European University Institute

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EUI Working Papers

LAW 2007/16

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The Future of the European Constitutional Idea

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DEPARTMENT OF LAW

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EUI Working Paper LAW No. 2007/16

ISSN 1725-6739

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy

http://www.eui.eu/
http://cadmus.eui.eu/

Abstract

This paper sets out to examine the prospects for EU constitutionalism in the light of the protracted and perhaps insuperable difficulties surrounding the ratification of the 2004 Constitutional Treaty. It argues that these difficulties simply reinforce the need for thinking about the EU's constitutional settlement in non 'finalist' terms. The EU polity has always been and remains dynamic and open-ended, and so the attempt to 'contain' it within a final settlement is probably in practice misconceived, as well as leading to deep disagreement about the terms of any such purported final agreement. The constitutional idea remains a powerful one - a key way for the European polity to think about itself seriously as collective project rather than the sum of it various national parts - provided the association of constitutional thought and method with *finalité* is broken.

Keywords

European Convention – Treaty reform – constitutional change – constitution building – referendum – identity

After *finalité ?*
The Future of the European Constitutional Idea*[1]

Neil Walker

Section I. A Time of Reckoning

The most remarkable consequence of the French and Dutch 'no' votes on the ratification of the Constitutional Treaty (CT) in the Spring of 2005 was not the reduction of the EU to a state of political crisis –we had been there before – but the sense, widespread even amongst those most ambitious and normally most optimistic with regard to the course of integration, that this time the crisis could hardly be viewed as "salutary."[2] It was and remains difficult, in other words, to construe that acute moment of political disaffection and disorientation as a turning-point, one that will lead in the fullness of time to the EU recovering its political health. On the one hand, for reasons to be discussed below, it is not easy to see how a wide-ranging agenda for the future structure and direction of the EU can now be developed in the absence of an explicit constitutional frame - or at least of the realistic contemplation of such a frame. Yet, on the other hand, popular rejection in two founding Member States – including one half of the *couple franco-allemand* for so long viewed as pivotal to the Union's coherence and credibility – cannot easily be repaired and continues to undermine the prospects for any such constitutional frame. Taken together, these two propositions cast severe doubt not only on the plausibility of an expansive conception of the future of European integration, but also, given the undeniable (if far from straightforward) significance of public opinion and support as a measure of the public good, on its desirability

But is such a bleak conclusion truly justified, especially now, a year on, when we have begum to achieve some critical and political distance from these seismic events? Is it indeed the case *both* that the European supranational project is likely to founder in the absence of an overt constitutional register of debate, *and* that the blocked documentary project must be discarded as an unrepeatable experiment - so removing the prospect of the future development of any such constitutional register? The answer suggested in this Chapter is that it is only if the strong likelihood of an affirmative answer to the first

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* forthcoming in G. Amato, H. Bribosia and B. de Witte (eds), Genèse et destinée de la Constitution européenne (Bruylant, 2007)

[1] An earlier and much briefer version of the argument developed in this text can be found in "A Constitutional Reckoning" (2006) 13 *Constellations* 140-150.

[2] P. Sutherland, "Editorial" , *EU Constitution Newsletter*, July 2005; www.fedtrust.co.uk/

question is broadly acknowledged that an affirmative answer to the second question may be avoided. That is to say, it is only if, as the referendum dust settles and there is some sense of a return to 'normal business',[3] we avoid complacency and continue to acknowledge that, however difficult, a *constitutional* reckoning – a settlement of accounts and treatment of differences in constitutional terms - remains indispensable to the future of the EU, that the political will may be found to revive or engage anew in such an experiment.

To unpack this argument we need to remember how we got here. We need to recall the initial reasons that were or might have been offered in support of a fallible constitutional process as it gradually unfolded over the course of the Laeken Declaration of 2001, the Convention on the Future of Europe of 2002-3, the Intergovernmental Conference (IGC) of 2003-4 and the subsequent tribulations of the treaty ratification stage. The structure of argument in favour of a documentary Constitution was twofold. First, it was claimed, or for the most part simply hoped or assumed, that the prospective prize of a ratified CT outweighed the negative consequences associated with failure. Secondly, the risk of these negative consequences could in any case be dismissed as slight, or at least as more palatable than the risks associated with constitutional inaction. For many this positive risk assessment was based on the rash assumption that since, despite frequent prognostications of doom, no previous Treaty had been rejected, the CT's rejection was likewise highly unlikely. Alternatively, and in the event more pertinently, if the CT did happen to be rejected, this need not undermine the relevance – perhaps even the indispensability - or destroy the prospects of the larger process or objective to which the CT sought to contribute. So while trying and succeeding was clearly better than trying and failing, trying and failing, on this view, was still preferable to not trying at all.[4] On what basis were these claims made and calculations arrived at, and crucially, how do they look and what, if any, optimal strategy do they suggest for the future now that the initial constitutional route appears to have been closed off?

Section II. The Case for a Constitutional Treaty: Material and Symbolic

The first argument – the argument of substance – divides into three. The prospective value of the CT's prize could be calculated in both material and symbolic terms, and also, if less obviously as regards its direct social effects, in terms of a more basic and non-consequential standard of political morality. The argument from political morality is more appropriately considered in the context of our second argument - the comparative assessment of the risks of failure against those of inaction. For the moment we will concentrate on the material and symbolic arguments and on the instrumental logic through which they proceed, with particular emphasis upon the vital but typically neglected or only superficially treated symbolic dimension..

Materially, the case for the CT is well-known, and indeed is discussed extensively in many of the contributions to Part I of the present volume. Like the Amsterdam Treaty

[3] See e.g. A. Moravcsik 'Why Europe Should Dare to be Dull" *European Voice* 8th June 2006.

