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The Ratification of the EU Constitution: An American Perspective on Why it Failed

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To a teacher and researcher of American constitutional law and theory, an overall examination of the process of constitution-making is an irresistible project. The project began with an article published in this journal (Boylan 2005) on the framing of the European Union's Constitutional Treaty. This study is the result of a year's Sabbatical (2004—2005) spent in Europe. During that time, the author visited 21 of the 25 current EU member states, conducted numerous interviews with legal scholars, politicians and civic leaders[1] and both studied and taught in a European institution as a visiting Fulbright professor. All that follows is the result of reading, listening and then drawing comparisons as an American observer.

The Convention on the Future of Europe provided a unique opportunity for academics and students of constitutional theory to survey three phases of constitution making—enactment, ratification and enforcement—as they unfolded. As one writer observed, "Those who are witness to this historic process are extremely fortunate. In the United States, many watch with awe and envy as Europeans confront the opportunity to create the most sophisticated, up-to-date, enlightened constitu-

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[1] Interviews were conducted with 35 individuals, including 12 political science professors, 6 law school professors, 4 think tank scholars, 2 business professionals, 1 religious leader, 3 educational administrators, 2 ambassadors, 1 retired United Nations official, 1 translator, and 3 professors from other disciplines.

tion of modern time" (Gormley 2003).[2] The scale, scope, ambition and significance of the European project created great interest across a wide range of disciplines, from law to politics, from economics to public policy. Naturally, it also invited comparison and contrast with the American experience of 200 years earlier.

The question posed here is, why did the EU fail to ratify its constitution? A working hypothesis is that the document failed for reasons only indirectly related to its substantive provisions. Rather, the sheer size and complexity of the document frustrated attempts to read, summarize or promote it. Further, both proponents and detractors could mine the text in order to portray it in radically different terms. The very complexity of the constitution was a signal to some that its goal—an ever closer union—would be a 70,000-plus word Trojan horse that would allow Brussels to insinuate itself via further regulation, standardization, and homogenization in order to overwhelm the member states. The debate over the constitution became a debate over the political economy of Europe. Highly symbolic and emotionally-charged issues—job security, national identity, Muslim immigration and assimilation, social welfare and pension benefits—animated debate and discussion. Gurfinkiel concluded

> In theory, the referendum on Europe had nothing to do with domestic politics. In practice, as everyone understood, things were different. A strong no vote would be taken as a demand for deep changes at home, if not a species of popular revolt" (2005, 39).

The process of ratification; with some members opting for referendum, some for parliamentary approval and some for a combination of each; became a contentious and confusing affair.

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[2] Although Gormley focuses attention on the period of the Articles of Confederation, he concludes that "the American experience does provide invaluable lessons when it comes to constructing a forward-thinking and enduring European Constitution." at 101.

Meanwhile, the claim that the Convention had been hijacked by elites and that the draft constitution did not address the "democratic deficit" led some members, most notably France, to change direction and offer their citizens the chance to give direct approval through an up-or-down vote. In the end, the procedural requirement that ratification be unanimous magnified the importance of each member's choice. Each was, potentially, a veto of one. In late May of 2005, two founding members of the European Union, France and the Netherlands, voted the constitution down by sizable margins. While a number of member states have proceeded with ratification votes following the French and Dutch referenda (the significance of which will be discussed in the final section), the combined votes of these two pivotal member states "shelved" the constitution for the foreseeable future.[3]

Observers have been cautious about comparing and contrasting the Convention on the Future of Europe with the Philadelphia Convention of some 200 years earlier. There are some who have utilized the language of comparison in speeches and scholarly works (de Burca 2004) only to minimize those possibilities in the text of their arguments. For instance, one scholar asked,

> [Are there] any real parallels with the adoption of the US
> Constitution in 1787 as a replacement for the Articles of
> Confederation, or do the great differences in historical con-
> text and circumstance render such a comparison entirely in-
> appropriate? According to a number of influential
> commentators, the two processes do not bear serious com-
> parison (de Burca 2004, 583).[4]

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[3] Immediately following the French and Dutch votes, Britain announced that it was suspending indefinitely any consideration of the constitutional treaty. Within a short time, Denmark, Ireland, Poland, and the Czech Republic followed suit.

[4] Note, however, that de Burca does draw out two clear parallels—the need for external security and the prevention of internal dissent—which form the thesis of her paper. She concludes, "Nonetheless, taking the different circumstances of history and time into
Note continues

Jurgen Habermas failed to find any parallels with either the convention in Philadelphia or the French Revolutionaries at the Assemblee Nationale in Paris at the close of the 19th Century (2001). Each of those earlier gatherings was "engaged in an extraordinary undertaking, without historical precedent (pp. 5-6)" and addressed very different challenges. For Habermas, the mission of EU convention was "not to invent anything, but to conserve the great democratic achievements of the democratic nation state" (p. 6).

