The currency of constitutionalism has become the dominant currency of the debates on European integration. We have moved from a process of constitutionalisation to question whether such process represented a European Constitution (does Europe has a Constitution?). We have then discussed whether the Union required a formal Constitution (does Europe need a Constitution?). Two issues underlie the discussion on both of these questions: whether constitutionalism is the best form of power for the European Union and whether the European Union has the political (constitutional) authority to adopt such form of power. These two constitutional questions can, in turn, be linked to two different types of legitimacy identified by Bellamy and Castiglione: regime and polity legitimacy. The first relates to the legitimacy of the institutional and procedural mechanisms through which power is exercised in a polity. The second refers to the need to justify the existence of that

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1 Advocate General at the Court of Justice of the European Communities. The views expressed are, naturally, purely so in a personal capacity. Some of the points raised in this paper arise from a common book project with Carlos Closa.

2 The definition of constitutionalism as the form of power belongs to Francisco Rubio Llorente. CITE

3 See Bellamy and Castiglione and Neil Walker, op. cit. The meaning does not totally coincide with that employed in here.
The way in which one answers these different questions in the context of the European Union is, in turn, influenced by the way we conceive constitutionalism in general (what does constitutionalism serves for) and the notion of a political community we embrace (what kind of social and political relationship must it embedded). Understood as a normative theory, constitutionalism has been conceived as a set of legal and political instruments limiting power (constitutionalism as limit to power). But it has also been conceived as a repository of the notions of the common good prevalent in a certain community and as an instrument organising power so that it pursues that common good (constitutionalism as polity expression). In between, it is possible to stress instead the role of constitutionalism in creating a framework in which competing notions of the common good can be made compatible or arbitrated in a manner acceptable to all (constitutionalism as deliberation). These notions of constitutionalism can, prima facie, be linked to different conceptions of the polity. The first appears to correspond to the liberal emphasis on the protection of freedom and private autonomy. The second, to the communitarian assumption of a thick form of association capable of supporting a notion of the common good. The third, to a republican ideal of a contestatory and fully deliberative polity whose identity is secured by engagement in its permanent discussion. Such associations should not, however, be overemphasised. It is possible, for example, to adopt the latter version of

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4 See also Neil Walker’s five orders of constitutional pluralism questions.

5 With this I mean a notion of constitutionalism that embraces a particular form of organizing power and not a neutral label for any fundamental document setting the organization principles of a particular system or organization (in this latter sense, one can find constitutions in the most diverse settings from the United Nations Charter to the statutes of a Golf Club as a conventioneer at the Convention on the Future of Europe remarked).

6 Dworkin, Hayek, Nozick, Petersmann in the EU

7 Cite Raz, Mortati, Schmitt etc.

8 Sunstein, Habermas, Petitt, (Siedman, Ackerman and Michelman, can they be included here?)
constitutionalism in the context of a liberal polity. Moreover, constitutional reality often presents us with a mix of those different constitutional and polity conceptions.

Those three core conceptions of constitutionalism and their partial affinity with certain notions of the polity allow me to present the key purpose of this paper: to identify the changing nature of European constitutionalism and its relationship with the intergovernmental aspects of power in the evolving European Union. My argument will be that the role of constitutionalism is changing in the European Union and that its determination depends both on the relationship between constitutional regime and polity legitimacy and, more generally, between constitutionalism and intergovernmentalism. The prevailing character of European constitutionalism has, so far, been determined by its instrumental character to intergovernmentalism. However, this relationship may have to be changed in light of the regime changes introduced by the current constitutional processes of the European Union. For these purposes, a distinction will be made between constitutionalism (where deliberation is based on the promotion of universal rules guaranteed, ex-ante, by its generality and abstraction and, ex-post, by non-discrimination) and intergovernmentalism (where deliberation does not aim at universal rules based on the individual status of citizens but reflects the bargaining power of States and generates accommodating agreements between their perceived conflicting interests). Furthermore, a circular relationship will be highlighted between regime legitimacy and polity legitimacy. So as regime legitimacy should reflect the form of polity legitimacy that supports it, so should the search for polity legitimacy be conducted in light of the changes undertaken in regime legitimacy.

I will start by revisiting the process of constitutionalisation of the European Union and the constitutional challenges that contribute to the legitimacy debate and the current constitutional discussions. I will argue that the process of constitutionalisation is linked to a broader process that Joseph Weiler has described as the “transformation of Europe”. This process included both a dynamic of constitutionalisation and of europeanisation leading to a claim by Europe to independent political and normative authority associated to a

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9 Habermas appears to be the case.
community of open and undetermined political goals. But this process did not affect the deliberative nature of the European Union that remained predominantly intergovernmental. This explains the limited nature and extent of the constitutionalisation operated in the European Union and can be demonstrated both by aspects of its regime and the different attempts to present its polity legitimacy. The constitutional form of power adopted for the Union was strictly limited by the adoption of the instruments of constitutionalism necessary to constrain and, at the same time, legitimise the constitutional authority claimed. Its polity legitimacy was either ignored, inspired by references to private autonomy or functionally linked (in different ways) to that of the States. As a consequence, its regime legitimacy was dominated by the form of constitutionalism as a limit to power and its polity legitimacy by private autonomy and functional legitimacy.

Changes in the regime, itself, and the pressures created by the enlargement have led to a crisis in the form of European constitutionalism and its relation with intergovernmentalism. After presenting this crisis I will discuss the nature of the Convention process entrusted with the resolution of this crisis. It is in the light of this discussion that I will review the main changes introduced by the new Constitutional Treaty paying attention to the relationships between regime and polity legitimacy and constitutionalism and intergovernmentalism. My overall argument is that those relationships have not been given sufficient attention by the constitutional process of the Union with the consequence that the Union may not have sufficient polity legitimacy to support the regime adopted and that a paradigmatic tension is created between constitutionalism and intergovernmentalism.

Constitutionalisation Revisited: InterGovernamentalism and Low Intensity Constitutionalism

In 1991, Joseph Weiler published what has probably become the most famous piece describing the evolution of the process of European integration in its legal, political and economic context. The title of such piece was “The Transformation of Europe”.¹⁰ In his
article, Joseph Weiler explained the constitutionalisation undertaken by the European Communities and how it had been possible. Following his previous thesis on the dual character of supranationality, Weiler explained how the adoption of normative supranationality (the adoption by European rules of constitutional federal authority over State rules) was linked to intergovernmental decision-making (States control and veto power over the decision-making process). But in his piece and following work, Weiler has also highlighted how some of the constitutional doctrines adopted by the Court (notably the protection of fundamental rights) could be linked to the supremacy and direct effect acquired by European rules. I would like to revisit the process of transformation identified by Weiler to try to identify in it the trademarks of European constitutionalism and its relation with the constitutional questions currently faced by the Union. I would not so much describe the process of constitutionalisation as I will try to stress how its normative foundation lies in a new claim of sovereignty whose connection with a process of Europeanisation lies at the basis of the current constitutional questions. But, furthermore, I will try to stress how the legitimacy of this constitutionalisation was linked to a particular notion of constitutionalism and its relationship with intergovernmentalism.

The classical literature on European integration has described how the case-law of the European Court of Justice developed a constitutional architecture for Community law founded on the principles of direct effect and supremacy, complemented with the adoption of constitutional law concepts such as fundamental rights, implied competences, State liability, enforcement mechanisms, separation of powers and, broadly, the notion of a community of law (the EU equivalent of Statsrecht or the rule of law). According to Weiler:

‘The constitutional thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a Treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law’.

This constitutional construction was legitimised by the Court on the basis of what I would call an epistemological shift operated by the ECJ in the understanding of EC law and the source of its normative authority. When the Court, in its path-breaking decisions, assumed EC law as an autonomous legal order, it did it on the basis of a direct relation with the peoples of Europe. It was this that granted to the European Communities (later the EU) and its legal order a claim of independent political authority. It would have been possible to base the supremacy and direct effect of Community law on some form of interpretation of international law. In fact, as Bruno de Witte as powerfully explained, even the principles of supremacy and direct effect, usually identified as the cornerstones of the constitutionalisation of Community law, could be developed and generally applied without changing, in a substantial manner, the character of the Treaties and Community norms as international law. There are other instances where international norms enjoy direct effect and supremacy without that implying any challenge to the ultimate authority of the States and their national law (particularly, constitutional law). On the contrary, it is often those Constitutions that confer that power to international rules. It would indeed have been possible to explain the supremacy and uniform application of EU law without challenging the traditional conception of sovereignty and its locus on the State. However, this vision was not the one embraced by the Court of Justice and by the national courts that, in entrusting the European Court with the resolution of the conflicts of authority between national and European norms, implicitly recognised that such conflicts where to be decided

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14 de Witte, Bruno, Direct Effect, Supremacy and the Nature of the Legal Order, in Craig and de Burca (Eds.), The Evolution of EU Law (Oxford, Oxford University Press, 1999), mainly pp. 181 and 209.
at the European level (on the basis of the jurisdiction of the Court of Justice to interpret and apply the Community legal order).

