Reflections on Europe’s Constitutional Future

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A recurrent image in the European debate, at least since Maastricht, is that of the European Union at a ‘crossroads.’ The Union, or so many believe and the Laeken Declaration proclaims, has reached a point at which it urgently needs to decide on its future institutional path. Miguel Maduro has ironically evoked the same image by comparing Europe to Alice in Wonderland, when she asks the Cheshire Cat what road to take. “That depends on where you want to go,” is the Cat’s answer. Does Europe know where she wants to go? Or, as Joshka Fisher asked in his Humboldt Lecture several years ago: “Quo vadis Europa?”

In truth, the crossroads image is partly misleading. It suggests that the European Union needs to march on in some direction. Moreover, it implies that each of these directions will lead to some definite destination. Both assumptions are contested. With regard to the former, this idea of a continuous march forward is generally known as the ‘bicycle theory,’ for which to stop pedalling means falling. From a socio-economic perspective, there may be a grain of truth in this; for the single economic market and the introduction of a common currency have created a context that requires both increasing convergence on a number of rules and conditions, and common management policies. But in a broader sense, increasing forms of political integration are neither inevitable nor unequivocally desirable. From an analytical perspective, and in contrast with the bicycle analogy, it can be argued that the European Union has already acquired a more or less definite institutional shape, which can be sustained in time – or at least for a considerable amount of time. From a more normative perspective, it is not unreasonable to maintain that there are as many dangers as opportunities in the Union’s eventual evolution towards a more definite state-form. For once, such a passage may be unfeasible, as supporters of the ‘no demos, no democracy’ theory clearly imply. And even though feasible, such a passage may be considered undesirable; for it may risk both weakening the institutions of democratic accountability, and undermining valuable differences between countries, while ultimately paving the way for commercial homogenization and over-bureaucratic centralization.

No less contestable and contested are the assumptions made on the possible end-states of the process of European integration. These are often imagined as either a federal or a confederal state. But, so far, the European process has been both open with regard to the forms of integration, and indeterminate in relation to its historical movement. This reinforces the impression, emerging also from other contexts, that some of the traditional concepts and categories of our political
language have exhausted their usefulness – with the effect that, while we struggle to understand the nature and direction of the European march (or, in some people’s view, of the present status-quo),\textsuperscript{7} we must needs revise the conceptual instruments through which we interpret it.

As a way of illustrating the complex and contested nature of this debate on Europe’s journey, I offer here a number of unsystematic reflections on the making – a process as yet unfinished – of the European constitution.

\textbf{Finality/Finalité}

It is probably apt to start our discussion from the much used, and abused, idea of finalité politique. This was at the core of Joschka Fisher’s Humboldt speech, which arguably gave political credibility to the constitutional debate. There are different senses in which this idea of ‘finality’ is deployed in the current debate. Neil Walker has distinguished seven of them. He suggests, however, that each sense refers to different processes, appealing to overlapping normative principles and values.\textsuperscript{8} Without entering into a detailed discussion of Walker’s subtle and perceptive analysis, I wish to borrow his categorization to make a few general points. Walker distinguishes between territorial, political, institutional, purposive, social, legal, and constitutional finality. At least conceptually, territorial finality is easy to understand. There are, of course, disagreements on where to draw Europe’s borders. Such disagreements depend as much on geopolitical considerations as on different conceptions of the European Union itself. But there is no disputing that for both functional and historical reasons the European Communities first, and the European Union later, were conceived as ‘expansive’ projects, whose concrete dynamics, however, need halting at some stage.

The other applications of the idea of finality are more problematic. Ideas of finality in both the institutional and legal domains, for instance, are clearly overdrawn. In the European context, both domains have grown piecemeal as the functional outgrowth of a complex series of international treaties and ad hoc policy agreements. The European Union has increasingly developed its own self-referential ‘order’ (the legal and institutional \textit{acquis}). As this has progressively been rationalized and acknowledged by an increasing number of social and political agents, it has become obvious that some kind of ‘final’ reorganization (of the institutional architecture) and simplification (of the large number of legal documents and treatises) were in order. And yet, there is no political society that can fix its political institutions and the power balance between them once and for all; nor is there any democratic society that can fully rationalize and co-ordinate the plurality of legal orders operating within its own borders. Both institutional and legal domains are continuously in flux, determining and being determined by the changing relationships between the polity and the regime aspects of the political community.\textsuperscript{9}
In fact, there seems to be an intrinsic contradiction in the ‘language of finality,’ particularly when one looks at its application to the social and political domains, and to the alleged purposes of the European Union. These three areas of application are intrinsically linked and they cover what is often, and more broadly, intended as finalité politique. In Walker’s classification, their respective meaning is more circumscribed. By social finality, he intends the question of whether the different peoples (and nations) of Europe may be able to unite into a single demos. By political finality, he refers to the question of the state-form of the Union, of whether this should be functioning as a confederacy (Statenverbund) or a federation (Föderation). This was, after all, the main problem posed by Fisher in his Humboldt speech, echoing the most common understanding of ‘finality.’ By the finality of purpose, instead, Walker refers both to the general objectives and ideals attributed to the Union, and to its specific areas of policy competence. The problem with these three kinds of ‘finality’ is that they present a paradox. On the one hand, the ‘language of finality’ seems to imply that the quest for either a ‘final point’ or an encompassing ‘aim’ is part of the attempt to change the European Union into a self-standing ‘state’ or political community. On the other, it is apparent that in our common understanding of political communities we make reference to neither a ‘final point’ nor a particular set of ‘aims.’ The claim that political communities make on their citizens’ allegiance is not based on having reached a particular ‘point’ in their own evolution, nor do they appeal to ‘aims’ that are extrinsic to their own existence as political communities. Their demand for political and legal obligation is indeed part of them being, either de facto or by tacit consent, the ‘social unions’ and ‘communities of fate’ within which their citizens are born and engage in viable forms of social and political co-operation.10

