



Europe in Search of Legitimacy: Strategies of Legitimation Assessed

ERIK ODDVAR ERIKSEN AND JOHN ERIK FOSSUM

ABSTRACT. In this article, we assess three explicit strategies (based on three logics of political integration) as possible solutions to the European Union's legitimacy problems. The first strategy amounts to a scaling down of the ambitions of the polity-makers in the European Union (EU). The second strategy emphasizes the need to deepen the collective self-understanding of Europeans. These two modes of legitimation figure strongly in the debate on aspects of the EU, but both have become problematic. The third strategy concentrates on the need to readjust and heighten the ambitions of the polity-makers so as to make the EU into a federal multicultural union founded on basic rights and democratic decision-making procedures. Taking stock of the ongoing constitution-making process, the authors ask how robust such an alternative is and how salient it is, as opposed to the other two strategies.

Keywords: • Citizenship • Deliberation • Democracy • European identity • Legitimacy

Introduction

Today's Europe is marked by deep changes. One of the most remarkable developments is the rapid pace of integration, which promises to alter fundamentally the political geography of Europe. The rate of change is astounding given the uncertainties and disagreements as to the future design of the European Union (EU) and the rest of Europe. It is astounding also given the many challenges currently facing the EU. These result from the EU's successes, as much as from its failures. As its main achievements, the EU has succeeded in entrenching peace and has established the Single Market and Monetary Union.

It is still, however, generally recognized that the EU suffers from important *legitimacy deficiencies*.¹ These are linked not only to aspects of the EU's structural and institutional make-up, but also to the normative justifications that it can

readily draw upon. This problem of legitimacy is lent further urgency by the decision to proceed with enlargement, and by attempts to expand cooperation in the fields of justice and home affairs, and in a common foreign and security policy. The EU is a novel type of entity whose principled and constitutional status is ambiguous and incomplete, and whose underlying *telos* is not clear.

These and other reasons prompted the EU to launch a broad debate on the future of Europe. The most tangible manifestation of this commitment was the setting up of the Convention on the Future of Europe (February 2002–June/July 2003). The Convention succeeded in putting together the Draft Treaty establishing a Constitution for Europe. During the Convention debate, it was clear that those who criticized the EU in legitimacy terms often did not agree, nor did they necessarily emphasize the same problems.² The same applies to the academic debate. Some are concerned with costs and efficiency, others with technocracy and lack of popular participation, others with the absence of a sense of community and identity, and others with legal-institutional and constitutional defects. Some critics have denounced the EU for its lack of ambition, others for its overly strong ambitions. The issue is not that of applying a set of ready-made prescriptions, as there are several. The question is, *which prescriptions?* In other words, *how* can the EU “repair” its alleged legitimacy deficit?

These observations serve to underline that there are several options with regard to the probable development of the EU, and these rely on qualitatively different normative standards. What, then, are the basic choices facing the members? How to conceptualize the relevant range of developmental paths for the Union? Three normatively distinct and stylized options can be derived from the structure in place and from the debate on its legitimacy.

To face the constraints of enlargement, one option is to scale down or to reduce the ambitions of the polity-makers in the EU so as to make it into a mere free-trade arrangement. The onus then is on *efficient regulation*, and the four freedoms of market integration. Another and different strategy is to deepen the collective self-understanding of EU citizens, so as to make the EU into a value-based *community*, founded on a common European identity and conception of the European heritage and value basis. The purpose of such a strategy is to forge a people, or demos, and in this manner enable the EU to cope with its legitimacy problems. A third option is to make it into a constitutionally entrenched *democratic political union*, based on a set of common civil and political rights, to empower the citizens to be and to see themselves as the “co-authors” of the law.

These options have dramatically different constitutional implications. The first speaks of the EU as a *problem-solving entity* based on derived legitimacy and a narrow economic citizenship; the second sees the EU as a *value-based community* premised on social and cultural citizenship; and the third invokes a *rights-based, post-national union*, based on full-fledged political citizenship.

Which option is the most viable? To which of these do the ongoing constitution-making process and the Convention’s Draft Constitution speak? Viability refers to normative status as well as to empirical relevance. The purpose of this assessment is to offer a contribution to the closing of the gap between normative standards and principles on the one hand and empirical realities on the other.

In the following pages, we first clarify the normative foundation and mode of legitimation that each strategy is based on. We then spell out and operationalize each strategy, as well as provide an assessment of their most important merits and demerits. This includes a brief assessment of each in relation to the constitution-

making process. How viable are the strategies in normative and in empirical terms? The final part of the article holds the conclusion.

Three Strategies of Legitimation

The recognition that informed the decision to establish the Convention, as expressed in the Laeken Declaration (European Council, 2001), was that the EU is standing at a crossroads, with qualitatively different developmental paths available to it. The Convention on the Future of Europe is unprecedented. Its appointment and composition, and the resultant Draft Constitution, are testimony to the seriousness with which the EU now takes this question. Until this event, however, those in charge of the integration process had consistently *failed* to engage in such a debate. Neither had they provided a set of agreed-upon blueprints for how to think of the EU in legitimacy terms. They had voiced support for certain standards and principles, but these have only very recently been expressed in polity terms. One of the main instigators here was the German Foreign Minister, Joschka Fischer. In his now famous speech of May 2000, talking as a *private citizen*, Fischer spoke of the need to establish a European federation.³ Since then, numerous heads of state have presented their visions for Europe. The constitutional issue was brought up and explicitly addressed by the European Council at the 2001 Laeken European Council meeting. In the Laeken Declaration, the European Council asked: "What might the basic features of [a European] constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?" (European Council, 2001).

These actions notwithstanding, there are several visions of Europe, and these differ considerably. The range of visions is almost certain to increase with further enlargement. The very act of enlarging the EU to the East and the South could have profound implications for the present entity, which has very weak sanctioning powers and which greatly depends on the Member States for the execution and implementation of its decisions.

For analytical purposes, as noted, three key strategies that can be used to "repair" the EU's legitimacy deficits may be identified. The strategies are based on three different conceptions of rationality (that is, instrumental, contextual, and communicative) and their adherent warranting notions (that is, efficiency, identity, and justice).

An *instrumental logic* designates the EU as an organization whose special purpose is to solve the perceived problems facing the nation-states, associated with an increasingly globalized economy; social dislocation and threats to social and welfare arrangements; migration-induced multiethnicity; environmental problems and risks; and international crime and security threats. Legitimacy depends on the ability to solve problems effectively and the capacity to deliver the goods that people demand (cf. Scharpf, 1999). Electoral responsibility through nation-state democracy and judicial review make for public accountability and are deemed sufficient for this kind of interstate cooperation.

A *contextual logic* conceives of Europe as a community in which the different national modes of allegiance and identification are to be harmonized. The success of the EU depends upon developing a shared identity and a value basis for integrating different conceptions of the good life, and a diverse range of societal interests (cf. Miller, 1995). Here, the notion of a European identity prevails, but

one which, nevertheless, has to be revitalized and fostered through participation in civic-type associations.

A *communicative logic* conceives of the EU as a polity *sui generis*. As such, it has proceeded well beyond intergovernmentalism, and has established a polity that is sensitive to cultural difference. The EU, in this view, is in need of direct legitimation and a firmer basis of popular participation than the one provided for by the democratic processes at the state level. Here, the integration process hinges on the ability to establish a fair system of cooperation founded on basic rights and democratic procedures for deliberation and decision-making. The communicative conception of rationality does not solely designate consistency or preference-driven action based on a calculus of success, nor mere norm-conformity or accordance with entrenched standards of appropriateness, but rather public reason-giving: when criticized, plans of action can be justified by explicating the relevant situation in a legitimate manner. Reasons make a difference (Habermas, 1996).

We develop and discuss the three rationalities as distinct strategies, and as ideal types of polity formation, in a Weberian sense. Our objective is to try to sort out more clearly the principal alternatives the peoples of Europe are faced with, looking for the best match possible between the relevant normative and empirical dimensions. This is important in order to clarify the nature of the choices (in normative and empirical terms) and the costs and benefits that we find associated with each strategy. It is also a way to substantiate our implicit hypothesis that the third strategy is the most viable. Normative viability, however, offers little assurance of empirical success, as such. It hinges on support, sustenance, and susceptibility. In other words, power matters. Viability therefore also relates to the degree of conformity with prevailing constellations of power (see Figure 1).

The strategies presented here, then, provide different answers to the question of the legitimacy of the EU, and hence to the question of legitimate governance. That is not to say that they are equally valid from a normative point of view, nor that they are entirely optional, that is, that they can be adopted entirely without constraints. A polity will most likely exhibit a complex and historically contingent weaving together of the strategies we present. Given that the nation-state is presently undergoing deep transformations, and that the EU has not solidified in terms of final shape, our examination must reflect a certain element of open-endedness. The EU may also solidify with considerable sectoral, or even geographical, variations – a *condominio* (Schmitter, 1996, 2000). That would mean a very different mixture of the strategies than that which marks the nation-state.