The Court of Justice, supported by national courts, founded the direct effect and supremacy of Community law on a direct relation between Community norms and the peoples of Europe. The treaty is presented as much more than an agreement between States; it is an agreement between the peoples of Europe that established a direct relationship between EC law and those peoples.\textsuperscript{15} That source of direct legitimacy established a political link authorising a claim of independent normative authority. Legal authority was therefore to be derived from an autonomous conception of the European legal order. This corresponded, in fact, to a claim of independent normative authority that meant that the European Communities where, in the words of the Court, endowed with sovereign rights.\textsuperscript{16} And this normative authority entitled the European legal order to set its borders with regard to national legal orders. It further granted to European rules the authority to derogate from the application of national rules corresponding, de facto, to an attribution of constitutional authority vis à vis those national rules.

The epistemological turning point on the locus of sovereignty and legitimacy in Europe lays in the direct relation found by the Court of Justice between the peoples of Europe and Community law. Once this direct political relationship was established between European law and the peoples of Europe, it was clear that the basic legal framework should be based on constitutional law and not international law. The latter regulates the relationship between States and their sovereign powers. The former regulates the relationship between the citizens and defines how is their sovereignty to be expressed in the political community. The assumption of constitutional authority (in the form of a claim, even if limited, of independent normative authority) required the adoption of constitutional doctrines to constrain and legitimise that authority. In the process of European integration, constitutionalism as the form of power followed the claim of constitutional authority and

\textsuperscript{15}Case 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, [1963] ECR 3.

\textsuperscript{16}Ibidem.
not vice-versa. It was thus a constitutionalism instrumental to that claim of constitutional authority.

The normative autonomy of Community law, founded on a source of legitimacy flowing directly from the peoples of Europe and, therefore, not dependent on the States, also allowed the expansion of the political ambitions and reach of the process of European integration. This was reinforced by the functional dynamics of the process of economic integration and political supranationalisation (the shift of political action from the national to the European arena). As a consequence, independent normative authority was complemented by independent political authority. This is visible in a process that we can classify as europeanisation.

The process of constitutionalisation would not have raised important constitutional challenges if the use of the “constitutional authority” assumed by Europe would have remained within the boundaries of clearly delimited competences, traceable to express delegations from the States. The same would be the case, if those competences would have continued to be subject to the agreement of all States (corresponding to Joseph Weiler’s relation between supranational normativity and intergovernmental decision-making).17

What raised the current constitutional challenges was the association between constitutionalisation (a claim of independent normative authority) and Europeanisation (the emergence of a community of open and undetermined political goals subject to majoritarian decision-making). Europeanisation took three main forms.

The first element of Europeanisation relates to the growth of Community and EU competences. In parallel to the process of constitutionalisation, EU law has also seen its scope of action and EU competencies extend well beyond the initial limits of the Treaties. This means that the European Union has taken over many traditional functions of governance and, even with regard to those still retained by the States, it exercises an increased supervisory role, limiting the self-governing powers of the States in their definition. Any analysis of the extension of EU powers will emphasise the growth of

Community and EU competencies through the successive Treaty revisions (which expressly created new areas of EU action), the use of the implied powers provision of the Treaty Rome,\textsuperscript{18} or the expansive interpretation given by European Court of Justice to Community competences (either through an extensive interpretation of the functional competencies related to the internal market or through the doctrine of implied competences).\textsuperscript{19} These developments have turned the European Union into a new space for political action regarding the framing of open and undetermined political goals. The borders of the Union action are no longer defined by the express competences that the States have attributed to it and are, instead, the flexible product of the political action of a broad variety of social actors that attempt to promote their interests in a new level of decision-making whose political authority is such as to allow for the pursuit of an almost universal set of public goals. Inherent in this is a conception of the European Union as a political community that could take over many of the traditional functions of governance of the States and where many of the policies of the later could be subject to new deliberations. In this regard, such Europeanisation also challenges the national constitutional definition of the rules of the game with regard to the way the different interests of the polity are balanced and deliberation takes place between its members.

But this Europeanisation did not take place only with regard to the extent of competences transferred from the States to the European Union. Also the way in which such competences are exercised has been progressively Europeanised through the move from unanimous decision-making to majoritarian decision-making. The increase in majoritarian voting in the EU has resulted from the successive Treaty amendments but also from the interpretation given of the appropriate legal bases for EU action (with preference being given to the legal bases involving both majority voting and an higher input of the

\textsuperscript{18} Current Article 308 that has been interpreted by both the EC political process and the ECJ has granting almost any competence that can be argued as necessary to achieve one of the broad goals of the European Community.

\textsuperscript{19} Articles 95 and 96.
This means that, not only were EU competencies extended but also the way they are exercised has changed and been Europeanised. The degree of control by individual States on EU policies decreases as they move from unanimous to majoritarian decision-making. Europeanisation occurs not only through the transfer of competences from the States to the Union but also when the exercise of those competences becomes the product of a European majority and no longer of a consensus among States.

There is a final element of this process of Europeanisation that is not related to the growth or exercise of EU competencies. It relates, instead, to the degree of EU control and impact on policies that continue to be pursued by the States. A key role in the Europeanisation of Nation States has been played by the market integration rules of the Treaty and by the simple dynamics generated by economic integration itself. The Europeanisation of national policies through market integration can, in the first place, be seen in the way in which the Court of Justice and, to a lesser extent, the Commission control the exercise of many national competences through the application of the rules of market integration. A good example regards the interpretation of the free movement rules. The Court extended the scope of application of these rules much further than the scope normally attributed to trade rules and has used the free movement rules to review almost any area of national legislation that impacts on the market. The extensive interpretation of the free movement rules led to a spill-over of EU law and its rationale of market integration into political and social spheres at the national level. National legislation intervening in the market became subject to review under EU law and assessed under criteria or necessity and proportionality, independently of any protectionism intent or effects. This meant that EU law would often second-guess the reasonableness of national policies on areas such as consumer, environmental or health policies. Another example can be detected in the use by the Commission of its discretionary power to authorise State aids to de facto impose certain elements of a Community industrial policy on the Member States. All this led to a process

\[20\] Compare for example, Article 100A and Article 235.
to which Burley and Mattli refer to as substantial penetration of EC law, and Sabino Casesse as “*comunitarizzazione* di funzione nazionali”. This is further reinforced by the mechanism of regulatory competition among States generated by the internal market and the mobility it entails. The “forum shopting” of companies, consumers and tax-payers allowed by economic integration and market competition challenges the autonomy of States even in the realm of policies such as those shaping their criteria of distributive justice.

**The Regime and its Polity Legitimacy**

Much of the legal writing has, for long, limited itself to describe the process of constitutionalisation and uncritically accept its results. However, the constitutionalisation of the Treaties created a constitutional body without discussing its soul. The constitutionalism emerging from the development of European integration was a peculiar type of constitutionalism that was never clearly identified but I would define as low intensity constitutionalism. Such constitutionalism was characterised by several elements. In the first place, this was an incremental and bottom-up constitutionalism. Not the product of a constitutional moment but of a judicial and political step by step development often constructed by reference to national constitutional sources. This nature is also reflected in the absence of a two-track democracy. There was no substantial difference between the legislative and constitutional processes. This helps explaining for example the extent of

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24 Cite Ackerman and Neil
judicial deference towards the legislative process (a different story occurred with regard to executive process). It was also a constitutionalism whose authority was constantly questioned by national constitutions and was dependent on the “veto right” of national courts.\footnote{Chalmers, cite}

It is therefore not surprising that it was also, in part, a “defensive” constitutionalism. It did not purport to reflect a social or political contract (even through artificial reconstruction) that would empower and organise the Union so as to promote a vision of the common good or, in alternative, resolve conflicts between competing visions of the common good. Instead, it consisted more on the adoption of a series of constitutional doctrines necessary to justify and legitimise the assumption of a normative and political authority by the European Communities. Concepts such as fundamental rights, separation of powers (embodied in the notion of institutional balance) and the rule of law were seen as guaranteeing that the powers assumed by the European Communities were subject to the same limits and constraints as when they were exercised at the national level.

When constitutionalism was indeed used, instead, as an instrument for the promotion of the authority of the Communities in encroaching upon the sovereign spheres of the States that was legitimated either through the degree of voice of the States in the process of deliberation or through the conception of that encroachment as protecting freedom and individual rights. It is notable, in this respect, that the areas where the Community started to evolve towards more majoritarian decision-making where those directly related with the internal market. These were also the easier to fit with this source of legitimacy. Constitutionalism is, in this way, link to two different visions of the legitimacy of the process of European integration. The first is that embodied by a functional and technocratic conception of the European Union has an efficiency oriented and problem-solving entity to whom States delegate the resolution of collective action problems they can no longer address individually.\footnote{Giandomenico Majone. Cite also Nathan Gibbs discussion.} The second, is that which follows the tradition of limited government and conceives the process of European integration as a new constitutional
constraint on public power, protecting freedom and private autonomy.\textsuperscript{27} Functional legitimacy fitted well with intergovernmental deliberation. Limited goals that were instrumental or complimentary to the State and did not have redistributive effects justified for deliberation to be a product of the aggregation and conciliation of State interests. Where the Union encroached upon State’s sovereignty, that legitimacy was also supplemented by the appeal to the protection of freedom and private autonomy in the face of power. This construction of European constitutionalism and of the legitimacy of European integration left the aggregation of individual interests to the States. The common good was either a product of an agreement between States or conceived as the protection of private autonomy and freedom enshrined in the logic of market integration and efficiency enhancing policies. This explains also the priorities of the judicial review which its focus on market integration and control of State action and an higher deference towards the EU intergovernmental process (legitimated by States consensus). Intergovernmentalism and low intensity constitutionalism as a limit to power dominated the arena. Deliberative and polity constitutionalism were left to the States. This was also due to the nature of the EU public sphere and political process that were not conceived as fulfilling the necessary conditions for such forms of thicker constitutionalism.