[4] See e.g., N. Walker, "Europe's Constitutional Momentum and the Search for Polity Legitimacy" (2005) 3 I*CON, 211-238; for a more cautious assessment, see P. Pettit, "Comment on Walker: Europe's Constitutional Momentum", (2005) 3239-242. I*CON

before it, the Nice Treaty left unfinished institutional business in the face of the pending CCEE Enlargement, particularly with regard to streamlining the legislative voting procedures and refining the executive direction (through Commission and European Council) of an EU of twenty plus.[5] But the material calculation was never about the scale or scope of the reform programme. Even if we define the urgent contemporary agenda more generously than the management of Enlargement, and include other timely initiatives that found their way into the text such as greater foreign policy co-ordination through an EU Foreign Minister[6] and steps towards a more extensive, but also more accountable, post 9/11 supranational capacity in the area of internal security,[7] the changes contemplated by the CT were no more significant than those wrought by various earlier treaties. Indeed, they were arguably much *less* significant than achieved in the 1990s at Maastricht or Amsterdam. If, nevertheless, only a self-styled *Constitutional* Treaty could deliver the necessary additional reforms, however modest these might be, then the material case for the CT would be made out.

Now, given the relentless pace of change since the 1986 Single European Act and the growing evidence of popular scepticism towards the EU after Maastricht, Europe had indeed been showing signs of Treaty fatigue in general and growing disillusionment with the IGC process in particular. The prospect of more of the same threatened a replay of Nice's weary compromise, if not downright failure. If Nice was supposed to deal with Amsterdam's institutional left-overs, but conspicuously failed to do so, where would the new momentum be found within the normal IGC cycle to deal with the "leftovers of the leftovers"?[8] Arguably, only a moment of *constitutional* import could provide the gravitas - the sense of history-in-the-making - required to concentrate minds on the importance of further reform.[9] And only a constitutional *process*, complete with a relatively inclusive, public and consensual Convention, and so arguably tending towards a model of decision-making more attuned to deliberation than to the strategic bargaining of the pure IGC reform mechanism,[10] and with the popular failsafe of a healthy spread of ratification referendums (however tardily and reluctantly conceded, and however dependent upon Tony Blair's strategic calculation of the balance of domestic political advantage!)[11] could provide a format capable of moving beyond the preference-entrenching strategic intergovernmental stand-off of Nice.

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[5] See Partie I, chs XII and XIII.

[6] See Partie I, chs, XXIII-XXV above.

[7] See Partie I, chs. XXII above.

[8] P. A. Zervakis and P.J. Cullen (eds) "Leftovers of the Leftovers - Introduction" in Zervakis and Cullen (eds) *The Post-Nice Process: Towards a European Constitution?* ((Baden-Baden: Nomos, 2002) 9-11.

[9] J.H.H. Weiler, "On the Power of the Word: Europe's Constitutional Iconography" (2005) 3 I*CON, 173-190, at 177.

[10] For a rounded analysis, see P. Magnette, "Deliberation or Bargaining? Coping with Constitutional Conflicts in the Convention on the Future of Europe" in E.O.Eriksen, J.E. Fossum and A.J. Menendez (eds) *Developing a Constitution for Europe* (London: Routledge, 2004) 207-225.

[11] Historians will disagree about the extent to which Tony Blair's abrupt change of heart in favour of a British referendum in April 2004 influenced many of his fellow European Heads of Government – including Jacques Chirac – to follow suit and take a late decision to hold a referendum. However, clearly Blair's choice did have some influence, and, equally clearly, the sense this conveyed of their responding to external pressure rather than taking a principled initiative placed the late converts to plebiscitary democracy at a strategic disadvantage in some of the subsequent referendum campaigns.

Symbolically, the case for a CT was and remains less tangible, but also both more profound and more controversial. It speaks to the contribution of a documentary constitutional project to the cause of European integration over and above the modest normative novelty of the text. But what, precisely, might this symbolic 'added-value' consist of? This is a contentious matter on two levels. In the first place, there was a diversity of shifting and overlapping 'symbolic agendas' in play during the making of the Constitution. Secondly, it was not obvious, and indeed remains unclear, which of these agendas, or perhaps which combination of or compromise between these agendas, was most likely to prevail or predominate at the level of the 'received public meaning' of the Constitution, or in what precise sense the successful symbolic agenda(s) might be considered to have made a positive difference to the cause of supranationalism.

At the risk of oversimplification, we can think of these different symbolic agendas as being underpinned by and formed through two contrasting types of 'symbolic register'- a division which reflects the Janis-faced significance of modern constitutionalism as simultaneously backward and forward-looking.[12] With regard to the former, we can point to those symbolic registers that utilize the language and practice of constitutionalism as a means of dramatizing the *maturity* of the European supranational project. On this view, which infers from the rich reservoir of meanings linking constitutional 'ownership' to the enjoyment of the particular polity status of statehood that the constitutional label be treated as the mark of attainment of polity status more generally, the making of a Constitution for the EU signals an important point of arrival for the world's most advanced post-state 'polity'. The message is conveyed that Europe, in reaching a stage where it is ripe for constitutional treatment, has graduated to a point of final settlement.

