



The Robert Schuman Centre for Advanced Studies
European University Institute, Florence
Jean Monnet Center for International and Regional
Economic Law & Justice
NYU School of Law



Christian Joerges, Yves Mény, J. H. H. Weiler (eds)

Jean Monnet Working Paper No. 6/01

**Mountain or Molehill ?:
A Critical Appraisal of the Commission White Paper on Governance**

With contributions by

*F. W. Scharpf • M. Telò • P. Magnette • N. Walker • C. Möllers • E. O. Eriksen
A. Héritier • P. Schmitter • D. Trubek / J. Mosher • K. A. Armstrong • C. Joerges • D. Curtin
J. Shaw • P. Steinberg • B. Kohler-Koch • M. Wind • N. MacCormick • J. H. H. Weiler*

Inge Burgess, Chris Engert
(assoc. eds)

www.iue.it/RSC/
www.JeanMonnetProgram.org

Editors
Christian Joerges
Yves Mény
J. H. H. Weiler
Assoc. eds.
Inge Burgess, Chris Engert

Mountain or Molehill?
A critical appraisal of the Commission
White Paper on Governance

Robert Schuman Centre for Advanced Studies
EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

The Jean Monnet Program
HARVARD LAW SCHOOL AND NYU SCHOOL OF LAW.

Websites:

The contributions in this volume may also be found at:

<http://www.iue.it/RSC/Governance>

and

<http://www.jeanmonnetprogram.org/papers/01/010601.html>

All rights reserved.

No part of this publication may be reproduced in any form without the permission of the authors.

© Remains with the individual authors

THE WHITE PAPER IN CONSTITUTIONAL CONTEXT

Neil Walker

1. Introduction

The Commission's White Paper on Governance in the European Union warns us at the outset that it does not and cannot be expected to "provide a magic cure for everything"¹ - 'everything' presumably referring to all the problems of legitimacy which attend the European Union today. A platitude perhaps, and a somewhat defensive one at that, but a useful starting point for discussion, nonetheless. For, in addressing the various criticisms of the White Paper that have been made² or that, in due course, may be made, it is important to ask the prior question: what alternative or additional line of argument or proposal might we *reasonably* have expected the Commission to come up with on this or that point? Our sense of what is reasonable here is, at least, threefold. First, reasonable, given the organisational culture and institutional interests of the Commission;³ secondly, reasonable, given the limited role and competence of the White Paper exercise in a broader process of reform; thirdly, reasonable, given the depth and complexity of the problems of legitimacy facing the unprecedented, multi-level, multi-functional European post-state polity and the resistance of these problems to definitive institutional solution.

The point of this initial orientation is certainly not to grant the Commission immunity from criticism. Even permitting our charitably expansive definition of the constraints on the reasonable scope of the Commission's strategic and normative perspective, there are plenty of faults to pick with the White Paper's conclusions, some of which are discussed below. Moreover, perhaps the sense depicted above of the constraints upon what might reasonably be expected is not just charitably expansive, but unduly and indulgently so. After all, why *should* the Commission be excused if, and to the extent that, they have acted as cultural dupes or rational-interest maximisers? The answer, of course, is that they should not be allowed any general exculpation on these grounds. Yet, something might still be said in mitigation of the initial proposition. Our sense of reasonable expectation may be more concerned with behavioural prediction than value judgement - with what was likely to happen in all the relevant circumstances, rather than what ought to have happened in an ideal or better world. But if this casts doubt on the sobriety of our expectations of anything better, it still offers no real consolation for the shortcomings of the actual result. Thankfully, however, this is not all that can be said on the matter. For our second sense of reasonable limitations points precisely to the fact that we cannot sensibly regard the White Paper process and result in isolation. As it matured, the White Paper exercise became clearly and explicitly linked with a broader constitutional process organised around

¹ European Governance: A White Paper, Commission of the European Communities, Brussels 25.7.2001, Com(2001) 428, p.9.

² See, for example, F. W. Scharpf, "European Governance: Common Concerns vs. The Challenge of Diversity," in the Present Symposium.

³ See, for example, H. Wallace, "The Institutional Setting," in H. Wallace and W. Wallace (eds) Policy-Making in the European Union, (4th ed., Oxford:OUP, 2000)

the axis of the post-Nice agenda. So, the White Paper need not, and should not, be evaluated as a definitive or even a lasting contribution to the contemporary debate on institutional reform, but merely as an episode within, and contribution to, an extended constitutional narrative. It is in these rather different and *ex hypothesi* more hopeful terms that the present contribution seeks to assess the contribution of the White Paper.

In introducing this wider constitutional context, however, we should also remain alert to our third sense of reasonable expectations. Even the broadest constitutional framework cannot hope to provide ‘a magic cure for everything’. The legitimacy of a political order is always significantly underdetermined by its constitutional framework, no matter how successful the constitutional framework is in elaborating this or that regulatory ideal.⁴ Moreover, as we shall see, some of the broader factors at work which account for the legitimacy deficit of the polity make it difficult to generate a constitutional framework which is optimal – that is to say, comes closest to a broadly-agreed regulatory ideal – in treating the problems of legitimacy. This sense of proportion should inform our reading of the White Paper just as much as the sense of wider possibilities derived from placing the said document in the context of a wider process of reform.

In addressing the wider constitutional context and implications of the White Paper exercise, the argument proceeds in the following way, moving from the abstract to the concrete. First, there is a brief consideration of the idea of legitimacy as it applies to the European Union, since only if we try to imagine what the ‘magic cure for everything’ might amount to, can we begin to assess and evaluate the possibilities of the actual cures which are on offer. Secondly, the idea of constitutionalism is introduced and dissected with reference to its relationship to various features of legitimacy. Thirdly, the White Paper is situated in the context of the constitutional debate and in the framework of opportunities and constraints supplied by that wider context. Finally, some of the main themes contained in the White Paper are briefly assessed in the context of that wider framework of possibilities.

2. Legitimacy in the European Union

As the burgeoning literature on the subject reminds us, there are many ways to cut the conceptual cake of legitimacy in the European Union.⁵ A first distinction is relatively uncontroversial, although the terminology used by various authors differs. This concerns the divide between the internal or social dimension of legitimacy on the one hand, and its external or normative dimension on the other. The former dimension refers to the social acceptance of the EU, to the issue of whether, and to what extent, the EU is rooted in popular consent or is otherwise congruent with the customs, beliefs, preferences and aspirations of its various public constituencies. The latter dimension is concerned with the justifiability of the EU in accordance with ‘external’ standards, including the attractiveness and efficacy of its objectives and whether or not its institutions are just and democratic. Clearly, these

⁴ See N. Walker, “European Constitutionalism and European Integration,” [1996] Public Law p.266, at 271-75.

⁵ See, for example, D. Beetham and C. Lord, *Legitimacy and the European Union*, (Harlow: Longman, 1988); R. Bellamy, “The “Right to Have Rights”: Citizenship Practice and the Political Constitution of the EU,” in R. Bellamy and A. Warleigh (eds) *Citizenship and Governance in the European Union*, (London: Continuum, 2001); R. Bellamy and D. Castiglione, “Normative Theory and the European Union: Legitimising the Euro-Polity and its Regime,” in L. Tragardh (ed) *After National Democracy: Rights, Law and Power in the New Europe*, (Oxford: Hart, forthcoming); G. de Búrca, “The Quest for Legitimacy in the European Union”, (1996) 59 *Modern Law Review*, 349.

two dimensions are closely inter-related. Social legitimacy is unsatisfactory unless it is grounded in a deeper normative legitimacy, and, indeed, given the internalisation of wider justificatory discourses in the moulding of individual preferences and in the formation of the collective will, it is incoherent to imagine social legitimacy without its embracing the deep presupposition or reflexive appropriation of much that is the subject of normative legitimacy. Equally, normative legitimacy is unsatisfactory unless it is vindicated in social forms, and, indeed, in an epoch in which our epistemological approach to the idea of the ‘good society’ is markedly anti-foundationalist, it is difficult to conceive of a broadly persuasive idea of normative legitimacy which is not constructed through, or apt to be tested against, the outcome of actual or hypothetical processes of social deliberation.

