WHOSE EUROPE? AFTER THE CONSTITUTION: A GOAL BASED CITIZENSHIP

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1. Introduction

Etsiamsi constitutio non daremur?

Suppose there were no constitution, would the legal system and political life of the Union be the same? In some respects, the EU would survive “etiamsi daremus non esse constitutionem” (even if we concede that the constitution does not exist). Nonetheless, the relevant question is whether the European order can be considered independently of the constitution: whether the constitution will affect the order it purports to regulate, or whether it will ultimately be irrelevant.

Today’s will to move toward the enactment of a constitution has been the quid novi: in contrast to the method of small steps and juridical incrementalism. Moreover, since a question of “will” is involved, the negations it elicits tend to become self-fulfilling prophecies. Thus, what the constitution demands from us is that we genuinely engage in debate precisely as if there were a European constitution.

One of the ideas hovering in the background should be that the constitution is not a mere source of “cognition,” as human reason was for Grotius (cognition of the natural order produced by God), but is, instead, a source formally connected to the production of what it regulates, at least in the weak sense that the repeal of a constitution would coincide with the overthrowing of the order expressed therein.

Herein I present what I believe to be the distinctive features of European constitutional citizenship. I will do this in the latter part of the essay, after developing the interpretive premises of a suitably European definition of categories—starting with sovereignty, demos, and constitution. In this context, I will also outline the theoretical background against which recent debate on political Europe has unfolded.

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1 HEGO GROTIUS, DE IURE BELLII AC PACIS [ON THE LAWS OF WAR AND PEACE] (1625). In his formula “etiamsi daremus (. . . ) non esse Deum, aut non curari ab eo negotia humana,” Grotius by no means sought to deny the existence of God—“quod sine summo scelere dari nequit.” Rather, he ultimately upheld the moral objectivity of natural-rational law. The emphasis was on reason and its cognitive autonomy.
In this historical phase, it is necessary to deepen and broaden the *social legitimacy* of the Union, making European issues both relevant to the popular judgment of domestic majorities and a genuine subject of public opinion. The idea is to balance intergovernmental delegation with the sovranational movement of ideas and the overt activities of transnational political parties.

This brings me to my main argument. Europe is a political entity, arising in opposition to any purely cosmopolitan conception of citizenship. There are three great distinctive planes of European constitutionalism, at this “moment,” that stand in contrast to the overall approach of modern constitutionalism. The first plane is represented by the understanding of the individual’s existence as secondary. Today’s common European constitutionalism is not ideologically individualist and, more generally, it is in no way focused on the individual, which used to be the real center of gravity of received constitutionalism. This appears to be consonant with historical constants of Europeanism that are not shaped preeminently around the liberal archetype of the individual. Moreover, these European trends do not tend toward the union of individuals beyond state borders, but simply toward the union of peoples.

By no means does this imply that Europe is following a communitarian ideal, any more than it is striving to follow an individualistic one. In a sense, as I will explain, the Union is neither liberal nor communitarian.

A second plane of European citizenship, likewise conflicting with a cosmopolitanism of rights (or the eschatological idea of a world constitutionalism), focuses on a holistic and systemic perspective that makes Europe, rather than the world, its horizon. Europe does not exist outside the framework imposed by this point of view of the totality; rather, it provides an additional code, as a new rational design in which peoples can inscribe—rather than alter—their own features. The European “whole” is certainly conceivable from many perspectives: as the set of essential constitutional elements concerning “political justice” (à la Rawls), which builds a frame for an active coexistence among different ethical and cultural positions; or as a place for elevation beyond unilateral state visions; or as a locus of fair procedural control over a common space that would otherwise risk submission to arbitrary power or conflict. In all these scenarios, the constitutional thrust requires the European and not the national citizens to become protagonists of this view.

Finally, the third plane of European citizenship is framed by the establishment of power rather than by liberation from a preexisting higher sovereignty. But the power thereby established acquires an innovative role if viewed from the perspective of modern constitutionalism. It is not to be thought of as the necessary evil against which rights constitute a bulwark (“Society in every state is a blessing, but government even in its best state is but a necessary evil. . . . Government, like dress, is the badge of lost innocence: the palaces of kings are built on the ruins of the bowers of paradise”).

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2 THOMAS PAINE, COMMON SENSE 3 (1776).
constitution—in which the various necessary state constitutions support a convergence in a single project—sets itself the aim of reassessing the opposition between power and rights. To invoke a metaphor—this project shortens the distance between paradise and government. But this is far from building a Europe on purely Kantian ideals, as if we were ignoring the artificial character and the coefficient of power that Europe will be called upon to embody.\(^3\)

In any case, instead of voicing a redundant affirmation of the universal, deontological nature of rights, the European order seems to conceive of rights on a further plane, which is political and teleological: rights belong to ends and affect common policies. This also provides an account of a new, overarching “European” public power, which otherwise might easily be considered as little more than a new, perhaps unnecessary, evil.

Thus, the European citizen represents the subjective moment of what I would define as an institutional vision of her rights, beyond a simple and private conception of the individual and a conception of rights as limits: neither could underlie this emphatically institutional rationale of the rights–government relation in the EU.

Europe has closed the door on the countermajoritarian difficulty, the fear of empowering the courts to infringe on the democratic principle. But Europe, in addition, must avoid surrendering to what I call the “liberal difficulty,” that is to say, the theory of a rights universe circumscribed by a zero-sum game of contradictory opposites, in contrast to one based on public policy and majority deliberations.

2. A brief review: Conflicting premises

The prospect of a new constitution suggests looking at Europe in terms of a new constitutional pluralism\(^4\) in which many routes appear to be open: cooperation and conflict; horizontal coordination between many exclusive legal systems and many fundamental norms, and a collaboration between the constitutional courts and the European Court of Justice (ECJ); and, finally, a

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\(^3\)This is true much more so for external and international relations. Nonetheless, Europe is a civil power rather than a military power. See François Duchesnes, *The European Community and the Uncertainties of Interdependence, in Nation Writ Large: Foreign Policy Problems Before the European Communities* (Max Kohnstamm & Wolfgang Hager eds., Macmillan 1973). The Kantian-Hobbesian opposition was developed, with not so farsighted realism, in Robert Kagan, *Paradise and Power: America and Europe in the New World Order* (Knopf 2003).

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juspositivist monism vertically ordered under a new fundamental unitary norm, embodying closure. This last route is an option that appears to contrast with various symptoms, among them the failure to make provision for the role of the judge in conflicts between national courts or powers and those of the Union. The extension of the problem of multiple “fundamental” norms is analogous to that of European and national citizenships. The chemistry of citizenship may act as a litmus test that is useful for any question concerning the plurality of legal systems. And vice versa. But none of this can be addressed except by starting from the relation between constitution and demos.

A constitution without demos would lack its fundamental element, that is, subjects. This element cannot easily be constructed or produced—assuming it might be desirable—partly on account of the lack of a European public space. In exactly the same way that a European civil society does not preexist the EU itself, so, too, a European public space does not antedate the Union, and it is unlikely to be created within a relatively short period of time. The conditions for a lowest common cultural denominator, which is, at one and the same time, symbolic, communicative and linguistic, are still very far off. However, it is sometimes unclear why a European civil society would need so much, and we should ask what is meant by common “cultural” denominator.

