The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights

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'Constitutional' and 'normal' politics are often treated as distinct species of the same genus.[1] Whereas the latter supposedly involves a focus on policy considerations and the promotion, balancing, and aggregation of sectional interests, the former is portrayed as a more high-minded affair. It consists of deliberation on the common good to arrive at a consensus on those principles required to show each person equal concern and respect.[2] As such, it comes as close as possible to the ideal politics of an original contract between free and equal citizens. Proponents of this interpretation maintain that if everyone is constrained to reason in an open and equitable manner, uninfluenced by purely private advantage, prejudice or other kinds of unjustifiable partiality, the contractors will converge on a conception of justice that is both fair and in the public interest. By contrast, normal politics is said to be the realm of shabby compromises, in which self-interested parties bargain for personal or sectional gain, only accepting what they have to in order to get as much of their way as they can.[3] Consequently, the outcomes of constitutional politics – most notably constitutional rights – provide the preconditions for normal politics and may legitimately constrain it.[4]

We dispute this contrast and the relationship it proposes between these two political settings. Constitutional politics are typically linked to dramatic 'moments' such as a civil war, revolution, military defeat, or some other national disaster or major turning point.[5] In these cases, it is necessary to rebuild the structures of normal politics and normalize the antagonisms of opposed groups. Less dramatic instances, such as the three rounds of constitutional politics in Canada since the mid-1960s, have had similar aspirations – namely, to bring antipathy to the prevailing regime within the fold of normal politics. We contend this process of normalization arises not because constitutional politics stands outside and differs from normal politics, but on the contrary because it reveals that conflicts on matters of principle are amenable to the normal political processes. Disagreements about constitutional principles are frequently well founded and reasonable, both reflecting and lying at the heart of normal political divisions. Consequently, a consensus beyond these political disputes is not available. Rather, mechanisms have to be found whereby people can live with their disagreements. As a result, constitutional politics reaches an accord not through some or all disputants being

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converted to a common point of view, but via a normal political process of give and take that allows the parties to reach mutually acceptable compromises in which each recognizes the views of others without necessarily agreeing with them. As with ordinary legislation, there need be nothing shabby about such deals.[6] They involve a complex mix of bargaining and principled argument that belies attempts to distinguish normal from constitutional politics by associating the former exclusively with the first and the latter with the second. Politics *tout court* necessarily employs elements of both, combining them in different ways according to the nature of the issue being discussed, so as to find solutions all can live with.

We shall illustrate our thesis via a detailed analysis of the debates in the Convention that drafted the EU Charter of Fundamental Rights. Section one considers the nature of constitutional rights. We argue that because rights are subject to reasonable disagreements about their substance, scope, and sphere, the subjects to whom they apply, and the ways they might be specified and secured, the conditions of public reason held to typify 'constitutional' politics will be insufficient to produce a consensus. The second section explores how these differences may nevertheless be resolved through various types of normal political compromise. The third section illustrates these points through an analysis of the Convention. We conclude by suggesting the success of this, as with other, conventions lay not in its extraordinary character so much as its normality. As a consequence, we ought perhaps to treat its conclusions as part of, and reformable by, normal politics too, rather than according them the superior status standardly attributed to the Charters and other agreements resulting from such meetings.

1. Rights and the Circumstances of Politics

Though most people agree that rights are rendered necessary by the limited altruism and resources that Rawls (following Hume) termed the "circumstances of justice,"[7] many disagree about which rights these are, their nature, bearing, and relationship to each other. Does the right to life rule out abortion; how far does the right to property restrict transfer payments for welfare; when, if ever, should freedom of speech give way to privacy? The list of potential divisions over the meaning and application of rights appears endless. This predicament poses a problem for the constitutional rights project. If we need rights because of the 'circumstances of justice,' it appears that we have to identify and interpret them in what Jeremy Waldron, among others, has called the 'circumstances of politics': namely, a situation where we require a collectively binding agreement because we will suffer without it, yet opinions and interests diverge as to what its character should be and no single demonstrably 'best' solution is available.[8] Many proponents of constitutional rights seek clear and settled answers that brook no debate because based on a consensus on justice. As such, they are supposed to be beyond politics, offering legitimate constraints upon it. However, if there are rea-

sonable disagreements about truth and justice, then a political process will be needed to resolve them. Constitutional rights will not be outside or even, as may be partly the case, presuppositions of politics.[9] They will be products of the very political bargaining they are supposed to frame.

It is sometimes objected that such disagreements over rights arise solely from self-interest, ignorance, or prejudice leading people to seek to perpetuate various sources of injustice. Wittingly or unwittingly, this is no doubt often the case. Yet, as John Rawls has observed, they also arise from what he calls "the burdens of judgement, . . . the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement in the ordinary course of political life."[10] Rawls lists the following six "more obvious" (and, in his view, least controversial) factors as contributing to a divergence of judgment among reasonable people: 1) the difficulty of identifying and assessing often complicated empirical evidence; 2) disagreement about the weighting of different considerations even when there is agreement about which are relevant; 3) the vagueness and indeterminacy of our concepts, which makes them subject to hard cases; 4) the effect of the different life experiences of people, which in complex societies vary widely, on the ways they assess evidence and weigh moral and political values; 5) the different kinds of normative consideration, each with different force, on both sides of an issue, which make overall assessments problematic; and 6) the impossibility of any social and political system being able to accommodate all values.[11]

Rawls cites these six factors as making it impossible to base a stable political settlement on a consensus around a comprehensive conception of the good. Yet, as a number of commentators have remarked,[12] they raise equal doubts about a consensus on the right. For example, think of the debates over breaches of privacy. It is often difficult to identify such breaches not only because the empirical details may be unclear, but also (and most importantly) because people differ over the boundaries of the concept, hold different accounts of the public interest and where it overrides the right to privacy, view personal responsibility differently, and so on. As a result, they may even have different views of when a right exists to be breached in the first place. Indeed, the laws in many states diverge on this point. For example, France and Germany protect the privacy of public figures more than Britain or the United States.

Thus, rights appear subject to many of the divisions animating political debate more generally. Indeed, these disagreements extend to the very concept of a right. For example, 'choice' and 'benefit' approaches produce very different accounts of the nature of rights, with this theoretical debate mirroring many political arguments among the wider public, such as those between libertarians and welfarists. Broadly speaking, we can say that disagreements can arise over:

- the *substance* of rights, or which rights we have and why;
- the *subjects* of rights, or who may possess them;

- the *sphere* of rights, or where they apply – only in the public sphere, or also to private associations;
- the *scope* of rights, or how they relate to other rights and values; and
- the *securing* and *specification* of rights, or the type of political or judicial intervention and the precise set of entitlements that are needed to protect them, both in general and in particular cases.