The main question we pose here is: is the EU moving toward a post-national, federal union? To establish whether this is the case, it is necessary to examine the extent to which the process will comply with the standards of legitimacy of deliberative democracy. A more thorough assessment would require probing

Conception of rationality	Mode of legitimation	Type of entity
Instrumental	Efficiency	Problem-solving entity
Contextual	Collective self-understanding	Value-based community
Communicative	Justice and norms of fairness	Rights-based union

FIGURE 1. *Three logics of integration*

deeper into the mixes and deciding whether the previous embrace of one serves to facilitate or stymie the adoption or grafting on of another strategy.

Strategy One: The EU as a Mere Problem-solving Regime

The first strategy is premised on a consequentialist notion of legitimation. It depicts an enlarged EU that instead of clarifying and addressing the question of identity and democracy opts for a looser organizational form that emphasizes binding economic cooperation. There is little emphasis on collective tasks and obligations beyond the narrow interests and preferences of the Member States. This type of organization comes close to the notion of the EU as a “special purpose association of functional integration” (Ipsen, 1972). Membership in the EU derives from its discernible benefits. According to this strategy, the EU is best conceived of as a functional type of organization whose purpose it is to promote the interests of the Member States.

The pattern of integration that informs this strategy reflects the constellation of constraints and opportunities of interdependent states steeped in a largely self-help international system. Asymmetrical relations of power pattern the integration and systemic constraints propel it in an economic direction. “European integration exemplifies a distinctly modern form of power politics, peacefully pursued by democratic states for largely economic reasons through the exploitation of asymmetrical interdependence and the manipulation of institutional commitments” (Moravcsik, 1998: 5). Such cooperation is maintained through institutions complying with an intergovernmental rather than a supranational logic.

From this reading of the EU and the integration process, several traits pertaining to its legitimacy can be discerned. For one, the EU is seen as a *derivative* of the European nation-states – hence, in democratic terms indirect legitimation is seen as sufficient. Democracy is associated with the nation-state and each nation-state is concerned with protecting core aspects of national sovereignty. For the EU itself, its legitimacy is related to its performance. As such, it is highly conditional. It cannot draw on anything but actual performance and is therefore unstable. According to this notion, support is withdrawn whenever expectations are not met. Given the nation-states’ concerns with sovereignty, there are also clear limits to the scope of this performance-based mode of legitimation.

This strategy envisions little redistribution within an enlarged Europe, except as side-payments in complex rounds of bargaining or for the sake of stability. Rather, enlargement provides the Member States with an expanded market and increased security vis-a-vis former foreign powers. Further, when it comes to enlargement and increased cooperation in the area of security and defense, there is considerable disagreement as to the merits and applicability of this strategy. It is difficult to form a collective will, and the Member States are apt to pursue their own interests in these areas, given their concerns with sovereignty. The risks of defection are high. Only states that share common economic or security interests will be likely to cooperate. On the other hand, when faced with high risks of defection, the EU has a strong incentive to include only those states that really matter. Extensive cooperation and a strong sense of obligation toward a common defense and security policy, within the framework of a loosely structured economic organization, will probably be available only in situations of crisis and when there are obvious external threats (see Figure 2).

FIGURE 2. *Europe as problem-solving regime*

Indicators of Strategy One pertain to the discernible and tangible material benefits associated with EU membership; cooperation and membership as premised on an ongoing calculation of costs and benefits; and the explicit recognition that the legitimacy of the EU is founded on its performance and is ultimately premised on the democratic legitimacy of the Member States.

Drawbacks of Strategy One: Stymied Expectations

There are obvious advantages associated with this first strategy. For instance, there is no need to clarify what are common concerns and what are issues to be handled separately by each Member State. Efficiency in terms of the satisfaction of the members' interests lends legitimacy, and there is at present a sufficient value basis in the EU to ensure this.⁴

However, the strategy rests on a set of problematic normative assumptions. Outputs or functional results are not a viable long-term source of cooperation, but are themselves in need of legitimation. The general verdict in the political theory literature is that explicit efforts to ensure a common value basis or a set of supportive institutions with sanctioning ability, or both, are required to sustain cooperation over time. A collective identity or other "non-majoritarian" sources of legitimacy are required in order to coordinate action through bargaining and voting and to solve the problem of collective action. This requires further elaboration.

According to the instrumental logic, the EU is merely a means for efficient decision-making. Hence, the reference to the notion of "output-oriented legitimation," which highlights positive results or consequences for the "stakeholders."⁵ This consequentialist view posits that it is the results that count in *intergovernmental* organizations. The veto power of all participants makes for legitimation in itself, as parties will not consent to decisions that are contrary to their interests. Only decisions that no one will find unprofitable (that is, *Pareto-optimal* solutions—decisions that will make no party worse off) will be produced. The notion of *instrumental rationality* becomes the requisite tool for assessing the performance of such organizations. Action is conceived of as motivated by preferences and anticipation of consequences. The question is whether the best means among alternatives is selected in order to realize given preferences, that is, according to their expected consequences for antecedent ends. However, functional interdependence and interest accommodation are inherently unstable, as actors will opt out of cooperation whenever they are faced with a better option. Interests make parties friends one day and enemies the next (Durkheim, 1964: 204). Therefore, a political order cannot be reduced to the pursuit of self-interest or to the requirements of functional adaptation. Interests generate unstable equilibria (Axelrod, 1984).⁶ Hence a common identity and common norms and values are required to motivate collective action.

Empirically speaking, while this strategy might have worked in the earlier EU (or more appropriately the European Economic Community) because of a *tacit consensus* on vital issues and values, foremost reliance on this would for the EU nevertheless represent a regression or a step backward from what has already been achieved. It is reasonable to anticipate further losses in legitimacy and motivation as a consequence of frustrated and stymied expectations.

Enlargement will most likely exacerbate such problems. The new and applicant countries differ greatly from their Western European neighbors in terms of their basic economic structures, in terms of the composition, level, and type of economic performance, as well as in their relative and absolute wealth. In a Europe with far greater economic differentials we cannot expect that the current consensus on economic harmonization as the overarching goal can be sustained or will be tacitly accepted, because some will find it unfair. The inclusion of a number of poorer countries has raised concerns in those Member States that stand to lose EU contributions through enlargement. Further, the distributive consequences of deregulation and market-making in the east may result in a cry for redistribution and justice within an enlarged Union. Lastly, in a more complex, diverse, and value pluralist Europe, it may be more difficult to reach consensus on any overarching goal, even of an economic character.

Recent developments in policy, political, and institutional terms have rendered the intergovernmental mode of legitimation inadequate. The principles, organizational and institutional structures, and action programs associated with the present-day EU impress upon analysts and decision-makers alike that it has emerged as a polity *in its own right*, and is no longer a mere derivative of the Member States. Its impact on its citizens, consumers, workers, clients, and producers as well as its nation-states is profound. Hence, in normative terms the consequentialist mode of legitimation is seen as insufficient. Indirect and performance-based legitimation does not suffice to account for the present-day EU in democratic terms.

Strategy Two: The EU as a Value-based Community

The second strategy is premised on the need to clarify further the value basis of the European community through a collective process of self-interpretation.⁷ Who are the peoples of Europe and who do they want to be? One option is to revitalize Christian and humanist values, which can then serve as the foundation for the development of a deeper sense of unity and community. Both the Convention that forged the Charter of Fundamental Rights of the European Union (2000) and the Convention on the Future of Europe (2002–3) have discussed the question of Europe's religious heritage. For instance, a penultimate draft of the Preamble of the Charter (Charter Convention, 2000) stated that: "Taking inspiration from its cultural, humanist and religious heritage, the Union is founded on...." This sparked a great deal of opposition. The official version of the Preamble did not contain the religious reference, but instead referred to "the spiritual and moral heritage" of Europe, although the notion of the spiritual-religious was retained in the German-language version (cf. Schönlaue, 2003: 128). In the Laeken Convention, Christian Democrats, the Pope, and others actively sought to have a reference to Christianity included in the draft, but did not succeed.⁸

In this perspective, the EU is a geographically delimited entity, but one which has not yet fully discovered a common identity which can serve as the basis for

developing stable goals and visions. Revitalizing traditions, mores, and memories of whatever common European values and affiliations there are may provide the EU with a more solid basis for further integration. This perspective posits that because of a common destiny, a common fate induced by common vulnerabilities, people are turned into compatriots who are willing to take on new collective obligations to provide for each other's well-being.

