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Europe's constitutional retrofit

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Abstract

The various and diverse academic responses to the Conference on the Future of Europe's
efforts at democratic renewal, including those by Ben Crum, Markus Patberg and Sandra
Seubert, speak not only to the lack of a clear institutional locus or pathway associated with
the Conference, but also to differing understandings of the basic conditions of existence – or
political ontology – of the European Union. These differing understandings are reflected in
different attitudes to the European Union's constitutional standing and prospects. This
article explores how the special place of constitutional retrofitting in the European Union –
of reconstructing and reimagining an originally pre-constitutional system in constitutional
terms – helps to illuminate the different understanding of political ontology in play, and
helps clarify what is at stake in the continuing debate over fundamental reform.

Keywords: Conference on the Future of Europe; democracy; European constitution; political ontology;
retrofitting

I. The presence of the past

Despite their central concern being with the urgently contemporary question of how to
evaluate and build upon the work of the recently completed Conference on the Future of
Europe (CoFoE) (2022), the three main papers in this special issue are far from neglectful
of the past. Indeed, the past figures in at least three ways in the contributions of Sandra
Seubert, Markus Patberg and Ben Crum. First, and unexceptionally, it supplies a basic
explanatory narrative of how we got here – via more than 60 years of institutional
adjustment and policy initiative in Europe's supranational project. Second, and most
prevalent in Ben Crum's article, the recording of past experience also has an important
educative function. We can learn much about present prospects from the past success or
failure of different models of legal and political reform of the European Union. Third,
underscoring the first two perspectives and most relevant for the purposes of my
comment, consideration of the supranational past allows us to address a fundamental
ontological question. It helps us to illuminate what may or may not be considered basic
and distinctive to the very nature of the European Union as a political entity. More
directly to the point, if – as is the case – a key concern of the three articles is the broader
'constitutional' meaning and potential of the CoFoE, then their answers ought to be

informed by understandings of how the very idea of 'constitution' does fit or could fit the politico-cultural DNA of the European Union. And that question of fit can only be answered by looking at the formative grounds and ongoing conditions of existence of the European Union.

Alongside each of these dimensions of inquiry we find considerable common ground between our three authors. Particularly as regards the ontological question, though, we also find elements of disagreement – or at least of divergent focus and priorities. These differences are important, and not just for constitutional theory and theorists. They also contribute to and reflect actual ongoing division and disputation over the future course and prospects of the European Union. My own contribution seeks to clarify what is at issue and what is at stake here through a particular reading of the European Union's constitutional condition. It is a reading that interprets the European Union's constitutional 'fit' as involving a very particular type of 'retrofit'.

II. Democracy in question

Where we find solid consensus among the three authors is on the question of the basic democratic receptiveness of the European Union. All are in agreement not only with the uncontroversial proposition that democracy is a good thing in general, but also with the somewhat more contentious premise that the supranational European Union, far from being some kind of post-democratic technocracy or epistocracy, should have as much democracy as possible. In that regard, the CoFoE is seen, at least potentially, as a step forward. In particular, the work of the four European Citizens' Panels is viewed as an important example of democracy in action through the vehicle of micro-publics. It introduces a mechanism that the Commission, as well as various civil society groups and academics, has endorsed as prefigurative of future ways and means of democratic policy-making. Alongside this micro-level 'process' good-in-itself, our three authors also note – albeit with varying levels of enthusiasm and optimism – certain consequential benefits of the CoFoE. Through the conclusions of the Conference Plenary, particularly those made in response to the recommendations of Panel Two on 'EU Democracy, Values, Rights, Rule of Law, Security', consideration of macro-level institutional innovation – at least in the short term – has been elevated to the top table of European political discussion. Various key actors, in particular the Commission and European Parliament, have been moved to address the possibility of a new Article 48 TEU Convention to initiate treaty reform. Such an initiative would not only supply its own higher-level democratic process good, but would also raise the prospect of reforms to the machinery of government that might, over time, enhance the role of a democratic voice in the quotidian functioning of the European Union.

