long-term effects on ordinary politics, rather than a new and indeterminately extended phase of constitutional politics.

Of course, this modest cluster of hypotheses is not all that is asserted in the Ackermanian scheme. Indeed, it only begins to scratch the surface of what is a rich analytical mine. However, even if it were possible in an article of modest length and with a more focused purpose, it would not necessarily be productive to dig too deeply and borrow too heavily from the theoretical original, for the emphasis of the present analysis is rather different. Two points of difference are of particular importance. First, Ackerman's scheme was basically conceived for historical-explanatory purposes, and, secondly, it is centrally concerned with the defensibility of a framework of "dualist democracy"[8] in which the higher level of constitutional democracy is distinguished from the everyday pattern of democracy not just by its (transformative) *effects* but also by its outstanding *property*, namely the quality and inclusiveness of the debate which it instantiates. The European context, by contrast, is forward-looking – it requires prediction rather than explanation, the evocation of what is the best way forward rather than simply making the best sense of an inert past. Moreover, while Ackerman is undoubtedly correct to avoid the amoral *cul de sac* of defining constitutional salience only in terms of consequences, and while the proposition that the degree and quality of public participation and engagement is an indispensable element of any meaningful characterisation of a constitutional event or phase as momentous is wholeheartedly endorsed here, the understanding of constitutional

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7 Ackerman's concluding extended metaphor in his seminal 1989 essay applies this kind of imagery, likening the American Republic to a railroad train moving through a changing landscape and occasionally taking (but usually refusing) a fundamental change of direction; see n3 above, at 546-7.

8 *Ibid* 456 *et seq*.

theory and praxis in general and of EU constitutional theory and praxis in particular advanced below nonetheless suggests good reasons not to view popular mobilisation as *the* defining property of a constitutional moment. Rather, a more expansive and multi-dimensional conceptualization of what is properly of constitutional moment is sought.[9]

The rather spare conceptual borrowings that we have chosen to restrict ourselves to are unable to, and, indeed, are not intended to tie the proposition (or belief) that the European Union is experiencing a constitutional moment to some precise political agenda or set of aspirations. Yet they are enough allow us to draw some limited but important preliminary inferences. To assert and to argue that the EU is experiencing a constitutional moment – that it is passing through a phase that is constitutionally *momentous* – is to say something about both macropolitical means and macropolitical ends. It is necessarily to believe that the EU is capable of being taken seriously in constitutional terms and, further, that the Constitutional Treaty will be a significant catalyst in conferring upon or deepening the status of the EU as a 'constitutionally serious' entity. It is to believe, in other words, that the Constitutional Treaty can make a difference in transforming the EU into a constitutional polity, or at least in providing a significant and lasting change in its quality as a constitutional polity. The purpose of the present article is to explore these implications of the moment metaphor in more detail. Can we indeed conceive of the Constitutional Treaty as a significant catalyst in conferring upon or deepening the status of the EU as a 'constitutionally serious' entity, and, if so, can we do so in a way that hold open the prospect of enhancing the legitimacy of the EU as a political project?

2. Other Conceptions of European Constitutionalism

To begin to specify more precisely what is at stake in the claim that the EU is experiencing a constitutional moment, we need to situate the idea of such a moment in the wider debate about Europe's constitutional prospects. To call the Constitutional Treaty a constitutional moment already involves taking an implicit or explicit stance against various characterisations or potential characterisations of European constitutionalism. Indeed, it also involves taking a stance against certain conceptions of constitutionalism more generally which are out of sympathy with a neo-Ackermanian approach – as much in the state context with which Ackerman was directly concerned as in the non-state or post-state context of the EU. Let us, however, concentrate on the EU dimension, not only because it is our direct concern but also for two other reasons. First, the more general challenges to the characterisation of any self-styled major constitutional event in any polity (state or non-state) as a constitutional moment are already implicit within – are carried forward into – the particular challenge to such a characterisation of a self-styled major constitutional event in the EU. Secondly, as we shall see, in some respects the challenge to the appropriateness of the 'constitutional moment' concept is in some respects more acute in the EU context. That is to say, there are certain features of the EU context that might suggest that the 'constitutional moment' characterisation is particularly and peculiarly inappropriate. In some ways the EU might be seen as the limiting case for the "constitutional moment" concept, the context to which it is least suited – and this, ironically enough, notwithstanding the broad currency which, as we have seen, neo-Ackermanian sen-

[9] See Sections 5 and 6 below.

timents have come to achieve in political, and, indeed., increasingly in academic understandings of and aspirations for the Constitutional Treaty.[10]

What then are the various conceptions of constitutionalism which would challenge the characterisation of the Treaty as a "constitutional moment", and which must themselves, therefore, be rejected or modified, if we are to make the case for such a characterisation? Four such conceptions are outlined below. As we shall see, these four conceptions cannot simply be read as alternative challenges to the idea of a constitutional moment. Rather, both because there is a measure of theoretical compatibility and continuity between at least some of these positions, and because elements of each are present in the practical arguments which have influenced the form and content of the Constitutional Treaty and the make-up of its collective authorship and supporting coalition, we must start from the assumption that they represent a cumulative challenge

(a) Constitutional scepticism

First, there is the attitude of the *constitutional sceptic*. There are a number of variants of scepticism. There is, first, a generic constitutional scepticism which, from a number of quite diverse starting points, holds that constitutionalism in any guise is incapable of making a significant positive difference to the legitimacy or effectiveness of the political domain.[11] Of more immediate relevance, there are two forms of constitutional scepticism which are more specific to the EU. There is, first, an attitude of deep scepticism, which simply holds that the EU is just not the kind of entity that is worthy of characterisation in constitutional terms.[12] There is also a more contingent scepticism, which often shades imperceptibly into the deeper scepticism.[13] The more contingent version of scepticism holds that while we should not rule out the possibility of a 'truly' constitutional status for the EU, and so should not entirely dismiss the prospect of a constitutional moment, no such status is yet appropriate and no such moment has yet arrived.

These attitudes, of course are associated with a state-centred view of constitutionalism, one in which states are not only the exclusive or dominant *bearers* of the constitutional tradition but also the exclusive or dominant *heirs* to that tradition. It is a view closely tied up with the idea that the EU lacks certain key legitimacy and functional prerequisites of polity status, in particular a *demos* – a political community which identifies itself as such and which has the regulatory wherewithal, the resources and the sense of common attachment necessary to make decisions which are seriously committed to and capable of addressing matters of common interest and are broadly perceived as so doing. On such a view, the formal rituals of constitutionalism – documentary or otherwise – are seen as just that, as so much rhetoric and ceremony, without the social and political substrata necessary for their effective operationali-

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10 See n4 above.

