Europe’s Constitutional Crisis: International Perspectives

Edited by
Michael O’Neill
Nicolae Păun

European Studies Foundation Publishing House
Cluj-Napoca, 2007
Lucrare finanțată cu sprijinul Centrului European de Excelență “Jean Monnet”, C05/000, un proiect al Acțiunii Jean Monnet a Comisiei Europene

© EFES, 2008
Copyright for each contribution lies with the author who retains sole responsibility for the contents therein
CONTENTS

Acknowledgements .................................................................................................................. 5

Michael O'Neill
Introduction: Explaining the ‘Crisis’ Over the European Constitution:
An International Debate ........................................................................................................ 7

Michael O'Neill
Chapter one: Europe’s Constitutional Crisis or Merely ‘Normal’ Politics? ........ 19

Nicolae Păun
Chapter two: Europe’s Crisis – A Crisis of Values? ............................................... 91

Michael O'Neill
Chapter three: Towards a People’s Europe?
The European Constitution and the Citizen ................................................................. 117

Frank Delmartino, Valérie Pattyn
Chapter four: The Constitutional Debate in the European Union.
A Quest for a New Paradigm ......................................................................................... 168

Laurie Buonanno
Chapter five: The Constitutional ‘Crisis’ in Perspective ........................................... 188

Norman A. Graham
Chapter six: A Transatlantic Perspective on the European Union’s
Constitutional Crisis: Back to the “Broader Before Deeper” Strategy? ............ 209

John D. Occhiptiti
Chapter seven: Securing Support for Reform: Justice
and Home Affairs and the New Treaty ....................................................................... 239

David Phinnemore
Chapter eight: Beyond Rejection: The Future of the Treaty
Establishing a Constitution for Europe ........................................................................... 269

Contributors ......................................................................................................................... 281
Chapter five

THE CONSTITUTIONAL ‘CRISIS’ IN PERSPECTIVE

Laurie Buonanno

Introduction

The Australian geographer, K. W. Robinson once commented that the ‘federation is the most geographically expressive of all political systems’.¹ Anticipating, it seems the preamble of the Constitutional Treaty—‘united in diversity’—he wrote that ‘Federation does not create unity out of diversity; rather it enables the two to coexist’. If writing today, Robinson might have added that the path to European federation would be ‘united by adversity’ because it was adversity—self-inflicted, but adversity nonetheless—that set Europe on the path to economic integration.

Near the end of the German presidency (the first half of 2007), Chancellor Angela Merkel had accepted as inevitable that the Constitutional Treaty was off the table and a mini-treaty was on.² With Prime Minister Tony Blair opposing the sort of grand treaty that would necessitate a referendum, Merkel realized that Germany’s original preference for an intact Constitutional Treaty was no longer feasible. Europe was also running out of time because one by one the leaders who had brought the Constitutional Treaty forward were leaving the European scene. Nicolas Sarkozy would soon replace Jacques Chirac as France’s president. European leaders were also anxious to commit to a plan of action before Tony Blair’s departure (after the June summit) and Gordon Brown’s arrival. With Nicolas Sarkozy’s victory in the French presidential election weeks before the close of the German Presidency,
France and the United Kingdom were united in their opposition to a revival of the Constitutional Treaty, but both firmly supported a mini-treaty to settle the institutional issues Nice had failed to resolve. Sarkozy, too, would support a new convention for a grand treaty, but only in 2009 after EP elections and the seating of a new Commission.³

The German presidency, anticipating an IGC to start in July 2007, suggested that the IGC should complete its work by the end of the Portuguese presidency in December. In April, the German presidency sent a one-page questionnaire to Member State capitals with some 12 questions to consider and, hopefully, achieve consensus prior to the June summit. These included returning to a ‘single legal personality’ (abolishing the pillar structure), preserving the consolidation of the treaties in Part I, dropping the article that refers to symbols and another that states the primacy of EU law, including issues that have emerged since the Constitutional Convention (e.g. energy), including the criteria for enlargement, addressing the ‘social dimension’, and using different terminology for the title of the treaty and the EU’s minister of foreign affairs.⁴ At the time of the writing of the submission of this chapter, the governments of the Member States agreed to the Lisbon Treaty (19 October 2007), which will be signed in Lisbon on 13 December.⁵

Has the constitutional moment passed? Should we expect a return to the ‘business as usual’ of an IGC every four or five years, and a treaty that puts in ink practices that are well underway among the Member States and EU institutions? And, if so, will the absence of a grand treaty negatively impact upon the course of European integration?

This chapter is written to address these questions. It does so in four sections. The first section of this paper identifies and examines the more likely causes of the impasse over the Constitutional Treaty. The second section offers a framework in which to examine constitutional lawmaking within the European Union. The lens one employs—intergovernmental, neo-functionalist, multi-level governance, or federalist—will shape one’s perception as to the indispensability or superfluity of a constitutional treaty. The third section explores the extent to which institutional, democratic, and policy sharing continued or stalled during the reflection period of the Constitutional Treaty. The final section draws upon the findings of this chapter in order to offer insights into the challenges that lie ahead and to identify promising mechanisms for consensus-building.
The Failure to Ratify

There are a number of plausible explanations as to the derailment of the Constitutional Treaty in the spring of 2005. Certainly leading the list would be deplorable timing. Jacques Chirac wins the blue ribbon in making a fuss over the Services Directive (the Polish plunger) just weeks before the Constitutional Treaty was put to a vote. Tony Blair's fury with this political gaffe was probably justified, but at the same time, it would be charitable to describe as a faux pas the Commission's decision to push the Services Directive (a perennial hot potato) at the same time Member States were presenting the Constitutional Treaty for ratification. The Commission's action reflected an almost incomprehensible political naiveté among Europe's elite civil service and seasoned politicians.