The pursuit of this theme of constitutionalism-as-polity-maturity has two particular reinforcing effects, one of which is peculiar to the supranational context and the other of which also resonates strongly in state settings. In the first place it helps account for the distinctive emphasis within the European constitutional project on the celebration and consolidation of past institutional achievement. Europe's *sonderweg* has not been one of independence or revolution or any similar such people-defining events which tend to provide both the catalyst and the affirmative focus of national constitutional foundings, and in so doing also typically to signal a radical departure from any prior system and

[12] All key "condensing symbols" within modern societies, of which 'constitutionalism' is one, are framing devices which draw upon familiar and shared institutions and cultural artefacts (e.g. currency, police, cuisine) to allow groups within a political community to imagine themselves *as* a political community by making common sense of the past, forming and pronouncing judgments about their common present, and planning and portraying various possible futures; see e.g. V.W. Turner, *Dramas, Fields and Metaphors: Symbolic Action in Human Society*(Ithaca: Cornell Univ. Press, 1974). However, the temporal dimension of the constitutional frame is particularly sharply divided between past and future orientation , or, if you like, between the priority to be given to one or other of the two senses in which a constitution provides a 'model' of the society with which it is concerned – both as synoptic record or representation and as ideal projection. Every constitution has to face the paradox of presupposing the authority and collective authorial identity of the very political community it seeks to construct (see e.g. H. Lindahl, "Sovereignty and Representation in the European Union " in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003) 87.) and its resolution of that paradox - or, more accurately, particular (and typically diverse) interpretations of its resolution of that paradox- – will inevitably incline towards either pole – towards reading the future conservatively in terms of the past or reading the past progressively in terms of an idealized future.

machinery of government.[13] Rather, it has been one of the gradual nurturing and careful preservation of a legal and institutional infrastructure – of an *acquis communautaire*. Enthusiasm for a text which (particularly in its largest part - Part III) wears the legacy of its past openly and which from the early stages of its design proclaimed and has largely retained its commitment to *droit constant*, therefore, is no mere accident of path dependency or technical drafting consideration. Instead, such an approach underlines and amplifies the sense of the EU Constitution as an act of vindication of the years of steady growth, and as an affirmation that one can achieve 'Big "C"' Constitutional polity status not only through some 'big bang' act of origin, but also, at least in the unique circumstances of a post-state polity, through the modest accumulation of 'small "c"' constitutional measures and initiatives.[14]

In the second place, the message of maturity encourages and is turn encouraged by a tendency towards closure – one whose presence in the European debate echoes a broader theme of (state) constitutional discourse. On the eve of the present constitutional debate, Joschka Fischer in a famous speech helped move the idea of *finalité* - or perhaps more accurately, captured the movement of the idea of *finalité* - to the centre of the debate on the future of Europe.[15] The *finalité* metaphor has a close affinity with a number of the senses of settlement we associate with documentary constitutionalization. It is capable of supporting the idea of finality of political purpose(s) or goals, as in the core sense of *finalité politique.* But it can also indicate the urgency or ripeness for settlement of the polity's institutional architecture, of its territorial boundaries, of the self-identification of its citizens, of the coherence of a (previously unwieldy) legal framework, and, crucially, of the very idea that, through the canonical form of a Constitutional document, these various settlements should be captured and formally entrenched against reform. Again, all of these themes – political, institutional, geographical, social, legal and Constitutional closure – figured largely at various stages of the EU constitutional debate. [16]

Yet constitutional debate can never be entirely mortgaged to the past, and an alternative and additional symbolic register was available to dramatize the *open-ended potential* of European Constitutionalism. Rather than tapping the reservoirs of meaning which understand the making of a Constitution as a point of arrival, such a register draws upon those that endorse the making of a modern Constitution as a point of departure. The constitutional project, on this view, is not about consolidation and vindication, but about exploration and realization. The emphasis is not upon the freezing of a mature understanding of the entity's form and jurisdiction, institutional apparatus, territory,

[13] See Walker n4 above.
[14] N. Walker, "Big "C" or small "c"? " (2006) 12 *European Law Journal* 12-14
[15] J. Fischer, "From Confederacy to Federation: Thoughts on the Finality of European Integration" reprinted with a series of responses in C. Joerges, Y. Meny and J.H.H. Weiler (eds) *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*(Florence: Robert Schuman Centre, 2000).
[16] N. Walker, "The Idea of a European Constitution and the Finalité of Integration", Faculdade de Direito da Universidade Nova de Lisboa, Francisco Lucas Pires Working Papers Series on European Constitutionalism , Working Paper 2002 / 01.

community or textual form or content, but upon the setting in motion of a process through which some or all of these features may be transformed.[17]

As already noted, the actual relationship in the debate over the CT between the different symbolic agendas which drew upon these opposite symbolic registers was complex and contentious. What is certainly true is that the backward–looking register with its associated notions of consolidation and finality, was more powerfully represented than the forward-looking register. Again, this is partly a general tendency within documentary constitutionalism - a temptation to freeze the institutional frame within which the political community operates in terms of contemporary conventional wisdom just because it *is* the frame – the very condition of political possibility, Partly, too, it has to do with the peculiar weight of institutional history in a transnational political community lacking other solidaristic cues, such as common language, exclusive territory or shared historical narrative, that we associate with the nation state. But what is also true was that this backward-looking representation fed in quite different ways into different symbolic agendas and the diverse polity ambitions associated with these agendas.[18] One such agenda was of constitutional limitation, where the implication of constitutional maturity was that a line should now be drawn in the sand – for example, by means of the new competence catalogue and the authority-constraining provisions of the Charter of Right – beyond which the Euro-polity should be firmly precluded from venturing. Another such agenda, which seemed very prevalent within the Convention, was much more concerned to focus upon the *status quo ante* not as a restraining device, but as a celebration of the resilient *sui genericity* of the Community model of permissive elite consensus and as a vindication of its incremental progression. A third symbolic agenda, although much more muted, was crypto-statist in import. The message here was neither one of truncation and amputation, nor one of the celebration of the contextual appropriateness of 50 years of piecemeal reforms, but one which affirmed the defining gradualism of the supranational past an ongoing dynamic principle - as the now constitutionally-dignified 'low road' to a final destination of statehood or quasi-statehood. On this view, moreover, the not inconsiderable strengthening of European legislative and executive power in the text of CT through the extension of QMV and the bolstering of the authority of the Council, provide an illustration and affirmation of the relentlessness of the gradualist 'push' towards a more centralized Union.[19]

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[17] N. Walker, "The Idea of a European Constitution and the Finalité of Integration", Faculdade de Direito da Universidade Nova de Lisboa, Francisco Lucas Pires Working Papers Series on European Constitutionalism , Working Paper 2002 / 01.