Power in this strategy is based on the sociocultural mobilization of people (from below or above, or both) around particular ethical-cultural values. This process generates a set of obligations, functioning to defend and protect our sense of "we-ness" and used to mobilize support for the realization of political projects. These obligations are part of a larger system of protection and integration, which infuses the central socializing institutions with a set of identity-forming values that establish and maintain clear boundaries. Those who do not subscribe to these values do not belong. Once established, the sense of common identity is maintained through the following:

1. A system of border control, which excludes those deemed as others; and
2. A system of military defense that protects against external aggression, influence, and control.

From this reading of the EU, to be legitimate a *common identity* is needed for securing *trust*. It is required to enable actors to cooperate and to let their differences be settled by neutral procedures. Every political order presupposes some kind of cultural substrate to foster allegiance and respect for laws. Even if the EU is something less than a state, it requires identity due to its ability to make collective decisions, that is, in order for the subjects of collective decision-making to comply with common norms. A value-based strategy may also contribute to consolidating the Member States at the present level of institution building (see Figure 3).

The anticipated developmental sequence in Figure 3 is very close to that depicted in the nation-building literature. Indicators of Strategy Two refer to a set of identifiable values that permit an unambiguous determination of who is European and what the boundaries of the EU are; cooperation and membership are presented as informed by and as vital to the realization of a set of identifiable values; and the explicit recognition that the legitimacy of the EU is founded on a set of values that permit conception and sustenance of the EU as a value-based community.

The advantages of this strategy pertain to the clarification of identity and self-esteem that make for collective action (solidarity and patriotism) among the members. It provides the EU with a more evident and solid basis for

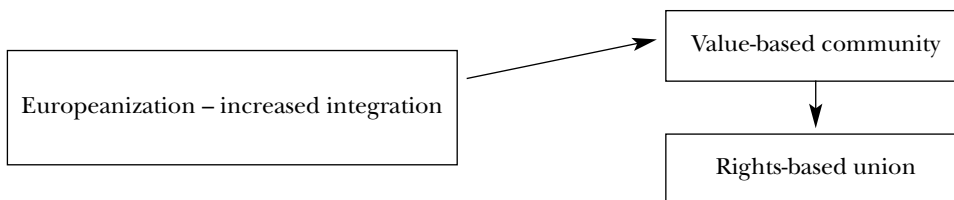


FIGURE 3. *Europe as a value-based community*

inclusion/exclusion, which in turn makes it possible to establish a set of clear territorial boundaries for the further extension of the EU. In this strategy, further democratization is possible if the people(s) of Europe are able to come together to discuss who they are and what their common goals are. This is so because democracy is not only about satisfying pre-established preferences or producing goods and commodities for a society, but is also a way to find out which problems need collective attention, which values deserve to be realized, and how to make hard choices between non-commensurable entities. It is a way to establish standards and to set priorities. Hence, the second notion of legitimation (which we, for the sake of simplicity, will name communitarian) sees democracy foremost as a place to deliberate upon the common good, and to establish bonds of solidarity. It posits that people address each other as fellow citizens within specific communal settings. Here, they are called upon to take stands on collective problems in democratic assemblies. Such interaction, the presumption is, helps mold and shape their preferences, and a clearer conception of the common good or the common interest is developed, which turns people into compatriots (brothers and sisters) who are capable of collective action. This will engender civil compliance and build character (Sandel, 1982). In this perspective, legitimacy stems from primordial sources of belonging, which constitute the identity of the group and provide the *cultural substrate* for collective decision-making (Miller, 1995). Identity, in this perspective, is reproduced and changed through a hermeneutical process of self-clarification, that is, a process of reflection and deliberation in which members reach an understanding of who they are and who they want to be. In this reading, democracy is not one among several alternative principles of associated life that may be chosen at will; rather, it designates the very idea of communal life itself. Democracy, then, is considered as an instrument for the preservation of society – for some sort of pre-established context and given values.

Drawbacks of Strategy Two: A Fortress Europe?

The problem with this kind of communitarian republicanism is that it pictures democracy as a process of collective self-discovery, which only gives human rights a binding status as long as they correspond with a society's collective self-understanding (Habermas, 1998: 239 ff.). The problem raised by this strategy, then, is twofold. For one, the EU is a post-communitarian entity which consists of different value systems and forms of allegiance. It is marked by value pluralism, and by conflicting views of the common good within and among groups, local communities, and cultures. For it to function, some modicum of a common will, nevertheless, has to be articulated. Such a common will cannot simply be based on the basic commonalities of the existing collectives, that is, on the nation-states. It must also draw on a different source of integration. One such is constituted by the system of rights that underpin the forms of constitutional democracy that are found in (western) Europe. The second problem is the status of those rights whose validity derives from collective deliberations. If they are reflections only of the deliberations of a particular community, what is their status in moral and legal terms? How valid or universal are they?

There are also normative problems in this strategy. If taken far enough, the idea of developing a cultural basis for inclusion/exclusion can conflict with universal human rights. Where many members share certain values, the rights and status of

minorities could become threatened. The normative problem most frequently referred to is that people have rights that should not be trumped by collective utility calculations or by value communities (Dworkin, 1984; Rawls, 1993).

Empirically speaking, it is far from clear what values and virtues are uniquely European, as opposed to universally shared or shared among smaller or more localized groups and collectives of people. For instance, there is little doubt that in value terms, as well as in institutional terms, there are significant differences in western Europe in the amount of support for European integration and for supranational structures. Historically, following Rokkan (1975), it is possible to define a European “core” which roughly corresponds to the six founding members of the EU. This notion of a “core” is also somewhat reflected in the present notion of flexible integration, which opens up the possibility for a group of Member States to pursue the integration process further than the rest (provided they comply with certain guidelines). Deepening and widening the EU further will easily exacerbate the tensions between the “core” countries and the others. Rather than value-based consensus, the more likely result of such a strategy may be to foster “deep diversity.”⁹ It may even stimulate a retreat to Europe’s heartland, as those least committed to integration withdraw from the Union. Indeed, the Draft Constitution contains a provision on voluntary withdrawal from the Union.¹⁰

If the EU is successful in establishing a value-based community, however, such a community will have a set of clearly demarcated boundaries between itself and the outside world. Depending on the nature of the values that are embraced, there is a prospect of a “Fortress Europe,” namely, the neglect of the legitimate needs of bordering states. There are thus both normative and empirical problems involved in this model that cannot be solved adequately by bringing “the peoples” of Europe together in communal and public settings.

Transcending the Nation-State

In legitimacy terms, these first two strategies conceive of the EU either as an organization in the hands of the Member States or as an entity that has superseded the Member States, able to claim a uniform sense of belonging and attachment. Neither captures well the EU in its present form, nor provides a set of recommendations for the future development of the EU that appear to be consistent with current developments.

The EU was established as a type of interstate cooperation. But it has changed, and so has the international context, which also deeply affects the future direction of the EU. The EU has established an “incomplete” constitutional arrangement. The EU’s democratic deficit, it is generally held, is due to the lack of European-wide political parties, a weakly developed system of representative accountability, and the absence of a truly European public sphere (Beetham and Lord, 1998; Eriksen and Fossum, 2000; Etzioni-Halevy, 2002).

These problems become more urgent as the EU actively engages in further widening and deepening of the integration process. Enlargement to the east and the south is a daunting challenge, as the structure that was initially set up to accommodate six Member States (and was found wanting even then) will now have to accommodate up to 12 new and far more diverse Member States. Many of these states lack the traditions of a liberal political culture and have only recently become democracies. The EU is also actively involved in a further deepening of

the integration process, as it seeks to expand its competencies in justice and home affairs and (despite the disagreements and setbacks suffered during the Iraq war) in the areas of common security and defense.

After a lengthy process of technocratically driven integration, which culminated in 1992 in the Maastricht Treaty, or Treaty on European Union (TEU), analysts and EU officials alike have become more aware of the lack of popular support and sanction. During the referenda held during the Maastricht Treaty process, the peoples of Europe struck back, making ratification unsure for several years and calling attention to the EU's profound legitimacy deficit (Weiler, 1999). In the past decade, the process of European integration has picked up new momentum in terms of both depth and breadth, and this has further underlined the need to clarify the nature and status of the EU. The TEU made clear that the EU could no longer simply draw its democratic legitimacy from the Member States. Is then the EU a novel entity whose legitimacy has to be established and considered with reference to the EU itself? If so, the question as to in whose interest the EU exists relates to a more profound concern, namely, to whom the EU "belongs" and what kind of entity it is and should be. Thus we are faced with profound questions as to what the European Union's identity is based on, what its basis of allegiance rests on, and how its boundaries are to be determined.