Though analytically distinct, these dimensions are related so that the interpretation given of any one of them will have knock-on effects for how all the others are conceived.[13]

To some degree, these six dimensions of rights can be seen as defining the contours of the political. A given view of rights will, explicitly or implicitly, identify certain sorts of agents and groups of people as citizens and describe the public realm in a particular way. For instance, moral and economic libertarians will be likely to have a narrower view of the legitimate range of political activity than social democrats, even if in some respects they might be willing to extend citizenship within this severely circumscribed range to a wider group of people. As such, one could describe arguments about rights as a form of 'constitutional' politics since they concern the very constitution of the political. Yet, as the example given above illustrates, they are also intimately related to the issues that engage people within 'normal,' everyday politics. To a greater or lesser degree, most policies involve taking a view on one or more of the dimensions of rights and this stance will reflect the ideological position, interests, and experiences of those concerned. In other words, the standard divisions of 'normal' politics, which lead conservatives and social democrats to divide over education, health, immigration, and so on, are related to many of the reasonable disagreements people have about rights. Indeed, these latter disagreements about rights inform their debates on policies. Consequently, 'normal' and 'constitutional' politics are intertwined. A constitutional settlement will tend to reflect what could be 'normally' agreed at the point at which it was framed. As such, it is likely to be at issue and subject to subsequent reinterpretation as normal politics evolves. Thus, we should not be surprised if normal divisions and strategies enter constitutional politics or that normal politics proves more adept at dealing with constitutional questions than many have supposed. Indeed, the very purpose of constitutional politics may be to appreciate the normality of these divisions and the need to live with them.

2. The Politics of Compromise

In circumstances of reasonable disagreement, deliberation will not produce consensus. There is no better argument none can reasonably reject and no compelling reason for anyone to transform their position to adopt another's. We submit that people overcome this impasse by dropping consensus for mutual acceptability and employing the arts of compromise to reach an agreement.[14] Compromise is

usually characterized as the product of shabby deals based on self-interest. By contrast, we argue it reflects a willingness to "hear the other sides" by acknowledging their reasonableness, without necessarily denying that of one's own position, and addressing the often competing claims of the parties concerned.

Roughly speaking there are three kinds of compromise, with the version adopted depending on the character of the parties and the differences dividing them. The first kind seeks a direct compromise between the different viewpoints. One of the commonest methods consists of *bargaining* and arises in what Albert Hirschman has called "more-or-less" conflicts.[15] In these cases, the disputants are either arguing over a single good whose meaning they share, or are able to conceive their various demands as being translatable into some common measure – usually money. Thus, when employees haggle over wages or house buyers over the price of their prospective home, they may have issues other than money in mind – such as the need to work late or the proximity of a railway line in these two examples – but they can nevertheless put a price on their concern that enables the parties to agree a mutually satisfactory deal. However, many conflicts cannot be resolved so easily because the positions are incommensurable or incompatible with each other. In these instances, more complex compromises are required. A more sophisticated style of bargaining involves *trading* to mutual advantage, whereby each gets some if not all of what they want. For example, most political parties have to engage in a degree of log-rolling to get elected. This procedure brings into a single party various groups that may disagree over many issues but prioritize them differently. If three groups are split over the possession of nuclear weapons, development aid, and a graduated tax, but each values a different one of these more than the others, it may be possible for them to agree to a package giving each the policy they value most while putting up with another with which they disagree in an area that matters less to them. Of course, sometimes the result can be a programme that is too inconsistent to be tenable or attractive. Here, it might be better for the groups to shift to an agreed *second best*. Some conflicts appear intractable at the level of abstract principle but can be resolved through the *negotiation* of the details. What appear to be stand-offs between incompatible views sometimes arise through the various positions being under-articulated. Thick description may help clarify the distinctive weight of different demands. Each party may agree that reasons of different weight or involving different sorts of consideration are involved. Or it may be possible to reason casuistically and by analogy from those cases where there is agreement to others where abstractly there appears to be a stand-off. Judges often use precedents in this way.[16]

The second kind of compromise consists of various attempts to skirt around the disagreement. For example, people often employ *trimming* to avoid talking about the issues that divide them and seek either to find agreement on other grounds or to take them off the agenda altogether. This technique resembles the way neighbors of opposed religious beliefs steer clear of discussing religion so as to remain sufficiently friendly to cooperate on school runs. It is partly employed by Rawls

when advocating the avoidance of 'comprehensive' moral theories in politics,[17] and is familiar in constitutions in the form of 'gag-rules.'[18] From this perspective, the very decision to have a Bill of Rights can be regarded as a compromise agreement to remove certain divisive issues from the political agenda. A variation of this technique is *segregation*. Here the attempt is to contain potentially conflicting issues or differing groups of people by placing them within distinct spheres. Granting ethnic or national minorities limited forms of self-government and consociational forms of democracy provide examples of this approach.

The third kind of compromise employs a procedural device to overcome deadlock. Third-party arbitration is one common mechanism of this kind, where trust is placed in the arbitrator to do the balancing in an impartial manner according to a fixed set of rules. Majority voting is another example of this approach. In this case, the disputants compromise on a procedure they all accept as fair even if they will continue to disagree on the merits of the actual decision itself. Such methods appear justified wherever agreement on substance seems unlikely because of time constraints or the character of the differences dividing the parties.

All three kinds of compromise, along with their variants, are standard political techniques and frequently combined. Each has its respective merits and demerits, according to the issue and the perspectives of the people concerned. Take religious education in a multicultural society. Trading might yield ecumenical solutions or concessions in other areas that certain religious groups regard as more important, such as special rights like Britain's exemption of Sikhs from wearing crash helmets on motorcycles. Or it might be better to trim or establish as a shared second best that schools are strictly secular. Societies that are deeply segmented along religious lines have often adopted various forms of segregation, such as consociationalism.[19] Sometimes a minority group engages in negotiation to get accepted. For example, British Muslims have pointed to analogies with established liberal or Christian practices to get certain of their claims recognized as legitimate and to promote understanding of them.[20]

Whereas the ideal of consensus suggests that constitutional politics should act as a funnel to produce agreement on some ideally just arrangement, the need to compromise simply acts as a filter, weeding out the most blatantly unjust and self-serving positions that fail to treat others with equal concern and respect. Moreover, while consensus aspires to a fixed point above normal political divisions, compromises necessarily reflect them. They differ according to context and evolve as people's circumstances and views change. Therefore, if compromise rather than consensus has to form the goal of constitutional politics, it will resemble normal politics not just in its processes but also in its decisions. For they will mirror the prevailing differences.

