

# The European Constitution Project after the Referenda

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## 1. The Unexpected Constitution

In the summer of 2005 the Treaty establishing a Constitution for Europe, having been drafted over a two-year period following a novel constitutional process, was rejected in popular referenda held within days of one another in two of the European Union's 25 member states. Since that time, the 'European Constitution' project has not been formally abandoned, but instead has been deliberately placed in a state of suspension by virtue of the political decision taken by the 25 heads of state and government, following the negative referendum results, to allow a 'period of reflection' for a year before any further decision or action is taken. Consequently, the European Union currently finds itself in this supposedly reflective state, pondering the next steps in the constitutional process which was so unexpectedly launched in 2001. After outlining briefly the origins of the Constitution project, this paper examines the current state of play, reflecting retrospectively on the wisdom of the project in the light of its apparent failure, and considering its current and future prospects.

The political project of enacting a documentary European Constitution is of very recent origin. Until the year 2000, in fact, the term 'constitution' had not entered mainstream European political discourse, remaining confined to specialized debates among EC lawyers and academic scholars who spoke of the 'constitutionalization' of EC law by the European Court of Justice,<sup>1</sup> or occasionally in the neglected proposals of committed Euro-federalist groups.<sup>2</sup> The fact that a document establishing an EU Constitution was signed by 25 member states in June 2004 should therefore be a matter of some surprise. And yet, from the time that the political debate was publicly launched by Joschka Fischer in 2000 in his Humboldt University speech, a clear consensus at the level of the European political elite developed rapidly around the question of the desirability of an EU constitutional settlement, and culminated in the adoption of a text only four years later.<sup>3</sup>

This unequivocal manifestation of high-level political agreement on the need for a constitution was not, however, accompanied by significant popular support. At best, during the course of drafting the constitutional text there seemed to be a wide degree of public apathy, with debate remaining limited to specialized interests and actors, in spite of the initial hopes that the new Convention would

stimulate wider participation and a broader debate.<sup>4</sup> Despite the optimistic showings of the EU's own Eurobarometer opinion polls,<sup>5</sup> the success of Euro-skeptical parties in the 2004 European Parliament elections and the mobilization of EU-critical groups around the prospect of national referenda on the new constitution suggested a different picture. The fact of these contrasting perspectives on the desirability of an EU Constitution presents an apparent puzzle. How was it that agreement was so rapidly reached on a matter in relation to which there had been decades of political resistance, passive or otherwise, about which the most prominent academic commentators were skeptical,<sup>6</sup> and for which – to put it mildly – there was no popular demand?

The key to understanding this apparent conundrum may lie in the fact that one of the very reasons for adopting a constitution may have contained within it the seeds of its own failure, at least in the short term. In other words, the lack of social or popular legitimacy which had grown increasingly obvious over the decade following the near-failure to ratify the Maastricht Treaty seemed to become a matter of increasing political concern as it threatened to undermine or halt some major EU initiatives to which member states were committed. This apparent lack of social legitimacy – most obviously demonstrated by marginal or negative referenda results – was diagnosed by several of Europe's political leaders as being a consequence of the complexity and incomprehensibility of the EU system and much of its legislation, and of the remoteness of its institutions and actors from ordinary people within the various member states.<sup>7</sup> The intention to “bring Europe closer to its citizens” was cited as a key reason for enacting a constitutional settlement.<sup>8</sup> And yet it seems to have been to a significant extent the lack of citizen identification with the European Union as a political entity which helps to account for the lack of broad public engagement with the constitutional process and the absence of evidence of popular enthusiasm for a European constitution. In other words, the ‘belonging’ or solidarity whose absence appeared to prompt several European leaders to pursue a constitutional solution may have been at least in part a condition for the success of the constitutional project this time around.