These strategies of legitimacy were however progressively challenged by the extent and nature of the powers assumed by the Union. Functional legitimacy is not really capable of adapting itself to an independent polity of open ended goals, whose policies have increasingly redistributive effects and are dependent on political dynamics that evade the State. Further the impact of European policies on national democratic deliberations could not be fully justified by the protection of freedom and private autonomy without assuming that the latter had become the dominant goals of any political community.

Gradually other visions of the legitimacy for an emerging European polity were proposed, reflecting the gradual expansion of its polity ambitions and regime changes. Weiler’s principle of constitutional tolerance is a good example. The EU would be legitimated by the openness to the other and the tolerance it would impose on States, limiting the

\textsuperscript{27} Cite ordo-liberals, Hayek, Petersmann etc.
communitarian dangers inherent in the Nation State.\textsuperscript{28} Christian Joerges work also pays great attention to the legitimating power of the inclusion of the other in national political processes promoted by EU law.\textsuperscript{29} Another trend, includes multi-governance scholars such as Jo Shaw’s and republican scholars such as Bellamy and Castiglione that stress the role of the EU in promoting a permanent contestability of democratic deliberations that is seen as feeding the legitimacy of political communities.\textsuperscript{30}

In previous works, I have argued for a legitimacy of the European Union grounded on its constitutional and democratic added value in reforming national political processes (with regard to external and internal democratic deficits) and in allowing for a choice among polities.\textsuperscript{31} There are three at least three forms of national democratic deficit with regard to which European constitutionalism may bring added value to European citizens. Firstly, national political processes no longer control many decision-making processes which impact on the national polity but take place outside its borders. In many cases, these are transnational processes (such as those of regulatory competition) that escape national democracies. Secondly, it has always been true that national democracy exclude from participation and representation in the national political process many interests which are affected by its decisions. Elsewhere I presented this as the paradox of the polity: a polity is both a condition for democracy and limit on democracy (by limiting those that participate in the democratic process).\textsuperscript{32} This is difficultly compatible with the claims of the modern citizen to have a voice in any polity that affects him or her and even to have a choice

\footnotesize{\textsuperscript{28} Sonderweg.}

\footnotesize{\textsuperscript{29} Cite}

\footnotesize{\textsuperscript{30} Cite}

\footnotesize{\textsuperscript{31} Cite We The Court and As Good as it gets.}

\footnotesize{\textsuperscript{32} Ibid.}
between different polities. In this respect, national democracy cannot cope with our desire to be involved in different polities and does not legitimise the different decision-making processes that affect our lives. Thirdly, even from an internal perspective there is a growing perception on institutional malfunctions on national democracies. The recognition that the political process may be captured by small concentrated interests is one of the examples of the challenges facing traditional democratic models through parliamentary representation. But that is also the case with the recognition that collective decision-making often takes place outside the political process or that representation and participation depends on a set of variables much more complex than simply political participation through elections. In some cases, national political processes have become embedded with certain values and assumptions that are no longer subject to deliberation. However, these values and assumptions are frequently the expression of particular interests. Economic protectionism and the frequent “hijacking” of the powerful concept of national interest are typical examples of these limits on the truly deliberative character of national democracies. European constitutionalism can be of added value to the citizen with regard to these different democratic deficits of national political communities. But he can also provide a new dimension of citizenship. Not only because it provides a new sphere of deliberation for problems we can no longer fully addressed at the national level but also because it provide us with a kind of meta-democracy: the possibility to choose among different political communities.

33 See Lucas Pires, Introdução ao Direito Constitucional Europeu, Coimbra: Almedina, 1997, at 67, that argued that national democracy is no longer able to satisfy the needs of the new ‘multiple and supranational individual’ which corresponds to the “modern citizen”.

34 These democratic problems can perhaps also be related to what Haberman’s described as the relation between lifeworld and system (Theory of Communicative Action, vol. 2, 1989). System’s are “genetically” embodied with certain values and assumptions that are excluded from communicative action (that is, discourse, which is, according to Habermas, the most way to legitimise moral statements and acts). What happens is that systems have been taken control over lifeworld (where communicative action and rationality now predominate albeit based on a set of common understandings and culture) in this way reducing the area of life and normative action subject to discourse. In other words, reducing the scope of democracy.
All these alternative conceptions of legitimacy that have been put forward for the European polity have in common that the source for its legitimacy is to be found in its role in controlling, reforming or questioning the States and not in developing an autonomous European vision of the common good. However, in this process, we have perhaps not paid sufficient attention to how in controlling, reforming or questioning the States the European Union does, in fact, decides between alternative visions of the common good. It is here that intergovernmentalism re-enters into the arena dominating the logic and legitimacy of deliberation. The policies of the European Union are limited and constrained by constitutionalism but they are still largely decided under the logic of intergovernmentalism. The extent of constitutionalisation remains, therefore, unclear and this leaves important questions open as I will discuss below.

**The Existential Crisis of European Integration**

Slowly, the Union has become unsatisfied with its traditional form of low intensity constitutionalism. As the Laeken Declaration defines it: “(T)he Union stands at a crossroads, a defining moment in its existence”. The political transformation of Europe that was described in the previous section has challenged some of the conditions for political organisation in Europe both at the level of the Union and the States themselves. The claim to independent political and normative authority linked to an emerging community of universal goals was not fully legitimised by the functional rationale and the low intensity constitutionalism highlighted above. At the same time, it challenged the constitutional basis of the States without providing a clear deliberative alternative for the definition of the common good. The processes of constitutionalisation and Europeanisation raised new claims for legitimacy in the European Union, challenged the conditions for the political subsistence of the States and changed the traditional mechanisms of participation and representation as traditionally framed in those States. The diversity of the constitutional challenges raised by these processes composes what we could describe as a kind of existential crisis in the process of European integration. The constitutional challenges faced by the Union were however perceived in many different ways and often by exclusive reference to the frame of constitutionalism and democracy borrowed from the State. Moreover, and more dangerously, such constitutional analysis is often applied in a
piecemeal manner without taking into account a systemic perspective. Therefore, a tendency emerges to borrow aspects of national constitutional regimes without assessing whether certain polity and deliberative requirements assumed by those national constitutional regimes are in fact fulfilled at the European level. A brief review of the main constitutional challenges composing the existential crisis of European integration may be helpful in this respect.

The constitutional problem most often highlighted in the current European Union is the “democratic deficit”. The agenda set forward for the convention on the future of Europe expressed this concern in different items such as national parliaments participation, transparency and fundamental rights protection. It also shaped the debate on the institutional reform. In reality, there were and there are different discourses on the democratic deficit. The most common presents the democratic deficit of the European as arising from the secondary position of the European Parliament vis a vis other European institutions in the decision-making process of the Union. In spite of the legal and political developments that have reinforced the position of the European Parliament in the institutional framework of the European Union, its role still reflects a lower degree of parliamentary representation and majority decision-making in the European political process than in national democracies.  

35 The focus is then on democratic representation through parliaments.  

These express a form of direct democratic representation and are, in

35 There are other issues which can be pointed as examples of the lower ‘quality of democratic representation’ in the European Parliament such as different national voting procedures and the unproportional representation of nationals of some member States. See Lenaerts and de Smijter, ‘The Question of Democratic Representation’, in Reforming the Treaty on European Union - The Legal Debate, Winter, Curtin, Kellermann, de Witte (eds.), Kluwer Law International, The Hague, 1996, 173, at 180-182. Another important handicap in the development of representative democracy and the operation of the European Parliament is the absence of real European political parties. See Lucas Pires, Introdução ao Direito Constitucional Europeu, Almedina, Coimbra, 1997. This can be related to a more general political/ideological deficit in the process of European integration whose developments take place in a context without any ideological debates. See Weiler and Shapiro, op. cit., n. 12.

36 See, for example, Lenaerts and de Smijter, ‘The Question of Democratic Representation’, in Reforming the Treaty on European Union - The Legal Debate, Winter, Curtin, Kellermann, de Witte (eds.), Kluwer Law
that respect, more legitimated than governments. The increased competencies of the European Union lead to claims of a democratic deficit since powers previously under the control of national parliaments are transferred to the European Union level and subject to a lower degree of parliamentary participation. This is so because EU decision-making is, in great part, controlled by the national governments and the Commission. The role of the European parliament in the European legislative process is lower than that usually played by national parliaments in the national legislative processes. The consequence is an overall decrease of parliamentary control over the legislative process what is foreseen as a democratic deficit undermining the legitimacy of the European Union and the powers exercised therein. There are two underlying fears: the first is the fear that non-directly accountable government officials may be more easily captured by interest groups and less accountable to the general interests of the people. But, there is a second fear: that a small minority constituted in a State will be over-represented in the inter-governmental process and able to impose its preferences even against an overwhelming European majority. Here, the argument turns into a second form of democratic discourse in Europe. One that focus on the non-majoritarian character of decision-making.