11 Elsewhere, I have argued that this tends to be associated with a critique of "the public institutional prejudice" or bias of much constitutional thinking, and a corresponding belief that private, or market-based or other micro-political forms of ordering are the more significant – and, indeed, more appropriate – regulatory modalities. See N. Walker, "The Idea of Constitutional Pluralism" (2002) 65 *Modern Law Review* 317, 323-4. For a good example of this kind of generic constitutional scepticism, but applied to the EU, see K.-H. Ladeur, "Towards a Legal Theory of Supranationality- The Viability of the Network Concept" 1997) 3 *European Law Journal*, 37.

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

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

zation and legitimisation. The Constitutional Treaty, for all its forensics and fanfare, can be nothing more than a false or *ersatz* constitutionalism, a text which illegitimately frames an essentially state-derivative legal configuration in autonomous and original terms, rather than a event which recognises or brings into being a new *pouvoir constituant* for the European Union.

(b) Constitutional historical-contextualism

Secondly, there is the attitude of the *constitutional historical-contextualist*. In some noteworthy respects, this is the opposite of the first approach. Rather than seeing constitutionalism as necessarily conformative to a single template – that of state constitutionalism, the historical-contextualist approach accepts a more protean definition of what is constitutional. On this view, any self-consciously 'constitutional' discourse and practice may be properly viewed as constitutional, regardless of pedigree or context. In these terms, the gradual development of a constitutional register of debate and self-interpretation by the ECJ and, gradually, by other European institutions over the past 30 years, provides abundant evidence that the EU already has a constitutional heritage.[14] On this view, the burden then falls on the defenders of the idea of a constitutional moment to argue for the distinctiveness and discontinuity of the Constitutional Treaty, and indeed for the distinctive *need* for a constitutional moment, in terms other than a simple argument about constitutional origins. If the Constitutional Treaty is indeed a moment, then, according to the historical-contextualist, it certainly cannot be a *first* moment, and its distinctiveness, if at all, can only rest upon a less clear-cut discontinuity and transformation - upon a qualitative change *within* constitutional discourse and practice rather than a categorical change from a pre-constitutional era. Further, the historical -contextualist might argue, since much of the content of the Constitutional Treaty is palpably concerned with consolidation, it is not immediately evident in what this qualitative change might consist. Part III of the Constitution, is for the most part, a simple consolidation and reorganisation of the existing Treaty provisions. Part II on Fundamental Rights merely formalises the legal status of another event, the declaration of the Charter of Fundamental Rights in 2000.[15] Even Part I, which deals with major institutional and authority-generative provisions of the new Constitutional settlement, may be viewed largely as a distillation of existing practice and arrangements.

On this view, the innovation of a self-styled Constitutional Treaty is seen predominantly as an exercise in documentation, with the new text more a repository or record of existing constitutional doctrine and practice than a source of something new. And implicit in the empirical rejection of the possibility of a discontinuous and transformative constitutional moment from the perspective of the historical-contextualist there is also a strong normative caution. If there is indeed a pre-Constitutional Treaty constitutional tradition, and one which, somewhat like the British common-law,[16] has grown slowly and incrementally, then, rather than a *tabula rasa,* we are faced with a rich tradition which is interwoven with and parasitic upon the peculiar practical concerns of the peculiar EU polity. And given its enbeddedness in a distinctive

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

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

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

conception of practical reasoning, this is a tradition that we should perforce handle with care and that we would dismantle at our peril.[17]

(c) Constitutional serialism

Thirdly, there is the attitude of the *constitutional serialist.* On this view, European constitutional development is best characterised as an iterative series of constitutional events rather than as a long process of normal politics interrupted by one or very few constitutional moments. That is to say, the serialist, who may also be a historical-contextualist,[18] does not necessarily deny that discrete self-defined macropolitical or constitutional events are important, but sees these as regular links in a chain rather than as axiomatic moments of configuration or reconfiguration. The question, then, becomes one of whether the present Constitutional Treaty can be sufficiently distinguished from antecedent, and perhaps subsequent set-piece events to merit the tag of a constitutional moment. If we look at the antecedents, there has been a palpable quickening of the pace of large-scale institutional change since the Single European Act in 1987. After 30 years of relative Treaty stability, the 1990s and the early years of the new century have seen three Intergovernmental Conferences and subsequent Treaty revisions, two rounds of Enlargement (the latter by far the largest to date), a Charter of Fundamental Rights, and a plethora of other major institutional initiatives which were arguably 'constitutional' in import if not in name,[19] - all before the present Constitutional Treaty was even a gleam in the drafter's eye. And if we look to the future, there is nothing in the draft Constitutional Treaty strongly to suggest that this pattern of iterative reform will come to an abrupt end. For the moment at least, the IGC mechanism is retained, and on what confident basis might we claim that the pressures which have led to its increasingly frequent invocation have been dispelled with the present settlement?

There are two ways of interpreting this serial pattern - one relatively benign the other distinctly less so. The first interpretation takes Bruno de Witte's characterisation of the contemporary phase of Treaty revision as a "semi-permanent"[20] constitution conversation and sees in this a reasonably healthy reflection of ongoing structural debate within a polity-in-the-making – a sign of an entity responsive to the dynamic expansion in the reach of European policy-making and seeking to come to terms with the diverse and changing aspirations of its citizens. The second interprets institutional restlessness in less optimistic terms. Here, serial change is

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17 For one sophisticated version of this argument, see Joseph Weiler's conception of "Constitutional Tolerance." For Weiler, a precious part of the European constitutional tradition is precisely the absence of the notion of subjection to one single constitutional discipline. This absence, for Weiler, is key to the negotiated quality of the common constitutional tradition, and, for him, it is an absence which a documentary Constitution, or at least the constitutional culture which would grow up around a documentary Constitution, is unfortunately bound to fill. See e.g. "Europe's constitutional *Sonderweg*" in J.H.H. Weiler and M. Wind, *European Constitutionalism Beyond The State* (Cambridge: CUP, 2003) 7, at 15-23. As I argue in Section 6 below, however, we need not necessarily view a European documentary Constitution in these terms. On one reading at least, a single Constitutional Treaty for the EU does not entail a single constitutional discipline for Europe.

18 In that the idea that the Constitutional Treaty should not be conceived of as a constitutional end-game shares with the idea that it should not be conceived of as a new beginning a necessarily modest understanding of the possibilities of documentary constitutionalism.