It is a more difficult task to disaggregate legitimacy in terms of the characteristics of the political entity – in the present case, the EU – to which it refers. One approach which builds upon existing approaches in the literature,⁶ and which may be of particular use in teasing out the significance of the EU’s constitutional project and of the Commission’s White Paper as part of that project, is to adopt a threefold distinction embracing *performance* legitimacy, *regime* legitimacy and *polity* legitimacy. Each of these dimension is closely related to the other two and any rounded assessments of the legitimacy standing and prospects of the European Union requires careful attention to all three.

Performance legitimacy – whether the EU has the right priorities and policies and how well it pursues them – has always occupied an important place in the development of the European Union. As one analysis puts it, “[t]he possibility of utilitarian justification has always been central to the analysis and practice of European integration.”⁷ The reasons for this are not obscure. Clearly, a major founding rationale for the European project was to achieve various economic purposes that required the States to make common regulatory cause in the areas relevant to these purposes. Just as in the aetiology of any international organisation, regime factors were, at the outset, of secondary and derivative consideration, as the means to the achievement of these purposes, while any additional questions of ‘polity’ legitimacy were barely, if at all, registered, as this would require the unlikely assumption that the European Union’s Treaty predecessors had initially sought to construct, or succeeded in constructing, anything as grand as a ‘polity’.⁸

Yet, while performance legitimacy remains of profound significance, regime and polity considerations have, over the succeeding half century, become of increasingly central concern. By regime legitimacy we mean the legitimacy of the overall institutional framework through which the entity in question is constituted and regulated. Regime legitimacy is concerned with the deep pattern of political organisation and “style”⁹ of political engagement within the entity in question, with the role, “scope”¹⁰ and representative quality of governing institutions and their mutual relationship, both as a matter of formal law and active political culture. The links between performance legitimacy and regime legitimacy are intimate and complex. Performance legitimacy clearly depends in no small

⁶ See n5 above. In particular, the (crucial, in my view) distinction between regime and polity legitimacy is taken from Bellamy and from Bellamy and Castiglione, although I employ the distinction to rather different effect and cannot do justice to their approach here. As to performance legitimacy, see, especially, Beetham and Lord, ch.4

⁷ Beetham and Lord, n.5 above, p.94.

⁸ See, for example, D. N. Chryssochoou, *Theorizing European Integration* (London: Sage, 2001) ch.4.

⁹ Bellamy and Castiglione, n.5 above.

¹⁰ *Ibid.*

measure on the capacity of the relevant institutional matrix to deliver, both in terms of the nurturing of a policy-making environment conducive to the development of ‘good’ policies and in terms of the fashioning of institutions equipped to implement in an effective manner the policies which are developed. Conversely, as the performative scope and ambition of an entity increases, clearly the legitimacy of the institutional regime which sustains the entity becomes a salient consideration in its own terms, and not just as an instrument for performance delivery. The more the European Union’s regulatory sphere has expanded to cover decisions bearing upon the allocation of key resources and the balance between fundamental political values, and the more it has come to challenge the dominance of the State in these matters, the greater has become the concern that its institutional regime is fully and fairly representative of the range of constituencies affected by its actions.

What of polity legitimacy? This is a more elusive notion, less fully explored in the literature, but again of increasing significance. A fruitful starting point is to think of polity legitimacy as a composite category, an umbrella term capturing all dimensions of the legitimacy of the entity in question. Patently, then, polity legitimacy includes and is, as explored further below, in significant measure dependent upon performance legitimacy and regime legitimacy, which, as noted, are themselves complexly related. But what else is involved in polity legitimacy? This depends upon what we mean by the term ‘polity’. This plunges us immediately into deep waters since perhaps the most contentious and inconclusive debate about the European Union in recent years, within both academic and political discourse and in terms both of normative and social legitimacy, has concerned precisely the type of political association that the *sui generis* European Union represents. Evidently less than a state but more than a traditional Treaty-based international organisation, it remains far easier and far less controversial to conceive of the EU in terms of what it is *not* rather than what it is. Yet, if we attempt to do more than to eliminate false suspects and seek also to make a positive identification, then, at least for the purposes of an inquiry into legitimacy, it is perhaps best to aim for a modest analytical framework which emphasises continuity with what we are already familiar without compromising our capacity to acknowledge and imagine what is new.

This, I would argue, is how we should exploit the conceptual currency of the term ‘polity’. In the so-called Westphalian world, states have provided the paradigm form of polity, or political community.¹¹ If we also conceive of the novel political form of the European Union as a polity, albeit a non-state or post-state polity, then, in common with states, it must meet certain minimal conditions of political community. These minimum conditions we can discover by disaggregating our idea of ‘political community’ into its two constituent terms. ‘Political’ refers to the measure of autonomous political authority – or, in some views, at least ‘sovereignty’¹² – vested in the entity in question. ‘Community’ refers to the social dimension, the sense of belonging to, identification with, or, if you like, ‘citizenship’ (in its ‘thick’ sociological sense, rather than its ‘thin’ legal sense) of the entity in question on the part of those who are implicated in, or affected by, the decisions of that entity.

¹¹ On the pre-Westphalian foundations of the ideas of polity (or polis) and constitutionalism, see, for example, J-E. Lane, *Constitutions and Political Theory*, (Manchester: Manchester University Press, 1996) chs.1-2.

¹² See, for example, N. Walker, “Constitutional Pluralism and Late Sovereignty in the European Union,” (EUI, European Forum Working Paper, 2001).

Two further points should be made by way of clarification. First, the idea of a ‘polity’ must be seen in ‘more-or-less’ terms rather than ‘either-or’ terms.¹³ ‘Polity-ness’ is a question of degree, of gradation along a continuum, rather than an absolute state. There may be sceptical questions, most forcefully put by state constitutionalists in legal discourse¹⁴ and by liberal intergovernmentalists in international relations discourse¹⁵ about just how much authority the EU wields and how autonomously it does so, yet, provided there is some common recognition that greater autonomous political authority is vested in the EU than in other international organisations, the analytical value of the ‘polity continuum’ is vindicated. Equally, there may be questions, most forcefully put by proponents of the ‘no-*demos*’ thesis,¹⁶ about just how deeply individuals register their identification with the EU as a political authority, but provided that such identification is different in quality from that which applies in the case of traditional international organisations the idea of the ‘polity continuum’ again pays its way. Secondly, even though the status of an entity as a polity may be a matter of degree, both elements mentioned above must be present in some measure for a plausible claim of this sort to be made. That is to say, ‘community’ is not enough if it is merely an “imagined community”¹⁷ without the support of political authority, as in many unfulfilled movements for national self-determination. Equally, ‘political authority’ is not enough if there is no or little evidence of those affected by that authority acknowledging the political authority in question as a component part of their political identity, as in the case of powerful regulatory authorities with restricted mandates and/or weakly representative institutions, such as the United Nations, the Council of Europe or the WTO.¹⁸

The identification of the above two component elements allows us to locate the additional dimension beyond performance legitimacy and regime legitimacy involved in polity legitimacy. A polity enjoys legitimacy *qua* polity to the extent that its putative members treat it as a significant point of reference within their political identity. There are complementary vertical and horizontal dimensions to this process of reference, which relate to the ‘political’ and ‘community’ features respectively. Vertically, there needs to be a minimal attachment to, or embeddedness in, the polity as such, an acknowledgement that the entity provides a framework of norms which connects the putative member to the authoritative institutions of the entity in a chain of reciprocal rights and obligations, or, to use a less rigid metaphor, in a web of mutual commitments. Horizontally, what is required is a minimum sense of ‘political community’ or ‘we-feeling’¹⁹ among the putative members, a perception of *common* belonging to and a recognition of a shared set of rights and obligations *vis-à-vis* the one entity.