It will be objected that compromise will only be fair if the relative power of the parties concerned is so divided that all get a hearing but none has the ability to force concessions to meet perverse or unjust claims. In fact, compromise shares the concern with political equality that animates democracy. Namely, it "requires

the view that we must recognize everybody with whom we communicate as a potential source of argument and reasonable information."[21] It is vital, therefore, that different view points are fairly represented in the decision-making process. One advantage of constitutional over normal politics may be that this is more likely to be the case. As we shall see was the case in the Convention, different view points tend to be so represented that even minority positions get a hearing, while the public character of their deliberations and the need for near unanimity encourage participants to appeal to shareable reasons rather then prejudice or self-interest when making their arguments. However, here too the difference between constitutional and normal politics is largely a matter of degree rather than of kind. Most political systems seek to ensure fair and reasonable decision-making through adopting a suitably proportional electoral system, drawing constituency boundaries in certain ways, dividing legislative power, and so on.[22]

The critique of majoritarianism, the most common objection to normal politics, needs qualifying in this regard. An insistence on unanimity may give small groups an effective veto over decisions that amounts to minority tyranny – a fear we shall show some voiced in the Convention. By contrast, majority voting can be the fairest decision procedure, as May famously showed,[23] and, as Condorcet revealed,[24] may be more likely to be right than individual judgment. Of course, both these results assume ideal conditions that rarely obtain in practice.[25] However, for this reason strict majoritarianism is unusual in real political systems. Most legislatures are elected via systems that produce multiple parties and a degree of representativeness that makes coalition-building necessary.[26] As pluralists have long noted, even within dominant parties majorities get constructed from minorities. Legislative majorities are often in reality super-majorities of the population as a whole, reflecting a wide spectrum of public opinion. Thus, the structures of constitutional politics are also closer to those of normal politics than is sometimes granted.

3. Compromising on Rights: An Analysis of the Charter Convention

We have argued that constitutional politics raises normal political disagreements and so must adopt the procedures of normal politics to overcome them, albeit refining some of its structures to do so. This section presents a case study to show how the Convention to draft the Charter of Rights employed the politics of compromise. The decision to draft the Charter originated during Germany's Presidency of the EU in 1999 and reflected a growing sensitivity to rights issues within the Union.[27] This concern had numerous sources – the long-standing challenges to the European Court of Justice (ECJ) on this issue from the constitutional courts of member-states,[28] the desire to uphold human rights standards in the face of the rise of far-right parties and the prospective enlargement to the new democracies of Central and Eastern Europe,[29] and the belief that highlighting rights would demonstrate the EU's commitment to the central principles of good governance.[30]

Though these triggers do not amount to a constitutional moment of a dramatic kind, they were aspects of a widespread feeling that the EU faced a legitimacy crisis that would inhibit its capacity to confront the challenges posed by the deepening and widening of the EU occasioned by the Euro and enlargement. However, like other EU attempts to legitimize itself, the Charter was originally conceived as addressing supposed weaknesses of popular perception more than of policy.[31] As the conclusions of the Cologne European Council meeting of June 1999 establishing the initiative made clear, the Charter was to be addressed to European citizens rather than EU institutions and personnel. Its purpose was to make the Union's existing "obligation . . . to respect fundamental rights," as "confirmed and defined by the jurisprudence of the Court of Justice," "more visible to the Union's citizens."[32] Accordingly, drafters were directed to those sources the ECJ currently employed when adjudicating on rights, notably the supposedly "common constitutional traditions" of the member states, the European Convention, the European Social Charter, and the Community Charter of Fundamental Social Rights of Workers. Whether the Charter would become legally binding was left open.[33]

Such attempts to constrain constitution-making bodies are not untypical.[34] Established authorities rarely welcome a potential subversion of their existing powers. However, like most past constituent assemblies, the Convention refused to be bound by upstream authorities.[35] The very adoption of the term Convention to describe itself, the official documents having referred simply to a "body," was a declaration of intent to draft a founding document rather than just showcase existing entitlements, though how far it could go was a point of contention throughout its proceedings. Meanwhile, the status of the document was neatly shelved by the Convention President's decision to draft the Charter "as if" it would become binding.[36] Though this policy was also contested, it lead to all the participants taking the process seriously enough to avoid it becoming simply a wish-list of campaigning groups, a fate that can befall international declarations that lack the backing or involvement of governments.

The Convention conformed to the ideal conditions for a democratic deliberative setting as nearly as is realistically possible.[37] Its size was reasonably optimal. With 62 members it was not so large that it favored oratory over argument, with those speakers most versed in rhetoric coming to the fore. Rather, all members could participate in discussion. Even if there was minimal direct consultation with the electorate over their deliberations or its conclusions, the Convention was more than usually representative of European public opinion in terms of the range of ideologies and interests it included and consulted. Like EU decision-making more generally, the Convention involved national, transnational, and supranational representatives, along with formal and informal consultations with subnational groups.[38] However, unusually the weighting was towards parliamentarians in the national and European parliaments, who accounted respectively for 30 (or two each, usually from the main government and opposition parties) and 16 of the

62 representatives. By contrast, member-state governments and the Commission only had one representative, making 16 in all. Nevertheless, only 16% were female and all were white. Two representatives each from the Council of Europe and the ECJ had observer status, and the European Council had indicated that other European bodies, such as the Ombudsman, the Committee of the Regions, and the Economic and Social Committee, be invited to give their views and an "appropriate exchange" be entered into with the candidate countries for Union membership.[39] In addition, the Convention was encouraged but not required to invite "other bodies, social groups, or experts" to give their views.[40] Though most Convention members belonged to institutions potentially affected by the Charter, most lacked a strong interest in preventing it from undermining these bodies. They were either senior figures nearing retirement, middle ranking politicians unlikely to achieve major office, or, in the case of certain governmental representatives, relatively independent academics or lawyers.

