

CONSTITUTIONALIZING EUROPE: A PERPETUAL TASK?



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Abstract

The present contribution discusses the prospects for further constitutionalisation of the European Union (EU). After briefly reflecting on the development of the respective discourse (1) and offering several contextual and conceptual clarifications (2), the article sketches some constitutional peculiarities of the EU (3). This is complemented by a section highlighting some contextual peculiarities (4). On this basis, the contribution postulates certain desiderata for a potential reform (5), concluding with a brief reflection on the conditions for further constitutionalisation of the EU (6).

Keywords: EU enlargement, EU constitutional characteristics, EU constitutional reform, democratic legitimacy within the EU, geopolitical demands on the EU

1. Prologue: *Nihil Sub Sole Novum?*

‘Nothing new under the sun’ – this often-quoted phrase catches quite well that sentiment between boredom and self-assuredness which appears to be the most widespread occupational disease among seasoned social scientists. And indeed, are we not typically – time and again – describing reconfigurations of what is already known?

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Rather delightfully, European integration long stood out in this regard. At some point, this gradually emerging supranationality began to appear genuinely peculiar.¹ Many of its interpreters have since insisted fiercely that this distinctiveness be properly appreciated, rather than conventionally conceptualised in traditional terms.² Understanding European integration and imagining trajectories for its potential evolution posed a refreshing challenge, henceforth, for an entire scientific community.

However, the initial excitement may have waned. The story is no longer new. The EU's peculiarity has been analysed innumerable times, condemned or praised, defeatistically declared doomed, or euphorically extrapolated into the future. All observations seem to have been made, all problems mapped, all options considered. Does this leave us with nothing new, and thus back to boredom?

Well, not quite. While the topic may seem exhausted, the issues remain – mostly unresolved and perceived as increasingly problematic. So, it is practical necessity, rather than curiosity, that requires us to keep engaging with them, follow their continuous permutations, recontextualise previous insights, assess new opportunities, and recombine elements of hitherto suggested solutions.

The hope for the present contribution cannot be, thus, to settle the debate. Europe – provided that the idea itself persists – is likely to require many more rounds of (re-) constitutionalisation. Our focus must therefore remain on just the next potential round, on the present context hence, and on how we might contribute something remotely useful for the way ahead.

2. Contextual and Conceptual Clarifications

Before proceeding, it is helpful to situate this contribution within the pertinent discourses, both with respect to historic context as well as to its conceptual premises.

2.1. A Reflection on the Occasion of a Potential EU Enlargement

The article reflects on the legal architecture of the European Union, particularly in light of current considerations regarding EU enlargement. It is difficult to imagine

- 1 While the peculiarity was brought about by the practitioners of European integration from the 1960s onwards, elaborate accounts emerged only later, cf., for example, the seminal works by Stein, 1981, p. 1 and Weiler, 1991, p. 2403; still more recently, historical accounts have elucidated specifically the role played by actors of the European executive branch, and, in particular, the Legal Service; cf. Rasmussen, 2012.
- 2 For an early and particularly elaborate plea for the appreciation of the EU's peculiarity, cf. Weiler, 1995.

that an enlarged EU could function effectively without some fundamental reforms. Decision-taking would otherwise become even more challenging.

Yet enlargement is not the only reason to contemplate such reforms. There have been debates about modifying the EU's institutional architecture, and that of its predecessor organisations, from the outset.³ European integration has always been conceptualised as a project, with change built into its DNA, and ample room for disagreement about its direction and speed.

Thus, the envisaged enlargement provides the occasion for this discussion and constitutes an important parameter. It may even create an opportunity for changes which would otherwise be harder to achieve. Nevertheless, the scope of analysis must be broader, taking into account the EU's current peculiarities, its overall situation, and divergent visions for its future development.

2.2. Constitution(alisation) with Inverted Commas

The term constitution(alisation) has long been sensitive in the EU context. Although widely used in international settings,⁴ it still carries, for many, a connotation of state-like integration, and any such programmatic implications are objectionable to some. This may explain occasional lapses in sobriety when addressing what is ostensibly just a terminological matter.

At the same time, EU law contains numerous elements typically associated with a constitution. There are rules defining the polity – by reference to its members and to its confines;⁵ rules defining the organization of the polity – by reference to its actors, their competences, and the respective procedures;⁶ and rules defining the core values of the polity – by granting a set of (mostly) individual rights deemed fundamental,⁷ and committing to certain objective principles concerning also the structure of the polity.⁸ All of these rules, moreover, occupy an elevated rank in the normative hierarchy,⁹ and they are difficult to amend.¹⁰ So, from a functional perspective, this would seem to be more than enough to speak of a constitutional order.

3 A famous metaphorical expression of this is ascribed to Walter Hallstein, who is said to have likened European integration to a cyclist for whom standing still means falling off; on the quote (and its unclear origin), cf. Graser, 2025, p. 231.

4 For an overview, cf. Peters, 2021, p. 649.

5 Both, by reference to the Member States: as for the territory, cf. Art. 52 TEU, Art. 355 TFEU, as for the citizens, Art. 20 TFEU.

6 Cf. Arts. 4, 5 TEU, Arts. 2–6 TFEU (competences); Titles II (procedural principles) and III (mostly actors) of the TEU and Part VI of the TFEU (actors and procedures).

7 Cf. Art. 6 TEU and the Charter of Fundamental Rights.

8 Cf. Arts. 2, 3 TEU.

9 For a nuanced treatment of the normative hierarchy in EU law, cf. Curtin and Tatevik, 2015.

10 On this aspect, cf. Subsec. 3. i) infra.

The outer appearance of these rules is more ambivalent. Although codified,¹¹ and more so than in some states,¹² they are not labelled a constitution and are spread across different documents, one of which resembles a free-trade agreement and contains numerous provisions atypical of a constitution.¹³ However, national constitutions also vary: not all are called a constitution,¹⁴ some are spread across different documents, too,¹⁵ and some are strikingly prolific.¹⁶ None of these features is unique to what functionally qualifies as the EU's constitution. So, its unusual outer appearance does not prevent the use of constitutional vocabulary.

There are, however, substantive peculiarities arising from the EU's origins as a regional integration project. Many of these traces remain present in the current supranational set-up and will be explored in the next section. It is for this reason that its 'sui generis' label remains appropriate to this day. This does not require avoiding constitutional vocabulary altogether, but it may, at times, be useful to imagine inverted commas around the related terms.

