Drafting a European Constitution –
Challenges and Opportunities

Andreas Føllesdal, University of Oslo

Drafting a European Constitution – Challenges and Opportunities[1]

Andreas Føllesdal, University of Oslo

andreas.follesdal@filosofi.uio.no

Abstract

These reflections address two tasks prompted by current controversies concerning whether the EU needs a written constitution. Normative considerations do not seem to require a constitution now – nor does such a constitution appear illegitimate in principle, hence it is normatively permissible in principle. Secondly, the Convention is called and composed in such a way as to exacerbate some risks, while reducing others, with ramifications for the legitimacy of the process and the normative quality of any resulting document. In particular, arguments must be provided both in favour and against centralisation of competences, to facilitate their best allocation. Given the participation of centralisation-prone institutions such as the European Parliament, the inclusion of national parliaments is welcome. Yet a disinterested stance is less likely insofar as many of the institutions are represented at the Convention, and especially insofar as an all-out crisis does not loom large. Bargaining solely for own institutional advantage is tempting, yet the credibility of the result requires that the institutions secure justice among Europeans and not least: that the institutions are seen to be so secured. A central challenge is to foster within the Convention a general and public attitude of commitment to 'the European interest.' This counts in favour of public scrutiny of the process, even though such transparency may constrain drastic and creative restructuring. Transparency may prevent anything more than incremental tinkering but that may be sufficient, and all that may reasonably be expected.

Introduction

> We are like seafarers, who must rebuild their ship in open sea, without being able to take it apart in a dock and build it up of its best constituents from the bottom up.

<div align="center">(Otto Neurath 1932)</div>

Whether the European Union needs a constitution is widely debated. However, much of the debate is somewhat off target: the central issue is not whether the EU should have a constitution, because for most intents and purposes it already has one. Instead, the crucial issues concern the substantial content such a constitution should have, and how to best obtain it. The current Convention on the Future of Europe is central in this process; its composition avoids some pitfalls but creates others.

The central tasks of a constitution are to establish and limit political authority. This is why a constitution – *de facto* if not on paper - is regarded as a necessary condition for legitimate rule, as witnessed in all European states. Yet the European Union does not have a written constitution, and the need for such a thing is hotly contested. So controversial is the issue that the current Convention on the Future of Europe (henceforth: 'Convention') is not formally referred to as a Constitutional Convention, even though its agenda is typical for conventions drafting federal constitutions.

These reflections address two tasks prompted by this controversy: An assessment of the conflicting claims regarding the need for a Constitution for Europe; and lessons that might guide the Convention. Firstly, I shall argue that it is difficult to find decisive arguments for or against a Constitution for Europe at this moment. Normative considerations do not seem to require a constitution now -- nor does such a constitution appear illegitimate in principle. So a Constitutional Convention for Europe is legitimate in the modest sense of being permissible in principle. Secondly, several lessons and reminders should inform the deliberations of the Convention, drawing on comparative research on constitutional conventions and federalism. The Convention is called and composed in such a way as to exacerbate some risks, while reducing others, with ramifications for the legitimacy of the process and the normative quality of any resulting document. In particular, when designing the future multi-level European political order it is important to ensure that arguments will be voiced both in favour and against centralisation of competences, to facilitate the best allocation of competences. Thus, given the participation of centralisation-prone institutions such as the European Parliament, the inclusion of national parliaments is welcome. Yet a disinterested stance is less likely insofar as many of the institutions are represented at the Convention, and especially insofar as an all-out crisis does not loom large. A further challenge is that at least some parties to the Convention may be quite satisfied if no agreement is reached, boosting their bargaining power. Under such conditions bargaining solely for own advantage is tempting, yet the credibility of the result requires that the institutions secure justice among Europeans – and not least: that the institutions are seen to be so secured. A central challenge is to foster within the Convention a general and public attitude of commitment to "the European interest" - legitimate interests of all Europeans and other affected parties, to such a degree that countervailing tendencies are checked. This counts in favour of public scrutiny of the process, even though such transparency may constrain drastic and creative restructuring. Transparency may prevent anything more than incremental tinkering – but that may be sufficient, and all that may reasonably be expected.

Section 1 identifies five tasks of a constitution; section 2 presents arguments *pro et contra* a written constitution for Europe. Section 3 provides a first line of response on the basis of claims that the Union already has a *de facto* constitution. Section 4 considers challenges for the process of constitutionalisation, and section 5 identifies some possible weaknesses of the resulting constitution. Section 6 draws some lessons, including the role of national parliaments and civil society in the Convention currently underway.

1 What a Constitution does

A constitution is an institution for establishing and regulating institutions, often on the basis of written, formally enacted documents. 'Constitution' can thus be used both about a *de facto* practice and about the documents often underpinning such practices (Lane 1996, 5-16).

A constitution typically performs four tasks. It *creates* (i.e. constitutes) new institutions or codifies existing institutions with specified competences in the form of bundles of legal powers. It *curbs* such powers, e.g. by a principle of legality, by securing human rights and other legal immunities and powers, and by dividing political authority among several institutions. A constitution may also *channel* the use of such powers further by indicating the goals to be pursued, typically as the ends of government stated in preambles. Fourthly, a constitution contains rules for constitutional *change*, so as to combine the requisite robustness with flexibility to adjust it to new circumstances. There are several benefits of an effective and normatively defensible constitution in this sense; in establishing new patterns of coordinated behaviour in the form of institutions, by reducing fear of abuse of powers, and by bolstering legitimate expectations (Cf. Elster 1988b, 13). A constitution thus safeguards citizens against risks and secures their interests, and, importantly, contributes to shaping citizens, by regulating the institutions that shape their life plans, interests and expectations.

2 Should the European Union have a Constitution?

Disagreements about a Constitution for Europe rage, not only about what such a document should include, but also about the appropriateness of such a thing even in principle. Yet few of the calls for - and warnings against - a European Constitution are well founded, or so I shall suggest.

There are several reasons why people call for a written constitution for the European Union with a clear allocation of competences between Member States and the Community bodies, and among the Community institutions, a (revised) Charter on Fundamental Rights, a statement of the ends of the Union, and rules for constitutional revision.

A clear allocation of competences and visible constraints, together with clear aims of the political order, serve to *bolster support and reduce fear* among the public. European institutions increasingly affect individuals' lives, due *inter alia* to the ECJ's doctrines of Direct Effect, Supremacy and Implied Powers, and to the increased scope of majority vote. This increased impact increases the need for a clear and convincing presentation and defence of such use of public power.