On the basis of these remarks, three tentative propositions may be put forward about the nature of the polity legitimacy of the European Union, and, in particular, of the ways in which it may be

¹³ N. Walker, “The EU and the WTO: Constitutionalism in a New Key, in G de Búrca and J. Scott, *The EU and the WTO: Legal and Constitutional Perspectives*, (Oxford: Hart, 2001).

¹⁴ See, for example, T. Schilling, “The Autonomy of the Community Legal Order - An Analysis of Possible Foundation,” (1996) 37 *Harvard International Law Journal*, 389.

¹⁵ See, for example, A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, (London: UCL Press, 1999).

¹⁶ For a sophisticated version, see D. Grimm, “Does Europe Need a Constitution?” (1995) 1 *European Law Journal*.

¹⁷ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, (London, Verso, 1991).

¹⁸ Walker, n.13 above.

¹⁹ K. Deutsch, S. Burrell, R. Kann, M. Lee, M. Lichtermann, F. Loewenheim and R. Van Wagenen, *Political Community and the North Atlantic Area*, (Princeton: Princeton University Press, 1957) p.36.

distinguished from that of the state. In the first place, the polity legitimacy of the EU is more precarious than that of the state. Again, this has both a 'political' (authority) and a 'community' (identity) dimension. At the level of political authority, both the general idea of the state and particular state traditions and boundaries are deeply entrenched and have a resilience which can withstand high levels of performance and regime illegitimacy. At the level of political community, deep-rooted national and even pluri-national identities²⁰ supply cultural substrata which, again, may survive the iniquities, failures or abuses of particular performative aims or achievements, and regime forms. So, even the most deep-rooted social, political and legal revolutions are often consistent with the continuity of the particular state, as with pre- and post-apartheid South Africa, or, allowing for a 45-year hiatus, pre-1945 and post-Cold War Germany. And even where particular territorial states terminally fail, as (presumably) in the case of the break-up of the Soviet Union or Yugoslavia, the template of the state continues to be used for the units of political authority which take their place. In contrast, the European Union lacks both a settled template of political authority and the relatively 'thick' cultural identity of the national or pluri-national state, even if we also accept that the idea that such a thick identity does, or should, rest on common ethnicity is widely and correctly discredited. As already noted, the European Union is a new and *sui generis* political formation, and, just because it is so, it cannot avoid or answer questions about the type of polity it is, including, crucially, whether it should be considered a separate polity at all, rather than a sophisticated, but ultimately derivative, institutional outgrowth of state interests, by relying upon some general model, of which it is but one particular instance. It lacks, in other words, a generalizable template and background presumption of settled political form. At the level of identity, too, it is well-known and much discussed that the European Union lacks the strong cultural ties of common language, traditions, history, affective symbols, and developed civil society and public sphere, which, in various mixes, are central to many national or pluri-national state identities.²¹

Secondly, precisely because the European Union lacks these latent attributes of authority and identity, its precarious polity legitimacy is far more reliant on the processes, designs and accomplishments through which performative legitimacy and regime legitimacy are sought than the state is. That is to say, the very nature of the European Union as a new and *constructed* polity²² means that the intimacy of the links between performance, regime and polity legitimacy is even more palpable than in the case of the state. We have already discussed the historical importance of performance legitimacy, and the fact that there continues to be so much political emphasis upon and controversy over not only the detailed range and profile of EU policies and priorities at any one time, but also the possible articulation of an overall motivating purpose, or ethic, of the Union - whether this be found in ideals such as peace and prosperity,²³ in 'historical missions' such as enlargement, or in self-consciously proclaimed long-term defining policy orientations such as the Single Market Programme or, more recently, the Tampere initiative on the Area of Freedom, Security and Justice - is testimony to the way in which this performative dimension is closely linked to deep questions of political authority and identity. As regards regime legitimacy, it, too, is important not only as a

²⁰ See M. Keating, *Plurinational Democracy: Stateless Nations of the United Kingdom, Spain, Canada and Belgium in a post-Sovereign World* (Oxford: OUP, 2001).

²¹ See, for example, Beetham and Lord, n.5 above, ch.2.

²² See, for example, J. Shaw and A. Wiener, "The Paradox of the European 'Polity'", in M. G. Cowles and M. Smith (eds) *State of the European Union, Volume 5: Risks, Reform, Resistance and Revival* (Oxford: OUP, 2000).

²³ See, for example, J.H.H. Weiler, *The Constitution of Europe*, (Cambridge, CUP, 1999) chs. 7 and 10.

component of overall legitimacy and as a facilitator of performance legitimacy, but also as a form of political engineering, as a means of fostering, through long-term institutional means, the distinctive features of authority and identity on which the credible claims of the polity *qua* polity depend. Thus, many shades of opinion, from deliberative democrats²⁴ to consociationalists,²⁵ from ‘thick’ communitarians to ‘thin’ cosmopolitans, approach the design and refinement of the European institutional regime not just as instrument to improve the setting and achievement of performance goals, not just in acknowledgement of the intrinsic worth and legitimating potential of just and democratic institutions, but also as a way of asserting the distinctiveness of the authority profile of the European Union and of coaxing and encouraging the generation of the forms of identity - of common and solitary political awareness and practice - through which a polity becomes self-recognised as a polity.

Thirdly and finally, whereas the state has traditionally figured as an exclusive or – in the increasingly plural configuration of political authority of the contemporary age – at least, dominant polity, the European Union has, from the outset, had to accommodate itself to a plural environment, and, in particular, to the continuing strong claims of the state. That is to say, both at the level of political authority and political identity, the establishment of the European Union as a polity has depended upon a relationship of accommodation with pre-existing state authority and identity claims, and, indeed, with claims to authority and/or identity from other sites, old and new, subnational and supranational. In this sense, the EU is an intrinsically *relational* polity²⁶ and its claims to legitimacy depend upon this relational dimension being satisfactorily addressed and internalised – upon its authority system being compatible with other authority systems and its identity claims being capable of nesting with other identity claims within the political consciousness of its citizens.²⁷

3. Constitutionalism

The ‘thin’ definition of a constitution, as the body of law which constitutes and differentiates the main organs of government and their powers, and which specifies the main rights and obligations connecting the citizenry to these organs of government tell us little more than that, in this minimal sense, the European Union, although clearly lacking a documentary Constitution, already has ‘constitutional law’.²⁸ To gain a closer understanding of the significance of constitutionalism and constitutional law in the European Union, and of its relationship to the various dimensions of legitimacy discussed above, we must look instead at the variety of different (but overlapping) social and political functions that may be performed by constitutional law and by constitutional discourse more generally. Constitutional law and discourse may be said to perform *community-generative*, *substantive*, *technical* and *polity-affirming* functions, and we will briefly discuss each of these in turn.

Constitutional law and discourse can be community-generative to the extent that the establishment, maintenance and development of a constitutional framework may be deemed to embody a series of

²⁴ See, for example, J. Habermas, *The Post-national Constellation: philosophical essays* (Cambridge: Polity, 2001) ch.4; O. Gerstenberg and C.F. Sabel, “Directly-Deliberative Polyarchy: An Institutional Ideal for Europe,” in C. Joerges (ed) *Good Governance in the European Union* (Oxford: OUP, forthcoming).

²⁵ See, for example, Chryssochoou n.8 above, esp. ch.5.

²⁶ Walker n.13 above.

²⁷ Weiler n.23 above, ch.10.

²⁸ P. Craig, “Constitutions, Constitutionalism and the European Union,” (2001) 7 *European Law Journal* 125, 126.

acts or even a continuous process²⁹ of self-legislation and of democratic will formation on the part of the members of the polity. Alongside and, at least from some perspectives,³⁰ shading into this procedural dimension, constitutional law and discourse performs substantive functions to the extent that it privileges certain norms of representation, of institutional capacity and design, and of individual and collective entitlements and obligations *vis-à-vis* the polity as the guiding or dominant modes of governance in the day-to-day operation of the polity. Next, constitutional law and discourse perform a technical function in so far as they provide a clear and co-ordinated statement of these governing norms in a particular document or other legal source, or in an ordered series of documents and other legal sources.