The problems of non-majoritarian decision-making have been exposed in the well known thesis of the joint-decision trap developed by Scharpf: Briefly, the “joint decision trap” occurs when the agreement of all national governments is required (unanimity): since all national interests are satisfied and costs are shared (or transferred to EU level), “joint decisions have politically more attractive cost-benefit ratios”37. However this leads to an increase in expenditure on these programs at the expense of potentially more efficient programs38. States compete for funds independently of real needs, and their different

International, The Hague, 1996, 173, at 175. These authors, however, recognize that the democratic deficit will not be solved on the basis of a simple transfer of parliamentary democratic representation to the European Union level. Indirect representation of this kind is also envisaged through national parliaments for example. See mainly at 178.


38 Ibid., specially at 247-249 and 255-256.
positions are not taken into account. Furthermore, “when circumstances change, existing policies are likely to become sub-optimal even by their own original criteria. Under the unanimity rule however, they cannot be abolished or changed as long as they are still preferred by even a single member”\(^{39}\). This can also be presented, as Weiler has stated, as another aspect of the democratic deficit: “the ability of a small number of Community citizens represented by their Minister in the Council to block the collective wishes of the rest of the Community”.\(^{40}\) It is in this respect that the non-majoritarian character is increasingly being linked to a third democratic deficit discourse, that of lack of proportional representation.

Nice was emblematic on the growth of a democratic rhetoric that stressed the need to organise representation in Europe according to a principle of equal representation among citizens and not among States. Therefore, follows the claim for a stronger proportional representation to the population of each State.\(^{41}\) Some Europeans, constituted in a small State, should not have more power than other Europeans, composing a larger State. Representation in Europe should move closer to the principle of one person one vote.

All these different versions of the democratic deficit, apparently, argue in favour of bringing the Union closer to the forms of democratic deliberation closer to the State. But, in reality, the proposals related to them are much more variable. Some argue, indeed, for an institutional system mirroring that of federal States. But others, argue for retaining or even reinforcing the logic of intergovernmental deliberation (retaining or even reinforcing the legislative and governmental role of the Council for example) while, at the same time, supposedly reinforcing its democratic character by such measures such as increased proportional representation, higher transparency and stronger political leadership. However, as we will see in more detailed below, the compatibility of some of these elements of democracy with intergovernmental deliberation is questionable and not discussed.

\(^{39}\)Ibid., at 257.


\(^{41}\) Whether, however, the second statement follows from the first is very doubtful and will be discussed below.
There are also those that argue that any democratic development is illegitimate either because the Union still does not have a demos capable of legitimating such democratic regime\(^{42}\) or, even more strongly, because it will never have one. For this perspective, what is wrong with the Union is not the absence of a democracy to exercise its growing powers but the expansion of those powers in the first place. What is needed, therefore, to correct that democratic deficit, is to impose stricter limits and controls on the exercise and growth of EU powers. This would “put the genius back in the bottle” and would reinstate the legitimating power of the functional theory and low intensity constitutionalism described above.

But Europe’s constitutional problems do not limit themselves to the rhetoric of the democratic deficit. Another problem which can be related (though not exclusively) to the previous critique of the process of European integration the perceived weakening of judicial control over the political process which arises from European integration and Community law. This is only the case in regard to countries which traditionally have judicial review of legislation. It is thought that EU law, which, according to the principle of supremacy, takes precedence over national law (including constitutional law), is not subject to the same intense scrutiny of constitutional judicial review to which national legislation was normally subject to.\(^{43}\) This can be seen in much of the rhetoric on the need for a better system of fundamental rights protection in the Union that preceded the Charter of Fundamental Rights and still subsists in light of its lack of legal binding character. Curiously, however, the debate on fundamental rights also contained elements of instrumentality to theses arguing for more and not less Europe. In fact, fundamental rights have also been put forward as an instrument for polity building, promoting an expansion of the Union’s actions in the internal and external domains.\(^{44}\)

Another major constitutional challenge brought by European integration regards the underlying conditions for the performance of certain functions of governance. Europe’s

\(^{42}\) Grimm.

\(^{43}\) See Weiler, Haltern and Mayer, op. cit., at 8-9.

\(^{44}\) See the debate between Weiler and Alston and Armin von Bogdandy.
economic integration has limited the capacity of States to pursue traditional functions of governance, in particular those regarding market regulation and distributive policies. Internal market rules, for example, have impacted on national regulatory policies well beyond trade considerations, in effect constraining national policies in areas as different as social, environmental and consumer policies. Moreover, in some cases, the increase mobility and economic regulatory competition also affected national redistributive policies. These limits on the pursuit of these functions of governance at the national level are not compensated by the degree EU intervention to secure those functions. The Union as yet does not fulfil the conditions or has the capacity to perform those functions of governance. Fritz Scharpf has presented this as a result of the gap between negative integration (economic integration through national markets deregulation) and positive integration (economic integration through Community wide re-regulation). The consequence is that the process of European integration is seen not simply has challenging the capacity of States to perform those functions of governance but, more broadly, has challenging those functions of governance themselves. For some, the process of European integration challenges the conception of the Welfare State that has supported the subsistence of national political communities and moulded our conception of public power. Others, notably Jurgen Habermas, perceive that challenge as resulting from broader global processes and, instead, conceive the European Union as an opportunity to answer to that challenge and protect the values of the Welfare State required for the subsistence of political communities and civic solidarity. In this case what would be required from the current constitutional process is the adoption of a social contract clarifying the forms of civic solidarity on which the European polity ought to be based. But this requires the Union not simply to address the question of finality by reference to an abstract goal but to get involved in an in depth discussion on opposing visions of the common good which have normally been discussed at the level of national political communities.

\[\text{45} \text{ cite}\]

\[\text{46 } \text{See The Postnational Constellation, London, Polity Press, 2001.}\]
This debate on a European social contract is also promoted by the increased redistributive consequences of the EU policies. The assumption of economic integration was increased growth without interference in the distribution function. But a viable and sustainable integration is only workable if the economic growth is fairly distributed. The issue of redistribution is therefore present from the outset of any project of economic integration. It is well known in economic theory that, although all may gain from economic integration and trade liberalisation, it is to be expected that richer and more competitive countries may gain more than less developed countries.\(^47\) Still the focus of the project of European economic integration has been on efficiency enhancing and wealth maximization. The economic growth to be expected from market integration was beneficiary to all albeit not in equal terms. Moreover, the degree of economic and social cohesion of the starting members of the project also reassured all that redistributive effects would not impose an unduly burden to any of the members. Mainly, as in most economic integration agreements, States make their cost/benefit analysis at the time of signing in and, if necessary, obtain specific compensations in agreeing with certain areas of economic integration. The fact that redistributive effects have taken place as a consequence of the developments in other policies of the Union could also be legitimised in light of the adoption of unanimous voting for decision-making in the European Community. In this case, States could either prevent policies which could have adverse redistributive effects for their own welfare or could subject their agreement to receive some form of compensation in other areas of European policies (something referred to as issue linkage).\(^48\) It is this that determined the pattern of both goals determination and institutional development of the European Union. And it was this that made such model justifiable in light of a functional form of legitimacy linked to


\(^{48}\) According to Shlomo Weber and Hans Wiesmeth, “an international regime (…) provides a political environment that naturally promotes issue linkage: by affecting ‘transaction costs’, the costs associated with acts of non-co-operative behaviour, it makes it easier to link particular issues and to negotiate side-payments that allow some actors to extract positive gains on one issue in return for the favours expected on another”, “Issue Linkage in the European Community”, JCMS, 1991, 255, at 258.
agreements between State and efficiency oriented decisions. However, the development of European integration has strained this relation between the model and degree of integration and its ideals. The degree of integration, the expansion of the scope of action of the European Union and its institutional changes are producing redistributive effects which can no longer be either traced back to an original agreement of the States or be predictable as part of an ad hoc political bargaining that may legitimise them through appropriate forms of compensation. Instead, the degree of majoritarian decision-making, the scope of European policies and the open and underdetermined character of political action therein, require an overall criterion of distributive justice which may legitimise those different policies and their redistributive effects or, in alternative, an agreement on constitutional forms of deliberation to develop that criterion.

There is final major constitutional challenge facing the Union. The challenge of constitutional authority and of defining the borders of the polities. In other words, if one is capable of legitimating a new European polity, a new question emerges on how the conflicts between polities ought to be decided. This question is reflected in the increased fears of a constitutional conflict between national legal orders (mainly national Constitutions) and the EU legal order. In reality, both national and European constitutional law assume in the internal logic of their respective legal systems the role of higher law. According to the internal conception of the EU legal order developed by the European Court of Justice, EU primary law will be the “higher law” of the Union, the criterion of validity of secondary rules and decisions as well as that of all national legal rules and decisions within its scope. Moreover, the Court of Justice is the higher court of this legal system. Therefore, it has the power to determine the constitutional borders of the EU legal order with those of the Member States. However, a different perspective is taken by national legal orders and national constitutions. Here, EU Law owes its supremacy to its reception by a higher national law (normally constitutions). The higher law remains, in the national legal orders, the national constitution and the ultimate power of legal adjudication belongs to national constitutional courts. One may agree as to the validity of the different legitimacy claims of national and European jurisdictions. Still, we are left with the question: who decides who decides? Or, as we came to know it in the European context, the kompetenz/kompetenz question. In reality this is a problem both about the authority of the
European Union and how such authority is to be coordinated and arbitrated with the authority of national polities.