19 Notably, the 2001 European Commission document *European Governance: A White Paper* (2001) 428.

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

seen as reflecting, in Ulrich Haltern's terms, an increasingly "breathless"[21] search for legitimating foundations for a polity which, since the first mobilisations of popular discontent around the Maastricht Treaty, has no longer been able to present itself in technocratic terms as a limited functional entity in no need of broad popular endorsement, but is instead now exposed to the harsh light of political scrutiny from all European constituencies – national, class and policy-sectoral. On this view, which knows much common cause with the state-based constitutional Euroscepticism described earlier,[22] Europe is caught in a tragic cycle of constitutional inflation. The more that the breadth and depth of European power and the lack of a common popular basis for exercising that power is exposed – with the original Irish "no" vote to Nice and the Swedish refusal to endorse the third stage of EMU only the most high-profile recent examples of popular disaffection – the more that the myth and ceremony of constitutional performance is invoked to resolve the impasse. But since each successive constitutional performance merely dramatises the continuing absence of the consensual social foundations for a lasting settlement, its failure, paradoxically, merely feeds the demand for a bigger and better version of the same - a yet grander and more aspirationally conclusive constitutional moment. The law of diminishing returns comes into operation and at the end of the cycle, to which we may be coming perilously close with the first self-styled "Constitutional" Treaty, lies the unnerving prospect of documentary constitutionalism as a busted flush.

Whichever version of the serialist position is endorsed, the more benign or the frankly dystopian, the idea of a defining constitutional moment clearly distinguished from the past and stably framing a constitutional future, is comprehensively challenged. In summary, just as the historical-contextualist tells us to beware of false beginnings, the serialist tells us to be equally wary of false ends – of a premature and implausible commitment to *finalité politique*.[23]

(d) constitutional processualism

Fourthly, and finally, there is the perspective of the *constitutional processualist*. The gist of this view, which need not be inconsistent with the historical-contextualist and serialist views, and even with some of the more generic variants of constitutional scepticism,[24] is that constitutional discourse and practice within the European Union should not be seen exclusively or even mainly as a matter of Treaties and self-styled constitutional documents. Rather, the test of constitutional relevance should be functional rather than formal, and *any* activity and *any* form of reflection that is concerned with the overall legitimacy of the European juridico-

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21 U. Haltern, "Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination" (2003) 9 *European Law Journal* 14.

22 In the sense that it may well, as in Haltern's own case, combine a deep scepticism about the possibility of political community at European level with a continuing faith in the resilience of political community at the nation state level.

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

24 There is a fine, perhaps invisible line, between a generic constitutional scepticism, such as that of Ladeur (n11 above), which sees constitutionalism, defined as a matter of self-styled documents and general institutional structures, as largely irrelevant to the ordering of social and political community – the ordering mechanisms instead being located in various micro-processes and mechanisms – and an approach which sees constitutionalism itself as dispersed across these same processes and mechanisms. To put it perhaps too bluntly, if constitutionalism is everywhere, there is a sense in which it is also nowhere and the retention or otherwise of the constitutional label may be reduced to a matter of merely nominal significance.

political order should be seen in terms of a constitutional register. If this view is taken, large public events, and, indeed, general constitutional doctrine and institutional arrangements (whether the product of large public events or more gradually evolved) become merely the tip of the iceberg. Underneath, other 'constitutional' practices are seen as unfolding, and it is this ongoing dispersed process of articulation and re-articulation of various parts of the constitutional whole which supplies the key dynamic rather than the surface movement of 'grand' constitutional events and outlines. Processes and mechanism which are given little direct recognition within the Treaty structure, such as comitology or OMC or partnership agreements or other "new" forms of governance[25] are then viewed, by dint of the pervasiveness of their practice and/or their transformative effect upon the general structural and cultural template of European regulation, as vital constitutional processes which are in danger of being obscured by the focus on surface activity.[26]

At the very least, this can lead to a skewing of attention towards the self-styled constitutional events and texts and a corresponding wasteful misallocation of political energies. More significantly, it may lead to a structural bias – to an unreflective privileging of certain traditional constitutional priorities which are the familiar concerns of the documentary Constitutions of states but which do not translate easily to the demands of a non-state polity. Thus, it could be argued that faced with the task of drafting a text which is supposed to be a Constitution (and so should *look like* a Constitution) the drafters of the Constitutional Treaty have drawn uncritically on the state template, giving undue attention to matters such as a Bill of Rights, the horizontal division of power between federal-level institutions, the vertical division of powers between "federal" and "state" institutions, external relations etc., in a way which may fail to grasp the *sui generis* quality of the EU order. The idea of a constitutional moment, in other words, is conceived as a false window of opportunity which marginalises the real constitutional debate for a post-state political configuration.[27]

3. The Practical Reflection of Theoretical Dissent

The challenge to the idea of the Constitutional Treaty as a constitutional moment is made all the more urgent by the fact that these dissenting theoretical voices are not merely that. They are not simply external accounts and characterisations of an event which unfolds in splendid isolation. They also reflect particular political attitudes and motivations which have been brought to bear in the constitution-making process itself. In that sense, the understandings which they represent become internal to the very event they purport to interpret. The Constitutional Treaty, as seen through a sceptical, historical-contextualist, serialist or processualist lens is also a Constitutional Treaty that has in part been shaped by the sensibilities of the sceptic, the historical-contextualist, the serialist and the processualist, as well as by the sensi-

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

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

27 See e.g. R. Bellamy**,** "Which Constitution for What Kind of Europe? Three Models of European Constitutionalism" *EU Jurist*, Thinking Outside The Box Editorial Series, paper 04/2003.

bilities of those who would wish it to be conceived, developed and executed as a discontinuous and transformative constitutional moment in the grand Ackermanian sense.

Take, first, the influence of the constitutional sceptic. In a negative sense, the influence of constitutional scepticism at least partly accounts for the modest extent to which the work of the Constitutional Convention penetrated popular consciousness. A Flash Eurobarometer Poll conducted on the very weekend that the fruits of the Convention were presented to the European Council in Thessaloniki in June reported that 55% of a transnational survey had not even heard of the Convention, and that only 32% could accurately characterise its product as a Constitutional Treaty, as opposed to some lesser species of text.[28] Whether and to what extent the result of ignorance in the face of an apathetic press coverage, or of indifference, or of hostile denial, it is difficult not to see these figures, and indeed a similar disengagement from or at least ambivalence towards[29] the constitutional process amongst various organised political groupings, as at least in some parts an indication that scepticism about the viability of European political community remains well-founded in the attitudes of some members of that putative community.