Finally, constitutional law and discourse perform a polity-affirming function, which, in the case of a non-state polity such as the EU, might take one of at least three different forms. In the first place, the very fact of its engaging in a self-conscious constitutional discourse might be seen to have some symbolic value in affirming the status of the European Union as a separate polity, if only because of the strong tradition of *state* polities possessing their own authoritative and autonomous constitutional law and discourse.³¹ Certainly, some of the support for the idea of a European Constitution, and perhaps even more of the opposition to such an idea, has turned implicitly or explicitly on the recognition (or fear) of just such a symbolic link. Yet, as the gradual acknowledgement amongst many Eurosceptics of the possible value of a European Constitution and Charter of Rights as a means of *limiting* European governmental power indicates,³² this point should not be pressed too far. A constitutional discourse may be seen as a *necessary* accompaniment and constituent condition of statehood, and by extension perhaps of ‘polity-ness’ more generally, but it is clearly not a *sufficient* condition. In the absence of other significant preconditions, the mere assertion of a constitutional identity cannot do the symbolic work of transforming general perceptions about the existence or degree of the polity status of an entity in an affirmative direction. Secondly, given our earlier proposition about the intimate link between performative legitimacy and broader polity legitimacy in a post-state polity, constitutional discourse may be polity-affirming to the extent that it seeks to direct, encapsulate or reinforce the broad purpose or purposes of the polity. Thirdly, given our earlier proposition about the intrinsically relational character of the post-state polity, constitutional discourse can be polity-affirming and polity-defining to the extent that it seeks to specify the nature of the relationship between the post-state polity and other extant polities, most significantly, the Member State polities. That is to say, it may be polity-affirming to the extent that key questions concerning the

²⁹ See, for example, R. Bellamy and D. Castiglione, “The Communitarian Ghost in the Cosmopolitan Machine: Constitutionalism, Democracy and the Reconfiguration of Politics in the New Europe,” in R. Bellamy (ed) *Constitutionalism, Democracy and Sovereignty: American and European perspectives* (Aldershot: Dartmouth, 1996).

³⁰ *Ibid.* From certain normative standpoints, the procedural, community-generative dimension must be in a continuous process of renewal and (re)vindication, in the sense that the constitution-making procedures themselves should not be firmly entrenched but subject to revision, or that the substantive results of constitution-making should not be firmly entrenched but subject to revision, or that the ambit of ‘higher’ constitutional provisions should be narrowly circumscribed and there should be significant scope for the generation of governance norms using other flexible self-legislative procedures - or any combination of the above. Indeed, to the extent that a more flexible self-legislative element is endorsed, this will argue - whether categorically or as a matter of degree - against a traditional conception of constitutionalism in which there is a strict demarcation between a documentary foundation of higher law and other substantive norms dealing with governance aspects of the polity.

³¹ Walker, n.4 above, 278-79.

³² See, for example, *The Economist*, 4 November 2000.

articulation of the boundaries of the polity and its mode of relating to other polities are addressed and resolved, including questions of supremacy, mode of legislative applicability (direct or indirect), institutional linkage and competence delimitation.

We are now in a position to trace some of the connections between constitutional function and legitimacy. The community-generative dimension of constitutionalism is crucial here in two respects. It is important not only as an independent factor in fostering the identity element of polity legitimacy, but also in promoting the internal legitimacy of the constitutional framework generally, and so in feeding the legitimating roots of the other three constitutional functions - substantive, technical and polity-affirming. That is to say, the legitimate authority of the constitutional norms which supply the substantive framework of governance, the capacity of the body of constitutional norms to present itself as a clear, definitive and coherent framework with a plausible claim to perform an ordering function, and also its capacity to affirm the status, mission and relative position of the polity, all depend, in no small measure, upon the legitimacy of the generative process.

In turn, each of these three additional types of constitutional function can make its own contribution to legitimacy. The substantive norms clearly contribute to regime legitimacy, but can also, on account of the internal relationship between regime legitimacy and the other two types of legitimacy, provide a structural framework which facilitates performance legitimacy on the one hand, and which complements the identity-forming and reinforcing work of the polity-generative rules on the other. The polity affirming function clearly also connects with wider polity legitimacy, most directly with regard to its authority dimension. The technical function is less significant as a direct source of legitimation, but in so far as transparency, publicity, accessibility and comprehensibility are all formal 'rule of law' virtues which provide added value to the constitutional framework generally, the technical function has the capacity to enhance, or, in its absence or deficiency, to undermine, the effective performance of the other three functions and the forms of legitimacy which flow from them.

If this analysis helps us to identify something of the legitimating potential of constitutionalism, it also points towards both the overall or external limitations upon this potential and the internal factors that may frustrate or curb what legitimating potential constitutionalism does possess. As regards the overall picture, there are definite limits, albeit controversial in their extent, to the potential of a legally-coded community-generative process to 'pull itself up by its own bootstraps' and generate the degree of trust, solidarity or loyalty associated with community in the absence of other prior or simultaneous processes and features of common identity-formation. Furthermore, on account of the important foundational role of the community-generative aspect of constitutionalism, any limits in the foundational framework will lead to limits 'all the way up', so to speak; that is to say, in the legitimating potential of the substantive, technical and polity-affirming functions of constitutionalism.

Each of these three functions also has its own intrinsic limits which reinforce the derivative limits. As regard the substantive governance-design function, while, in principle, this bears upon each of the performance, regime and identity-constitutive elements of wider polity legitimacy, it also *underdetermines* each of these. It underdetermines performance legitimacy in the sense that it may provide a facilitative framework for the generation and effective implementation of widely approved and beneficial policy norms, but it cannot guarantee these. It underdetermines regime legitimacy in the sense that it can lay a blueprint for an institutional complex which instantiates key governance values, but it cannot guarantee that, in the actual operation and inter-relationship of these institutions, these values will be effectively articulated or optimally balanced. Finally, it underdetermines that

dimension of wider polity legitimacy with which it engages, namely, the identity dimension, for the same ‘boot-strapping’ reasons as the identity dimension is underdetermined by the polity-generative rules.

The overall limitations of the technical function, which, as we have seen, is an important lubricant in the operation of the other functions, have to do with the incapacity of formal ‘rule of law’ values to generate the conditions for their own effective implementation. In other words, there is more to predictability, accessibility, comprehensibility, *etc.*, of the constitutional order than a thin commitment to, and exemplification of, these within the key texts of that constitutional order. Rather, there must already exist or be generated by other means a cultural propensity amongst all relevant constituencies, including legal professionals, key interest groups and institutional actors, as well as the general publics of Europe, to treat the constitutional framework in such a way as to promote, enhance and take advantage of these values.

Finally, the intrinsic limitations of the polity-affirming function in certifying the authoritative dimension of polity legitimacy have to do with the general limitations of law as a declaratory or exhortatory device. Each of the three modes of polity affirmation discussed above turns, in one way or another, on law’s symbolic function.³³ As noted earlier, the significance of the very existence of a constitutional framework for the perceived status of an entity turns on the strength of the symbolic association of constitution and polity. The significance of a broad constitutional statement of the polity’s mission turns on the capacity of law to capture or to be an active agent in promoting something as broadly conceived – some would say ineffable³⁴ – as an overall *telos*. The importance of a constitutional demarcation of the polity’s relation with other polities turns on the capacity of the internal law of one legal order to define or influence its relationship with other legal orders against a complex and shifting macro-political backdrop and in circumstances of constitutional pluralism³⁵ – that is, where there is no super- or meta-constitutional guarantee that the internal constitutional conceptions of the relation between polities espoused by each of the relevant polities will be in harmony or that any differences will be capable of definitive resolution. In each case, we see law removed from its normal context of authoritative justiciability and, instead, compelled to draw upon a broader and less assured symbolic capacity for persuasive ordering, a capacity which (especially in the absence of the deep-rooted tradition typical of national legal orders) is in significant measure dependent upon the fund of legitimacy accrued from the precarious success of its foundational polity-generative procedures.³⁶

Alongside these overall external limits on the potential of constitutionalism, there are other internal factors which interfere with its capacity to realise its potential. As suggested earlier, the two types of limits are closely connected in as much as some of the very problems that constitutionalism ‘cannot reach’ tend to interfere with the dynamics of constitution-building. In the context of the

³³ See, for example, R. Cotterrell, “Some Aspects of the Communication of Constitutional Authority”, in D. Nelken (ed) *Law as Communication*, (Aldershot: Dartmouth, 1997) 129.