The point I am here making concerns neither the grounds for political legitimacy, nor the conditions for a well ordered society. More narrowly, I am suggesting that there is an inherent contradiction in advocating the evolution of the European Union into a fully-fledged political community while adopting the ‘language of finality.’ For the latter attributes to the Union instrumental qualities, which are usually associated to secondary associations, whose scope and purposes are subordinate to those of the political community.

This conundrum is perhaps better explained by paying closer attention to a linguistic point, also raised by Walker in a footnote to his piece.11 There is, in fact, a difference of meaning between ‘finality’ as it is used in the English language and the equivalent term (finalité, Finalität, finalità) in most of the other European languages. The latter meanings refer to an ‘ultimate aim or purpose,’ while in the English language ‘finality’ refers to the ‘quality of being final.’ Walker suggests that the English meaning has recently intruded in what was the more traditional, and mainly continental debate on the ‘ultimate aims and objectives’ (finalité) of the integration process, by adding to it the sense that the question of integration is now “apt for final resolution – or . . . as having reached the end game.”12 In his view, this ‘(mis)translation’ has created some equivocation, thus contributing to
the polarization of the debate. All this is probably true, I tend however to see the mistranslation as something operating at a more conceptual level. The English meaning of ‘something final’ carries with it the idea that something is also ‘complete and definite.’ Moreover, a subordinate meaning of ‘finality’ in English is that of being a ‘final cause.’ With respect to this less colloquial, sense, the difference between English and the other European languages is less marked. Thus, the various meanings seem to combine and reinforce each other, giving to the idea of the ‘finality’ of the integration process (its aim, its final and functional causes, its definite and most complete state) a distinctively teleological undertone, which turns out to be the truthful philosophy behind the ‘language of finality’ itself.

There is a further paradox here. It regards the way in which the demands for democratic legitimacy, when presented through the ‘language of finality,’ turn out to be based on the very same premises on which the functionalist method – Monnet’s method of making Europe through practical policies and their spill-over effects – rested. Although it is now generally agreed that more direct legitimacy should partly substitute the output-based forms of legitimacy associated with the functionalist method, the ends of the integration process remain the same, confirming the impression that these are intrinsically (hence teleologically) inscribed in the process of integration itself. In other words, it is assumed that there was a telos driving the European integration process from the very beginning. Direct and functional forms of legitimacy turn out to be different means of an unchanging philosophy of history. Such an operation tends to idealize, and partly to misrepresent, the nature and history of the functionalist ‘method.’ Besides, it proposes a curious view of democratic legitimacy, which forecloses citizens’ options by fixing the political agenda in advance of the democratic debate and predetermines their decision by putting in front of them the stark alternative between integration and decline. The reason for this paradoxical continuity between functionalism and ‘finalist’ federalism lies perhaps in the erroneous foreshortening of the view of the various phases of the ‘integration’ experience into a single process. This approach fails to distinguish between the conditions and the socio-legal dynamics characterizing different phases of the formation period of the European Communities and the Union, particularly those applying to the post-Maastricht period. The latter is inscribed in a new geopolitical scenario, which follows from the collapse of the Soviet regime in Eastern and Central Europe, and poses new political demands to the nations and peoples of Europe. As a consequence of this overcompressed view of European integration, the vocabulary of ‘finalité’ (in the more instrumental sense of aims and purposes), which was originally applied to the evolutionary and functionally determined process of socio-economic integration, has uncritically been grafted onto issues of direct and democratic legitimacy concerning the new demands for greater political co-operation and social solidarity. It is this confusion that lies at the basis of the unresolved paradoxes of the ‘language of finality.’
A Constitutional Moment?

So far, I have said nothing on the last type of ‘finality’ mentioned by Walker: constitutional finality. One reason is that, in a sense, this is derivative from the others, particularly from the central group of social, political and purposive finality. In another sense, constitutional finality – meaning by this the achievement of a constitutional settlement – is, as Walker aptly shows, both a focus and a catalyst for all other forms of finality. It is not surprising, therefore, that the idea of a constitution of Europe has been at the center both of federal projects of Europe and of the ‘language of finality.’ And yet, as it is obvious, a constitution is a ‘beginning’ or a foundation moment, rather than a point of arrival. The only sense in which it can be considered as the end of a process is when looked at from a pre-constitutional perspective: as a document or a moment made possible by the coming to matur-ation of certain historical and political conditions. To be fair, in his Humboldt speech, Fisher did not duck the issue. When talking of the main reforms that the Europe Union needed in order to confront the challenges of the new century, he abandoned the language of finality for that of renewal: “These . . . reforms . . . will only be able to succeed if Europe is established anew constitutionally. In other words, through the realization of the project of a European constitution.”