The European Council specified that the debates and hearings of the body and the documents submitted to it should be public, and a dedicated website made the proceedings reasonably easy to follow from outside and allowed submissions from any interested individual or group. Most debates were held in open, plenary sessions. As a result, the process was public enough to ensure transparency and oblige participants, however hypocritically, to employ the language of impartial reason rather than of mere self-interest. But its meetings were not so publicized as to encourage grandstanding and rhetorical overbidding aimed at courting or palliating groups outside the Convention. Moreover, if total secrecy encourages bargaining, partial secrecy can allow free and frank discussion. A key role in this respect was played by the praesidium, which met in secret and placed drafts before the Convention to amend or accept. It consisted of a chair, Roman Herzog, a former president of both the Federal Republic of Germany and its Federal Constitutional Court, who was chosen by the Convention, and three vice-chairs chosen respectively by the national parliamentarians, the European parliamentarians, and the representatives of the member-state governments (who were represented by the delegate of whichever state held the rotating EU presidency at the time). It acted as a third-party arbitrator, brokering compromises that their declared commitments hindered the participants from reaching directly themselves.

Finally, the Convention had a strong incentive to reach a mutually acceptable outcome. The Council had ordained that a draft Charter was to be presented for approval "when the chairperson…deems that the text of the draft Charter elaborated by the body can eventually be subscribed to by all the parties."[41] The Convention's chair, Roman Herzog, took this instruction to mean that votes on individual proposals were to be avoided and that decision-making should be as consensual as possible. This interpretation was not uncontentious, and was felt by some to obscure real divisions and by others to give too much power to minority opinions.[42] Still, the final draft was approved by a "consensus minus two" at the plenary.[43]

However, notwithstanding these near optimal discursive conditions, this apparent constitutional consensus actually consisted of a series of normal compromises aimed less at normative agreement than mutual acceptability. The Convention debates reveal cleavages over all six dimensions of rights. A major divide concerned the legitimate sphere of the Union's activity. Some, like the British government's representative Lord Peter Goldsmith, maintained "the task of this Convention is to make existing rights at European Union level more visible."[44] They wished to restrict the Charter to those rights derived from the sources to which the Council had referred them for guidance. Others, like the Italian government's delegate, Stefano Rodotà, thought the Charter should go beyond the ECHR and give "substance to European citizenship."[45] They wanted to draft a new and substantially wider document that extended into areas not covered by earlier instruments, such as biotechnology, and that might even provide the foundation of a future federal European polity. As a result, the debate over the EU's sphere partially overlapped with familiar philosophical and ideological differences over the substance of rights. Some wanted social rights included, others viewed them as policy choices that lie within (and must be compatible with) a domain established by civil and political rights. This debate was also related to discussions over whether all rights, some or none should extend to subjects other than citizens of the Union (a status currently restricted to nationals of the member states). Some considered fundamental rights as logically including all humans, others considered them as attributes of citizenship. Different accounts of the nature of rights also tend to produce divergent understandings of the scope of various categories. Not surprisingly, conservative parties tended to emphasize market-based and process rights protecting formal equality, while social democrats favored placing social rights on a par with traditional civil and political rights as necessary to ensure these were of equal worth to all. These differences also informed the major divisions over the status of the Charter and how, if at all, it should be secured. Some insisted the Charter should be legally binding, others contended the Cologne conclusions had made clear it would only be declaratory. Naturally, all these issues had an impact on the way the various rights came to be specified.

Significantly, the Convention did not divide into two distinct groups of minimalists and maximalists, with debates so polarized between them that compromise became difficult. Because a maximalist on matters of substance might be a minimalist over which subjects or spheres should be included, there were cross-cutting divisions. The groups who agreed or disagreed about one dimension differed from those who agreed or disagreed over another. Nor was a maximalist position necessarily always the most just, with all detractions from it being motivated by national or group self-interest rather than principle. To a large extent, disagreements took place in the context of general agreement on the importance of rights. All member states are signatories of the ECHR, along with other international instruments, and possess some form of domestic bill of rights. Though

special interests may have motivated some arguments, this applied as much to maximalist as to minimalist positions. However, most divisions mirrored, albeit at a lower level of sophistication, debates in the academic literature between cosmopolitans and liberal-nationalist communitarians, Kantians and utilitarians, choice and benefit theorists, and so on. In other words, they are rights-based differences between and over the nature of rights rather than between proponents and opponents of rights.

The solution to these disagreements lay in the types of compromise outlined above. Forms of bargaining that simply split the difference proved possible to a remarkable degree. For example, the substantive debate between proponents and opponents of workers' rights reached a compromise whereby the proposal for a "right to work," in the sense of an entitlement to a job, became modified to the more free-market sounding "freedom to choose an occupation and a right to engage in work" (Art. 15). Other compromises in this area involved trading, whereby a package was agreed giving each side some of what it wanted. Thus, a deal was done whereby Article 29 establishing a right of access to a free placement service was included in return for a relatively open-ended "right to own, use, dispose or bequeath his or her lawfully acquired possessions" and the recognition of the "freedom to conduct a business" (Arts. 17 and 16 respectively).[46] Part of the controversy surrounding social rights arose from many aspects of social policy not falling within the EU's current competence.[47] Consequently, even those who substantively favored social rights did not necessarily support them in the Charter because they did not wish to expand the Union's sphere. Here too trading offered the solution, with Articles 51 and 52 representing a compromise of this kind that gave something to both minimalist and maximalist stances on this issue. The former gain by the first article, which limits the Charter's application to EU institutions and the implementation of EU law by the member states (51.1) while explicitly ruling out the creation of any new competence (51.2). However, the latter gain by the second article, which indicates that limitations on these rights are not justified by the subsidiarity principle (52.1) and that when they coincide with rights in the ECHR, acceded to by all member states, have the same scope as there (52.3), though allowing the Charter and Union law to exceed them. This concession to the sphere minimalist in the event allowed a fairly maximalist view of the scope of social rights to enter into the Charter, even when it was doubtful if they did fall within the EU's competence, as was the case with social security (Art. 34) and health care (Art. 35) (though these were only granted "in accordance with the rules laid down by Community law and national laws and practices").