**The Constitutional Moment**

Many perceived the tensions created by such challenges as requiring a clearer definition of the *ethos* and *telos* of European integration to be expressed in the form of a new and fully assumed political contract.⁴⁹ In contrast, European constitutionalism evolved as a simple functional consequence of the process market integration without a discussion of the values it necessarily embodies. In other words, it was presented as a logical constitutional conclusion without a constitutional debate. In this respect, the current debate on the future of Europe was presented as a departure from the traditional way “of doing constitutional business” in Europe. It was, first of all, presented as a constitutional moment. To use the words of Laeken declaration: “the Union stands at a crossroads. A defining moment in its existence.” To legitimate the constitutional exercise necessary to answer to this moment, a different procedure was set up, one that comes closer to the idea of constitutional deliberation. The basis for this constitutional procedure was the Convention model, already adopted in what we could qualify as the pre-constitutional moment of the Charter of Fundamental Rights. Such model appears closer to a traditional process of constitution-making than the classic inter-governmental model that has so far dominated the revision of the Treaties. But what makes such process more “constitutional”? And how does it impact on the constitutional outcome? Usually, the stress is placed on the broader scope of representation and direct legitimation entailed in such a method. The Convention is composed of representatives of the EU institutions, national parliaments and national governments. In particular, the role played by national parliaments and the European Parliament was aimed at expressing a more direct link with the European citizens. These institutions (notably, national parliaments) are seen as expressing a form of direct representation that national governments lack. In this sense, the Convention method, by comparison with the inter-governmental method, appears closer to a Constitutional

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⁴⁹ See Neil Walker paper
convention with direct representatives of the people reflecting the different social interests. But also the representatives of the national governments reflected a pattern of representation different from the classical inter-governamental process. In some cases, though not in all, they were independent personalities selected in view of their technical and/or political experience and not as representatives of the State. But it is curious to note that the number of independent personalities called in to represent the States decreased considerably from the Convention on the Charter of Fundamental Rights to the Convention on the Future of Europe. Regarding the former, national governments probably did not fully grasp the potential impact of the Convention. Once it became obvious, with the exercise of the Charter, that the Convention results could become, in practice, highly binding for the Inter-Governamental Conference, many national governments decided to change the profile of their representatives that became, in several instances, their ministers of foreign affairs. The Convention was, in this respect, inter-governmentalised.

The Convention is also presented as promoting a broader participation from the “so-called” civil society (though the extent to which it did so successfully is a cause of dispute). At least theoretically, civil society participation was furthered and a high stress was placed in making the debates more transparent for public opinion. This mirrors an idea of constitutional deliberation for Europe: constitutional moments are identified with a much broader mobilisation of society and a higher degree of direct participation from citizens. The deliberative process on the Charter would enhance Europe’s constitutionalisation by promoting such broad involvement and, at the same time, help legitimise it. However, its constitutional characterisation can also be linked to other elements.

The constitutional character of the Convention method must, however, be discussed not only in light of its scope of representation but also by taking into account the character of

50 Regarding the Charter of Fundamental Rights see de Burca, op. cit., at cite and J. B. Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law’ 38 CMLRev. (2001), 1171, namely at 1182.

its deliberative process and the balance between the political and judicial roles in the constitutionalisation of the European Union. The second major difference brought in by the Convention method regards, precisely, the way deliberation is expected to take place and the nature of the contract arising thereof. Inter-governmental conferences have as their purpose the production of an agreement between States. A forum of inter-governmental bargaining is expected to reduce information and transaction costs between States facilitating the adoption of cooperative decisions. Each State departs from a pre-definition of the national interest that it attempts to promote and harmonise with the interests of the other States. This inter-governmental bargaining is quite different from the nature of the deliberative process usually identified with the framing of Constitutions. In the latter, the vision of a social contract appears with its universal underpinnings. Deliberation is seen as an agreement among individuals on the basis of universally constructed rules under a hypothetic veil of ignorance. The framers of a Constitution are seen as rational actors in search of universal rules that can best satisfy everyone’s future interests.

This form of constitutional deliberation is substantially different from intergovernmental bargaining even when we realise that every constitutional deliberation is shaped and influenced by the specific interests of the participants and the context they are on. The difference arises from four elements that the Convention method expresses, albeit in an imperfect manner. First, the expectation is that an overall political contract will be produced and not simply a particular negotiation on certain opposing interests; this helps to detach participants from their contextual stand points and to take a overall long term perspective that is more conducive to the universal rules typical of a constitutional contract. Second, the creation of a forum of stable long term deliberation, instead of the short-term highly concentrated (though previously prepared) intergovernmental conferences, shifts the attitude of participants towards the process of deliberation itself and promotes higher mutual trust, stronger involvement and a more rational engagement between the participants. Thirdly, the participants in the Convention were expected to consist of more independent individuals, more committed to certain rational conceptions of the common good than to pre-established assertions of the national interest. Even when that is not the case, because, for example, national governments appoint public officials as their representatives in the Convention, the Convention method still promotes a more open
deliberation on the part of the participants. This is due to the circumstance that the “national interest” is not represented by a particular single representative at the process of negotiation. The variety of national participants both releases them from being the individual guardians of a pre-defined national interest and challenges their respective notions of that national interest. The fourth and final element of constitutional differentiation of the Convention deliberative method regards its potential higher transparency. The subjection of the deliberative process to higher transparency requires arguments to be put forward in terms of universal rules of a social contract and not as a defence of the national interest. This change in the character of the arguments that participants can use will end up reflecting itself in the agreements that they will reach.

It is wrong, however, to adopt an idealist perspective of the Convention method. On the one hand, this process entrusts a great degree of authority to those that shape the agenda and provide the technical expertise and legal drafting required for. The “independence” and lack of in depth expertise of many of the participants make them much more dependent from the EU technocracy. At the same time, in such a large scale and comprehensive project the Praesidium and Secretariat assume a key role in setting the agenda, processing the different amendment proposals and drafting final versions. In the case of the Convention on the Future of Europe one of the main critiques has been, precisely, that its President has not taken into account the entire scope of views expressed in the Convention and has, in reality, given a too strong personal imprint to the final document. This was also visible, in part and in a different way, in the process of drafting the Charter and namely on the tremendous impact that the EU technocracy and the Praesidium had on the final versions of the more contentious provisions, particularly when compared with the degree of incorporation of the amendments proposed by other participants at the Convention and civil society.\footnote{See Liisberg, op. cit., at 1178 and de Burca, op. cit, at cite}

The third change in Europe’s constitution making introduced by the Convention method regards a reinstatement of the political control over the constitutional development of European integration. As said above, it is well known that the constitutionalisation of EU
law has been, to a considerable extent, a judicially driven process. This has open the constitutional growth of the Union to legitimacy challenges and the Court itself appears to be pressing the political process to take seriously the constitutional development of the Union. The apparent resistance of the Court to make references to the Charter of Fundamental Rights can be seen as an example of this. The Court is no longer willing to intervene in filling up the constitutional vacuum left by the EU political process in not agreeing on the legal status to be given to the Charter.

The Convention and the larger constitutional process initiated with the Declaration on the Future of Europe can be seen as signalling a move towards the political process in the development of European constitutionalism. There are important consequences that can be expected in the outcomes arising from these two different processes once both representation and the form of deliberation differ between them. It also impacts on the sources of law and its process of discovery that have dominated the European Constitution. In the absence of a written Constitution, the Court of Justice has constitutionalised the European Communities (now the EU) by reference to the constitutional principles of its Member States. The European Constitution becomes, in this light, mainly a product of both the EU Treaties and national constitutions and it is upon these sources that the constitutional values of the emerging polity are to be found by the Court. Once the EU political process takes over, EU constitutional values become a product of a trans-national political deliberative process that takes place at the EU level. The dynamics of this new constitutional political arena is bound to determine a different set of constitutional values.

This formalisation and politicisation of the Constitution do not determine necessarily a lower importance of the role played by the European Court of Justice in the context of European Constitutionalism. It is not so much a difference in relevance as mainly a change in the nature and character of the role to be played by the Court. The emphasis will no longer be in the granting of Constitutional authority to EU law and the creation of a constitutional architecture in legal dogmatic terms. The emphasis will probably move into securing and clarifying the constitutional conditions inherent in the political community necessary to support the constitutional architecture set up by the future Constitutional Treaty and striking the constitutional balances inherent in it. A major challenge will also be that of guaranteeing the constitutional coherence of a document where constitutional
ambitions are mixed with classical inter-governmental bargainings. These two logics (that of universal rules associated to a social contract and that of ad hoc agreements associated to bargaining between States) do not necessarily fit well together and will raise concrete legal conflicts between, on the one hand, constitutional principles and fundamental rights and, on the other, particularised rules and inter-governmental agreements.

