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Still a Union of deep diversity?¹

The Convention and the Constitution for Europe

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Abstract

This paper examines the Convention on the Future of Europe in terms of whether its work bears the imprint of a constitutional treaty or a constitution proper. Two constitutional visions for the EU are presented - *deep diversity* and *constitutional patriotism* - and assessed in relation to the existing structure of the EU and the Convention's work and results. It is found that the result is more than mere consolidation. It reflects a further step in the process of forging a viable political entity in Europe. The Convention has taken a number of decisions that appear to weaken the multiple constitutional *demos* doctrine associated with constitutional treaty, and to move the EU closer to one based on constitutional patriotism. The Convention's very use of the terminology of constitution could be potentially significant as a rallying call to bring institutional reality in line with constitutional aspirations, although the result is still ambiguous enough as to require a decision on which constitutional aspirations should serve as the 'leitmotif'.

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I. Introduction

The European Union, as noted in the Laeken Declaration, is at a critical crossroads (European Council 2001). This notion of crossroads pertains to three critical dimensions. The first is the geographical scope of the future Union, where several stages of enlargement will make it a much larger and more diverse EU. The second is its institutional-constitutional status. Under the shadow of enlargement, the EU has launched a broad and deep review process of the fundamental aspects of the Union, so as to help it grapple with the challenges ahead. The third is the normative dimension and pertains to the political justifications and basis of legitimacy that the entity can and should draw upon. The Convention on the Future of Europe, it is here claimed, offers a unique contribution to the assessment as to whether, or the extent to which, the three dimensions have converged in its work and results.

What have the Convention's efforts at forging a constitutional and institutional framework resulted in with regard to our conception of the nature of the polity and the fundamental principles that this is to be based upon? This question is squarely located in the constitutional debate - with particular attention to the peculiar nature and status of the entity that makes up the EU. It has long been acknowledged that the European Community has developed a legal order that in many respects is unique and is something more than an international legal order. The EU is clearly also more than an economic arrangement. It is widely held to possess a material constitution. In legal dogmatic terms, the Treaties make up the 'constitution of the Union'. This constitutional arrangement, several prominent analysts assert, is based on a set of principles, organisational arrangements, and modes of allegiance and also lays claim to a normative justification. To Joseph Weiler, the core legitimating principle of this system is *constitutional tolerance* (Weiler 2001 a; b; 2002). It permeates, and is imbedded within, an institutional system that is a complex mixture of supranational and intergovernmental traits and whose basis of allegiance is not one *demos* but *multiple demoi*. This position not only recognises, but also lauds, that there is no European people upon which to base the EU. I will argue that in allegiance terms, such a system can be termed as marked by *deep diversity* (Taylor 1993).²

² For applications to the EU see Fossum 2003a; b. This overlaps with but is not the same as Weiler's constitutional tolerance.

There is also a second constitutional vision. This vision of the EU is informed by a full-fledged constitution on a par with that of the democratic constitutional state; its attendant mode of allegiance is *constitutional patriotism*; and it also rests on a set of rather specific institutional-constitutional arrangements (see chapters by Habermas, Eriksen, and Menéndez in Eriksen, Fossum and Menéndez 2004).

The EU has embraced many of the core principles of this arrangement, and has throughout its history experienced several defunct attempts to establish such a European democratic constitution. It is widely acknowledged that the EU falls well short of the standards of the democratic constitutional state or that there is a deep gap between these standards and its legal-institutional - and constitutional - makeup.³

Given the presence of two visions, and in particular the fact that the present EU represents an aberration from conventional constitutional thought, the question is: what is the nature of the constitutional doctrine with regard to allegiance formation that we can discern from the Convention? Does the Convention depart from the system in place and embrace a mainstream type of constitutional doctrine that presupposes the creation of one demos, or does it seek to retain the present system of multiple demoi?

To this end I first spell out the two constitutional doctrines, which I label *deep diversity* and *constitutional patriotism*. In the third part each of these is briefly assessed against the Convention, its work and its results. The point here is to establish the direction of change, and the relative salience of one doctrine as opposed to the other. A clear determination requires that the provisions in the complex document be put into effect and tested against the complex European reality. The assessment of the direction of change presented here is nevertheless important to shed light on: (a) the magnitude of change suggested by the Convention; (b) the Convention's underlying constitutional thinking; and (c) the prospects for a post-national European democratic constitution. The final part of the paper holds the conclusion.

³ For a small sample of assessments of the EU's democratic quality and the nature of the gap, see Weiler 1999; Beetham and Lord 1998; Eriksen and Fossum 2000; Weale and Nentwich 1998; Scharpf 1999b; Schmitter 2000.

II. Deep Diversity and Constitutional Patriotism

Deep diversity is here such construed as to provide a set of standards for the assessment of the political-institutional underpinnings, and the sociological-anthropological character of allegiance that is relevant to the question of identity in contemporary Europe, not the least perhaps because it refers to a wide range of allegiances, well beyond national identity. A Union of Deep Diversity might even be an apt description of the system in place.

Deep diversity

Deep diversity refers to a situation where a ‘plurality of ways of belonging ... (are) ... acknowledged and accepted...’ (Taylor 1993: 183) within the same state or polity. Acceptance entails that special political-legal, and even constitutional, measures have been devised to preserve and promote it. Communitarianism is the philosophical basis of deep diversity. This position underlines that rights and constitutional arrangements are inadequate as means of fostering a sense of community and belonging. The law and rights are always steeped within a particular cultural setting that provides people with deep-seated cues as to who they are and what is good and valuable.⁴

Legal-political arrangements thus offer only a partial intake to peoples’ actual allegiances, albeit it is possible to spell out some core conditions under which deep diversity will occur. The following extrapolation and application of this principle contains some adaptations from Taylor’s description, to suit the European case.

A political system whose hall-mark is deep diversity can be federal but cannot be based on one nation-state. Deep diversity does not presuppose a constitutional demos, and the constitutional arrangement, therefore, does not need an explicit popular endorsement on a par with that of a full-fledged constitution. The first condition that we can use to assess the work and results of the Convention in relation to deep diversity refers to the nature of the constitution: deep diversity does not presuppose that the entity is based on a full-fledged constitution (with the underlying recognition of a unified popular will), but on a compact, which at most can be characterised as a constitutional treaty. It acknowledges the existence of separate national popular wills,

⁴ See Taylor 1989; 1994; 1995a; 1995b. This is a standard communitarian argument.

but establishes a set of common institutions and principles based on a constitutional treaty, not a full-fledged constitution.