³⁴ See, for example, I. Ward, “Beyond Constitutionalism: The Search for a European Political imagination” (2001) 7 *European Law Journal* 24.

³⁵ See, for example, Walker n.12 above; N. MacCormick, *Questioning Sovereignty: Law, State and Practical Reason*, (Oxford: OUP, 1999) esp. ch.7.

³⁶ See N. Walker, “Flexibility within a Meta-constitutional Frame: Reflections on the Future of Legal Authority in Europe” in G. de Búrca and J. Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford: Hart, 2000) 9. 29-30.

European Union, we can identify five interconnected problems associated with the internal dynamics of constitution-building.

First, there is the problem of *constitutional denial* that is peculiar to the category of putative post-state polities to which the EU belongs.³⁷ As we have seen, many sceptical voices which question the identity and authority claims of the EU in turn question the legitimacy of dignifying the EU with constitutional status, and this threshold objection continues to blight the development of a shared explicit constitutional discourse about the EU.

Secondly, there is the problem of *self reference*,³⁸ which affects the generative rules of all constitutions, but which is particularly acute in the context of a polity whose generative rules are statist in origin and which, despite the gradual growth of constitutional awareness within the EU in its case law, institutional self-understandings and public attitudes,³⁹ continues to lack a self-conscious self-legislative basis, or indeed, as the problem of constitutional denial indicates, even an agreement that, in principle, such an aim is legitimate. The problem of self-reference concerns the doubtful legitimacy and impartiality of responding to perceived inadequacies in the constitutional framework by seeking to reform the constitutional framework - including the procedural rules for generating that constitutional framework - by means of utilising the existing rules for generation and reform, where these existing rules may be viewed as being responsible for or associated with the perceived inadequacy in question. To exacerbate matters, the phenomenon of constitutional denial and the doubtful continuing legitimacy of an original process in highly altered circumstances which make the problem of self-reference so acute also make it difficult to reach agreement on a process of constitutional renewal or initiation *other* than by means of self-reference.

Thirdly, there is a more general problem of *ideological disagreement* over the substantive content of any European constitutional settlement. The ever-shifting institutional balance between the three main organs of the Commission, the Council and the Parliament; the gradual accretion of institutional novelties such as the European Council and the Comitology network; the incremental assumption of exclusive or shared substantive competences in new policy areas; the complexity of discovering satisfactory institutional solutions to predicaments which arise precisely because of fundamental disagreement over the nature and scope of the classical Community method, as in the Three Pillar structure and the flexibility provisions; the uneven history and tentative progress of the EU's fundamental rights commitment, most recently reaffirmed by the merely declaratory status of the new Charter of Fundamental Rights; each of these bears witness to the unstable and provisional nature of any agreement on substantive constitutional norms in a relatively new political entity in which the nature of political identity and the limits of political authority are fragile and contested. In turn, this problem is exacerbated by two other internal constraints on constitutionalism in the EU considered below.

Fourthly, then, there is the *absence of a default constitutional template* derived from the state model as a reference point for addressing disagreements associated with the governance structure of the new post-state polity. These "problems of translation"⁴⁰ are manifold; for example, whereas most

³⁷ Walker, n.4 above, 278-279.

³⁸ See, for example, P. Eleftheriadis, "The European Constitution and Cosmopolitan Ideals," (2001) 7 Columbia Journal of European Law, 21, 22-24.

³⁹ See, for example, Craig, n.28 above, 128-30.

⁴⁰ Weiler n.23 above, 270.

states “work on the basis of some division between executive, legislature, administration and bureaucracy”⁴¹ in which there is a reasonable correspondence between function and institution, in the European Union there is a much more complex, and ever shifting pattern of functional roles within and across institutions and no tried and tested conception of institutional design to guide reform. Fifth and finally, there is the problem of *explicit constitutional engagement*. One of the ironies of the continuing and inconclusive struggle to develop an explicit constitutional discourse for the European Union, whether in the traditional sense of a documentary Constitution or in the broader sense of seeking to attribute constitutional status to the continuing debate over its rules of governance, is that the very effort to strengthen and legitimise the governing base can expose difficulties which had been fudged, compromises that had been made, and “abeyances”⁴² which had been left under the less harsh spotlight of the long, incrementally adjusting, ‘pre-constitutional’ stage of development of European government. Once the game becomes an explicitly constitutional one, the stakes may be raised and all previous bets cancelled, as, for example, in the case of the key polity-affirming function of specifying the relationship between the EU and its Member States, where deep constitutional exploration of concepts such as supremacy, direct applicability and effect and residual competence would inevitably expose a minefield of contestable interpretative possibilities.⁴³

4. Situating the White Paper

The emergence and reception of the Commission’s White Paper may be placed in the context of a reform process in which many of the limitations and possibilities, dangers and opportunities discussed above assume concrete form. The White Paper initiative can usefully be viewed as a constitutional episode at the point of intersection between two distinct, but closely inter-related, regulatory projects, each with distinct but closely inter-related constitutional discourses and legitimacy challenges.

On the one hand, much of the impetus for the White Paper is internally driven. It is the acknowledged progeny of a new Commission President, Romano Prodi, its conception announced at the outset of the new 2000-2005 Commission, its purpose of “promoting new forms of European governance” unveiled as one of four key strategic objectives alongside stabilising the continent and boosting Europe’s voice in the world, generating a new economic and social agenda, and fostering a better quality of life for all.⁴⁴ An important subtext of this new governance project, of course, as with every major initiative of the new Commission (including, most prominently, Neil Kinnock’s institutional reform programme),⁴⁵ is the corruption and mismanagement scandal which led to the eclipse of the previous Santer Commission, and the desire to distance the new Commission from the events in question and the attitudes and practice which made them possible. More positively, however, the White Paper appeared to be motivated by a double-pronged concern for the legitimacy of the EU’s framework of governance; for both the intrinsic merit of the governance values it should

⁴¹ Craig, n.28 above, 139.

⁴² M. Foley, *The Silence of Constitutions: Gaps, “Abeyances” and Political Temperament in the Maintenance of Government* (London: Routledge, 1989).

⁴³ Craig, n.28 above, 143-45.

⁴⁴ R. Prodi, “Shaping the New Europe”, Speech to the European Parliament, 15 February 2000.

⁴⁵ See, in particular, *Reforming the Commission*, Commission of the European Communities, Brussels, 5th May 2000, COM(2000) 200; N. Kinnock, “State of Play on Administrative Reform”, Speech to the European Parliament, Strasbourg, 3 September 2001.

instantiate – or regime legitimacy – and its instrumental capacity to fashion better policies and more effective policy delivery – performance legitimacy.⁴⁶

On the other hand, there is clearly also an external context to the Commission's White Paper. Even as it was launched, the Commission President acknowledged that it would proceed in "parallel with the IGC"⁴⁷ as well as with the broader Kinnock reform programme. As time has passed, the relationship between the internal and the external process has become more palpable. The Treaty of Nice – the legal outcome of the IGC to which Prodi refers – in its immediate launch of "a deeper and wider debate about the future development of the European Union"⁴⁸ has confirmed the analysis of one commentator, that Europe is now engaged in a "semi-permanent Treaty revision process."⁴⁹ This meant that, as it took shape, the White Paper was required not only to take account of the backdrop of a newly accomplished set of institutional reforms directed to preparing the Union for enlargement – Nice's explicit project – but also to contribute to, or at least remain cognisant of, an ongoing venture culminating in a new IGC in 2004 and signposted at Nice only in the most general terms. These signs included, but were quite explicitly not limited to an exploration of the possibility of establishing a more precise delimitation of competences between the European Union and the Member States, an examination of the role of national Parliaments in the European architecture, an analysis of the potential for the simplification, clarification and consolidation of the Treaties, and an assessment of the appropriate future status of the Charter of Fundamental Rights (whose proclamation at Nice and preparation over the preceding months had attracted just as much media and institutional attention, and arguably greater public involvement than the pre-Nice IGC process itself).⁵⁰ In its published form, the White Paper responds to this continuing process not only by acting upon Prodi's initial promise to make recommendations for the governance of the Union as a whole and not simply in respect of the Commission's own role, but also by committing itself to draw upon the principles enunciated in the White Paper in its contribution to the European Council at Laeken in December 2002 – the first key staging-post in the post-Nice process.⁵¹

5. The White Paper as a Constitutional Episode.

We are now in a position to draw upon the earlier discussion of legitimacy and how this connects with the internal and external limitations on constitutionalism in the EU to make some tentative points about the significance of the White Paper as a constitutional episode.