I shall return to the temporal ambivalence – as end-results and new beginnings – of constitutions and constitutional moments. For the moment, I want to concentrate on the process of making a constitution from a normative perspective. In other words, I want to move from the question of whether Europe needs a constitution, to what making a constitution means for Europe. The political and constitutional debate surrounding the work of the European Convention has developed its own dominating image: no longer abstract and generic, like the crossroads, but concrete and historically situated: Philadelphia. Is the European convention the new Philadelphia? The question normally hides two other distinct questions. More directly: can the European convention have the same kind of impact that Philadelphia had on the making of the United States? Somewhat implicitly: can the European constitution initiate a new constitutional model, as the American constitution did more than two hundred years ago? Here I shall concentrate on the former question, but as it will emerge towards the end, the answer one gives to it partly depends on issues that have to do with the latter.

But to proceed in order, we need first to clear the ground from a number of confusions that the comparison with Philadelphia gives rise to. The comparison invites two types of judgments which, though understandable from a political and rhetorical perspective, I believe to be misleading. One concerns the historical impact, the other the product of the European Convention. The first comparison is misleading because it asks us to compare events of which we already have historical knowledge, and whose effects we are able to judge with hindsight, with other events, about which we can only make a judgement based on the aspirations of the participants. Moreover, many of the comparisons are based on an idealized
view of Philadelphia as seen through the eyes of successive American generations. These have often looked back at the work done by the ‘founding fathers’ at Philadelphia, in the light of the ongoing political process, reshaping constitutional history in their own self-image in the attempt to find a narrative for American political identity. The ‘meaning’ of Philadelphia is therefore a historically constructed meaning, which transcends the events of the time, while the ‘meaning’ of the European Convention is still in the making. The second comparison, that between the text of the American Constitution as it was approved at Philadelphia and the Constitutional Treaty drafted by the European Convention, is also misleading from a historical perspective. The two texts emerge from different sets of circumstances and operate in very different institutional, legal and cultural contexts, both geographically and historically. To assume that texts so far apart in time, space, and purpose should have similar systemic properties is rather naive.

It reflects a purely idealistic conception of the ‘constitution,’ while overlooking the nature of the specific challenges posed by the constitutionalisation of the European Union.

This said, there are ways of making more meaningful comparisons. These are neither historical nor textual but normative in character, and mainly concerned with the process of constitution-making. Of course, constitution-making itself can be examined historically by paying attention to its originating conditions and to the socio-political dynamics that drive it. It can also be studied descriptively, by analyzing the agents involved, the instruments and procedures they adopt, the arguments they deploy, and the kind of documents they produce. Both perspectives offer valuable insights for a normative analysis, but in themselves are inconclusive. Nor are all normative perspectives equally interested in constitution-making. Those that resolve the validity of constitution-making into either the unmediated exercise of ultimate sovereignty (pouvoir constituent) or the codification of a superior rationality (rightful norms) have little concern for the normativity of the constitution-making process itself. In order to establish a normative framework within which to assess and compare different constitution-making experiences, one needs to start from a more procedural and open-ended conception of constitutional principles and legitimacy. Such a conception takes the constitution-making process more seriously, by assuming that it makes a difference to the normative force (if any) of the constitution.

One particular normative framework through which to judge constitution-making is that recently suggested by Bruce Ackerman (and partly endorsed by Rawls) in his interpretation of the American experience as a dualist form of democracy with a two-track lawmaking process, one for ‘normal’ and the other for ‘constitutional’ politics. Normal politics is mainly oriented towards substantive policy-making, while constitutional politics sets the general legal and constitutional framework within which the polity functions. But for Ackerman the difference is not exclusively, and indeed not particularly, one of substance. There are other important characteristics that need to be in place throughout the various
phases of constitutional politics for the higher law-making function to be discharged legitimately and with full credibility. These include a deep, broad, and decisive popular mobilization capable of articulating its transformative project in the language of public reason; a sustained period of public deliberation; and the elaboration of a coherent set of principles, which can function as a credible guide for normal policy making for an extended period. These characteristics derive from Ackerman’s own view of the quality of participation in modern democratic societies. According to him, though democracies cannot rely on the full commitment of their citizens in the ordinary political process, they must nonetheless expect the citizens to make their own clear (and sovereign) voice heard in important and decisive moments of politics. These are the moments of constitution-making, whose legitimacy can be tested in relation to their ability to meet the criteria for higher law making suggested by Ackerman.