The opposite opinion, championed by, among others, Jürgen Habermas, is based on the idea that construction of the demos could result from the common effort to build it up. According to this view, what is called for is a process that will act similarly to the effort, made at an earlier stage of history, when there was a thrust toward unification, partly under the impulse of the modern constitutions and also partly as a result of the new political units, above all the nineteenth-century states whose rulers sought to unify their countries culturally and politically. To cite one classic example, it was the period when, as Massimo d’Azeglio put it, what was required was to “make the Italians,” after having made Italy. I do not disagree with this hypothesis, if its objective is “thin” and political. Others, however, believe it is impossible to embark on an attempt to construct and unify Europe by extending the analogy of the nation-state to the EU because the new Europe cannot be founded on the breakup of a preexisting empire or a preexisting domination. Moreover, Europe cannot be founded as if there had been a conquest. In short, Europe, as things stand, would be incapable of replicating the constitutional movement of

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6 JÜRGEN HABERMAS, STAATSbüRGERSCHAFT UND NATIONALE IDENTITäT [CITIZENSHIP AND NATIONAL IDENTITY] (Erker 1991); Stefano Rodotà, La Carta dei diritti dopo Nizza [The Charter of Rights after Nice], in SFERA PUBBLICA E COSTITUZIONE EUROPEA (Carocci 2002); Luigi Ferrajoli, Dalla Carta dei diritti alla formazione di una sfera pubblica europea [From the Charter of Rights to the formation of a European civil society], in SFERA PUBBLICA E COSTITUZIONE EUROPEA (Carocci 2002).
modern states as the assertion of freedom. European citizens already possess freedom and the Union imparts no added value to that freedom. In no way can Europe be reduced, by the homogenization of multiple and traditional suitable elements, to a single demos.

Both Joseph Weiler, who emphasized multiple demoi and constitutional tolerance, and Neil MacCormick have proposed accepting the unicity and novelty of a union, above all, as a political concept, which unifies on the plane of institutional action but does not lead to cultural or ethical and organic convergence.

To be sure, the demos will have no source in ethnos or in foundation myths. It will be a “procedural” demos, to use Habermas’s expression for sovereignty, although I by no means attribute an ultimate, legitimizing value to the morality of “correct” procedures. Instead, I use demos in the sense of representing the collective, historical result of such practices and opportunities: consisting of a sensitivity to political questions, built up by small steps, in an endeavor to engage in intermediations and translations, as well as the frequenting by the citizenry of preregulated institutional places of participation. Accordingly, the demos is the place of the common existence of the diverse national cultures of the peoples of the Union.

3. Demos, European society and constitution

Europe is not only an organization designed for technocratic services; nor is it simply a juridical mechanism. The purely regulatory postdemocratic state, and the very idea of legitimacy through output, are relevant and present components in contemporary polities, but they are not exhaustive or exclusive. The complexity of contemporary citizenship in Europe lies in the fact that the political element persists as a singularly recurrent—and therefore compelling—demand, despite existing alongside the growth in demand for technical and administrative control and efficiency. I do not believe that either of the two paradigms can claim to be absolute.

As far as the constitution is concerned, it can constitute the conditions for the formation of a polity. Constitution may be associated with the idea of a

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8 See generally Neil MacCormick, Questioning Sovereignty (Oxford Univ. Press 1999).


“constitutive” rule (in Searle’s or Rawls’s sense)\textsuperscript{13} whose logical priority—with respect to the social practice it sets up\textsuperscript{14}—allows the actual conditions of the conceivability of that practice to be defined and, thus, produces its essential identity. There is no obligation to conceive of constitutions in an anti-Enlightenment sense, à la Schmitt,\textsuperscript{15} as prepolitical, organic orders, rather than as founding artifices.

The constitution as a constitutive rule institutes a social practice like that of the Union, and it can be taken seriously \textit{ex novo}, independently of the historical substrate on which it is based (and therefore without the need to negate the weight the historical substrate has exerted on the constitution and the value it has had in making the constitution possible). Thus, the normative presence of the constitution\textsuperscript{16} does not represent a mere regulatory moment of the Community’s legal system but, rather, the reference point \textit{ex novo} of the Union’s life.

At the same time—against the critics of the purely top-down, voluntaristic character of the constitutional act—it is worth recalling that this constitution does not invent, on paper, a hypothesis never tested before, imposing a new order the Europeans would never have expected.\textsuperscript{17} On the contrary, the constitution benefits from genuine historical presuppositions and rests on prior consolidated institutional practices that help to legitimize its constitutive force.

On the sociological plane, however, visible European society prior to the constitution is found in the Communities’ operational framework. It is therefore a society perceived through its economic, monetary and technocratic aspects. It is still a society of passive citizens—\textit{individuals} not yet linked by any specifically European social bond. The supranational public place is perceived as an extension of the private spheres. It restricts itself to representing the


\textsuperscript{16} Gráinne de Búrca, \textit{The Role of Law in European Integration} 15, Hauser Colloquium: Theorising the New Europe (Jean Monnet Center: NYU School of Law, Spring 2004). The article seems also to assign a constitutive role to constitution but says this threatens to “undermine both the legitimacy of the polity it purports to constitute, as well as the legitimacy of constitutional document and of law itself.”

\textsuperscript{17} Conflicting opinions are found also in Italy. \textit{See, e.g., Ferrajoli, supra} note 6, at 92 (speaking of a “constituting process started by this Charter [of Fundamental Rights].”) \textit{But see} Maurizio Fioravanti, \textit{Il processo costituente europeo [Europe’s constituting process]}, 31 \textit{Quaderni fiorentini} 273–297 (2002).
Hegelian “system of needs,” in which the individual is considered abstractly, as an indifferent element of technical and juridical coordination and regulatory practices.

In contrast, society, understood as the public sphere, in which consensus and dissent take shape and the conditions for deliberative democracy take root, must address the controversial question of public good.

The ratio of the public sphere, unlike the system of needs, entails excluding the possibility that private negotiation can deal with questions that potentially concern all of us, questions with regard to which there is certainly no aim of reaching a supposedly unanimous consensus. On the contrary, we expect that dissent will be voiced, and, therefore, must build into the system safeguards for the expression of dissent.

4. Sovereignty and citizenship

The connection between constitution and peoples is, in many ways, linked to the tricky question of sovereignty, which is a trait d’union between a people and the constitution. It has been given various interpretations over time—in revolutionary France, in Dicey’s England, in the work of nineteenth-century figures such as Otto Mayer, Carl Friedrich von Gerber, Paul Laband, and Georg Jellinek (where it decidedly became the sovereignty “of the State”), in the Italy of “parliamentary” constitutionalism, or in the postwar Germany of the federal constitution.

Political sovereignty merged with citizenship after Rousseau, since it was Rousseau who accepted Bodin’s dogma of the summa potestas and unicity of the sovereign, inverting it in order to achieve the political autonomy of the subject. This encapsulates the idea of self-legislation as the criterion (volenti non fit injuria) of the Rousseauvian social contract and of the Kantian republic. Citizenship, sovereignty, and democracy form a conceptual chain and are the foundation of the existing European constitutional traditions.

Numerous critical analyses have voiced objections to sovereignty: for example, they seek to show it in decline, as the summa potestas legibus soluta, and


19 Jeremy Waldron, Law and Disagreement (Oxford Univ. Press 1999). The author believes in parliaments, but, since Dewey, we rely on the well-known role of the public sphere in the liberal democratic formation of opinion.