In the meantime, agriculture found its way into the debate. First, Member States had already opened Round One of the 2007-2013 Financial Perspective, this time Tony Blair replacing Margaret Thatcher as the prize fighter named 'British Rebate'. Blair hoped to tie the rebate to the shifting of CAP funds to rural development (using the CEECs as his wedge). Second, the Constitutional Treaty process also took place against the backdrop of the Doha Round, the WTO round in which the developing countries have been particularly assertive—after feeling shortchanged on agriculture in the Uruguay Round—in pressuring the U.S. and the EU over agricultural subsidies. Anti-globalization certainly persuaded some French voters to reject the Constitutional Treaty (e.g. José Bové's Confédération paysanne opposed it) and, as always the case (e.g. the empty chair crisis) with agricultural policy and the French, the CAP has become a point of honour in preserving the French monopoly on haute cuisine and fine living.

The French economic doldrums naturally figured in the no vote (and exacerbated French hostility to the Services Directive), as does the economy in any election or referendum. A 10% unemployment rate in France, a lack of a clear direction and annunciation of the Lisbon goals and objectives (liberal or social democracy?), and the renegotiation of the conditions of the Stability and Growth Pact (SGP) when it became apparent that neither France nor Germany could no longer meet the stringent requirements, further contributed to an overall sense of dissatisfaction with the EU. All the while, the reliable Franco-German motor had stalled the lack of leadership especially on display in the June 2004 and June 2005 European Council summits.

Like a dark cloud hanging over Western Europe, the polity of the
old Member States had succumbed to enlargement fatigue, and, the French and Dutch articulated a desire of many West Europeans that the EU simply slow down and take stock. Nevertheless, as Europeans grappled with the Constitutional Treaty, European leaders could no longer defer the question of whether to open accession negotiations with Turkey. The debates took place in 2005, with talks formally opened in October 2005. Admitting Turkey was of particular concern to the Dutch, along with the related fear of losing influence in an enlarged Europe. But this was not all. About the time the referendum was presented in the Netherlands, the Dutch had come to feel cheated by the EU, believing that the Guilder was undervalued in the Euro-Guilder exchange (later proven correct). Particularly galling to the Dutch was the constant chatter over the British rebate all the while with the Dutch as the biggest per capita contributors to the EU budget.\textsuperscript{6}

There may never be an optimal time to introduce a major treaty, but there was no requirement that it include the politically-charged description 'constitutional'. It is now understood that including 'constitutional' was simply a mistake. It will likely be remembered as one of the great ironies among the many setbacks in the integration process because, first, the \textit{acquis communautaire} is, in effect, a constitutional body of laws, and second, the Constitutional Treaty is a compact (the stuff of treaties) among the heads of state and governments of the Member States, not the people of Europe. The preamble of the Constitutional Treaty begins with 'His Majesty the King of the Belgians... WHO, having exchanged their full powers, found in good and due form, have agreed as follows:' Conversely, the preamble of the U.S. Constitution reads, 'We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America'.

A third reason for the treaty's rejection may be due to the lack of information available about the document. Member States were criticized, incredibly by that bastion of clarity, the European Commission, for inadequately educating their polity on the Constitutional Treaty. It is true that the public were mainly ignorant of the precise contents of the Constitutional Treaty. The Eurobarometer asked a battery of 'knowledge' questions on the eve of ratification which signalled that a large minority (in some Member States, a majority), of the EU polity could not be expected to make informed decisions on some of the institutional changes contained in the referendum. Among the incorrect answers was one that
dealt with the particularly sensitive issue of taxation, with 39% of the overall respondents answering that the Constitutional Treaty would create a direct European tax (39% non-responses, 27% answered correctly). The respondents with the lowest percentages of correct answers also happened to be from the Member States that are particularly adamant about preserving unanimity in Council for tax matters. The Eurobarometer, however, did not test general knowledge about objectives and aims, which one might think offered a better measure of citizen understanding. At any rate, this notion of the need to educate the public on the ins-and-outs of the Constitutional Treaty is predicated upon accepting the tautological argument that a single treaty would make the EU more understandable to the polity. No one—except, perhaps, Jacques Chirac—should expect the average person to read, let alone, understand, the Constitutional Treaty. And, why should they? Citizens pay taxes to support politicians and bureaucrats who enjoy drafting and reading the excruciatingly dull legalese of regulations, directives, and legislation. Furthermore, one can hardly suggest that EU lawyers and European judges are confused as to the contents of the EU treaties and EU case law; as a matter of fact, they seem to quite enjoy speaking in their private language, which is heavily sprinkled with Article numbers and even, ex-Article numbers. Indeed, the EU has an existing constitutional basis in its treaties, regulations, directives, and case law.