When it came to the tricky issue of the subjects of Charter rights, segregation provided the solution. The Cologne mandate had been ambiguous on this question, listing not only the supposedly universal rights contained in the ECHR, but also "the fundamental rights that pertain only to the Union's citizens,"[48] thereby implying not all the rights included in the Charter would automatically be rights

of "every person." Many Convention members expressed their concern about limiting rights to EU citizens, which some saw as incompatible with the substance of human rights as universal entitlements.[49] However, it was also possible that extending EU rights to all persons would result in a minimalist position as regards both their sphere and scope. The resolution of this complex dispute was a multi-layered compromise involving distinguishing five categories of rights according to their subject. So the 'classical' fundamental rights and freedoms (i.e. those taken mainly from the ECHR) are formulated as "rights of every person," those rights based on the EC/EU Treaty provisions on citizenship are rights of "every EU citizen," then there are rights, such as for example "social security and social assistance" (Art. 34) which are addressed to "everyone residing and moving legally within the European Union," while some other rights (for example Arts. 27, 28, 30, and 31) provide rights for "every worker" or for "every child" (Art. 24.3). Finally, the Charter introduces a new category of rights addressed to "any Union citizen and any natural or legal person residing or having its registered office in a member state" (Arts. 42, 43, and 44). So, by segregating between different categories of rights and stipulating carefully who could hold them, the classes of people counting as subjects of EU rights could be expanded.

Nevertheless, not all issues relating to the identity of the subjects of rights could be dealt with in this way. A particularly pertinent example was the right to join and found political parties at the European level. Compromise on this right was only achieved by a form of trimming that involved moving from the particular policy to a higher level of abstraction. Originally the praesidium had proposed a separate article specifying that "every citizen" had the right to join and found parties.[50] This proposal sparked a controversial debate over whether such an important political right could and should be restricted to EU citizens, and what provisions ought to be made for immigrants. In response, the praesidium proposed a second draft of this article which drew a distinction between the right to join a political party, which it gave to "everyone," and the right to found political parties, which was to be restricted to "every citizen."[51] After another debate and a number of written alternative proposals, the praesidium withdrew this idea and decided to drop the whole article from the Charter's chapter on citizens' rights. Instead, parties are now referred to only in the abstract in the second paragraph of Article 12, which covers the much less controversially universal right of "freedom of assembly."

As the above examples show, compromises over one dimension of rights tended to interact with, and often ease, compromises in other dimensions. As a result of this process, agreement on the Charter as a whole gradually developed. However, there was always a danger of the various compromises coming apart whenever the ways they fitted together as part of a composite package came under close scrutiny. For reasonable disagreements remained, particularly over the substance of many rights and the status of the Charter. These differences

were largely overcome by concentrating on particular issues and treating the decisions as the product of a pragmatic attitude of give and take rather than a consensus on rights. Indeed, sometimes the language of rights was dropped altogether.[52] For example, in the areas of consumer and environmental protection, it proved impossible to settle on a formula based on individual rights. Instead, agreement was reached on a general policy aim or "principle," as it was termed. Thus, Article 37 does not give a right to a clean environment but merely declares "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." Likewise, Article 38 states "Union policies shall ensure a high level of consumer protection."[53]

The debate over the preamble to the Charter illustrates well the tensions dividing the Convention and the political mechanisms employed to resolve them. There was a general discussion early in the Convention about whether the Charter needed its own preamble, since it was to become either a part of the Treaties (in which case it would be preceded by their preambles) or a mere political declaration to which a prologue of some sort could be added later and not necessarily by the Convention. Yet, in the spirit of Herzog's view that the Charter should be a self-standing document that kept all options open, several individual Convention members proposed drafts for a preamble, as did the praesidium.[54] The exchanges that followed once more brought to the fore the different visions among Convention members of both European integration and the role and basis of the Charter, threatening to block final acceptance of even those articles which had already been agreed to.

By the time the preamble came to be debated, it had been agreed that the European Convention of Human Rights (ECHR) should provide the minimum standards on a number of civil and political rights. Nevertheless, disagreements still existed over the role, scope, extent, and legal function of social rights within the Charter, and more generally about the source and substance of rights. With regard to the first issue, the praesidium's introduction into its first preamble draft of "solidarity" as one of the "indivisible, universal principles" on which the Union is founded was a major step. However, though it reflected the discussions thus far, it remained contentious.[55] Moreover, it became entangled with a debate over the second issue when a further controversy arose on July 19, 2000 over the suggestion that the preamble should identify Europe's cultural and, in particular, its religious heritage as the source of fundamental rights.[56] In response to the written contributions and discussions that followed, the praesidium's third draft proposed to open the text with the phrase, "Taking inspiration from [Europe's] cultural, humanist, and religious heritage, the Union is founded on the principles of…."[57] However, this suggestion aroused such profound political disagreement that it appeared compromise would be impossible. On the one side, the French government's representative, Guy Braibant, apparently argued within the praesidium

that any reference to religion would be unacceptable to France and lead it to veto the whole Charter at the Intergovernmental Conference following the Convention. On the other side, the proponents of the religious reference (mainly German Christian Democrats from the EP delegation) were equally adamant. Given the tight time schedule (the impasse became apparent on September 14 and the Convention was due to present a complete draft to the Biarritz European Council meeting on October 11) and the large number of issues still outstanding, two parallel dynamics evolved around this question: on the one hand, the praesidium attempted to construct a compromise based on its proposed text but involving linguistic segregation and trimming; on the other hand, the EP delegation, where disagreement was most pronounced, arranged a compromise by constructing a trade-off.

These two strategies emerged in part because of the praesidium's decision that for the Convention to express a consensus on the Charter, each of its four components, namely the delegates of the 15 national parliaments, the European Parliament, the 15 national governments, and the European Commission, had to agree to it separately. Consequently, the first three held group meetings to discuss a draft of the whole Charter on September 25 and 26. The types of compromise each adopted to resolve their remaining disagreements reflect important differences in their composition, purpose, and style of politics. Trading came naturally to the EP delegates of the two main factions, the Party of European Socialists (PES) and the European People's Party (EPP), who were used to doing deals with each other to resolve ideological disputes, especially as many votes within the EP require majorities of around 70% of those voting to be carried. Moreover, the need for some sort of compromise was inevitable given that the president of the EP delegation, Iñigo Méndez de Vigo (a Spanish Christian Democrat), had decided to follow the Convention's method of reaching agreement without recourse to a vote. Faced with a division between the socialist (PES) and the conservative (EPP) blocs, Méndez de Vigo decided to tie the preamble problem to a number of other outstanding controversial issues as part of a package deal. The reference to Europe's rootedness in religion as demanded by the right thereby got linked to the demands by the left for the inclusion of a right to strike in the Charter and their desire for limitations to the right to own property. Though to some degree the motivations of the various actors have to be inferred from the available materials, it would appear that this package proved acceptable because each side gave a higher priority to getting their way on the issues they felt important than to preventing the other side achieving its goal. As a result, each could gain concessions from the other in their preferred policy area in exchange for agreeing to their opponents demands. The EP delegation thus 'agreed' on the Méndez de Vigo package, although two members (Kaufmann and Voggenhuber, neither members of the two large party families) registered their dissent. Therefore, Iñigo Méndez de Vigo took this as a mandate to "negotiate" a solution within the praesidium.

