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THE FUTURE OF THE CONSTITUTIONAL PROCESS OF THE EUROPEAN UNION

Andrew Moravcsik and Kalypso Nicolaidis¹

1. THE RATIFICATION PROCESS HAS STALLED. SHOULD IT BE SALVAGED? IF SO, HOW AND WHEN?

A strong case can be made against continued ratification of the existing text.

The case for stopping the ratification process now has little to do with the content of the constitution, which was both modest and sensible. It has to do with the practical politics of ratifying this controversial document.

The current debate among EU insiders is couched in democratic symbolism. One group calls for the process to continue, because more than half the member states have ratified and the remaining states should be granted democratic expression. The other group calls the process to be shut down, pointing to the democratic legitimacy of the French and Dutch votes and highlights the absurdity of asking voters and parliaments elsewhere to vote on a text that nearly everyone admits will never be ratified in its present form.

Yet to dwell on symbolism rather than pragmatic politics is simply to perpetuate the sort of misjudgements that brought this constitutional debacle in the first place. The real question is: Which course is most likely to increase the effectiveness and legitimacy of the EU going forward? We have little doubt that calling an end to the process is preferable. It is not simply that few in France and the Netherlands are prepared to vote again—the “Ireland scenario.” It is not simply that the treaty could well be voted down by 4-6 member states, perhaps a majority of those holding referenda. It is also that referendum campaigns are singularly ill-suited as mechanisms to make decisions about the future of Europe.

Politics by referendum, like the promulgation of a new European constitutional document itself, is based on a naïve theory of democracy, whereby greater publicity and participation encourages public education, which brings about greater support for sensible policies. Democracies have never actually worked this way, particularly in regard to issues that do not rank near the top of the voters’ agenda. The central problem is that the EU will not—and, even in the wildest dreams of its enthusiasts—become the primary forum to address the

¹ Andrew Moravcsik is Professor of Politics and Director of the European Union Center at Princeton University. More information is available at www.princeton.edu/~amoravcs Kalypso Nicolaidis is University Lecturer at Oxford University. More information is available at www.sant.ox.ac.uk/knicolaidis

issues that matter most to voters: “taxing and spending” issues like fiscal policy, social welfare and pension reform, medical care, infrastructure, defence procurement, and education, as well as immigration and cultural policy. Thus the common voter cannot be convinced to educate themselves, deliberate or vote on the basis of EU policies. This is not to deny that the level of elite debate was often impressive in France and the Netherlands. Yet we should not mistake this for popular deliberation or public education, since the subtleties of such debates, and their focus on EU policies, remained almost entirely absent in actual voting behaviour.

The recent referendums demonstrate what happens when voters are encouraged to participate actively in a debate about abstract matters unconnected with issues of concrete concern. They simply import into EU debates gripes about national policies, even when they have almost nothing to do with ongoing EU policies, let alone the substance of the constitution. Indeed, the “no” campaigns all but conceded the desirability of the modest reforms from the start—including the foreign minister, stronger anti-crime policy and streamlining of voting procedures. Such changes are popular, not least in France, which proposed most of them. Insofar as there was any focus on European issues, most of their criticism focussed on the content imported from past treaties and related to the implementation of the single market—which, as part of the *acquis*, would not be changed irrespective of the referendum results.

One is thus forced to conclude that this document became controversial not because the reforms it proposed were objectionable, but because they were so innocuous that citizens saw a chance to cast an inexpensive protest vote. The result empowered ideological extremists, invited protest voting against national governments, and made a mockery of the electoral deliberation proponents of the constitution imagined. Relaunching the ratification process would simply re-launch this unhealthy form of debate. That way lies at best a diversion and at worst another disaster.

2. IF THERE WAS TO BE A RENEGOTIATION OF THE CONSTITUTION, WHAT SHOULD BE ITS MAIN FEATURES? WHAT PROVISIONS SHOULD BE CHANGED, RECALLING THE NEED FOR CONSENSUS?

Renegotiation of the constitution, if it is to occur at all, should take place only after a lengthy period, and should be conducted in a pragmatic, restrained manner with more moderate rhetoric on the part of proponents and evidence of changes in attitudes on the part of the public.

The debacle to date appears to have had some effect: No one now favours an immediate renegotiation. The EP report proposes a new Convention meeting in 2008 whose results would be ratified at the same time of EP election in 2009. We believe that even this is too hasty.