A fourth reason, and the catalyst for the ‘crisis’, was the decision by ten Member States to put the Constitutional Treaty to referendum. As David Butler and Austin Ranney have argued, complex issues are not appropriate for referendums, and, that states put constitutional issues to the citizens only when they expect to win. Indeed, most European states lack a tradition of direct democracy. This was, for instance, the first national referendum held in the Netherlands. British democracy, too, is representative democracy because it is held that only through informed debate among the peoples’ delegates can issues be fully comprehended. The one state with a long, established history of direct democracy, Switzerland, has rejected EU membership (twice) in citizen referenda. Even in France, rather than a tool of democracy, the referendum was De Gaulle’s trick in the Fifth Republic to bypass duly elected representatives whom the general loathed as self-serving lowlifes. Nor had the history of French referenda concerning EU matters been particularly auspicious for a positive vote on the Constitutional Treaty. When in 1972 French President Georges Pompidou called for a referendum on British accession, 61% voted yes in a 60% turnout. This was the first of a trio of close calls, next, Maastricht, then, Nice. With eight more states to follow the failed
referenda in France and the Netherlands, many countries put their referenda on hold. That Luxembourg insisted upon submitting the Constitutional Treaty to referendum soon after the French and Dutch rejections (it passed, but not resoundingly) taunted the bound Prometheus rather than contributed anything in the way of a constructive solution to the dilemma.

The 'constitutional moment' can be partially attributed to the unarticulated fears of a generation of Europeans leaders: in essence, the impetus for the Constitutional Treaty was inter-generational, not intergovernmental. With the aging of the World War II generation and the World War I generation all but passed, how could Europeans who had constructed a new Europe on the principle of an ever closer union expect the hip-hop, baggy jeans generation to appreciate that despite their identical lifestyle of Abercrombie shirts, razor mobiles, haversacks, streaked hair and waxed eyebrows, ubiquitous iPods dangling from tangled earbuds, and frappachinos slurped from plastic domed cups, they, too, could under the right—make that, wrong, conditions—re-invent the madness that their grandparents and great-grandparents visited upon Europe in 43 years of Civil War? Was it possible that a generation that had hung Benito Mussolini by his toes and had rebuilt Berlin from Azero could not now will to the next generation anything better than a string of incrementalist treaties—Rome, SEA, Maastricht, Amsterdam, Nice? The Constitutional Treaty would be a legal torch that codified and classified a half a century of European experience in a last will and testament of one generation for another. Not coincidentally, the Convention was managed by a trio of men born prior to the Cold War: its Chairman, Valéry Giscard d'Estaing was born in 1926, and his vice-chairmen, Giuliano Amato, 1938, and Jean Luc Deheane, 1940.

It is unlikely, however, that a 'constitutional treaty', let alone a 'constitution', could save the EU if the next generation of Europeans had not developed a sense of identity or attachment to it. This is so because 'nation' serves as a stabilising force on the state.13 European identity has proved illusive. In the period in question—between the Laeken Declaration of 2001 and the closing of the Constitutional Convention—the standard Eurobarometer questions designed to measure European identity continued to report low rates of European identity.14

European leaders probably misread their publics as well. Effective leaders gauge the public mood before introducing controversial proposals. The EU archives are littered with proposals introduced at inauspicious times (for instance, prior to competitive national elections in France, Germany, the U.K. or to the European Parliament). Ironically, even the
European Parliament that so prides itself as the only directly-elected EU body—was out of step with the European polity. In January 2005, 500 MEPs voted in favour of the Constitutional Treaty, 137 against, and 40 abstained, despite Eurobarometer surveys reporting considerably less enthusiasm among the EU polity. In the EU-25, 33% of the respondents had not heard of the Constitutional Treaty, and in the ten countries that announced they would hold referenda, only 65% knew of its existence. On the eve of ratifications, the EU-25 average in favour of the Constitutional Treaty was 49%, with stunningly uneven results (Italy, 72% and the U.K., the lowest, at 20%). In France and the Netherlands, the results were 48% and 63%, respectively, but 35% of the French and 26% of the Dutch were undecided.

These, then, are the reasons that Europeans rejected Constitutional Treaty. If the matter ended there it would be simply a matter of convincing the public of the wisdom of the Treaty. But this tack assumes that the EU needs a grand treaty in order to effectively and efficiently to meet its goal of ever closer union, or, specifically to expand the Four Freedoms. Furthermore, if the EU does need a grand treaty, what ground should it cover—rights, institutions, competencies?

Constitutions are the organizing documents of states. If the EU is not a state, then the aquis is nothing more than a set of Member State accords. If, on the other hand, the EU is a central government in a confederal, quasi-federal, or federal state, a constitutional ‘treaty’ is a governing document that among other provisions (rights, symbols) lays out the parameters of European-Member State power sharing indirectly through provision for and description of the institutions of the central government.

What is the European Union?

Despite the denial of its existence by some Member States, particularly the United Kingdom, federalism runs like a scarlet thread in the EU treaties—ever close union, subsidiarity, community method, Article 308 in the TEC, and the preamble of the Constitutional Treaty. If the EU is 'sui generis', scholars must create new concepts (e.g. multi-level governance) to understand the European Union. If, however, the EU is a confederal or federal state, scholars will study institutional power sharing and follow the process through to policy outputs. As can be inferred, this writer is highly sceptical that the EU is a
post-modern mirror to the future held together by the tangled web of network governance. In framing the debate on the future of Europe as one of intergovernmentalists versus supranationalists cum neofunctionalists, scholars risk missing the core dynamic of federalism: the difficult and laborious negotiations between constituent governing units characteristic of central-state government relations.