Meanwhile, the praesidium sought to trim the religious issue by replacing the controversial word "*religieuse*" in the French original with the word "*spirituelle*," thereby finessing the debate.[58] While some Convention members, especially in the EP delegation, were still unhappy with this formula (which was too weak for some and too strong for others), the prevailing feeling was one of relief that a solution had been found to a problem which had, in the views of many, grown out of all proportion to its importance. In yet another twist to the story, which bears witness to the complexity of the decision, two German and one Dutch Christian Democrat members of the EP delegation (Friedrich, Mombauer, and van Damme) argued in direct consultation with the praesidium that the word "spiritual," when translated into their respective languages, would be too ambiguous and should therefore be rendered as "spiritual-religious" in the German and Dutch versions. The German members apparently found support from Roman Herzog (himself a Christian Democrat) for their case, and the German version of the Charter preamble consequently reintroduces the notion of "religious," although the Dutch version follows the other nine official languages in not mentioning it. Thus, a form of "segregation" occurred between the different language communities. Several other German-speaking members of the Convention objected to such special treatment, but by this stage the issue was no longer sufficiently important to generate much debate.

As Figure 1 shows, the Charter involved multiple compromises over each dimension of rights. A 'constitutional' consensus could not be found through convergence on a uniquely reasonable position. Instead, mutually acceptable concessions between reasonable and occasionally incompatible views were sought and found. These compromises involved bargaining as much as deliberative argument, although the latter more often than not informed the former, which were founded as much in conflicts of principle as in competing interests. In many cases, it was not the right itself that was in dispute so much as the policy implications that might be drawn from a given interpretation of it. Sometimes, as in the debate over the right to join and found parties, the issue was resolved by trimming to a level of abstraction that left the right sufficiently fuzzy as to allow a variety of interpretations. However, in most cases the desire was to reduce the scope for judicial discretion by either segregating the right to protect national jurisdictions or specifying a given interpretation, in which case a trade-off usually was necessary over some other right in another policy area. As a result, the Charter came to resemble a piece of ordinary legislation not just in the way it was framed, but also in its substance.

The need for compromise might be attributed to the absence of voting producing the search for near unanimous decisions. As we noted, however, within the context of normal EU politics super-majorities are not unusual. Moreover, use of majority voting can itself be regarded as a form of compromise – the acceptance of a procedural device when it proves impossible to do any more than agree to disagree while accepting the need to reach a decision by a fair means. Indeed, on

Figure 1: Rights Compromises at the European Charter Convention

Dimension of Rights	**Type of Compromise**				
	bargaining	*trading*	*segregation*	*trimming*	*third-party arbitration*
substance	right to work (Article 15)	Article 29 in return for Articles 16/17	linguistic segregation on the religious issue in preamble (German text is different)	question of legal status of the Charter – Herzog's 'as if' approach	overall agreement on the Charter as a package (final decision about Charter was left to IGC)
subjects			five categories of rights holders in the Charter	question of political parties (now only mentioned indirectly)	question of application to member states "only when they are implementing Union law" left to the ECJ
sphere	"solidarity" as principle in preamble in return for less substantive social rights	Article 51/52 setting limits to Charter applicability	principles rather than rights on environment and consumer protection	agreement that Charter would only be applicable to EU institutions, not directly to member states	
scope		Article 51/52 setting limits to Charter applicability but making Charter "minimum standard"		linguistic trimming: earlier drafts spoke of EU "guaranteeing rights" – replaced by "recognizes rights"	
securing and specification	introducing the reference "under the conditions provided by Community law and national laws" in contested articles	Article 51/52	later addition of 'explanatory statements' by praesidium (now part of the Charter text in draft Constitution)		

at least one occasion during the debate over social rights, some members felt a vote would have been more suitable than conceding ground to what many believed had become an unreasonable minority view. Several also argued that indicative votes at various points would have given a clearer picture of the state of debates in the Convention and could have speeded up the process.[59] Ultimately, the

search for unanimity was itself a compromise position that was felt necessary to reach agreement on the Charter and secure its long-term acceptance.

Conclusion

The Convention to draft the Charter was thought in many quarters to offer a new method for legitimating European integration – one that differed from the normal politics of compromise held to characterize intergovernmental conferences where principle was allegedly subordinated to national interests.[60] The decision to employ a Convention to discuss the Future of Europe and draft a new European constitution was partly motivated by this supposed difference between constitutional and normal politics.[61] We have argued this contrast is overdrawn. The convention setting can help filter out overtly self-serving arguments, but it cannot funnel reasoning towards a consensus that abstracts from and rises above normal politics. To a great extent, this is because matters of principle, such as rights, are subject to the reasonable disagreements that animate normal political debate. Moreover, given that these disagreements result from the complexity of people's circumstances and experiences, compromises not only are achieved using the stratagems of normal politics but also reflect the prevailing normal political divisions on the issues of the day. The main achievement of constitutional politics is not to resolve or go beyond these divisions so much as to render people aware of them and to normalize them within mutually acceptable agreements that take them into account. In this respect, the comparative representativeness of both conventions has been crucial, as has been their relative openness to civil society.[62] Yet this inclusiveness makes the need for compromise more rather than less likely, since it almost certainly increases the diversity of views and interests that need to be accommodated.

Are the results of such processes compromised as a result? Those disappointed by what they regard as the unfortunate political maneuvering of both the Charter Convention and more especially that on the Future of Europe might be tempted to argue that academics, bureaucrats, or members of the judiciary rather than politicians should draft constitutional documents. Such a proposal would be misguided. First, there is no reason to believe that any group containing the standard range of views on these questions would be any less likely to diverge on the points that have divided these (and other) conventions. After all, constitutional courts frequently split and have to make decisions by majority vote, while their agreements are often "incompletely theorized" and either trim from their principled disagreements or involve negotiation on the basis of analogies with other cases.[63] Second, a frequent complaint about the EU is that too many important decisions get taken by experts and technocrats. As the elected representatives of citizens, politicians arguably have greater standing legitimately to make what are necessarily political choices on their behalf. Indeed, António Vitorino, the Commission representative, went so far as to argue the "wise combination of the

Community and national sides and, above all, the parliamentary predominance will help bolster the draft Charter's legitimacy in the eyes of a public that is often critical of the complex decision-making machinery at European level."[64]A supposedly ideal normative consensus would simply have indicated the exclusion of a number of widely held positions from the drafting body and so delegitimise its conclusions.[65] Finally, this argument misconceives the role of a constitution. The necessary employment of normal politics within constitution-making reflects the purpose of constitutions themselves as much as the process of drafting them. Rather than treating constitutions as somehow superior to and literally constituting normal politics, they should be seen as a form of mutual recognition that normalizes political divisions.[66] Their success lies not in remaining outside normal politics but in informing it – and not merely via blind obedience to constitutional norms but also through citizens critically challenging and defending them. In other words, perhaps the prime virtue of the normality of constitutional politics resides in turning the resulting constitution into part of the basic vocabulary of normal political debate.[67] It achieves this effect not through by-passing everyday political divisions but by engaging with and reflecting them using the resources of normal politics.[68]

NOTES

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1. E.g. B. Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991), 3–33.