To begin with, we should note the absence of any explicit usage either in the White Paper itself or, initially at least, in the formal post-Nice process of the language of constitutionalism. The sound of silence was deafening, particularly against the backdrop of the growing extra-curricular clamour

⁴⁶ This theme is to the fore both in Prodi's speech announcing the White Paper (n.44 above) and, as we shall see, in the Report itself.

⁴⁷ See n.44 above.

⁴⁸ Treaty of Nice, Annex IV, Declaration on the Future of the Union.

⁴⁹ B. de Witte, "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process," in P. Beaumont, C. Lyons and N. Walker (eds) *Convergence and Divergence in European Public Law*, (Oxford: Hart, forthcoming).

⁵⁰ See, for example, G. de Búrca, "The Drafting of the EU Charter of Fundamental Rights," (2001) 26 *European Law Review*, 126.

⁵¹ See n.48 above. The Commission's commitment is followed through in its pre-Laeken contribution; *Renewing the Commission Method*, Brussels, 05.12.2001 COM (2001) 727 final.

for constitutional discussion of which Joschka Fischer's headline speech at Humboldt University in May 2000 was both symptom and reinforcing cause.⁵² Clearly, the reticence of official discourse reflected the resilience of the phenomenon of constitutional denial. It acknowledged both the care necessarily taken by those with a strong reform agenda, including those with a more explicit constitutional agenda, not to confuse or endanger wide-ranging discussion of key questions of institutional reform by introducing such a sensitive ideological tone, as well as the resistance of those who would be offended by such a tone. Indeed, even when, following a Franco-German initiative at the end of November 2001, the words "constitutional text" were finally allowed to enter the official lexicon as part of the Laeken Declaration, the strong legacy of constitutional denial ensured that the prospect of the endorsement of such a text was relegated to the longer-term and limited to the achievement of the technical goals of Treaty simplification and reorganisation.

Yet, the absence of an explicit constitutional discourse from the White Paper does not prevent the issues discussed and the proposals made from having significant resonance in terms of the multi-functional definition of constitutionalism set out earlier. We have already noted how the White Paper directly engages with questions of regime legitimacy and performance legitimacy, and this is achieved through a commitment to what we have termed substantive constitutionalism. At the heart of this commitment, and, indeed, at the heart of the White Paper, is the affirmation of five principles of good governance, namely, "*openness, participation, accountability, effectiveness and coherence*",⁵³ which should govern the workings both of the Union in general and of the Commission in particular. These principles and their double commitment to regime and performance legitimacy are reflected in the organisation of specific proposals. One section concerned with "better involvement and more openness" is primarily directed to regime legitimacy, while another concerned with "better policies, regulation and delivery" is primarily directed to performance legitimacy, although there is also a clear recognition that the two are symbiotically related; this, for example, greater involvement in, and information about, policy proposals can also enhance the quality of these proposals.⁵⁴ A third section on "refocused institutions"⁵⁵ makes even more evident the inextricability of regime and policy legitimacy and of the governance values associated with them, 'refocusing' presented as a means not only to optimise the efficiency and co-ordinative capacity of EU institutions, but also to increase transparency and accountability – to meet the need for people "to understand better the political project which underpins the Union."⁵⁶ And alongside this, the White Paper is alive to the possibility of the governance values that anchor its substantive constitutionalism also relating to the identity-aspects of wider polity legitimacy. In this vein, there is much talk of "Europeans feeling alienated from the Union's work,"⁵⁷ of their "no longer trust[ing] the complex system to deliver what they want,"⁵⁸ of the need "to connect Europe with its citizens"⁵⁹ and the like.

⁵² Reproduced together with a series of commentaries in C. Joerges, Y. Mény and J.H.H. Weiler, (eds) *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Florence: Robert Schuman Centre, 2000).

⁵³ White Paper p.10.

⁵⁴ White Paper pp.11-12

⁵⁵ There is also a fourth section on "The EU's contribution to global governance", the brevity of which rather reinforces the point that the main concern of the White Paper is the internal legitimacy of the EU.

⁵⁶ White Paper p.37.

⁵⁷ White Paper p.7.

⁵⁸ White Paper p.7.

⁵⁹ White Paper 3; see, also, 27.

If we turn to the external post-Nice reform process with which the White Paper intersects, the constitutional resonance is again clear, even if, here, even after Laeken, we do not yet have an elaborated vision to corroborate this. The debate on competences and the examination of the role of the national Parliament both connect clearly with the authority aspect of constitutionalism's polity-affirming function, by dealing with the boundary negotiation question as a matter of both legal-jurisdictional limits and of institutional demarcation and interlocking. The debate on the Charter of Fundamental Rights is currently, perhaps, the strongest vehicle for an incipient constitutionalism. As well as providing a prominent, some would argue indispensable, feature of substantive constitutionalism and all that this implies for regime legitimacy and the identity-constitutive aspects of polity legitimacy, the unfinished Charter-making process also provides, by its example, the most visible pre-figurative evidence of the potential of a polity-generative constitutionalism within the Union other than the received IGC method.⁶⁰ Finally, the Treaty consolidation exercise, again underpinned by a busy anticipatory schedule, hits some clear constitutional notes in a more modest technical key, and, indeed, as already noted, provided the immediate cue for the explicit reference to constitutionalisation of the Union in the Laeken Declaration.⁶¹

Given this scenario of a vigorous multi-faceted pursuit of various constitutional functions – which, in the scale and ambition of its constitutional reflection, is already becoming significantly removed from the vivid picture painted by one commentator of the Community in its turbulent post-Maastricht phase as possessing the outer carapace but little of the inner spirit of constitutionalism⁶² – does it matter that, at the official discursive level, this pursuit is still represented in crypto-constitutional terms, as a constitutionalism that hardly dare speak its name? In some respects, indeed, it might be seen as a positive advantage that this is the case. This way some of the internal dangers and distractions posed by the problems of constitutional denial, of ideological disagreement and of explicit engagement might be avoided or minimised. Further, constitutional reticence might be seen to allow other, perhaps healthier, regulatory vocabularies to flourish.

Take, for instance, 'governance' itself, the White Paper's anchoring concept. Defining governance as the "rules, processes and behaviour that affect the way in which powers are exercised at European level,"⁶³ the White Paper goes on to link these explicitly to the five values enunciated above. A less loaded and more general definition, one which is, perhaps, more useful for understanding the broad orientation of governance discourse, is "the intentional regulation of social relationships and the underlying conflicts by reliable and durable means and institution, instead of the direct use of power and violence."⁶⁴ Two features stand out as distinguishing the idea of governance

⁶⁰ See de Búrca, n.50 above; N. Walker "The Charter of Fundamental Rights of the European Union: Legal, Symbolic and Constitutional Implications," in P. J. Cullen and P.A. Zervakis, (eds) *The Post Nice Process: Towards a European Constitution?*, (Bonn: Nomos, forthcoming).