3. Constitutional Peculiarities

Every constitution is, of course, different. One may define clusters of similar constitutions and create a typology, an idea underlying the 'varieties of constitutionalism' discourse.¹⁷ Yet despite such variation, the constitution of the EU must be considered as an outlier. Acknowledging this is more than a terminological issue; it is central to any reflection on the way forward.

3.1. *Sediments of Intergovernmentalism*

There are persisting sediments of intergovernmentalism: the European Council and its rotating presidency,¹⁸ the composition of the Commission¹⁹ and of the Court

- 11 With a possible exception for non-codified elements of the so-called 'general principles' of EU law.
- 12 The paradigmatic case in point is the constitution of the UK, considerable parts of which are to this day not codified.
- 13 This applies, in particular, to Part III of the TFEU, large parts of which still resemble a free trade agreement.
- 14 The German 'Basic Law' is but one example.
- 15 A paradigmatic example is the Swedish Constitution, which is thought to consist of the 1974 Instrument of Government, the 1810 Act of Succession; the 1949 Freedom of the Press Act, and the 1991 Fundamental Law on Freedom of Expression, cf. the Swedish Ministry of Justice, 2013.
- 16 The Constitution of India is widely referred to as the longest (national) constitutional text.
- 17 For an exposition of that approach (and its application to a current theme), cf. Riegner, 2024, p. 161.
- 18 Cf. Art. 16, Sec. 9 TEU.
- 19 Cf. Art. 17, Sec. 5 TEU – and the decision of the European Council that alters it (2013/272/EU) and provides for there to be one member per Member State.

of Justice,²⁰ the prominent role of the Council of the EU in legislative procedures,²¹ the extent of qualified-majority requirements,²² and the significant limitation placed on centralised competences, found within the legislative branch,²³ and even more so regarding the two other branches which remain largely truncated.

To be sure, this multilevel system of governance is remarkably stabilised, more so than any other organisation beyond the state level, and to such an extent that it might even be conceptualised as a form of federalism, another sensitive term in EU discourse. But if so, it would be an exceptionally loose, decentralised form of federalism. Hence, in case of such sensitivities, it may again be advisable to imagine inverted commas around the term.

3.2. Abundance of Veto-Positions

A second characteristic of the EU's constitution is the high threshold required for legislation to be passed. Evidently, this is related to its historical roots. In classic intergovernmental decision-making, the basic paradigm is not majority voting, but consensus. Every single vote then translates into a veto right.

This is not the EU's structure today. It has come a long way towards state-like structures in this regard: the Commission may initiate legislation independently of the Member States,²⁴ and Parliament typically decides by majority vote.²⁵ However, Parliament remains relatively weak. It lacks an autonomous right of legislative initiative and forms part of a bicameral system, in which it is inferior to the Council, where the intergovernmentalist legacy is most prominent. Admittedly, there are only a few areas in which the Council has to decide unanimously,²⁶ and qualified majority voting, with varying degrees, has become the norm. Still, it typically takes only a group of Member States to block a decision. The extent of veto power in the EU thus remains striking.

Nonetheless, increased consensus requirements are not uncommon in state constitutions. All forms of bicameralism that are not purely consultative may be interpreted this way. The same applies to restrictions on the right to initiate legislation and to various formal or informal hurdles to collective decision-taking.

20 The composition of the Court of Justice of the EU also follows a representational approach; cf. Art. 251 seq. TFEU and, for more detail, see European Union, no date a.

21 Cf. Art. 294 TFEU for its role in the ordinary legislative procedure, but mind also the existence of special procedures according to Art. 289, Sec. 2 TFEU. For an overview on these, see Cabral, 2020, p. 172.

22 For information on the different procedures of majority and their application cf. the website of the Council, see European Council, 2024a and Art. 238 TFEU.

23 Cf. Art. 2 TFEU.

24 Cf. Art. 17, Sec. 2 TEU.

25 More specifically, a simple majority typically suffices, unless an absolute majority or some quora are required.

26 For a compilation of those matters, cf. European Council, 2024b.

Veto power is, ultimately, a matter of degree, and few constitutional systems allow a simple majority of ‘50% plus one’ to effect significant change. Even so, the EU’s constitution contains substantially more veto points than most counterparts on state level, making collective decision-taking exceptionally difficult at EU level.

3.3. Openness Towards Territorial Change

A third characteristic of the EU’s constitution is its openness to territorial change. While the thresholds differ for accession and exit,²⁷ the relative ease with which such territorial changes may occur in either direction would be highly unusual in a constitutionalised state, even a federal one. Once again, this feature aligns the EU more closely with the paradigm of an international organisation than that of a state.

3.4. Split Sovereignty

At this point, one might be tempted to contest the EU’s peculiarities and explain them by reference to the concept of sovereignty. For isn’t this the ‘ultimate cause’? If sovereignty rests with decentralised units, any higher-level organisational integration may be viewed through the lens of international law, with its own conceptual tools: no state then, no federalism, and no constitution. These terms would be reserved for the reverse case, i.e. when sovereignty is located at the highest level.

The allure of this approach is evident. It is convenient to have neat, workable distinctions. And there is nothing wrong with this, as long as they describe their intended objects adequately.

Moreover, concepts in law possess performative power; to some extent, we can make the world fit these concepts, not just vice versa. Or, put differently: There are many contexts in which the bifurcated conceptualization sketched above may not have been a perfect representation of reality, but in which it has been close enough to serve as a useful description, or forceful enough to shape (our perception of) reality accordingly.

As for the EU, however, it does not seem that the concept of sovereignty in the above sense can be helpful in describing the state of affairs in this supranational polity ‘*sui generis*’. Nor would it be desirable for it to serve as a prescriptive concept, narrowing down, thus, the options to either striving for a state-like integration on EU level, or to reinvigorating (or insisting on the increasingly implausible fiction of) national sovereignty. Member States have *de facto* given away their sovereign rights to an extent that is unprecedented in the international realm, and they have done so in a way that has persisted and even expanded over time. Admittedly, they might still revert this process collectively, or exit it individually. But this could be said also about the subunits of federal states. The difference lies merely in the likelihood of

27 Cf. Arts. 49 and 50 TEU.

such an occurrence, its legal construction, and the associated cost. So, again, it is a matter of degree.