20 Gianluigi Palombella, Costituzione e sovranità. Il senso della democrazia costituzionale (Dedalo 1997); for a reconstruction, see Maurizio Fioravanti, Costituzione e popolo sovrano: La Costituzione italiana nella storia del costituzionalismo moderno 14 (Mulino 1998).

21 Jean-Jacques Rousseau, The Social Contract 25 (Penguin 1968), which refers to a political association in which each person, while joining forces with others, nevertheless obeys only herself and thus maintains her own autonomy. See also Jürgen Habermas, Völkssouveränität als Verfahren, supra note 10.
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superiorem non recognoscens. The critical point of the concept of sovereignty is represented by its connection with the uniqueness, exclusiveness, absoluteness, and territorial nature of power in the modern state. What is often claimed to be appropriate for the EU today is a different paradigm, one used for world order by theorists such as Hedley Bull, who defined “neomedievalism”—a complex phenomenon in which, among other things, overlapping and concurrence of multiple legitimate authorities take place inside the same decision-making framework. The obsolescence of the state—sovereignty relation and, therefore, of both the potestas summa and its uniqueness, seems to be reflected in the competition among various centers to which power is ascribed and among the multiple allegiances in the European framework. Furthermore, in the Union, the member states’ commitment to relinquish totally autonomous choices has not been compensated by the creation of a new sovereign (European) state. This gives the impression that uniqueness, exclusiveness, and absoluteness lost on the national level are not transferred to the higher plane of European institutions. It thus appears as if sovereignty has, in part, evaporated. In some respects, these observations reflect a genuine state of affairs, which implies that the modern idea of sovereignty should be acknowledged to be outdated.

However, taken on its own, the medieval metaphor—where the overall balance seems beyond the control of the political will—ends up concealing many of the persistent economic and political questions to be faced within the global order and, with reference to the EU, ends up hiding the fact that institutions and authorities do not have an original and ultimate legitimation but, rather, one that is dependent on the principle of self-legislation by those who are governed.

For the gift of constitutionalism has been twofold: on the one hand, the absoluteness of power is overcome, as a result of its subordination to the juridical force of constitutions; on the other, the distinction between (democratic) sovereignty and established powers is maintained through the negation of the final-instance character of such powers. This last feature is often overlooked in constitutional thought.

The first point, above, is expressed, on the juridical plane, as the limitation of sovereignty, since constitutions remove any foundation for a putative holder of limitless power over political decisions, at least in the sense that constitutions deprive the sovereign of decision-making power over vast spheres, starting from the sphere of fundamental rights. The second point is expressed both in the


23 This outcome is predicted also from a world politics perspective. See also Kenichi Ohmae, The End of the Nation State: The Rise of Regional Economies (Harper Collins 1995).
founding and constitutive value of a “consensus of the governed”\textsuperscript{24} and in the reluctance to allow the legal order to have the last word. The main thrust of this insight is expressed in the countermajoritarian difficulty\textsuperscript{25} and in the allied defense of the reasons for democracy, and thus of the very possibility of deciding.

It is necessary, especially within the European context, to make a distinction between popular sovereignty, or, better, the sovereignty of the citizens, and the sovereignty of the state proper. It is evident that popular sovereignty can withstand the passage of time, as an expression of our trust in democracy, and it can do so independently of the fate of the state as a form of the organization of power, that is to say, of the organization of force according to the realism of Kelsen’s and Weber’s visions.

From a descriptive point of view, we should not confuse the decline of the sovereignty of the state—an entirely European concept founded on the reduction of law to the will of the state as an autonomous macroperson—with the decline of the sovereignty of the citizens. This decline of political citizenship would correspond to a relinquishing of democracy, which is not part of constitutional traditions. Finally, from a normative standpoint, popular sovereignty has acquired an intrinsic value that is hard to abandon unless one falls into a nonpolitical order, be it pre- or postpolitical. In Europe, popular sovereignty is not monolithic but, rather, is structured according to the dual position of the national and European citizen; its value resides in precluding the risk that decisions may be swayed by partial and unilateral points of view, or be at the mercy of the sectorial interests. In this sense, the idea of sovereignty assumes the function of representing an overarching point of view, a higher plane that is connected to the superiority of democratic citizenship (see below, section 8).

The constitutional system of the Union takes its liberal democratic character from member countries’ constitutions and, in fact, sets itself the goal of respect for democracy and rights. Today, Europe grasps the meaning of sovereignty and its renewed political content. However, this Europe may not be reduced to a mere expression and prolongation of the sovereign politics of the states, that is, an internationalist Europe rather than a constitutional one.

Moreover, beyond the sovereignty of the treaties, the structure of citizenship as involving multiple demoi will inevitably be taken into account. This should prevent the advent of a thick and flat one-demos thesis, based on the “We the People” narrative. Europe does not need to abandon demoi in order to make it \textit{e pluribus unum}. This said, common constitutional citizenship’s general root will also, inevitably, make sense.

\textsuperscript{24} More interesting arguments for the purposes of reconstruction may be found in Akhil Amar, \textit{The Consent of the Governed: Constitutional Amendment Outside Article V}, 94 \textit{Columbia L. Rev.} 457, 499 (1994). \textit{See also Gianluigi Palombella, Costituzione e sovranità, supra note 20.}

\textsuperscript{25} Alexander M. Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} 16–23 (Bobbs-Merrill 1962).
In the “new European order,” which is not a dot com, a number of typically postdemocratic and technoregulatory moments are woven together with persistent forms of traditional, “political,” culture. It is this kind of culture that must now be tested through a rethinking of European citizenship and through an acknowledgment of the concurrent role to be played by member states as organs of the EU. This may be done in spite of complaints about the democratic deficit, given that transparency, efficacy, and responsiveness do exist within the EU, while the claim of democracy should be revised, on a new basis that goes beyond nineteenth-century ingredients, structures, and conceptions.

For this reason, the existence of a uniquely European constitution does not indicate a concomitant decline of the sovereignty of the Europeans. Nor does it indicate the final surrender of governments. Even as a purely practical matter, the EU, as a constitutional organ in the organization of European powers, needs member states. This prevents a dispersal of the EU’s “network,” which would render citizenship extraneous.

To be sure, the separation between legitimation and decision, representation and deliberation, is also part of the critical configuration of national democracies. Against this vision there stands the political idea, which perhaps could be summarized by the lapidary words of Robert Dahl: “[T]he legitimacy of the constitution ought to derive solely from its utility as an instrument of democratic government—nothing more, nothing less.” From this there follow two observations: first, the visibility and the strength of the European constitution will become more intense only when the sovereignty of the European peoples begins to take convergent shape. Second, the juridical affirmation of a constitutional document is not equivalent to the affirmation of any of the other normative texts so far produced for and by the Union, and should become, therefore, the vehicle for the Union’s political achievements.