More positively, paradoxical as it may seem, constitutional scepticism also provided some of the motivation behind the Convention and its product. Many constituencies historically opposed to the idea of the European Constitution as an inspiration towards and mark of European political community became in the pre-Convention phase converted to the constitutional process *not* as a polity-making or polity-consolidating device, but as a polity-limiting device. Groups such as the German Lander with their commitment to a strong competence catalogue[30] or the various other Eurosceptic voices who supported a Charter of Rights[31] as a power-constraining rather than a power-enabling device, became strategically reconciled to the constitutional process as a way of advancing a Eurosceptical agenda rather than as a mark of their conversion to the idea of the EU as a robust self-standing polity.

The historical-contextualists, too, have left their imprint on the process and the text. One important factor in building constitutional momentum in the years between Amsterdam and Laeken, and indeed one of the four themes in the 2000 Nice Declaration which paved the way for the establishment of the Convention at Laeken in December 2001,[32] was the commitment to consolidation and simplification of the Treaties.[33] To some extent, the idea that mere consolidation and a commitment to rationalisation and reorganisation should provide a significant rationale for a *constitutional* text (as opposed to a more modest revision instrument)

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

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

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

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

32 Treaty of Nice, Annex IV, Declaration on the Future of the European Union.

33 See e.g. B. De Witte, "Simplification and Reorganization of the European Treaties" (2002) 39 *Common Market Law Review* 1255-87.

provided a convenient pretext for those with more ambitious objectives; a low-key mechanism, "lawyerly" and politically uncontroversial, for introducing the idea of constitutional reform onto the political agenda.[34] Yet the strength of the idea of consolidation also speaks eloquently to the influence of the historical-contextualist reading of Euroconstitutionalism. For in that vision, the Constitution is most appropriately conceived as by and large a crystallisation of existing practice. At every stage of the Convention this conservative attitude was powerfully present; in the very gradual widening of the agenda from consolidation, to proto-constitutional in the Laeken text[35] to fully constitutional in the Convention itself; in the early commitment within the Convention, necessarily limiting in the scope for consultation and substantive reform it allowed, to a determinate time-frame of text-drafting rather than an open-ended process of constitutional exploration;[36] in the subsequent procedural choice to convene only a limited number of Working Groups and to keep the large and potentially highly open-ended questions of institutional reform in cold storage until towards the end of the process and even then under the close control of the Presidency and Praesidium; in the cautious framing of sub-agendas, including mere ratification of the Charter and a commitment to *droit constant* in most aspects of Part III; and, not least, in the presentation of the final text in some quarters, many of the key players within the Convention included, *as* a largely conservative measure, not least to urge the IGC to do likewise and itself conserve that essentially conservative measure.[37]

The stamp of the constitutional serialist, who, as already noted, has much common cause with the historical-contextualists, is also present in the Convention and its text. For all the innovation of the use of constitutional language, the "rules of change"[38] of the EU's constituent documents remain distinctly Treaty-based. We are, after all, presented not with a Constitution, but with a peculiar hybrid – a Constitutional *Treaty,* with both the ratification and, even more tellingly, the amendment mechanisms in Art IV-8 and IV-7 respectively of the document continuing to treat the IGC, and, ultimately, the Member States (in accordance with *their* constitutional requirements) as 'Masters of the (constitutional) Treaty." This means, as already noted, that in terms of constitutional form, there is no impediment to business as usual, and a continuation of the series of regular major reforms which would soon enough place the present major reform in a more modest historical perspective.[39]

What, finally, of the processualists? Like the sceptics, the processualists were perhaps most present in their absence, most eloquent in their silence. For those who stayed away from the debate out of a sense that a large constitutional event was inappropriate or disproportionate to the constitutional requirements of a dynamic post-state polity-in-the-making, the early he-

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34 See Walker, n.23 above.

35 Laeken Declaration on the Future of the European Union, Annex I to the Conclusions of the Laeken European Council, 14-15 December 2001, SN 300/101 REV 1.

36 For a good overview of the internal political dynamics of the Convention, see J. Shaw, "What's in a Convention? Process and Substance in the Project of European Constitution-Building" (2003) Institute for Advanced Studies, Vienna, 89 Political Science Series.

37 This conservative theme is especially 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) – on the key occasion of the presentation of the draft document in accordance with the Laeken timetable and mandate.

38 H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 2nd ed., 1994) 95-99.

39 For an alternative suggestion to the model preferred in the Constitutional Treaty, see N. Walker, "Europe's Constitutional Passion Play" (2003) 28 *European Law Review* (forthcoming).

gemony of the very state-derived idea of documentary constitutionalism, the Conventional form of constitution-making and the familiar structure of the final document would offer few pleasant surprises. For not just those public constituencies that are perennially disengaged, but also many involved in the constitutional politics of the Union, whether as legal or political theorists or scientists or as citizens involved in its countless micro-politics, hardly addressed the constitutional process, seeing in its conventional top-down form and hierarchical logic a structure inimical to their bottom-up concerns and more heterarchical sense of regulatory design. As these alternative concerns were in any case likely to be structurally marginalised by the very idea of a documentary constitution in a conventional mode, perhaps their attitude of critical distance had very little influence on the final outcome, but in any event that end-result would do nothing to disconfirm the preconception of those who believe that documentary constitutionalism hardly touches the more significant steering mechanisms of a complex post-state polity.

4. The Constitutional Moment in Critical Context

If we place the various theoretical challenges to the idea of a constitutional moment (Section Two) together with the evidence of how these theoretical positions have left practical 'traces' in the process of the Convention and the body of the Constitutional text (section Three), we are faced with a formidable normative and empirical critique of the very idea of a constitutional moment. The normative critique instructs us to beware any prospect of "success" of the constitutional moment, for it will come at a price. The empirical critique instructs us that the likelihood of any such success is, in any case, small, for there are forces at work which will dilute or undermine the significance of the Constitutional Treaty as a constitutional moment.

As to the normative critique, we are warned, on behalf of the sceptics, to beware the overweening ambition of a polity-building moment before an apathetic or hostile public – a reluctant political community; on behalf of the historical-contextualists, to be prudent before jettisoning the incrementally and responsively evolved informal constitution in favour of a new formal beginning; on behalf of the serialist, not to be seduced by the siren calls of *finalité* into thinking the time is ripe to draw a line under the constitutional *acquis*, for if we do, then at the very least we will be freezing a constitutional settlement which in its institutional structure, core values and relations to other political communities is still in a state of becoming, or, even worse, we will be triggering constitutional hyper-inflation in a futile attempt to resolve the irresolvable; and on behalf of the processualist, that, in a fit of constitutional hubris, we have simply picked the wrong target for our constitutional commitments, and so diverted attention from and perhaps undermined the operation of the true dynamic of constitutional practice.