Yet beyond this loose consensus welcoming the pro-democratic current of the CoFoE exercise, our three authors have rather different views of its deeper constitutional significance. These differences speak to their varying responses to the question of the kind of entity the European Union could or should become. In interpreting these responses, we should note that while there is unavoidably an element of personal preference at work, such preferences – as we have already suggested – are also informed by their answers, implicit or explicit, to a deeper ontological question; namely by their consideration of what is feasible and appropriate in light of certain basic features of the European project.

Let us begin with the approach that is most obviously distinctive from the others. Ben Crum's interest in a constitution-style process or event is basically strategic. His primary focus is on the practical objective of ensuring that a 70-year-old European construction of still-expanding jurisdiction is not prevented by decision-making gridlock or inertia from carrying out the kind and scale of reform of its institutions that may be necessary for its effective future functioning (see also Crum 2012). For him, the traditional treaty-prescribed method of the Intergovernmental Conference (IGC) remains the main and ultimate forum for considering and deciding upon such reform. It is the mechanism best placed to achieve the right balance of democratic legitimacy and political viability, and so also best placed to deliver. An Article 48 Convention, or a wider Citizens' Convention understood along the lines of a scaled-up Citizens' Panel (of the sort that has been given prominent place in constitutional initiatives in countries such as Ireland and Iceland in recent years) would have less purchase; at best, the work of such bodies would be merely preparatory to the IGC. For all that mini-publics may serve other more general goals of enhanced participation, therefore, when it comes to delivery of fundamental institutional reform, they should be viewed as just one early and quite tenuous link in the chain.

As Crum explicitly acknowledges, this approach, with a state centred-IGC to the fore, gels with an understanding of the European Union as a 'demoi-cracy'(Nicolaïdis 2013) – as a polity that began as an agreement between multiple distinct democratic peoples and that today retains that basic form. Such an understanding, to the extent that it views constitutionalism as relevant to the European Union, tends to do so largely in instru-mental terms. That is to say, it recognizes the value of an event that is 'constitution like' in the wide ambit of its agenda and in the quality of its ambition – namely wholesale reconsideration of the state of the European Union with a view to structural reform or renewal. Yet it is also an understanding that, because of the weight accorded to the original pact and to the identity of its contracting parties, would consider it inappropriate, or at least unrealistic and premature, to imagine such an event as 'constitutional' in a fuller (and likely to be nominally Big 'C' explicit) performative sense – that is to say, as the symbolic expression of the mobilization and self-authorization of a new political com-munity at the European level.

If we turn to the other two articles, their focus is rather different. Like Crum, both Patberg and Seubert would surely view increased public engagement and its institutional encouragement as a good thing in terms of the substantive reform outcomes it might deliver. But their focal interest is on the engagement itself, and on the expressive significance of the 'constitutional' events that both frame and endorse such engagement, with outcomes bracketed as a downstream benefit – important but consequential. Yet there remains an interesting measure of divergence in how they view the relationship between form and process in shaping and mobilizing that engagement. In crude terms, while both see a bottom-up process of democratic ignition as vital, for Patberg there is an important sense in which 'constitutional' form stands prior to democratic process, whereas for Seubert the reverse is true.

Where Crum understands the European Union as a demoi-cracy of the national peoples, Patberg instead favours the more expansive *pouvoir constituant mixte* model, according to which constituent power lies jointly and simultaneously with these national peoples and with the European citizenry as a whole (Habermas 2017; Patberg 2020: Ch. 5). This involves a quite distinct political ontology of the European Union. Where Crum sets great store by the original pact, in investigating the basic structure of the European Union's polity Patberg's mixed or constituent power model is broadly reliant on the Habermasian idea of a permanent (re)founding (Habermas 2001; Patberg 2020: 113.) By

its terms later generations are able to untap the democratic potential latent in the original settlement so as to 'resettle' the polity to address its changing legal and political circumstances. Of particular significance in making the case for such a resettlement is the way in which the European citizenry are increasingly seen as the direct addressees – and to a lesser extent through the increasing authority of the European Parliament also as the direct authors – of the expanding corpus of European law, and no longer merely as subjects indirectly interpellated through the mediation of states and state interests.