5. Citizenship and constitutional itinerary

In a sense, the history of the European constitution may unfold in a direction inverse to that of the U.S. Constitution. The preeminent political value of the constitution of the (one) people of the United States acquired the force of a binding juridical document at the moment (1803) when Justice Marshall elevated it to the status of the criterion for the judicial review of legislation. Of course, this was made possible only as a result of historical and political forces. The juridical force of the constitution as higher law was founded not on

26 For different perspectives, see Andrew Moravcsik, In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the EU, 40 J. Common Mar. Stud. 605 (2002); see also Sabino Cassese, Lo spazio giuridico globale [The Global Legal Space] 86 (Laterza 2003).


natural law but, rather, on popular sovereignty. As Bruce Ackerman has pointed out, Marshall “asserts that the Constitution has a superior status as higher law by virtue of its enactment by the People. Until a constitutional movement successfully amends our higher law, the Court’s task is to preserve the People’s judgments against their erosion by normal lawmaking.”

By contrast, the European constitution is endowed with a solemnity that does not appear to be supported by a “constitutional moment,” or even by a conscious idea of “the People.” The juridical document, the constitutional treaty, seems to precede its recognition and its political functioning. But this inversion by no means precludes the possibility that the European constitution will find the political interlocutor to which it is addressed. The Charter of Fundamental Rights will provide an occasion to raise a number of last-minute questions, institutional as well as moral questions. Awareness that it is not purely a matter of neutral, legal regulation—for then it would be unable to sustain its own legitimacy and would become overburdened with an avalanche of unsatisfied expectations—is the first seed of European citizenship.

From this perspective, the juridical relativization of countries’ internal legal systems, within the broader European order, is not accompanied by a political relativization of citizenship. On the contrary, this view postulates a growth of European citizenship. In a sense, the new constitution produces a complex effect: thus, while European citizenship is notoriously secondary, adjunctive, and derived, the legitimacy of the Union ceases to be derivative. It becomes primary and no longer dependent on the legitimacy of the states; rather, it is to depend on the public autonomy of a sovereign that is coextensive with the constitutional text’s range of influence. At this moment, in Europe, it is still the national constitution that legitimates the European citizen, and not vice versa. But this phase must come to an end if the European constitution is to be historically assimilated. The European space will appear as a further framework, held in common by many.

Joseph Weiler has pointed out that what is required is for us to accept that others, other peoples and other institutions, will make decisions on our behalf as well. One might say, also, that what counts is for us to administer ourselves through the Union and not merely through the national states.

Another point is that the idea of toleration, connoting a set of nonconflictual coexistences, is a presupposition but not the objective of the constitutional process. The objective in question, in contrast, is political; it depends on recognition of being part of a whole, a whole that has some costs but also offers opportunities and, therefore, must be recognized, not merely tolerated. This recognition depends on the European citizen, while tolerance is an attitude required from the national citizen.

29 See generally Bruce Ackerman, We the People: Foundations (Harvard Univ. Press 1991).
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The constitution calls for involvement by the European citizen, and this implies bridging the vertical gap between the bureaucratic-administrative-economic integration of Europe and its political "soul." 30

The intensely voluntaristic aspect that is implied by this conclusion is in tune with a conception of constitutionalism as a project, not merely as a guarantee; as a political document as well as a legal document, as a charter of values and not simply an organization of powers. The institution of an organizational form is not simply the outcome of spontaneous practices but a political step taken to confront domestic and foreign affairs and the widening circle of "enlargement." This process suggests that the provisions of the Maastricht and Amsterdam treaties would not have produced the same result as could be (and has been) achieved through a constitution. The latter triggers a logical short circuit in citizenship because it invites us to take the Habermasian notion of "public autonomy" seriously, within the European framework, a notion that eludes our abilities and habitual modes of communication (on account of its known peculiarities—in primis, differences in language). In this respect, hope for the gradual development of the public sphere over time cannot be abandoned or stifled by retrograde jurists or proponents of technical efficiency.

Yet there is one more pressing question: Why must this public sphere be provided for in a constitution, not in the treaties? For the same reasons—but oriented in the opposite direction—that are at the root of the constitutional skepticism of the last few years. These were the reasons that accounted for the skepticism regarding popular political legitimacy of the Communities based on the treaties. It was said that European political power does not derive from the people but was mediated through states. "And since the Treaties thus have not an internal but an external reference point, they are also not the expression of a society's self-determination as to the form and objectives of its political unity. Insofar as constitutions are concerned with the legitimation of rule by those subject to it, the treaties thus fall short." 31 Furthermore, the treaties cannot offer "popular legitimation of the legal act constituting the Union and the associated self-determination by the Union citizens as to the form and content of their political unity." 32 But producing this result through a constitution would be tantamount to "altering" the "legitimating basis of the European Union." For "the primacy of Community law over national law would no longer be the consequence of the member States’ order issued in the Treaties, but of the constitutional precept in the Community constitution." 33

Throughout the long era of the treaties, it was perfectly possible to ignore the direct relation between Community institutions and the European social

30 For the reference to the European "soul," see Cerutti, supra note 9.


32 Id.

33 Id. at 298–299.
sphere. What was valid, instead, was the delegated democratic power that national citizens granted to each member state. But this situation made it difficult to highlight the supranational aspect of the citizen in Europe. Once a constitution is approved, the lords of the pacts no longer act as such but, rather, as mere “organs of a self-determining union”—and this represents a point of no return. It is a point that is reached when the increase and extension of the “community of law” and the acquired autonomy of the legal order have led beyond the limits of an internationalistic framework. And all this cannot be sustained without a decisive qualitative leap toward effective citizenship.

The treaties bring with them an inescapable sluggishness and bureaucratic verticalism, in which citizenship appears to be conceded, as it were—because the European citizen is not the master of the treaties, is not necessary to the treaties themselves, nor is he or she their source. These treaties, it must be stressed, are due to the states, and therefore, if anything, refer back to the national polity.

This generates an asymmetry and, as a result, the self-legislative circularity necessary for recognition does not arise. While the national citizen stands behind the treaties, the European citizen comes into play when questions (for example, recognizing a constitution) that go beyond treaties call for a supranational dimension. It matters little, at this point, what procedure and what contingent tool (even a treaty) is used to produce and formally ratify the text of the constitution. The existence of a constitution becomes independent of the nature of the juridical tool or source that actually enacted it.

The European constitution provides a remedy for a paradoxical state of affairs. The great decisions on the future shape of the Communities have always been taken by member states and, consequently, only on behalf of the national citizen, the ultimate subject to whom those decisions could be traced. Now, the existence of the constitution could represent, if taken seriously, the first autonomous political act of recognition of the European citizen.

6. Citizenship as a reflex of the nonunique (multiple) order

If constitutional pluralism has any meaning in relation to institutional multilevel cooperation, consistent with the explicit language of article I-10, paragraph 1, then this pluralism depends on the fact that the European citizen and the national citizen do not exercise a single identical political autonomy, but two different ones, different by extension and goal. A person

34 The autonomy of the European legal system is traced back to Case C-26/62, Van Gend en Loos, [1963] ECR 1.

35 “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it.”
can belong to several demoi, or to several unions, but must do so in accordance with a principle (to be defined) of addition.

In this perspective, European citizenship, through the existence of the constitution, effectively denies the hierarchical character of the “closed” legal order. Europe is not a normative system with one single fundamental norm that prevails over (and replaces) that of each national system. Rather, what is produced is, if anything, a cooperative structure of the order, as per article 5, paragraph 2. This aspect is certainly delicate and controversial. Two different circumstances appear relevant here.