⁶¹ See, in particular, the EUI Report, A Basic Treaty for the European Union: a Study of the Reorganisation of the Treaties (Report submitted on 15 May 2000 to Mr Romano Prodi, President of the European Commission). See, also, Craig, n.28 above, 147-50. The Commission's commitment is followed through in its subsequent pre-Laeken contribution; *Renewing The Community Method*, Brussels, 05.12.2001 COM(2001) 727 final.

⁶² Weiler, n. 23 above, ch.1.

⁶³ White Paper 8 (fn 1).

⁶⁴ M. Jachtenfuchs, "The Governance Approach to European Integration," (2001) 39 *Journal of Common Market Studies*, pp.245-64, at 246.

in this more general sense from at least some definitions of constitutionalism. First, and more explicitly, governance is less concerned with the idea of hierarchical, command-based authority than some positivist visions of constitutionalism. Secondly, unlike the self-referential tendencies within constitutionalism to regulate only the public institutional complex of the state (or the polity more generally) which constitutional authority itself constitutes and only the institution-citizen relationships (typically through classical ‘first generation’ rights) which are necessary incidents of the core security function and intrusive potential of the so-constituted public institutional complex of the state, governance is explicitly concerned with the regulation of all “social relationships”, including those involving ‘private’ social and economic actors.

Clearly, one need not accept the restricted definition of constitutionalism which would so flatter ‘governance’ by contrast. Even if narrowly ‘public institutional’ and/or hierarchical conceptions of constitutionalism hold sway in some traditions, constitutionalism is a sufficiently open-textured notion to overcome these local difficulties and embrace all that is ‘good’ in ‘good governance’.⁶⁵ Arguably, moreover, if we concentrate on the benefits, rather than the costs, of constitutionalism, the powerful historical legacy of constitutionalism also forges a powerful symbolical link with an idea of responsible self-government and with certain core ideas such as democracy, fundamental rights, dispersal and limitation of power, *etc.*, which those who invoke the language of constitutionalism (for motives however self-interested) then ignore at their peril.⁶⁶ In this way, constitutionalism generates a normative momentum and an ideological discipline that is difficult for any other concept to match. Yet, in the final analysis, ‘governance’, despite, or perhaps because of, its shallower historical and normative roots, provided an appropriately flexible conceptual vehicle for the wide-ranging, non-coercive regulatory values espoused in the White Paper. At the very least, therefore, little, if anything, appears to have been lost by using a governance-based, as opposed to a constitutionalism-based, discourse, especially as constitutionalism figures as such a palpable ghost at the feast.

However, even if the absence from the White Paper of an explicit constitutional discourse is not *per se* detrimental, arguably, what this absence implies about the overall configuration of political forces from which the White Paper emerged and in terms of which it is apt to be judged is of more serious moment. Two related difficulties are particularly worthy of comment. The first concerns the uneasy relationship of the White Paper to the polity generative base of constitutionalism. The second concerns the broader *communicative* potential in a constitutional key of the valuable but under-elaborated complex of values that the White Paper identifies with good governance.

As regards the first problem, as already noted, the lack of an explicit constitutional discourse suggests the perseverance of problems of constitutional denial, of ideological disagreement and of explicit engagement in particular. While these difficulties do not undermine the capacity of the White Paper to wax eloquently about the substantive constitutional values that should lie at the heart of European governance, they indicate and dramatise the more urgent matter of the attenuation of its discourse from core polity-generative constitutional processes. As discussed earlier, the legitimating potential of constitutionalism in its various other functions rests significantly on the legitimacy of its polity generative function. This creates a paradox for a political entity such as the EU, whose existing

⁶⁵ See, for example, M. Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics*, (Oxford: Hart, 2000) ch.14.

⁶⁶ See Walker, n.13 above.

generative processes are increasingly exposed to significant criticism and challenge but which has yet to develop a generally agreed alternative. Such a political entity is liable to be damned by some if it continues in a self-referential manner to follow its own constitutional reform process, and damned by others to the extent that it seeks to depart from this. In these delicate circumstances, it is unsurprising that the polity-generative constitutional process of the European Union at its present stage of development has come to display an uneasy mixture of both dynamics. On the one hand, the call for a wider and deeper debate at Nice involves an element of auto-critique, an admission by the state actors who control the IGC that the generative debate should be 'deepened and widened', if only in terms which they self-referentially authorise. On the other hand, other actors, including (but by no means limited to) actors such as the Commission, which otherwise wield considerable institutional power within the Union but which are marginalised by the existing generative process, (in the Commission's case allowed to submit proposals for reform but denied a formal voice at the decision-making stage),⁶⁷ respond to the opportunity – and, indeed, to the threat – posed by this loosening of the reins by giving full vent to their own voice and seeking to maximise their influence over the direction of the reform debate.

Yet, this paradox of generative renewal is endemic and unavoidable within circumstances of constitutional transition, an unsteady state which is often exceptional and of limited duration in state constitutionalism, but which appears to have become the norm in the deeply contested European constitutional context. And equally unavoidable is the critical reaction which accompanies the events, such as the White Paper, through which this ever-shifting, always-precarious, scenario unfolds. Accordingly, the appearance or anticipation of criticism should not in itself engender pessimism about the broader reform process to which the White Paper contributes. After all, the Commission does not have the last word; other voices will be heard, and ultimate control of the reins continues to lie in the hands of the state actors. In the long-term constitutional view – the only view that *can* sensibly be taken of an episode in a regenerative narrative which is, in principle, unending and, in practice, at the very early stages of a phase of potentially far-reaching plot-development – what is important is not the volume of critical comment which greets the event but whether and to what extent it can be seen to have stimulated the constitutional process in a manner which, on balance, serves, rather than hinders, the legitimating potential of the various constitutional functions on which the document bears. In particular, it depends upon the type of message which the White Paper communicates in respect of these constitutional functions in which it is primarily implicated or with which it is primarily concerned, namely, the polity-generative function itself (now viewed in a longer perspective) and the substantive function.

In the present circumstances, these two functional imperatives and the dimensions of legitimacy with which they are associated are even more closely related than usual. At this early and informal stage of the preparation of an IGC in which an unprecedented depth and breadth of consultation is promised, the Commission's contribution to the enhancement of the polity-generative process depends upon how it feeds and responds to this broader consultative spirit, not just in terms of the openness of the White Paper process itself (and here the intensity of the preparatory debate and the commitment to an extended and extensive web-centred post-publication debate send modestly promising signals),⁶⁸ but also in terms of the breadth of the matters with which it concerns itself and

⁶⁷ Art. 48, TEU.

⁶⁸ White Paper p.9.

its perceived willingness in treating these matters to transcend the Commission's own interests and to anticipate and accommodate a more inclusive set of aspirations and perspectives about the future of the Union. In this sense, then, the *substance* of its agenda and approach is also, in significant degree, a measure of the White Paper's contribution to the polity-generative *process*.

In this vein, the ambition shown by the Commission in framing its proposals in a general discussion of governance values is striking. The White Paper could have limited its approach to the detail of institutional reform within the gift of the Commission, but did not. It could have tailored its approach to the detail of institutional reform affecting the Commission including those which require broader Treaty sanction, but did not. It could have focussed on the broad sweep of institutional reform across the Union and yet have retained a pragmatic disregard for underlying philosophy, but did not. Instead, we are treated to the least restrictive approach of all, one which at least in some areas, does not shrink from institutional detail, yet, is just as concerned with its philosophical grounding.