Strategy Three: The EU as a Post-national Federation

The third strategy is based on a rights-based procedural notion of legitimation. It is premised on the recognized need for continuing the process of institution building at the political level. It envisions a wider, cosmopolitan conception of democracy. It is premised on the notion that decision-makers will be forced to pay attention to a wide range of popular opinions (European as well as non-European, transnational movements, international nongovernmental organizations, and supranational and international bodies of norm enforcement) to obtain legitimacy.¹¹ This is so because they now face a set of rights holders who are cognizant of their entitlements.

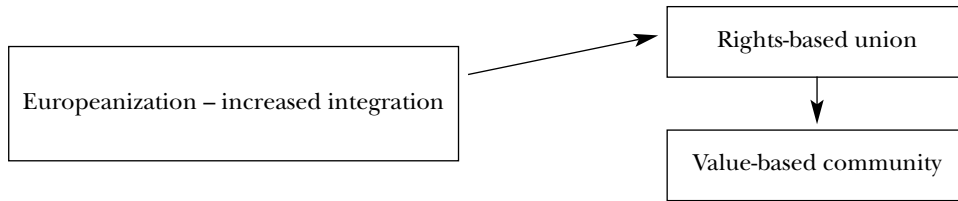
The normative essence of modern constitutions is tied to respect for the integrity and dignity of the individual. This respect has to be rooted in a political culture based on tolerance of difference and on the principle that disagreements should be settled by argument and be reflected in the working principles of the polity. The politico-institutional nexus of the modern state entails rights both for protecting the integrity of the individual (private freedom) and for making possible participation in the opinion-formation and decision-making processes (that is, political rights that establish public freedom). Democracy, then, should be conceived of not only as an organizational arrangement (parliamentary or presidential democracy), but also as a legitimation principle, that is, a procedure that sets the terms for reaching legitimate decisions. Further, by legitimate decisions we mean that people accept the results because they find them right or worthy of respect.

In this perspective, only deliberation can ensure democratic legitimacy, as it entails the act of justifying the results to the people who are affected by them. Public deliberation is the way to find out what is good, right, and just in the political sphere of action. It is only possible to test the quality of arguments in a debate in which all affected parties are involved. This is the task of the public sphere, the realm outside of state administration and the market and in which

people gather and become a public and hold the decision-makers accountable. According to the criteria of discourse theory, only a norm that has been approved in free and open debate is valid (Habermas, 1996: 107). A public sphere whose generic set of conditions are freedom, inclusion, equality, participation, and an open agenda provides the arena for that debate. Thus, the quest for a European public sphere (or a set of strongly overlapping publics) is of utmost importance for democracy to thrive, given that the EU has become a polity with considerable governing competencies, and whose decisions affect both its citizens and Member States profoundly. For the peoples of Europe to become citizens (who see themselves not only as the subjects of the law, but also as its authors), they must be equipped with political rights and other requisite resources. Citizenship implies the ability to rule over one's equals and to be ruled in turn. This strategy envisions a pattern of integration that is responsive to *communicative power*. The deliberations that emanate from a multitude of public spheres are channeled into and shaped, transformed, and tested by a set of basic individual rights and democratic procedural arrangements. In this reading, rights are "legally institutionalized relations of universal respect for the autonomy and dignity of persons" (Anderson, 1995: xii). Legal rights are founded on the notion of reciprocal recognition, and as such can foster a sense of community allegiance.

This strategy is premised on ongoing constitution-making to establish a set of principles that provide the entity with democratic legitimacy. Such a strategy is also consistent with the integration process, as "the EU constitution lies less in the founding Treaties than in the gradual 'constitutionalisation' of the EU legal system" (Hix, 1999: 108).¹² The presumption is that public support will reside in a *constitutional patriotism* (Habermas, 1998, 2001), which emanates from a set of legally entrenched fundamental rights and democratic procedures, but which also reflects political affect and identification. In empirical terms, this will spring from a mutually supportive process in which constitution-making is carried forth so as to establish an EU citizenship based on entrenched political rights, reformed decision-making procedures, and clearer divisions of competencies along vertical and horizontal lines, that is, between the EU institutions and the Member States (vertical) and among the institutions at the EU level (horizontal). Such a process will, insofar as it occurs, likely stimulate further "parliamentarization," thus making the European Parliament (EP) a full-fledged parliament and the Council a "second" chamber and co-legislator with the EP.¹³ Other institutional measures could include the use of optional referenda and other methods aimed at amplifying the role and sphere of public deliberation (in a multitude of increasingly convergent public spheres) and critical scrutiny of decision-makers as the most prominent means to ensure that the common will prevails in the EU system. The legitimacy deficit can thus be "mended" by involving the citizens of Europe directly or via their representatives in the EU system of deliberation and decision-making. In this manner, a European demos is also shaped, but the approach is quite different from that pursued in the second strategy listed above. What is more, in this strategy the EU's foundation and its boundaries are justified within a cosmopolitan framework. The development of the EU is connected to and highly dependent on the support and further development of similar regional associations in the rest of the world and on a democratized and rights-enforcing United Nations (see Figure 4). Figure 4 depicts how a common sense of allegiance and attachment can be fostered through legal-institutional means.

Indicators of Strategy Three refer to the further delineation of a set of civil and

FIGURE 4. *Europe as a democratic multicultural federation*

political rights that permit Europeans to conceive of themselves as constitutional actors; an ongoing commitment to those legal and political institutional reforms that are conducive to the furtherance of post-national constitutional patriotism, including representative and accountable institutions; extensive constitutional deliberation; and the explicit recognition that the legitimacy of the EU is founded on a constitutional structure that appeals to fundamental principles of justice.

With regard to the internal structure and the workings of the EU, the question of forming a coherent will is also related to the question of the division of powers and competencies between levels of governance, as some policy areas both require and are more conducive to concerted action. The questions listed above cannot be assessed merely with reference to how much the EU has of each, because that would ignore the important “federal,” or “subsidiarity,” aspect of this process. The question also pertains to whether these policy areas can be justified as requiring collective EU action and a common EU position – in other words, the will, the need, and the ability to federalize.

There are obvious advantages associated with this strategy, as the EU comes to be seen as building on the very principles and rights that are uniquely European and normatively uncontroversial, since every Member State subscribes to them and since these moral norms are increasingly spread worldwide. One may also see this as a way to reduce the normative problem of limiting the EU or defining a set of acceptable boundaries. The EU’s boundaries are set by the constraints embedded in the functionality of popular representative democracy in Europe and in other similar regions. By delineating the EU in democratic terms, its boundaries can be justified within a cosmopolitan framework. The borders of the EU are in this perspective to be drawn both with regard to what is required for the Union itself in order for it to be a self-sustainable and well-functioning democratic entity and with regard to the support and further similar development of regional associations based on exclusive membership rights in the rest of the world (such as the North American Free Trade Agreement, Mercosur, the Association of Southeast Asian Nations Free Trade Area, and the African Union). In this way, both the problem of legitimacy and the problem of establishing a set of normatively acceptable borders are solved in a universalistic manner, that is, based on the principles of popular sovereignty and human rights.

Drawbacks to Strategy Three: Requirements Beyond Present Capabilities

The challenge to this way of solving the legitimacy problems pertains to the sheer heterogeneity as well as the weakly developed common understanding of the

European project, both of which are likely to become further exacerbated through enlargement. This is so because different developments, experiences, histories, traditions, and languages put the political discourse (the communicative community) under strain and make it difficult to obtain the kind of civic understanding, tolerance, and respect for pluralism that are all necessary to achieve post-national rights-based integration. This alternative may be correct in normative terms, but the social and civic prerequisites are not (yet) in place.

The EU is a dynamic entity. It is an "organization in motion," marked by polycentricity and flexibility and whose direction and underlying *telos* are still not clear. There is little consensus on what the EU is or should be, which inevitably hampers the EU's ability to handle emerging or new problems. At the same time, enlarging the EU and devising new collective measures regarding social policies and foreign and security policies require ever more willingness to pay the costs and to form deep and long-term commitments. A "we-feeling" (a sense of solidarity and trust) is needed. On the other hand, the unclear and ambiguous notion of the EU may also be a resource, as it may make it easier for a wider range of collective moods and interests to find reasons to comply. This process may foster the required "civicness" and trust; a common sense of identification can be created through an inclusive deliberation process. The demos is to be shaped by political means; hence, there can be no European demos without a European democracy.

In any case, reducing the ambitions of the EU, making it into a mere special-purpose regime, is highly questionable as a solution to its legitimation problems. When faced with today's challenges, as reflected in the changes wrought by globalization to both welfare and territorial borders, such an entity may not be capable of handling the problems effectively. There are, however, signs of the emergence of a rights-based union in the present reform process of the EU.