[18] See Walker, n4 above. 222-231.

[19] Indeed, in the most extreme version of this argument, the Constitution becomes a kind of societal pressure-cooker. Here, the integrative promise of the Constitution inheres less in the sense of common performative meaning implicit in engaging in a constitutive political process, and more in the crude attempt to manufacture a supra-statist solution by granting concrete competences to the European centre in areas such as immigration and redistributive social policy which anticipate – and so beckon – such a solution. On this depiction of the extreme version of the Eurofederalist social democratic position, see A. Moravcsik, "A Category Error" *Prospect,* July 2006, 22-26 at 25. Moravcsik explicitly associates this line with the approach of Jürgen Habermas. While this is one possible reading of his work, another reading aligns him to the more subtle 'constructive' approach to the mobilisation of political community discussed in the text below. See J. Habermas, "Why Europe Needs A Constitution" (2001) 11 *New Left Review* (Sept.-Oct.) 1-20, at 17. For discussion of the ambiguities in Habermas's approach to Europe, see N. Walker, n4 above, esp. 233-238.

For all that they speak to quite diverse political ambitions, and use the idea of *finalité* in radically different ways – as a negative check on any further integration, as a positive vindication of what has been achieved so far, or as a reaffirmation of a teleological conception of the Union as a goal-directed entity with much 'unfinished business', what these approaches have in common is a somewhat static view of the political community and of the symbolic added value a constitutional document offers to that political community. The unifying theme seems to be that the constitutional imprimatur is available as a symbolic prize for whatever understanding of the political community and its polity ambition and status is best captured by the textual product, or at least is capable of being represented as best captured by the textual product. The symbolic added value, in other words, merely amplifies the power and impact of any particular polity ambition and its associated material agenda. But there are two connected problems with this perspective. In the first place, if there is such keen competition over the symbolic prize, and, as is palpably the case with a document written in such general terms and attending to such diverse themes, if those with quite different symbolic agendas can plausibly claims to have won the prize, then the very sense of a symbolic prize may disappear in the vortex of claim and counter-claim. In the second place, it is in any case not clear what additional authority the 'C' word might in principle bring to a textual agreement – even if its meaning and broader import were undisputed. To the (considerable) extent that the constitutional debate was preoccupied with the wining of the constitutional seal of approval for one or other preconceived vision of political community, it appeared to operate on the unlikely and largely unexamined assumption that constitutionalism functions as some kind of floating signifier – capable of performing its symbolic magic and vesting some additional quality of authority in just whatever polity vision comes to the fore and just however it comes to the fore.[20]

Yet if we turn to those parts of constitutionalism's symbolic register that are forward-looking, here the tables are turned and the question of just how constitution's general symbolic effect operates on those social forces which are pertinent to the success of its material provisions and associated polity ambition are given priority over the content of these material provisions and polity ambitions. For the forward-looking perspective starts from the premise that the EU is in some significant measure an incomplete political community, and that the measure of the value of the constitutional settlement lies in how it addresses that incompleteness and the problems of authority and legitimacy associated with it through its own 'constructive' work, regardless of the specific material provisions in terms of which these ambitions are made manifest. Here, then, we can begin to contemplate a form of symbolic added value which is not dependent upon partisan political preference and which, if plausible, can be weighed in favour of a European Constitution on a more general set of scales. We can point to two such constructive lines of argument.

In the first place there is the capacity argument. Just as at the state level,[21] we can distinguish between the formal legal competence and the effective political capacity of the EU polity. The notorious "joint-decision trap"[22] of a contemporary decision-making constellation that seeks to track the different sites and multiple levels of

[20] Walker, n4 above, 230-231.
[21] See M. Loughlin, *The Idea of Public Law* (Oxford: OUP, 2003) ch.5.
[22] F. Scharpf, "Problem Solving Effectiveness and Democratic Accountability in the EU" Max Planck Working Papers (2003).

collective action problems that we confront under conditions of economic, cultural and political globalisation, speaks to the ways in which the increase in competence at the EU level in matter such as monetary policy and positive regulation of various general social interests and against certain general social threats can reduce both competence and capacity at the state level without necessarily generating a compensatory (still less a surplus) measure of additional capacity at the EU level. Super-majoritarian decision rules and the residual veto positions they entertain are only part of the problem here. Much more important is the lack of shared political capital - and so the absence of the elements of trust, mutual concern and common terms of reference of which such shared capital is comprised – necessary to put and keep things in common sufficiently to exploit European political capacity. The danger, then, is of "false negatives,"[23] of the EU's inability to fulfil its formal democratic potential by effectively putting in political common those matters that cannot, or cannot any longer, be adequately addressed through the variety of national political agendas. And so the constructivist argument is, in short, based on the proposition that the political act of self-constitution may contribute to the fostering of a sense of political community and the production of a common political capital sufficient to overcome the problem of false negatives. [24]

In the second place, and less obviously, there is the argument from pluralism. This holds that however much the European people want to put things in common, whether more so than presently, much the same, or perhaps even less, and wherever they want to strike the balance between national and supranational action, respect for diversity and responsiveness to the variety of internal opinion can only be enhanced by an increase in the resources of dedicated political capital available at the European level. The key to this argument is historical as well as normative. It lies in asserting that the idea of constituent power and of its relationship to a dedicated public or political sphere that we find in the enlightenment thought of such as Locke and Sieyès, and which inspired at least some of the protagonists of the English, French and American revolutions, was not intended, as has often subsequently been misunderstood or misappropriated, simply as an assertion of the greater power and potential impact of a political authority founded in popular opinion rather than proprietary right.[25] Just as important a dividend of popular sovereignty as the empowerment of public authority in the name of the public good was that of the limitation or forbearance of government authority in that same name. For the idea of an *indivisible* collective foundational of government denies to any section of that collective, or to any government operating in the name of any section of that collective, final and unlimited exercise of constitutional authority. That is to say, if self-government properly rests in the constituent authority of the collective people, then any Constitution based upon an image of collective self-government must be concerned as much with checking governmental factionalism or abuse of minorities as with democratic empowerment of majorities.