In the years since Winston Churchill’s famous pronouncement in his 1946 speech in Zurich calling for a ‘United States of Europe’, the ideal structure of a pan-European state has been continuously debated on both sides of the Atlantic. American foreign policy has unwaveringly supported an ever-closer economic union, particularly in nudging the United Kingdom to abandon its support of EFTA and apply for membership in the EEC. In the 18th Century the EU would have been described as ‘confederal’, the term ‘international organisation’ not having been coined and available for ‘concept stretching’. Undoubtedly, the EU exhibits characteristics conducive to a federal arrangement: large territory, (placing the EU as the sixth largest country in the world, between Australia and India), multi-core, no primate city, many languages (23 official languages in the EU), different religious denominations (e.g. Orthodox, Protestant, and Catholic, even more Muslim), a variety of ethnic groups (both within Member States and throughout the 27 Member States), and distinct cultures. Federal states also gain acceptance from its constituent states to locate a federal capital in other than one of the major cities (while de-facto, Brussels serves this function). Following a familiar pattern in federal states, EU courts (Court of First Instance and ECJ) have been instrumental in building the internal market. This is the case because the politics of distributive policy informs us that with the electoral necessity of responsiveness to parochial and regional societal actors, legislative bodies studiously avoid the responsibility for advancing the single market.

It is also not unreasonable that a confederal or quasi-federal state would wish to streamline and codify its mode of governance, albeit in the language of power rather than policy. By contrast, international organisations are intergovernmental, managed by unelected experts taking direction from government ministries who lay out the specific goals and the mechanisms that will be utilized for their achievement.

Part III of the Constitutional Treaty (policy competencies) would make sense in an international organisation, but not in a federal system. This is so because federal relations are not advanced in constitutions, but by political practice. Federalist systems are built through trial-and-error and central governmental power waxes and wanes according to current
'exigencies. Of the over 400 million citizens of the EU, however, only the Belgians and Germans live under federal systems. Among the CEECs, only Slovenia has experience working within a federal system. The attempt to anticipate and regulate EU-Member State policy competencies is likely either an artefact of unitary thinking imposed on a federal process or the overly influential paradigm of the EU as 'multi-level, network governance'.

As mentioned above, in federal systems constitutional courts adjudicate disagreements between central and constituent units. Indeed, the ECJ has undertaken the same function as the American federal courts of the 1790s-1930s in establishing the ground rules of Member State/European power sharing. It is unlikely, therefore, that any treaty or constitution could adequately lay out policy competencies. Instead, constitutions establish competence through vague phrases: 'receive and send ambassadors', language seized upon by wily U.S. presidents to establish and broaden 'inherent' powers in foreign policy. The U.S. Congress, too, has expanded its powers in interstate commerce through both the commerce and elastic clauses. A similar mechanism exists in Article 308 (TEU), often referred to as the elastic clause of the EU.  

In federal systems, policy competence shifts among constituent governments according to the needs of the governed and the governing. The current debate in the EU as to the proper locus of immigration policy is a good example to illustrate this point. In the U.S., immigration policy was controlled by the individual states until the late 1880s. In fact, the states 'had virtually a free hand in setting up whatever local regulations they desired in the field of immigration'. Only through the intervention of the U.S. Supreme Court did Congress begin to deal with immigration; initially, through recourse to the internal market, by ruling in 1876 that state laws that taxed immigrants and the owners of vessels that carried them were unconstitutional attempts to regulate foreign commerce. The national government moved toward asserting control in 1882 when President Arthur sponsored the first federal legislation and in 1892 opened Ellis Island, destined to become the nation's largest clearinghouse for landed immigrants. The recent scandals in immigration clearance in Italy (Lampedusa) and Spain bring to mind the Castle Garden scandals in New York City, the immigrant clearing station run by New York State (at the Battery), notorious for its corruption and incompetence. New York and other receiving states simply could not bear the expense involved with policing their borders and processing landed immigrants. One can see the analogy between the U.S. experience and that of Europe today with Malta, Spain, Italy, Portugal, and Greece, referred to by Northern European countries as the 'soft underbelly of Europe'. IGOs have charged these
countries with corruption and ill-treatment of asylum seekers. No change was needed to the U.S. Constitution to bring immigration policy under federal authority; neither would a treaty be required for Member States to federalize European immigration policy or, even, to agree to a European Coast Guard.

This section has argued that the classification of the EU—whether intergovernmental, neo-functionalist (assumes eventual spillover), supranational (mixed elements of intergovernmental and federal aspects), multi-level governance (a dense network of local, regional, state, and European institutions and societal actors), or confederalist/federalist—matters for two reasons. First, different tools are utilized for each of these arrangements in order to analyze, explain, and predict the course of European integration. Second, and related to the first, the contents of a constitution or constitutional treaty should reflect the entity’s structure. International organizations evolve differently than do federal states. Perhaps the EU’s greatest hurdle is the notion of ‘sui generis’ perpetrated in EU scholarship. It will be difficult to achieve agreement as to the ‘way forward’ without such consensus.

Continued Integration during the Reflection Period

Is a constitutional treaty necessary both for the EU to slough off inelegant and turgid rules and procedures and to implement more ‘democratic’ decision-making procedures that are thought to impede the completion of the internal market and alienate the public from the European project? This section examines progress, or lack thereof, in institutional reform and democratisation in the two years since the French and Dutch rejections.