As to the empirical critique, we are advised that the constitutional moment is in fact a non-event, that the *pouvoir constituant* has not been properly identified or mobilised, and that insofar as there has been a degree of quasi-constitutional activity, it has for many been more concerned with polity-limiting than with some transformative act of polity-making; or that the constitutional moment has been largely about consolidating existing arrangements rather than the forging of a new settlement; or that it contains no mechanism to guarantee against endless repetition, thus diluting its self-standing significance; or that it is an exercise in ritual that has failed to locate or to activate the steering mechanism for genuine transformation.

We do not, of course, have to accept the entirety of this critique, and, indeed, could not logically do so as some parts are mutually irreconcilable. Rather, each of the normative critiques should be seen as a possible line of challenge whose full endorsement depends upon a particular view of historical causation, socio-political dynamics, and the role of constitutional law within this, but which nevertheless sound as one possible set of objections to which a conception which wants to defend the significance of the constitutional moment is bound to respond. Equally, each of the empirical critiques speaks to a trend of uncertain weight within the constitutional process, and whose final significance it is premature to judge but instead remains dependent upon the ongoing interaction of different interests and aspirations as the documentary Constitution unfolds.

5. Defending the Possibility of a Constitutional Moment

How, then, do we begin to answer the criticisms made above, and decide whether and on what terms the basic intuition that the Constitutional Treaty is capable of providing a transformative constitutional moment might be defensible? Two hints as to how this might be done are already suggested by the terms of the above challenge.

In the first place, the sheer range and variety of normative critiques which can be made of the present constitutional phase suggest not just theoretical disagreement over a commonly conceived object of study, but an even more basic disagreement over the nature and content of that object of study. Accordingly, in responding to those critiques, we should be careful, *pace* Ackerman,[40] not to be unduly selective in our identification of what is constitutional salient, and instead to specify as comprehensively as possible which basic properties we might find within and what functions[41] we might expect of a "thick" constitutional process or event.. That way, through an inclusive conception of the concept of constitutionalism, we are more likely to capture all the opportunities, and also all the pitfalls, of the present constitutional phase. We are also, therefore, likely to provide a more nuanced answer to the question of the viability of the conception of the Constitutional Treaty as a constitutional moment, one whose relative affirmation or otherwise depends upon the various functions in question and their mutual articulation.

In the second place, implicit in each of the above critiques, because implicit in the idea of a constitutional moment for the European Union, is a degree of projection. If a constitutional moment is about transformation, then now may not be the moment to judge whether such a transformation has taken place. That is to say, as the ensuing discussion will make clear, we must look to a point at some distance after the constitutional moment to assess the viability of the constitutional moment.[42] Accordingly, in assessing the significance of the various constitutional functions that are performed or might be performed through the mechanism of the present constitutional event, we must take a long-term view.

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40 See Section 1 above.

41 The term "functions" is preferred as it embraces *both* properties and effects. That is to say, it avoids the "black-box" consequentialism of a wholly effects-based approach (i.e. the Constitution is nothing more than the configuration of power and advantage that results from the Constitution), yet it also avoids the self-referential idealism of a wholly properties-based approach by interrogating and measuring the intrinsic properties of a constitutional process in terms of their actual social impact.

42 See also, Castiglione, n.4 above.

"It all depends' and "wait and see' might seem like peculiarly unsatisfactory pair of answers to the question whether the Constitutional Treaty is a momentous act. But in a climate of theoretical disputation over the meaning of constitutionalism, of contending political forces and aspirations coalescing in the constitutional event itself, and of an as yet unpredictable environment for the completion and reception of the putatively constitutional document, it seems that such a conditional answer is the only one plausibly available. In any case, conditionality should not necessarily be viewed pejoratively. The specification of conditions prevents us from giving definitive answers about the value of the constitutional moment, but it may nevertheless guide us towards a better sense of how to optimise its value.

6. After the Constitutional Moment

Let us then identify, and briefly examine in turn four basic, if complexly interrelated, constitutional functions which may or may not be performed by the Constitutional Treaty, and which may or may not, in the fullness of time, contribute to the transformative effect implied by the 'moment' metaphor.

(a) Structural design

A constitutional settlement or process is always in some respect concerned with questions of structural design. In Ivo Duchacek's terms, it is a "power map",[43] - an organogram of governance relations between institutions and between these institutions and the citizenry. Clearly, Part I of the Constitutional Treaty has much to say on this score, and at least some if it is new. *Inter alia,* it significantly strengthens the European Council and endows it with a longer-term President, it achieves a two-tier Commission, it creates a new cross-institutional post of Minister of Foreign Affairs, it endorses co-decision as the normal mode of legislation and thereby significantly strengthens the Parliament and makes majority voting more common in the Council, and it makes the Charter of Fundamental Rights justiciable. All of this is well known and has already been extensively analysed,[44] as indeed have the large elements of continuity endorsed by the Constitutional Treaty – including the re-endorsement of the basic Community method of law-making which relies on Commission initiative, the retention, with certain limited exceptions, of the present scope of competence of the EU, the continued faith in a single directly elected legislative chamber, the preservation of the basic structure and jurisdiction of the system of courts etc.

The attention both in Convention practice and in contemporaneous and subsequent reflection to questions of structural design is eminently understandable. Structural design is the basic hardware for constitutional practice, and the most familiar, visible and tangible index of constitutional continuity and change. Yet, whatever its fundamental importance, it is difficult if not impossible to make out a case for the Constitutional Treaty as a transformative moment on this ground alone. Partly, this is a simple methodological problem. How does one measure one set of structural reforms against another in terms of their net transformative

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43 I. Duchacek, *PowerM aps: Comparative Politics of Constitutions* (Santa Barbara, 1973).

44 See for example, P. P. Craig, "What Constitution does Europe Need? The House That Giscard Built: Constitutional Rooms With a View" The Federal Trust, August 2003; J. Ziller, *La Nouvelle Constitution Europeene* (Paris: La Decouverte, forthcoming).

effect? How can one confidently conclude, even with the benefit of hindsight (which, of course, we do not yet have) that this set of reforms is more momentous in its effects than that concluded at Maastricht, or Amsterdam, or even in the initial declaratory phase which brought about the Charter of Fundamental Rights? In this regard, the claim that the Constitutional Treaty is a constitutional moment is particularly vulnerable to counter-claims by the historical-contextualist or the serialist. For both of these positions take questions of structural design very seriously, and just because of that can claim serious considerations for other structural developments or changes. In the case of the historical-contextualist, it may be claimed that the weight and geological layering of the accumulated prior structure provided a comprehensive structural ensemble only modestly refined by the Convention, while in the case of the serialist, it may be claimed that other recent Treaty changes or Constitutional Treaty changes-to-come are likely to be just as significant as the Constitutional Treaty itself.