2. E.g. J. Elster, *Argomentare e negoziare* (Milan: Anabasi, 1996); J. Cohen, "Procedure and Substance in Deliberative Democracy," in S. Benhabib, ed., *Democracy and Difference* (Princeton, NJ: Princeton University Press, 1996), 95–119.

3. E.g. J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity, 1996), 127, 165–7, 181–83.

4. E.g. R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), Introduction.

5. Ackerman, *We the People*, 266–94.

6. While we can only examine the normality of constitutional politics here, we would equally wish to insist on normal legislative politics having many of the qualities reserved by some to abnormal constitutional deliberations; see J. Waldron on *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999). However, we would also want to stress that even on matters of principle, politics cannot be too high-flown. To resolve principled disagreements that defy any consensus, we often need to use a range of bargaining and procedural techniques to achieve a compromise.

7. J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 126–30.

8. J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 107–18, A. Weale, *Democracy* (Basingstoke: Macmillan, 1999), 8–13.

9. Habermas's *Between Facts and Norms* probably represents the most sophisticated attempt to derive rights from democratic procedures. However, though certain rights can be regarded as

implied by politics, such as the right to vote, even these can be subject to reasonable disagreements as to whom they apply and how they might be institutionalized; for detailed criticisms of this thesis, see R. Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London: Routledge, 1999), ch. 7; Waldron, *Law and Disagreement*, ch. 13. As we shall see, these debates arose in the Convention. Meanwhile, not all rights are tied to political procedures, even when broadly conceived.

10. J. Rawls, *Political Liberalism* (Chicago: Chicago University Press, 1993), 55–56.

11. Ibid, 56–57.

12. E.g. B. Bower, "The Limits of Public Reason," *Journal of Philosophy* 91 (1994): 21.

13. For a full analysis of debates over these dimensions of rights, see R. Bellamy, "Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act," in T. Campbell, K.D. Ewing, and A. Tomkins, eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), esp. 17–21.

14. This section summarizes Bellamy, *Liberalism and Pluralism*, ch. 4. See too M. Benjamin, *Splitting the Difference: Compromise and Integrity in Ethics and Politics* (Lawrence: University Press of Kansas, 1990).

15. Albert Hirschman, "Social Conflict as Pillars of Democratic Market Society," *Political Theory* 22 (1994): 203–18

16. C. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford university Press, 1996).

17. Rawls, *Political Liberalism*, xvii, 141–4.

18. S. Holmes, "Gag Rules or the Politics of Omission," in J. Elster and R. Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1998), 19–58; Rawls, *Political Liberalism*, 151 n. 16.

19. A. Lijphard, *The Politics of Accomodation: Pluralism and Democracy in the Netherlands* (Berkeley: University of California Press, 1968).

20. T. Modood, "Kymlicka on British Muslims," *Analyse und Kritik* 15 (1993): 87–91.

21. Weale, *Democracy*, 57.

22. For a survey of how different forms of representation ensure minorities reach a sufficient threshold to have a voice, see A. Phillips, *The Politics of Presence* (Oxford: Oxford University Press, 1995).

23. K. May, "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision," *Econometrica* 10 (1952): 680–84

24. Marquis de Condorcet, "Essay on the Application of Mathematics to the Theory of Decision-Making," in K.M. Baker, ed., *Condorcet: Selected Writings* (Indianapolis: Bobbs Merrill, 1976).

25. R.A. Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989), 144–50, 160–62.

26. Lijphart's analysis of 21 stable democracies revealed only six as conforming to this pattern; see A. Lijphart, *Democracies* (New Haven: Yale University Press, 1984) and Dahl's remarks in *Democracy and its Critics*, 156–60.

27. G. de Búrca, "The Drafting of the European Union Charter of Fundamental Rights," *European Law Review* 26 (2001): 128–31.

28. See J.H.H. Weiler, "The Reform of European Constitutionalism," *Journal of Common Market Studies* 35 (1997): 97–131.

29. Michael Merlingen, Cas Mudde, and Ulrich Sedelmeier, "The Right and the Righteous? European Norms, Domestic Politics and the Sanctions against Austria," *Journal of Common Market Studies* 39 (2001): 59–77.

30. European Commission, "White Paper on Good Governance," COM (2001) 428, Brussels 2001.

31. Reports in 1998 and 1999 had proposed improving the attention paid to rights by setting up a specific Commission directorate for human rights and formally acceding to the European Convention on Human Rights (ECHR); European Parliament "Leading by Example – A Human Rights Agenda for the European Union in the Year 2000," (Lalumiere Report), Brussels 1998;

Philip Alston and J.H.H. Weiler, eds., *The EU and Human Rights* (Oxford: Oxford University Press, 1999). However, neither proposal met with political support.

32. Conclusions of Cologne European Council Meeting 3–4.06.1999, Annex IV.

33. Conclusions of Cologne European Council Meeting, 3–4.06.1999.

34. J. Elster, "Deliberation and Constitution Making," in J. Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998), 99.

35. Ibid., 105–07.

36. Roman Herzog set out this idea in Convention Document "Body 3" of January 20, 2000.

37. The discussion that follows employs the criteria Elster derives from his analysis of the Philadelphia, Paris, and Frankfurt conventions in "Deliberation and Constitution Making," 107, 117. For a similar appraisal, see de Búrca, "The Drafting of the European Union Charter," 131–34.

38. Given that regions often have some constitutional independence, their involvement was weak – the only formal requirement being to consult the Committee of the Regions (Conclusions of the Tampere Council October 15–16, 1999, Annex, A iv). However, where, as in Germany, the second house is a federal chamber, the national parliamentary delegations included a regional representative.