Democratisation of EU decision-making structures has likely increased during the reflection period. In 2006, for instance, the Council implemented a significant reform in the comitology governance structure. By way of background into comitology, much of the implementing legislation for regulatory policy is issued as Commission regulations and directives taken in the relevant DGs. While comitology refers to all three types of committees—advisory, management, and regulatory—it is on the latter two that national officials sit and can block (management procedure) or must approve (regulatory procedure). While some EU legal scholars defend the comitology structure as a middle way between mutual trust (harmonization) and independent (regulatory) agencies
(deliberative supranationalism), MEPs have been among comitology's fiercest critics, characterizing the system as non-transparent, undemocratic, unaccountable, and prone to unstable policymaking. The long-repeated exclusion of MEPs from comitology deliberations (under Article 8 of Decision 1999/468/EC) was changed just one-year after the Dutch rejection of the Constitutional Treaty when new comitology rules (regulatory procedure with scrutiny, amended by Council decision 2006/512/EC of July 17th 2006) were put into place where an absolute majority of MEPs can veto a decision approved by a regulatory committee up to three months afterwards.26

Nor did the reflection period prevent the Commission from finding ways to extend co-decision to policy areas the EP had not previously enjoyed. The Commission has been able, in the past, to interpret the treaties to favour co-decision. The European Food Safety Authority, for example, was the first agency established by a regulation of both Council and Parliament after David Byrne, then in his capacity of Commissioner for DG Health and Consumer Protection, determined that food safety policy fell under Articles 95 (internal market) and 153 (public health), both of which are subject to Article 251 (co-decision and qualified majority voting), thereby, establishing a precedent in 2000 for EP co-legislation. This brought the European Parliament into a process in which it had never had more than a consultative role.27 Despite the derailment of the Constitutional Treaty, the Commission has continued to interpret the Treaties to favor co-decision; for instance, in the spring of 2007 classifying unbundling in the energy market as an internal market issue, thereby falling under co-decision.28 So while the Constitutional Treaty would have extended the circumstances for which the co-decision procedure would be used, the Commission has shown itself flexible (and a continued ally of the EP) as to interpreting the Treaties in the EP's favor by proposing legislation under treaty articles where co-decision applies. At any rate, the Lisbon Treaty preserves, largely in tact, the extension of co-decision provided for in the Constitutional Treaty.

The European Court of Justice had also asserted its right to interpret protocols as EU law. The ECJ has signaled its inclination to accept The Charter of Fundamental Rights of the Union (Part II of the Constitutional Treaty) as EU law irrespective of the fate of the Constitutional Treaty. Indeed, in the Lisbon Treaty the Charter becomes legally binding, even if it is annexed rather than incorporated in the body. The ECJ has defended this interpretation for two reasons: first, the rights of the Charter codify a large corpus of ECJ case law, and second, protocols can be understood as EU law (the Charter was attached as a protocol to
the Nice Treaty).

But what of institutional reforms specifically contained in the Constitutional Treaty? Some of these can be effected by the European Council without recourse to a new treaty. In fact, such action has been taken. In September 2006, the European Council amended its Rules of Procedures to create a Trio Presidency: ‘Every 18 months, the three Presidencies due to hold office shall prepare, in close cooperation with the Commission, and after appropriate consultations, a draft programme of Council activities for that period’. This was put into practice with the Germany Presidency, when together with Portugal and Slovenia, the following two holders of the Presidency, Germany submitted a joint programme (December 2006) for the coming 18 months. It comes as no surprise that the trio presidency survives in Lisbon.

Many of the ‘new’ policy competences covered in the Constitutional Treaty are already undertaken by the EU. This is standard practice in the EU, where policy cooperation within the EU framework precedes incorporation in the Treaties. Such was the case with environmental policy (SEA), some aspects of JHA (Maastricht), and employment (Amsterdam). That energy policy is not covered in existing treaties, has not prevented EU action; conversely, despite the inclusion of transportation policy in the Treaty of Rome, the EU has yet to agree on a common policy.

Neither did the impasse over the Constitutional Treaty derail the EU’s larger policy priorities. Several examples illustrate this point. First, the CEECs have now been members for two years and have integrated remarkably well into the EU. The many years of assiduous enlargement negotiations seemed to have prepared the EU for the monumental task of admitting ten new members. Second, the financial perspective was agreed to without provision for Turkey, allaying concerns that Turkish accession will happen quickly. Third, the EU has clearly communicated which countries can join and which ones cannot; hence, the Southwest Balkans are now covered by European Agreements and the EU has established a fairly comprehensible policy—the candidate states (Croatia and Turkey), the future candidates (Albania, Montenegro, Serbia, Bosnia-Herzegovina, Kosovo, and Macedonia), and the European Neighbourhood Policy for countries of Central Asia and the Mediterranean Rim with no prospect of membership. No one, except the occasional rogue Polish MEP, seems particularly bothered about Moldova, Ukraine, and Belarus, obvious potential candidates, but with so many internal problems as not to be considered credible candidates in the near future.

So while the Constitutional Treaty might provide some clarity and even a sense of security for advocates of written constitutions, especially
those who have no experience of either a federalist system or an unwritten constitution, a grand treaty is not a pre-requisite for completion of the single market, further democratization, and cooperation in area such as JHA and CFSP that impinge on Member State sovereignty.