What has been said already highlights that this is a very peculiar form of constitutional moment that does not fully adopt a form of constitutional deliberation. This, has we have seen with the adoption by the Convention of the Constitutional Treaty, did not really prevented an agreement on the use of constitutional language. However, this agreement on the use of constitutional language does not really entail an agreement on what constitutionalism means for the Union. In reality there are two very different conceptions of constitutionalism underlying the apparent agreement on a Constitution. One is the conception of constitutionalism as a limit to power. The other is the conception of constitutionalism as polity expression. A review of the four main constitutional issues of the new Constitutional Treaty will help me highlight those two different conceptions. As it will be discussed latter, however, deliberative constitutionalism remained absent from the debate and as a consequence the tension between intergovernmentalism and constitutionalism will be reinforced.
The new Constitutional Treaty: Legitimating the European Regime?\textsuperscript{53}

Several strategies have been presented to face the challenge of legitimacy in Europe. Most of them were actually reflected in the agenda for the “Constitutional” Convention and have spill-over into the Constitutional text. Next, I will assess what are in my view the four core issues addressed by the Constitutional Treaty and their connected strategies of legitimacy for Europe. I will try to show that the legitimating power of these strategies depends both on different conceptions of constitutionalism and on its relation with intergovernmentalism and that, in fact, this both those different conceptions and the tension between constitutionalism and intergovernmentalism is reflected in the constitutional text. I will also highlight that albeit the focus of the Constitutional Treaty appears to be in regime legitimacy such is not possible without facing the question of polity legitimacy.

The Importance of Being Called a Constitution

The Constitutional form assumed by the Constitutional Treaty appears, in the first place, as the essential element of a strategy that appeals to the legitimating power of constitutionalism. There several possible advantages entrusted into this formal constitutionalisation. A less ambitious thesis\textsuperscript{54} foresees the process of formal constitutionalisation as an opportunity to codify and clarify Europe’s constitutional principles, fundamental rights and political organisation. But this is not seen simply as an

\textsuperscript{53} The distinction between regime legitimacy and polity legitimacy (see below) was advanced by Bellamy and Castiglione (see R. Bellamy and D. Castiglione, “Normative Theory and the European Union: Legitimising the Euro-Polity and its Regime,” in L. Tragardh (ed) \textit{After National Democracy: Rights, Law and Power in the New Europe}, Oxford: Hart, forthcoming cited in Neil Walker) and recently also used by Neil Walker, The White Paper in a Constitutional Context, part of the Jean Monnet Chair Working Paper 6/01 (available in http://www.jeanmonnetprogram.org/papers/01/011001.rtf ). The meaning in which these expressions will be used in here does not totally coincide with the meanings attributed to the expressions by these authors.

\textsuperscript{54} That Neil Walker refers as documentary…cite
exercise in tiding up. It is expected to have important consequence due to the mobilisation of political and legal discourses that will be promoted by a clearer exposition of the European Constitution. The Constitution might not change much but it would no longer be implicit. It will be there for citizens to discuss and engage with and this, apart from its immediate legitimating value, could have important future political and legal spill-overs in the constitutional development of the Union.

A more aggressive version of the codification strategy, that appears to have been partially embraced by the Convention, is one that argued for such opportunity to be used to introduce certain constitutional foundations of the Union: a catalogue of fundamental rights, a clear allocation of competences, a “truly” democratic institutional system for the Union. The formal constitution was presented as the instrument to bring forward these changes.

But there are other arguments that can be put forward in favour of a formal constitution. First, this Constitution is expected to clarify the present constitutional system and its relationship with national constitutions and, in this process, confirm the independent authority of the European Constitution vis à vis those national constitutions. Second, the process of drafting a formal constitution will be itself a polity building process and would finally grant to the European citizens the final control over constitution-making in Europe. It will make the European demos through the exercise of its pouvoir constituant at the European level. With regard to the first argument, it has been questioned, however, whether we should in fact clarify the present relationship between the European and national constitutions. Isn’t it a particular trademark of European constitutionalism that it is built in co-operation with national constitutions? And doesn’t this, in turn, reflect the nature of European constitutionalism as found on the competing claims of the European and national

55 For a critical summary of the arguments in favour of a European formal constitution, see also Joseph Weiler, Federalism and Constitutionalism: Europe’s Sonderweg, Jean Monnet Chair Working Papers, Nº 10/00, available at www.jeanmonnetprogram.org/papers/index.html

political communities? In this respect, the argument opposing a formal constitution argues that such constitution reflects a particular model of constitutionalism, that of national constitutionalism, that is associated with a State and an ultimate sovereign authority. It reflects a form of constitutionalism that is not and ought not to be that of European constitutionalism.

I agree with such type of concerns regarding any move that could allocate final constitutional authority to the EU. This does not mean, however, that the European Union ought not to have a constitutional future. The value of European constitutionalism lays precisely in its pluralistic form and the permanent dialogue it establishes with national constitutionalism. In this light, I believe that the Union should adopt some form of constitutional document. This is so for two reasons: first, the process of drafting a constitutional document will itself help to develop a European political identity; second, that constitutional document will be the basis for a permanent European wide discourse that would sustain a European public sphere and its polity building dynamics. These are, in my view, essential elements for the polity legitimacy that the European Union currently requires. A political community needs a permanent public and reflective discourse on its political values. Constitutional texts normally provide the basis for that discourse. They provide a common platform of agreement on the basis of which political conflicts assume the nature of competing rational arguments on the interpretation of shared values and not the character of power conflicts without mutually accepted (albeit not agreed) solutions. Text does matter in this context. But what is not required is for such text to take the nature of a formal constitution adopted in the way national constitutions normally are.

What has been said can be related to two different constitutional dimensions on the basis of which we can assess the true constitutional nature of the Treaty instituting a European Constitution. One as to do with the constitutional authority of the document and the other with the degree to which it adopts constitutionalism as the form of government.

If the current process would have abandoned the requirement of unanimous ratification by the States, it will be recognising an independent constitutional authority to the Union. In other words, the Union would not simply have normative authority over national legal orders but that authority was the result of a constitutional authority independent from the
States or the peoples of Europe. Its future would be decided by a single European polity and not by an agreement between all national polities. Whether or not to have a European Constitution would then be a decision to be taken by the European people and no longer by the peoples of Europe. For some, this exercise of *pouvoir constituant* at the European level was what was needed to legitimate the European Union. In this light, what Europe lacks is not a people but simply a true exercise of constitutional power by that people. For others, any such European constitutional exercise is illegitimate precisely because it implies a European *demos* that does not exist. The new constitutional treaty did not assume a true *pouvoir constituant*. Instead, the constitutional authority of the Union will continue to be a mix product of the formal constitutional authority of national polities complemented by an incremental or, to use an expression of Neil Walker, reflexive constitutionalism that flows the deliberative mechanisms set up by the Constitution and upon which the polity itself is in the process of being built. In this respect, the Constitutional treaty appears to respect the canons of the constitutional pluralism upon which the Union as evolved.

This is not to say that the adoption of a formal constitutional text will have no effect. On the contrary, it will have two type of profound effects. First, its will generalise the use of constitutionalism as the language of political and legal claims in the European Union and, as stressed above, will provide the basis for the rationalisation and arbitration of political conflicts that characterises successful political communities. This impact will not be simply a consequence of the symbolic and codification value of a European Constitution. It will also be an impact of the second constitutional dimension referred: the adoption of constitutionalism as the form of power. In this respect, the question becomes that of determining the extent to which the formal adoption of constitutionalism is reflected in the deliberative logic of the entire polity and its regime. The limited conception of constitutionalism, that I have identified as dominating until now European constitutionalism, is challenged by this broader constitutional ambition.

**Fundamental Rights: A Tool or a Limit to European Integration**

The different conceptions of constitutionalism to be applied to the European Union are particularly relevant in the Charter of Fundamental Rights that now integrates the Constitutional Treaty. From the outset, the instrumental role of the Charter in providing
legitimacy of the project of European integration was conceived in two very different ways. One discourse places the Charter at the centre of the political building of Europe and foresees it as a dynamic element for further constitutionalisation. Another presents it as a limit to the political growth of Europe and conceives it as a tool for the protection of national constitutional values.\(^{57}\)

The original aim entrusted to the Charter appeared to fit better with the second perspective. The goal ascribed to the Convention entrusted with the drafting of the Charter was not to alter the substance of fundamental rights protection in the Union but to make that protection clearer for European citizens. That was expected to promote a more effective application of those rights and, at the same time, reinforce the legitimacy of the integration process. It is this that also explains why the attribution of legal binding effect was not considered to be a priority. However, the final product is much more complex. The duplicity of constitutional discourses on the Charter comes to light in its catalogue of rights that is broader than what would simply result from the consolidation of previous Community legislation, Treaty provisions and the Court’s case law. In fact, the Charter constitutes the most comprehensive catalogue of rights adopted in many years.\(^{58}\) At the same time, some of the rights may not create new competencies but may nevertheless give rise to new claims both under the existing competences and with regard to future constitutional developments. This dimension is reflected in the higher expectations that some deposit on the Charter as the basis for a strategy of legitimacy based on an understanding of the Charter as a centre for continuous discourse and deliberation that would lead to both a constant affirmation and redefinition of European political identity.\(^{59}\) This identity could even be affirmed in the internal sphere of the States. In this respect the Charter could provide a yardstick to be applied to Member States in defining a common set of European political values that all have to respect.

\(^{57}\) I develop this analysis in The Double Constitutional Life of the Charter, in…cite


\(^{59}\) Ibid.
On the other hand, the scope of application of the Charter is substantially limited in its horizontal provisions and limits its polity building ambitions. First, the Constitutional Treaty even reinforces the limits on the use of the Charter’s rights to expand the competencies of the Union. At the same time, the provision limiting the application of the Charter to the classical scope of EU law limits the potential for incorporation of European political values in the Member States domestic orders. In that regard, it is well known that the general catalogue of EU fundamental rights does not, in general, apply to acts of the States, and the Charter is also reserved in that regard.