Yet for this iterative pattern to be triggered, there has to be a sense of the European citizenry becoming reflexively aware of their potential contributory role to the refounding of the polity, and finding the means to act on that awareness. Here James Bohman's (2007) notion of the 'democratic minimum' figures large in Patberg's account. The democratic minimum speaks to the effective freedom of individuals to initiate deliberation and communicate with others about common political concerns – including, crucially, higher order questions about the very nature of their basic decision-making framework. To the extent that this is successfully set in motion, it will involve the articulation of a new sense of constituent power and – as 'to constitute' is a transitive verb – a new object of that constituent power. Yet in the face of political opposition and public indifference, and against the grain of an intergovernmental institutional framework that cannot readily recognize the emergence of a novel claim to partial constitutive authority on behalf of the European citizenry as a whole, success can hardly be guaranteed; still less can the additional move from articulation to exercise – from the making of a visible claim to be a legitimate agenda-setter to the actual exercise of such an authority in a fuller constitution making process – be guaranteed. And it is in the potential and pitfalls of that gap that Patberg locates his ambivalence about the idea of a permanent citizens' assembly as a possible extension of the model established by the CoFoE's Citizen's Panels. For there is a fine but hazardous line between such bodies having a genuine prefigurative role in the reconstitution of the EU polity and their being relegated to a mere consultative forum – their agenda and the fate of their deliberations remaining within the gift of the European Union's existing 'constituted' powers.

Seubert, too, is far from convinced that the democratic potential glimpsed in the CoFoE will be realized. Yet, as noted above, for her process appears to take priority over form (see also Seubert 2021). The imperative is to increase the intensity of citizenship practice and widen the sense of citizenship agency. That this will happen in a number of different forums, at a number of different levels, and often with less specific focus upon the EU polity than upon a more general fuzzily demarcated domain of transnational policy, matters little in the first instance. Indeed, the messy variety of the transnational policy space, rather than a bar to a coherent response and a focused mobilization, can instead be seen to enhance opportunities for democratic innovation. In the final analysis, however, Seubert also wants this democratic activity to deliver a dividend in terms of constitutional form. She envisages citizenship practice progressing from 'polity-activating' to a deeper 'polity-constituting' mode. And she is quite explicit that the final pay-off of the raising of the democratic banner should be a European Convention that incorporates a deliberative assembly of the European citizenry and produces a settlement that is put to the people in an European Union-wide referendum.

This approach suggests yet another understanding of the political ontology of the European Union. Rather than a demoi-cracy, or an emergent dual polity, a more flexible picture is painted. The European Union is presented less as an already constituted polity with a discrete identity (whether state-centred or mixed) and more as a space of emergent and fluidly organized transnational policy that attracts incipient forms of democratic

action. The moment of constitution – of crystallization as a self-standing political community – remains significant, but it is not constrained or even closely guided by the conditions of origin. In fact, in an important sense, the lack of constitutional foundations – rather than depriving the supporters of a deeper Europe of a vital constitutive resource – instead allows them greater latitude in their subsequent democracy-shaping endeavours.

III. Retrofitting the constitution

Each of the three articles, therefore, makes rather different claims or assumptions about what constitutionalism might contribute to the European project. Let us now test these claims or assumptions against those features of the European Union's constitutional circumstances that, as I will argue, lead to a quite distinctive order of reliance on retrofitting.

The term 'retrofitting' refers to the addition of new technology or features to an older system. This may be done in order to avoid or delay the need to replace (or simply discard) the system entirely while adapting to circumstances neither present nor anticipated at the time of the system's original development. It is a term that has become popular in recent years with particular reference to methods of climate change mitigation and adaptation, and more generally to the growing currency of the idea of a non-linear or 'circular' economy in which recycling and waste-minimization are central tenets. In general, then, we may say that we resort to retrofitting where a requirement or pressure to reform or renew arises in a context where there are also either (or both) significant benefits in retaining the original model or significant difficulties and costs in seeking to discard it.