Beneath this optimistic assessment, however, lies a difficult federal issue. Specifically, institutional reforms which involve fundamental federal issues in the distribution of power between small and large states, can be brought about only through treaty; namely, the reduction in the size of the Commission (which Member States thought they had settled in Nice) and the scrapping of the Nice triple majority in favour of a simpler system such as the Constitutional Treaty’s double majority. These needed to be dealt with in treaty; and, indeed, these institutional issues were agreed to in Lisbon (beginning in 2014, the downsizing of the College of Commissioners and double majority voting in Council).

The Way Forward

This chapter has argued that despite the failure to achieve consensus on the Constitutional Treaty, the EU had continued to govern effectively before agreement to the Lisbon Treaty. Nevertheless, when institutional changes raise federal issues, a mini-treaty is necessary to effect reforms. Either one—‘Lisbon Treaty’ or a ‘Ljubljana Treaty’—had a nice ring to it. The Germans laid the groundwork, but Portugal and Slovenia deserve their place in the sun as members of this indefatigable trio.

With the Lisbon Treaty agreed, the dark mood returns as domestic opponents seize the opportunity to run against Europe, their most effective weapon—demanding citizen referenda. Nevertheless, it is likely the European public will support this new mini-treaty of Lisbon because the polity seems to recognize the need for institutional reforms to streamline decision-making in the European Union. Among supporters of the Constitutional Treaty, 38% of responses were categorized as ‘Essential in order to pursue European construction’. Similarly, 22% of the responses were categorized as ‘essential for the smooth running of the European institutions’. Those dealing with citizenship (13%), democracy (13%), and strengthening the EU vis-à-vis the US (15%) were cited less frequently.36

Nor should Lisbon be seen as precluding institutional reforms does not preclude a future attempt to draft a comprehensive treaty or
constitution. A working committee overseen by the European Commission could be quietly put to work on a consolidated treaty of the TEC, TEU, Amsterdam, Nice, and Prague to be presented as the basis for a European Convention after the 2009 EP elections and installment of a new Commission. Significantly, 16 Member States ratified the Constitutional Treaty and still support the original draft. The governments of two other Member States, Portugal and Sweden, while not among the states that ratified, were favourably inclined. Even the Czech Republic favoured ratification, but with fellow Atlantist, Great Britain, would not accept the inclusion of a social dimension. Despite exasperating negotiators with its bid to increase its voting strength by bringing up population losses suffered under the Nazi era, Poland exchanged months of public grumbling over the Nice formula for 'energy solidarity clause' and the meaningless (given the consensual nature of Council decision-making), Ioanina Compromise, just as in the Constitutional Treaty negotiations Poland used its dissatisfaction with the abandonment of the Nice voting weights to extract other concessions (e.g. structural funds) from the EU. The Netherlands' (giving voice to the many other Member States on these issues) demands were easily met: drop the name constitution and reference to EU symbols, anthem, and other aspects of European nationhood. These were mere window dressings, and, do not a constitution nor European nation-state make.

Whether a new constitutional treaty will make significant strides toward integration or be limited to consolidating previous treaties, will depend upon the situation in Europe post-2009. This is because the quest for closer union normally arises when constituent governments cannot effectively govern, particularly in providing for the safety and security (economic and physical well-being) of the citizens. In such situations, constituent governments seek the assistance of central government because of its superior ability to organize and marshal resources. Such was the impetus in 1787 that led some American leaders to call for a Constitutional Convention with the purpose of establishing a stronger central government. The Confederation Congress (Continental Congress) was too weak to provide direction and assist the states in overcoming economic difficulties, domestic unrest, competition among each other, and insecurity on the borders and at sea. That Congress had little power can be illustrated by its inability to pay down the $40 million debt incurred in waging the Revolutionary War. Without an independent source of taxation, Congress relied on the states to voluntarily pay their share of the debt. By 1783, less than fifteen percent of the $10 million requested of the states had been paid. Richard Morris writes that
Congress's Superintendent of Finance 'likened talking to the states to preaching to the dead'. By 1783 Congress was broke and only a loan from Dutch bankers kept it afloat. Congress had attempted repeatedly to amend the Articles; for instance, in 1781 Congress proposed a five-percent federal duty on imports to pay the interest and principal on the national debt, but Rhode Island (Rogue Island) refused to approve the amendment. When in 1783 Congress tried once again, New York blocked the effort; it did so because most of New York's revenue was derived from the Port of New York, a natural deep-water harbor. On the occasion of the New York veto, Henry Knox, the Secretary of War, exclaimed, 'Every liberal good man is wishing New York in Hell'.

In 2005-2007, Europe faced nothing akin to the severity of crises experienced by America under the Articles of Confederation. But focusing on those 'halcyon' years of the European Union is disingenuous, at a minimum, but more likely quite dangerous to the future peace and prosperity of Europe. In the previous century, Europeans endured one crisis after another, culminating in the civil war of 1914-1945. The American Revolutionary War and the difficult decade that followed are insignificant in comparison to the human suffering and loss of life in Europe's mid-20th Century crises. And the challenges Europe faces today—replacing aging Europeans with a younger workforce, managing immigration in a borderless EU, fostering family friendly policies in the Member States, security at Europe's borders, global warming, and declining competitiveness—are mercifully minor in comparison.