Institutional overhaul is required to cope with unintended deadlocks. The institutions originally created for only six countries can barely function with the present 15 member states, and cannot handle further enlargement.

A constitution is a suitable basis for *fostering civic virtue* among the citizenry. It would spell out the ends of the political order more clearly, and thereby facilitate individuals' acceptance and support for the European political order.

A constitution by that name would also *facilitate legal interpretations*. It would confirm the ends of the Union and identify the allocation of competences and the rights of individuals, thus facilitating the determination of legality of new legislative proposals.

A constitution could *curb centralisation* in the form of Community colonisation of fields traditionally within the scope of Member State sovereignty, by specifying the allocation of competences between the centre and the constituent units. Without such a federal constitution the EU can easily become a unitary state.

A constitution by that name would *confirm the status of the EU* as a separate political order, confirming the shift to supremacy of Community law over Member States (Castiglione 1995, 63; Weiler 2001).

Turning to the process yielding a constitution, two further arguments are made:

A constitutional debate would *foster a more fair basis of cooperation* in Europe. Such a debate would highlight the need for fundamental treaty reform, by drawing attention to the problems and skewed nature of current treaties in favour of the four freedoms without sufficient consideration for social cohesion, human rights, democratic accountability and justice.

The process of a constitutional debate would be good for *building a political culture*. Such social capital is required for defensible use of majority rule among citizens and officials, since individuals must at least sometimes guide their decisions by considerations of the common European interests rather than only seek personal or national interests.

Yet others have voiced worries concerning such calls for a Constitution for the European Union. Some have held that *constitutions generally conflict with the principle of rule by the people*. More specifically, constitutions are said to be unalterable, and distanced from political debate (Bickel 1962, Bellamy 1995, Harrison 1993). Values and norms are frozen and beyond democratic control. Another objection claims that "It works. Don't fix it" (Weiler 2001, 73). The EU already has a constitution that furthermore achieves a precious expression of the need to maintain different political communities within Europe, there is no need to acquire such a constitution.

Another reason to be wary of a European constitution stems from latent conflicts. National highest courts, most famously the German Federal Constitutional Court, has identified tensions between the domestic legal orders and the Community concerning who has ultimate legislative and/or judicial authority. Such conflicts may typically arise regarding human rights standards, where a national highest court might have to uphold higher standards than those maintained by the ECJ (cf. the German Federal Constitutional Court's Solange judgements). A European constitution would presumably determine these conflicts regarding the limits to community competences ("Kompetenz-Kompetenz").

The result may quite possibly in favour of the ECJ, at least regarding the determination of legality (Weiler 1999, 99-101; 312).

More general warnings against a written constitution have also been raised. There is a risk of *closet centralisation*. Historically, many of those who have favoured a European constitution might be suspected by those who other persuasions, of really hoping for a closer union among European states in the direction of a very centralised federal European (super-)state.

Moreover, the lack of a written constitution may help preserve the status quo of a treaty-based legal federation with confederal institutions. The absence of a European constitution *ensures that the Member States remain 'Masters of the treaties'*, and prevent their weakening as often happens in federations. To illustrate: Some may fear that a Constitution, as with a written Charter, that its enumeration of individuals' rights or Member States' competences will be regarded as exhaustive. Small and EU-wary states maintain their influence under the present arrangement by ensuring that decisions with constitution-like impact continue to require unanimity among the contracting parties. Such checks are likely to disappear with a written constitution.

Another worry is that *the constitution-making process may itself foster conflicts* that might be better handled without the aid of constitutional or legal norms and institutions (Elster et al. 1998, 64). For instance, discussions concerning constitutional rights may split the population, rather than unite it - consider, for instance, potential conflicts concerning abortion. Focus on written formulations may expose difficulties and draw attention to problematic historic compromises and conceptual shifts concerning such terms as 'supremacy' and 'sovereignty' (Walker 2001).

Joseph Weiler has recently argued against a constitution typical of federations that would ground the constitutive authority with the people of Europe (Weiler 2001). Instead he suggests that one should keep the text of the Preamble of the Treaty of Rome: "Determined to lay the foundations for an ever closer Union of the *peoples* of Europe .." (my emphasis). This phrase expresses the appropriate attitude of *Constitutional Tolerance towards Europeans* of other Member States, respect them without seeking to transform them into persons and people 'just like us'.

Yet another concern is that since unanimity among the states would presumably be required to arrive at a constitution, it is likely to build on, rather than remove, any *skewed* basis of the existing treaties that is favoured by a Member State. This historical path will lead to a constitution which reflects its market-focused genesis unduly.

3 First line of response

Two observations reduce the weight of several of these arguments.

Firstly, as far as most of these concerns go, *the European Union already has a constitution* – though not by that name (Snyder 1998, Weiler 1999). The ECJ and other bodies hold that the treaties constitute a new legal order with Primacy and Direct Effect. Indeed, the ECJ has characterized the EC Treaty as "a Constitutional Charter" – though not after the Treaty on European Union came into force.[2]

Certainly the Union has a constitution in the sense of having practices, regimes and institutions actually acted on as if there was a constitutional charter; even in the absence of a written constitution (Lane 1996, 9; MacCormick 1997; Weiler 1999, 221).

The treaties - and the European Court of Human Rights (Buergenthal 1997) – arguably already perform all the four tasks typical of constitutions.

The Treaties have *created* institutions with competences at the level of the EU, with a new legal order in place. The Treaties also *curb* such institutions, by according the ECJ some – if not complete and uncontested[3] - judicial authority or interpretive autonomy to test the legality of Community decisions -- against the Treaty, against human rights standards, and against specified competences[4]. Doubts as to the ECJs efforts in this regard have been somewhat allayed by the recent judgment annulling a Directive banning tobacco advertisements (Germany v Parliament and Council[5]). The Treaties also *channel* the use of the institutions in the form of statements of the ends of the Union, such as found in TEU Article 2. This is of course not to deny that these ends of the European Union are contested. A shared conception of justice in Europe is strongly overdue, to ensure that the European polity expresses a commitment to equal respect for all individuals living in Europe.

The fourth role of a constitution, laying out rules for *constitutional change*, can be found even though the Community lacks legislative Kompetenz-Kompetenz. The treaties do not include rules for their own change in the ordinary sense, since they only acquire legal standing by unanimity among all Member States. Still, that rule may be regarded as a rule for constitutional change found in the real Constitution of Europe. Such a requirement of unanimity is highly unusual for constitutions, tending to favour the status quo since constitutional changes in one sub-unit's disfavour becomes quite unlikely (cf. Elster 1988a). As Lijphart notes: "Because these are international treaties, they can be changed only with the consent of all of the signatories. Hence they are extremely rigid." (Lijphart 1999, 45). Thus there is a real risk that this lack of rules for constitutional change renders the Union unable to maintain a legitimate political order over time, e.g. ensuring the proper balance between empowering and checking central and domestic government.