The first is the absence of an explicit norm for closure and of an institution officially endowed with Kompetenz-Kompetenz. This institution may prove, implicitly, to be the Court of Justice; furthermore, the very existence of a constitution per se may turn out to allocate this position and this task to that court without further ado or doubts. Indeed, it is hardly a random coincidence that the transfer of decision-making power to the Union, and to new supranational sources, had been said to require a European constitution for the very task of “subordinating these new sources and new powers to constitutional constraints” in order to “avoid insoluble conflicts between state constitutions and legal systems versus the community legal system.”

The second circumstance is, historically speaking, the prevailing tendency to engage in coordination on the substantial plane of court activities. This is the meaning of “cooperation” among different juridical orders, which should not need to defend themselves against the European constitution: rather, they should be concerned with defending the European constitution against partial and unilateral interpretations. The enlargement to include countries in the east introduces an obvious imbalance, but the wager for the future is to build on their potential strengths. The internal multiplicity within the Union is capable of remaining solid and whole only on condition that the constitution be defended against any attempt to divert political action unilaterally and in an unbalanced manner.

Therefore, the great democratic objective of the European constitution is not so much to overcome the deficit of accountability inherent in the legislative institutions as it is to succeed in placing the European citizen at the forefront of the public stage, that is, to ensure that the European citizen is the true beneficiary of the common action. Thus, given the current prevalence of the community order, this institutional system of cooperation will lead to a pendant attaching to citizenship. In this sense, the European citizen must not replace the state citizen, and vice versa (art. 45, para. 2).

16 “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.”


18 See Ferrajoli, supra note 6, at 92–93.
The EU is an institutional model that corresponds to a proper model of citizenship, referring to the European citizen but consonant with maintenance of identities. The institutional arrangement also preserves the original aim of gathering the peoples together by means of the direct presence of the member states among the various powers. That is to say, the European constitution by no means seeks to utilize the peoples as mere vehicles for the unification of individuals on a universal scale, according to the post-Kantian variant of the project for perpetual peace proposed by Habermas.39

The European legal order can avail itself of a fundamental inclusive norm. This is because it does not express itself against the states but through the states and, likewise, not against the European people and its parliament but through it. If we wish to speak of a mixed sovereignty, this is no replication of the king-in-parliament model, which imputes sovereignty jointly to two elements both internal to the same social structure. Instead, this is a division into two differently organized systems, each with its own distinct structure—one in the form of a future political society, the other in the form of states.

The Union’s primum movens is the recognition of the juridical and political nexus and of the differences between the European citizen and the member states. The essence of this nexus/difference lies in the question of what it means to belong to the Union. This new sort of belonging can only be the result of a prior judgment of compatibility between the fundamental norm of the Union and that of the national juridical-political systems.

Therefore, the fundamental norm of the Union will be to function as an adequately reliable custodian of a project that each member state can recognize, by now, as a coherent development of its own constitutional aims. For this reason, even the building up of a European civil and political society can only create an additional space. It cannot be made to replace (or prevail over) national political societies. To think otherwise would certainly be an illusion; moreover, it would be a mistake.

This new dual citizenship depends on the vision of the Union as a single body with two heads, binding together in a single multilevel order the strategy of the states and that of European society.

The idea of calling on all European citizens and states and peoples to determine a common policy line creates a pattern of reflected approaches. The Union maintains itself as a union of peoples while asking the states to express themselves as macroindividual subjects in the intergovernmental space; at the same time it constructs the common space with reference to the European citizens, inasmuch as they are subjects and beneficiaries of the provisions, rules, and activities of the Union. Thus the system of addition opens up a dynamic pattern of competition and cooperation that cannot be reduced to the mere opening up of borders. And it is partly for this reason that it cannot be

associated with the rationalistic endeavors that, surmounting the obstacle of the individual sovereignties, project their viewpoint toward a European constitutionalism, considering the latter as a homogenizing stage in the model of a global society of rights. These arguments start out from a purely juridical, nonpolitical constitutionalism and move toward a universalism of citizens and rights. But they risk being misleading. We are not dealing, here, with a pure universalism of individuals who are allowed to flow from the national spaces in the European territory.

This would be an echo of a rationalistic cosmopolitanism. The latter, in its many variants, starts, rightly, from the presuppositions of individualism, universality and generality, which show that the citizen of the world is a human being regardless of her community identity or the status she is granted in society: according to her qualities that call for recognition by everyone. Beyond this, viewing the world as the true object of global regulation is a cosmopolitan idea. Frequently, one also finds appropriate tools for the enactment of a “cosmopolitan democracy” and a world legal order to replace that made by nations. According to such perspectives, the aim to be pursued is universal self-determination in a global democratic state.

Those perspectives notwithstanding, Europe is moving in the opposite direction. Moreover, the reason for this is precisely the persistence of sovereignties, and the mixed logic according to which Europe is structured. Europe does not believe in a universal citizenship; not even in an original European citizenship. Yet, it is being constructed as a system in which sovereignty is shared and exercised in a form that is not purely liberistic, that is to say, anarchic.

There are three fundamental reasons for this construction, linked to the content of citizenship. The first is that Europe does not place the individual at the center; the second is that Europe seeks a special form of government of the whole; the third is that Europe interprets rights not just in terms of guarantees but also in institutional terms and, thus, as “objectives.”

7. Individuals and citizens

Like cosmopolitanism, which, in some cases, can be extremely radical, even modern contractualist constitutionalism and veil-of-ignorance

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40 Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 57 (1992). The author points out that "individualism: the ultimate units of concern are human beings, or persons—rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations or states. . . Second, universality: the status of ultimate unit of concern attaches to every living human being equally—not merely to some subset, such as men, aristocrats, Aryans, whites, or Muslims. Third, generality: this special status has global force. Persons are ultimate units of concern for everyone—not only for their compatriots, fellow religionists, or such like." Id. at 48–49.

neocontractualism\textsuperscript{42} presuppose, methodologically or substantially, that the argument originates in individuals. The aim, according to such doctrines, must be to search for solutions regarding the destiny of individuals in society, and these solutions must be rational in terms of justice and fairness. Europe, however, does not derive from a mental or rationalistic experiment; nor does it even operate from the vantage point of individuals. It does not posit the individual, as such, as the cognitive premise that renders the Union intelligible. The value of individual autonomy, while not called into question,\textsuperscript{43} is neither the paradigm nor the driving force in the European instance, which is in contrast to its role in modern constitutionalism. Even contemporary European constitutionalism is inspired by social or solidaristic variants of liberal individualism. The EU, however, is not merely a manifestation of a change in ideology. It is truly a project that has been conceived from the perspective of the political structures and from that of the peoples.

Europe does not emanate from individuals, but neither does it require that they be absorbed into the “community.” It does not call on them to think of themselves as being first and foremost “Europeans.” And it is partly for this reason that Europe lacks the driving force of a movement toward community-based republicanism. Realistically, the multiplicity of loyalties and allegiances at play is compatible only with a fluid and open interpretation of the European world. Europe is not driven by the mirage of the priority of community, in the sense of a community that cultivates some biological, geographical ethic of identity that gives rise to a common, homogeneous, and unifying culture, or that precedes, shapes, structures, and situates the individual.\textsuperscript{44}

Europe looms as a second-degree association, a union of and through societies, proposing a criterion of citizenship for its members rather than a mere choice of state. This further demonstrates that Europe is not reducible to an aggregation of individuals. Being neither liberal nor communitarian, it does not place itself within the perspective of the individual, but, at the same time, it has no intention of falling into the closed ethical and identity-oriented essentialism of a “community.”