Whether Europeans will adopt the longer view depends upon the skills of their leadership in framing the case for Europe. Otherwise, it will take security issues—such as Russia challenging NATO's authority in the CEECs—to frighten Europeans into support for a constitution or constitutional treaty. An important cautionary note involves the inherent instability of the confederal form of government. History has demonstrated that confederations either break apart or form closer unions. The EU teeters on a similar precipice, as had the U.S. between the years 1783-1787. Inaction, therefore, is probably not an option.

The Constitutional Treaty has also affected the procedures for introducing and ratifying treaties. Given the publicity over the French and Dutch rejections, voters in other EU Member States may be less inclined to accept parliamentary ratification without, at a minimum, a non-binding referendum. And with ten states having promised a referendum on the Constitutional Treaty, it will now be difficult (if not politically impossible in some Member States that have not previously held a referendum on EU treaties), to withdraw the promise of referendum on the Lisbon Treaty. As
argued earlier in this chapter, treaties and constitutions in toto make for poor subjects of referendum.

If Europe is to more fully integrate over the coming years, and, if a constitution will be one mechanism to assist in accomplishment of that goal, governments will need to improve upon the two-way exchange of information between leaders and the polity. Representative democracy overcomes the need for citizens to perform exegesis of governmental agreements, but the public should understand institutional reforms that change the balance of power between the EU and its Member States. But agreement that the citizens should be informed is not the major hurdle. This point is driven home by the responses collected in the aforementioned Eurobarometer. Question 6 asked, ‘Who do you trust most to inform you on the draft European Constitution?’ The respondent was read the choices listed in

Table 1: Trust in Information Sources. While only one answer was permitted, none reached even 25 percent. Note that the national government is the most trusted source of information, but even here the EU average is only 22 percent.

Table 1: Trust in Information Sources Expressed in Percentages
(Source Table, Q6, Appendix)

<table>
<thead>
<tr>
<th>Trusted Sources</th>
<th>EU-25</th>
<th>France</th>
<th>The Netherlands</th>
<th>the UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Government</td>
<td>22</td>
<td>21</td>
<td>31</td>
<td>23</td>
</tr>
<tr>
<td>Journalists</td>
<td>16</td>
<td>17</td>
<td>12</td>
<td>18</td>
</tr>
<tr>
<td>European Parliament</td>
<td>15</td>
<td>13</td>
<td>15</td>
<td>5</td>
</tr>
<tr>
<td>European Commission</td>
<td>11</td>
<td>10</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>Your relatives, Your friends</td>
<td>9</td>
<td>8</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>National political parties</td>
<td>5</td>
<td>5</td>
<td>12</td>
<td>6</td>
</tr>
<tr>
<td>Consumer organizations</td>
<td>4</td>
<td>8</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Local councilors</td>
<td>3</td>
<td>5</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Trade Unions</td>
<td>2</td>
<td>4</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Religions denominations</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Other (Spontaneous)</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
</tbody>
</table>

One solution to the challenge of educating Europeans about a constitutional treaty would be to emulate the U.S. constitutional process,
which involved electing representatives to state-level constitutional conventions. Without these conventions, it is safe to conclude that the Federalists would not have been able to overcome the opposition of the Anti-Federalists to the U.S. Constitution. Member State constitutional conventions might produce other dividends—educating Europeans about the federal arrangements and offering amendments to the draft document. On the latter point, for instance, the U.S. owes its Bill of Rights to the Massachusetts constitutional convention, which extracted an agreement from the Federalists to propose a Bill of Rights during the first session of the U.S. Congress. Significantly, constitutional conventions would provide a forum for debate on the issues that concern each Member State, thereby eliminating the need for citizen referenda.

The Constitutional Treaty should be viewed as a significant moment in European state-building. As the EU becomes increasingly important in the lives of Europeans, it is less likely that the European polity will continue to support further integration under the rules and decision-making procedures of international organizations. While the path to European integration has been taken incrementally as measured in weeks or months, if measured in decades, European integration has run every bit as fast as the TGV.

Governmental relations in confederal and federal systems involve many levels of the bargaining and consensus building all too familiar in democratic polities. The federal structure may be the only option available for states exhibiting the characteristics earlier identified as associated with ideal federal states. Hence, there is a visceral sense that a divided Europe is ceding economic competitiveness to China and India and foreign policy and security issues to the United States, a country with little sense of history and less understanding of geography (how could an island between two mighty oceans understand the world as does Europe, a peninsula of Asia?).

Nevertheless, it is difficult to envisage that the institutional reforms agreed to in the Lisbon Treaty (such as a High Representative for Foreign Affairs and Security Policy and simplified voting in Council) would substantively alter Europe’s global influence in a Europe unwilling to lead. One of the oft-commented upon positive changes in the Constitutional Treaty was the elimination of the pillar system (successfully carried over into Lisbon), itself a compromise needed to wrap up the TEU. While EU pillarisation was probably a bad idea from its inception, treaties are compromises, and, at some point the hosts must roll up the red carpets and send the delegates packing. The pillar system, however, is merely the structural manifestation of the chasm between economic and political
integrationists. Abolition of the pillars would not solve the reasons for the pillar system; i.e., a lack of will to advance CFSP, ESDP, and JHA among European leaders.