Although his framework is mainly an interpretation and rationalization of American constitutional history, at a certain level of abstraction, and as a first approximation, it can be used to assess whether Europe is living through a constitutional moment. In another recent paper, Neil Walker has suggested that what is characteristic of constitutional moments, as defined by Ackerman, is the fact that they are “marked both by discontinuity and by transformation.” This would seem to imply a mere consequentialist approach to constitution-making. On the one hand, constitutional moments are events that mark and make the difference between two different periods of normal politics; on the other, they need to make a significant difference. Both elements can only be judged a posteriori. Moreover, as Walker also remarks, the discrete and transformative character of constitutional politics imply that these moments should be both relatively rare and brief in duration – moments indeed. This characterization is certainly correct, but perhaps over-stylized. The duration of the constitutional moments, for instance, may vary greatly. Indeed, Ackerman notices that the phase of ‘mobilized deliberation’ requires the “movement’s transformative proposals [to be] tested time and again.” More generally, in his own characterization of Ackerman’s position, Walker concentrates on the ‘effects’ of constitutional politics and gives less consideration to its ‘properties,’ which, as he nonetheless says, are an important part of Ackerman’s theory of dualist democracy. Such properties, which as mentioned mark off constitutional from normal politics, can be judged as events unfold, even though they may need to be validated by their capacity to produce certain kinds of effects for the constitutional moment to succeed. In fact, Ackerman also contemplates the possibility of constitutional moments ending in failure, something that occurs in those cases in which the proposed transformations do not reach the codification phase. Thus the normative validity of constitutional moments is not merely consequential. Constitutional politics is legitimate not merely because it produces something new and distinctly different, but because is able to express, at particular moments, the generative force of democratic sovereignty. Its validity needs therefore to be fully inscribed in Ackerman’s more
general vision of dualist democracy as a system of legitimate government. This assumes that (‘We’) the people are able to engage in a higher form of law-making at certain historical junctures, thus making it possible for the citizens to conduct the normal (and less demanding) business of interest-driven politics between such junctures.28

When seen in its entirety, Ackerman’s framework offers a number of procedural criteria for the evaluation of the present phase of constitution-making in Europe. As John Erik Fossum and Agustín Menéndez have attempted to do,29 there is scope for assessing the pre- and post-Laeken process of writing the European Constitution in terms of the signalling, proposal, mobilization, and formulation phases outlined by Ackerman. Of course, the tests through which we can put the current constitutional process are mainly interpretative. First, we need to decide whether the public debate has been both deep and broad. Second, we need to consider whether the proposal on the table has what Ackerman calls ‘decisiveness’ – in other words, whether it commands a decisive majority against any likely alternative, or instead it is only supported by a relative majority, which lacks ‘decisiveness.’30 Third, we need to establish whether the way and the channels through which the proposal has been formulated make it worth of constitutional consideration. This is a rather intricate issue, which is particularly intertwined with the constitutional history of a country and the way in which some of its institutions may come to acquire a particular role as conduits towards constitutional transformation. Fourth, we need to assess whether the mobilization of public opinion in support of transformation is extended over time, so to gain an lasting and decisive majority. Finally, we need to evaluate whether the proposal is capable of legal codification, so to act effectively as a constitutional guideline for normal legislation.31

Since the debate over the European constitution has not yet gone through all these phases, it may be premature to formulate a precise opinion on whether it has the ‘properties’ that Ackerman attributes to successful (or even failed) constitutional moments. The application of Ackerman’s framework to the European context, however, presents two more fundamental difficulties. First, as we have already observed, the legitimacy criteria outlined by Ackerman are parasitic on his general theory of dualist democracy. Thus it would appear that the application of his evaluative framework to the European Union depends on whether this can be consider to be a kind of dualist democracy – which would not yet seem so – or whether at least we think it should aspire to become one. In either case, and specifically in the latter, the Constitution of Europe cannot so much be conceived as a constitutional moment between two phases of ordinary politics as a more foundational moment, from which a dualist democracy may eventually emerge. The second difficulty concerns the emphasis that Ackerman places on the sovereign subject (‘We, the People’) in the process of constitutional politics. This is particularly cogent if one assumes that the European constitution is a foundational moment, standing at the beginning of a series of cycles of ordinary and constitutional
politics. The adoption of Ackerman’s model therefore requires the solution of what is still a very open question in the European debate: who is the subject of the European constitution? This is no other than the much discussed question of the European demos: whether it is possible to envisage the formation of a European people, or whether differences between European peoples can not and should not be completely overcome. In considering these two difficulties, it must be concluded, as Walker does, that Ackerman’s dualist framework is not immediately applicable to the European situation. We must find some other normative framework in order to judge constitution-making in Europe.

The Constitutionalization of Europe: Normative and Institutional Disagreements

It is possible to identify a number of other approaches to constitution-making. Andrew Arato lists three such approaches besides Ackerman’s. Two of them – the classical European tradition, which places the constituent power in a normative vacuum (revolutionary democracy), and the liberal tradition, which is primarily interested in the substance of the constitutional arrangements (liberal democracy) – limit the importance of the constitution-making process by emphasizing the radical break with the past and the outcome of the process, respectively. The other two approaches (Ackerman’s and Hannah Arendt’s) conceive democracy as a dualist process, harnessing the vitality of democratic power to some kind of process or rule of law. This list is probably not exhaustive, but has the advantage of suggesting a link between the democratic principles underlying each approach and the institutional solutions characterizing different historical models of constitution-making. The latter are distinguished by the main agent directing the process of constitution-making: a constitutional convention, a constituent assembly, a normally elected legislature, the executive powers, or an evolutionary process.

Opting for one or the other of these institutional solutions tends to reveal the implicit theory of democratic sovereignty enshrined in a historical experience. But, according to Arato, there is no one-to-one relationship between normative approaches and historical solutions; rather, each democratic approach favors different rankings of the institutional options, thus suggesting a more complex relationship between democratic theories and constitutional processes.