The foregoing sheds further light on citizenship, offering a different way of defining a relation among peoples—one that is not based on a distinction between individuals who are included and those who are not. Europe does not regulate the acceptance or exclusion of individuals as the member states do. After all, we have been dealing with enlargements and extensions. Citizenship entails a process of incorporation, advancing toward new borders, rather than being merely exclusionary. Europe should not be viewed as a

\textsuperscript{42} \textit{See John Rawls, A Theory of Justice} (Harvard Univ. Press 1971).

\textsuperscript{43} Of course, rights in the charter “are also a signal to the outside world of the central place that the individual takes in our political system.” \textit{See Pernice & Kanitz, supra} note 4, at 7.

\textsuperscript{44} See, for example, Ferdinand Tönnies, author of \textit{Gemeinschaft und Gesellschaft} (1887), and Darmstadt, but also theorists such as Charles Taylor or Michael Walzer.
stationary geopolitical place that opens or closes its gates but, rather, as a moving political geography that has absorbed new member countries over the past fifty years.

Given these circumstances, individuals are neither the point of departure nor even the object of the Union. The institutional goal is still a union among peoples. Such a union is extraneous to modern constitutionalism (even if it is present in universal peace projects, à la Kant), but it is likewise extraneous to the cosmopolitan orientation and so, I believe, can be proposed more credibly in a “constitutional” guise.

By overcoming the individualistic premise, Europe can respond to the normative demands of both a universalistic cosmopolitanism and of community-based republicanism. In response to the cosmopolitanist demand, Europe may argue that it is necessary to go beyond the abstractness with which rights are proclaimed for human beings, independent of concrete institutions, duties, and borders. Rights must be given an institutional elaboration and aim at connecting with the political will of the single polities. Moreover, Europe can address the communitarian demand precisely because it does not view the situation in individualistic terms. It holds the specifically national acquis to be the premise for the common perspective; it seeks to boost common political values in the Rawlsian sense, which is consistent with varying national ethical and cultural values. Europe’s objective is, if anything, “glocal,” and requires realism. Accordingly, it does cultivate national peculiarities but primarily as places of external interaction that remain porous and permeable.

### 8. Attention to the whole

Constitutional European citizenship may be understood as a response not to the decline of states—a matter of great controversy—but to the demise of the illusion of the free market as a criterion for relations among states. If anything, the European constitution is linked to new relations among states, rather than representing the ontological negation of the old statal political units.

The European constitution can withstand the rise of a single, monolithic ideology of planetary governance.⁴⁵ Constituting Europe means refraining from the globalization syndrome, inspired by the conviction that all spaces are indomitable, nonesoteric and acephalous. Swimming against the current, Europe likewise resists any notion of a global empire lacking walls and borders. Today, united Europe represents a sort of noncurrent, a constraining

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⁴⁵ See generally Governance without Government: Order and Change in World Politics (James Rosenau & Ernst-Otto Czempiel eds., Cambridge Univ. Press 1992). With “planetary governance” we should mention the “non globality of globalisation.” See also Robert O. Keohane, Governance in a Partially Globalized World, in Governing Globalization (David Held & Anthony McGrew eds., Polity 2002); for the role of Europe and the regional relations, see Europe, New Regionalism, Regional Actors and Global Governance in a Post-hegemonic Era (Mario Telò ed., Ashgate 2001).
countermeasure against the loss of the center, as it reconstitutes a center of gravity. This does not mean that the result has already been achieved, but this paradigm has shaped its normative accent and historical function.

 Accordingly, European citizenship represents a resistance, a countervailing element, to the Enlightenment-inspired cosmopolitan effort to create universal citizenship, which would reduce the inhabitants of the world to citizens of the world and nationals to human beings. The quest for a “soul” for Europe follows a different path. On the one hand, it accepts the Kantian invitation to think of universality as an essential guiding idea of our pure reason, but, on the other hand, it acknowledges that a concrete universality needs to be more structured, and not flat. It needs to stand for a complex form of the world, a form embodying supranationality. Still Europe rejects the extreme idea of a single world order that would conceal a fairly explicit, unilateral, and imperial dominion, culminating sooner or later in what Kant feared as a “soulless despotism.”

 The EU purports to be a player on the global stage, but a different player than the sovereign state in an anarchical world. Moreover, if globalization implies the deterritorialization of politics, law, and governance, then Europe is a phenomenon of reterritorialization. It is a means of restoring the center of gravity and, therefore, a new operation of artificial order. European citizenship is inconceivable either in a “Westphalian” world or in a world that is merely prey to globalization effects.

 Those who would constitutionalize Europe do not believe in a universal society, consisting of individuals as final-instance socially disembodied entities. While they do not believe in the destruction of the fatherlands or the peoples, they are building an Aufhebung; thus, they intend to conserve as well as to transcend.

 The citizen of the global world has no “internal” place to protect as her own. Such universal citizenship entails a planet-wide acquisition of the greatest possible number of emancipations, faculties, and powers, thus becoming a wholly useless category. It is a category that is undergoing an identity crisis, rather than the tool or the reflection of any concrete project.

 Certainly, the old world of sovereign states, out of whose horrors the European adventure originated, and the global world both declare their

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46 The bond between peoples aims in Kant at a “Weltrepublik,” conceived as the “good” ideal, universality, not to be confused with a universal monarchy, which would lead to a “soulless despotism.” Immanuel Kant, Toward Perpetual Peace, in PRACTICAL PHILOSOPHY: CAMBRIDGE ED. OF THE WORKS OF IMMANUEL KANT IN TRANSLATION 336 (Mary J. Gregor & Allen Wood eds., Cambridge Univ. Press 1996).


48 See generally the contributions in GLOBAL TRANSFORMATIONS (David Held et al. eds., Polity 1999).

49 For the changing of the world, given supranational and international institutions, see BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION (Gene M. Lyons & Michael Mastanduno eds., Johns Hopkins Univ. Press 1995).
abstention and their impotence regarding governance of the whole. European totalitarianism demonstrated the poverty of a liberalism that had entrusted prosperity to an individual and national dimension, forgetting about a common space. For this reason that kind of liberalism is constantly exposed to the risk of the whole finding itself occupied by a part that arbitrarily transfigures itself into an emissary of totality.\(^{50}\)

But through the constitution the European whole does appear: it does so as a perspective, not as a higher reality; it indicates not an empty space but a regulated space and a framework of common interest in which the parts are conscious of contributing and to which they are willing to belong. Above all, its meaning cannot be appropriated unilaterally by any particular actor. The European whole ceases to be conceived as a \textit{res nullius}. European citizenship thus declines to adopt a particular profile of inclusion. It affirms the significance of national allegiances, yet European citizenship is not based on exclusion, for this was already instituted as the prerogative of each member state. Instead, European citizenship calls on the citizens of each of the demoi to consider the external as a place of common political regulation and, in addition, as a space in which human beings, as such, are protected.

In the setting of constitutional citizenship, which starts from the premise that the whole is \textit{not} an unthinkable \textit{res}, mere tolerance—as a \textit{modus vivendi} among constitutional individuals (nation-states)—is enriched by the addition of the Union. What is added is a vantage point from which to conceive of the positions, lives, and prosperity of the individual parts. Seen from this angle, the Union appears as something more than a mere perspective; it appears as a fairly thick medium of coexistence.