A second kind of rules for constitutional change has ensured that the real constitution of Europe has remained flexible. The Member States have agreed on treaties that have included rules for future treaty change. The Maastricht Treaty included an Article N that required a new Intergovernmental Conference in 1996, to examine certain parts of the Treaty. Likewise, in the Amsterdam Treaty the parties agreed to a new IGC to review the composition and functioning of the institutions, in both cases shaping the IGCs in formal ways such as by specifying the agenda (Sverdrup 2002, 124-25).

Thus, we can find all four roles of a constitution fulfilled by the real constitution of the EU.

Another oddity regarding the treaties regarded as a constitution, is that they refer to Member States rather than to the people of the Union, who are also subject to the treaties. Nevertheless, such features would not seem to reduce the force of claims for and against a written constitution by holding that the

treaties and the European Convention of Human Rights are central parts of the real – though possibly normatively problematic - European Constitution.

It is not clear whether the real constitution of the EU shapes citizens' aspirations and self-conceptions; though there is evidence to support claims of such effects for national officials participating in EU decision making (Egeberg 1999, Trondal 2000, Trondal and Veggeland 2000).

The second observation is that Intergovernmental conferences can yield similar benefits as a Constitutional Convention. The IGCs are in several relevant respects *functional equivalents* to such conventions, and "they have emerged since 1985 as the key arenas in which competing visions of the structure and overall direction of the Union are articulated." (Bainbridge and Teasdale 1995). IGCs, carefully regulated regarding participants and process, may host the requisite discussion and stimulation to political awareness: no further constitutional convention seems required. This is not to deny the need to foster civic virtue and a commitment to the European interest – quite possibly before expanding majoritarian rule for European decisions. We must ask what civic virtues Europeans must share, to ensure a stable and just European polity -- and how and where they can be fostered, faced with underdeveloped European public spheres. However, such fostering can take place in other arenas than a constitutional convention, particularly since such character formation must be ensured for generations to come.

With these two general observations in mind, let us briefly reconsider the various arguments *pro et contra*.

The need for a constitution to ensure *clarity* and hence support is reduced by the real constitution in place.

The need for *institutional overhaul* can be met by an IGC – the alleged failures of previous IGCs in this regard may just as well affect a constitutional convention.

The need for clear ends of the EU to *foster civic virtue* can be provided by treaties.

Legal interpretations may be bolstered by improved treaty texts.

Treaties specifying competences can curb centralisation. The need for treaty reforms for a fair basis of cooperation can be underscored by IGCs, not only by a Constitutional Convention.

Likewise, the role of public deliberations for building political culture can be filled by IGCs, appropriately run.

One argument in favour of a written constitution does remain unaffected: the status of the EU as a political order would be boosted by a written constitution.

Most arguments against a written constitution are also rendered less forceful.

The real constitution in place weakens the argument against a written constitution on the basis of conflicts *with rule by the people*. Moreover, the removal of some issues from ongoing political debate

is not to be regretted (Follesdal 1998). It is surely not conducive to allegiance, neither of the majority nor of minorities, if elected representatives can easily redefine the basic rights of those in the minority. Furthermore, constitutional constraints on political decisions -- for instance by a constitutional court – do not remove issues from public debate. Instead, they give notice to legislators and the public that the political powers now take an extraordinary course, that or the unintended systemic effects of political decisions now cross certain important boundaries. Such warnings do not stifle political debate, since the constitution can be revised if the requisite safeguards are satisfied (Ackerman 1988, 192).

Regarding conflicts such as those concerning Kompetenz-Kompetenz, these tensions are already present due to the real constitution; they are not avoided, but rather settled even more clearly, by a written constitution.

Concerning *closet centralisation*, it is by no means obvious that a written constitution would boost centralising tendencies within the Community. True, federations often exhibit strong drift towards a centralized, unitary political order (Lemco 1991); but one of the benefits of a constitution securing federal elements would typically be the entrenchment of some competences placed with the Member States, thus reducing such risks. Federalism need not lead to a unitary state, but can rather prevent it (e.g. Abromeit 1998, 42).

Many of the conflicts created by a constitution-making process are likely to arise also in the IGCs, thus the central question would seem to be whether such conflicts are better processed and resolved *within* a constitutional convention and a constitution, or without them.

Regarding Weiler's concern: leaving aside the issues concerning what form of non-ethnic sense of people-hood one might want in Europe, and what kind of tolerance is best suited, a European constitution could still include in its preamble precisely what Weiler seeks, namely expressions to the effect that the political order was one of peoples rather than one of the *people* of Europe. True, the constitutions of federations such as US, Canada and Germany may talk of "*the* people", but other constitutions of federations refer to communities, regions or states -- for instance those of Belgium[6], Brazil[7], and India[8] (and cf. Lane 1996, 112).

The objections regarding fixing things that aren't broken, and the likely bias in any agreed constitution, will count differently depending on one's views about the proper role of the EU and concerning how far the present political order is from such standards. Surely, the fact that a Constitution would still be flawed though not as much as the present real constitution can hardly count in its disfavour – especially if a written constitution would be easier to modify than the present flawed real constitution.

The upshot of these brief remarks is that several of the arguments concerning a Constitution for Europe suggest that the main issue is not whether to explicitly create a written constitution for Europe, but the process and contents of such a constitution. For instance, a written constitution should address the tensions concerning Kompetenz-Kompetenz stemming in part from art. 308 TEC; there is a risk that a constitutional convention may lead to a closer union than the Member State governments, their

parliaments, or their citizens now would seek; and a constitution may entrench existing political divisions in ways that may hinder necessary adjustments in the future. The remaining sections consider some of these concerns.

4 Challenges for the Process of Constitutionalisation

The Convention on the Future of Europe may suffer from several weaknesses owing to features of the composition of the Convention and of the likely process. These risks are identified on the bases of three bodies of literature, all of which should be consulted and systematically sifted for further lessons beyond those covered in this paper. Firstly, normative contributions concerning constitution-making and constitutional design can be brought to bear regarding when to bring which groups in, with what mandate. Some such contributions have addressed the EU specifically, including Thomas Pogge (Pogge 1997) and Philippe Schmitter (Schmitter 2000). Another valuable source of lessons is the comparative studies of constitutional conventions (Elster 1988a; Elster et al. 1998). Thirdly, the vast literature on federal arrangements contains many further valuable suggestions (Cappelletti, Seccombe, and Weiler 1986, Hesse and Wright 1996, McKay 2001, Nicolaidis and Howse 2001).