Second, the society contains *several and different* collective conceptions of its cultural or national or linguistic or ethnic make-up, and there is thus *no overarching agreement on what the country is for*.

Third, the existence of different collective goals is not only an acknowledged and accepted fact, but also something that is accommodated through differentiated citizenship, and other means, through which collectives try to maintain their sense of difference. Deep diversity presumes that a group's sense of belonging to the overarching entity passes through its belonging to another smaller and more integrated community. Citizenship in the overarching entity is thus differentiated because it must reflect the nature of this relation and the character of the smaller and more integrated community. Additional provisions are needed to protect the unique history, culture, language, and identity, of each such national (and other distinct) community. At the same time, an overarching system of provisions, laws and institutions is needed to ensure that the basic concerns and interests of *non-nationals* are systematically taken into account. Such a system could be marked by the lack of a clear normative hierarchy and perhaps even sanctioning means; acceptance and subordination could thus at least in principle be voluntary. Deep diversity is hence also compatible with provisions for voluntary exit of individual states or subunits from the polity.

Fourth, deep diversity presumes that each member state and other relevant cultural actors have veto over treaty or constitutional change.

***Present-day EU – A Union of deep diversity?*⁵**

Deep diversity, as noted, presumes a wider approach to allegiance than that presented in legal documents. Its relevance must therefore be established with reference to

⁵ Other terms to capture its complex nature are *Condominio*, *Consortio* (cf. Schmitter 1996), a multi-level polity (Marks et al. 1996), mixed commonwealth (Bellamy and Castiglione 1997), post-national entity (Curtin 1997; Habermas 1998; 2000), *objet politique nonidentifié* (Schmitter 2000), cooperative confederation (Bulmer 1996), quasi-federal entity (Sbragia 1992).

central traits of the EU. How compatible is deep diversity with the central tenets of present-day EU? The EU is a particularly complex multinational and poly-ethnic entity, with a wide range of sources of difference and diversity. As noted, the sheer range of diversity and the strong sense of *national* identity have prompted many analysts and even decision makers to conclude that there is *no European demos*.⁶

Deep diversity assumes as an implicit premise that this respect for difference is central to the entity's constitutional ethos. It is a normative good. The constitutional term for such an entity would be constitutional treaty (Grimm, chapter 5 in Eriksen, Fossum and Menéndez 2004; Weiler 2001a; b; 2002). At the same time, deep diversity presupposes a set of institutions that can undertake common tasks and foster the respect and tolerance necessary for democratic and peaceful co-existence.

In line with the second and third criteria listed above, Joseph Weiler argues that the EU has developed a unique federal arrangement, the normative hallmark of which is the *principle of constitutional tolerance*. This is based on two core components. The first is the consolidation of democracy within and among member states. The second is the explicit rejection of the One Nation ideal and the recognition that 'the Union ... is to remain a union among distinct peoples, distinct political identities, distinct political communities... The call to bond with those very others in an ever closer union demands an internalisation – individual and societal – of a very high degree of tolerance' (Weiler 2001a: 68). As Weiler notes in a more recent article, 'in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to be bound by precepts articulated, not by "my people", but by a community composed of distinct political communities: a people, if you wish, of "others"' (Weiler 2002: 568). The EU, therefore, is accepting of different conceptions and visions of what the polity is, and ought to be.

⁶ The German Constitutional Court's ruling, in the famous Maastricht case, was premised on the notion that there is no European *demos*. See Weiler 1995. European Convention, Contribution by Mr. Jens-Peter Bonde, 'The Convention about the FutureS of Europe', CONV 277/02: 45.

In its strongest and most pronounced form, deep diversity is incompatible with a constitutionally entrenched Charter of rights, if such leads to uniform citizenship and helps eradicate difference. However, a Charter (that is incorporated in the constitution) might still support deep diversity, provided the following requirements are met:

- the Constitutional Treaty contains provisions on differentiated citizenship and other means of acknowledging cultural and national and other forms of difference,
- the scope of application of the Charter is limited and only applies to issues that do *not* affect the propounding of such forms of difference.

In a Union of deep diversity, each national community would be seen as the locus of primary and deeper attachments. This condition is reflected in many aspects of the EU, such as the notion of Member-States as the masters of the treaties, unanimity requirements, division of powers, and European citizenship provisions - where access to European citizenship is conditioned on national citizenship.

The Union of deep diversity's constitutional treaty can not be based on the notion of final, ultimate authority, or on a single, founding norm. In the EU, the overarching entity is equipped with a constitutional authority, but the acceptance of its authority is, at least in principle, 'an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities (Weiler 2001a: 53). The supranational level is intended to fulfil a specified set of tasks that the lower-level entities confer on it. Further, there are provisions to ensure that the authority conferred, and the resources granted, are properly put to those tasks.

Deep diversity does not require a full-fledged representative democratic system based on majority rule. That could amount to a nation-state. Deep diversity could instead be

based on *audit democracy*,⁷ which is based on the principle of accountability, and supplemented with representation. The core concern is to maintain the conditions for voluntary acceptance of the structure in place. Since the structure affects both states and citizens directly, the higher-level institutions will have to have institutions that can accommodate both sets of concerns. All higher-level institutions, courts, legislative, executive and administrative bodies would have to account for how they have expended with the powers and prerogatives granted to them to the fulfilment of certain goals defined in the constitutional treaty (this is akin to output legitimacy). This is one element of accountability – in relation to both goals/purposes and institutional/constitutional provisions. It does not provide adequate assurance against growth in functions through issue-linkages and spill-over. Neither does it offer an adequate *democratic* sanctioning of the system in place, not in the sense of citizens as the authors of the laws but as the stewards of the treaty goals and accountability criteria.⁸ Audit democracy presupposes popularly elected bodies at both levels that are endowed with specific responsibilities for the monitoring and stock-taking of the Union's principles, institutional arrangements and activities and for the ensuring that these resonate with popular needs. Present-day EU is imbued with the logic of audit democracy but it also has traits - albeit weaker - of representative democracy.