Constitutionalizing the EU

The establishment of the Convention on the Future of Europe is the single most important sign that the EU has involved itself in constitution-making.¹⁴ As noted above, the Laeken Declaration paved the way for the Convention to open up an explicit discussion of the question of a European constitution. It also left the Convention with a very open-ended mandate. This was framed as a list of 56 questions, which were cast under six broad headings. The Convention's President, Valéry Giscard d'Estaing, presented these in the following manner: "fundamental questions on Europe's role; the division of competence in the European Union; simplification of the Union's instruments; how the institutions work, and their democratic legitimacy; a single voice for Europe in international affairs; and finally, the approach to a Constitution for European citizens" (2002: 10). The Convention was asked to address a wide range of questions, ranging from core principles to rather mundane and technical or institution-specific questions. The Convention was also given considerable leverage to develop its own interpretation of its mandate. We turn now to its specific response, substantially and procedurally.

Substantive Proposals

There is wide agreement among analysts and decision-makers alike that the

Convention achieved more than an Intergovernmental Conference (IGC) would have.¹⁵ Among the most important substantive changes proposed by the Draft Constitutional Treaty are the following:

- The incorporation of the Charter of Fundamental Rights in the Constitution (European Convention, 2003d: II-1–54)
- The recognition of the legal personality of the Union (European Convention, 2003d: I-6)
- The elimination of the pillar structure (European Convention, 2003d: I-6, I-33, ref. III-302, I-24)
- The recognition of the supremacy of EU law (European Convention, 2003d: I-10.1)
- Reduction and simplification of the instruments used in law-making and decision-making procedures, plus the introduction of a hierarchy of legal acts (European Convention, 2003d: I-32–8)
- A delineation (although far from unambiguous) of the distribution of competences (European Convention, 2003d: I-11–14)
- The generalization of qualified majority voting in the Council and the designating of co-decision as the standard procedure (European Convention, 2003d: I-33, ref. 302, I-24), albeit subject to important exceptions (European Convention, 2003d: III)
- Changes to the Council presidency (elected for a once-renewable term of 2.5 years) (European Convention, 2003d: I-21, I-27), and
- A popular right of initiative (European Convention, 2003d: I-46.4).

This list suggests a marked change in the direction of a federal, rights-based Union: the Convention's work and results have been informed by Strategy Three. However, it is important to test this impression by examining the draft more closely. If the Convention's work were to result in a constitution that is wholly consistent with Strategy Three, its draft should fully reflect the fundamental tenets of the democratic constitutional state and highlight basic rights and representative democracy. More explicitly, it should:

- Propose a European Constitution with a fully incorporated Bill of Rights
- Include provisions to ensure that the EU will be based on representative and accountable government, subject to strict requirements of transparency
- Call for a division of powers and competences within the EU that respects individual autonomy, that is, that ensure that the Union's sphere of competence is consistent with the requirements of political citizenship
- Include provisions for constitutional change based on the principle of popular, and not Member State, sovereignty
- Call for the creation of a "Constitution for Europe," and not a mere Constitutional Treaty, and
- Propose a method for framing the Constitution that would be transparent, deliberative, and widely representative.

On the first point, that of proposing a full-fledged Constitution for Europe, it is notable that the Convention was set up as merely a *preparatory* body, that is, it was only designated to come up with one or several proposals that the subsequent Intergovernmental Conference (which started its work in October 2003) would discuss. The Convention had not been designated as a Constitutional Convention, neither was it equipped with decision-making powers. The IGC is, according to Article 48 of

the TEU, the body formally endowed with the authority to undertake treaty changes. This weak formal status of the Convention meant that, at least in principle, whatever it came up with could be overturned by the Member States, either during the IGC or at the ratification stage. It is also notable that both these stages will include the current Member States, as well as the 10 applicants that formally joined the EU in May 2004. The process is therefore steeped in, and has to relate to, the core tenets of national-sovereignty protection embedded in Strategy One.

Yet, the Convention did come up with a proposal draped in constitutional cloth and garb. In symbolic terms, the legitimacy of the Union is said to derive from the citizens and the Member States (cf. European Convention, 2003d: I-1). The draft also includes a complete Charter (Bill of Rights) in Part Two of the Draft Constitution. The inclusion of the Charter is a significant sign of the embracing of Strategy Three. To corroborate this, it is necessary to examine the nature and composition of the rights in the Charter, as well as whether the institutional structure of the EU might seriously curtail such rights. For one, to be fully reflective of Strategy Three, the Charter would have to strengthen the rights of EU citizens. In addition, for the Charter to be fully effective, the Draft Constitution would have to reform the institutional structure of the EU.

The purpose of the Charter was to make *existing rights* more visible to EU citizens, not to add new rights or new competences to the Union. The Charter was, however, culled from a wide range of sources, including EU law, the European Convention on Human Rights (ECHR), national constitutional traditions, and the European Social Charter. As a result, it contains a comprehensive list of rights (including civil, political, social, and economic ones, listed in 50 Articles). In terms of the range of rights, it does *not* differ much from conventional state-based Charters or Bills of Rights, although it is more up to date than most of these. Further, the underlying philosophy of allegiance that can be discerned from the Charter is one that is reflective of Strategy Three: a universally oriented and essentially secular constitutional patriotism, rather than a communitarian-republican commitment to a set of specific and uniquely European cultural values. But the nature of the Union's value basis was contested in both Conventions. This was particularly so with regard to the role of religion. As noted, there was a strong appeal for an explicit mention of Europe's religious and, more precisely, *Christian* heritage. With regard to the Charter, it was only the German-language version of the Charter Preamble (now included in Part II of the Draft Constitution) that included a reference to religion. In the Preamble to the Draft Constitution proper, there is explicit mention of the religious inheritance of Europe, but no mention of Christianity (European Convention, 2003d: 3).

Concomitantly, Title IV of the Charter, entitled "Solidarity," contains a wide range of social rights, reflective of Strategy Two. The commitment to social values could be seen to refer to a common sociocultural substrate in western Europe – the welfare state and social rights. Such solidarity could be seen as necessary to sustain a European polity with redistributive measures. However, their status is that of ordinary rights or policy objectives, rather than as fundamental rights proper (Menéndez, 2003: 198). This designation is indicative of the weak competence the EU has in the field of social rights, thus raising questions as to its ability to serve as a market-correcting vehicle. Such a role is necessary if the Charter is to serve as a proper promoter of a rights-based Union founded on the principles of justice and freedom. A related issue here is that the scope of the Charter is circumscribed by the horizontal provisions found in Articles 51–4, that is, it only applies to the

actions of the EU institutions and the Member States' authorities when implementing EU law. In a similar vein, the Charter adopts the citizenship provisions in EU law, and these are based on a weak notion of citizens' public autonomy (Fossum, 2003a).¹⁶ The Charter, while in symbolic terms a potentially important spearhead for institutional reform, suffers from some structural defects.

These comments indicate that when assessing the Strategy Three thrust of the Draft, we cannot consider the Charter in isolation. It has to be seen in relation to the highly complex and composite EU, with strong remnants of a Union derived from the Member States, and with a strong internal market focus. The further question, therefore, is whether the other reforms in the Convention draft will help strengthen the bite of the Charter.

The second point pertains to representative and accountable government. Several of the proposals in the Draft Constitution would heighten the democratic quality of the Union, both in terms of representation and in terms of accountability. The elevation of co-decision to the standard legislative procedure (subject to important exceptions spelled out in Part III of the Draft Constitution) will help greatly to amplify the role of the EP within the EU institutional system, as it essentially places the EP on a par with the Council as a legislative chamber. Increased transparency requirements (European Convention, 2003d: I-49, III-304, III-305) would improve individual and interinstitutional lines of accountability. In the same vein, the elimination of the pillar structure and the recognition of the Union's legal personality (European Convention, 2003d: I-6) would make the Union more institutionally coherent and strengthen the Court's presence within the EU's institutional system. Still, the Parliament cannot take initiatives but has to work through the Commission. The latter is responsible to Parliament but does not emanate from it. The division of responsibility between the Commission and Council as executive bodies is unclear. Hence, the Draft Constitution proposal is still deficient in democratic terms.

The third point, that of the division of powers and competences and their consistency with political citizenship requirements (the protection of a broad spectrum of rights at the EU level), is hard to assess. The division of powers between levels has become clearer than in the present system, but the large number of shared competences means that there will be considerable uncertainty. Although a simplified version of qualified majority voting (QMV) has become the norm (to take effect from 2009), the Member States retain unanimity in critical issue areas such as social policy, taxation, and foreign and security policies. The vertical division of competences leaves few issue areas within the exclusive remit of the Union. Key areas in which the Union is equipped with exclusive competence are monetary policy, common commercial policy, and customs – all areas related to the Internal Market and hence conducive to a narrow economic citizenship. Those devices that are generally held to be market correcting are in areas of shared competence (cf. European Convention, 2003d: I-13), in the coordination of economic and employment policies (cf. European Convention, 2003d: I-14), and in areas of supporting, coordinating, or complementary action (cf. European Convention, 2003d: I-16). Symbolically, at least, this division does not appear consistent with Strategy Three and apparently continues to leave a strong Strategy One imprint upon the EU.