Thus, the EU is best described as exhibiting split sovereignty. This notion reflects both, its unusual openness towards territorial change, as well as its relatively far-reaching restrictions on central competence. But it also emphasizes the (in part: resulting) ambiguity when it comes to assessing where any ultimate power center might lie.

3.5. Polity Without Purse (and Sword)

Although the EU's regulatory powers are exceptionally weak compared to other polities, these very powers are, nonetheless, its strongest tool. The point here is not so much that, notoriously, the EU does not have anything to back its claim to authority by brute force: neither an army, nor any real police forces.²⁸ This is remarkable, to be sure, but it has proved rather unimportant, at least so far, in the absence of existential threats.

What is more important for its day-to-day functioning is not force, but finance, and here the EU remains extremely weak. While it has a budget, funded mainly from Member State contributions and customs duties,²⁹ allowing it to fund its institutions and distribute grants and subsidies, the overall volume is limited.³⁰ Moreover, the EU stays clear of the core areas of distributive policy as it does not get to tax its citizens, nor can it hand out social benefits to them.

This feature is reflected in the truncatedness of the executive branch that was mentioned before. So, there is no social security administration at EU level, nor are there any tax authorities or welfare agencies. But it also characterizes the EU's legislative activities, as the decisions on social spending and its financing through taxes have remained the domain of the Member States. In this sense, the EU is mostly left to regulatory interventions, and continues to be a polity without a purse.³¹

3.6. Precarious Legitimation Balance

Tying public power to democratic participation is broadly viewed as an essential precondition for legitimising its specific exercise as well as the institutions of the polity more generally. Defining and prescribing such participation is part of what constitutions typically do. As very few polities are completely centralised, it is also common for such institutionalised participation to be spread across multiple levels. There is nothing unusual, hence, in the coexistence of an advanced system of

28 Cf. Art. 87 TFEU on the – limited – competences of Europol.

29 For the legal basis, cf. Art. 311 TFEU; for more detail, cf. Schwarcz, 2025.

30 On current figures, cf. European Commission, no date.

31 This situation has remained remarkably stable over the past decades; for an early analysis, cf. Graser, 2000, p. 336.

democratic participation at EU level with its respective counterparts at the level of the Member States. Composite procedural legitimation is the rule, not an exception.

On a closer look, however, the EU's situation is still distinctive. Partly, this stems from the transitional character of the respective procedural arrangements. European integration has moved steadily, but slowly, from an international-organization style arrangement towards the kind of parliamentary participation that is known from (federal bicameral) state systems. But it might, indeed, never reach this level. At least, it is not there yet, as could be seen from the intergovernmentalist sediments sketched above.³² So, to the extent that these sediments are still present, the system continues to incorporate legitimacy elements based on the international law paradigm: consensus, that is, instead of majority voting, and states speaking for their peoples, instead of more direct forms of representation. This emphasizes the relevance of democratic participation on Member State level, but reduces the relevance of legitimation through arrangements that reflect a paradigm of democratic participation on central level.

This latter strand of legitimation faces an additional challenge. While the formal structures of democratic participation at EU level may indeed have reached an extent that is unparalleled in the international realm, the relevant social preconditions for meaningful representation are lagging behind. It continues to be primarily the Member States where the political discourses take place. With interest group formation, party politics, and media attention shifting – or rather: expanding – only slowly to the central level, a truly European public sphere would yet have to (be) develop(ed). Furthermore, there are doubts whether it even could: multiple languages, different cultures, heterogeneous living conditions, and fragmented collective identities – there is a long list of potential obstacles,³³ the surmountability of which is unclear.

As a consequence, the EU's legitimacy structure is peculiar, not because it is multilevel, composite type, but because the balance is precarious: lopsided towards the Member States, even as a long-term, uncertain transition towards central-level legitimation continues.

3.7. Inscribed Directionality

Among the functions that constitutions serve, providing stability features quite prominently.³⁴ They stipulate the 'rules of the game'. So, reliability is important. And they contain a commitment to a set of core values, which usually comes with a claim

32 Cf. Subsec. 3.a) *supra*.

33 Remarkably, the German Federal Constitutional Court has placed much emphasis on what it considers such sociological conditions of meaningful democracy, cf. in particular, two of its landmark decisions on European integration, BVerfGE 89, 155 (Maastricht), at paras. 98–101, BVerfGE 123, 267 (Lisbon), at para. 250; for a discussion, cf. Graser, 2023, p. 23.

34 For a nuanced reflection of the need for (and limits of) the provision of stability, cf. Schuppert, 1995, pp. 32 et seq.

to some durability, too. Correspondingly, constitutions are typically difficult – and sometimes almost impossible – to change.

This emphasis on stability does not preclude, however, that they might also entail some programmatic ambition.³⁵ Constitutions may mark the beginning – or a reboot – of a polity, and hence enshrine a collective aspiration towards a more or less distant goal. So, transformation can well be part of an – indeed: stabilized – program.

The EU has long been understood as the institutional embodiment of the European integration project. Unsurprisingly, its constitution contains aspirational, transformative elements: the creation of common market, currency union, political union, and the commitment to ‘an ever closer union’.³⁶ While constitutional aspirations are not unusual per se, the EU’s transformative ambition is remarkable.

For one, the degree of transformation is exceptionally fundamental. It is not ‘just’ the progressive realisation of substantive goals within the given order – such as, a society that is more just, affluent, or advanced in some other respect. Rather, it is about changes to the constitutional structure itself. For a project transitioning from an international organisation to a novel supranational polity, this is explicable, yet it clearly distinguishes EU’s constitution apart.

A second peculiarity relates to the phrase ‘ever closer union’. Albeit vaguely worded, it appears too specific to be disregarded as purely rhetorical. Should there really be no limit to the envisaged closeness of the peoples of Europe? Again, this may be explicable by reference to the specific context. For a visionary endeavor, the attainment of which seems both, desirable without any qualification, and extremely far away, such an unlimited mission might seem plausible. Precisely for this reason, however, the inscribed directionality distinguishes the EU’s constitution and may become problematic if the underlying assumptions no longer hold.

3.8. *Variable Geometries*

European integration has progressed impressively over time, not only in terms of its intensity, but also its extension. Perhaps most striking is that both dimensions have advanced concurrently. With each round of accession, the *acquis communautaire* expanded further, increasing the distance that new Member States needed to cover by adjusting their laws with EU standards. Similarly, as the EU grew, heterogeneity with regard to social conditions increased, and promoting convergence has remained a challenge to this day.