At a high level of generality, retrofitting becomes an idea that is applicable to just about any humanly constructed system. It is no surprise, therefore, that it has been used in the context of the development of legal systems in general and constitutional systems in particular. Legal systems must always adapt to new circumstances, yet the pull of precedent and the draw of historical sources typically remain powerful for a number of reasons (Krygier 1986). There are epistemic reasons – the accumulation of knowledge and practical wisdom in the *acquis* of existing rules and decisions. There are also ideological and cultural reasons – the long-term resilience of the legal system often feeding a claim of communal identity and corroborating the idea of the long-term sustenance of a common form of life.

While this suggests that all law is in some measure drawn back to its roots and, in consequence, is somewhat constrained in how it looks forward and innovates, constitutional systems exhibit an especially potent form of past-dependence and face distinctive challenges in facing the future (Albert 2019). It is a dependence that incorporates ideological, cultural, epistemic and practical elements. Rather than the narrative of gradual evolution that attends the development of common or customary law, the story of the original constitution has a distinctly punctual quality. It normally involves an event and an associated text that claim to represent the self-founding of a political community. That event and the terms of the text will typically be of profound ideological importance in the first moment, as a widely resonant and persuasive assertion of self-determining authority. And, over time, the founding document will assume deeper cultural and epistemic significance. For it will often become sedimented as a vital part of common memory and heritage, as well as a receptacle of situationally apt knowledge concerning how to address issues of governance peculiar to this polity. One particular aspect of the

symbolic gravitas of the original event and document is often a high degree of entrenchment of its foundational provisions against change by ordinary legislative means. Therefore, even to the extent that the ideological, cultural and epistemic weight of the constitution's origins and *acquis* might be overcome and its authoritative investment discounted, there are significant practical impediments to regular reform or radical renewal. Instead, change tends to be occasional and piecemeal; it involves working as much with the grain of the original settlement as possible.

For a set of reasons, therefore, retrofitting is often the order of the day in high-level constitutional politics (Dorf 2012; Rosenbloom 2000). This may happen without resort to formal procedures of change. For example, it may simply involve judicial interpretation of the original document to mean something beyond the framers' intent – as in the famous American example of the judicial 'invention' of the power of judicial review (Dorf 2012).[1] It may also involve taking a careful and parsimonious approach to the use of formal constitutional amendment. Again, the oldest of the modern constitutions, the US Constitution, is a case in point – amended only 27 times in over 200 years.

What does the general importance of retrofitting to constitutional practice imply for our understanding of the European supranational case? We should begin our consideration of that question by bracketing off the constitutional dimension, and treating supranational retrofitting in the first instance as a general problem of institutional engineering. So understood, there are two sides to the distinctiveness of the EU challenge. There is a problem both of (inadequate) supply and (excessive) demand. Taken together, they deepen our overall appreciation of the European Union's predicament of self-government and help clarify what is at issue between our three authors.

On the supply side, both the indirectness and the narrowness of the European Union's origins makes the work of retrofitting more contentious and precarious. As I have argued elsewhere (Walker, 2023), supranational Europe's policy trajectory has *from the outset* been one of incremental adjustment and adaptive growth that defies the orthodox path of constitutional development. Whereas the modern sovereign state begins with a constitutional framework of compendious legal and political authority in which wide-ranging institutional innovation and policy growth may be accommodated, the European Union and its predecessor organizations have pursued the opposite approach. They began with limited authoritative capacity. The ongoing construction of institutional architecture and extension of policy competences have not been sanctioned by any original constitutional event and authority and anchored in a stable general authority, but have instead supplied the very source and measure of the European Union's net 'constitutional' progress. For the European Union of today, in other words, legal and political power has been a stepwise and aggregative achievement ultimately sourced externally to the polity – in the states as masters of the treaties – rather than a holistic *self*-endowment. [2] Cast in the language of retrofitting, we may suggest that whereas in the state tradition the *weight* of the constitutional past – in ideological, cultural, epistemic and practical terms – may create rigidity and work against the possibility of effective change and adaptation, in the EU context, it is in some respects the *lightness* of the past that is the core problem. For whether and to what

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[1]Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[2]This is nicely captured in Kaarlo Tuori's (2015) depiction of EU constitutional development as involving the successive emergence of various 'sectoral' constitutions – economic, social and security – alongside the juridical and political orders. In these terms, Europe has required so many partial constitutional orders, and such a Baroque architecture, just because it lacked the founding legitimacy that would have produced a single encompassing settlement.

extent the original model or frame of the European project is of sufficient breadth or robustness to anchor and bear the burden of the subsequent busy practice of retrofitting have always been in precarious balance.