## **2. A Period of Reflection or a Period of Gloom?**

So where does the project stand following the negative referendum results in France and the Netherlands? Given the widespread sense of failure and indeed almost of finality (in the sense of marking the end of the constitutional project) which the French and Dutch results seem to have precipitated, the actual figures relating to the ratification of the Treaty establishing a European Constitution are perhaps surprising. At the time of writing, fourteen of the 25 member states – over half of the EU's members – have ratified the document, including two (Luxembourg and Spain) by popular referendum. These fourteen were Austria, Belgium, Luxembourg, Spain, Germany, Italy, Greece, Cyprus, Hungary, Latvia, Lithuania,

Malta, Slovakia, and Slovenia – countries which include seven out of fifteen of the ‘old’ member states and seven out of ten of the ‘new’ ones, representing over half of the EU’s population. A further nine countries chose to postpone or to suspend the ratification process during this year’s period of reflection following the French and Dutch votes. These countries include the UK, Denmark, Ireland, Portugal, Finland, Sweden, Estonia, the Czech Republic, and Poland. Looking solely at these figures, the negative results of the two referenda might not seem quite as catastrophic to the Constitution project as it initially did. Given that there were also two positive popular referenda results and twelve positive parliamentary ratifications, why did the negative results in France and the Netherlands lead so definitively to the postponement of the whole project and to the air of gloom currently surrounding its prospects?<sup>9</sup>

There are a number of possible answers to this question. The first answer concerns the identity of the particular states which failed to ratify the constitution. These were neither small, less powerful states such as Ireland and Denmark, which in the past were coaxed into a second vote when their populations voted no to a treaty the first time round, nor were they states that had only recently joined and whose populations had significant reservations about membership of the EU, nor were they Euro-skeptical states such as the UK, from which a no-vote had been anticipated.<sup>10</sup> Instead, they were two of the founding member states – two of the six that first established the European Coal and Steel Community and European Economic Community in the 1950s. One of the two, France, formed half of the crucial Franco-German partnership which has been widely perceived as the real motor of European integration over the decades; the second, the Netherlands, has until recently been one of the most enthusiastic supporters of European integration both at the level of the political elite and in popular terms. A second possible explanation for the general sense of despondency concerns the decisive nature of the no-votes: the negative results were far from marginal, and they followed lengthy and animated public debates as active and intense (even if also, as some have argued, ill-informed) as any that have ever taken place on a European issue – or indeed on many domestic political issues. A third possible explanation concerns the difficulty of knowing how precisely to interpret for the rejection of the constitutional treaty in those states. The likely mixture of very different possible reasons made it hard to imagine a response aimed at asking those populations to ‘try again’ or explaining the rejection by reference to some discrete issue or set of issues which could be isolated and addressed in a way that would enable the constitutional treaty project to go forward.. A fourth possible answer relates to the swell of uncertainty and general insecurity that followed the referendum campaigns and results, which indicated a significant rise in the expression of anti-EU sentiment or Euro-skepticism, not only in the two states in question but in many other member states, new and old. All of these and other factors contributed to the sense that the French and Dutch results represented a very serious blow indeed to the European constitution project, and not one that could be dealt with in

the relatively sanguine way that the initial Danish ‘no’ to the Maastricht Treaty in 1992 and the Irish ‘no’ to the Nice Treaty in 2000 were politically addressed.

### 3. Four Responses

The status quo, six months after the referenda and halfway through the formal period of reflection, has remained characterized by uncertainty, lack of direction, and ambivalence as to the future of the European constitutional project. Below, four possible appraisals of the current situation are outlined, each of which corresponds broadly to a position actually articulated by specific actors or scholars, and each of which expresses a dual view about (a) the wisdom of the Constitution project in the first place and (b) the significance and implications of its rejection in the two referenda. While far from exhaustive, these four broad categories reflect a range of the basic responses to the constitutional impasse.