The Convention also failed to reach agreement in the critical issue area of foreign and security policy. Here, despite strong public support for a common EU foreign policy, the different responses to the Iraq war served to split the members

of the Convention and precluded it from acting.¹⁷ This is another example of national-sovereignty preservation, and consistent with the tenets of Strategy One. The overall finding is that the proposed institutional reforms will clearly *not* lead to a complete transformation of the EU's institutional system in the direction of Strategy Three.

The fourth point is that constitutional change should be based on the principle of popular, and not Member State, sovereignty. The draft here did not abandon the principle of Member State sovereignty. It essentially retained national veto power in treaty and constitutional change (cf. European Convention, 2003d: IV-7). It did, however, insert new provisions on the need for a Convention at the treaty preparatory stage, but precisely how extensive its application and when it will be triggered remain to be established. The retention of the national veto is not compatible with the notion of popular sovereignty, as this is spelled out by Strategy Three.

Preserving a national veto also touches on the fifth point, namely, the essential designation of the document as a constitution. If the veto is retained, then we are talking about a *constitutional treaty* and not a democratic constitution proper. A treaty is a contract between states and not a pact between citizens. The retention of the veto also raises the prospect of a European constitution serving less as a vehicle for further development, as suggested in the Draft title, and more as a system of restraint. The difficulty of forging agreement among 25 plus states could make the constitution into a straitjacket (a fear that many members of the Convention harbored).

These observations suggest that whereas the Draft Constitution contains the strongest commitment to Strategy Three ever expressed by the EU, it also retains a very strong nation-state presence within the EU. The Draft contains a strong commitment to the protection of *national identities*: "The Union shall respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" (European Convention, 2003d: I-5). The commitment to universal values expressed above is thus combined with a strong commitment to national (and regional) identity.¹⁸ This latter commitment is combined with new provisions to strengthen national democracy in EU matters. This is done through making national parliaments more involved in the decision-making processes at the Union level, rather than by removing items from the Union's remit. The Draft Constitution contains a Protocol on national parliaments and a Protocol on subsidiarity, both of which are provisions to strengthen the role of national parliaments within the EU system. This latter provision may therefore also serve to modify the Strategy One imprint here.

Lastly, for the Constitution to be wholly consistent with Strategy Three, it would have to be transparent, deliberative, and widely representative. By "deliberation" we mean a process of argumentation in which actors are swayed by the force of the better argument. Debate and discussion prior to decision-making facilitate preference formation and revision. Further, in the case of conflict, the process of arguing has the effect of changing the standpoint of at least one of the actors. The Convention was set up as a deliberative body. This and other traits have been seen to mark off the Convention approach from the former IGC method, which has brought about the type of treaty-based constitution that the EU currently has. The IGC method of treaty-making and change is fundamentally intergovernmental in its orientation and has many of the traits of *interstate diplomacy* (Curtin, 1993). The Member States are the dominant actors, and parliamentary and other deliberative

bodies play a marginal role. The negotiations take place in a closed, secretive, and “bargaining” manner – all of which are characteristic features of the first strategy listed above.

Thus, the substance of the Draft Constitution falls short of Strategy Three in many important ways. We turn now to a closer examination of questions of process.

Procedures Followed

To begin with, the Convention, while intended to be deliberative, was not set up as a Constitutional Convention and no effort was made to obtain a popular mandate through election or other direct consultation. In these circumstances, it would seem to be particularly important for the Convention to compensate for some of these defects through its own work. This means that two traits would have to be amplified: (1) its ability to reflect and project the range of visions and arguments in Europe, that is, its representativeness, and (2) its ability to foster agreement through deliberation.

The Convention’s composition largely duplicated that of the Convention that forged the Charter of Fundamental Rights of the European Union (2000), that is, it was made up of a majority of parliamentarians (46 out of 66 voting members and 26 out of 39 from the candidate countries). It had also appointed representatives from the Member State governments, but these were in a clear minority. The inclusion of both sets of representatives could be construed as a compromise solution, between a government-led forum (reminiscent of an IGC) and a parliamentary assembly (cf. Closa, 2004). This construction makes it important to establish whether the government representatives operated under the tight control of their respective governments or had a fairly open mandate. Perhaps the most conspicuous trait of the Convention was its domination by representatives from the EU institutions and the Member States. There was no direct subnational representation and no direct representation from civil society, although both categories had a limited number of observers present. In terms of mirroring the composition and diversity of European society, the Convention suffered from a number of weaknesses, particularly in having a very low percentage of women and in utterly failing to reflect the increasingly multicultural nature of many of its Member States (Shaw, 2003). Thus although the Convention’s composition was far more representative than any previous constitution-making body in the EU, its composition, nevertheless, did not properly represent or reflect European society.

Presumably, then, what could matter more to its legitimacy would be its deliberative quality – its ability to foster consensus through deliberation. The Convention was set up as a deliberative body. Its deliberations would run for longer than 16 months, and its working method was to be marked by openness and transparency. Its president, Valéry Giscard d’Estaing, underlined the deliberative character of this body in his inaugural speech on February 28 2002. Each member was asked to refrain from acting as a spokesperson for the organization that appointed her or him; there would be time to deliberate; decisions would be reached by consensus rather than through voting; and the end result (one proposal) had to be agreed upon consensually (cf. Maignette, 2004). Giscard d’Estaing concluded that “If your contributions genuinely seek to prepare a consensus, and if you take account of the proposals and comments made by the

other members of the Convention, then the content of the final consensus can be worked out step by step here within the Convention.”

The work of the Convention did comply with some of the tenets of the deliberative model (cf. Fossum and Menéndez, 2003; Magnette, 2004; Maurer, 2003), but to a variable degree. The process was structured to ensure that different views could come to the fore and throughout the process opinions and positions changed. The Draft Constitution was also accepted by a very large majority of Convention members. However, as the different portions of the Draft appeared, deliberative norms were more frequently violated. Giscard d’Estaing did so himself when on April 22 2003 he floated a personal proposal to the newspaper *Le Monde* prior to presenting this to his colleagues in the Praesidium, in an effort to break a deadlock on institutional questions (European Convention, 2003b: 3). In the last few months of the Convention’s work, the process was de facto reorganized into three sections: Members of the European Parliament, national parliamentarians, and government representatives. The core institutional interests thus gained a prominent position in the final stages of the Convention’s work. Furthermore, voting was introduced, albeit only in the Praesidium.¹⁹ In the final days, there were instances of brinkmanship and high tensions, and Giscard d’Estaing was accused of attaching different weight to members, de facto privileging the government representatives.

Giscard d’Estaing’s actions and much of the Convention’s work was driven by what may be termed *forward linkage*. That the Convention’s work has to be scrutinized by and is ultimately subject to the approval of each Member State in the IGC and in the ratification stage has deeply shaped and affected its work. It was probably one important reason for the Convention’s working close to the text of the treaties, so that much of its work revolved around assessing the provisions already in place (adding, revising, keeping, and cutting). Forward linkage is also reflected in heightened government interest in and concern with the Convention. Over time, a number of Member States replaced their initial government representatives, either with foreign ministers or with more senior ministers.²⁰ This tightened the links to the respective governments and served to shift some of the inevitable intergovernmental bargaining into the Convention. This forward linkage aspect could mean that whatever agreements were struck in the Convention would have a greater probability of lasting through the IGC. But it could also affect negatively the Convention’s legitimacy as a deliberative body.

The Draft Constitution was presented and understood as a compromise, but is better seen as a *working agreement* (cf. Eriksen, 2003). The deliberative imprint is clear, as positions have been moved and standpoints have changed. The agreement rests on reasonable reasons, not only on compromised interests. This designation is consistent with participants’ accounts. They portrayed the Draft as the best that could be got under the circumstances, but they also underlined that this was a result that had been forged through a lengthy argumentative procedure; hence ultimately lending legitimacy to this result.

Here again in the operation of the Convention, partly induced by its hybridity (partly an IGC and partly a freestanding deliberative body), we see the complex interweaving of the bounded mandate and bargaining approach to decision-making (characteristic of Strategy One) coexisting in considerable tension with the deliberative approach to decision-making (characteristic of Strategy Three).

Conclusion

Many see the EU as currently caught between the Scylla of unfettered marketization and the Charybdis of overambitious nation-building. This tension certainly runs through the EU, as a system in motion in a more fundamental sense. But this does not mean that it is necessarily locked in between two incompatibles. There is a third way, as presented in our Strategy Three, which has become steadily more manifest and apparent since the early 1990s. This third way, it should be noted, has deep historical roots in Europe.