The last criterion of deep diversity is that of Member State (and other relevant diversities) veto over constitutional change. To protect nationally based difference the constitutional treaty is a seamless web in that no part is open to majority decisions. This provision is necessary to ensure that the states are in legal and symbolic terms the masters of the treaties. The present system of treaty change/amendment in the EU complies with these requirements. In sum, the present EU system can to a large extent be labelled a Deep Diversity Union.

⁷ For a definition of this term explicitly applied to the EP, see Eriksen and Fossum 2002. The definition used here is developed further and in relation to the requirements of deep diversity, as I try to reconstruct it here.

⁸ Weiler lauds the EU for explicitly having rejected the full-fledged federal state option, yet criticizes it for its democratic inadequacies. The EU thus both presents democratic theory with a challenge as well as has to meet the democratic challenge properly. (cf. Weiler 2001a: 54)

Constitutional Patriotism

Habermas has written extensively on constitutional patriotism. In his chapter in this book, he outlines the institutional conditions for a European federation. His prescriptions are clearly consonant with the core components of constitutional patriotism, as set out here. In the chapter Habermas uses the term federation of nation-states. This term might carry with it the connotation of multiple demoi. The version of constitutional patriotism that I present here is also federal but more explicitly *post-national*, and based on the notion of one constitutional demos.⁹

Constitutional patriotism elicits a *post-national* and rights-based type of allegiance, a sense of allegiance that is not derived from pre-political values and attachments steeped in a culture, tradition or a way of life, but from a set of principles and values that are universal in their orientation, albeit contextualised. Constitutional patriotism is a mode of allegiance; it elicits support and emotional attachment, because the universalistic principles are *embedded in a particular context*. People's attachments are derived from the manner in which a set of universal principles are interpreted and entrenched within a particular institutional setting. The principles are fused with a set of values that are steeped in a particular geographical setting, and embedded within a particular set of traditions. The universal principles help entrench a set of procedures that, when made to operate within a particular context, render this self-reflective, and hence, responsive to change. Constitutional patriotism thus provides one set of answers or recommendations for how to reconcile universal values with context-specific ones, whilst also retaining sensitivity to difference and diversity.

There are four central components to how we might think that constitutional patriotism, as based on universal rights steeped within a particular legal and communicative community, can be fostered through the work and results of the Convention. The first relates to the putative status of the draft constitution (if it is adopted in the first place), the second to rights, the third to institutional conditions, and the fourth to provisions for constitutional change/amendment.

⁹ This also appears to be consistent with the tenet of other of Habermas' writings. See Habermas 1996; 1998; 2000. See also Eriksen and Weigård 2003.

On the first, the status of the constitution, in the European setting, an unambiguous expression of constitutional patriotism is found in the explicit pronouncement of a *European constitution*, and not a European constitutional treaty, and one that is both fully recognised and acknowledged as, ‘higher’ law. Constitutional patriotism presupposes a democratic constitution. A necessary aspect of this is an explicit popular endorsement.

With regard to the second, rights, constitutional patriotism presupposes a firm commitment to personal autonomy. This applies to both public *and* private autonomy – as both are required for democracy, i.e., political participatory rights as well as private protective rights. The two sets of autonomy are mutually dependent on each other and presuppose each other (Habermas 1994; 1996). Those who are the addressees of the law, to be truly autonomous, and to act as the authors of the law, also need to participate in the actual process of lawmaking.

Social rights are also important. They help ensure autonomy and also foster a deeper sense of solidarity. Certain cultural rights are also required, as part of a commitment to, and provisions for, the respect for diversity, albeit in conditional rather than absolute form. The underlying principle is the notion of ‘the reciprocal recognition of different cultural forms of life’ (Habermas 1998: 118-9). In both substantive and symbolic terms, the framers’ inclusion of a strong and comprehensive commitment to rights in the constitution serves to direct subsequent constitutional interpreters to ensure that these provisions are heeded and also that the other provisions in the constitution are made to cohere with this strong commitment to rights. The most explicit way of doing so is to entrench a Charter or a Bill of Rights in the constitution, i.e., one that contains the full range of rights. That lends high visibility and unambiguous status to rights as intrinsic parts of ‘higher’ law. The spirit of constitutional patriotism must not only permeate the result of the process of constitution making, the method of forging the constitution also has to be transparent, deliberative and widely representative. If not, citizens would have little or no assurance that their rights would be protected in the resultant text.

Third, constitutional patriotism presupposes that the Constitution contain a set of institutional prescriptions that ensure that citizens can see themselves as the ultimate authors of the law. In other words, representative bodies are required that can

transform popular deliberations in the public sphere into binding decisions in a manner consistent with the spirit of these deliberations. This also relates to the division of competences, congruence and accountability. In complex, federal-type, entities the vertical and horizontal division of competences must be such construed as to ensure that the basic criteria of congruence and accountability are maintained. This should be achieved not through excessive centralisation but through a vertical division that is consistent with the location of problems and the means to their solution.

Fourth, and in the extension of the above, constitutional patriotism presupposes that the constitution is sanctioned through direct popular consultation. This entails a commitment to some majoritarian formula. No single Member State can have veto power over constitutional change. Otherwise the ensuing constitution would lack this critical component of popular sovereignty, and citizens would not in any meaningful way conceive of themselves as the authors of the law.

III. The Convention's work and results – an assessment¹⁰

Was the Convention intended to forge a European Constitution or to consolidate the structure in place? The Laeken Declaration (December 2001) which contained the decision to set up a Convention and also spelled out its mandate and composition, did not designate it as a Constitutional Convention. It was presented as a *preparatory body* with the task of forging one - or several - proposals for the forthcoming IGC, which was the body formally in charge of treaty change (according to Article 48 TEU).

The democratic credentials of this idea were weak. The Convention idea was not carried forward by a strong popular movement or a pan-European movement, which is characteristic of constitutional moments. Neither was there a process of obtaining a popular mandate for a European Constitution through election or other direct consultation. The push for a Convention came from the EP and national

¹⁰ This assessment is based on Convention documents, academic analyses, interviews with Convention Members and other who followed the Convention process and personal attendance at debates in the Convention and in the EP.

parliamentarians. There was no explicit mandate for the Convention to forge a European Constitution.

This could be construed as an effort to merely consolidate the structure in place. However, the mandate did instruct it to consider the constitutional question. The Convention, as expressed by its President in his inaugural speech, took upon itself to produce a constitutional proposal and succeeded in producing a complete constitutional draft within the eventual deadline set by the European Council. This draft was accepted by the European Council meeting in Thessaloniki 19-20 June 2003, as the basis for its work.