The truth is that the constitution undermined rather than deepened the trust of Europeans in the EU. Whether we set the constitution aside for a while or renounce it entirely is a

tactical issue, depending on your assessment of the prospects for the constitution to play a positive role in re-establishing the EU's credibility.² It is clear, however, that the EP's proposed timing and method are ill-judged. Such an ambitious plan plays Russian roulette with the EU's shaky credibility. Greater confidence in the likelihood of success would be required. The Parliament must indeed retain a certain momentum, above all through giving more publicity to its own activities and pointing to the connection between its specific law-making activities and constitutional questions. But actual renegotiation must wait until the time is ripe.

The central error of the European constitutional framers was one of style and symbolism rather than substance. The constitution contained a set of modest reforms, very much in line with European popular preferences. Yet European leaders upset the emerging pragmatic settlement by dressing up the reforms as a grand scheme for constitutional revision and popular democratisation of the EU. As we have seen above, European citizens did not vote against the new content of the constitution although it can be argued that some of this content could be amended at the margin to make the document more user-friendly.³ Renegotiation of content alone does not address the current problems.

Proponents of the constitution portray the EU as teetering on the brink of collapse. They bring forth Mr. Hallstein's "bicycle theory," whereby the EU will fail if it does not continue moving toward "ever closer union." In this regard, we believe that it is time to transcend this sort of "rhetoric of crisis". It is both misleading and unproductive.

Far from demonstrating that the EU is in decline or disarray, the current situation demonstrates its essential stability. The EU appears, indeed, to have quietly reached a stable "European constitutional settlement"—a stage of maturity beyond the point of no return, in which Europe does not need to keep moving forward to survive. The EU has a *de facto* constitution in the amended Treaty of Rome, with respect to which the new constitutional treaty marks at most a consolidating change. While constitutional deliberation and popular debate did reveal discontent, it also revealed a stunning absence of significant positive proposals for new EU policies, and direct criticism of the constitution's proposed reforms.⁴ The 15 years since the fall of the Berlin wall has been, after all, the most successful period in EU history, during which the single market, the Euro and a nascent European foreign and defence policy came into being. EU enlargement was carried out with surprisingly little disruption in existing member states, and proved the most cost-effective western instrument for advancing global democracy and security. And there is little evidence, despite rhetorical

² The two authors differ on this score. One of us argues that the constitution should simply be dropped (Andrew Moravcsik, "Europe without Illusions," *Prospect*, July 2005), while the other believes the EP reasoning is viable in the long-term (Kalypso Nicolaidis, "UE: Un moment Tocquevillien," *Politique Etrangère*, September 2005).

³ For examples of proposed changes of provisions, the reader can refer to *Making it Our Own: a transeuropean proposal on amending the draft constitutional treaty* which can be found inter alia on www.sant.ox.ac.uk/knicolaidis

⁴ We recognize the plethora of proposals put forth by the so-called "pro-European" no groups in France, from a 4% budget to a new EU infrastructure policy. Most of these do not amount to new policies, in a constitutional sense. Moreover, we doubt that there is a real consensus among these groups, let alone in Europe, as to how such funds should be raised and spent. Certainly this is true of more ambitious proposals for a distinctive EU social policy vis-à-vis the US.

fears to the contrary, that the current system will grind to a halt with 25 members. Current controversies, such as that over the Bolkenstein directive—would occur with or without a constitution; indeed the constitutional limbo may be at the margin an inducement for politicians to make slightly greater efforts to compromise in order to show their citizens that they can deliver. All this demonstrates the underlying stability of the EU system.

Under these circumstances, the only remaining question is whether the adoption of a formal constitutional document could succeed in producing a “story” for Europeans about themselves which would in turn provide a useful backdrop to big policy decisions and debates. Although we disagree on the ultimate answer to this question we agree on the basic premise that this would require pre-conditions that are not present in the current climate.

In response, it is tempting simply to drop the draft constitutional treaty as a failed experiment based on naïve presuppositions about democracy. Yet outright renunciation would leave unsolved one fundamental problem, which the constitution—no matter how wrong-headedly—was meant to address: the lack of a shared symbolic language about the EU to which Europeans respond. When pro-European political elites found themselves defending a constitution with modest content, they felt they had no alternative but to oversell it using inflated notions of what the EU does and rhetoric drawn from 1950s European idealism predicated on superseding European nations in favour of a centralized federal superstate. Small wonder they were outgunned by grumpy populists with stronger symbols rooted in class, nation and race (and even more inflated views of what the EU does). Publics became confused and alarmed by the scare tactics of both sides. The referendums came to inhabit a strange twilight zone of symbolic politics, in which claims about the EU bore little relationship to reality, and support and opposition for a status quo constitution became a potent symbol for the myriad hopes and fears of modern electorates. This is hardly a satisfactory state of affairs. Perhaps it might be possible, eventually, to find a shared symbolic language for the EU that can be appropriated by large enough majorities of citizens across the EU. Or perhaps no idealist discourse exists and the EU is better off selling itself as a pragmatic, essentially boring civilizing enterprise that it has become. It is worth the effort to find out which is the case.