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[23] P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: OUP, 2nd ed. 1999)

[24] See e.g. J. Habermas, "Why Europe Needs A Constitution" (2001) *New Left Review* Sep-Oct (11), 5 , and n38 above. See also, N. Walker, "Europe's Constitutional Engagement" (2005) 18 *Ratio Juris* 387-399.

[25] See e.g. B. Yack, "Nationalism, Popular sovereignty, and the Liberal Democratic state" in T. V. Paul, J. Ikenberry and J.A. Hall (eds) *The Nation State in Question* (Princeton Univ Press: Princeton NJ, 2003) 29-50.

This ambitious thesis, moreover, need not be dismissed as wishful thinking or pious hope. For the normative strength of the aspirational model of political community which has been contained in much of Western constitutionalism lies precisely in the promise (however imperfectly delivered) that investment in a shared political capital will engender a sufficient sense of a community of attachment and a sufficient fund of shared political capital not only to make the idea of non-unanimous decision-making - of sometime winners and losers - fair and palatable to all in a longer perspective, but also, and reciprocally, to restrain what may legitimately be done to any part of the community by the sometime winners in the name of the whole.

If it is nevertheless objected that the new EU Constitution, as opposed to is national predecessors, lacks the social preconditions to have the required mobilizing effect, then one may respond that this remains an open question. Of course, Constitutions cannot take root in entirely fallow ground. Yet it is often overlooked that Constitutions have historically been agents of integration, rather than mere endorsements of existing political communities, in just these circumstances where traditional sources of cultural or political identification are not readily available - think of 18th century America with its diverse immigrant communities, or mid 20th Century Germany defeated and divided by war.[26] These examples, typically unfolding unevenly and across an extended period, give lie to the prejudice that only a community with a pre-existing 'thick' demos can establish and sustain a viable constitutional order. Rather, it is just these circumstances where the reflexive sense of a demos is emergent or contested, and in any event precarious, that Constitutions can perform their most vital symbolic or integrative work. And for all the failure of the CT in the French and Dutch referenda, the fact remains that as of Summer 2006 it has nevertheless been ratified in 15 out of 25 member states - representing well over half of the EU's 450 million citizens, and that its supporter in these national ratification forums and in the earlier more textually focused forum of the Convention inevitably included many across the entire spectrum of relative emphasis on the Constitution's potential in social, economic and security policy competence enhancement on the one hand and its importance as a check on public authority on the other. This suggests that despite the undoubted emphasis on particular, partial and inherited material agendas in much of the political debate over the Constitution, the European political imagination is by no means blind or entirely resistant to a more, general, inclusive and transformative understanding of the symbolic role of the Constitution.

***Section III*: The Resilience of the Constitutional Case**

How do these two species of argument – material and symbolic - look today? Paradoxically, in some respects they may have been strengthened in adversity. The material argument has patently failed by its own highest standards. If a process of explicit constitutionalization was invested in as a means to keep the reform ball rolling, then this particular investment has not paid off. Opposite inferences may be drawn. Either it was, after all, a profound strategic miscalculation, and an old-fashioned IGC process, with its familiar low-visibility, elite-driven compromise politics, would more likely have delivered the goods; or, more probably, in the wake of Maastricht and an increasingly poor record of popular ratification of EU treaties in western Europe, most

[26] See e.g. D. Grimm, "Integration by Constitution" (2005) 3 I*CON 193-210, at 198-203.

recently apparent in the initial Irish rejection of the Nice Treaty in 2001 and in the Danish and Swedish rejections of the Euro in 2000 and 2003 respectively, whatever the procedural route taken – Treaty or Constitution – high-level structural reform of the EU is just becoming more difficult, as too, crucially, is the possibility of approving such reform anywhere it may be seriously contested without resort to referendum. If this is true, then to blame the (latest) messenger, now dressed for the first time in full constitutional garb, rather than the (long-term) message seems perverse, and to contemplate a return to a sub-constitutional elite-driven process for just those questions that are increasingly unlikely to slip below the radar of popular politics might simply be wishful (and self-defeating) political thinking.

The symbolic argument, too, is sharpened by the troubles of the current CT. While no-one can deny that the French and Dutch rejected *this* CT, it is much less clear that they renounced the very idea of a European Constitution. Indeed, immediately after the French vote, which provoked an intensity of domestic political discussion unknown since the Socialist-Communist coalition bid for power in 1981,[27] 75% of the French people maintained that a constitutional text of some sort was nonetheless indispensable to sustain the European integration process. In the Netherlands, likewise, the picture is far from one of clear-cut rejection of the principle of a constitutionally self-constituted European political community. Indeed, as with France, a clear majority of its citizens continue to back the general idea of a European constitution.[28]

We can only account for this by introducing another distinction within constitutional discourse – one closely related to the previous division between forward- looking and backward-looking symbolic registers. For both the curse and the hope of the referendum process and debate has resided in its merging of different levels of constitutional debate. The historical peculiarity of the decision to invest for the first time in the symbolic register of formal or documentary constitutionalism *through* the affirmation, with some modification, of an already 50 year old legal-normative order – a choice which as we have seen owed much to the backward-looking conservative bias which figured large in many symbolic agendas – meant that it was possible to vote 'no' in quite different, and potentially inconsistent registers: either to the second-order idea of an EU Constitution worthy of a democratic mandate *tout court*, or to the first-order modified affirmation of the detail of that "constitution" Yet as well as possibly exaggerating hostility to the CT, the depth and complexity of the decision structure – the fact that the performative meaning of the Constitutional event was as a formal founding as well as a substantive reaffirmation-with-revisions - also served to galvanise debate. Indeed, for those looking for light at the end of the constitutional tunnel, we may be faced with the contradictory scenario of the pilot script for a supranational political community being the subject of such lively contestation as to suggest, the negative result notwithstanding, an intensification of public engagement with the very question of how European politics ought to be configured from which an embryonic sense of European political community *might* in due course develop.