There are several reasons to be wary of the constitutionalisation process for the EU. To begin with we should insist that *no* institutional body may at any time plausibly claim to express the "Common Will" to the common European interests as a matter of course (Rousseau 1978). This is true not only for legislatures and other bodies established by a constitution, but also for constitutional conventions. There are additional interrelated reasons for limits to optimism concerning the writing of a European Constitution – even though the composition of the Convention and the process as laid out so far lay some fears to rest. Any convention in charge of writing a constitution face challenges, but there are special hurdles when the constitution shall regulate existing institutions and political orders, especially when these bodies are represented in the Convention. In this, the Convention for the Future of Europe is similar to the recent conventions creating constitutions in Eastern Europe (cf. Elster 1993b; Elster et al. 1998). Neurath's metaphor that we must rebuild the boat without a dock, is particularly apt: the process of constitutionalisation cannot proceed from scratch *ex nihilo*, but involve existing institutions, established principles and constitutions in struggles for constitutional recognition (Tully 1995).

a) The Constitutional Convention may not respect the agenda and constraints of their Convenors

The participants in the convention may well take on tasks beyond their mandate, and regard themselves as unbound by instructions given by bodies less legitimate than themselves. Such disobedience is more understandable insofar as a convention is called due to the felt illegitimacy of existing institutions and rules – including the institutions and rules authorising a constitutional convention (Walker 2001). This was the experience with the French Constitutional Convention (Elster 1993a), and it may well happen in the Convention. Thus the agenda may well change during the lifetime of the Convention.

b) The Convention participants are likely to be blind to their own bias

One of the roles of a constitution is to curb powers so as to protect citizens against standard threats likely to arise in any political order. Citizens also require constitutional protections against threats that are especially likely to arise within a particular culture – be they threats against minorities of colour, against women, the elderly, or the sick. Such culturally contingent threats are often difficult to discover and acknowledge (Elster 1993b, 12). Thus, sadly, such constitutional protections are unlikely (Sunstein 1991). Sorely needed protections are especially likely to be overlooked if the composition of the Convention is biased against vulnerable segments. In general, this is highly likely since many of those likely to be harmed are those whose plight are not yet recognized by those in power.

This is not to say that participants at a constitutional convention will always seek to tailor the constitution to further their interests to the detriment of others, but merely that such effects can easily be the result. There is a tension, therefore, between including voices of those likely to have a stake in the decisions, and the need to insulate the convention from "special interests and the scrutiny of mass publics" (Schmitter 2000). One legitimate concern may well be to ensure that all states are represented, regardless of population size; another may be to protect those likely to suffer from inappropriate centralisation or decentralisation of competences. Unfortunately, other vulnerable segments of Europeans may not be satisfactorily represented in the Convention because the relevant cleavages are invisible and inaudible - yet.

The Convention seems to have taken precautions against these risks: its President Valery Giscard D'Estaing has declared that the Convention will seek to listen to affected parties, especially to the young and to the applicant countries. The process will also be followed by media to a great extent, and it will be more open than most Constitutional Conventions, thus allowing more scrutiny and opportunities for response at least by those able to organise and voice their concerns.

c) The Creatures are Participants at their Creation, without Veils of Ignorance

At constitutional conventions, uncertainty concerning likely pay-offs in the near and distant future often facilitate participants' ability and willingness to consider all affected parties and be guided by normative principles, rather than only consider the division of benefits in terms of what will benefit their own heirs.[9] To be sure, participants at Constitutional Conventions will often consider what's in it for them, and should not be expected to solely seek the normatively best solutions in ignorance of effects on themselves and the institutions they represent. The point is rather that the identification and weight of considerations of self interest, broadly speaking, increases insofar as there is a clear overlap between persons and institutions in the constitutional convention, and in the subsequent institutions. One reason is that such conflation reduces uncertainty concerning personal benefits in the future. Thus a central challenge to the constitutionalisation process in the EU is that future beneficiaries – individuals and institutions - take part in the proceedings. We can expect that the Convention will be heavily affected by the *de facto* constitution of the EU and by the concern of those representing

institutions, to maintain or boost their powers. The conflation will tend to shift the balance of considerations in favour of personal and institutional self-interest. The representatives of the European Parliament, the Commission, the national governments and national parliaments can be expected to seek large capabilities for their institutions, possibly hindering normatively preferred allocations of powers.

An added challenge with the Convention is that agreement is less likely when fine-tuning is possible, and where prediction about one's future position is easier (Elster 1988a). Both of these would hold for the constitution-making process in the Union where, for instance, calculations about voting weights abound. Disagreement is particularly likely since there are no obviously salient "Schelling points" concerning allocation of competences and decision procedures (Elster 1988a) – a problem not reduced by the highly contestable idea of "subsidiarity". Moreover, due to the carefully prepared bargaining, suspicions of self-interested suggestions are likely. Agreement in such situations will be more difficult, since it is "easier to get acceptance for policies that rely on chance than those that are suspected of intentionally benefiting some groups." (Elster 1988a, 319). Even the time frame of the Convention may be unfortunate: it may be too long to provide the requisite ignorance, but too short to allow critical scrutiny of the various claims and calculations. A politician in Czechoslovakia said during the process of their constitution making that "a constitution can be written in three months or in ten years, but not in two years." (Elster et al. 1998, 69).

These features create two kinds of problems. Parties are somewhat more likely to engage primarily with their own interests in mind, rather than with the normatively preferable concern for the European interests. In addition, this suspicion creates a lack of assurance. All participants may prefer negotiations and deliberations based on a commitment to fairness, but suspect that some others may not – and hence seek their own interests in a pre-emptive move.

One way to reduce some of these risks is to foster within the Convention a general and public attitude of commitment to the common interests of Europeans, recognising a role for safeguarding and furtherance of own institutional and national interests limited by constraints stemming from a shared commitment to equal respect owed all Europeans and their states. Another, supplementary strategy could have been to require all members of the Constitutional Convention to accept a 10 year quarantine for positions in Member States' parliaments or Community bodies after the Constitution is ratified – though this might have had problematic effects on recruitment of younger participants.

From this point of view, the choice of older statespersons for the Convention may be wise: their personal stakes are not so much tied to creating positions for themselves in future institutions, but rather to create a lasting place in the history of Europe – which requires the Convention to reach an agreement that will stand scrutiny and command agreement and admiration.

d) Assymmetric value of No Agreement

A further challenge to the Convention on the Future of Europe is, paradoxically, the lack of a looming shared crisis. The need to reconfigure institutions prior to enlargement has not taken on the required urgency, nor has the need for a clearer global role for Europe – though this was a repeating theme at the convening of the Convention.