*Position 1: (a) The constitution project was misconceived and (b) its rejection has not precipitated any kind of crisis.*

According to this viewpoint, the exercise of drafting and adopting a constitutional treaty was misconceived in the first place. It was an unnecessary and counterproductive strategy, and further, it is no bad thing that it was rejected and has effectively been abandoned. A well-known proponent of this view is Andrew Moravcsik, who has written extensively on the folly of the constitutional ambition,<sup>11</sup> and who takes the view that the failure of the otherwise “modest reforms” and “incremental improvements” contained in the constitutional text is explicable by reference to the determination to enact them as part of a *constitution*.

The essence of this view is that the EU did not and does not need a constitution, and that the attempt to generate support for one was the misguided work of “democratic enthusiasts” and “centralizers” who failed to recognize the wisdom and stability of the existing compromise. However, all is not doom and gloom on this view, since the failure of the constitutional treaty is not thought to fundamentally disrupt the sensible functioning of the existing ‘constitutional compromise.’ Instead, the low-key and largely technocratic workings of the EU on matters of public policy, which are often the subject of non-majoritarian governance within member states (and therefore do not need to be deeply ‘democratized’ or constitutionalized), should continue uninterrupted. Europe should abandon grand visions and go back to doing what it does best: regulating trade, standardizing telecommunications, coordinating economic policies, and so on. There is no real crisis, and the negative public feelings will abate once the misguided attempt to involve the wider public is forgotten.

Another, slightly different strand of the view is that the no-votes in France and the Netherlands were not so significant and have not precipitated any real crisis. This view maintains that the votes in any case were not really about the constitution or even about the EU, but about a range of other, only loosely connected issues. In

particular, the argument has been made that this was a case of unpopular national politicians being punished; or that the referendum was used by some to express opposition to the prospect of Turkish accession; or that it represented a general public response to prevailing economic and job insecurity and fear of immigration; or even that, insofar as the negative vote could be attributed to dislike of provisions of the constitutional treaty, these were often provisions contained in part 3 of the text (e.g., on the role of competition policy and other ‘neoliberal’ economic elements of the document), which were not constitutional innovations but long-standing parts of the original European Economic Community treaty. The gist of such arguments is that the no-votes in any case need not be taken seriously as verdicts on the substantive merits of the Treaty Establishing a Constitution for Europe.

*Position 2: (a) The constitution project was misconceived but (b) the impact of the negative referenda results is problematic for the EU.*

In common with the first position, those holding this view believe that the exercise of drafting and adopting a Constitution for the EU was misconceived and counterproductive, but they differ in perceiving the negative votes as a cause for significant concern. For commentators such as Joseph Weiler, the move to adopt a documentary constitution was ill-considered in its attempt to replace Europe’s unique constitutional order based on voluntary acceptance of mutual commitment with the imposition of the formal authority of a constitution.<sup>12</sup> However, even for some who initially opposed the idea of a constitution for Europe, the failure of the constitutional process, once it was actually underway and a novel procedure had been established to generate popular and political agreement on a new constitutional settlement, became a matter of serious concern. On the one hand, the collapse of the project as a whole also meant the failure of its most laudable aspects insofar as it constituted an attempt to genuinely engage the public and to address the democratic weaknesses of the EU system. On the other hand, it revealed a growing gulf – or an existing gulf whose magnitude had not been fully realized – between the peoples of Europe and its governing elites, resulting in a general situation of political stalemate, revealing an absence of leadership at European level, and arguably leaving the EU in a weakened state both internationally and domestically. The absence of consensus on how best to move forward and the conflicting views expressed by a range of high-profile political actors in the EU on the wisdom of continuing with the constitutional process are seen as underscoring a more general sense of confusion and lack of direction in Europe following the referenda.

*Position 3: (a) The constitution project was a positive and hopeful one and (b) its rejection by the French and Dutch people is a disaster.*

The perception of the constitutional project as a positive or even idealistic one has been fairly broadly shared among EU scholars and also by many of the political

actors involved in the drafting of the text, as was the disappointment at the negative outcome of the two referenda. For many, the exercise of drafting and adopting an EU constitution was a welcome step in attempting to establish a legitimate democratic foundation for the EU, and in consolidating and strengthening it as a political entity.<sup>13</sup> It was the culmination of many years of incremental integration and 'ever closer union,' and had sought to break away from the purely intergovernmental mode of treaty-making to enable a more open, public, and participative means of drafting and enacting a formal constitutional settlement. The failure of this project, on the other hand, is seen to have resulted in a sense of disarray and decline.