On the demand side, the sheer scope and depth of the expanding policy agenda compound the problem of limited authoritative capacity. The functionalist logic still so central to EU thinking implies a repeated pattern of 'spillover' (Haas 1958; Hooghe and Marks 2019).[3] Every new addition to the modest original agenda – mainly micro-economic in focus – was made in response to the suggested need to provide flanking measures to support that original agenda, with these flanking measures in turn generating the case for their own flanking supports. And so the restless expansion from a common market framework to the incorporation of a social agenda, a home affairs agenda, a defence and security agenda and, increasingly, a macro-economic agenda has been guided by a governing rationality in which the consolidation of existing policy frontiers has an inherent tendency to open up new frontiers.

The struggle to generate sufficient supply to meet demand has always been present in the European supranational project and has intensified over time. The stress placed on its basic retrofitting resources manifests itself in two ways, which track the formal/informal distinction we have already drawn in respect of national constitutions. It can be measured formally, through the marked increase in the scale and frequency of treaty reform required from the Single European Act (1987) onwards, and the ever-present and increased difficulty in finding the common political will to engage in further treaty reform. Yet, partly in response to or anticipation of these difficulties, it can also be measured in the wide-ranging resort to informal growth or initiative. The European Parliament was directly elected for the first time only in 1979, some 27 years after it first surfaced as a Common Assembly of the European Coal and Steel Community – a consultative body of 78 appointed parliamentarians drawn from the national parliaments of member states, and possessing no legislative powers. The European Council – the vital executive organ of contemporary Euro-governance – did not gain treaty status as an institution until some 32 years after its inaugural meeting in Dublin in 1975. The two great pillars of internal and external security grew out of the informal meetings of Trevi and European Political Co-operation respectively. The examples are legion and, tellingly, informalism has only intensified in the 'crisis' years since 2009. As Ben Crum recounts, the European Union's responses to the financial crisis, the migration crisis, Brexit, the COVID-19 crisis and the Russian invasion of Ukraine have often taken the form of what he calls, somewhat euphemistically, 'informal intergovernmentalism' – measures of executive federalism that stand outside the established treaty structure and the procedures and competences it authorizes.

Our three authors are closely aware of the difficulties of matching supply to demand. They each appreciate that the availability of sufficient retrofitting resources depends upon underlying authoritative capacity, and that this in turn depends, at least in some measure, on the legitimacy credentials and authoritative weight that a fuller democratic framing might bring. In order to keep up the necessary work of ongoing reform, they must at a deeper level play democratic 'catch-up' – a phrase highly telling of the underlying supply-side deficit. It is here that the question of the constitutional dimension of retrofitting must

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[3]Though the language of 'spillover' is that of neo-functionalism, we should note that all the major theories of European integration – intergovernmentalism and post-functionalism as well as neo-functionalism – recognize the perennial pressure on the European Union to locate the authoritative resources adequate to its ambition (Hooghe and Marks 2019).

enter our calculations. On the one hand, the attraction of a first explicit constitutional event 70 years into the life of the European project may be that it offers a powerful, game-changing way to play democratic catch-up. It suggests a distinct upgrade on any other species of institutional retrofit. On the other hand – and this is the special 'burden' of the European constitution (Walker 2023) – it is also a distinctly precarious – indeed, in constitutional terms, perhaps uniquely precarious – form of retrofit. This is because, quite unlike a constitutional retrofit at the state level, the difference it seeks to make is not just an adjustment to an existing self-proclaimed constitutional order, but the introduction of a first self-proclaimed constitutional order. In other words, what is being retrofitted is something more than a set of formal or informal amendments to the constitutional order; rather, it is the very idea – absent at the outset of supranational Europe – that the European Union is a type of entity whose institutional order is capable of being endowed with, and that ought to be endowed with, full polity-constituting and polity-shaping constitutional significance.