But, of course, this thought can just as easily be attacked as wishful thinking – as an altogether too convenient way of imagining today's nascent, Europe-wide "anti-

[27] See e.g. W Pfaff, "What's left of the Union?" (2005) *New York Review of Books,* Vol. 52, No. 12 July 14, 26-29

[28] Indeed, according to the latest Eurobarometer Survey, 62%of French Citizens and 59% of Dutch citizens still back the general idea of a European constitution. See eu*observer* 6/7/2006.

constitutional patriotism"[29] as the harbinger of tomorrow's constitutional patriotism. How that charge of wishful thinking might be answered is a subject to which we return below.

Section IV: The Implications of Failure

But perhaps the more positive interpretation is in any case entirely moot. For if we turn to the second question – the risk involved in the failure of the CT – on what basis can we avoid the conclusion that that risk has proved to be fatal? Certainly, despite the commitment of the June 2006 European Council to extend the reflection period (agreed the previous year in response to the French and Dutch "no" votes) into 2007 and any subsequent decision-making timetable into the second half of 2008,[30] – the attempt to revive *this* constitutional process[31] continues to appear ill-fated, and properly so. Practically, there seems no combination of circumstances which would allow a text which has failed to negotiate the formidable obstacle course of a strictly unanimous ratification procedure[32] at a point when the political momentum behind the Convention and IGC agreement was its greatest, to be successful a second time round, when the terms of the bargain are growing stale, the *dramatis personae* have changed, and the goods are so patently damaged. It would in any case be democratically inappropriate to try to revive the form of the present agreement, even if some of its content might conceivably survive to be adopted another day and in a different form.[33] A referendum should not be treated as a 'neverendum', a process whose conclusion is ignored unless and until a palatable answer is received. And it is no answer to such democratic scruples that the bar of ratification was set unfeasibly – or even 'undemocratically' - high to begin with, since collective confidence in the adequacy of majoritarian criteria as a measure of the democratic credentials of our quotidian political institutions depends, in some measure at least, upon the rules or conventions constituting and generating such criteria themselves meeting higher standards of affirmation.

However, the same practical and normative objections need not prevail against the development of a *new* constitutional process. Given the impracticality of an indefinite moratorium on the sorts of material reform required to address stalled 'old' and emergent 'new' urgencies, it is hard to imagine that the political pressure for reform will go away. And, as already noted, there is no reason to think that the elimination of the "C" word will smooth the passage of such reform. On the one hand, proponents of a new wave of reform may seek to revert to the classical IGC method of Treaty amendment,[34] but it is precisely because many believed this to be a superannuated

[29] R. Dehousse, "The Unmaking of a Constitution: Lessons from the European Referenda" (2006) 13 *Constellations* 151 -164, 159

[30] Council of the European Union, Presidency Conclusions, 15/16 June 2006, 10633/06 paras. 42-49.

[31] See Scenario 1 of the *Avant Propos* to the present volume.

[32] See Constitutional Treaty Art. IV-447.

[33] There have been various suggestions along these lines. For example, this seems to be envisaged in the two-stage plan of the European Parliament evolved during the autumn of 2005 to revive the constitutional process – with the first stage involving a new Treaty formalizing agreement on the supposedly uncontentious parts of the existing Constitutional Treaty; see EUobserver.com - 19th September 2005. The European Parliament's final report, however, expressed a clear preference for reviving the current process and adopting the text unamended. "Report on the Period of Reflection" European Parliament, Committee on Constitutional Affairs, 16/12/2005, A6-9999/2005

[34] One (modest) variant of Scenario 2 as discussed in the *Avant Propos* to the present volume.

process in the first place that the documentary constitutional turn was taken after Nice; and, in any case, the threshold of success – ratification by all Member States – is just as formidable here[35] as in the case of the CT. On the other hand, resort may be had to low-profile methods of informal constitutional reform,[36] such as interinstitutional agreements,[37] but here there can be no expectation that those who opposed the Constitution so resolutely will not be just as vigilant in ensuring that its reforms are not implemented by indirect means and just as diligent in exposing those who would pursue such a strategy.

The unlikely prospects for structural reform by other means, do not, of course, in and of themselves make the case for a new constitutional initiative. To take that additional step, we have to move back on the normative domain, for in the final analysis the practical and the moral case for a new constitutional initiative are closely interwoven. Let us again start in negative vein, with the possible objection. It may be argued that there is no moral difference between trying to revive a failing constitutional process and trying to replace a failing constitutional process with a new one. In both cases, is there not a kind of obduracy at work, one which not only is destined to practical failure but which also evinces a certain moral blindness – a refusal to accept uncongenial conclusions? Beyond a certain point, does not the claim "that the answer to failed democracy is more democracy and the answer to a failed constitution is another constitution" [38] stray beyond the ingenuous towards the *dis*ingenuous, and indeed reveal an anti-democratic sensibility?