There are advantages in considering the European experience by combining the institutional and normative perspectives. For it would appear that the post-Laeken phase of constitution making in Europe has so far opted for a mix of institutional solutions, and that this is one terrain of confrontation between different normative positions. Neil Walker suggests as much when he considers four constitutional narratives in competition with the ‘constitutional moment’ hypothesis: constitutional skepticism, historical contextualism, serialism, and processualism. Each of these positions either denies that the European Constitutional Convention can produce a proper constitution or defends a more gradualist
conception of the constitutionalization process. More significantly, all these perspectives are presently operating in the very process of constitution-making, leaving, as Walker puts it, “practical ‘traces’ in the process of the Convention and the body of the Constitutional text.”

From what has been said, it would seem that in the present phase of constitution-making both the institutional and the normative games are still wide open, suggesting that the debate on the European constitution is more fragmented than often assumed. Disagreements are not mainly about whether we need some kind of constitutional document – an issue somehow settled at Laeken, and by now generally accepted by all institutional players and people of different persuasions. Nor are disagreements limited to the content of the eventual constitutional document: the kind of values, rights, and ‘power map’ this will enshrine – something that is still very much open to discussion after the failure of the Italian Presidency to complete the IGC process by December 2003. There is also, and perhaps more fundamentally, disagreement over three other aspects of the constitutionalisation process: on its forms, its time scale, and the status of the eventual document. I shall briefly outline each of these three areas of disagreement so as to bring my reflections to a conclusion.

Disagreement about the forms of European constitutionalisation concerns the two related issues of the proper institutional channels through which to conduct it and the kind of public deliberation and decision-making needed for it. In this respect, the adoption of the convention method – even in the half-hearted way in which it has emerged – has played more than a symbolic function in correcting the previous practice of constitutionalization. In the past, constitutionalization – if it can be so called – had mainly progressed as the result of the interpretative function of the European Court of Justice and of the solidification effect produced by successive treaties negotiated at an intergovernmental level. The convention method has had the effect of widening both the debate and participation in the process, potentially involving the whole of the European citizenry. It therefore makes a claim for a constitution that is generative rather than merely interpretative (common law-style) of constitutional principles and conventions. It also partly redefines the character of the participants in the ‘constitutional’ debate by asking them to take on a new role as members of a ‘common body,’ the Convention, instead of simply acting as representatives of particular national interests. Moreover the broader representative nature of the Convention (also involving the European and national parliaments) and its more public and deliberative procedures seem to promote the idea of a constitution of the European people(s).

But this is only part of the story. Indeed, citizens’ participation and representation in the Convention has been rather indirect. The selection process has been a low-key affair, conducted entirely by and within the normal governmental and representative institutions. There has been little concern over both the low level of public interest shown in the work of the Convention, and the fitful way in which the press and the media have covered its proceedings. Some of the
initiatives organized to give it public visibility have mostly been perfunctory, as in the case of the youth convention, while the attempt to involve citizens more directly through the participation of civil society organizations has been largely symbolic and not properly thought out. The only formal role assigned to citizens – and this only in those few cases where member states’ legislation requires it – is to ratify the final text by referenda. Citizens, however, will be under heavy pressure not to scupper the whole delicate balance of agreements and compromises reached at the European level, or perhaps their vote will be used as a bargaining chip by governments that may wish to strengthen their own hand throughout the IGC phase. In fact, the IGC still remains the ultimate place where agreements can be made and unmade, while giving its final shape to the constitutional text. As some would argue, the retention of national veto power at the IGC table puts the whole process back in the hands of the national executives, making the convention method practically irrelevant. Such a conclusion, however, is not fully warranted. The truth lies somewhat in the middle, with the constitutionalisation process no longer in the exclusive hands of the governments and the European Court, but neither in those of the citizens organized as a ‘constituent’ power.

The second area of disagreement, which follows directly from the disagreement about the forms of constitutionalization, is that on its duration. This is no trivial matter, for it involves a fundamental difference between those who think of constitution-making as an event and those who conceptualise it as a process, a difference that takes us back to some of the themes discussed with regard to finality and constitutional moments. In point of substance, there may be no difference between a constitutional order achieved through a gradual process and one agreed at a particular moment. Indeed, many who throughout the years have applauded the role of the European Court of Justice in upholding the existence of a new European constitutional order now welcome the fixing of the constitution by the Convention. According to them, after a period of de facto constitutionalization, we have entered a phase when a more definite constitutional settlement needs to be formalized in view of the profound changes introduced by the single market, monetary unification, and enlargement. Moreover, both the legitimacy and democratic deficits need urgent attention, something that may only be achieved by fixing Europe’s institutional architecture and the rights of the European citizens. This kind of argument, however, presents two problems. By accepting that a constitution of sorts was already in place, it makes the present moment less foundational, thus posing the problem of the relation between the past and future constitutional orders. By emphasizing the legitimacy deficit of the European institutions, it becomes vulnerable to the counterargument that fixing the European constitution at this particular moment risks freezing the status quo, making it less acceptable to the European citizens. A more gradual process may be better at tracking and directing the political sentiments of the European peoples as they are asked to widen their sense of solidarity. It may also be more flexible and therefore better equipped at developing institutional arrangements so
as to make them seem relevant to policy projects and objectives in which citizens can more immediately recognize their interests and for which they may more readily mobilize.