Since the French Revolution, nation-states have not “existed in isolation as bounded geographical totalities, . . . they are better thought of as multiple overlapping networks of interaction” (Held, 1995). This is a process very much speeded up by the EU, which has “established the bold idea to disconnect nationality and citizenship and this idea may well evolve [in]to [a] general principle which ultimately transforms the ideal of cosmopolitan citizenship into reality” (Preuss, 1998: 149). In this respect, the EU is pursuing the modern idea of statehood, as divorced from nationhood: the polity is not bound by pre-political bonds. We are now witnessing a constitution-making process that may do the job, but because of present constraints the outcome is still uncertain.

Our conclusion is that the EU has taken a stride forward from just a few years ago in that it has embarked on a self-conscious process of forging a constitution. There is a sense among many of the members of the Convention and its observers that what we have been witnessing is of historic proportions. This process admittedly takes the existing structure as its point of departure, and the result is likely to retain many of the unique features of the EU *qua polity*. But the Draft Constitution not only offers a complex mixture of the three legitimation strategies, but the character of the mixture has changed. The Convention’s work, if adopted, will move the EU in the direction of the third strategy listed above, from a partly derivative *condominio*-type entity and in the direction of a state-type entity. What we see is not a full leap, but nonetheless a major step toward finding a workable arrangement between the dominant strategies (One and Three) that run through the Draft and that also mark the Union.

This attempt deeply affects the Union’s approach to values, an approach which itself reflects this tension and that is played out in the efforts to accommodate values associated with universalism and with deep diversity (Fossum, 2003b). In cultural terms, it is a matter of reconciling different value sets through an appeal to European values of a universal bent. In social terms, it is a matter of nourishing at the European level the sense of solidarity that was fostered by the welfare state. This makes for a complex accommodation of distinctively national, European, and universal values and principles. The European Union is still a work in progress.

Notes

1. There is a large body of literature on this. See, for instance, Abromeit (1998), Beetham and Lord (1998), Bellamy and Castiglione (2000), Eriksen and Fossum (2000), Nentwich and Weale (1998), Scharpf (1999), Schmitter (2000), and Weiler (1999).
2. For a rich source of different views, consider the more than 1080 responses to the first 16 articles of the proposed constitutional treaty (see <http://european-convention.eu.int/amendemTrait.asp?lang=EN>).
3. For an assessment of this speech, see Joerges et al. (2001).
4. See Abromeit (1998) and Scharpf (1999). Also belonging to this group of scholars are Majone (1998: 5–28) and Moravcsik (1993, 1998).

5. For this term, see, for instance, Majone (1996) and Scharpf (1999).
6. This is to say that such forms of collective action could theoretically be modeled as rational choices from the actors' point of view by means of game theory, for example, through tit-for-tat strategies and repetitive games (Axelrod, 1984). However, these are "as if" explanations and seem highly speculative and unrealistic, and quite often also cynical. For instance, the tendency to explain integration and enlargement as the mere results of side-payments seems overly suspicious and overlooks the force of justice in international affairs and of opinions about rectification of previously committed injustices in Europe.
7. This kind of reasoning is quite prevalent among politicians. Consider, for instance, Giscard d'Estaing's remark to the effect that Turkey could not be a member of the EU because it is not "European." We can also find traces of this in many academic analyses. Many of these analysts use this as a key standard or reference from which they develop their own positions, often hybrids or composites with additional ingredients or modifications. See, for instance, Bellamy and Castiglione (1998, 2000). Other analysts take this as their desired position, but lament its unattainability. See, for instance, Grimm (1995: 282–302), Guéhenno (1996), and Offe (1998).
8. In the plenary debate on the proposed Article 2 of the Constitutional Treaty, on the Union's values, 29 Convention members underlined the need to make reference to religion as part of Europe's value foundation. References were made to God (modeled on the Polish Constitution), to Christianity, and to Judean-Christian roots. See European Convention (2003a: 18).
9. "Deep diversity" refers to a "plurality of ways of belonging" to a polity and is open to multiple conceptions of citizenship which coexist within the same state (Taylor, 1993).
10. The conditions are spelled out in Article I-59, Voluntary withdrawal from the Union (European Convention, 2003d).
11. See, for example, Habermas (1998, 2001), Held (1995), Preuss (1998), and Weiler (1999).
12. See also Stein (1981: 1–27) and Weiler (1991: 243–83; 1999).
13. This model deviates from the one outlined by Habermas (2004) with regard to its federal aspects. Habermas speaks of a *federation of nation-states* and sees the *Chamber of nations* (the Council) as the main legislative body. Our model envisages full "parliamentarization." Institutionally speaking, the role of the Member States will be more like that of the German *Länder* in the federal model of Germany (albeit the division of powers and competences will not equal that of the German model).
14. It should be noted that the assessment contained in this section is based on documents issued by and written on the Convention, personal attendance at six plenary sessions, interviews with Convention members and social movements, and attendance at several conferences on the Convention.
15. See Closa (2004), Craig (2003), Crum (2003), Hughes (2003), Magnette (2004), and Maurer (2003). For participants' accounts, see Duff (2003) and European Convention (2003c).
16. Some of the more than 30 constitutional proposals that have been submitted to the Convention contain citizenship provisions that could rectify this. See, for instance, Member of the European Parliament Jo Leinen's (2002) draft proposal entitled *Draft Constitution of the European Union*.
17. Eurobarometer figures released in March 2003 revealed that since spring 2002 public support for the principle of a common foreign policy had risen from 64 percent to 67 percent, with 73 percent supporting the principle of a common security and defense policy. See http://europa.eu.int/comm/public_opinion/archives/eb/eb58/eb58_en.pdf.
18. This protection of national and regional identities is evocative of *deep diversity*.
19. This took place on April 23 2003 as part of the Praesidium's fierce reaction to the proposal Giscard d'Estaing had floated to the press (see EU Constitution Project Newsletter, April 2003).
20. For these changes, see Closa (2004).

References

- Abromeit, H. (1998). *Democracy in Europe*. Oxford: Berghahn Books.
- Anderson, J. (1995). "Translator's Introduction," in A. Honneth (ed.), *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge: Polity Press.
- Axelrod, R. (1984). *The Evolution of Cooperation*. New York: Basic Books.
- Bellamy, R. and Castiglione, D. (1998). "Between Cosmopolis and Community: Three Models of Rights and Democracy within the European Union," in D. Archibugi, D. Held and M. Köhler (eds), *Re-imagining Political Community*. Cambridge: Polity Press.
- Bellamy, R. and Castiglione, D. (2000). "The Uses of Democracy: Reflections on the European Democratic Deficit," in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration Through Deliberation?* London: Routledge.
- Beetham, D. and Lord, C. (1998). *Legitimacy in the European Union*. London: Longman.
- Charter Convention (2000). Charte 4470/00 CONVENT 47. *Draft Charter of Fundamental Rights of the European Union—Complete Text of the Charter Proposed by the Praesidium Following the Meeting Held from 11 to 13 September 2000 and Based on CHARTE 4422/00 CONVENT 45 1*, September 14 2000. Brussels.
- Charter of Fundamental Rights of the European Union (2000). *Official Journal of the European Communities*, 18.12.2000, C 364/01-22/2000, URL: http://europa.eu.int/comm/justice_home/unit/charte/index_en.html.
- Closa, C. (2004). "The Convention Method and the Transformation of EU Constitutional Politics," in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds), *Developing a Constitution for Europe*. London: Routledge.
- Craig, P. (2003). "What Constitution Does Europe Need? The House that Giscard Built: Constitutional Rooms with a View," Federal Trust Papers, August. London: Federal Trust.
- Crum, B. (2003). "Towards Finality? A Preliminary Assessment of the Achievements of the European Convention," ARENA Working Paper 03/4. Oslo: ARENA.
- Curtin, D. (1993). "The Constitutional Structure of the Union: A Europe of Bits and Pieces," *Common Market Law Review* 30: 17–69.
- d'Estaing, V. Giscard (2002). "Introductory Speech to the Convention on the Future of Europe," SN 1565/02, February 28.
- Duff, A. (2003). "A Liberal Reaction to the European Convention and the Inter-governmental Conference," Federal Trust Papers, July. London: Federal Trust.
- Durkheim, E. (1964). *The Division of Labor in Society*. New York: Free Press.
- Dworkin, R. (1984). "Rights as Trumps," in J. Waldron (ed.), *Theories of Rights*. Oxford: Oxford University Press.
- Eriksen, E.O. (2003). "Integration and the Quest for Consensus – On the Micro-foundation of Supranationalism," in E.O. Eriksen, C. Joerges and J. Neyer (eds) *European Governance, Deliberation and the Quest for Democratisation*. ARENA Report 03/2, Oslo: ARENA.
- Eriksen, E.O. and Fossum, J.E., eds (2000). *Democracy in the European Union: Integration Through Deliberation?* London: Routledge.
- Etzioni-Halevy, E. (2002). "Linkage Deficits in Transnational Politics," *International Political Science Review* 23(2): 203–22.
- European Convention (2003a). *Reactions to Draft Articles 1 to 16 of the Constitutional Treaty – Analysis*, CONV 574/1/03 REV 1/2003, February 26, Brussels.
- European Convention (2003b). *Summary Report of the Plenary Session 24 and 25 April*, CONV 696/03, April 30, Brussels.
- European Convention (2003c). *Summary Report of the Plenary Session 11 and 13 June*, CONV 814/03, June 19, Brussels.
- European Convention (2003d). *Draft Treaty Establishing a Constitution for Europe*, CONV 850/03, July 18, Brussels.
- European Council (2001). *Laeken Declaration on the Future of the European Union*, SN 273/01, December 15, Laeken.
- Fischer, J. (2000). "'Vom Staatenverbund zur Föderation,' Speech at Humboldt University on 12 May 2000," in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of*