In the final scene of Jean Renoir’s film Grand Illusion, Rosenthal studies a map of Switzerland while Lieutenant Maréchal surveys a snow-covered valley in the German Alps. Trying to determine where Germany ends and Switzerland starts, he comments, 'It all looks the same'.

Rosenthal replies, 'You can't see borders. They're man-made. Nature couldn't care less'.

Spotted by the German border patrol as they make their way across the valley, a soldier raises his rifle, but his commander shouts, 'Don't shoot! They're in Switzerland'.

The soldier lowers his rifle and responds, 'Good for them!'

Renoir had it right when he shot his film in the interwar period. The EU could not be a project of and for the elites. It is the German soldier who lowered his gun, Lieutenant Maréchal and Elsa who fell in love despite the enmity between France and Germany, von Rauffenstein who cut his prized geranium when de Boeldieu died. The lesson of the Constitutional Treaty is that no constitution, no treaty can substitute for a lack of will among people living in democratic states to cooperate for the common good of Europe; likewise, with the EU an increasingly federal project, the European polity will set the terms and determine the pace of European integration.

Notes
2. Taylor, Simon. ‘Merkel Seeks Short and Sharp Talks on Treaty’ European Voice, 19-25 April, 2007, p. 3. In a letter to the ‘chief representatives’ of Member State leaders, the German Presidency states its preference for an IGC with a ‘very precise and limited mandate’ early in the Portuguese Presidency.
3. Taylor, Simon. ‘A Declaration for the Next 100 Days’ European Voice, 29 March-3 April, 2007, p. 6
4. Ibid.
6. Bickerton
7. Knowledge questions (foreign affairs minister, selection method of the European Council president, European citizen right of initiative, direct tax, national citizenship, Member State withdrawal from the EU).
8. The French government mailed a copy of the Constitutional Treaty to every French household.
12. United Kingdom, France, Spain, Poland, the Netherlands, the Czech Republic, Portugal, Ireland, Denmark, and Luxembourg.
16. The Eurobarometer was administered in the fall of 2004 before the ratification process had been started in most countries, and months before the first referendum. In Lithuania, the parliament ratified the CT on November 11, 2004, with the surveying in that country taking place from 4 November through 21 November. (See Eurobarometer ‘Technical Specifications’.) All other ratifications occurred after the fieldwork had been completed on the Eurobarometer, which took place between October 27 and November 29, 2004. Citizen referenda were called in four countries: Spain (February 2005, ‘yes’), France (May 2005, ‘no’); the Netherlands (June 2005, ‘no’); and Luxembourg (July 2005, ‘yes’). See ‘State of Play’ Europa: A Constitution for Europe at http://europa.eu/constitution/ratification_en.htm. (Retrieved 20 April 2007).
17. France: 54.68%, no; the Netherlands: 61.6%, no. Adding the French undecided (35%) and unfavorable (17%) only reaches 52%. Adding the Dutch undecided (26%) and unfavorable (11%) only reaches 36%. Clearly, French and, especially, Dutch public opinion changed between the fall of 2004 and May/June 2005.
18. Article 308: ‘If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures’. Compare with the U.S. Constitution’s ‘necessary and proper’ (elastic) clause: Article I, Section 8, Clause 18. The Congress shall have power ...To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof. The Preamble of the Constitutional Treaty reads: CONVINCED that, thus ‘United in diversity’, Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth...’ See, also, Dinan, p. 297.
19. For more on the U.S. support for a federal Europe, see Desmond Dinan, Europe Reconst: A History of the European Union. (Boulder, CO: Lynn Reinner, 2005)


21. Although there are approximately 15 states organized on a federal basis, these states represent over 50% of the world’s land surface.

22. Article 908: ‘If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council, shall, acting unanimously on a proposal from the Commission and after consulting with the European Parliament, take the appropriate measures.’ Compare with the U.S. Constitution’s Article I, Section 8, Clause 18: ‘The Congress shall have power...To make laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof’.


26. Simon Taylor. 2007. ‘MEPs Flex Their Muscles on EU Food Regulation’, European Voice, 4-11 April 1. See EU Law Blog, http://eulaw.typepad.com/eulawblog/2006/07/new_cointology_.html. Article 5a has been added providing that: ‘...the European Parliament, acting by a majority of its component members, or the Council, acting by a qualified majority, may oppose the adoption of the said draft by the Commission, justifying their opposition by indicating that the draft measures proposed by the Commission exceed the implementing powers provided for in the basic instrument or that the draft is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality’.


33. Morris, p. 138
34. James Madison, John Jay, and Alexander Hamilton. *The Federalist Papers*. (New York, NY: Bantam Classic Edition, 1988) In *Federalist Paper No. 18*, James Madison writes of the failure of the Greek republics to cooperate under the Amphyctionic Council, 'Had the Greeks, says the Abbe Milot, been as wise as they were courageous, they would have been admonished by the experience of necessity of a closer Union and would have availed themselves of the peace which followed their success against the Persian arms...Had Greece, says a judicious observer on her fate, been united by a stricter confederation, and persevered in her Union, she would never have worn the chains of Macedon; and might have proven a barrier to the vast projects of Rome'.
35. United Kingdom, France, Spain, Poland, the Netherlands, the Czech Republic, Portugal, Ireland, Denmark, and Luxembourg. Ireland, Latvia, and the U.K., liberal tax states, had the lowest averages for correct answers, 33. 37, and 39%, respectively.