Against this background, it is unsurprising that when new steps of integration were contemplated, not all Member States were willing or able to go along. It may, however, not be self-suggesting that, on such occasions, the others would still move

35 For a discussion of some further examples of programmatic prose in constitutions, cf. Graser, 2025, pp. 231 et seq.

36 The phrase can at present be found in Art. 1 Sec. (2) of the TEU as well as in the preambles of both, the TEU and the TFEU. It was included already in the preamble of the Treaty of Rome.

ahead.³⁷ And indeed, such differentiated integration has remained a relatively rare occurrence. The concept of '*l'Europe à deux vitesses*' has always been contested, not least because it might result in permanently variable geometries.³⁸

This concern does not seem to have been unfounded when looking at the present situation: the Eurozone comprises 20 EU Member States,³⁹ while the Schengen Area comprises 25,⁴⁰ and this is decades after the relevant steps towards integration were taken. Notably, some EU Member States have chosen not to join these systems, while certain non-EU states have entered them. Thus, not only are there inner circles of deeper integration within the EU, but its confines are also blurred externally. This is true not only for the Schengen Area and the Eurozone. Notoriously, there are multiple ways how countries which have not (yet) joined the EU have become associated with it, in some cases very closely.⁴¹ This all adds up to a considerable variability in the EU's geometry.

Comparable features may also exist in other multilevel polities, for instance, where central governments establish experimental zones,⁴² or allow subunits to co-operate.⁴³ Yet the degree of variability in the EU is exceptional. Currency and internal borders are matters of heightened relevance. Moreover, while other polities may also open themselves externally, through free trade agreements,⁴⁴ the EU's blurred external borders go well beyond what is common.

In sum, these variable geometries constitute a distinctive characteristic of the EU's constitutional set-up, a feature whose significance increases the more persistent it becomes.

3.9. *Extreme Entrenchment*

Constitutions are typically difficult to amend; entrenchment is a common feature,⁴⁵ though its degree varies. Constitutional amendments may require qualified

37 By entering into separate agreements or based on the special provisions for enhanced cooperation now contained in Art. 20 TEU.

38 For a condensed account of the variations of this model and its uses so far, cf. De Witte, 2019, p. 20.

39 For an overview, cf. European Union, no date b.

40 For an overview, cf. European Commission, 2025.

41 This is true, in particular, for the members of the European Free Trade Agreement (EFTA).

42 China's special economic zones may be among the most prominent examples globally for this phenomenon; for an overview, cf. Martinek, 2014, p. 41.

43 For a (somewhat dated, but still) instructive analysis of the pertinent practice in German federalism, cf. Vedder, 1997.

44 It seems noteworthy in the given context that even the advanced ones, such as Mercosur, see mercosur.int, no date, do not typically reach the integrative level that is common in Europe even for many non-EU members.

45 For a recent, exceptionally broad analysis of the actual relevance of such entrenchment in constitutional adjudication cf. Hein, 2020, p. 78. He concludes that these clauses do matter, but have got ambivalent effects.

majorities in one or more legislative chambers, a referendum, or a waiting period, and they may even be prohibited where core provisions are considered unamendable.⁴⁶

In the EU, the roots in international law remain particularly prominent in its degree of constitutional entrenchment. Although treaty revision does not follow general public international law, but instead a distinct set of procedure(s),⁴⁷ the basic paradigm may loosely be described as ‘double unanimity’: consent of all governments on EU level, followed by confirmation by each Member State.

This requirement may once have seemed entirely appropriate for a project of incremental supranational integration. Within a Westphalian framework, it seems self-evident that every further step of integration would need to be consented by all involved states. From a constitutional perspective, however, the resulting degree of entrenchment is enormous, with remarkable ramifications.

It becomes evident, first, when considering that it is not only integrative steps that have to overcome those high obstacles, but all kinds of amendments. Disintegrative reforms would have to meet the same threshold. Second, entrenchment matters more when constitutional provisions are more extensive. This is the case for the EU insofar as much of its codified primary law pertains to economic integration.⁴⁸ Again: This is no surprise in a polity that has emerged from a common market project. But it is highly unusual for a constitution, the regulatory extent of which is thus increased in the specific case of the EU. Lastly, primary law is more than those extensive black letters that we find in the Treaties. It is what the Court of Justice of the EU (CJEU) makes of it. Admittedly, this is true in all constitutional set-ups featuring a constitutional court, with the relevance of this aspect depending on the willingness of the respective court to engage in progressive interpretation. While it may be difficult to measure this dimension, it would seem clear from the history of European integration that the CJEU is leaning towards the active side,⁴⁹ to put it mildly. Arguably, this has been desirable, maybe even necessary. For the more entrenched a constitution is, the more need there is for the judiciary to ensure its adaptability to changing circumstances. But the downside is, quite ironically, that whatever constitutional interpretation it generates, this typically takes part in the entrenchedness of the interpreted constitution.⁵⁰ So, for the legislator, it is as hard to change as the constitutional provisions themselves, and the capacity of a court to revert its own decisions is for practical reasons quite limited, too.

46 A prominent example is Art. 79 Sec. 3, the so-called eternity clause, of the German Basic Law.

47 As specified in Art. 48 TEU.

48 This is particularly true for Part III, the largest part of the TFEU, which in turn is the most comprehensive of the codifications of EU primary law.

49 For a thorough review of the related scholarship, cf. Stone Sweet, 2010.

50 For a seminal treatment of this feature of constitutional interpretation in the context of US law, cf. Monaghan, 1975; for an attempt to build upon Monaghan with regard to German constitutional jurisprudence, cf. Graser, 2001b.

Taken together, the EU is hence characterised by an extreme level of entrenchment. This may be perfectly understandable with a view to its roots in international law. But it stands out when viewed from a constitutional perspective.

4. Contextual Peculiarities

Context matters. It helps explain why constitutions develop as they do, and it needs to be considered when discussing possible future amendments. If the constitution of the EU appears peculiar, this is due, at least in part, to the peculiarity of its context.