There are two other important themes around which the disagreement about the time scale of the constitutionalization process revolves. One is the question of the relevance of the issues at the centre of constitutional debates, and the other is the precise impact of constitutional politics makes compared to ordinary politics. On the issue of relevance, Joseph Weiler has been particularly critical of the way constitutional mobilization has diverted attention from the really momentous changes that have occurred, or are occurring, in the European Union, and which have instead been managed either pragmatically or by default decisions, making sure, however, that the citizens were excluded from debating and deciding such issues. Enlargement, the single currency, and the stability pact are examples of important and ‘momentous’ policies and institutional developments on which there has been little public debate. These have been the hard choices confronting Europe, on which the formal constitutional process has little if no impact.

Weiler’s argument on the ‘irrelevance’ and timidity of the European constitutional debate can lead to two different conclusions. One, of more local consequence, is that the European political class has failed to put certain issues at the center of the public debate. The other, of a wider ranging nature, would suggest that there is no difference between constitutional and ordinary politics, and that the latter can have effects as momentous as the former. There is no space here to develop this argument, but I wish simply to note that the difference is more strategic than categorical. In a broader sense, constitutional politics is the kind of action that a series of favorable circumstances converge to create by offering a ‘window of opportunity’ within which it is possible to operate so to determine the character of a polity and its regime for a relatively long period of time. From this perspective, constitutional politics can only be judged consequentially, as was discussed earlier. But there are a number of other important elements that follow from this ‘strategic’ sense, which should also be noted. First, constitutional politics is not tantamount to producing a formal constitution, a document that has the formal qualities of constitutional law, distinct from ordinary legislation. The object of constitutional politics is more often the interconnection between the political (the more substantive organization of power) and the formal constitution. At times, it may concern changes in the ‘material’ constitution, by which one should understand important pieces of legislation or the organization of the state, which do not need to be part of the formal constitution itself. In view of this, it is impossible to define the province of constitutional politics in a way that excludes ordinary politics. Secondly, because of its partly consequentialist character, constitutional politics finds its validation in the way in which ordinary politics makes it its own point of reference.

In relation to the more ‘intrinsic’ properties of constitutional politics, these can be seen as a possible effect of the ‘window of opportunity’ contingency and of the
capacity of both leaders and citizens to operate in such a way to exploit the moment by organizing political attention and activating mechanisms of broader acceptance and allegiance within the community.\textsuperscript{39} In the modern conditions of democratic societies, sustained public debate and the mediation of ‘strong publics’ make an important contribution to the emergence of broad forms of principled and strategic agreement and practical convergence, at least in the long term.\textsuperscript{40} But all this does not necessarily require a higher level of consensus, which is almost impossible to achieve even among reasonable citizens, in view of their diversity of values, interests, and empirical assessments, quite apart from the complexities of social choice and its subject matter. Agreements in constitutional politics, as in ordinary politics, are points of equilibrium often reached through a variety of considerations and strategies, involving arguments, bargaining and negotiating processes, compromises, incomplete theorization, and strategic arguments.\textsuperscript{41} What is sometimes considered the binding character of constitutional consensus is at its origins – even when it emerges from truly exceptional moments of collective crisis and mobilisation, which are indeed rare – the product of a number of more or less principled compromises. At first, these compromises result in a \textit{modus vivendi}. Over time, and by the effect of common and continuous engagement both in the business of ordinary politics and in ongoing deliberative and decision-making, such a \textit{modus vivendi} may consolidate in a shared framework, which is always open, however, to different interpretations or to sudden collapse – as the experience of constitutional democracies amply testifies. To conclude on this point, if constitutional and ordinary politics cannot be clearly and categorically distinguished from each other on either their substance or because of their properties, and if nonetheless there is a more strategic sense in which such a distinction can occasionally become operative, there is no simple way of saying whether constitutions, and their normative appeal, are either the product of extended processes or decisive events. Indeed, it is probably safer to assume that both aspects tend to contribute to the making of a constitution.

Finally, I turn to the disagreement on the nature of the constitutional document, which in some respect is an extension of the disagreement on the constitution as an event or process. Here the question is partly captured by the issue of the ‘gender’ of this document, as humorously described by Giuliano Amato.\textsuperscript{42} He wished, or so he says, the newly born text to be a ‘girl’ (\textit{una femmina}), but had to acknowledge that it was in fact a ‘boy’ (\textit{un maschio}). In his view, the convention did not produce a ‘constitution’ (\textit{costituzione}, a feminine noun in Italian) but a ‘treaty’ (\textit{trattato}, masculine). Amato is convinced that the real point of difference lies in the power of revision that the draft attributes to the national governments and not to the European institutions, thus favoring an interpretation of the EU as still an international organization operating according to intergovernmental principles. And yet the draft does not present itself as a simple ‘treaty,’ but as ‘constitutional treaty,’ or, in other contexts as a ‘treaty establishing a constitution.’ This would seem to signal that the process of constitutional definition of the
European Union is still very much open and in the making. Moreover, and perhaps more importantly, the nature of the European constitution is in doubt. Indeed, many believe that the idea of the constitution as traditionally applied to the national context is no longer adequate in the transnational and multilevel context characterizing European governance. Such inadequacy has two sources. One is in the very conception of the constitution as an overarching document at the apex of a unified legal and political system. Such a conception has been said to be no longer tenable even at the national level because it is unable to capture in a few general principles the normative pluralism of modern societies, their socio-political differentiation, and the more particularistic nature of social legislation.43 The other source of inadequacy is the changing nature of constitutionalism, which in the European context needs to accommodate the national forms and practices of constitutional law. According to many, this gives to European constitutionalism a plural character, which needs to make a virtue of the necessity to enter in dialogue with diverse traditions and also find forms of accommodation between parallel legal and constitutional orders. One of the formative principles of European constitutionalism is therefore that of being tolerant, as Weiler maintains,44 or as Maduro says: “we have to start reasoning in the realm of what could be called counterpunctual law….The discovery that different melodies could be heard at the same time ….”45 From such a perspective, writing now the constitution as a more traditional text may risk jeopardizing what may be construed as perhaps the greatest achievement to date of the European constitutional order, that of a allowing for an ongoing political and constitutional conversation to go on across Europe.