This is an audacious claim for a non-state polity – so audacious that in practice many would reject it as an implausible and illegitimate move, a retrofit stretch too far, or even a radical rebirth masquerading as a retrofit, while many others would be ambivalent and offer only qualified support. The unsuccessful Constitutional Treaty of 2003–05 is highly instructive here. Many opponents, including many of those who opposed ratification in the fateful Dutch and French referendums, did so on the basis that only states could be constitutionally self-authorizing, and the use of the expressive language of constitutionalism in the supranational domain was an unjustified power grab – politically and legally illiterate. No constitutionalizing retrofit could cure the original lack of constitutional authority. For those who were more favourable to the initiative, there was often an ambivalent attitude. In many cases, support was focused on the instrumental potential to deliver wide-ranging reform. Supporters could point to the fact that the 'treaty' aspect of the Constitutional Treaty ensured legal continuity in terms of the normal procedures of Treaty reform. In a technical sense at least, the retrofit continued to be *to* the original scheme of authority and its earlier amendments or retrofits, even if the cumulative impact of the retrofits spread well beyond the original authoritative terms. Yet the use of constitutional language also spoke to a hope that some of the expressive gravitas of constitutionalism as a polity-constituting and polity-shaping claim would rub off. But there remained a strong sense, both in the hybrid language used and in the very absence of an attempt to transcend the limited and fundamentally intergovernmental forms of treaty reform, that this was more about borrowing constitutional clothing for a one-off stage show than making it the defining feature of the European institutional wardrobe.

IV. Retrofitting Europe's future

Today, the retrofitting question and the difficult ontological questions it references continue to loom large over the debate on the European Union's constitutional future. Ben Crum, as noted, focuses on ensuring that the practical and epistemic dimensions of retrofitting work as well as possible – oiling the wheels of the system, avoiding gridlock and seeking to continue to deliver the IGC centred sequence of considered reform of what he still sees as essentially a 'demoi-cracy' of states. In so doing he avoids grand constitutional talk while continuing to worry whether the small 'c' constitutional route can deliver. That worry is grounded in the fact that the ideological and cultural supports necessary to generate authoritative capacity could depend on a fuller constitutional

commitment. As suggested earlier, such weighty supports may encourage – and in the national context often have encouraged – rigid adherence to the received text; however, they can also, in their more general endorsement of a political community's constitutional identity and self-confidence, effectively lubricate its agenda of self-(re)construction. That more positive prospect is the nettle that Markus Patberg grasps. He insists on the need for an exercise of constituent power to legitimize what he sees as the emerging dualism of the European Union's political form, even if this would involve an audaciously enhanced retrofit of the European Union's original condition Something akin to a full constitutional baptism would be required. But that means confronting full-on the European Union's most basic constitutional dilemma, and the problem of regress associated with that. For the ideological and cultural resources that a constitutional refounding would contribute to the cause of increasing authoritative capacity may remain out of reach absent the ideological and cultural resources of common commitment and identity necessary to launch such a constitutional project in the first place.

Sandra Seubert's emphasis on the gathering range, intensity and democratic openness of transnational citizenship practice may be seen as an attempt to move beyond the paradoxical conclusion that constitutionalism's polity-building ideological and cultural resources may be least available where they are most needed. For her, democracy and the constitutional authority that is both source and dividend of democracy are emergent and gradualist properties, located on a broad spectrum of achievement rather than viewed in binary terms of sufficiency or insufficiency. From her perspective, retrofitting – if the term remains at all suitable – could only be viewed as a deeply iterative process, one in which the original settlement was no longer the dominant design and the static object of 'refit', and so treatable only either by modest reform and elaboration or by a radical refounding.

The future prospects of the European Union as a post-state model of constitutional democracy depends not only on the strength and quality of collective commitment to make it such, but also on which of these different narratives of development is most persuasive and most attuned to the European Union's conditions of existence and its particular problems of retrofitting. If for no greater reason, therefore, we should welcome the CoFoE as a process that, by dint its own lack of a clear and uncontested institutional locus and meaning, provokes us to embark on a broader conversation – perhaps even a meta-constitutional conversation – about the comparative attraction and plausibility of these different conceptions and trajectories of change.

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