More specifically, it has been noted that the pattern of voting in the referenda revealed a clear lack of interest or commitment – if not outright opposition – on the part of the younger population to the European Union project more generally,<sup>14</sup> as compared with those of the postwar generation, who believe in European integration as an idealistic project partly aimed at overcoming the worst excesses of nationalism and division in Europe. Further, there has been a sense, in particular among those lamenting the outcome of the referenda and the failure of the constitution project, that there is a need to locate responsibility for this outcome – to point to the respective failures of political leadership, of public opinion-shapers, the media, intellectuals, and educators, and to point to the limitations in the way the Convention process and the Intergovernmental Conference which followed it were conducted. The implication of such reactions is that matters may have evolved differently and that the outcome may have been otherwise had the procedures and the debates been organized in a different way.

*Position 4: (a) The constitution project was a reasonably good idea but (b) its immediate failure is not necessarily a bad thing.*

On this view, while the attempt to draft a constitution for the European Union may have been a good one in principle, its rejection in the French and Dutch referenda was not such a bad outcome.

There are many possible reasons for arguing that the constitutional project was a positive one, but the specific reason considered here concerns its 'democratic-mobilization' potential: i.e., that the process was intended to generate a public debate about the desirability and form of a constitutional settlement for the EU, in part as a means of generating more public engagement with the European Union, and certainly more than seen in the context of any of its previous elite- and executive-dominated treaty-drafting exercises. At a minimum, therefore, and regardless of the particular form that the constitutional treaty eventually took or the considerable deficiencies of the process that was ultimately established, the basic idea of establishing a new foundational source of legitimacy for the EU grounded in a constitutive text which would be publicly debated and drafted was broadly positive.

In what sense, then, might its failure be said not to be a negative outcome? One answer would be that the process can be revisited again at a later stage, and that in

the meantime business can go on as usual in the EU without necessarily being adversely affected by the no-votes. However, I want to suggest another answer: that the rejection of the constitutional text has some positive potential – as opposed merely to not having adverse effects – precisely because it *did* produce a certain sense of crisis, and because it has required that serious political attention be paid to the voices of popular disaffection and alienation from the EU. More generally, it can be argued that the no-votes have not been disastrous for the EU because the very act of debating and rejecting the constitutional text in these two states has contributed to the necessary process of politicization of the EU, and of EU matters within member states. This is a process whose absence has arguably been a key part of the EU's long-standing democratic and legitimacy deficit.

In direct contrast to Moravcsik's stance, I want to argue that it is precisely the attempt to technocratize and downplay the EU's functions as low-key, non-politically-salient tasks best performed by non-majoritarian institutions, that has contributed to exacerbating popular and social discontent with the EU. This has become all the more evident as the EU's functions have undeniably expanded in ever more obvious and politically salient ways – in fields such as criminal justice, anti-terrorism, immigration, risk regulation, and so on. The process of debating the constitutional text brought European Union issues more actively and intensively onto the domestic political and public agenda in the member states in question – and in others – than almost anything else in the history of the EU. That in itself is part of a crucial process which has to develop – and which has really only just begun – if the EU is to confront its ongoing and often seemingly intractable legitimacy problems. In other words, European Union issues ought to be seen and presented for what they are: as genuinely political issues, matters which need to be open to domestic political debate, and not as specialized “technocratic” matters best decided by executive agents and experts.

Paradoxically, therefore, Europe needs more rather than less of the kinds of processes which took place leading up to the referenda in France and the Netherlands – not necessarily in the form of popular referenda, which have their own significant democratic weaknesses, but more generally in the form of public contestation and open political processes in which people have a stake. A greater degree of faith in the viability and worth of the European project, and not just in the constitutional project, is necessary if it is to flourish in the longer term, and such faith is not demonstrated by claiming that it works best as a low-visibility, functionally-specific regulatory entity, away from the fray of the political process.