This does not imply that constitutions lack transformative effect. Indeed, EU history is often read as a case in which a community was forged by law.⁵¹ Accordingly, a new step of constitutionalisation may therefore aim not only to (re-)align the existing constitutional arrangement to changing circumstances, but also to harness the transformative potential of constitutional reform. However, it is difficult to disentangle, retrospectively, how strong such transformative effects have been, let alone to predict their future impact. Accordingly, we do not know when exactly a contextual factor turns into a constraint that needs to be respected but cannot be changed by constitutional reform. Nevertheless, despite this uncertainty, any meaningful discussion of reform must take note of the contextual aspects that have proved relevant thus far, and that may remain so in the future.

4.1. Geopolitics

European integration has always been a geopolitical endeavor. This is not its only purpose, to be sure, and there have been periods when it may not even have been a prominent one. But it was there at the very beginning, when it was paramount to prevent that the continent's central powers could ever again fight a war against each other. While prosperity became a more important driving force in ensuing decades, geopolitics moved center stage again after the fall of the Iron Curtain, when the West – wisely or not – quickly integrated much of the East into the newly created EU. In the following decades, other goals took over again, or rather concerns became dominant: solving genuinely transnational policy problems such as climate change, or growing migration flows. At the time of writing, however, geopolitics has regained primacy. The focus is once more on the Eastern border, which may eventually even need to be defended. For now, though, the reverse perspective seems dominant, as

51 The notion is commonly ascribed to Walter Hallstein, but has been referenced widely; for a historical reflection on the concept, its development and relevance over time, cf. Stolleis, 2019, p. 71.

further waves of enlargement are being discussed, despite – and in part propelled by – the Russian military attack on Ukraine.⁵²

This has been a very rough sketch,⁵³ admittedly, highlighting only the most obvious geopolitical aspects of European integration. A fuller account would have to include, *inter alia*, the association agreement with Turkey,⁵⁴ the European Neighborhood Policy,⁵⁵ and the Eastern Partnership.⁵⁶ The ambition here, however, is not to engage into a discussion of the EU's geopolitical role, but merely to recall how the trajectory of European integration has been influenced by geopolitical demands – repeatedly, and to this very day.

While it is hardly possible to predict future demands or how the EU might respond, it is worth noting that its capacity and mode of responding to such demands is peculiar. 'Enlargement', most notably, is not an instrument that states can easily employ, whereas international organisations typically can. The hybrid nature of the EU may, in this regard, be an advantage. This option is highly context-dependent, however, and it could fade as the EU becomes more state-like, or if its geopolitical situation becomes more adversarial. Nonetheless, it may be worth preserving.

4.2. A Deregulatory Bias

It is not only geopolitics, but also other functional demands that place the EU in a special situation. This is not because these functional demands are in any way unique. On the contrary, the policy goals pursued by the EU are not unusual: an economy that generates present and future wealth, accompanied by policies that ensure its fair distribution, the preservation of the environment, the enjoyment of human rights and democratic participation.⁵⁷ What is peculiar is the tension between some of these goals, arising from the EU's multi-level configuration.⁵⁸

While market integration progressed early, regulatory capacities at the central level long remained weak and, to this day, have not reached the extent common in state governments. Due to liberalisation requirements and market pressures, it has

52 For example, the 'Group of Twelve' place this factor at the beginning of their report; cf. Group of Twelve, 2023.

53 For a somewhat more thorough account of the '*raisons d'être*' of the EU and its predecessor organisations and their development over time, cf. Graser, 2025, p. 226.

54 Initiated as early as 1963; for details on the so-called 'Ankara Agreement' cf. Delegations European Parliament, no date; notoriously, the relations between the gone back and forth, with accession negotiations opened in 2005 and halted in 2016.

55 Cf. the pertinent website of the Diplomatic Service of the EU, see The Diplomatic Service of the European Union, 2021.

56 Here, too, cf. the pertinent website of the Diplomatic Service of the EU, see The Diplomatic Service of the European Union, 2025.

57 For a specific and more detailed exposition of the aims of the EU, cf. Art. 3 TEU and the Preambles of both, the TEU and the TFEU.

58 Fritz Scharpf has been among the earliest to describe this, cf. e.g. Scharpf, 1995 and again more recently in Scharpf, 2008; for an extensive analysis with regard specifically to social policy cf. Graser, 2001a.

become more difficult for member states to pursue distributive policies or other measures that restrict economic activity. At the same time, this cannot be fully offset by regulation on central level, as competences are limited and procedures often require more consensus than can realistically be reached.

The assessment of this set-up depends on perspective. Undoubtedly, the EU strengthens the capacities of its Member States by enabling coordinated policy-making beyond what any other international arrangement allows. It also increases, most likely, the prosperity of all Member States due to the efficiency gains that market integration promises, at least on the long run. Thus, the argument is not that EU membership is not advantageous – there is all reason to believe that it is, most of the time, for most of the people, and in all Member States.⁵⁹

Rather, the argument is that the EU's constitutional set-up has been tilted towards market liberalisation, and against regulatory policies. This does not have to be a bad thing; liberalisation may often be beneficial, and passionate deregulators may welcome it unconditionally. But it does mean that we are most likely paying a price for this, in that other policy goals, such as sustainability, equality, or the protection of human rights, are being pursued to a lesser extent than they otherwise would. This is why it is so difficult, for many, to accept the limitations of the EU's regulatory capacity. And the underlying tension is key to understanding who is endorsing which kind of reforms.

4.3. The Conundrum of Supranational Democracy

For those dissatisfied with the EU's limited powers, an obvious response would be to expand competences and reduce veto positions – centralisation, in short. Yet such a move would affect the balance of democratic legitimation. If more government capacity shifts to the EU, democratic participation at Member State level becomes less significant for overall legitimation. To offset the resulting loss, it would seem necessary to expand the structures of participatory democracy at the central level – i.e. to strengthen the role of the European Parliament with regard to its legislative powers as well as to the selection of leading figures of other branches of government.⁶⁰ But while it is not difficult to imagine an appropriate design for this, it remains doubtful whether such structural reforms would suffice. For as was noted earlier,⁶¹ the social preconditions for meaningful representation at EU level might still be underdeveloped.

It is (the assessment of) this context factor that might be the most critical one for (the assessment of) the prospects of further integration – or put more generally: for the (choice of) direction for future reforms. Unfortunately, the relevant questions

59 For a more differentiated treatment of the different and variable interests and their potential aggregation cf. Graser, 2025, p. 228.