In this regard there was one aspect of the constitution that deserves attention, namely its frank appeal not to the ideal of “ever closer union” but to an ideal of “unity in diversity,” the overlapping consensus of different national polities. We believe that if there was to be an eventual renegotiation, this narrative should be expanded – including by revisiting the infamous Preamble written by Valéry Giscard d’Estaing or the issue of the EU presidency. Perhaps also it would be wise – as proposed by Paul Mignette in these hearings — to separate the exercise of codifying the existing treaties (a text that can be ratified by national parliaments) from the drafting of a brief declarative charter or constitution (an improved and simplified version of parts 1, 2 and 4) which would reflect this evolving narrative.

Let us assume for the sake of argument that there was a plausible chance for renegotiation to achieve this. In this case, it is hard to see how the convening of yet another convention nominated by committee within two years would address any of the essential problems. An alternative might be to tie a subsequent EP election to the possible drafting of a new text by the newly elected parliament. If a majority of the MEPs had campaigned against renegotiation then the process would be dropped. Otherwise, there could be a two-track

process with some configuration of the new EP one side and a *parallel* IGC on the other side, as occurred before the Single European Act and Maastricht. In any case, one should avoid having a convention set the agenda for the IGC (as in 2002-03), to the extent that the over-ambitious rhetoric of European federalists bears responsibility for the failures of the current draft. If there is any lesson from recent events, it is surely that constructive involvement by the groups like European Parliamentarians presupposes a more pragmatic and “political” attitude on their part. Greater restraint could generate tremendous positive benefits for the European project, as we set forth in the remainder of this paper.

3. IF THERE WAS NOT TO BE A RENEGOTIATION OF THE CONSTITUTION, WHAT INSTITUTIONAL OR POLICY REFORMS SHOULD BE PRIORITIZED –AND HOW?

There is a good case for implementing some of the innovations in the constitution by other, piecemeal means, but this strategy is limited.

Reform requires an IGC revising the Nice Treaty. Only the provisions on democracy, including the role of national parliaments, are perhaps uncontroversial enough to be implemented any other way. Most reforms, such as the external action service, require a clear legal mandate. The central problem is that the various institutional reforms are interconnected in a political compromise between large and small, core and peripheral, rich and poor, new and old countries.

This leaves few options. Perhaps, over a five-year period, one could slowly and cautiously implement reforms of the Commission, Council voting, EP involvement, foreign policy-making. For the moment, however, the major focus should be not on constitutional changes, but on specific domestic and European-level legislation: domestic economic reform, a budget deal, Balkan enlargement, services liberalisation, regulatory simplification, and so on. These will probably add more to the EU’s legitimacy than any renewal of the grand constitutional debate.

4. WHAT SHOULD THE EU DO TO RECONNECT TO THE CITIZENS?

Supporters of the EU need to develop a new symbolic language based on pragmatic policies, public sentiment and a conception of European integration as a complement to, rather than a substitute for, the nation-state.

The basic impetus for the constitutional convention, namely the conviction that Europe is in need of political education in regard to the EU, is sound. It is true, for example, that political attitudes toward the EU are based in large part on erroneous information. It would be quite naïve, however, to think that this problem is to be solved simply by providing information, hosting high-profile events, staging debates, promulgating a constitution, or democratizing the EU—as ambitious plans to exploit the “reflection period” seem to suggest.

The first step toward a more productive strategy is to understand and internalize two deeper lessons of the constitutional process.

First, as we have seen, the EU deals with issues of less salience to the electorate than major national issues like social policy. The basic constraint on popular involvement, we have argued, is the lack of time, interest and involvement of Europeans, and this problem can be addressed only within those constraints. People do not learn because elites tell them what they think is right or wrong, which is often the message that great Commission “information campaigns” seem to convey. People learn when they have a motivation which is usually grounded in concrete politics. Thus no amount of political education can overcome the tendency of European voters to participate in a less active and informed manner in European politics than in national politics. There is, indeed, something elitist about the supposition that if only properly instructed by European constitution-writers, the voters would change their mind about which issues are most important to them.