Europe survives even if the Convention does not reach agreement: Non-agreement does not mean that the European Union is abolished, but rather that cooperation continues on the terms spelled out by the last Treaty agreed to. This is common knowledge among the parties, and reduces the incentives and pressure for agreement – at least for some parties. The different value participants place on this fall-back option skews the bargaining power. For instance, in the Community setting, institutional arrangements that impose costs on some Member States are unlikely without any side payments. Hence redistributive arrangements across state borders are unlikely except when they are seen to be to mutual advantage relative to the treaty in force – unless they can be made to appear required by widely held normative commitments.

Prospects of agreement are even dimmer insofar as the unanimity condition may shape participants' perception of the rules of the process. Their *de facto* veto option may foster perceptions that their dominant task is to maximise their institutional interests (Goodin 1996). Vetos may cause normatively more attractive interpretation to recede, namely that their task is to find a constitution that best secures a normatively legitimate European political order.

This risk would be reduced if the parties were convinced that only a constitution can stave off a crisis, and that using veto in the unconstrained pursuit of institutional interests is in practice unacceptable or unworkable.

It is not clear that institutional arrangements can prevent participants' inappropriate use of veto, for the rules should not to prevent all vetos, since representatives ought to veto outcomes that fail to respect the legitimate interests of all Europeans. Rather, the task is to arrive at outcomes where use of veto is illegitimate. But such judgments must be guided by standards concerning what justice requires regarding the European political order. Alas, such standards are presently hard to find. Nevertheless, one could establish a practice where veto would have to be justified in terms of vital national interests, fairly precisely specified.

e) Lack of requisite political culture/conception of European justice

The task of creating a constitution for Europe is challenged further by the general suspicion that there is no commonly shared commitment to the European interest. There is no sufficiently widespread and appropriate political culture in the sense of informal norms which help deliberation. There is little in the way of sufficiently clear and shared normative conceptions of what justice requires regarding the institutional distribution of political rights and material resources within a multi-level, multi-polar

political order containing sub-units with established expectations concerning legitimate domestic institutions.

Such shared norms are important for trust and cooperation, especially in order to reach long-term goals which in the short term may be regarded as unpopular or too risky (Bessette 1994; Follesdal 2001). One component of such a political culture at the constitution-making stage would be a shared and public conception of justice. The participants – and possibly many of the Europeans they represent -- must agree on fundamentals about which goals should be pursued by the European Union, which by the Member States, and how to express equal respect in a community of states. It is not clear that Constitutional patriotism (Sternberger 1982, Habermas 1989, Habermas 1998) or a Constitutional consensus (Baier 1989) is *enough* (Follesdal 2001), but presently even such a slender shared bases is absent.

The absence of such a shared conception makes it easier to suspect the participants of engaging in unconstrained pursuit of own interests – and thereby undermining the legitimacy of the whole endeavour: "a constitution will lack legitimacy to the extent that it is perceived to be mere bargain among interest groups rather than the outcome of rational argument about the common good." (Elster 1993b).

Without broadly held trust by Europeans in the good will of the representatives to the Convention, there is also reason to be wary of granting them broad mandates. Some argue in favour of the trustee-model of representation, where representatives exercise their judgment under the influence of secret processes of endogenous preference formation, by mechanisms fostering deliberation. One might hope that participants will change their values and conceptions of the ends of Europe for the better, but there are also risks that changes will not be optimal, particularly in the absence of shared standards for what would count as improvements, and what is mere group think. When trust is at a premium – as in Europe at present - such suspicions should be reduced; hence it seems that transparency should be required even at the cost of some creative options.

5 Some Problems with the likely Result

We now turn to consider some of the features of the likely resulting constitution, features that to some will appear as flaws.

a) Suboptimal/subsatisfactory?

Formal and empirical studies of institutional engineering suggest that tinkering with details seldom secure more than a "local" improvement, leaving major improvements out of reach (Elster 1988a, 307-310. Such institutional 'gardening' (Olsen 2000) may nevertheless be all that is realistically within reach. A complete overhaul of institutions, even were it possible, is not likely to secure a global maximally satisfactory solution. Several features are familiar to students of organisations, such as endogenous preference formation, restricted knowledge, and resilient institutions. (Elster 1988a; Olsen

2001). Such considerations support the view voiced by MacCormick, that "It is more probable that improvement can be achieved by further tinkering and marginal adjustment than by an attempt at grand re-design and comprehensive constitution-making (as distinct from a reflective consolidation of the existing acquis communautaire)." (MacCormick 1997, 355). This is not to counsel against a constitution, but rather to remind us that expectations should not be too high concerning the success of drastic overhaul.

b) The bodies represented in convention will ensure their place in the constitution

The composition of the Convention is important for the process, to ensure sufficiently encompassing deliberation about interests and institutions. We must also expect that the institutions present at the creation will ensure that the Constitution accords them powers, thus the composition will affect the substantive allocation of powers and checks and balances in the resulting constitution.

c) Lack of models for stable federal political orders

Our arsenal of tools is more limited when it comes to building a non-unitary political order such as one that might work for Europe – particularly insofar as we look for a stable order. Useful comparative lessons from other federal constitutions are highly desirable, though they are scarce for at least two reasons. It would seem that every federation is federal in its own way, to address specific historic tensions, crises and opportunities. Secondly, most federations fall apart (Lemco 1991).

If one would want to obtain a constitution for a stable European federal political order, one should not start from here. This is the chilling implications of the comparative study of factors yielding stable federations[10]. Jonathan Lemco has undertaken a comparative study of stable federations that have existed during the last 200 years – stable in the sense of neither ending with secession nor with a unitary state. He concludes that

> if one was to establish a federation that would stand the greatest chance of remaining stable, based on the results derived from the history of previous federations, one might seek the attributes listed below.
>
> Such a federation would be composed of many small constituent units owing their first allegiance to a strong central government. It would have an effective two- or multiparty system that would allow for a great deal of political freedom. Furthermore, the federation would be created in the face of a strong military or economic threat, and this threat would not dissipate until a strong sense of national legitimacy developed. This sense of legitimacy would be threatened, however, if there were frequent major constitutional changes.
>
> To further minimize the potential for federal instability, the political elites of such an ideal federation would avoid concentrating national minorities in a small number of constituent units, where the minorities would be in the majority …
>
> … in developed states, leaders would be well advised to discourage rapid economic modernization: the evidence suggests that where rapid economic change exceeds the adaptive capacity of the nation's political institutions, as has often historically been the case, there has been a great deal of internal divisiveness.
>
> (Lemco 1991, 160)

Consider, in contrast, the present state of the European Union:

- a set of Member States with great variety in size and population;

- peopled with individuals clustered by nationality in member states, with primarily sense of loyalty to their own state rather than to the Community;

- with an underdeveloped party structure at the European level;

- nowadays suffering little in the way of external threats;

- alleged to enjoy exceptionally low legitimacy in the populations;

- modifying the fundamental constitutional arrangements at Intergovernmental Conferences as often as 5 year intervals;

- with one dominant religious heritage – at least in the sense that the place of religious worship most Europeans do not attend is definitely Christian churches, rather than mosques, synagogues.