60 For some references on the pertinent debate, cf. Fn. 74.

61 Cf. Subsec. 3. f) supra.

are hard, if not impossible, to answer. Even if, first, there may be little doubt about the current deficiencies of what might eventually grow into a truly European public sphere, there is still room for debate on how serious they are, especially if compared to the respective situations at the level of individual Member States. Second, we can at best speculate about how this situation will evolve and, more importantly maybe, whether it could effectively be influenced by policy measures, or even by just leaping ahead with structural reforms, hoping for the relevant social conditions to follow. Lastly, even setting these uncertainties and ambivalences aside, there is scope for disagreement also in normative terms: even if organizing meaningful democratic legitimization in such a large and heterogenous polity were to prove feasible, one might still prefer smaller-scale communities whose government capacities might be more limited, but which might allow for more immediate individual participation in the exercise of collective autonomy.

At this point, it is worth noting that the situation of the EU is not all that unique in this regard. Nation states may tend to portray themselves as natural entities, but the respective communities and, even more so, their exact confines are typically quite contingent constructions – ‘imagined communities’, as it has famously been termed.⁶² This observation underscores the performative potential of social constructions. It is not impossible to forge new collective identities, as would be a critical step, probably, in overcoming the conundrum of supranational democracy. This does not imply, however, that any community could be performatively ‘imagined’ into existence, and given its scale and diversity, the EU may be a particularly challenging case compared to many nation state examples in history.

4.4. Heightened Susceptibility to Divergence

There are many reasons to regard EU membership as a matter of choice, rather than destiny: Choice, after all, is how membership is brought about. Also, there is always the option to leave, and no collective identity that is so deeply rooted as to render dismemberment inconceivable

Admittedly, this account is simplistic⁶³ and blurry already in conceptual terms. To see this, one does not have to enter into the debate on whether there is (in this context, or even generally) anything like destiny at all – or conversely: whether there is anything else but destiny. It is enough to look at the other end of the distinction. For choice is a notoriously difficult concept, too. Does it have to be ‘real choice’, or can the alternative options be so (un)attractive that the decision is more or less predetermined by the set-up? So, clearly, the dichotomy of choice and destiny is misleading. It is, if anything, a matter of degrees, and cast, moreover, in concepts that replicate social constructions, which may have deep cultural roots, but are contingent, nonetheless.

62 By Benedict Anderson in his seminal work entitled ‘Imagined Communities’; Anderson, 1983.

63 For an attempt at a somewhat more thorough treatment, cf. Graser, 2025.

With these qualifications in mind, however, the initial point can still be made. It is that EU membership is more plausibly seen as a matter of choice than is the case for subunits of states, including federal ones. While perhaps intuitive, even trivial, this observation carries implications. If viewed as a matter of choice, EU membership is more likely to be questioned. It will hence need to be justifiable, at potentially any moment in time, from the perspective of each Member State. And such justification cannot rely on primordial belonging, but must be provided in functional terms, based on the benefits of membership.

In this regard, the EU differs markedly from most polities. Admittedly, this difference might, on the one hand, sound more dramatic than it actually is. Leaving the EU is a huge step in terms of both, the required effort and the resulting cost.⁶⁴ Moreover, being part of the EU would seem to pay off in all Member States, for most of the people, and most of the time. Accordingly, exit had for long been close to inconceivable – until it actually happened once. But even after this, it would still seem very unlikely for an exit to be a rational move from a Member State perspective.

On the other hand, what matters is not actual pay-offs, but perceptions, which may be politically manipulated. Moreover, the exit option need not be used to have an effect; its mere possibility may influence decision-making. This shadow is potentially omnipresent, and it has become sharper after Brexit.

The result is another contextual peculiarity: divergent interests among Member States can lead to disintegration more easily in the EU than in more state-like settings. This heightened susceptibility to divergence is further amplified by the EU's exceptional heterogeneity in both, economic as well as cultural terms. As EU policies affect Member States differently, divergent interests become more likely.

5. Desiderata for a Reform

If the Herculean tasks had to be defined today, an accurate and comprehensive description of the EU would certainly be among them. The sketches provided in the previous sections can therefore only offer an approximation to some relevant aspects. As regards comprehensiveness, they cannot even count as serious attempts.

When we now turn to the desiderata for a reform, it is with an emphatic disclaimer: this will be tentative and selective, not a blueprint for the way ahead, but merely arguments and suggestions for further discussion. They rest on three guiding principles: increasing internal functionality, maintaining geopolitical viability, and aiming for broad acceptability. Each of them will be addressed below.

⁶⁴ The cost which the UK has incurred due to Brexit has been studied widely. A detailed overview on the current state of this research is provided by the Brexit Analysis of the Office for Budget Responsibility; Office for Budget Responsibility, 2025.

5.1. Internal Functionality

The EU's internal functionality has long been a problem. Decision-taking procedures require levels of agreement that often cannot be achieved because Member State interests diverge too sharply. Past enlargement waves appear to have exacerbated this, as institutional reform may not have sufficed to compensate for increased heterogeneity. Moreover, challenges to be addressed—unstable financial markets, climate change, migration flows, external security threats—have grown, rendering institutional weaknesses more visible.

Although the diagnosis of this deficit will hardly be controversial, views may differ on its severity, especially regarding the trade-offs involved in addressing it. Potential reforms have long been discussed,⁶⁵ but without clear prospects of implementation. The issue has become more pressing with new enlargement rounds in sight, which would hardly be conceivable without constitutional overhaul.⁶⁶

A core element of reform would have to be a loosening of qualified majority requirements.⁶⁷ Various paths exist: lowering the numerical thresholds for decision-taking in the Council, assigning more matters to lower-threshold procedures, or strengthening Parliament's weight relative to the Council. Most conceivable reforms would combine these elements. But while identifying a design that is both practical and acceptable to all relevant players is difficult, the more fundamental challenge lies in addressing the legitimacy concerns accompanying such a shift of policy-making capacities towards the central level.

The conundrum of supranational democracy, as described earlier,⁶⁸ necessitates focusing on the social preconditions of meaningful democratic participation. When strengthening the respective structures at EU level, calibration must be careful, advancing cautiously so as not to lose touch with the reality of a still deficient European public sphere, and so as to encourage its gradual development. Measures might include giving Parliament greater influence in determining the Commission leadership⁶⁹ or granting it a right to initiate legislation.⁷⁰ Both could attract more at-

65 For a succinct account of specifically enlargement-related debates, cf. De Witte in his 2019 analysis for the Committee on Constitutional Affairs; De Witte, 2019.