The draft is officially labelled the Draft Treaty establishing a Constitution for Europe. This term is suggestive of the result as formally a treaty, hence lending support to the first criterion of deep diversity and not to the first criterion of constitutional patriotism. But the term also seems to suggest that it might serve as a launching-pad for a subsequent constitution. The following assessment will also touch on the merits of such an assertion.¹¹

As is revealed in several of the contributions to this book (Closa chapter 11, Magnette chapter 12 in Eriksen, Fossum and Menéndez 2004) the process of preparing the draft (the Convention process) was so different as to raise the expectation that the existing constitutional treaty could be turned into a constitution proper.

A constitution of states or of citizens?

The present structure of the EU has strong traits of deep diversity. This is also reflected in the ambiguous coupling of the notion of the Member States as the masters of the treaties, with the principles of European law supremacy and direct effect. A move from the present situation to one consistent with constitutional patriotism would require a Constitution that is - and is portrayed as - explicitly derived from its citizens.

¹¹ Note that during the process of forging the draft, it has been referred to as both constitution and constitutional treaty. The first draft was termed a Constitutional Treaty (CONV 369/02) and set the stage for a Constitutional Treaty for Europe, not a full-fledged constitution. In the subsequent proposals for articles, the terms 'Constitution' and 'Constitutional Treaty' were used interchangeably on the Convention Website – there is no clear logic as to what term is used where.

Article I-1 (CONV 850/03: 5) states that ‘Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common’. This statement can be construed as equipping the Union with a dual basis of legitimacy: a Union of citizens and of states.¹² The Constitution emanates from both, but the draft retains the notion of attributed competence. The citizens thus have to convey their will to the Union through the power of conferral that rests with the Member States. On its part, the Union must ensure that it has the necessary competence before it can seek to realise the citizens’ will. The explicit founding of the Union on the dual principle of legitimation is a clear step in the direction of constitutional patriotism, but the retention of the Member States in a privileged position, does indicate that much of the old structure of state-privileged deep diversity may be retained. But it is noteworthy that there was movement on this question during the Convention’s work. In the first draft of the relevant provisions (CONV 528/03), the reference was to ‘the will of the peoples and the States of Europe’, a statement that is far closer to the spirit of deep diversity. This change from peoples to citizens is important in symbolic terms. It highlights Europe as a collection of individuals over that of peoples’ communities. It further privileges states over peoples, and awards a greater role to states to ensure deep diversity. The net effect might be to highlight that form of diversity that we associate with state-based national identity.

A Democratic Union, a Christian Union or a European Union of Nations?

Does this apparent privileging of the Member States signal that the Union is based on several and different collective conceptions of its cultural and national and linguistic and ethnic make-up? Is there no overarching agreement on what the EU is for (both of which are critical components of deep diversity)?

The values (as expressed in Article I-2) that the Union is founded on are basically the same universal values as were presented at Amsterdam, and reiterated at numerous occasions, namely human dignity, liberty, democracy, the rule of law and respect for

¹² European Parliament, Committee on Constitutional Affairs, ‘Draft Report on the draft Treaty on the European Constitution and EP opinion on the convocation of the Intergovernmental Conference (IGC)’, PROVISIONAL 2003/0902(CNS)Par 1, 5 August 2003.

human rights. In addition, equality was added in the final draft, after great pressure by numerous members of the Convention. This article further notes that ‘These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination’ (CONV 850/03: 5). Central to the Union’s objectives is to ‘promote peace, its values and the well-being of its peoples’ (I-3). The values referred to in Part I Title I and that spell out the definition and objectives of the Union are universal in their orientation. There is no reference to an explicit *European* value basis. Neither does the preamble make such a reference, although it does emphasise how the ‘cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law,...’ (CONV 850/03: 3). These values are highly consonant with the spirit of constitutional patriotism. How consonant they will be depends on how they become embedded in institutional and cultural form, as constitutional patriotism refers both to universal values and to their contextualisation.

In the Convention there were strong efforts to carve out a clearer and more restrictive set of values. Some, including Giscard, were concerned with how the values would inform the more specific criteria for membership and the use of internal sanctions (CONV 601/03: 4). Others were concerned with giving the constitutional edifice a much clearer ethical – and even religious – foundation. Some also wanted to include religious criteria in the membership requirements. A number of Convention members, strongly supported by the Pope, and much of the European People’s Party, sought to have a reference inserted to Europe’s religious foundation – through a reference to God modelled on the Polish Constitution, or to Christianity, or to Europe’s Judaeo-Christian roots, or to Graeco-Roman roots.¹³ The debates on the value basis in the Convention proceeded along at least four dimensions: those that sought to base the Union on a set of universal and secular values, those that sought a mention of religion but without confining it to a specific religion, those that sought to highlight the role of Christianity, and those that sought to highlight national (and regional) identity. The

¹³ There were also similar attempts in the Charter Convention and the German language version of the Charter deviates from the rest with its reference to Europe’s *religious* rather than *spiritual* heritage (cf. Schönlaue 2003: 130).

two former groups could be seen as exponents of some variant of constitutional patriotism. The third group could be seen either as championing a European community spirit or that of deep diversity - due to the sheer multitude of different confessional orientations in Europe. The fourth group could be seen as championing a Union of deep diversity. The resultant draft basically retains the universal value orientation that has marked the EU, albeit grafted onto a set of provisions that speak to the need for the Union to 'respect its rich cultural and linguistic diversity...' (I-3.3).

That the Union has a strong nation-state presence, and that its retention is valuable, was made clear in Article 1-5 which stated that: 'The Union shall respect the national identities of its Member States...'. This provision is retained from the TEU. In the Convention's deliberations, opinions had differed on this. Federalists wanted this struck (Duff and 4 other members). Many Convention members sought reference to national identities as reflective of the states' institutional and constitutional structures (57 members and observers), including regional and local levels, whereas others stressed the need to link national identity with cultural heritage and the cultural and linguistic diversity of Europe. It is the latter position that is the closest to deep diversity. A clear majority in the Convention stressed the institutional over the cultural emphasis and this was also the result, as is spelled out in Article I-5; hence the deep diversity position was not pursued to the full. This raises the interesting scenario of propounding constitutional patriotism at the national level, whilst propounding national diversity at the European level. But it could also be argued that the result might serve as a restriction on the pursuit of diversity and serve as a *de facto* further vehicle of ensuring the inclusiveness necessary to sustain European co-operation.