Without this means of coexistence, the interpretation and application of the Charter of Fundamental Rights, so central to citizenship, cannot be given a common meaning. Embracing a point of view internal to the whole—and not merely to one’s own national system—is essential in order to identify the positioning of one’s self in a space that could encompass common advantages and burdens. The European point of view is not that of the national citizen, nor should it be, and can only be reached if each person starts out from her own perspective. Europe proposes a charter of commitments that identify an area of political overlap that does not invade or absorb different ethical-cultural identities.

Perhaps Europe needs to trust in an affinity among European peoples, although that is a somewhat vague concept. But affinity is not a preconstituted given: it is a product of knowledge intentionally oriented toward the quest for bonds and continuity. This is an interpretive concept consisting in the projection of a gaze capable not simply of finding the whole but indeed of weaving

its very fabric. In a sense analogous to Ronald Dworkin’s concept of the “integrity” of a legal order,\textsuperscript{51} affinity among peoples, at least on the level of overlapping political essentials, is not a static historical datum but an interpretive product whose ultimate origin is the European citizen.

Ascent to the whole world point of view would certainly be impossible, were it not for the rights and freedoms afforded European citizens as early as the Treaty of Maastricht. Such rights are visible, concrete interpretive presuppositions—infrastructures of citizenship—providing the conceptual basis for the whole, rather than discrete individualistic claims with little added value. Strictly European rights that are conceived as citizenship rights are commodities that enhance the prominence of Europe rather than simply increasing the basket of individual powers. This enables each of us to reconceive the horizon of our real capabilities (to recall Sen)\textsuperscript{52} beyond the limits of national citizenship and territory. Rights must be linked to an opportunity for their exercise on a truly European scale and to the individual resources necessary to take advantage of that opportunity.\textsuperscript{53} This transition from rights as simple freedoms to rights as effective resources for mastering Europe cannot come about without the political elevation of European citizenship.

9. Rights as goals

The European constitutional project undeniably also embraces the classical aim of limitation of power, controlling “the excesses of the modern nation-State in Europe” and countering “the inability of the international system” to constrain its propensity to conflict.\textsuperscript{54} This vision of Europe is opposed to that of a European macrostate. It is the supranational and community-based vision. Supranationalism replaces the anarchical vision of international balance, once more proposing constitutionalism as a form of limitation. Thus “the challenge is to control at the societal level, the uncontrolled reflexes of national interests in the international sphere.”\textsuperscript{55}

I would underscore, as well, the importance of the other ostensibly forgotten aspect, that of the constitution of power. This aspect is associated with supranationalism and the pursuit of the founding ideals.

\textsuperscript{51} Ronald Dworkin, \textit{Law’s Empire} (Harvard Univ. Press 1986). See chapter two on “interpreative concepts” and chapters six and seven on \textit{“the integrity of law.”}

\textsuperscript{52} Beyond formal rights, the question concerns what citizens get: whether the overall resulting world is an increase in the citizens’ opportunities for achievement. See Amartya Sen, \textit{Development as Freedom} (Oxford Univ. Press 1999).

\textsuperscript{53} See Dahl, \textit{supra} note 27, at 150. Author considers resources as a \textit{pendant} of rights in addition to duties.

\textsuperscript{54} Joseph Weiler, \textit{The Constitution of Europe} 250 (Cambridge Univ. Press 1999).

\textsuperscript{55} Id. at 251.
The traditional narrative of liberal constitutionalism could not explain this feature of contemporary Europe, particularly as the Union is not a watershed between a past of subjugation and a future of emancipation. Nor would it be worthwhile defending rights that are already adequately safeguarded within the member states.

Rather, the spirit of the European constitution is that of a veritable act of realignment of power on new bases, a strengthening of power structures, and an enhancement of the horizon line of its authority. This requires a more advanced approach. First, through the Union, Europe assumes control over its own objectives, which it would risk losing in the new global conditions of the economy and the market. Second, Europe should set up a constitutional link between individual rights and government objectives.

Once we grant noninterference with the independence of individuals, we must acknowledge that liberal democratic rights are no longer merely self-executing. That is to say, free speech cannot be regarded as a mere freedom from censorship, simply requiring government officials to abstain from imposing a ban on satanic verses, or from silencing a street-corner speaker. Nor can individual property rights be confined any longer within a Lockean vision of dependence on nothing but the individual’s “work.” Each of these rights can only be maintained in a regulated society that shoulders the burden of their costs and, furthermore, that intervenes to actualize their significance as collective ends. This system-based horizon of rights gives an obsolete feeling to the original intuition of the authors of modern constitutionalism (such as the American founding fathers), namely the idea that constitutional rights “are guaranteed almost entirely by imposing constitutional limits on the government. The Constitution tacitly assumes that citizens themselves will somehow possess the opportunities and resources necessary in order for them to act on their rights.”

The change of perspective reflects the artificial character assumed by rights in contemporary societies, where it is not sufficient for rights to be awarded deontologic protection, or to be elevated to an uncontroversial juridical document.

Surprisingly, there is a body of European juridical theory that has proved almost insensitive to this change. Interpreting the charter’s values through a rationalistic lens, it emphasizes the charter’s introduction of “limits and constraints on the European decision-making organs from which a large part of our law now derives” as well as the fact that “it contains rights and guarantees that risk falling into abeyance if our [Italian] Constitution is tampered with”—that is, if the constitutions of the member states are tampered with.

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58 Dahl, supra note 27, at 143.
59 Ferrajoli, supra note 6, at 93.
Naturally, we know the value of including guarantee limitations in constitutional norms. It is an important function of a charter to provide protection for rights even against the very power that the charter institutes. Accordingly, fundamental rights can also be seen as negative Kompetenznormen with reference to EU institutions.

Seen from outside, Europe already appears to be hyperprotected by virtue of its lengthy, elaborate constitutions. Furthermore, the European constitution sets particularly elevated parameters, not only because it provides for new rights in the sphere of bioethics and biotechnology, and the environment, but also because it provides for the protection of social rights. It can be said that these are expressions of common values that “will give the policies of the European Union orientation and legitimacy,” confirming that the Charter “largely exceeds the defense of the individuals’ ‘space of liberty.’ The right to education (art. UU-14 CT) and the rights regarding solidarity (Title IV of the Charter) show that fundamental rights also compel public authorities “to take positive measures.”

Thus, we need a contemporary way of looking at rights, one that becomes fused with the spirit of European citizenship rather than fixating on the limits imposed on institutional policies. Not only does part II of the EU constitution carve out an area of countermajoritarian protection, embodying an incontrovertible content; of course, constitutional rights inform the separate and cooriginal quest for justice that affects sovereignty. They are also something more: internal objectives of common power, not simply guarantees to the citizen against power. The Union, therefore, is not created merely to mediate between states and individual freedoms.