But even if a compelling case could be made for the distinctive significance of the present round of structural reform, this would not convince either the constitutional sceptic or the processualist. The sceptics might acknowledge institutional added value, but would not accept this institutional added value, however impressively significant, as *constitutional* added value, any more than they would accept any previous institutional development in the EU which happened not to be accompanied by a constitutional fanfare as constitutionally significant. The processualist might not rule out the possibility of constitutional added value, but would, by dint of a theoretical sensibility which sees the highest institutional layer as only the superficial layer of the governance ensemble, be inclined to view any such added value in distinctly modest terms.

It would seem, therefore, that it is not possible, either on methodological grounds, or on deeper conceptual grounds, to make a generally persusasive case for the Constitutional Treaty as a constitutional moment on the basis of a purely architectural argument.[45] Either, the measure and extent of structural reform remains imponderable, or the concentration on structural reform begs the constitutional question. We should turn, then, to three other possible constitutional functions which, although often less visible and legible in public debate, address more directly and, together, more expansively, the range of concerns of the critics.

(b) Authority constituting

In the formal Kelsenian sense of the hierarchical structuration of legal norms, all Constitutions, of course, confer, confirm or presuppose their independent and ultimate authority over that which they constitute. Except in the case of the first constitution of a new polity, however, this does not necessarily register or reflect an act of transformative political significance. And as the historical-contextualist would argue, the European legal order from the outset, and with considerable help from its judicial organ the ECJ, has through its doctrines of supremacy, direct effect and implied powers, presupposed and confirmed *its* own autonomy as a legal order. Yet this does not mean that the Constitutional Treaty is insignificant in authority-conferring terms. If we move beyond the legal system of the EU conceived of as a self-referential structure, as an institutional monad, and conceive of it instead as an order located within a heterarchical constellation of polities in which questions of authority *inter se* are con-

[45] This is not to say, however, that architectural arguments are not closely implicated in some of the other functional claims. See in particular subsection (d) below.

troversial and contested,[46] then the Constitutional Treaty may assume greater significance in authority-conferring terms.

It is arguable that the Constitutional Treaty marks a significant departure in the negotiation of relations of authority between the EU and the Member States, and this for two reasons. First, the very fact of a self-proclaimed Constitutional document amongst whose authors representatives of state governments and Parliaments are prominent, has a palpable symbolic significance. As noted earlier, the statist sceptic of the EU had historically resisted the idea of a European Constitution precisely because of the strong symbolic association between Constitutional status on the one hand and statehood, or equivalent "polityhood" on the other. Even if some state sceptics subsequently became minded to accept the idea of a Constitutional Treaty, as we have seen, much of the motivation for this has been pragmatic – to do with the potential of the new order to limit rather than extend or in any deep sense (re)constitute European power. Yet such a pragmatic motivation on the part of one constituency does not necessarily dictate or limit the symbolic resonance of the self-assumption of explicit Constitutional status in the workings and textual product of the Convention. The explicit endorsement of constitutional status announces membership of the "constitutional club" – a proclamation whose impact may escape the intentions of the document's more reluctant subscribers and whose reverberations for inter-polity relations may be far-reaching.

Secondly, given that the symbolic significance of the Convention's work *will* nevertheless remain contested, it is instructive that the Treaty itself sets certain parameters within which the identity of the EU as a polity may be negotiated. Notoriously, there has never been a basic template or "structural ideal"[47] in terms of which the EU can locate itself as a polity type. Every development of a state constitution presupposes that the polity takes and continues to take the form of a state, with full formal authority over the political constellation relevant to a particular population and territory. As a more limited polity, there is no equivalent polity genus of which the EU is a clear species. In line with the absence of a clear structural signature, it has often been argued that EU politics frequently becomes a kind of meta-politics, with questions of policy programme entangled with and sometimes hostage to unresolved questions about overall polity authority.[48]

In other words, first-order substantive policy arguments often become confused with or may even have to take second place to second-order arguments which go to the very authority of the source which purports to develop the policy. In this regard, the Constitutional Treaty, quite apart from its overall symbolic significance in persuasively announcing independent polity status, might represent a modest step forward. On the one hand, the "primacy" principle in Art. I-10, may over time silence arguments that the EU can still plausibly be construed as no more than a massive *delegation* of state authority. On the other hand, the principle of "conferral" in Art. I-9 together with the affirmation of Union respect for national identities and essential state functions in Art. I-5 may gradually dispel fears and silence debate about whether the Union is developing momentum towards a federal state. Of course, there remain a vast array of options in the continuum of forms of structural identity between the

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46 See e.g. Walker, n11 above; see also N. Walker, "Late Sovereignty in the European Union" in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003).

47 N. Walker, "All Dressed Up" (2001) 21 *Oxford Journal of Legal Studies*, 563, 577.

48 See e.g. J.H.H. Weiler, *The Constitution of Europe* (Cambridge: CUP, 1999) ch.2.

two poles of intergovernmental delegation and federal superstate, but at least in ruling out these two extreme positions the new settlement seeks to overcome an unhelpful dichotomy with a destabilising heritage. In the future, debate on the structural principle on which the EU is and should be founded will doubtless remain fierce, but the new constitutional settlement may provide a framework within which it can at least be recognised as a common debate with manageable boundaries and with polar options excluded, rather than leaving a deep fault-line which undermines the very ground on which debate might take place.

(c) Epistemic development

Constitutionalism, at least on one view, represents a particular way or range of ways of looking at the world, in terms of both normative ends and appropriate means, which is absent in the non-constitutional perspective. Constitutionalism presupposes a polity to which an ethic of responsible self-government is appropriate. It involves a number of institutional values – separation of powers, decentralisation of authority, rights protection, democratic accountability, judicial review and 'rule of law' based custodianship of the basic structural order, which are not necessarily present or well-developed in non-constitutional systems, as well as a way of thinking about these values in a holistic sense, as testable against the overall ethic of responsible self-government.[49] Membership of the constitutional club may, as it has in the adoption of many new constitutions in the post-imperial and post-Cold War waves of constitutional globalisation, also open the way to more explicit "constitutional borrowing"[50] from and comparisons with other constitutional systems, perhaps in the Courts, but also in the political institutions and in public debate about the 'best Constitutional way' more generally.