There is another dimension that a European Charter of Fundamental Rights could assume: that of a Charter of European citizenship focused on a new set of rights granted to individuals vis-à-vis all national political communities (including their own and others) and transnational processes. In other words, the rights linked to a new form of citizenship relevant in the context of a plurality of political communities and a growing deterritorialisation and atomisation of power.\textsuperscript{60} It will be argued below that this should be one of the preferred paths for legitimacy in the European Union but, to argue it, one must first discuss the telos of European integration and the nature of the European political community. In itself, the Charter and the Treaty Constitutional do not appear to have paid much attention to European citizenship and the set of rights and duties that could be attributed to it.

The primary goal of the Charter appeared limited to a classical dimension of constitutionalism in the European Union: to guarantee that the assumption of European powers will not challenge the standards of fundamental rights protection granted to European citizens in their States. But the logic of a Charter of fundamental rights and its placing at the core of a comprehensive constitutional project for the Union immediately adds a polity perspective to that more limited role: the exercise in defining the common political values justifying the recognition of those rights and the debate that will be generated in the interpretation and application of them will both legitimate and promote

\textsuperscript{60} Gustavo Zagrebelsky talks about a pluralist revolution, Il diritto mite, Torino: Einaudi, 1992, notably pp. 4-11 and 45-50.
polity building dimensions. It is thus difficult to clearly establish the nature of the relationship between the Charter and European constitutionalism. It shares the same ambiguous constitutional character of the other pillars of the Constitutional Treaty, reflecting an agreement inherent on the use of the language of constitutionalism in European integration without agreeing on the conception of constitutionalism underlying such language. For some, the Charter is the foundation upon which to build a true constitutional project for the European Union. It will promote the construction of a European political identity and mobilise European citizens around it. For others, the Charter is simply a constitutional guarantee that the European Union will not threaten the constitutional values of the States. It is a constitutional limit to the process of European integration.

**Competences: Constitutional Limits to Integration or Promotion of a European Public Sphere?**

Another topic constantly in the driving seat of the constitutional debate regards the setting up of clearer limits on EU competences. The issue of competencies normally focuses on a clearer delimitation of the competencies given and/or exercised by the EU. In this respect, the Treaty both addressed that concerned (though a new classification of the different EU competencies and a clear affirmation of the principle of conferred competences) and recognised the limits to establish a clear separation of competencies between the Union and the States (by maintaining a flexibility clause and not adopting a strict catalogue of competences). There are both normative and pragmatic reasons that explain the difficulties involved in attempting to make a clear-cut division of competences.

From a normative stand point it is, first of all, quite contestable that there can be, in abstract, an ideal allocation of competences. The allocation of competences is often better made by taking into account the real world contexts of participation in the different institutional alternatives to exercise those competences. For example, it is often proclaimed that competences should be exercised as close as possible to the affected interests. However, it is misleading to assume that the institutions closer to the affected interests are always the more apt to exercise the competences affecting those interests. In fact, it may often be the case that that circumstance leads to the capture of those institutions by the
concentrated interests against a dispersed majority. In the real world, more distant institutions may perform better in regulating local interests where the local institutions are particularly susceptible to capture by regulated interests. That will not always be the case but this simply serves to prove the point that an abstract allocation of competences ignores these institutional dynamics and therefore presents serious normative problems. Secondly, it is also quite debatable that there is, or even that it should exist, an agreement on what competences should belong to the Union and what competences should be left to the States. Though the question of competences is often presented as an issue of simply determining who is more efficient or effective in performing some competences, in reality, it often hides profound different conceptions of the polity and the common good it should pursue. Our stance on the renationalisation of redistributive policies at the European level depends, for example, on whether we believe or not that a polity such as the European Union should pursue objectives of solidarity and distributive justice between its citizens. Underlying the discussions on competences are, therefore, different conceptions of the European political community and the nature of the political and civic links between its citizens. In the light of this, it is in normative terms more appropriate for the Union to maintain an organisation of its competences that leaves room for pluralism in the discussion of alternative visions of the common good associated with the European polity and its policies.

From a pragmatic perspective, it is also quite difficult to devise a workable general and abstract criterion that can provide a clear allocation of competences between the States and the Union. The history of federal systems tell us how ineffective it is to trust to either a catalogue of competences or an abstract criterion the role of clearly allocated competences between different levels of government. The same can be said about the practice of European integration and the limited effect of the principle of subsidiarity. Once the threshold of simple inter-governamental cooperation and limited competences is passed the idea of a clear allocation of competences is surpassed by the dynamics of political action and institutional interpretation. Once you have a new level of independent political power, this level is bound to be used by any social actor that is not satisfied with the national or local resolution of a certain policy issue. In this context the question of allocation of competences really comes down to be a question on who should allocate those
competences? Who should decide on who can better exercise a certain competence? And to what kind of institutional constraints should the exercise of that competence be subject?

The Constitutional Treaty appeared to have recognised this complexity. Some of the most positive reforms introduced by the project of Constitutional Treaty with regard to EU competences are, in reality, measures addressing the accountability and transparency in the exercise of those competences. The mechanism of control by national parliaments introduced in the new Constitutional Treaty is a good example in that regard. Its merit and effect does not lay so much on a possible blocking right of national parliaments in the adoption of EU legislation. It lays instead on the higher scrutiny by national parliaments on the role of their respective national governments in the adoption of such legislation. At the same time, the increased discussion of EU legislative acts in national parliaments might subject EU legislation to a higher public scrutiny though the different national public spheres. National parliaments become, in the light of this, catalysts for an emerging European public sphere. This is improved by further elements of transparency in the legislative process (such as the openness of the Council deliberations when adopting legislation). This transformation of the question of competences into a question of transparency and accountability also shifts its constitutional role from that of a limit to European integration into an instrument for the development of more European deliberation with enhanced citizenship participation.

**Institutional Reform: Intergovernmental Majoritarianism?**

The core of the constitutional debate was, however, institutional reform. In this respect, there were four main goals enshrined in the agenda of the Convention: first, higher transparency and simplification; second, stronger democratic legitimacy; third, effectiveness and operationality; fourth, the promotion of political leadership. In part, these goals reflected old normative problems of the Union. In other part, they were made more visible and acute by the forthcoming enlargement. But the discussion of these goals entailed

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61 The control over competences is normally transferred in this case to the institutional mechanisms of participation in the definition and exercise of those competences. That was expressly recognized by the American Supreme Court in Garcia v San António [469 U.S. 528].
a reorganisation of the balance of power with the Union. One of the problems was that the
move towards a more effective, operational and stronger European Union would not be
compatible with the continuation of the traditional institutional balance. This balance
satisfied different national States and EU institutions, by diffusing power to such an extent
that it affected the operationality and effectiveness of the Union or the degree of political
leadership we could expect from it. In this way, for example, the aim of providing stronger
political leadership enters into conflict with the goal of maintaining the current institutional
balance as it will require empowering one of the institutional pillars. The same occurs with
the claims for higher democratic control or effective decision-making in an enlarged EU.
The pursuit of these goals requires abandoning an institutional system whose legitimacy
basis, as referred above, is deeply dependent, on the one hand, on the degree of voice given
to the States in its decision-making processes and, on the other hand, in a partial delegation
of power into a technocratic institution, independent from the States (the Commission) and
which is conceived as functionally legitimated and pursuing efficiency goals. There is
nothing scandalous, however, about a Constitutional Convention being dominated by
concerns over the distribution of power. On the contrary, that is a key concern of
Constitutions. The problem with the Constitutional Convention was the lack of a
constitutional theory of power (or a debate between competing constitutional theories of
power) to frame such reorganisation of power within the Union. Instead of the discussion
being framed by a previous debate and clarification of the political characterisation of the
Union and of the principles of representation and separation of powers to be taken into
account in its institutional and political reform, the path followed was that of a piecemeal
inter-governmental bargain whose impact on the constitutional principles legitimating and
organising power will largely be a product of unintended consequences.

In my view, the current draft Constitutional Treaty reinforces certain majoritarian elements
of the institutional system without fully addressing the requirements necessary to legitimise
such a system in both normative and social terms. What do I mean by a majoritarian
political system in this context? A system where decisions in a particular jurisdiction are
taken, in an open and undetermined sphere of competences, in accordance with the majority
view of its citizens and can be effectively pursued by the legitimated authority of that
jurisdiction. Such a system implies an effective executive, a system of decision-making
dominated by majority vote, increased proportional representation and an open and undetermined field of competences. The Union already fulfilled some of these requisites and they are being enhanced by the recent and forthcoming institutional changes. One of the consensual aims of the current reform is the emergence of a true executive power, either commanded by a President of the Union responsible before the European Council or by reinforcing the authority of the Commission and its accountability to the Parliament. Majority decision-making is also being extended, albeit not as much as some would like. Proportional representation too has been a key feature underlying many of the current debates and was quite visible in the stress placed by the president of the Convention on legitimacy having to be assessed by the support of the majority of the European population and not the majority of the States. Proportional representation to the population has been reinforced in the Council with the Nice Treaty but will also increase via the extension of the co-decision procedure (since the Parliament is thought to be closer to such a principle of representation).