Another indication of the Convention's conception of the Union's value basis can be deferred from the regulations regarding admission of new members and the question of boundaries. The Convention members differed in terms of values vs. principles, and whether *European* location should be privileged over basic principles, as expressed in the Constitution. Article I-1 stated that: 'The Union shall be open to all European states which respect its values and are committed to promoting them together'. The referral to European states serves as a clear restriction, whereas the values otherwise referred to are universal. This provision is an explication of Union

practice, a practice where the Union has strengthened the onus on basic rights, the rule of law and democracy, over time (Sjursen and Smith 2001).

To sum up, in value terms the Convention, in the draft, ended up appealing to the same complex of universality and difference as is found in the most recent treaties. The question is whether the draft also contained the same particular mixture of such, how these would be embedded in institutional shape, and which institutions would carry or sustain them. One critical issue here is whether the Convention, in its work and in the draft, brought the EU closer to an agreement of the type of entity it was and what it would be for.

In the Convention there appeared to be consensus that present-day EU is not a state, but no consensus on precisely what type of entity it is. An earlier formulation (CONV 528/03) included the following reference: ‘shall administer certain common competences on a federal basis’ sparked a lot of debate and proposals. 34 members of the Convention wanted to have the reference to ‘federal basis’ struck, but their reasons differed, in line with their different conceptions of the EU. Some wanted it struck because it conflicted with their largely intergovernmental notion of a Union derived from the Member States. The majority of the UK and Scandinavian contingent associated the word federal with centralisation and a European state. Others wanted it struck because they saw it as linking the EU too closely to the notion of state and hence downplaying its unique character as polity. Even those propagating its role did not agree on the resultant entity. The upshot was that the ‘federal’ reference was struck, and replaced with ‘the Community way’. This latter term is open-ended: it could be seen to depict an entity *sui generis*, but it does not foreclose the development of a full-fledged European state. Somewhat ironically, ‘federal’ does not necessarily designate ‘state’ (cf. Elazar 1987: 230). The Convention left to others to develop further the vocabulary to depict the entity.

In sum, the Convention experience revealed the continued presence of widely different conceptions of Europe and what the EU should be for. At the same time it is important to underline that the Convention, in its debates, its documents and its proposals, amplified the *political* character of the Union. If its draft is accepted people will be hard put to label it as merely an economic Union.

Chartered Citizenship – European or differentiated?

The Convention, by agreeing to make the *Charter of Fundamental Rights in the EU* legally binding,¹⁴ has greatly raised the symbolic role and visibility of individual rights. Community law has long taken individual rights into account, but the Charter signals that they are an intrinsic part of the EU constitutional edifice. The very notion of a Charter of Rights is laden with constitutional symbolism. A resolve on the part of the EU to make a Charter could be seen as an important stepping stone towards a proper European constitution, or it could simply serve to consolidate the structure in place, provided the Charter is confined in the ways prescribed by deep diversity.¹⁵

The underlying philosophical orientation of the Charter is that of constitutional patriotism (Fossum 2003a). The values listed in the preamble of the Charter (which was retained in the draft, hence leaving the draft with two preambles, one for the whole Constitution and one for the Charter) refer to a conception of the EU as based on a set of universal principles. Its commitment is to the principles and values of democracy and the rule of law, and not to a set of specific and uniquely European values.

The Charter is not different from, neither more constrained in its scope than, conventional state-based Charters or Bills of Rights. It is also more updated. Further, the strong onus on solidarity and social rights in the Charter could – if pursued to the full – provide the EU with a more explicit ethical foundation.

Having said that, there are aspects of its drafting and its perceived role in the EU that affect its salience as a vehicle for propounding constitutional patriotism. The Convention that drafted the Charter wrote it *as if* it were to be binding. Its provisions draw heavily from existing EU law. This is significant in the sense that the Convention decided not to reopen the contents of the Charter. The Working Group in the Convention specifically devoted to the Charter dealt with how it could be

¹⁴ See I-7: ‘Fundamental Rights’, which states that ‘The Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution’ (CONV 850/03: 8).

¹⁵ For a small sample of assessments see Feus 2001; Eriksen, Fossum and Menéndez 2003; Lenaerts and de Smijter 2001; Weiler 2002 and chapter 4 in Eriksen, Fossum and Menéndez 2004.

incorporated, not with its substantive contents. The Charter, including its preamble, was directly included in Part II of the draft constitution. This means that the weak provisions on citizens' public autonomy¹⁶ in the Charter were carried into the draft constitution. The Charter therefore does not abrogate the aspect of differentiated citizenship that inheres from the fact that access to EU citizenship is conditioned on national citizenship and subject to national rules of incorporation, but it might narrow it considerably. Another possible constraint relates to the restrictive rules of legal standing for direct actions, and the ECJ's enormous workload, which might reduce the applicability of the Charter (Craig 2003: 5). Further, the horizontal clauses (and to some extent the onus on interpreting it in line with the explanations provided by the Charter Convention) clearly restrict its scope of application. The setting in which the Charter is to be included is one highly protective of nationally based identities and values.

To sum up, the Charter is imbued with the spirit of constitutional patriotism, but its ability to foster such will likely be hampered by several important restrictions, some of which were explicitly injected by those seeking to retain a Union of deep nationally based diversity.

Representative or audit democracy?

The present constitutional treaty structure of the EU is more akin to the audit democracy of deep diversity than to the representative democracy associated with constitutional patriotism (although the trend over time has been towards representative democracy). Audit democracy highlights accountability over representation, and is consistent with the privileging of nationally based democracy, characteristic of a constitutional treaty. Such accountability is ensured among other things through conferral of authority onto the Union by the Member States, as set out in the Treaties; through the fixed allotment of money and careful monitoring of its use; and through the democratic auditing role played by bodies such as the EP – probably more of a democratic auditor than a full-fledged representative assembly.

¹⁶ Some of the well over 30 constitutional proposals that have been submitted to the Convention contain citizenship provisions that could rectify this. See for instance MEP Jo Leinen's draft proposal entitled *Draft Constitution of the European Union*, Brussels: European Parliament, October 2002.