Of course, this hypothesis raises all sorts of questions, to which there are no easy answers. Does not the European Union, the historical-contextualist might argue, already have at least a proto-constitutional episteme, and if so, should we not be careful not to overstate the paradigm-shift attendant upon explicit constitutional self-endorsement? And even if there is an epistemic shift, where this will take us in terms of concrete polity performance and legitimacy and, to return to the fears of those who see the state constitutionalist paradigm as too prominent a historical and comparative reference point, how can we be sure that wherever it takes us will be appropriate to the needs of a post-state polity? I do not try to answer these questions here,[51] suffice to make two points. First, regardless of the likely trajectory of development and the value-judgement one might make of that trajectory, it is at least plausible to argue that the explicit endorsement of the register of constitutionalism will have significant long-term implications for the reflexive process by which a wide range of institutional, and perhaps non-institutional actors, argue about the ways and means by which the polity should be constituted. Secondly, as developed below, the legitimacy of the trajectory of epistemic development associated with an explicit and reflexive process of constitutionalization is intimately tied up with the quality of the process of community mobilisation which that same process of constitutionalization sets in train.

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49 Walker, n11 above.

50 See e.g. the symposium on Constitutional Borrowing edited by Barry Friedman and Cheryl Saunders in (2003) 1(2) *International Journal of Constitutional Law* 177 *et seq.*

51 For an extended, but still very preliminary attempt to tackle these questions, see N. Walker, "Postnational Constitutionalism and the Problem of Translation" in Weiler and Wind (eds) above n17, 27.

(d) Community-mobilisation

Finally, then, to return to the property or function which Ackerman puts at the centre of his own analysis, we should address the significance of the Convention and the Constitutional Treaty as a process - as a sociological means by which the very notion of a political community may be mobilised. In Habermas's terms, this may be a "self-fulfilling"[52] prophecy to confound the constitutional sceptic, to challenge the historical-contextualist's assumption that the risks to the gradually evolved constitutional heritage outweigh the benefits of a more fundamental renewal, to expose the limitations of the optimistic serialist's belief in iterative institution-building and the pessimistic serialist's despair of that same staccato pattern, and to persuade the processualist that constitutional surfaces may reflect rather than simply obscure constitutional depths. The Habermasian gambit, or, to put it in more general terms, the constructivist gambit,[53] is to the effect that to the extent that the European *demos* remains underdeveloped – a possibility that must be taken seriously by anyone who is concerned with whether the EU has sufficient collective political resources (in terms of mutual trust, common engagement and a general readiness to put things in common *as well as* legal-institutional capacity) to overcome the problems of collective action it confronts and to achieve the kinds of political objectives which its various overlapping coalitions of public support might want it to achieve[54] – then the Constitution-making act itself may act as a catalyst for its deepening and strengthening.

If it were to succeed in augmenting popular involvement and legitimacy and increasing a sense of attachment to a shared European public good, and therefore of enhancing effective political capacity, the constitutional initiative would also have clear dividends for the other two constitutional functions just discussed. It would, first, give sociological ballast to the authority claims of the European Union within the broader configuration of political authority. It would, secondly, through providing the level of engagement and commitment necessary to reach a threshold of popular legitimacy and a minimal sense of common attachment and public good, promise a broader constituency and a richer debate through which epistemic transformation might take place. If we can speak, as I suggest we can, of constitutional knowledge and its application as something in principle of value to a political community, and if we can speak of that knowledge as something which may be capable of being augmented in certain circumstances, then the additional resources of political initiative and imagination attendant upon a widely-endorsed sentiment of engagement in a shared project would seem to be one important condition of such augmentation. Quite apart from the general fruits of wider involvement in the process of knowledge-production, a more engaged and articulate political community addresses a more specific problem with constitutional knowledge – namely the perennial tension between particularism and universalism. Constitutionalism is always concerned with the balance between will and interest on the one hand and reason on the other,[55] For their part, the boundaries of collective will-formation and the selectivity of interests always threaten to marginalize the more general knowledge-claims of constitutional thought,

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52 J. Habermas, "Why Europe Needs A Constitution" (2001) *New Left Review* Sep-Oct (11), 5, at 17.

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

54 For an excellent framing and exploration of the EU's collective action problems, see F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999).

55 See P. Kahn, *The Reign of Law*, (New Haven, Yale University Press, 1997)

while, conversely, constitutional reason may aspire to a universalism which risks losing sight of the contextual demands and aspirations of a specific political community. A more participative discourse responds to these opposite dangers, both protecting against the petrification of a particular configuration of will and interest and requiring more universal claims to be translated into local needs, and in this way suggests a more productive management of the perennial tension at the heart of constitutional discourse.

Of course, it is tempting to dismiss the constructivist gambit as displaying a foundational naivety. Does the idea of the constitution as a catalytic event not involve making false assumptions, both about the general influence of constitution-making as a matter of sociological significance, and about the particular priority of the so-called EU constitution in polity-building as a matter of specific historical causation in the here-and-now? Arguably, this is not so. The constructivist case need not involve foundation assumptions in either of these senses, and as such deserves to be treated as making a serious contribution to the case for considering the Constitutional Treaty as a constitutional moment.

Let us revert to and extrapolate from Habermas to make this argument. In his conception of how Constitution-making contributes to political community Habermas is decidedly *not* a foundationalist. Rather, he locates the well-springs of European political community in the circular development of three features – a transnational civil society, a European public sphere of cultural and political debate in which a discursive context is found for discussions and proposals to be fed into the formal political process, and a common political culture which provides some kind of shared normative frame of reference.[56] The strength of this thesis lies precisely not in its foundationalism, but in its depiction of a symbiosis between all three elements, with none having any necessary priority, and each depending upon the development of the other for its own strengthening. Law in general and the constitutional-law making process in particular is not located within this circular process, but nor is it treated a foundational for it. Rather, its catalytic potential lies in is capacity to connect with each of the three elements simultaneously. So the constitution-making process itself, and in particular the more outward-involving and inclusive activities of the Convention, tended to encourage the mobilisation of civil society groups in terms of interests and aspirations which transcended national boundaries. The publicity and debate generated by the Convention process, and in particular the simultaneous and interlinked discussion of this event in various national media and associational contexts, however muted, promised some stimulus to the development of a European public sphere.[57] Finally the debate over values in the Convention, which finds its textual expression in the preamble and, in particular in Arts I-2, I-3, I-4 and I-7, assumed importance not so much as a means of guiding the polity towards certain substantive ends, still less as a set of justiciable principles, but as a way of grounding and generating deliberation about what a common public culture might mean on a European scale and so helping in the creation of that very sense of a common public culture. On this view, in response to the prompts of the self-conscious constitutional debate, the circular process of mutual reinforcement of civil society, public sphere and common culture should gradually take over, develop

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56 Habermas, n.52 above, 16-21.