39. Conclusions of the Cologne European Council, June 3–4, 1999, Annex IV.

40. Ibid., spelled out further in Conclusions of Tampere European Council, October 15–16, 1999, Annex.

41. Conclusions of Tampere European Council, October 15–16, 1999.

42. For a critical view, see Johannes Voggenhuber "Die Wahrheit ist bloß eine Behauptung," in Sylvia Kaufmann, ed., *Die Grundrechtecharta der Europäischen Union* (Bonn: Europa-Union Verlag, 2001). On one occasion, the attempt by the acting chairman Méndez de Vigo to put a praesidium proposal to a vote nearly led to a walk-out of a large number of Convention members who insisted that votes were not allowed under the Cologne/Tampere mandates (debates on document Conv 36/00 on June 6, 2000, as summarized in Deutscher Bundestag, *Die Charta der Grundrechte der Europäischen Union* (Berlin, 2001), 285).

43. The last plenary meeting of the Convention took place on October 2, 2000 during which the "consensus of the Convention on the draft Charter of Fundamental Rights"was declared by the Convention's president to the applause of all but two delegates.

44. Lord Peter Goldsmith in an interview on July 17, 2000 and his "Consolidation of Fundamental Rights at EU-level – the British Perspective," in K. Feus, ed., *The EU Charter of Fundamental Rights* (London Federal Trust, 2000). Interview data comes from Justus Schönlau, "The EU Charter of Fundamental Rights: Legitimation through Deliberation," PhD-thesis, University of Reading, 2001.

45. Stefano Rodotà in an interview on April 4, 2000.

46. This 'trade-off,' explored below, was struck by Iñigo Méndez de Vigo in the European Parliament delegation between the Socialists and Social Democrats, on the one hand, and the Conservatives and Christian Democrats, on the other.

47. See Convention debate on April 3, 2000 as summarized in Deutscher Bundestag, *Die Charta*, 253–54. The Cologne mandate had stated that social rights from documents like the European Social Charter should only be included "insofar as they do not merely establish objectives for action by the Union," a view supported by the head of the Convention secretariat, J.P. Jacqué, who argued that the Community could not promote human rights but only uphold a minimum set of judicially enforceable standards; de Burca, "The Drafting," 134–5. As we shall see, the Convention partly dissented from this restricted view.

48. Conclusions of the Cologne European Council Meeting.

49. Johannes Voggenhuber was most clearly against any restriction (interview October 10, 2000). Most other Convention members accepted that for practical reasons, and with reference to the Cologne mandate, the Charter would include different categories of rights holders.

50. Convention 17 of March 20, 2000

51. Convention 28 of May 5, 2000

52. See the June 5, 2000 debate over whether the Charter could distinguish between "genuine rights" and "mere principles"; Deutscher Bundestag, *Die Charta*, 279–84.

53. In the June 5 debate (previous note) Herzog used the protection of the environment as an example of a "principle" which was not an individual right, but should still bind the member states. Summarized in ibid., 279–80.

54. For example draft preamble by Manzella, Paciotti and Rodotà, Contrib. 175 (May 17, 2000).

55. Praesidium's draft preamble contained in Document Convent 43 (July 14, 2000).

56. Some Christian Democrat members of the Convention, especially Ingo Friedrich and Peter Mombaur, arguing in favour, some socialist/social democratic members, notably Elena Paciotti and Ieke van den Burg, against. See Deutscher Bundestag, *Die Charta*.

57. Praesidium third draft preamble, contained in Document Convent 47 (September 14, 2000).

58. Document Convent 48 of September 26, 2000.

59. E.g. Voggenhuber "Die Wahrheit.'

60. E.g. Florence Deloche-Gaudez, "The Convention on a charter of Fundamental Rights: A Method for the Future," Notre Europe Policy Paper, November, 15 200,1 *http://www.notre-europe.asso.fr/fichiers/Etud15-en.pdf*

61. Jo Shaw, "Process, Responsibility and Inclusion in EU Constitutionalism," *European Law Journal* 9 (2003): 53–54.

62. For an assessment of how far these virtues are to be found in the Convention on the Future of the Union, see ibid., 53–67. See too R. Bellamy and J. Schönlau, "The Good, the Bad and the Ugly: The Need for Constitutional Compromise and the Drafting of the EU Constitution," in Lynn Dobson and Andreas Føllesdal, eds., *Political Theory and the European Constitution* (London: Routledge, 2004).

63. Sunstein, *Legal Reasoning*, ch. 3.

64. Quoted in de Búrca, "The Drafting," 131 n. 17.

65. It is noteworthy how often the term compromise has been used approvingly with regard to the draft EU constitution, just released at the time of writing (the Convention on the Future of Europe agreed the draft on June 13, and, with respect to Part III, on July 10 and it was submitted to the member states on 18 July 2003). For example, the pro-EU *Le Monde*, June 15–16, 2003, even headlined its report "Un texte de compromis pour un Union á 25."

66. Shaw, "Process, Responsibility and Inclusion," 47–52 and J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), 30.

67. Rights-foundationalists, who advocate far-reaching judicial review, often make similar claims for Bills of Rights; e.g., R. Dworkin, *A Matter of Principle* (Oxford: Clarendon, 1986), 32. However, if the advantage of constitutional politics lies in its normality, this may be an argument for doing away with Bills of Rights altogether. In fact, the evidence is that such Bills often have the effect of encouraging legislatures either to leave principled issues up to courts or to seek to anticipate their judgments; see A. Stone Sweet, *Governing with Judges* (Oxford: Oxford University Press, 2000). Either way, politicians (and to some degree ordinary voters too) will have ceased to think about rights and discuss them for themselves. If we wish the true advantages of the normality of constitutional politics, then we ought perhaps to ensure rights belong within legislatures rather than the courts; see M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

68. The Charter has been adopted almost unchanged as Part II of the draft EU Constitution. The main change is that the British have pushed through the incorporation of the praesidium's explanatory notes into the body of the Charter (Part II, Title VII, Arts II-51–54, CONV 850/03, 59–60), largely because these were taken as limiting its 'scope' more clearly to EU institutions and policies; see the White Paper "A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference 2003," Cm5934, 39 para 102). During the IGC to approve the draft, a new reference to the explanation was included in the body of the Constitution. (Art. II 52.7). There is also now a commitment to attempt to accede to the European Convention on Human Rights (Part 1 Title II Art 7 para 2, CONV 850/03, 8).

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