However, even now because of its decision-making powers, the EP has acquired a role beyond that envisaged in a constitutional treaty marked by deep diversity.

Does the draft constitution contain such provisions as to move the EU from this extended auditing democratic role to a full-fledged representative democracy role, in line with the requirements of a democratic constitution? Article I-45 states that ‘The working of the Union shall be founded on the principle of representative democracy’. Article I-46 spells out the principle of participatory democracy. Article I-44 (The principle of democratic equality) states that ‘In all its activities, the Union shall observe the principle of the equality of citizens. All shall receive equal attention from the Union’s Institutions’. The question is whether these provisions, their specific definitions and the relevant institutional provisions to ensure their operation can be construed so as to think of the EU as a system of self-legislating citizens. Another relevant question is whether the EU will be endowed with the means (fiscal and other) that this notion presupposes.

The definitions provided in Part I, Title VI on ‘The democratic life of the Union’ (Articles I-45-51) make clear that the conception of representative and participatory democracy is more akin to the accountability requirements of audit, than to the participatory requirements of representative, democracy.¹⁷ For instance Article I-45.3 states that ‘Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly as possible and as closely as possible to the citizen’. The mode of participation referred to (Article I-46) is ‘opportunity to make known and publicly exchange their views’, engage in ‘an open, transparent and regular dialogue’, be involved in consultations carried out by the Commission, and seek a Commission initiative through a citizens’ initiative. These definitions reveal a clear willingness to involve citizens, but they are not unambiguously reflective of the

¹⁷ A total of 235 amendments were submitted to these proposed articles. An earlier version (CONV 650/03: 08) contained an even weaker set of formulations but these were changed in response to strong pressure from Convention members. In a proposed amendment 19 members and alternates proposed to delete the entire title (proposed articles 33-37), as ‘Title VI is an inadequate advertisement of the Union’s true democratic underpinnings. It reads like an apology... it diminishes the visibility and impact of the true democratic bases of the Union’s decision-making institutions.’ (<<http://European-convention.eu.int/Docs/Treaty/pdf/600/global600.pdf>>)

notion of citizens as self-legislative. The citizens have a stake in the institutions but the institutions are not unambiguously framed as ‘theirs’. This corresponds with the weak notion of public autonomy in the Charter, as noted above.

On the other hand, the provisions in Title VI, and in particular I-45, are sufficiently strongly framed so as not to *exclude* citizens from seeing themselves as the ultimate authors of the law. The crux of the matter is the nature of the institutional provisions, and in particular the role of representative bodies such as the EP and national parliaments within the larger institutional system of the EU.

Several of the institutional proposals will increase the democratic quality of the EU. The resolve to institute co-decision as the main legislative procedure (Article I-33, with reference to Article III-302), coupled with a greatly increased use of qualified majority voting in the Council (cf. Article I-24), and the abolition of the pillar system (albeit far from completely in practice), will help greatly amplify the role of the European Parliament in the EU institutional system. These reforms will go quite far in establishing the EP as a legislative chamber on a par with the Council. An improved clarification of the distinction between legislative and executive acts has the ‘implication that any executive act requires a legislative (or constitutional) mandate. This means that, except for constitutionally provided exceptions, the European Parliament acting as a full legislator enjoys a veto-power over any delegation of executive powers in the Union’ (Crum 2003: 8). Heightened transparency requirements (Article I-49, III-304, 305) help improve individual and inter-institutional lines of accountability.

The proposal moves the EU closer to a parliamentary model in that the role of the EP is strengthened but this is not an unambiguous strengthening. For one, although the Commission shall be responsible to the Parliament (Article I-25.5, with reference to Article III-243), the Commission does not emanate from Parliament, as it would do in a full-fledged parliamentary system. The European Council proposes a candidate for President of the Commission to the Parliament, who is adopted or rejected by the EP. As John Pinder notes, however:

‘the European Council is required to take into account the results of the European Elections and to decide on this candidate ‘after appropriate consultations’; and if the candidate is not approved by a majority of the Parliament’s members, the European Council must follow the same procedures before proposing a new candidate. Thus the Parliament should be able to convert the procedure into one of virtual co-decision with the European Council, which should be optimal, given the need for a Commission that is acceptable to the states as well as to the citizens’ representatives; and the citizens will be able to see that their votes in the European Elections help to determine the character of the executive as well as of the legislature.’

(Pinder 2003: 2)

The Union Minister for Foreign Affairs is appointed by the European Council (with the agreement of the President of the Commission), and can be replaced by the same. The Minister is only accountable to the EP when handling those aspects of the Union’s external relations that he/she handles within the Commission (cf. Article I-27.3). The Council president is elected by the Council and neither the president nor the council is accountable to the EP. The Council is both an executive and a legislative body, with the specific division of tasks still unclear. The specific delineation of tasks and functions between the Commission and the Council as executive is also not entirely clear. The institutional system that is devised is one of complex and quite ambiguous lines of accountability.

The draft also amplifies the role and salience of national parliaments in that they are able to give inputs into European policy making.¹⁸ Such amplification could serve as an institutional guarantor for deep diversity, in that it could help protect democracy at the national level, as well as would provide an additional check on the system that those issues deemed critical for the maintenance of nationally based identities were retained at the national level. On national democracy, increased use of QMV in the Council, could however reduce nationally based lines of accountability (Crum 2003), although this could be somewhat modified by heightened transparency requirements.

¹⁸ See CONV 353/02 for the recommendations from the Working Group (WG IV) and an analysis of the protocol on national parliaments: CONV 611/03.

On national identity, the early warning system could serve such a purpose, but it is not clear from the provisions how important this concern will be.

The net upshot of the Convention's proposal is to strengthen the European-level democratic institutions and to involve national ones more directly into the process. The proposal clearly moves the EU institutions from an onus on audit democracy to representative democracy, but far from all the way. These institutions still do not comply with the requirements of a democratic constitution. The proposals are also not internally consistent so as to pull the EU in one coherent direction. They do not in an unambiguous way support the notion that the Union derives its legitimacy from its citizens. But they weaken the notion that the Member States are the masters of the treaties.

Institutional coherence vs. institutional diversity?