66 For this assessment, cf. already De Witte, 2019 *ibid.*; more recently, the Report by the Group of Twelve, 2023; and the European Parliament, Committee on Constitutional Affairs, 2023, adopted by the Parliament, albeit in a relatively close vote.

67 Thus, i.a., the 2023 Report of the Committee on Constitutional Affairs on proposals of the European Parliament for the amendment of the Treaties, *ibid.*

68 Cf. Subsec. 4 c) *supra*.

69 While the right of nominating the candidate for presidency of the Commission has so far remained with the Council, there have for years been efforts by the party represented in the Parliament to establish a practice of nominating 'lead candidates' (*Spitzenkandidaten*) in European elections, and to advocate that the winning lead candidate should become President. For an account of that development, cf. the briefing by Silvia Kotanidis, 2024. There have also for long been more far-reaching proposals to have the President of the Commission be elected directly by EU citizens, for an account of the pertinent discussions, cf. Decker, 2012.

70 I.a., the European Parliament itself has made this proposal; cf. European Parliament, 2022.

tention to parliamentary activity and stimulate increased media coverage, interest group formation, and popular engagement.

Besides organisational reform, other vehicles may invigorate popular interest in European politics. It could be instrumental to grant the EU some competence in taxation and social spending, as policies in these fields have immediate, straightforward effects on the population. Again, it may be advisable not to move too far too quickly. But even a limited new competence in these fields may function as a catalyst for broader public attention.

The development of a European public sphere may be a critical precondition for meaningful democracy at EU level, but not the only one. The formation of a corresponding collective identity also seems important. How to promote this, however, remains largely speculative:⁷¹ shared culture, historically rooted narratives of belonging, and recurrent references to collective identifiers in daily communication are likely to matter. Constitutions can contribute by defining a polity, expressing its common values, and structuring the modes of interaction for the exercise of collective autonomy. Republican thinking places particular hope in repeated experience of negotiating interests, reaching compromise, and enjoying equal entitlement.⁷² If so, increasing interest and participation in EU-level politics might foster a corresponding collective identity. However, this is unlikely if the boundaries of the polity are excessively blurry. Variable geometry has undoubtedly allowed integration to progress without full consensus, but it may hinder the formation of a stronger collective identity if it results in multiple incongruent circles in which varying groups of states interact across different policy fields. Some consolidation might, therefore, be warranted.

5.2. Geopolitical Viability

Reforming the EU is complex even from a purely internal perspective. But the EU does not exist in a territorial vacuum. Forms of affiliation with the EU, ranging from loose association to full membership, have long served as important geopolitical tools, enabling cautious, gradual territorial reconfigurations on a historically tense and conflict-prone continent. Current enlargement plans, and their eminent geostrategic motivation, attest to this, and there is no indication that such external demands will disappear soon. While reasonable disagreement exists about when and how to employ EU affiliation as a geopolitical tool, and whether past uses were always wise, this is no reason to dismiss the tool altogether or ignore the external dimension in the reform debate.

The problem, already noted above, lies in the potential incompatibility of external demands with the desideratum of increased functionality. The more integrated the EU becomes, with more centralised competences and streamlined decision-taking

71 For a brief overview on the pertinent discourse, cf. Graser, 2009, p. 100.

72 Ibid., p. 104.

procedures, the more demanding membership becomes. Full membership might thus move out of reach for states who could otherwise be deemed accession candidates, reducing the EU's geopolitical leverage.

Other forms of EU affiliation may continue to play a role, but unless designed as transitions to full membership, they have generally remained modest in intensity, not reaching a degree that appears necessary to secure geopolitically relevant integration.⁷³ Moreover, there have been multiple formats of affiliation. But their continued and potentially even extended use would run counter the goal of decreasing the variability of the EU's geometry.

Reconciling these conflicting aims will be difficult. A possible compromise is to retain some variability, while simultaneously consolidating formats.⁷⁴ More specifically, one option would be to create a type of low-intensity membership for states willing to join, and potentially also for current members who find present or future integration levels unacceptably high. Such a format should include full market integration, but exclude more sensitive policy fields such as migration. Voting rights would be restricted accordingly, as would participation in EU funded programs. While it is unrealistic to reduce all present and future affiliation to this single secondary format, consolidation should be the aim. The format could serve as a uniform floor, supplemented by additional cooperation mechanisms, particularly for states moving toward full membership. The latter should remain as uniform as possible, thereby forging a cohesive core capable of effective cooperation and conducive to collective identity formation.

5.3. Broad Acceptability

Acceptability is key to any reform proposal. But as no proposal will ever fully align with every actor's preferences, compromise is essential. And for agreement to be possible, it must come from all sides.

The changes suggested above have an integrationist spin, responding to plausible functional demands, both internal and external ones. But they cannot eclipse concerns about excessive centralisation. These concerns must also be addressed, not merely by offering a second-level membership option. The aim must be to maximise acceptability among all current Member States for the envisaged reforms of the 'core' EU.

A first measure, arguably overdue, would be to abandon the EU's inscribed directionality. While further integration may remain desirable, it should no longer be an unconditional credo. For decades there have been voices advocating movement in the opposite direction, and it is clear that this mandate cannot be kept in eternity, but must depend on the level of integration accomplished at any given moment. The

73 A case in point appears to be the recent turn away from Europe in Georgian politics.

74 The plea for consolidating the formats is not new; a similar proposal is, e.g., made by the the 'Group of Twelve' in Group of Twelve, 2023.

respective formulas (or confessions?) should therefore be removed from primary law. While symbolic, the notion of ‘an ever closer union’ seems to have had a prominent place in the minds of leading actors.⁷⁵ So, its deliberate abandonment would probably send out an effectful signal, too.