- Constitution for What Kind of Polity? – Responses to Joschka Fischer*. San Domenico: European University Institute.
- Fossum, J.E. (2003a). "The European Charter: Between Deep Diversity and Constitutional Patriotism," in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds), *The Chartering of Europe*. Baden-Baden: Nomos.
- Fossum, J.E. (2003b). "The European Union in Search of an Identity," *European Journal of Political Theory* 2(3): 319–40.
- Fossum, J.E. and Menéndez, A.J. (2003). "The Constitution's Gift: A Deliberative Democratic Analysis of Constitution-making in the European Union." Paper presented at the CIDEL Workshop "Deliberative Constitutional Politics in the EU", Albarracín, Spain, June 20–1.
- Grimm, D. (1995). "Does Europe Need a Constitution?" *European Law Journal* 1(3): 282–302.
- Guéhenno, J.M. (1996). "Europas Demokratie erneuern – Stärkung der gemeinschaftsbildende Kraft der Politik," in W. Weidenfeld (ed.), *Demokratie am Wendepunkt*. Berlin: Siedler Verlag.
- Habermas, J. (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law*. Cambridge, MA: MIT Press.
- Habermas, J. (1998). *The Inclusion of the Other*. Cambridge: Polity Press.
- Habermas, J. (2001). *The Post-national Constellation*. Cambridge: Polity Press.
- Habermas, J. (2004). "Why Europe Needs a Constitution," in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds) *Developing a Constitution for Europe*. London: Routledge.
- Held, D. (1995). *Democracy and the Global Order*. Cambridge: Polity Press.
- Hix, S. (1999). *The Political System of the European Union*. Basingstoke: Macmillan.
- Hughes, K. (2003). "A Dynamic and Democratic EU or Muddling Through Again? Assessing the EU's Draft Constitution," Federal Trust Papers, August, URL: <http://www.fedtrust.co.uk/Media/KirstyHughes.pdf>. London: Federal Trust.
- Ipsen, H.P. (1972). *Europäisches Gemeinschaftsrecht*. Tübingen: Mohr/Siebeck.
- Joerges, C., Mény, Y. and Weiler, J.H.H., eds (2001). *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*. San Domenico: European University Institute.
- Leinen, J. (2002). *Draft Constitution of the European Union*, October. Brussels: European Parliament.
- Magnette, P. (2004). "Deliberation or Bargaining? Coping with Constitutional Conflicts in the Convention on the Future of Europe," in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds), *Developing a Constitution for Europe*. London: Routledge.
- Majone, G. (1996). *Regulating Europe*. London: Routledge.
- Majone, G. (1998). "Europe's 'Democratic Deficit': the Question of Standards," *European Law Journal* 4(1): 5–28.
- Maurer, A. (2003). "Less Bargaining – More Deliberation: The Convention Method for Enhancing EU Democracy," *Internationale Politik und Gesellschaft* 1: 167–90.
- Menéndez, A.J. (2003). "'Rights to Solidarity.' Balancing Solidarity and Economic Freedoms," in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds), *The Chartering of Europe*. Baden-Baden: Nomos.
- Miller, D. (1995). *On Nationality*. Oxford: Oxford University Press.
- Moravcsik, A. (1993). "A Liberal Intergovernmental Approach to the EC," *Journal of Common Market Studies* 31(4): 473–524.
- Moravcsik, A. (1998). *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca, NY: Cornell University Press.
- Nentwich, M. and Weale, A., eds (1998). *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*. London: Routledge.
- Offe, C. (1998). "Demokratie und Wohlfahrtsstaat: eine europäische Regimeform unter dem Stress der europäischen Integration," in W. Streeck (ed) *Internationale Wirtschaft, Nationale Demokratie. Herausforderungen für die Demokratietheorie*. Frankfurt am Main: Campus Verlag.
- Preuss, U. (1998). "Citizenship in the European Union: A Paradigm for Transnational Democracy?" in D. Archibugi, D. Held and M. Köhler (eds), *Re-imagining Political Community*. Cambridge: Polity Press.

- Rawls, J. (1993). *Political Liberalism*. New York: Columbia University Press.
- Rokkan, S. (1975). "Dimensions of State Formation and Nation Building: A Possible Paradigm for Research on Variations Within Europe," in C. Tilly (ed.), *The Formation of National States in Western Europe*. Princeton, NJ: Princeton University Press.
- Sandel, M. (1982). *Liberalism and the Limits of Justice*. Cambridge: Cambridge University Press.
- Scharpf, F.W. (1999). *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press.
- Schmitter, P.C. (1996). "Imagining the Future of the Euro-Polity with the Help of New Concepts," in G. Marks, F.W. Scharpf, P.C. Schmitter and W. Streeck (eds), *Governance in the European Union*. London: Sage.
- Schmitter, P.C. (2000). *How to Democratize the European Union... And Why Bother?* Oxford: Rowman and Littlefield.
- Schönlau, J. (2003). "New Values for Europe? Deliberation, Compromise, and Coercion in Drafting the Preamble to the EU Charter of Fundamental Rights," in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds), *The Chartering of Europe*. Baden-Baden: Nomos.
- Shaw, J. (2003). "Process, Responsibility and Inclusion in EU Constitutionalism," *European Law Journal* 9(1): 45–68.
- Stein, E. (1981). "Lawyers, Judges, and the Making of a Transnational Constitution," *American Journal of International Law* 75: 1–27.
- Taylor, C. (1993). *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*. Montreal and Kingston: McGill-Queen's University Press.
- Weiler, J.H.H. (1991). "The Transformation of Europe," *Yale Law Journal* 100: 243–83.
- Weiler, J.H.H. (1999). *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays*. Cambridge: Cambridge University Press.

Biographical Notes

ERIK ODDVAR ERIKSEN is Professor of Political Science at ARENA, University of Oslo. His main research fields are political theory, democratic governance, public policy, and European integration. Recent publications include *Kommunikativ ledelse* (1999), *Democracy in the European Union* (co-edited with John Erik Fossum) (2000), *Demokratiets sorte hull* (2001), *Understanding Habermas* (co-authored with Jarle Weigård) (2003), *The Chartering of Europe* (co-edited with John Erik Fossum and Agustín José Menéndez) (2003), and *Developing a Constitution for Europe* (co-edited with John Erik Fossum and Agustín José Menéndez) (2004). ADDRESS: ARENA, P.O. Box 1143, Blindern, N-0317 Oslo, Norway [email: e.o.eriksen@arena.uio.no].

JOHN ERIK FOSSUM is Senior Researcher at ARENA, University of Oslo and Associate Professor, Department of Administration and Organization Theory, University of Bergen. His main research fields are comparative politics and political theory, constitutionalism, and democratic legitimacy in the European Union and Canada. Recent publications include *Democracy in the European Union* (co-edited with Erik Oddvar Eriksen) (2000), "The European Union in Search of an Identity" (2003), *The Chartering of Europe* (co-edited with Erik Oddvar Eriksen and Agustín José Menéndez) (2003), and *Developing a Constitution for Europe*, (co-edited with Erik Oddvar Eriksen and Agustín José Menéndez) (2004). ADDRESS: ARENA, P.O. Box 1143, Blindern, N-0317 Oslo, Norway [email: j.e.fossum@arena.uio.no].

Acknowledgments. The authors are grateful for comments on earlier versions of this article from the members of the CIDEL group at ARENA, as well as the anonymous referees for the *International Political Science Review*.