Deep diversity is wholly compatible with the logic of a pillar structure (such as that set down in the Maastricht Treaty): to protect or shield certain areas deemed vital for the protection of national identity from the gravitational force of integration. An obvious question in this connection is whether the *present* pillar structure is consistent with deep diversity. The short-hand answer is that the pillar structure matters to the preservation of deep diversity, but many of the areas important to the preservation of national and other identities are not in pillars II and III. In the present system, some of the important factors to the protection of national (and other forms of relevant) identity are the division of competences, the notion that the Union needs a basis in the treaties to act, unanimity as voting procedure, national implementation, economic dependence on the Member States, and that the Member States – acting unanimously - are in charge of treaty change. These serve, in institutional terms, to help sustain an important deep diversity imprint on the Union.

A democratic constitution consistent with constitutional patriotism presupposes a coherent institutional structure. In other words, for the Convention to have moved the EU in the direction of constitutional patriotism, it would have to abolish many of the traits listed above and replace these with the institutional prescriptions for constitutional patriotism. Was this done?

The Convention decided to equip the EU with *legal personality* (cf. I-6:7). The EEC earlier had personality. But this change paves the way for a merging of the Treaties and it gives greater coherence to the Union's constitutional architecture (cf. CONV 305/02: 4). This does entail the abolition of the pillar structure (although as will be seen below some of this is retained through other provisions).

Other institutional provisions point in the same direction of coherence-inducing simplification. The endorsement of co-decision (symbolically elevated to “the ordinary legislative procedure”), and qualified majority voting in the Council, as general principles, could be seen as further steps of de-pillarisation. The general embrace of these two principles should strengthen the Community method and lend greater coherence to the institutional system of the EU. The draft introduces a simpler set of requirements for its operation (these will not be operational until 2009, however) The question is whether these changes will amount to more than ensure a functioning institutional system in an EU of 25+, as QMV is often depicted as necessary to prevent deadlock in an enlarged EU.

What aspects of the diversity of Europe – even in a Europe of 25 – will be retained with these decision-making procedures in place? Note first that the Convention did not adopt QMV or co-decision across the board.¹⁹ Unanimity was retained in the areas of foreign and defence policy, tax policy, and in most aspects of social policy. The unanimity requirement on tax effectively keeps the present system, where the Union is at the mercy of the Member States with regard to its funding. Other institutional mechanisms also entrench a continued strong Member State dominance within the foreign policy and defence areas.

On the division of competences, the draft retains the notion of Union competences as ‘governed by the principle of conferral’ (Article I-9: 9). This means that ‘the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences

¹⁹ Maurer notes that QMV accounts for 175 and unanimity for 78 issue areas in the June 27 draft proposal (CONV 820/1/03REV and 848/03) (as compared to 137 for EU/EC in Nice). Co-decision applies to 82 issue-areas, as compared to 45 in the Nice Treaty. See Maurer 2003.

not conferred upon the Union in the Constitution remain with the Member States'. As noted, this principle is one means for the Member States to protect their uniqueness.

In the draft, Union exclusive competences are identified and singled out (monetary policy, common commercial policy, customs union and conservation of marine biological resources, cf. Article I-12). This list is very short, and does not include the four freedoms, which are placed in the next, the shared competence, category. The list of shared competences is very long,²⁰ and Craig notes that this is now the default position (Craig 2003: 7) between exclusive competence and its supporting and coordinating role (in such areas as education and culture (I-16)).

This way of dividing competences leaves large scope for the interweaving of levels through the very large number of – and scope for - issue areas within the shared competence category; hence raising questions as to the status of the principle of conferral. Although this certainly raises the spectre of further unleashing the teleology inbuilt in the Common Market and/or does provide the Union with means of further aggregating powers, the overall picture is more complex. The levels are not only tightly interwoven; the manner in which they are woven together varies considerably from one issue to the next. These are spelled out in the detailed provisions in Part III (Craig 2003: 7).

The flexibility clause (Article I-17) offers the possibility of Union action in areas listed in Part III, where the Union does not have powers. The provision can enable the Union to obtain such, subject to unanimous Council approval and EP consent. The provisions on enhanced cooperation (I-43 and III-322 - 29) permit at least a third of the Member States to avail themselves of the Union institutions to pursue closer co-operation in specified fields. The conditions for such are spelled out and are to serve as a last resort, rather than as a procedure that can be easily triggered.

²⁰ The list includes the internal market, area of freedom, security and justice, agriculture and fisheries excl. conservation, transport and trans-European networks, energy, social policy, economic, social and territorial cohesion, environment, consumer protection, and common safety concerns in public health matters (cf. Article I-13.2). The Union also has competence to act in other areas, such as research, technological development, and space (I-13.3) development cooperation, and humanitarian aid (I-13.4).

The Draft also contains a provision that permits voluntary withdrawal from the Union (I-59). It is left to the applying state itself to determine how such an initiative comes about. The Union does not for instance impose a popular consultation requirement. The Union bodies decide in favour of or against such a proposal. This threshold is lower than for instance in Canada, the only other entity with provisions for voluntary withdrawal. Voluntary withdrawal is clearly compatible with the basic tenets of deep diversity.

In sum, the draft does propose a more coherent institutional structure for the EU, than is the case at present. The abolition of the pillars and the steps towards harmonization of decision rules are important to that end. At the same time, the significant competence overlap and the large scope for Union action within a very wide range of policy fields raises questions as to the salience of the principle of conferral of powers. Its operation is clearly dependent on the complex system of detailed rules in Part III. Of considerable importance, then, is whether these provisions can easily be changed, or whether they are quite resilient to change.

Constitutional amendment or treaty change?

The system in place is based on the deep diversity provision of national veto. Midways in the Convention's work, Convention vice-president Giuliano Amato noted that: 'If the current procedures for amending Union treaties are retained, the projected constitution would be such only in name. On the other hand, should the adopted amendment procedure require that future amendments be decided at the level of the European Parliament and be enforced only if subsequently approved by four-fifths of the national parliaments, the treaty would be constitutional in substance' (Amato 2003: 362; see also Weiler 2002).

The proposed mechanism is spelled out in Article IV-7 *Procedure for revising the Treaty establishing the Constitution* (CONV 850/03). This mechanism is marked by the following traits. First, it embodies the key traits of what may now be termed the Laeken model (cf. Fossum and Menéndez 2003). Second, it is a procedure for the whole constitutional treaty, i.e., there is no formal differentiation between the different parts of the constitution, as was considered during the Convention debate. Third, it is a very elaborate procedure in that it greatly formalises the process. Fourth,

the European Parliament is more directly included in this model than in the IGC model, i.e. the pre-Laeken model. The EP may submit a proposal to the Council. This means that the procedure provides institutional space for a popular movement organised around the EP to ask for a constitutional change. But there is no real or strong provision for such a popular movement to come about, as the procedure still largely privileges the institutions, and the *executive* component of these. Fifth, the model opens up the possibility for the reconvening of a Convention, but this is *not* a mandatory requirement.