Although Neil Walker would not disagree with Habermas' overall assessment, he would note that a constitution is often a cause of integration and not necessarily an outgrowth of it. If Europe lacked the social preconditions to mobilize the European citizenry around a new constitution, perhaps the framing and promotion of the document would help create those preconditions. He cautions readers against an inflexible view of cause-and-effect and concludes

> 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 eighteenth-century America with its diverse immigrant communities, or twentieth-century Germany defeated and divided by war (2006, 13).

Paul Magnette maps out three broad thematic areas that caution observers against drawing out comparisons with the American experience. He states

account, it is clearly the case that much of the political energy directed towards the promotion and justification of a constitution for the EU at the present time is focused on its relation to the external world, and in strengthening its perceived internal unity (p. 583).

It was however naïve to think that the Convention could be 'Europe's Philadelphia.' First because, before the Convention, the EU was already much stronger than the loose American confederation: it was a firm and largely accepted legal order based on federal principles; it comprised stable and permanent institutions, some directly elected by citizens; and was based on a intensely regulated single market and a common currency. Secondly, European states at the beginning of the twenty-first century, with their long history, strong national identities, large fiscal resources and redistributive policies, cannot be compared to the young, weakly populated and recently independent 'states' which formed the American Confederation. Finally, nothing in the present European situation could create a pressure comparable to the context of military, commercial, political, moral and religious crisis that had given rise to the Philadelphia process (2003, 7).

This study offers a different perspective.[5] While care should be taken to avoid spurious connections, the year bracketed by the accession of the ten new member states (May, 2004) and the French and Dutch referenda (May/June, 2005) demonstrated that valid, meaningful and intriguing parallels could be drawn between the success of the American constitutional process (in the framing, promotion and ratification of the draft document) and the failure of the European project. Further, a survey of the provisions of the text, the process of ratification and the politics of the debates provides clear indications of how and why the European text was scuttled and may provide some direction for future efforts to revise, revive or reintroduce the constitutional treaty.

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[5] I am not dismissing the aforementioned scholars who warned against making direct comparisons. Each of these commentators wrote before the completion of the final draft document and the beginning of the ratification process. These writers cautioned about making comparisons tied to the motives of the framers. My intent here is to focus on the dynamics of ratification.

PROVISIONS AND POLITICS:
A 70,000 WORD RORSCHACH TEST[6]

The European Union has grown and evolved over the last fifty years from a loose economic and trade confederation of six nations to the current union of twenty-five member states (Gurfinkiel 2005). Over the latter half of the 20th Century, a cluster of treaties enabled the Union's members to trade more freely, adopt a single currency and agree on issues from immigration to the environment.[7] These treaties have been cumulative, in that each built upon, but did not replace, the existing agreements. Further, the founding treaties have been amended on several occasions, usually coinciding with the addition of new member states. The draft EU constitution was a departure from these arrangements, as it aimed to replace all of the existing treaties with a single, comprehensive text.

Not until 2000 had there been a serious proposal to consider a constitution for Europe. Beginning with the proposal by Joschka Fischer (Nelson and Stubb 2003, 70-75),[8] the German foreign minister, the turn of the century witnessed a vigorous debate over the feasibility and desirability of a constitutional document. In the years that followed, a plan took shape for a Convention for the Future of Europe that would frame a draft document. For sixteen months during 2002-2003, the convention drew over 200 delegates from over twenty countries. These "framers" sought to

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[6] The Rorschach test, commonly known at the "Ink Blot Test," is named after Swiss psychiatrist Hermann Rorschach. It functioned as a personality analysis test in which the person being tested was asked to identify what is suggested to him by a series of ink blot designs of various shapes.

[7] It is beyond the scope of this study to survey the history and provisions of the existing European Union treaties. Europa, the official website of the EU, provides an excellent treatment of the treaties (http://europa.eu.int/abc/treaties/index_en.htm). A more comprehensive history of the treaties can be found in Church, Clive H. and David Phinnemore, 2002. *The Penguin Guide to the European Union Treaties*. London: Penguin Books, Ltd.