The answer to this objection is threefold. First, there is a not insignificant formal difference between reactivating the old constitutional machinery and developing a new engine, and indeed the history of state constitution-making knows many examples of iterative attempts at constitution-building before an effective model is finally produced.[39] The new machinery will require its own self-generated pedigree or constitutive rules - its own institutional pathway for reform, and it is only if such new generative rules or procedures are, first, agreed,[40] and secondly, successfully applied, that a constitutional package will be forthcoming. The negotiation of these two stages of democratic renewal is a quite different thing from the truncated strategy favoured by

[35] See Art. 48, TEU..

[36] See Scenario 3 of the *Avant Propos* to the present volume.

[37] For example, to ensure that the new powers the Constitutional Treaty sought to confer upon national parliaments as watchdogs of "subsidiarity" are granted *de facto*.

[38] Moravcsik n19 above, at 25.

[39] See e.g. A. Arato, *Civil Society, Constitution ad Legitimacy* (Lanham, Rowman and Littlefield, 2000) ch.7.

[40] Which agreement, in the absence of a explicit and "revolutionary" break from the previous constitutional system, will also have to remain consistent with that previous framework. The decisive area here tends to be the "rules of change' themselves, with discontinuous constitutional initiatives distinguished by their disregard for the amendment rules set out under the *ancien regime*. In the case of the European constitutional debate, there has been little public discussion of or support for the idea of a discontinuous or revolutionary framework. Accordingly, the rules for the adoption of the Constitutional Treaty as contained in its Art. IV-447, namely approval by all member states in the framework of an IGC followed by unanimous national ratification, were consistent with the existing Treaty amendment rules in Art 48 TEU, even if the procedure was importantly modified by the insertion of the Convention at the earlier stage of deliberation and proposal. This rather reinforces the double signification of the CT discussed in the text, as not only a formal founding of a *new* order but also a substantive revision of an *existing* order.

the 'reactivators'; namely a rerun, on the basis of a tendentiously stretched reading of its constitutive rules, of the second or application stage of the original constitutional process.

Secondly, and to return to the aspiration – or, for some, wishful thought - with which we concluded the previous Section, a second constitutional process would also inevitably take place within a political and symbolic environment much changed by the very fact and failure of the first process. Paradoxically, as we saw, one of the effects of the fact and failure of the first process has been to put the first order question – whether we need a Constitution *at all* – more squarely in the frame of a public debate which has itself been in some measure 'Europeanized' or a least 'transnationalized' by that same process and emergent common question. For both negative ad positive reasons, any second process would be less likely to be mortgaged to the past – to the sense of historical vindication and the trope of finality – than its predecessor, and more likely to be engaged in a constructivist forward-looking register in which common goods such as enhanced joint capacity and pluralist diversity-in-unity would be to the fore. Negatively, the experience of failure of an approach dominated by a backward-looking symbolic register should have a chastening effect – influencing the architecture and culture of subsequent debate in a less finalist direction. Positively, the stimulus to the development of a European public sphere provided by the stalled initial process should provide a momentum – a threshold of common engagement - that any subsequent process may be able to exploit to its advantage

Thirdly, the defensibility, and, finally, the viability of a new constitutional initiative cannot be considered in isolation from the defensibility and viability of the other available options. And if we look at these options, then it is arguable that just as the current constitutional episode has not delivered a mandate for constitutional reform, equally it has not delivered a mandate either for *non-constitutional reform* or for *constitutional non-reform*. The impracticality of non-constitutional or sub-constitutional reform has already been noted, to which one can add the moral objection that that which cannot be delivered by more exacting democratic means should not be delivered by less exacting means. But what of the alternative, or, more likely, the complementary option of taking the "no" on the detailed mandate seriously and so committing Europe to a constitutional steady state for the indefinite future?

Arguably, the very referendum results which on one reading seem to elevate this to the status of the default option, on another and broader understanding seem to rule out any such alternative. This conclusion does nor depend upon the convenient argument, popular amongst disappointed supporters of the CT,[41] that the referendum is a blunt device for expressing preferences, and especially inarticulate in its expression of negative preferences. So much is doubtless true, but this is but one variant of the restricted eloquence of any of the institutional methodologies of large-scale democracy, and thus not a reason to discount the result. Rather, it is again the peculiar double significance of the constitutional question as it was posed in its novel transnational context which casts significant doubt on the defensibility of the *status quo ante*. For if, as already indicated, the performative meaning of the first constitutional endorsement of the EU was ambiguously located between the fundamental second-order question of

[41] See e.g. B. Waterfield "No means no: which part of "non" doesn't Brussels understand" 31st May 2005, http://www.spiked-online.com/Articles/0000000CAB82.htm

whether the Union was deserving of a democratic imprimatur *at all* and the first order question of the adequacy of modestly modified 50 year old *acquis*, then a "no" vote invites the conclusion that the legitimacy not just of the mooted modest reforms, but of the basic structural template of the Union – *whether or not modestly reformed* - has been cast in severe doubt. The supposedly default option of constitutional passivity, therefore, seems on closer inspection to be no less undermined by the ratification process than any of the more active strategies we have considered.

This, however, is not the end of the argument, for there is one final and more fundamental objection to such a challenging conclusion as to the nature of the strategic bind in which the EU now finds itself which takes us, finally, to the core argument of political morality for or against a documentary constitutional process. This more fundamental objection involves switching the emphasis away from the negative content of the answer to the supposed inappropriateness of the question. On this view, we should not torture ourselves with the paradox of finding a meta-democratic constitutional way of organising the system of government for a putative demos which is deeply divided on whether and, if so, on what terms it should understand itself *as a* demos in the fist place. Rather, this is the just the conceit of the European political class, guilty of a "category error"[42] in supposing that the EU is the kind of entity of which the documentary constitutional question should be asked. Instead, Constitutions *qua* constitutive settlements are exclusively affairs of states, with their confident self-understanding *qua* demoi and their original and potentially unlimited political and legal authority, rather than of supranational organisations with their tenuous subjective sense of political community and only derivative and textually limited competence. Since, regrettably, the constitutional question was nonetheless posed at the supranational level, and given its inappropriateness was unsurprisingly met with a negative answer, we have to deal with the potentially damaging political consequences of that answer. And the best way to mitigate these consequence, from this state-centred perspective would be readily to admit the hubristic error of the big "C" Constitutional way and to return instead to the small "c" tradition of incremental system–building which has served the EU so faithfully over the previous 50 years.[43]