#### **4. Next Steps?**

Yet while a process of politicization may have begun, and while it seems unlikely that EU affairs will ever again enjoy quite the low public profile or the relatively uninformed ‘permissive consensus’ of the pre-Maastricht years, the future of that

process, and more particularly the future of any EU constitutional project is not easy to predict. In the shorter term, a number of different options have been canvassed, ranging from continuation of the ratification procedures to abandoning the constitutional process entirely. Five such possibilities (among many existing alternatives) are briefly discussed below.

(a) *The second-bite option.* This suggestion has been made by, among others, a group of MEPs who have remained committed to the Constitution project and argue that essential parts of the document should be revived after an appropriate dialogue has taken place across Europe. In a 'concept paper' preceding a report prepared at their own initiative for the constitutional affairs committee of the European Parliament,<sup>15</sup> Duff and Voggenhuber argued in October 2005 that "our aim should be to seek consensus around the essential democratic advances proposed in the Constitution. It should be possible to reach basic agreement on democratic goals and key institutional amendments." German Chancellor Angela Merkel and Portuguese Prime Minister José Socrates also declared their support for reviving the Constitution, and pledged to take steps in this direction during their respective EU presidencies in 2007. Arguments for this option include (i) the claim that the Convention process which contributed to producing the constitutional text generated a greater degree of legitimacy for its contents than almost any previous EU or EC treaty, (ii) the assertion that the Constitution contained many valuable new provisions on which a broad degree of consensus had been found, and (iii) the argument that, as a document which was signed unanimously by 25 states, it is deserving of fresh consideration, albeit under circumstances which take seriously the concerns reflected in the referendum no-votes.

(b) *The finish-the-process option.* Closely related to the first option, but more modest in that it does not necessarily envisage any alterations to the constitutional treaty as adopted, this option entails simply letting the ratification process run its course. In other words, all member states should be given the chance to complete the ratification of the treaty, whether by parliamentary vote, by referendum, or otherwise, and a decision could be taken as to what steps to take once the process is completed. For some, of course, this option is inherently undemocratic since it proceeds with the attempted ratification of a text which by definition cannot be ratified through such a process, since it ignores the results of the French and Dutch referenda. In other words, since the constitutional treaty itself requires unanimity for ratification, even if every state other than France and the Netherlands ratifies the document, it cannot come into force. Others, however, point to the pragmatism of Declaration 30<sup>16</sup> and the kinds of accommodations made during previous treaty ratification processes to encourage states which had initially voted no to hold a second referendum. On this view, there is also a good argument in favor of giving every state – and its

population or parliament – the opportunity to proceed with the ratification of a treaty it has already signed.

(c) *The new-initiative option.* While having a certain amount in common with the second-bite option, this is not a proposal to revive the rejected Constitution, but rather to start afresh by drafting another constitutional text, using a different process such as a directly elected Convention, culminating in ratification by a Europe-wide referendum. This option was mooted by some of the dissenting members of the Convention on the Future of Europe, which was responsible for the first draft of the existing treaty. The dissenting group within the Convention did not seek to prevent the adoption of the Constitution by consensus in the Convention,<sup>17</sup> but argued for drafting a different kind of document. Since the no-votes in France and the Netherlands, several members have continued to argue for such an option.<sup>18</sup> Rejecting both the existing constitutional text and the specific process by which it was adopted, those arguing for a new initiative favor the idea of giving citizens a considerably larger say in any future constitutional settlement for Europe, and encouraging them to shape such a settlement through a more participatory mechanism than that used to draft the Treaty Establishing a Constitution for Europe.