[8] Speech given at Humboldt University in Berlin, May 12, 2000.

codify the treaties that had bound the nations of Europe together since the middle of the 20th Century and to both articulate and clarify the core principles that had brought about the call for a constitution. These principles, articulated by French President Jacques Chirac in a speech before the German Bundestag in 2000, included the following: (1) making the European Union more democratic, as there was a common perception that the building of Europe had been, for the most part, the work of leaders and elites; (2) clarifying the division of responsibilities among the different levels of the European system, while recognizing the need to apply the principle of "subsidiarity;"[9] (3) guaranteeing that enlargement and progress would be mutually supportive; and (4) ensuring that Europe would have strong institutions and effective decision-making mechanisms where majority voting was the rule and that majority voting would reflect the relative weights of the member states (Nelson and Stubb 2003, 75-78).[10]

The final draft document covered these points and more. The 70,000 word text had four major sections. Part I contained the institutional reforms that brought the succession of past treaties together. Part II, a constitution in itself, incorporated the prolix Charter of Fundamental Rights that had been adopted in 2000. Part III streamlined, simplified and re-stated already existing European Union treaty law. Part IV, similar to Articles V and VII of the US Constitution, contained the procedures for ratification and amendment.

Scholars, politicians, journalists and observers soon developed conflicting descriptions. The disagreement over terminol-

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[9] Subsidiarity is the doctrine that governance should take place at the lowest possible, or most sensible, level. President Chirac described it as the need to have answers provided at the level closest to the problems at hand.

[10] From the text of the speech by French President Jacques Chirac before the German Bundestag on June 27, 2000.

ogy became confusion over identity. The key leaders of the Convention found themselves juggling terminology from speech to speech. Valery Giscard d'Estaing, President of the Convention, first suggested the use of the term "constitutional treaty." Many participants at the Convention, however, had opted for the more unequivocal language of "constitution." Others referred to the document as the "constitutional text." When the final text appeared in July of 2003, it was named the "treaty establishing a Constitution for Europe."[11]

Some scholars have suggested that the Convention failed to produce a true constitution. The text, bringing together and meshing the provisions of the treaties that preceded it, could not be legally distinguished from its predecessors. But it was envisioned, written and promoted as a constitution. And the use of that language created expectations, assumptions, fears and complications that could not easily be answered or resolved by the proponents of the document.

Misunderstanding emerged in two ways. First, the length and detail of the document meant that it was very difficult for citizens, groups, and even leaders to have a comprehensive grasp on its contents. Not only was it difficult to fully apprehend, but it was also relatively easy to either misrepresent or selectively attack. In a certain sense, it was a form of political Rorschach test that enabled groups across the political spectrum to justify their fears about the direction and scope of European enlargement, integration and unification. Richard Bellamy observed that "the drafters side-stepped their disagreements by choosing formulations that were so abstract that all sides could read into them what they liked. Yet, this strategy merely postpones the day of

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[11] See de Burca (2004, 560) for further description of how the language of the document reflected the complexity and ambiguity surrounding the process of enactment and the debate over ratification.

reckoning and assumes legitimate bodies exist to decide the question, which is doubtful (Bellamy, 2006)." In France, resistance from the left focused on Part III, the existing body of EU law and policies that have developed since the 1950s. In essence, Part III contained little that was new or innovative. However, the French "Non" campaign was successfully able to describe that section of the Constitution as the high road to further globalization and enlargement with the concurrent loss of French sovereignty and autonomy.[12] The left coalition's ability to link this section of the Constitution with the British free-market economic model—with the attendant fears for the future of the French social welfare system—advanced a frightening interpretation of the text. Thus, a section of the text that did little more than formalize and streamline already existing arrangements was portrayed as a dangerous new development. One writer observed

> With Part III recapitulating 50 years of European integration, moreover, the referendum gave voters their first-ever opportunity to challenge formally and directly core features of the EU: its competition policy, the freedom-of-movement rules in the single market (notably the liberalization of services), the euro and the EU's monetary policy, and enlargement. The pre-referendum debates also reflected dissatisfaction with slow growth and high unemployment, immigration, enlargement and "social dumping" from new members, the prospect of Turkish membership, globalization, and the growing competition from China and the United States. They revealed profound worry about Europe's ability to address these concerns, especially as a group of 25 heterogeneous members increasingly unable to act efficiently and

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[12] There was as much resistance from the right-wing parties in France as there was from the left. The right's fear of unbridled immigration and the resulting threat to job security, coupled with fears over Turkey joining the Union, helped bring about a coalition of the right and the left against ratification.

with no stable geographic or cultural borders in sight. Never
mind that the constitutional treaty improved the institutional
framework and decision-making process of the EU and did
little else (Cohen-Tanugi 2005, 57-58).