- undergoing massive changes in the economic structures towards a common market, many also towards a common currency, alleged to exceed the political capacities of the Community institutions;

- facing expansion that will include states with a drastically lower standard of living, marked inexperience with democratic and market arrangements and –culture.

6 Some lessons

The historical record suggests caution and humility regarding the prospects of a stable, federal European political order – not to speak of a legitimate such order. The observations presented in this paper suggest at least the following conclusions.

a) The importance of Domestic Parliaments and/or Supreme Courts

The considerations presented above underscore the need for representatives or bodies in the constitutional convention that will flag interests and concerns of individuals potentially negatively affected by a constitution.

Insofar as considerations of subsidiarity and fears of undue centralisation are relevant, it is important to have representatives present whose institutional interests will be against centralisation. A central political and philosophical issue regarding the future of Europe is the legitimate role of the member states beyond the need for some bodies to balance centralising tendencies of the federal political order. Appeals to subsidiarity say very little about the appropriate tasks for Member States in the absence of clear ends for the political order as a whole. It seems that the proper scope of competences must be determined with representatives of states present. If Member States should remain loci of political power, it would seem important to entrench competences with Member States, and to establish some checks and balances with bodies likely to pursue the Member State perspective. While the representatives of Member State governments of course represent national interests, their institutional interest in escaping domestic parliament oversight may render them susceptible to unduly favour centralisation. Several authors note the present bias in favour of executive power, and this can be

avoided by including national parliaments or national MPs in EU decisionmaking more generally (Abromeit 1998, referring to Brittan 1994 and the French Senate's Guena Report).

On this issue, the Convention is satisfactory, since it indeed includes representatives of Member State parliaments. Alternatively, representatives of national supreme courts could have been included. With such a composition, we may expect that a European constitution will entrust some competences and/or checking and balancing roles to (representatives of) national parliaments as another site of elected representatives (for detailed assessment of some possible roles, cf. Pernice 2001); and/or to national supreme courts, for instance in the form of a Constitutional Council (Weiler 1999, 322).

But it is of course not obvious that state borders will match salient and normatively significant cleavages in the populations over time, especially not with increased mobility of culture and values among Europeans. Over generations, Europeans may find that, while they do not want all power placed in Brussels, the proper sub-units are not states. Instead, some other unit should be politically salient, be it sub-state region or non-territorial forms of association. Be that as it may, there are reasons to move slowly in reducing the powers of existing states, so as to not upset expectations created under a system of governance consisting of somewhat sovereign states, where geographically clustered groups of compatriots share institutions and culture. The interest of individuals in controlling the development of their institutions and culture may best be served by allocating the power to maintain and develop these institutions in state institutions. However, the rules of constitutional change should not allow any single Member State to block constitutional change.

b) Input by Civil Society: Cui malo?

Since the detrimental effects are difficult if not impossible to foresee, it is important to ensure that affected parties can mobilise with relative ease, so as to communicate their concerns to the Convention. The listening process promised by President d'Estaing is a promising step in this regard. Yet to avoid unfortunate bias, it does not suffice to keep the door open for those who want to participate in the constitutional process. Those disadvantaged are not likely to be heard, due to lack of awareness of the long-term implications and lack of resources. It must instead fall on the participants in the Convention, aided by agents in civil society – the media, universities, and watch groups -- to scrutinize the proposals with particular attention to identify who might be harmed by various proposals; who are likely to be overlooked or might get an exceptionally bad deal. For instance, those vulnerable to sudden shifts in the welfare regimes should receive particular attention (Scharpf 1999); likewise third country nationals who have weaker electoral influence. The European Union is surely no more likely to avoid the problems and risks facing any political order: of unintended cumulative effects of well-intentioned policies, of incompetence, and of intended ills wrought by politicians of ill will. Both the constitutional process and the constitution of Europe must allow critical attention by the public, and by agents of civil society at large – including media and universities. One central question

that must be kept in mind – and that governors must always ask and be asked -- is "Cui malo?" – who will be hurt by such policies? The proposed openness of the Convention is promising in this regard.

c) Scrutiny and Reminders by Civil Society: Calls for Justification

Scrutiny and voice is not sufficient. The participants in a constitutional convention must also be convinced to establish institutions that do not put groups at undue risk.

Theories of legitimacy that utilize notions of consent have been criticised on at least two fronts: Hume criticized Locke that a historical compact was a fiction, a myth that for that reason could have no normative significance. Constitutional conventions typically avoid this charge. The second criticism can less easily be dismissed: How can the consent of one generation bind the next: why should it matter morally what ancestors agreed to? One response to such criticisms combine the historical occurrence of consent with arguments invoking hypothetical consent – that the ground rules agreed to are such that they *could have been consented to* by people committed to treating each other as equals. This liberal commitment, harking back to Locke, Rousseau and Kant, insists that "the rules and restraints that are necessary must be capable of being justified to the people who are to live under them" (Waldron 1987, 134). One central challenge is to ensure that a constitutional convention facilitates the participants' adaptation of this perspective (Goodin 1996), to allow and remind them that they must reflect critically about whether their preferences are legitimate grounds for decisions about the Constitution shaping the future Europe[11]. It is important to facilitate and exploit the beneficial role of publicity, shaming and other instrumental roles of public deliberation (Elster 1998b). Against this, authors have observed that too much transparency may be counterproductive: the process should allow opportunities for the participants to explore options and trade-offs in relative secrecy – since 'sunshine' laws often prevent not only collusion in pursuit of sectoral interests, but also can prevent creative explorations for the common good (Elster 1998a, 109). However, in the current situation where Member State populations and governments wonder about the level of shared commitment to the European interest and solidarity across state borders, it would seem wise to forego such opportunities and instead err on the side of transparency – especially since modest tinkering is more likely to be successful than drastic revisions anyway.