The mechanism has what may be labelled as several thresholds. The first threshold is the power of initial initiative, which includes the European Parliament. The present system in place does not. The draft also states that national parliaments shall be notified, i.e., if they want to take an initiative they must still submit this to their government or to the EU institutions. If they do, they are faced with a choice as to whether a Convention should be set up. Here the requirement is a simple majority in the European Council, after a round of consultation among the three EU institutions. The decision on whether to use the Convention option is based on a substantive assessment of the ‘extent of the proposed amendments’. The next step is the Convention’s assessment of proposals and ability to forge a consensus on these. The second threshold is the determination by common accord of the conference of representatives of the governments of the Member States. The third threshold is the ratification – the requirement is unanimity and each state decides according to its constitutional requirements. There is no uniform procedure for ratification. Subsection 4 provides a set of guidelines to be followed should all governments not have ratified the amendments. The failure of a state to ratify will after two years be referred to the European Council but there is no explicit procedure for how the Council is to handle this. This is an important new provision and its specific contents and operation will likely be the subject of considerable debate.

The Convention vehicle is *not* a mandatory part of constitutional change. Whether this raises or lowers the threshold for subsequent constitutional change is less certain. The final version of the text (CONV 850/03), after significant pressure from the EP and the national parliamentarians included an insert to the effect that a decision not to establish a Convention had to be approved by the EP.

The wording used to initiate the Convention procedure differs from one amendment to the next. The Convention's draft (CONV 850/03) uses 'extent of the proposed amendments', whereas an earlier version (CONV 728/03) uses 'should this not be justified by the tenor of the proposed amendments'. The explanatory note uses 'the scale of the amendments'. These are quite different justifications. When the Convention option is *not* used, the draft states that the European Council must spell out the terms of reference for the conference of representatives of the governments of the Member States (CONV 850/03).

The draft contains an elaborate procedure, which essentially provides each Member State with the power of veto, but there are some important changes from the present system. The draft does include the European Parliament more directly and also many of the different stages – this is an important difference from the current arrangement. This means that there is much more scope for popular mobilisation through an open initial part of the process: the initiative and proposal stages, whereas the decision-making and ratification stages are more closed and narrowed through national vetoes.

The elaborate procedure might also make the system rigid and resilient to change. However, it is important to recall that the draft does contain scope for change without recourse to this procedure. Consider the flexibility clause (I-17), the provisions on enhanced co-operation, and the so-called 'passerelle' in Article I-24.4. This clause permits the European Council, acting unanimously, to take issue areas under special legislative procedures and subject them to the Community method.

IV. Conclusion

The Convention's mandate was to develop proposal(s) for the IGC to consider; and not to serve as a constitutional convention. However, the mandate did not exclude a broader – and constitutional - role in that it asked the Convention to discuss the question of a European Constitution, and the Convention did seize the opportunity. Commentators and participants have been struck with the progress that the Convention has been able to make. It has moved ahead on a number of issues, where the IGCs had previously failed to reach agreement, albeit the end result of this process of course does hinge on the outcome of the IGC.

At the outset two constitutional visions for the EU were presented. The use of two visions served several purposes, not the least to avoid the fallacy of confusing ‘the juridical presupposition of a constitutional *demos* with political and social reality. In many instances, constitutional doctrine presupposes the existence of that which it creates...’(Weiler 2001b: 56) Present-day EU is said to actually favour a multiple *demos* constitutional doctrine. But there is also a partial commitment to an alternative doctrine that propounds the need to found the EU on constitutional patriotism.

These doctrines were assessed in relation to the existing structure of the EU and the Convention’s work and results. It was found that the Convention has taken a number of decisions that appear to weaken the multiple constitutional *demos* doctrine and that seem to move the EU closer to one based on constitutional patriotism. In this context, the symbolic value of the explicit pronouncement that the EU is based on the citizens and the states of Europe should not be ignored. Having said that, the wording that runs through the text and that appeared from the Convention’s debates is far from an explicit endorsement of constitutional patriotism.

The result does reflect a further step in the process of forging a viable political entity in Europe, and to do more than merely simplify and consolidate the structure in place. The Convention’s very use of the terminology associated with constitution could be potentially significant as a rallying call to bring institutional reality in line with constitutional aspirations. But there is more than one set of aspirations. Further, it is less clear that the treaty has laid the institutional groundwork so as to *establish* a subsequent Constitution. Aspects that might support such a further process are first the Charter, which might empower citizens to think of themselves as Europeans and inspire them to take actions that breach the distance between the new treaty and a full-fledged constitution. Second, such a process could be reinforced through the strengthened role of the EP - and national parliaments – and perhaps also the abolition of the pillar structure, co-decision and QMV. On the other hand is the cumbersome and still largely intergovernmental revision procedure that *might* act as a significant break on any such attempt. Might is rightly emphasized here because of the more prominent presence of the EP – coupled with the option of a convention. Both could inject a strong popular input into subsequent amendment processes. How this

procedure will work in the future will become clearer once the present process has come to an end.

There is also a real risk that the new structure in a Union of 25 might contain an overly high threshold for subsequent change. This risk is twofold: over-reliance on constitutional terminology and symbolism to create something that does not have the proper preconditions; and the setting up of an apparatus and procedures bent on, and almost premised on, the ongoing approach to constitution making that is characteristic of the EU but now having to operate within a setting of overly high thresholds.

Nevertheless, perhaps it could be argued that the main contribution of the draft and the Convention's work is to open up and leave open the question as to whether Europe should be based on multiple constitutional demoi or one constitutional demos. The Convention has not resolved the constitutional question. The hopefuls may say that it has given this discussion a major boost and also furnished future constitution makers with better tools to push the process further. The doubters may say that the Convention abrogated its responsibility to act as a true constitution maker and instead left the question in the hands of the citizens, but without giving them the proper tools. What the citizens themselves and their representatives will make out of this remains to be seen.

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