Conclusions
What conclusions to draw from the reflections on constitution making in Europe? Quite simply, that the European ‘constitution’ is a work in progress in more than one sense.46 This is not because of the incapacity of governments to find an agreement in Brussels last December, which was partly, but not exclusively, the result of a poverty of leadership.47 Moreover, by the time this article is in press the IGC process may have been completed and a constitutional text ready for ratification (a process which, however, may not be entirely without problems, as the post-Maastricht experience showed). There are, I believe, deeper reasons that make constitution-making both contested and controversial in Europe. These reasons are linked to processes of transformation that are changing our very conceptions of constitutionalism and constitutions.

Because of this, there is no particular reason to worry about some of the inevitable failures of the constitutionalization process. Nor, should one be too sanguine about the dangers of one or the other constitutional path. Gradualists, for instance, may emphasize that a premature fixing of the formal constitution may turn out to be nothing more than a symbolic act – to which non-gradualists may answer that
the formal constitution should be nothing less than such a symbolic act.\textsuperscript{48} It is in this space between the ‘nothing less’ and the ‘nothing more’ that one should look for the effectiveness of any document eventually approved by the IGC and sanctioned by the peoples of Europe.

The legitimacy of any EU constitution requires constitutional dialogue at both the polity and regime levels. For this we need an open and public constitutional debate, but it is doubtful whether the best way of doing this is to have a traditional constitutional document in the short term. This may end up being both divisive and inconclusive. What is perhaps needed, in the short and medium term, is to set up a more definite and responsive institutional framework for the process of unification – a scaffolding to help form the constitution-in-progress, rather than an internal structure that may prove incapable of supporting the complex new functions of European institutions and the growing expectations of the peoples of Europe.

NOTES

1. Work for this article is part of a research done for the CIDEL RTD project under the European Fifth Framework Program. The article elaborates ideas first presented at the CIDEL workshop organised in Albaraccín (Spain), and further developed in an article published in Danish in the March 2004 issue of Politik. I gladly acknowledge the comments and criticisms made by the participants in the CIDEL event. This article was written while I was Visiting Academic Fellow at the Center for Democracy and the Third Sector (Georgetown, Washington DC) and I have also benefited from being Visiting Fellow at the EUI/RSCC 2003–04 Forum on European Constitutionalism. Finally, I am extremely grateful to Neil Walker for a series of stimulating exchanges and conversations around the themes of this article. My indebtedness to two of his recent articles is evident from my text. The usual caveats about authorial responsibility apply.

2. The title of the first section of the Laeken Declaration is “Europe at a crossroads,” and the text maintains: “The European Union is a success story…. Fifty years on, however, the Union stands at a crossroads, a defining moment in its existence.” The Preface to the Draft Constitutional Treaty, signed by the President (Valéry Giscard D’Estaing) and the Vice-presidents (Giuliano Amato and Jean-Luc Dehaene) of the Convention, echoes the same argument by using the related image of Europe being at a “turning point.” For earlier uses of the ‘crossroads’ image, cf. Paul Hirst, “The European Union at the Crossroads: Integration or Decline?” in R. Bellamy, V. Bufacchi, and D. Castiglione, eds., Democracy and Constitutional Culture in the Union of Europe (London: Lothian Foundation, 1995), 45–56; and François Furet, “Europe after Utopianism,” Journal of Democracy 6, no. 1 (1995): 79–89.


5. Cf. Hirst, “The European Union at the Crossroads,” 47. Hirst’s argument on the need for but not inevitability of integration, and on the rather complex nature of the relationship between economic and political integration, is both subtle and, with hindsight, fully convincing. Some of his
more pessimistic conclusions on the danger of decline if a socially progressive project did not emerge to power Europe forward have, however, proved exaggerated.


10. I am purposefully mixing the expressions ‘social union’ (used by Rawls and other liberals) and ‘community of fate’ (which has a more communitarian flavour) to indicate, as I do in the following sentence of the main text, that the argument I am making does not depend on accepting either of these perspectives.


12. Ibid.


15. Cf. J.H.H. Weiler, “Fischer: The dark side,” in ibid., 235–47, esp. 235–38. Weiler suggests that the European elite is relying on sleight-of-hand tactics, when they present a number of options (in his colorful example: different types of flavored milk) to the European peoples, while in fact taking away from them the most of important decision of all (whether or not they want milk). Weiler is perhaps carried too far in his criticism by his own rhetoric, but his suggestion that no real democratic choice has been given to the European citizens, is substantially right. On this, see below. On the rather alarmist aspect of the alternative between integration and decline, see Albert Hirschman’s cautionary advice that reformers should be wary of the force and persuasiveness of the ‘impending disaster’ arguments, cf. “The Rhetoric of Reform,” The American Prospect 4, no. 14 (June 1993).