(d) *The move-on option.* Proponents of this position argue that the Constitution project, and indeed all similar EU constitutional pretensions, should be abandoned, and that Europe should forge ahead instead with other important substantive goals and policies. This has been the position adopted by the President of the European Commission, José Manuel Barroso, since shortly after the results of the French and Dutch referenda. It is a view shared by many, including commentators such as Moravcsik, whose views have been mentioned above.<sup>19</sup> The argument is that Europe does not need grand constitutional schemes, that such projects are destined to backfire, and that what it needs instead is to deliver on the policies and programs that matter most to ordinary people rather than to intellectuals or elites. This approach has something in common with the early functionalist approaches to European integration, which jettisoned high-profile political projects and federalist ideals, focusing instead on pragmatic problem-solving processes.

(e) *The cherry-picking option.* This final option also embodies a rather pragmatic approach, but instead of abandoning the project entirely or promoting a new constitutional initiative, it recommends rescuing some parts of the constitutional document – e.g., those which were least controversial or those which were very important and on which hard-won unanimous member-state agreement was finally reached – and pursuing them by other means. There is some evidence that this approach is already taking place in practice, and once again it has both opponents and proponents. On the positive side, it is argued that rather than squander the agreement achieved on important matters between states on account of

referendum results which may have had little or nothing to do with those specific matters, such reforms should be implemented by another route – whether by simple political agreement where no treaty change is envisaged, or by traditional treaty amendment with legal changes to the relevant structures. In more critical vein, it has been argued that cherry-picking at the very least expresses disdain for the undeniably complex but nonetheless clearly negative verdicts passed on the constitutional treaty in the Netherlands and France, and more generally demonstrates the determination of political elites to press on with their preferred projects regardless of public opinion.

At the time of writing, the two options which are most actively being canvassed or already pursued are the second-bite and the cherry-picking options. In the case of the first, the initiative proposed by the forthcoming German and Portuguese presidencies to find a way of reviving the Constitution has also appeared to find some resonance in opinion polls published by Eurobarometer, which indicate surprising support for the idea of a European Constitution even in France and the Netherlands.<sup>20</sup> In the meantime, and perhaps not entirely unconnected with the first strategy, a process of cherry-picking has begun, with several of the constitutional treaty's novel provisions being proposed or implemented by other means. This does not seem to be a particularly coordinated strategy, since some of the proposals have been made by members of national parliaments, while others have been made by the Council of Ministers. For example, the Conference of Community and European Affairs committees of European parliaments (COSAC) has proposed moving ahead with a form of collective subsidiarity monitoring of forthcoming EU legislative proposals, not dissimilar to that which was envisaged by Article 6 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which was annexed to the Treaty Establishing a Constitution for Europe.<sup>21</sup> More recently, the Council of Ministers has decided to change its rules of procedure by opening the meetings where it acts in a legislative capacity (under the so-called 'co-decision procedure') to the public, a change similar to that which would have been introduced by Article I-50(2) of the constitutional treaty.<sup>22</sup> Others have mentioned the 'citizens' petition' for a legislative initiative as another of the constitutional treaty's provisions which could be cherry-picked and implemented without much legal formality.<sup>23</sup>

It seems evident that the objections which can be made to cherry-picking are much less likely to apply to initiatives of this kind, since they are precisely intended to enhance the accountability and openness of the EU and to subject its law-making processes to greater scrutiny by national parliaments and publics alike. In that sense, the pursuit of such initiatives is intended to strengthen the democratic quality of the EU rather than to continue elite-led strategies over the objections or without the knowledge and support of the public. Arguably, those provisions of the constitutional treaty that would enhance the democratic process or the politicization of European affairs across member states can and should be pursued in

other ways. On the other hand, with regard to changes contained in the constitutional treaty which were more contentious even if also 'citizen-oriented,' such as the legal incorporation of the Charter of Fundamental Rights or the mandate to accede to the European Convention on Human Rights, or those changes that would require treaty-revision, cherry-picking without a more robust prior political process of public engagement and debate would not be desirable.