Conclusions

I have argued that the standard arguments presented concerning the need for a Constitution for Europe, and against one, are inconclusive. So the Convention is legitimate at least in the modest sense of being permissible in principle. Secondly, I have sought to draw several lessons and reminders that should inform the deliberations of the Convention on the Future of Europe. The Convention is composed in such a way as to exacerbate some risks, while reducing others. The Convention must be guided by normative considerations of the legitimate ends of the political order, subordinating the interests of institutions and particular individuals. Given the participation of centralisation-prone institutions such

as the European Parliament, the inclusion of national parliaments is welcome, to ensure that arguments will be voiced both in favour and against centralisation of competences. A drawback of including future institutions at the Convention is that they will hinder a disinterested stance, and importantly also hinder the impression that the Convention has been seeking the general European interest. Such risks are stronger insofar as an all-encompassing crises does not loom large and since a no-agreement alternative in the form of the existing treaties seem bearable for some parties to the Convention. Under such conditions bargaining solely for own advantage is tempting, yet the credibility of the result requires that the Constitution shows that it treats all Europeans on a footing of equality.

Given the potentially partisan composition, and the lack of a crisis adding pressure for a fair agreement, a major task will be to foster within the Convention a general and public attitude of commitment to the common interests of Europeans, to such a degree that countervailing tendencies are checked. This counts in favour of public scrutiny, even though transparency may constrain drastic and creative restructuring. Incremental tinkering with present arrangements may be sufficient – and indeed all that may reasonably be hoped for, and expected.

A central challenge for civil society as well as for the ongoing Convention on the Future of Europe is to remind the participants that their power is not to be used for unconstrained pursuit of the interests of the institution they represent, but rather that their "Prerogative is nothing but the power of doing public good without a rule." (Locke 1963).

References

Abromeit, Heidrun. 1998. *Democracy in Europe: Legitimising Politics in a Non-State Polity*. New York: Berghahn Books.

Baier, Kurt. 1989. "Justice and the Aims of Political Philosophy." *Ethics* 99: 771-90.

Bainbridge, Timothy, and Anthony Teasdale. 1995. *The Penguin Companion to European Union*.Penguin.

Bellamy, Richard. 1995. "The Constitution of Europe: Rights or Democracy?" *Democracy and Constitutional Culture in the Union of Europe*. Richard Bellamy, Vittorio Bufacchi and Dario Castiglione, editors, 153-75.

Bessette, J. M. 1994. *The Mild Voice of Reason. Deliberative Democracy and American National Government*. Chicago: Chicago University Press.

Bickel. 1962. *The Least Dangerous Branch*. New Haven.

Brittan, L. 1994. *The Europe We Need*. London.

Buergenthal, Thomas. 1997. "The Normative and Institutional Evolution of International Human Rights." *Human Rights Quarterly* 19, 4: 703-23.

Cappelletti, Mauro, Monica Seccombe, and Joseph H. H. Weiler, eds. 1986. *Integration Through Law Europe and the American Federal Experience*. Berlin: Walter de Gruyter .

Castiglione, Dario. 1995. "Contracts and Constitutions." *Democracy and Constitutional Culture in the Union of Europe*. Richard Bellamy, Vittorio Bufacchi and Dario Castiglione, editors, 59-80. London: Lothian Foundation Press.

Cohen, Joshua. 1989. "Deliberation and Democratic Legitimacy." *The Good Polity*. Alan Hamlin and Philip Pettit, editors, 17-34. Oxford: Blackwell.

Egeberg, Morten. 1999. "Transcending Intergovernmentalism? Identity and Role Perceptions of National Officials in EU Decision-Making." *Journal of European Public Policy* 6, 3: 456-74.

Elster, Jon. 1988a. "Arguments for Constitutional Choice: Reflections on the Transition to Socialism." *Constitutionalism and Democracy*. Jon Elster and Rune Slagstad, editors, 303-26. Cambridge: Cambridge University Press.

———. 1988b. "Introduction." *Constitutionalism and Democracy*. Jon Elster and Rune Slagstad, editors, 1-18. Cambridge: Cambridge University Press.

———. 1993a. "Constitution-Making in Eastern Europe: Rebuilding the Boat in the Sea." *Public Administration* 71: 167-217.

———. 1993b. "Rebuilding the Boat in the Open Sea: Constitution-Making in Eastern Europe." *Centre for European Studies, Nuffield College Oxford*, 24.

———. 1998a. "Deliberation and Constitution Making." *Deliberative Democracy*. Jon Elster, editor, 97-122. Cambridge: Cambridge University Press.

———, editor. 1998b *Deliberative Democracy*. Cambridge: Cambridge University Press.

Elster, Jon, Claus Offe, Ulrich K. Preuss*, and others*. 1998. *Institutional Design in Post Communist Societies Rebuilding the Ship at Sea*. Cambridge: Cambridge University Press.

Follesdal, Andreas. 1998. "Democracy, Legitimacy and Majority Rule in the EU." *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*. ARENA Reprint 99/2. Albert Weale and Michael Nentwich, editors, 34-48 . 14 . London: Routledge.

———. 2001. "Union Citizenship: Unpacking the Beast of Burden." *Law and Philosophy* 20, 3: 313-43.

Goodin, Robert E. 1992. *Motivating Political Morality*. Oxford: Blackwell.

———. 1996. "Institutionalizing the Public Interest: The Defense of Deadlock and Beyond." *American Political Science Review* 90, 2: 331-43.

Habermas, Jürgen. 1989. *The New Conservatism: Cultural Criticism and the Historians' Debate*. Shierry Weber Nicholsen, editor, transl. Cambridge: MIT Press.

———. 1998 [1993]. "Struggles for Recognition in the Democratic Constitutional State." *The Inclusion of the Other: Studies in Political Theory*. First in *European Journal of Philosophy* 1 (2): 128-155. 203-36. Cambridge, Mass.: MIT Press.

Harrison, Ross. 1993. *Democracy*. London: Routledge.

Hesse, Joachim Jens, and Vincent Wright, ed. 1996. *Federalizing Europe? the Costs, Benefits and Preconditions of Federal Political Systems*. Oxford: Oxford University Press.

Lane, Jan-Erik. 1996. *Constitutions and Political Theory*. Manchester: Manchester University Press.

Lemco, Jonathan. 1991. *Political Stability in Federal Governments*. New York: Praeger.

Lijphart, Arend. 1999. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. Buy. New Haven: Yale University Press.