But such an expansive strategy is a double-edged sword. An approach which delves beyond and beneath the Commission's own immediate institutional context may be of an *imaginative* ambition to engage sympathetically with a wide audience, but it also risks being construed as displaying an arrogance of *institutional* ambition which threatens the interests and aspirations of that wider audience. We have remarked on how the range of governance values centring the White Paper seeks to bear positively on performance and regime legitimacy, and through the link provided by intrinsic regime values such as openness and participation, on the identity aspects of polity legitimacy. Yet, the generality of the underlying philosophical framework is both a strength and a weakness. The relationship between such a general framework and particular institutional proposals may be plausible and persuasive, but it can never be compelling. Not only are the particular values vague and open-ended, but, considered together, and notwithstanding the tone of the White Paper being to the contrary,⁶⁹ they are not necessarily cumulative or complementary. In particular, the values which emphasise performance - effectiveness and coherence, may, sometimes, be in tension with those which emphasise the intrinsic features of regime legitimacy - openness, participation and accountability. So, questions of the operational meaning and scope of the individual values, and of the priority and choice between the 'performance' and 'regime' value-clusters remain controversial, requiring finer normative judgements and sensitivity to the balance of political assumptions and expectations about the state and direction of the Union, including awareness of what the wider limits of polity legitimacy of the Union are presently likely to withstand as regards the scope of its jurisdiction. It is in the pursuit of these questions within the vast permissive spaces left by its laconic framework of governance values, rather than in the choice of the framework itself, that the White Paper is vulnerable to criticism. In particular, five accusations of variable but cumulative force may be levelled against the White Paper as a constitutional episode - namely, hubris, institutional self-interest, performance bias, tokenism and internal inconsistency. In conclusion, we will briefly look at each of these.

To begin with, despite its initial claim to have no magic cure for the ills of Europe, the White Paper proceeds to court the danger of constitutional hubris. In foregrounding its abstract framework of governance values, yet demonstrating little acknowledgement of the difficult and controversial character of the institutional choices thrown up by the tension between these constituent values and

⁶⁹ Especially in the "Better Involvement" section (11-18).

the need to respect the boundaries of existing polity legitimacy in their articulation, the White Paper tends to understate those limits on constitutionalism which concern the translatability of the governance blueprint into institutional design and culture (including the difficulties posed by the lack of a default statist template to guide institutional reform) as well as the ‘boot-strapping’ constraints of governance measures in deepening the authoritative claims of the entity. To say, as the White Paper does of an entity whose wider polity legitimacy remains challenged on both ‘identity’ and ‘authority’ grounds, that “ people... expect the Union to take the lead [and to act as visibly as national governments] in seizing the opportunities of globalization for economic and human development, and in responding to environmental challenges, unemployment, concerns over food safety, crime and regional conflict,”⁷⁰ is to underestimate the difficulty of translating what may be persuasively analysed as an *objective* need for the Union to fill certain ‘gaps’ left by the declining legal authority and economic steering power of the state on the one hand,⁷¹ into a widespread *subjective* appreciation and endorsement of such a need on the other. To imply, as the White Paper does,⁷² that any such gulf between objective need and a popular mandate for action can be adequately bridged purely through attention to governance values and regime legitimacy, tends to overestimate the legitimating potential of regime values in the abstract and to underestimate how their operationalisation is itself made more problematical by unresolved issues of polity legitimacy. To take but one example, the exhortation to the Council to forego the search for unanimity and to pursue qualified-majority voting wherever possible to speed-up the legislative process and fill in the policy ‘gaps’ in the name of the governance values of efficiency and co-ordination,⁷³ ignores the complex culture of inter-state compromise and minority protection which reflects the existing basis of and limits to trust and solidarity within the emergent Euro-polity.

Secondly, there is a danger that the pattern in the White Paper of consolidating power in the Commission risks being seen as the product of naked ambition or the jealous preservation of vested interests. Clearly, as noted at the outset, we ought neither to be surprised nor shocked that a key institution of the Union should look favourably on its own role in any redesigned regime of governance. Indeed, in a serial, open-ended process of constitutional reform, where other actors and institutions are apt to do the same, this can even contribute to balance and to the healthy engagement of different perspectives.⁷⁴ Further, to the extent that there is, nevertheless, criticism of the Commission’s motives, some of this is unavoidable, for, in a polity whose status and limits remain fundamentally contested, there will be no shortage of those inclined to read the motives and judge the quality of the constitutional proposals of its traditionally most *communautaire* institution uncharitably - with a mind to condemn the imperialism rather than to embrace the breadth of its vision. Yet, precisely because of the delicacy of the present constitutional situation of which this tendency to cynical interpretation is symptomatic, and the consequent need for the Commission to bolster the fragile legitimacy of the constitutionalism process with a generous approach to the exploration of substantive reform possibilities, it is also important that the Commission does not offer too many

⁷⁰ White Paper p. 3

⁷¹ See, for example, Scharpf, n2 above, Section 3

⁷² In the paragraph immediately following on p.3.

⁷³ White Paper p.22.

⁷⁴ See, for instance, the work of Jim Tully, who argues that democratic constitutional deliberation has an irreducibly ‘agonic’ quality according to which positional differences can never be eradicated but, if fully recognised, can at least be the subject of fair and fruitful negotiation. See, for example, “Struggles over Recognition and Distribution,” (2000) 7 Constellations 469.

hostages to fortune. From this perspective, it must be conceded that the circumstantial evidence of self-aggrandisement is not insubstantial. In particular, the suite of proposals concerned with enlarging the influence and discretion of the Commission in matters of legislative policy, including a more uncompromising use of its legislative initiative,⁷⁵ the greater use of framework legislation,⁷⁶ its abolition of policy and management ‘Comitology’ committees at the implementation stage,⁷⁷ and its careful circumscription of the independent role of agencies,⁷⁸ suggests a “revitalization of the Community method”⁷⁹ which promises to revitalize one organ – the Commission itself – rather more than others.

Even if the Commission’s generous interpretation of its own place in the scheme of things is not read cynically, it may be criticised on one of the other three grounds mentioned. To begin with, there is the question of performance bias. Arguably, in resolving the (largely unacknowledged) areas of tension between performance and regime values, the White Paper tends to come down in favour of the former. The general streamlining of the legislative process alluded to above, for example, or the restriction on the use of the new and much-heralded Open Method of Co-ordination to circumstances where legislative action under the Community method is not possible,⁸⁰ tend to favour programme values at the expense of the nurturing of an inclusive and consensus policy-making environment. In turn, this tends to undermine the credibility and import of these measures that are innovative in seeking to underpin regime legitimacy. The menu of suggestions aimed at greater involvement of local, regional, national and other grass-roots organisations in policy-consultation, finessing and implementation, including the broader use of formal and informal consultative procedures (in which virtual consultation figures prominently),⁸¹ and the greater use of target-based tripartite contracts,⁸² partnership arrangements⁸³ and network-led initiatives,⁸⁴ are all promising in their endorsement of a broader conception of regime legitimacy. Yet, their stark juxtaposition to a reinforced, efficiency-orientated Community method which downgrades the role both of states and other constituencies in the key areas of authoritative decision-making threatens to taint these suggestions with the aura of tokenism.

Drawing these arguments together, we may conclude that the White Paper is vulnerable to a more general charge of inconsistency in its constitutional approach - one of key communicative significance. If, at one level, the White Paper recognises its constitutional responsibility to stimulate an inclusive constitutional debate which, in agenda and substance, makes up for some of the unavoidable deficiencies of the constitutional process of which it is part, then, in terms of delivery, it falls some way short of the mark. Just as constitutionalism’s procedural polity-generative role should be directly concerned with nurturing the identity base of polity legitimacy but remains dogged by the problem of self-reference, so the kind of substantive constitutionalism in which the White Paper

⁷⁵ White Paper p.22.

⁷⁶ White Paper p.20.

⁷⁷ White Paper p.31.

⁷⁸ White Paper pp.23-24.

⁷⁹ White Paper p.29.

⁸⁰ White Paper pp.21-22.

⁸¹ White Paper pp.11-17

⁸² White Paper p.13.

⁸³ White Paper p.17.

⁸⁴ White Paper p.18.

engages is also indirectly concerned with polity-generation through the secondary effects of institutional design and regime legitimacy in demonstrating a commitment to a quality of inclusive identification which accommodates both old (state) and newer (non-state) constituencies. To the extent that the White Paper has missed its constitutional opportunity, this lies in its failure, notwithstanding its grand statement of abstract intent in the language of governance values, to show sufficient empathy with these deeper concerns.