## **5. In Conclusion**

I have argued, in contrast to contemporary functionalist-type accounts of European integration which emphasize the desirability of low-key and non-majoritarian policymaking, that the problems of public alienation from the EU and the general legitimacy of the polity will not be addressed without a process of gradual politicization of European affairs within national and other fora. It is certainly true that this is likely to generate considerably greater contention and less easy consensus than did the more elite and technocratic forms of policy-making the EC has used in the past, but the era of low-key technocratic policy-making is, in my view, over for the EU. The nature and scope of the issues with which the EU deals, and the variety of ways in which its laws and policies make themselves felt in national political, economic, and social life, mean that it is neither plausible nor desirable to conceal or underplay their significance. Rather, more robust legitimacy for the European polity can only come about through open public debate and contested political processes – including (though certainly not limited to) those of the kind seen in the context of the French and Dutch referendum debates. However unpalatable some of the arguments and views expressed during those debates may seem, and whatever the degree of ignorance that, it has been argued, was exposed, the vital process of emergence of a European public sphere is unlikely to be a tidy and enlightened one in the shorter term. The 'Plan D for Democracy' proposed by the European Commission in the wake of the negative referenda results, however well-intentioned, still looks more like a bureaucratic communications strategy to inform and convince the public about EU affairs<sup>24</sup> than a genuine, bottom-up engagement in creating and debating European policy. The emergence of a European public sphere, and the politicization of European affairs in general, is much more likely to be a long, slow, and uneven process involving many messy democratic moments such as those exemplified by the Dutch and French referenda. This should not be a matter for regret, but rather one to galvanize commitment to a more genuine and robust European democratic and political engagement.

## NOTES

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1. For some of the classic literature see E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution," *AJIL* 1 (1981); G.F. Mancini, "The Making of a Constitution for Europe," *CMLRev* 26 (1989); and more generally G.F. Mancini, *Democracy and Constitutionalism in the European Union* (Oxford: Hart, 2000) and J.H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999). The two key earlier cases in which the European Court of Justice referred to the EC treaties as a constitutional charter are Cases 194/83 *Parti Écologiste Les Verts v European Parliament* [1986] ECR 1339, and *Opinion 1/91 on the EEA Agreement (no. 1)* [1991] ECR I-6079.

2. For example Altiero Spinelli's Crocodile Club in the mid-1980s, which led to the draft constitution of 1984.

3. N. Walker, "The EU as a constitutional project," <http://www.fedtrust.co.uk/uploads/constitution/walker.pdf>.

4. See the account provided by Peter Norman, *The Accidental Constitution* (Brussels: Eurocomment, 2003), §4.4.

5. [http://www.europa.eu.int/comm/public\\_opinion/flash/fl159\\_fut\\_const.pdf](http://www.europa.eu.int/comm/public_opinion/flash/fl159_fut_const.pdf).

6. See e.g. J.H.H. Weiler, "Federalism and Constitutionalism: Europe's Sonderweg," Jean Monnet Paper 2000, and "A Constitution for Europe? Some Hard Choices," *Journal of Common Market Studies* 40 (2002): 563–80; Stephen Weatherill, "Is constitutional finality feasible or desirable? On the cases for European constitutionalism and a European Constitution," *Constitutionalism Webpapers*, no. 7/2002, <http://www.les1.man.ac.uk/conweb/>; and A. Moravcsik, "The EU ain't broke," *Prospect*, March 2003.

7. For an analysis of the various speeches on the desirability of an EU Constitution made by European leaders in the year or so leading up to the Laeken Declaration, see B. Laffan "The Future of Europe Debate" (Dublin: Institute for European Affairs, 2002).

8. R. Hirschl, in "Hegemonic Preservation in Action: Assessing The Political Origins of the EU Constitution," Jean Monnet Working Paper 5/04, <http://www.jeanmonnetprogram.org/papers/04/040501-05.html>, is skeptical about this "evolutionist" explanation for constitutionalization, finding it implausible that it took thirteen years from the Maastricht ratification crises for political agreement of this kind to crystallize. He prefers to isolate one kind of reason from a range of others as the main or the most convincing explanation for the political decision to constitutionalize, which he labels strategic and describes as a "hegemonic preservation" measure undertaken by self-interested, risk-averse political power-holders who, given the uncertainty and potential threats posed by EU enlargement and other potentially destabilizing processes, may seek to entrench their privileges, worldviews and policy preferences through constitutionalization."