Second, the EU’s lack of legitimacy does not stem primarily from its non-participatory character. There is (within advanced industrial democracies) no necessary relationship between greater participation, engagement and “democracy”, on the one hand, and political popularity or legitimacy, on the other. The most popular political institutions in Western societies are not legislatures, which are universally disliked, but insulated institutions specializing in delegated tasks: courts, police forces, armies, executives, and even, in some societies, bureaucrats. The record is clear: EU elections, referendums, and debates are characterized by apathy and cynicism at best, and outright Euro-scepticism at worst. This does not mean that mobilisation and participation cannot often be a good thing, in particular on the part of the wide range of individuals or organisations who find themselves at the interface between EU bureaucracy and EU publics, from Erasmus students and academic grantees to NGOs of all sorts, local national officials and lobbies. Unfortunately and for the moment these are as often alienated by as they are co-opted in the EU system.

Keeping these two facts in mind, European opinion leaders need above all to encourage a symbolic discourse about European integration that lowers expectations about what the EU can or should do. It is easy for those whose political, scholarly or journalistic life is bound up in the EU to forget that the EU only influences around 20% of European policy-making. Most remains national. This will not change soon, as there are—so the constitutional convention teaches us—no viable plans for communitarizing fiscal policy, defence, immigration, social policy, health care or any of the other policies about which citizens care. Even influential left-wing critics like Jürgen Habermas and his French counterparts, who extol the legitimating effects of *debating* social priorities, have few practical policy proposals for EU social policy. The same goes for other issues raised in European debates.

The greatest obstacle to the introduction of a new discourse that could re-legitimize the EU is, ironically, those who care most about it. For it is the attentive elites who, particularly when faced with the difficult task of selling a constitution with modest substantive content—tend to oversell the EU in a manner reminiscent of the 1950s. Old stories about the Franco-German war that never happened, loose talk about a “European state” or “ever closer union,” only spook an electorate who understands the limits of integration better than some of its political leaders. It is precisely the unguarded idealism of Euro-enthusiasts that seems to confirm the ungrounded fears of Euroskeptics. To get the debate back onto a constructive path, this unhealthy co-dependence between Euro-enthusiasts and Euro-

sceptics must end—which requires that the debate be taken beyond the exclusive remit of those who promoted the draft constitutional treaty.

A more promising strategy would be one based on pragmatism, patience, and pluralism.

- (1) **Pragmatism: Stress concrete advantages.** Politicians should focus for an extended period on practical policies aimed at concrete problem-solving. There is much room for incremental improvement of existing policies. Any constitutional choices put before the public should be linked directly to practical implications for the success of these ongoing policies. This strategy, successfully pursued with the Single European Act and Maastricht, offers the best chance of re-grounding public debate in real policies. One silver lining of the low salience of European issues is that there is little chance that the public will spontaneously rise up against new initiatives that are not couched in the grand language of constitutionalism.
- (2) **Patience: Await a new political context.** Any new constitutional initiative should await a new political context and therefore at a minimum not precede the next EP elections.
- (3) **Pluralism: Stress the inherent diversity of the European Union.** Political leaders should be explicit about the limits and constraints on the European Union that stem from its inherently pluralist character. The member states of the EU are diverse, and the EU cannot and need not rest on a *pensée unique*—a unitary “vision of Europe” imagined and delivered by enlightened leaders. Instead, political leaders need to speak more explicitly of the EU as a means to correct specific excesses of its member states, rather than—even implicitly—replacing them with a “superstate”. Publics will be reassured if the EU is portrayed as a means to achieve the goals of nation-states, rather than as an effort to supplant them. Judged by this standard, more ever, the extraordinary successes of the EU would become clearer. The unique genius of the EU lies precisely in its ability to promote intense interstate policy coordination while respecting the powerful rhetoric and symbols that still adhere to national identity.

This tripartite strategy—pragmatism, patience, pluralism—would return the EU to the essence of its distinctive and successful model of international cooperation. The symbiotic relationship between the enduring nation-states and the most ambitious voluntary international organization in history is what makes the European integration a unique process of world-historical importance. The Europe Union represents the first distinctively new form of the state to emerge and prosper since the rise of social democracy a century ago. It remains an inspiration, even at times a “model,” for the rest of the world. The recent success of enlargement demonstrates reiterates its continued attractiveness. Development of a more modest and more credible ideal of Europe, and symbolic language appropriate to it, must start from this realization.