57 Habermas himself has made several media contributions of precisely this sort, in so doing avowedly setting out to galvanise wider debate. See, for example, J. Habermas and J. Derrida, "Unsere Erneuerung nach dem Krieg: Die Wiedergeburt Europas" *FrankfurterAllgemeine*, May 31st 2003.

its own separate momentum, and so escape and transcend the deliberative confines of the constitutional moment.

Historically, too, the constitutional moment works not in splendid originalist isolation, but in a complex series of refractions backwards and forwards within a dynamically conceived framework of constitutional tradition.[58] Looking backwards, the first EU Constitution is not of course *the* first Constitution, but gains much of its initial resonance from the cumulative symbolic resonance of constitutionalism generally (thus the insistence upon and preoccupation with the Philadelphian imagery) and from the common ground which may be found between specific Member State constitutional traditions in particular. Looking forward, the Constitutional Treaty may be seen as the self-conscious forging of a new branch of the constitutional tradition, and so as providing a lasting reference point of mobilisation of public and political argument about the meaning and significance of the European polity. That is to say, the symbolic value of the constitutional process does not expire with the process itself, but continues to provide a historical resource for the very discursive process which it has generated.

Of course, the fact that a European constitutional event *might* engage the circuit of community mobilisation and *might* have the kind of deep and lingering historical resonance sketched above does not mean that the particular constitutional event with which we are concerned – the Convention, the Constitutional Treaty and its subsequent process of intergovernmental confirmation and national ratification – will in fact have that kind of catalytic effect. In the first place, arguably the moment simply failed to engage and to mobilise sufficiently to have the kind of impact that Habermas and the constructivists would have wished. Ironically, to the extent that this may be true, it might hint at a number of self-fulfilling prophecies other than the one Habermas would endorse. The political instantiation of the very critical perspectives which we outlined earlier,[59] each of which had a serious impact on the constitutional process itself, may have compromised the possible range of significations of the Constitutional event. The hostility, indifference or strategic conservatism of the sceptics and the ambivalence of the processualists contributed their particular types of limiting effect. And even though they were more favourably disposed toward the Convention and in many ways its leading influences, the historical-contextualists and the serialists also contributed significantly to circumscribing its possibilities. The very commitment to a disciplined timetable of text-production implicit in these overlapping brands of incrementalism, and in particular the necessary caution which the perspective of historical-contextualism and the necessary modesty which the perspective of serialism respectively brought to that task, was bound to lead to a certain narrowing of procedural possibilities and substantive horizons.[60] Secondly, and relatedly, in a historical perspective perhaps the moment was simply *unripe* for such an audacious experiment. Perhaps the objective conditions for a constitutional event to have the kind of catalysing effect contemplated by the constructivists were not realized, with the strong presence of the more sceptical and cautious attitudes at the constitutional table one manifestation of this. On such a view, regardless of the theoretical merits of the constructivist

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

59 See Sections 2 and 3 above.

60 See, e.g., Shaw n.36 above. On the potential delegitimating effects of such constraining factors in the Enlargement states in particular, see N. Walker, "Constitutionalizing Enlargement, Enlarging Constitutionalism" (2003) 9 *European Law Journal* 365.

techniques of prompting the circulatory process of community mobilisation, actual conditions have simply militated against the successful operation of such a dynamic. Thirdly, it may be argued that there is in any case a kind of performative contradiction implicit in the idea of the Constitutional Treaty as a catalyst towards a more fully mobilized political community. According to this view, if the procedural imperative implicit in the idea of the Constitutional Treaty as a community-mobilizing event is that of participative democracy, then it is vital that not only the form of the event itself but also the content of its textual product should advance the idea of participatory democracy. And if that is the test, then although the Treaty makes some gestures towards "enhancing the democratic life of the Union,"[61] overall it may have done little to disturb the *status quo ante* and correct the various dimensions of the long acknowledged 'democratic deficit' of the institutional design of the Union.[62]

These are powerful objections, but they need be by no means fatal to the constructivist case. For in the final analysis, the constructivist gambit rests on a deep conviction that the meaning of the constitutional moment need not be fatally compromised by the conditions of its origin. If we take seriously the Habermasian idea that the present constitutional phase involves the invention of a new tradition, and that, beneath all the current disagreements and disappointments, its common and resilient "performative meaning"[63] is of a people founding a voluntary association of free and equal citizens committed to self-government, then the force of the contemporary objections that the motivations were too mixed, that the time was not ripe, and that the Convention lacked the courage of its democratic form or convictions, is reduced. Instead, the test of its long-term credentials lies in the capacity of the common performative meaning implicit in the constitutional moment to provide a lasting focus – a historical anchoring – for the efforts of "later generations [to] critically appropriate the constitutional mission and its history."[64] The founding conditions are clearly not irrelevant to the prospects of future generations making the kind of confident shared investment in the performative meaning of the original act for this kind of process of self-reflection to unfold, nor to the likelihood of such a process being a broadly inclusive one. Yet they surely do not rule out such a prospect in advance either.

By way of conclusion, then, it is important to re-iterate that the idea of the present constitutional phase as a community-mobilizing moment, upon whose plausibility the success of the other non-design-related constitutional functions mentioned above – the functions of authority conferral and epistemic development – also intimately depend, remains a long-term gambit. As with the aprocyphal examination answer given by the laconic history student to the question of the success or otherwise of the French revolution, the full transformative effect of the present phase of intensive constitution-building in the European Union (provided, of course, it overcomes the not inconsiderable hurdles of IGC approval and national ratifica-

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

62 See. e.g, Weiler above n.48, ch.8.

63 Habermas, above n.58, at 193.

64 *Ibid.*

tion,[65]) might for some considerable time simply be "too early" to assess. Yet it is precisely because it retains the potential to be more than the sum of its present parts that we should not dismiss the Convention and all its works as merely ephemeral - as a fleeting moment rather than a momentous event.

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65 At the time of writing (October 2003) it remains remarkable how little open political or public discussion there has been about the possibility of failure of ratification. Clearly many political leaders do not want to tempt fate, but the recent record in Ireland and Sweden suggests that the strategy of refusal to contemplate failure at the level of national ratification, if it ever were an effective strategy *against* failure, clearly is no longer. It remains unclear how many states will require ratification by referendum. Certainly, the option of a Europe-wide referendum, advocated by Habermas himself (n52 above) seems unlikely in such a cautious and fearful political climate. Yet it is hard to escape the conclusion that, whatever the risks, this would represent is a missed opportunity to forge the sense of a common performative meaning and shared tradition of which Habermas speaks.