The move towards a majoritarian system may be unavoidable in a Union entrusted with a broad scope of undetermined and flexible competences and including an increased number of participants in its decision-making processes. Even if we would depart from the assumption that the acquiescence of all participants (unanimity) will be, in normative terms, the normative ideal for collective action in the context of the EU, we would have to recognise, as Buchanan and Tullock have taught us¹, that with 25 Member States the costs of deciding will be so high that they justify the adoption of majority decision making as a second best. Once we do that, the question becomes the criteria to be adopted in determining the relative power of the different participants and this requires elements of proportional representation in balancing between equality between States versus equality between citizens. We will then also have to define appropriate mechanisms of separation of powers and political accountability what requires a stronger distinction between the executive and the legislative, allowing stronger political leadership but subject to a more intense democratic scrutiny. In this context, the move towards to a majoritarian system is inextricably linked to the scope of the political ambitions that the European Union has assumed and the costs of decision-making generated by the enlargement process.
In these circumstances, it becomes crucial to discuss what kind of requirements a majoritarian system must fulfil and how are they to be guaranteed in the European Union. The move towards a majoritarian system entails first of all a move from what, adopting the categories of Hirschman applied by Weiler to the previous stages of European integration, we could define as a system of allegiance based on voice (secured by the high degree of relative power of all States in the decision making process and the issue linkage between different policy decisions of the Union compensating different States) to a system based on loyalty (where citizens will feel bound even by decisions of the majority to which they don't belong). One of the first priorities of the current constitutional reform should therefore be that of establishing the conditions for political loyalty of the all European citizens towards the majoritarian decisions of the Union. Second, any majoritarian system must establish a framework guaranteeing the protection of minorities and, above all, the prevention of permanent and insulated minorities (net loosers). This requires mobility between majority and minorities (that those one day in the minority may be part of the majority in the other) and a deliberative system that tends to disseminate the patterns of vote and not to promote the aggregation of rigid majorities or the creation pivotal players. This guarantees, at the same time, the prevention of zero-sum decisions (since those which composed a majority now that they can, in another instance, be part of the minority and have, therefore, an incentive to create mechanisms of compensation for the loosing minority). Third, majority decisions tend to always be mediated by a principle of universalizability in their translation into policy making and rules. Policies are framed under criteria of universal application, that determines that they are applicable to all citizens fulfilling the same requirements. Rules are subject to requirements of generality and abstraction that have a similar purpose. In this way, they are potentially applicable to everyone independent of their belonging to the majority or minority.

What has happen in the Convention has been that little attention was paid to these requirements. Some of them can, in fact, be deduced from the general principles of the Constitution but that, in effect, involves assessing the extent of constitutionalism envisioned by the Constitutional Treaty. The creation of political loyalty would require a much stronger emphasis on enhancing European citizenship and mechanisms of distributive justice than it indeed was the case at the Convention. It would require further expanding the
ambitions of the European polity and engage European constitutionalism in the debates of competing visions of the common good. The other requirements would basically entail a move from inter-governmental deliberation to universal deliberation and from inter-governmental policies to universal policies. This would require constitutionalism to also become the form of deliberation in the Union and no longer simply an instrument of control over intergovernmental deliberation.

There are aspects of the Constitutional Treaty where the logic of intergovernmental deliberation appears to remain dominant but is difficultly compatible in normative terms with some of the majoritarian developments. For example: there has been a tendency to promote proportional representation both by extending the role of the European Parliament and by reinforcing the application of that criterion in the Council. But, in this process, it is ignored that the nature of deliberation in the Council (with aggregation of blocks of votes by States and the pivotal role of the few States which still have a relevant blocking capacity) gives rise to much higher risks of creating insulated and permanent minorities. Therefore, it would have made much more sense to leave proportional representation, expressing equality between citizens, to the European Parliament (where majorities and minorities are more flexible and increasingly taking place along ideological lines) while leaving to the Council the full expression of the other principle of representation (equality between States with simple majority voting). This would further require extension of the co-decision procedure. Such a system will be more transparent, operational, democratic and reduce the risks of creating permanent and insulated minorities. Such risk will also have to be fight by promoting mobility between national political communities. The very low

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62 I have tried to demonstrate elsewhere that the proportionality principle can lead to important distortions of representation where votes are aggregated via the States and exercised in blocks. Such form of aggregation can in effect very easily mean that the view of a large majority of all Europeans but largely disseminated in all States can be overcome by the view of a minority of Europeans that however, through their concentration in a few decisive States, get the majority of votes in the Council. But there is another risk: the reduced set of deliberative actors (the States) can easily (especially when a small sub-set of those has a much higher likelihood of veto power) create stable alliances between the actors whose permanent veto power in effect becomes a permanent decisive input in all policies (the agreement of those actors always being necessary but not that of the others).
degree of mobility within the EU is another instance that enhances the risks of rigid and insulated minorities (easy targets for the majority that runs no risk of ever becoming part of such minority). Mobility in the EU should be a priority since it becomes instrumental to political mobility between majorities and minorities in a political community of this type.

The same intergovernmental aspects have dominated the conception of EU policies. Many continue to be largely framed as policies that distribute between States and not as policies based on the individual status of EU citizens independently of their nationality. This exacerbates the risks of malfunctioning in the majoritarian political process once such policies can easily mirror the power of the majority in concentrating the benefits on some States. Instead, deliberative constitutionalism requires EU policies to move into a framework of universalisability, satisfying substantive, and not simply formal, conditions of generality and abstraction and where their redistributive impact is determined by the individual conditions of EU citizens.

A majoritarian political system needs a political community that guarantees the legitimacy of such system and secures the necessary safeguards to prevent its risks. Securing political loyalty, changing the character of political deliberation and universalising its policies, ought to be the priorities of any constitutional reform of the European Union that takes seriously its democratic rhetoric and the need for social legitimacy. But this requires European constitutionalism to fully embrace a discussion of its polity legitimacy and adopt a truly constitutional form of deliberation in the EU political process.

**Conclusion: What Does Constitutionalism Means for the European Union?**

At the moment, the future of the Constitutional Treaty remains at peril. This month it looks more likely than the month before that an agreement will be reached on a Constitutional Treaty for the Union. But we do not know what next month will bring and, much less do we know, what will be the results of the lengthy process of ratifications of the Treaty. The current constitutional process may still tilt in two opposing directions: it may promote a genuine deliberative debate on Europe’s political identity but it may also reinforce the
constitutionalism by default that has marked much of Europe’s development. Whether it
will be one or the other does not depend on the idealist conceptions of broad public
involvement in direct constitution-making that the current rhetoric of openness and civil
society appears to assume. It depends much more on tackling the issues that may mobilise
the peoples of Europe to engage in the creation of that political identity. It is not that such
political identity is a necessary pre-condition for a constitutional project: a Constitution
both assumes and promotes a political community (it is both an arrival point and a point of
departure in the construction of a political identity). Instead, that constitutional project must
fulfil two polity building conditions: first, it must create the right incentives for European
citizens to accept to embark in such a constitutional project; second, it must provide an
adequate framework for European citizens to engage in the construction of a common
political identity. In other words, it must create the conditions for the political loyalty
necessary to a political community. This is what I have described as the need for polity
legitimacy and deliberative constitutionalism.

Until we fully address the need to legitimate the polity and not simply the regime we will
not get satisfactory answers to the constitutional challenges faced by the Union. It is not
necessary, however, that we fully agree on what makes a European polity legitimate. We
only have to agree on having that debate. In other words, we must agree to discuss different
conceptions of the common good relevant at the European level and we must accept a
common framework for that discussion. It is here that deliberative constitutionalism
becomes relevant. Once the polity is becoming increasingly majoritarian in its regime, it
becomes quite difficult to conciliate those developments with the continuing
intergovernmental character of deliberation. A majoritarian and increasingly redistributive
polity is difficultly compatible with the low intensity form of constitutionalism that has
helped to legitimate the Union so far. It needs to add to the dimension of constitutionalism
as a limit to power, its polity expression and deliberative dimensions.

This tension between intergovernmentalism and constitutionalism may become clearer with
an example. Let us assume that a certain common policy is reformed in such a way that

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production subsidies in that area are given to individual producers on the basis of certain ecological and efficiency criteria to be individually determined. However, for the reform to be possible the agreement of a certain group of States was only obtained by establishing that, in any event, during a certain number of years the producers of those States (that were, in general, more benefited by the previous criteria) will not receive less than 80% of the average subsidy received in the previous two years. Is such a legislation acceptable under the European Constitution? It is a typical legislative compromise arising from intergovernmental bargaining. But it does not really fit the criteria of universalisability: is it really general and abstract? doesn’t it impose a different treatment to European citizens fulfilling the same criteria? Yet, this is the logic of intergovernmental bargaining and the Union has many similar legislative measures that have so far pass largely unnoticed. In other cases, the legislative criteria are defined so as to correspond to the interests of some States in some areas and other States in other areas, de facto compensating between them. But this compensation between States does not mean compensation between individuals. Even if we where to assume that overall all States are equally benefited in net terms that does not tell us that all citizens are treated the same since the citizens of a State suffering the costs of a certain EU policy may not be the same that are benefited by the advantages obtained by the State in a different EU policy.

Is this intergovernmental logic acceptable in a Constitutional Europe? The answer to the question will define the extent to which constitutionalism has truly become the form of power in the European Union. Until we know what we mean by constitutionalism in the European Union we will not really know what a new European Constitution will mean.