Yet the conservative quality of the premises from which such a response is fashioned are unmistakeable. As noted earlier, the big "C" constitutionalization of the EU polity debate is more persuasively seen as a *response* to the more insistent challenges to the legitimacy of the EU polity which surfaced in popular as much as in elite attitudes from Maastricht onwards rather than as the *cause* of or cue for such challenges. In turn, this reflects the growing belief that the idea of an autonomous democratic (re)founding which is central to the second-order constitutional question is indeed just as appropriate to the transnational domain as to the state domain, and in some respects even more pressing. Granted, certain features of the supranational domain, including the size and diversity of its popular constituency, its unusual dependence on technocratic expertise for the performance of many of its functions, its lack of the clearly developed party cleavages and public sphere which aid democratic opinion formation at the state level, its absence of clear lines of democratic accountability due to institutional plurality and cross-institutional sharing of the functions of government, and, last but by no means

[42] See e.g. Moravcsik n19 above.

[43] *Ibid*; and, in more detail, see A. Moravcsik, "The European Constitutional Compromise and the Neofunctionalist legacy" (2005) 12 *Journal of European Public Policy* 349-386.

least, its need to co-exist with and resilient practical subordination to national sites of democracy, mean that democracy is and will remain a complex and somewhat muted virtue of the quotidian politics of the EU. However, given, nonetheless the sheer scope of so-called 'pooled' supranational sovereignty – of the EU's wherewithal, positively, to influence the life-chances of its citizens independently of the will of any particular national government and, negatively, to compromise the capacity of any particular national government to influence the life-chances of its citizens,[44] it seems all the more important that the primary regulatory structure with its inevitable attenuation of democracy itself be directly democratically mandated at the level of polity-generative rules.

On this view, the root case for a renewal of the EU's constitution-making efforts in the face of initial failure becomes a simple one of political morality. As is corroborated by the flavour of much of the constitutional debate in and after the Convention as well as by the mere fact of such a constitutional debate –redolent with the symbolism of democratic polity affirmation – being allowed to proceed, the EU is increasingly viewed as the type of entity which has passed a threshold of authoritative capacity and normative penetration beyond which its structures of government require a direct rather than indirect and state-mediated mandate from those who fall within is jurisdiction. The written constitutional form, with its classical double hierarchy of normative pedigree and popular endorsement, remains the best way of securing such a mandate whether as an act of foundation, or, as in the case of the EU, one of popular re-appropriation. [45]

Section V: Constitutionalism beyond constitutional *finalité* ?

For some, the EU's hour of constitutional reckoning is stretching critically late and desperate efforts are required either to resuscitate the body or to put it in cold storage pending some future 'miracle cure' of political consensus. For others that hour has already passed, and either an opportunity has been terminally lost or a hard lesson has been learned that the EU's ongoing political narrative is simply not appropriately framed in constitutional terms. These views share a presupposition that constitutionalisation is about the recognition or attainment of polity maturity, which in turn is about achieving a state of *finalité*. Accordingly, it makes no sense to think beyond *finalité* in search of a new kind of constitutional project and prospect. *Finalité* remains the only relevant standard, for better of for worse – either to be obstinately persevered with or to be discarded as beyond reach or appropriate pursuit Yet, as I have sought to argue, there is another view which treats a full constitutional reckoning, both as a matter of democratic baptism and as an ongoing framing device as an unavoidable imperative give the uniquely empowered postnational polity the EU has become. In some measure, as we have seen, this is a material and a symbolic imperative – a matter of finding the necessary normative means to avoid the EU becoming a blocked political

[44] With the shortfall between the negative and positive - between what is lost from national capacity and what, absent the requisite development of new transnational political capital, is added to supranational capacity - giving rise to the famous supranational "problem-solving gap." See. For example, F. Scharpf, "Problem Solving Effectiveness and Democratic Accountability in the EU" Max Planck Working Papers (2003)

[45] See e.g. J. E. Fossum and A.J. Menendez, "Democratic constitution-making: Reflections on the European experiment" Arena Working paper No.18, May 2005

system, incapable of authorising even broadly endorsed avenues of structural reform, as well as a way of mobilizing the sentiments of political community through which any polity may find the best and avoid the worst manifestations of the sense of the common good it seeks to articulate. However, underpinning these, there is also a basic imperative of political morality – a backstop guarantee of democratic self-legislation particularly appropriate to a polity whose everyday regulatory politics cannot, and often should not, place large-scale democratic participation or simple majoritarian responsiveness in the foreground.

None of this means, of course, that the EU will move quickly, or even slowly, to a new post-*finalité* constitutional reckoning – one where the emphasis is on an inclusive, secular and adjustable process of political community-building rather than on the handing down and entrenchment of a sacred text.[46] Here the muted nature of the post-referendum response, and in particular the obduracy of elite attachment to the damaged goods of the CT, is a telling reminder of the difficulties ahead. What does seem certain, however, is that the plausibility and legitimacy of the alternative strategies – non-constitutional reform and constitutional non-reform as much as the attempted resuscitation of the present CT – will remain significantly compromised by the dramas of the last few years. The fear is that the political crisis of the EU has not yet touched bottom; the hope is that when eventually it does, the experience will after all prove to be a salutary one.

[46] See e.g. N. Walker "Europe's Constitutional Passion Play" (2003) 28 *European Law Review* 905-908