Locke, John. 1963 [1690]. *Two Treatises of Government*. Peter Laslett, rev. and introd. New York: New American Library, Mentor.

MacCormick, Neil. 1997. "Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth'." *Law and Philosophy* 16, 4: 331-56.

Madison, James. 1967 [1787]. *Notes of Debates in the Federal Convention of 1787*. Adrienne Koch, ed. New York: Norton.

McKay, David. 2001. *Designing Europe - Comparative Lessons From the Federal Experience*. Oxford: Oxford University Press.

Neurath, Otto. 1932. "Protokollsätze." *Erkenntnis. (Transl. in Otto Neurath, Philosophical Papers 1913-1946 Reidel 1983)*. 3: 204-14.

Nicolaidis, Kalypso, and Robert Howse, eds. 2001. *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*. Oxford: Oxford University Press.

Offe, Claus. 1997. "Micro-Aspects of Democratic Theory: What Makes for the Deliberative Competence of Citizens?" *Democracy's Victory and Crisis*. Axel Hadenius, editor, 81-104. Cambridge: Cambridge University Press.

Olsen, Johan P. 2000. "How, Then, Does One Get There?" *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*. Christian Joerges, Yves Mény and J. H. H. Weiler, editors, 163-80. Badia Fiesolana: European University Institute, http://www.jeanmonnetprogram.org/papers/00/00f0901.html

———. 2001. "Reforming European Institutions of Governance." *ARENA WP 01/7*.

Pernice, Ingolf. 2001. "The Role of National Parliaments in the European Union." In Dimitris Melissas and Ingolf Pernice (eds*.) Perspectives of the Nice treaty and the Intergovnernmental Conference in 2004*, Baden-Baden: Nomos 2002, 73-93.

Pogge, Thomas W. 1997. "How to Create Supra-National Institutions Democratically." *Democracy and the European Union*. Andreas Follesdal and Peter Koslowski, editors, 160-185. Berlin: Springer.

Riker, William H. 1975. "Federalism." *Handbook of Political Science: Governmental Institutions and Processes*. Fred Greenstein and Nelson W. Polsby, editors. Reading: Addison-Wesley.

Rousseau, Jean-Jacques. 1978 [1762]. *On the Social Contract*. Roger D. Masters, editor and Judith R. Masters, transl. New York: St. Martin's Press.

Scharpf, Fritz W. 1999. *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press.

Schilling, Theodor, J. H. H. Weiler, and Ulrich R. Haltern. "Who in the Law is the Ultimate Judicial Umpire of European Community Competences?". Jean Monnet Working Paper no 10/1996. http://www.jeanmonnetprogram.org/papers/96/9610.html

Schmitter, Philippe C. 2000. *How to Democratize the European Union - and Why Bother?* London: Rowman.

Snyder, Francis. 1998. *General Course on Constitutional Law of the European Union*. Florence: EUI.

Sternberger, Dorf. 1982. "Verfassungspatriotismus." *Schriften, Vol. 10*. Dorf Sternberger, editor, 17,. Frankfurt am Main: Insel-Verlag.

Sunstein, Cass R. 1991. "Preferences and Politics." *Philosophy and Public Affairs* 20, 1: 3-34.

Sverdrup, Ulf. 2002. "An Institutional Perspective on Treaty Reform: Contextualizing the Amsterdam and Nice Treaties." *Journal of European Public Policy* 9, 1: 120-140.

Trondal, Jarle. 2000. "Multiple Institutional Embeddedness in Europe: The Case of Danish, Norwegian, and Swedish Government Officials." *Scandinavian Political Studies* 23, 4: 311-41.

Trondal, Jarle, and Frode Veggeland. 2000. "Access, Voice and Loyalty: The Representation of Domestic Civil Servants in the EU Committees." *ARENA Working Paper*, 8.

Tully, James. 1995. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge: Cambridge University Press.

Waldron, Jeremy. 1987. "Theoretical Foundations of Liberalism." *Philosophical Quarterly* 37: 127-50.

Walker, Neil. 2001. "The White Paper in Constitutional Context." *Symposium: Responses to the European Commission's White Paper on Governance*. Christian Joerges, Yves Meny and J. H. H. Weiler, editors.

Weiler, J. H. H. 1999. *The Constitution of Europe*. Cambridge: Cambridge University Press.

———. 2001. "Federalism and Constitutionalism: Europe's Sonderweg." *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*. My comments based on version published as Harvard Jean Monnet Working paper 10/00. Kalypso Nicolaidis and Robert Howse, editors, 54-73. Oxford: Oxford University Press.

Weithman, Paul J. 1995. "Contractualist Liberalism and Deliberative Democracy." *Philosophy and Public Affairs* 24, 4: 314-43.

---

[1] I am grateful for comments from audiences at the ECPR conference on *The Role and Meaning of 'European' Constitutionalism* at Canterbury, and the Nordic Network on Political Theory, Uppsala University, both in September 2001; the ARENA seminar in February 2002; and constructive suggestions from Jo Shaw and Antje Wiener. The substance of these reflections was largely formed prior to the Laeken Declaration convening a Convention on the future of Europe.

[2] Case 294/3, *Les Verts*, 23 April 1986. ECR 1986-4, p. 1365. I owe this reference to Piris 2001.

[3] Cf. the discussions in the aftermath of the 1993 Maastricht Decision of the German Federal Constitutional Court (89 BverfGE 155), particularly Schilling, Weiler, and Haltern .

[4] In addition to this treaty-base, note that Buergenthal 1997) holds that the European Court of Human Rights also serves as a constitutional court for Europe.

[5] C-376/98 Germany v. Parliament and Council (2000) ECR I-8419 regarding Directive 98/43/EC. I am grateful to

Agustin José Menéndez for this reference.

[6] Art. 1 Belgium is a Federal State made up of communities and regions.

Art. 2 Belgium is made up of three communities: The French Community, the Flemish Community and the German Community.

Art. 3 Belgium is made up of three regions: The Walloon region, the Flemish region and the Brussels region.

Art. 4 Belgium has four linguistic regions:…

[7] "Article 1 [State Principles] (0) The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities, as well as the Federal District, is a legal Democratic State and is founded on:…"

[8] Preamble: WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC ….

…

I 1-1) India, that is Bharat, shall be a Union of States.

[9] George Mason noted this effect at the American Constitutional Convention (Madison 1967; cf. Goodin 1992, 103).

[10] A future constitution of the EU will presumably have strong federal features, in the sense of federalism used e.g. by Riker: "a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions." (Riker 1975, 101)

[11] -- if not generally in the political processes (Offe 1997, Cohen 1989, Weithman 1995).