A second, more tangible set of measures concerns the level of homogeneity the EU seeks to maintain in its fundamental rights policies. Greater heterogeneity might be achieved by limiting EU legislative competences in these areas, or by increased self-restraint on the part of relevant EU actors. Another avenue would be a more restrictive interpretation of the scope of the Charter of Fundamental Rights. These suggestions do not imply neglect of the importance of these policies; their relevance for individuals is undeniable. Nor do they underestimate their political salience; indeed, it is precisely this salience that makes it particularly divisive if there is, in this regard, divergence in along Member State lines. But while there are some areas in which diversity within the EU cannot thus be tolerated, there are others in which this is at least debatable. Delineating these spheres will perhaps be difficult and certainly contentious, but not impossible. Due to the demands of an integrated market, homogenization might be more warranted for those fundamental rights whose protection implies a significant burden on economic actors. Moreover, the EU might also need to safeguard against a fundamental political transformation of its constituent units and hence insist on the homogeneity of rights whose exercise is critical for the functioning of a pluralistic democracy. This leaves us with those – merely – individual guarantees pertaining to matters such as the rights to life and bodily integrity, family affairs, equality, or freedom of religion. And while, admittedly, this does not look like a list of primarily EU-driven policy areas, there here has been considerable activity in some of them.⁷⁶

A third and likely most fundamental set of measures would seek to reduce the level of entrenchment within the EU’s constitutional framework. Earlier sections described how extreme this entrenchment is compared to state constitutions, how it has evolved from the EU’s international law origins, and how it pertains to both, the extensive body of norms occupying constitutional rank and the procedural requirements for changing them. One option is to downgrade part of the TFEU from primary law to a lower status amendable through lighter procedures. Another is to ease the amendment of primary law itself. This is, of course, a double-edged sword. Those concerned about being locked into what they may perceive as an excessively

75 (Affirmative) References in political speeches may have become less frequent in recent years, but still abound. For an instructive reflection of the relevance of that commitment – despite its apparent weakness as a legal argument – cf. Radlgruber and Wagner 2016.

76 In some instances, these were mere recommendations, like, for example, the so-called Matić Report on Sexual and Reproductive Health and Rights in the EU (European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women’s health (2020/2215(INI)), pertaining to the first set of rights in the previous list. In other instances, however, we find a vast array of binding rules at EU level, such as on anti-discrimination matters (cf. Council Directives 2000/43/EC; 2000/78/EC; 2002/73/EC; and 2004/113/EC).

integrated community, with no realistic alternative but exit, would gain a more viable route to reversal. Yet entrenchment has also constrained integrative steps. Unless a differential regime is introduced for integrative steps on the one hand, and their reversal on the other, a decrease of the level of entrenchment could have effects in both directions. This ambivalence does not imply, however, that there was not any scope for agreement on this issue, one way or another. And indeed, moving away from the intergovernmentalist legacy in this regard could be considered a sign of constitutional maturation.

In addition, the special dimension of entrenchment afforded to judicial interpretations of primary law should also be reconsidered. Reaching consensus on this point may be easier. First, the Court has typically applied progressive interpretations to primary law. Making these easier to override would not accelerate integration, but simply moderate it where Member States object.

Secondly, the high level of entrenchedness afforded to judicial interpretations of primary law seems an unfortunate anomaly. While national constitutional jurisprudence typically enjoys similar protection, national systems usually exhibit lower overall entrenchment, and the phenomenon has been criticised even there.⁷⁷ Compared to this, it seems all the more problematic for the EU to combine maximum international-law-style entrenchment with a court whose role is not weaker, and in some respects even stronger, than that of national constitutional courts. A gradual deconstitutionalisation of judicial decisions thus appears warranted and viable. Various implementation paths exist; the key is to define a procedure for overriding judicial interpretations of primary law, which could be limited to certain parts of the Treaties, and which would have to be less demanding than changing primary law.⁷⁸

5.4. Trajectories of Transition

The required reform, whatever its direction or magnitude, would be substantial. Understanding the demands, designing options, predicting their effects, reaching agreement: these are undoubtedly difficult, perhaps daunting, tasks. While the path of European integration has been unexpectedly successful to this day, its evolution was not primarily driven by visionary agreements among Member States, but by incremental change shaped through constant interaction among diverse actors, with the Court having repeatedly played a decisive role.

This does not downplay the importance of treaty revisions to date. But reaching the required consensus has not become easier, and the steps now needed seem no smaller than the past ones. It would be remarkable indeed if a thorough overhaul of

⁷⁷ On that feature in national constitutional law, see the references in FN 56.

⁷⁸ Fritz Scharpf may have been the first to advocate such an approach, allowing for a Member State to challenge a ruling of the Court in the Council, where a simple majority would then suffice to confirm it; cf. Scharpf, 2009, p. 474, where he also points to a similar arrangement under WTO law.

the EU's constitution were agreed upon by the Member States anytime soon. Incremental evolution remains the most likely trajectory.

6. Epilogue: *L'Europe Se Fera Dans Les Crises*

It is in moments of crisis that Europe will be built – but will it really? Monnet's dictum is often quoted as a source of optimism. Yet this may be a misinterpretation. The actual line, from his memoirs, is retrospective:⁷⁹ Monnet stated there that he had always believed that Europe would be forged in crises.

This was likely a fair historical account in the 1970s. As an analytical statement, it may remain plausible beyond that time: states do not normally relinquish sovereign powers. So, for regional integration to occur, special circumstances are necessary:⁸⁰ be it a hegemonic power incentivising hesitant countries, be it a counter-majoritarian institution – such as a court – instigating a 'quiet revolution',⁸¹ or be it a crisis facilitating unexpected compromise.

The current situation fits the crisis scenario in more than one way. Immediate security threats such as the war in Ukraine, continuous challenges such migration management, and the catastrophic prospects of climate change may all justify movement toward a more effective EU.

However, there is no guarantee, even under such special circumstances, for integration to come about. It might also just fail, and Monnet said nothing to suggest otherwise.

In the sentence following the above quote, he did, however, suggest what can reduce the probability of such failure: potential solutions must 'be proposed'.⁸² And discussed, one may add, revised repeatedly, and refined, always working towards better proposals for yet another round of Europe's constitutionalisation. The task may not be perpetual—for what could ever be? But, certainly, there is no end in sight.

79 In its English translation, it reads: 'I have always believed that Europe would be built through crises, and that it would be the sum of their solutions'. Cf. Monnet, 1978, p. 417.

80 For a broad treatment, reaching beyond the European context, cf. Mattli, 1999.

81 Thus the term used by J.H.H. Weiler, to describe 'the new constitutional regime 'imposed by the European Court' during an early formative period of European integration, cf. Weiler, 1994, p. 510; for a related reflection, cf. Höreth, 2000.

82 The sentence following the one quotes above (Fn 82) reads: 'But the solutions had to be proposed and applied'.

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