I must briefly reconstruct the premises behind my conclusion. In civil law countries, the modern tension between rights and government was resolved through the continental notion of the “state based on law,” with emphasis on the sovereignty of legislation, the eventual source of rights. The autonomy of the legal source of rights (their cooriginality with respect to the legislation) did not emerge again until after the decline of the legislative-parliamentary state, and the emergence of twentieth-century constitutions. The constitutions were what restored the original tension and balance of power, a reciprocal legal

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60 Pernice & Kanitz, supra note 4, at 8, (noting that “a few provisions of Part II (…) guarantee rights only in the cases and under the conditions provided for by Community Law and/or national law and practice”—arts. 9–10, 14, 27–28, 30, 34). These provisions make clear “that the objective character of these rights as values prevails over their function as subjective claims in individual cases.” Id. at 9. I would add that, generally, system and function of rights in the constitutional treaty imply rights meant eminently as goals rather than claims.

force of rights and legislation.\textsuperscript{62} And, in my opinion, this is not yet the end of the affair.

Normative competition (between democracy and individual claims guarantees) has been interpreted in terms of pairs of opposites, so that the force (and meaning) of rights emerges only as the negation of the majorities’ “contingent” aims. As Dworkin, and Habermas after him, argued, rights do not have a teleological impact (they do not point to common ends) so much as a deontological force (they indicate only the imperatives of justice vis-à-vis the individuals). They are a breakwater against the action of the government and the invading utilitarianism of the common good.

When speaking of “fundamental” rights this vision appears to be somewhat old-fashioned and insufficient. In this context, European citizenship displays a historical role; its political matrix is entwined with dignity, quality of life, and solidarity and depends on social citizenship, much as democracy is a function of the resources of freedom and fundamental goods, from education to labor to health. And this is the benchmark of the European gubernaculums. It all depends on the extent to which Europe succeeds in effecting a thrust toward common objectives, which, though they still depend on national resources rooted in the member countries’ socio-political area, actually exceed their control.

The European constitution aims to exert an influence in the sphere of collective ideals, aiming for harmonization, even with reference to those goods linked to individuals in the form of rights (although, strictly speaking, the Union cannot lead to any kind of intervention in noncommunity matters). The purely judicial idea of rights would not have needed a European constitution.

One can demonstrate the plausibility of this argument. What would happen were we dealing, instead, with the constitutionalism of rights claims, not of goals but of side constraints on public policy? The greater the number of rights considered as fundamental and amenable to judicial enforcement, the less room there would be for the exercise of deliberative power. The extensive series of rights in the Union would risk being translated into marginal political rights. European civil society would be content with a legitimacy based on technocracy and rights (more rights, less democracy). This would result in an administrative regulation of efficiency accompanied by a guarantee of “justice,” implemented through the substantially legislative function of the Court.

This would produce a perverse effect, a real blockade of political rights within European citizenship and, finally, a significant friction between justice and politics, and between Union and member states. Even the concept of “belonging” would lose support and the disputed democratic deficit would just be a deficit induced by rights.

This would result in a sort of virtuous and moralistic Europe, capable of stirring up deep concern, justifiably, in those who perceive the logic of a

\textsuperscript{62} For a partly coincident picture, see Gustavo Zagrebelsky, Il diritto mite [The Mild Law] (Einaudi 1992).
countermajoritarian difficulty. Still, this would by no means imply that rights would be better safeguarded, if Europe had only the last resort of courts.

The new constitution, on the contrary, will help to shed light on, and to revisit, a few key questions. For example, it will be possible to reexamine what I have called the “liberal difficulty”: it is the claim that rights are fundamental because they are protected against the people. This makes rights the passive content of citizenship and allows them to be considered fundamental inasmuch as they are intrinsic to human beings, regardless of their positive and institutional significance within a political system. Mutatis mutandis, this would mean, for instance, that within the Union, rights would be stressed as rationally self-evident and thus guaranteed by the ECJ, against the people and against the states. Some Europeans do fear that the EU will invade political areas through a rights-protecting track, and that this might happen not just in the political arena but, worse, through a kind of judicial adjudication policy.

The implementation of commitments and values in part II of the EU constitution cannot be brought about by virtue of prohibitions; it should emerge as the outcome of convergent policies within the member states, as well as from within the Union itself. The role of the ECJ should take the form of arbitration among policies, based solely on their consistency with the constitutional framework. The ECJ itself is far from possessing the social legitimacy of national courts. Accordingly, rights would be better protected as aims of European policies, not just as a jurisdictional safety valve against them.

Therefore, the EU must achieve a balance between the two difficulties I mentioned. The countermajoritarian difficulty calls for constitutional rights to be consistent with the will of the people; the liberal difficulty insists that fundamental rights not be conceived as common ends, rooted in the social rationality of a system, and that they be freed from the tension between institutions and the public sphere.

Certainly the countermajoritarian difficulty raises a caveat, but its objections do not contrast the procedural guarantees, the democratic rights of minorities, and those essential freedoms that are internal to—and ensure—the democratic process. The liberal difficulty may conceal the ethical and deliberative content of rights; without such content, neither independent agencies nor judicial bodies would have anything to protect. Beyond both of these difficulties, rights in a system—whether we like it or not—are choices teleologically directed toward goods that do not have a neutral impact. These goods can be protected only through a profound institutional awareness, and through constant self-understanding by the Europeans. The fundamental character of such rights is not

63 Therefore, rather than pursuing a role in policy as the U.S. Supreme Court has done, the ECJ should aim merely at safeguarding the treaties. See Armin von Bogdandy, L’Europeizzazione del consenso giuridico come minaccia per il consenso sociale [The Europeanization of juridical consensus as a threat to social consensus], in Zagrebelsky, supra note 62, at 286.

defined by rational abstractions, but through a common convergence that places them at the center of the system to which they belong.\textsuperscript{65}

If EU citizenship presupposes a sharing of the fundamental character of certain principles forming the mainstay of the EU, including those in part II, then these are a breviary of political action and not merely a potential judicial resource.

\textbf{10. Epilogue}

The Union will function as long as it does not postulate a spirit of faith, or a militant religion. This nondogmatic, open belonging springs from heterogeneous motivations and admits of diverse visions of Europe. Therefore, European citizenship must remain a status without inevitable ties to suffocating bonds, a belonging understood as a second degree bond. It is more difficult to preserve an open belonging than to declare an allegiance by faith; we require a critical spirit, information, participation, and the strength to abandon, when necessary, the garb of a “private” citizen\textsuperscript{66} who discovers her problems only when these are brought before tribunals.

European citizenship is a question of freedom, security and justice, but also an eminently political and social question, which will require decisions to safeguard its welfare and to provide guarantees, partly through the solidarity of the richer countries toward those experiencing greater difficulty. Being a European citizen will produce further advantages and responsibilities, rights and duties. If one excludes exit, there is only one way to avert the risk that even these political decisions will be reduced to matters of economic efficiency. It is to be hoped that over time we will see the development of dissenting participation—votes, not vetoes—and that there will be majorities and minorities, that there will be worthwhile movements of opinion and European political parties. Without all this, citizenship remains incomplete, carrying the implication that many prefer to be an intemperate political minority rather than a unanimous apolitical society of private parties and clients.

\textsuperscript{65} Extending the notion of “rule of recognition,” \textsc{Herbert L. A. Hart, The Concept of Law} (Penelope A. Bulloch & Joseph Raz eds., Oxford Univ. Press 1997). I argue that rights should be understood as “fundamental” if they are designed to function as substantial criteria in the “rules of recognition” of legal orders. \textit{See generally Palombella, supra} note 61.

\textsuperscript{66} \textit{But see Ackerman, supra} note 29, at 297 (noting the distinction between private and public citizen).