9. Among those declaring the constitution dead are José Manuel Barroso, president of the EC Commission, Antonio Vitorino, former member of the Commission and a key player in the Convention which drafted the constitutional treaty, and former French Prime Minister Lionel Jospin, who had campaigned in favor of the text.

10. Declaration 30 annexed to the Final Act of the Treaty Establishing a Constitution for Europe, which specified that in the event of ratification within two years of signature by four-fifths of the member states but where one or more states had difficulties with ratification, the matter would be referred to the European Council, was widely understood to be a proviso included in the event of an expected no-vote should a referendum be held in the UK.

11. Moravcsik, "The EU ain't broke" and "Europe Without Illusions," *Prospect*, July 2005, available online at <http://www.princeton.edu/~amoravcs/library/prospect.doc>.

12. Weiler, "Federalism and Constitutionalism: Europe's Sonderweg."

13. See, e.g., Ingolf Pernice and Roberto Miccù, *The European Constitution in the Making* (Baden-Baden: Nomos, 2003); Koen Lenaerts, "The Merits and Shortcomings of the Draft Constitution for Europe: A First Appraisal" [http://www.law.kuleuven.ac.be/ccle/pub\\_EU\\_draft\\_constitution\\_\(K.\\_Lenaerts\)\\_print.htm](http://www.law.kuleuven.ac.be/ccle/pub_EU_draft_constitution_(K._Lenaerts)_print.htm).

14. See European Citizen Action Service (ECAS), "What Way Out of the EU Constitutional Labyrinth?," December 2005, [http://www.ecas.org/file\\_uploads/950.pdf](http://www.ecas.org/file_uploads/950.pdf), at p. 11 on the relevance of age in voting.

15. A6-0414/2005.

16. See n.10 above.

17. For the alternative report, see “A Europe of Democracies,” Annex III to the Report of the Presidency of the Convention to the President of the Council of the European Union, July 18, 2003, CONV 851/03, available online at <http://www.european-convention.eu.int/docs/Treaty/cv00851.en03.pdf>.

18. According to one prominent spokesperson for this view, MEP Jens Peter Bonde: “Instead of losing time by waiting for the impossible, I proposed a different method: Let the proponents and the opponents meet, and establish a joint text for debate in all EU countries. Let us then debate and elect a new Convention, with the task of establishing a short and effective constitution as well as an alternative cooperation agreement. Put the 2 proposals to referenda the same 2 days in all European Member states. This process will take about 3 years. If we start now, we can give the EU a fresh start by 2009. Then, the basic playing rules will have been adopted by the voters, and the EU will have left the period of civil servants legislation and moved on to the period where legislation is made by democratically elected members of parliaments.”

19. See also more recently, A Moravcsik and K. Nicolaidis, “The Future of the Constitutional Process of the European Union: Input to the European Parliament Symposium of 13–14 October 2005.”

20. See the Eurobarometer survey results published in December 2005 [http://www.europa.eu.int/comm/public\\_opinion/archives/eb/eb64/eb64\\_first\\_en.pdf](http://www.europa.eu.int/comm/public_opinion/archives/eb/eb64/eb64_first_en.pdf).

21. See point 2 of the Conclusions of the XXXIV COSAC, adopted 9–11 October 2005, available online at <http://www.cosac.org/en/documents/contributions/>.

22. This initiative was decided upon by the Council in its “Conclusions on Improving Openness and Transparency in the Council” at its meeting of December 21, 2005.

23. See ECAS, “What Way Out of the EU Constitutional Labyrinth?”

24. See COM(2005)494, “The Commission’s contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate.”

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