16. The continuity between the ‘functionalist’ and the ‘federal’ phase is self-consciously maintained by Fischer in his own speech. More generally, such a continuity is embraced by most supporters of the federal option.

17. Fischer, “Vom Staatenverbund zur Föderation,” 27 (my emphasis). I quote, of course, from the English translation, which I have slightly changed to render the original German, where the first sentence talks of ‘Europe’s constitutional renewal’ (konstitutionelle Neugründung Europa), which needs to be achieved by writing ‘European constitution’ (europäischen Verfassung). The English translation uses ‘constitution’ in both parts of the sentence, making this sound rather redundant.

18. I am not here defending the draft text prepared by the Convention. I am convinced that there were other (probably more effective and certainly more elegant) ways of writing it. But direct comparison with the American Constitution, and the kind of criticisms that point out that the European draft is neither as short nor as elegant nor memorable as the text of the American
Constitution miss the point of what the European constitution is meant to do in the present circumstances. This is part of the ‘illocutionary act’ of the constitutional text, which in the European case may be very different from the one that applies to the American constitution when it was written.

19. On both these issues, see below.


21. Ackerman, We the People, 290.


25. Ackerman says that this phase may take years. Moreover, this phase needs to be distinguished from what he calls the ‘signalling phase,’ which can also be long and protracted. Cf. Ackerman, We the People, 266.

26. I must add that in my own paper for the CIDEL Albarcín Workshop I put a similar emphasis on effects over the procedural properties of Ackerman’s view of the constitutional moment. In this article, I am correcting that original impression.

27. Ackerman, We the People, 267.

28. As I say in the main text, although I regard Walker’s characterization of Ackerman’s idea of constitutional moments to be both correct and perceptive, I think he understate some of its procedural aspects. In talking of the ‘property’ of Ackerman’s constitutional politics, Walker refers to the ‘quality and inclusiveness of the debate.’ This seems to refer to the extent and deepness of public participation, but tends to glide over the ‘public reason’ elements that (more controversially) Ackerman’s position would seem to endorse.


30. This is a condition difficult to apply to the present circumstances in Europe, but a possible way of operationalize this condition would be that proposed by Philippe Schmitter, who suggests to put two different constitutional texts to the vote and to apply each of them to the European countries whose citizenry supports them. See P. Schmitter, How to Democratize the European Union ... And Why Bother? (Lanham: Rowman and Littlefield, 2000).

31. In the case of the drafting of the European constitution it would seem obvious that, if a text is finally approved, this would meet this final requirement. However, one should not take it for granted that all texts that may be presented as ‘constitutional’ have constitutional effectiveness. Indeed, in the very process of drafting of the constitution, many have maintained that this is only a ‘tidying-up exercise,’ whose end product does not qualify as a ‘constitution.’

32. It is interesting to notice that the Preamble to the Draft Constitutional Treaty adopted by the Convention did not have a subject, making its present reading syntactically odd. Evidently, the Convention decided not to pre-empt the eventual decision of ‘naming’ the subject (or ‘master,’ as often referred to in German: Herren) of the constitution: the people, the peoples, the nations of
Europe), or, more modestly, the governments comprising the European Council as signatories of the treaty establishing the constitution. On this problem of the demos/demoi, see Kalypso Nicolaïdis, “The New Constitution as European Demoi-cracy,” http://www.fedirust.co.uk/uploads/constitution/38_03.pdf.


35. Ibid.

36. There is a general agreement between European governments and European institutions that enlargement and the other recent developments require a more definite modus operandi within the Union and that this should be enshrined in some kind of document. As to the debate between Euroskeptics and Europhiles, the constitution can be seen by both as a useful instrument. By the latter to pursue the federal line, by the former to put a halt to that very same process.


44. Cf. Weiler, “In defence of the status quo.” Weiler’s argument about the plural nature of the European constitutional order is clear, but his use of the idea of ‘toleration’ as applied to the interrelation between different constitutional orders is rather confusing, unless it is meant as a generic attitude to intercultural dialogue. On the difficulties raised by recent debates on toleration, see Catriona McKinnon and Dario Castiglione, “Reasonable toleration,” McKinnon and Castiglione, eds., The Culture of Toleration in Diverse Societies: Reasonable Tolerance (Manchester: Manchester University Press, 2003), 1–11.


46. On the various aspects of this process, see Jo Shaw, “What is a Convention?,” Reihe Politikwissenschaft/Political Science Series 89 (2003).

47. The fact that the holder of the European presidency at the time was the Italian prime minister, Mr. Berlusconi, is symptomatic of that failure of leadership, though it would been difficult to imagine a less apt European leader for the task at hand. Indeed, even if the political situation, particularly after the Spanish elections, has made it much easier to find an agreement, the Irish presidency
acted more skilfully and effectively from the start. It is probably thanks to the ‘cunning of history’
that Europe has been spared the ignominious fate to have its constitution approved while Berlusconi
was its president.

48. Neil Walker is right to stress how Habermas’s and others’ arguments in favour of a consti-
tution cannot be easily dismissed as inapplicable at the present moment, for such appeals and argu-
ments are part of a community-mobilizing moment, which has, if successful, a partly self-fulfilling
aspect; see “After the Constitutional Moment.”

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