No referenda were held in Eastern European countries and
many of the national parliaments in those countries were quick to
ratify the document without protests or resistance. Public opinion
polls showed that citizens in Eastern European countries had less
overall knowledge of the contents of the constitution, but were
generally supportive of the document and saw it, on whole, as a
positive development.[13] It simply reflected and confirmed their
newly acquired "belonging" to Europe and symbolized their
freedom from an oppressive and heartbreaking past. Even in
Spain, a vigorous yes campaign managed to only get a bare con-
stitutional minimum (42%) of voters to the polls, and exit polling
revealed that most citizens were ratifying the positive perform-
ance of the Spanish economy in recent years. A poll commis-
sioned in mid-2003 by the Elcano Royal Institute, a Madrid-
based think tank, had found that only 1% of Spaniards knew
what the constitutional convention was meant to do. Eighteen
months later, with no apparent turnabout in public awareness,
Spanish voters ratified the new constitution.

In the less benign contexts of the French and Dutch refer-
enda, the government-sponsored yes campaigns could not over-
come the perception that the constitution would lock in trends
and developments with deeply negative consequences. Peter Hy-
larides' survey of the Dutch referendum noted

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[13] See findings from the first Eurobarometer survey on the proposed Constitution. At:
http://ec.europa.eu/public_opinion/flash/fl159_2en.pdf. See pp. 16-28 on the specific
questions covering the content of the Constitution and pp. 29-30 on the conclusions. Note
the language indicating that, "The rate of correct answers is significantly less high in the
new member states." (p. 24).

The first opinion poll carried out in January on behalf of the government showed that only 30 per cent of the population was in favor of the constitution. More than 80 per cent of the electorate indicated that they had no idea what the constitution was about, whilst two-thirds thought the European constitution would replace the Dutch constitution (2006, 89-90).

The debates played on passions and fears, with little effort to delve into the structure and meaning of the text. In the end, "hardly any of the treaty's new substance was debated during the French and Dutch referendum campaigns. The absence of a well-focused discussion only compounded the effect of the potent misrepresentation that surrounded the text from the beginning" (Cohen-Tanugi 2005, 56).

The second misunderstanding was centered more on how the process took place than on the document itself. One of the core purposes for enacting a constitution was to address the concept of a "democratic deficit" that had emerged from the Danish rejection of the Maastricht Treaty in 1992.[14] There were high expectations that the process of constitution-making would bring in

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[14] The democratic deficit has also been termed a "legitimacy gap." The gap has been defined as the popular perception that EU government lacks accountability and responsiveness. Critics contend that each successive treaty has pushed power away from democratically elected national governments and towards supra-national institutions and bureaucracies far removed from democratic accountability.

The European Union continues to struggle with finding the proper balance between centralized and coordinated power in Brussels and national sovereignty within the member states. During the ratification debates over the U.S. Constitution, great care was taken to ensure the states that their sovereignty would not be jeopardized. The Supremacy Clause was balanced by the enumerated powers reserved to the states in Article I, Section 9, and by the later inclusion of the Tenth Amendment. The text of the American Constitution clearly marked out the scope and limits of the new government's power in a way that the EU Constitution's treatment of "subsidiarity" did not. For a further discussion comparing the two documents, see my earlier essay in this Journal, Vol. 33 2005, pp. 1—38. For an informative roundtable on the question of democratic legitimacy in the wake of the no votes, see Moravcsik, Andrew. 2005. "Europe Without Illusions." *Prospect.* Issue 112. July. pp. 22-26.

diverse voices from across the political, cultural and geographical spectrum, and would symbolize a new phase of democratic openness within the EU. Jo Shaw noted

> Since its creation was first announced in December of 2001 at the Laeken European Council meeting, very substantial expectations have been invested in the Convention on the Future of the Union by many observers of the European integration process. Perhaps it could finally address the yawning legitimacy gap that appears to have opened up in European public affairs since the time of the Treaty of Maastricht, leading to a widespread alienation between the activities of the European institutions and those whom they are meant—like any public bodies—to serve, that is, the citizens and residents of the member states (2003).

Leaders hoped that the inclusiveness of the Convention and an array of communications strategies (the Convention had its own dedicated website with daily updates) would begin to address the question of democratic legitimacy. For the vast majority of Europeans, they didn't. It was then hoped that the ratification process would create public dialogue and cause individual citizens and interest groups to delve into the specific provisions of the document. By early 2005 and the opening salvos of the French and Dutch battles for their respective referendum votes, there was concern that the democratic process would yield an ironic result: the very democratic process that the framers hoped to bring about through the creation of the constitution would occasion its downfall.[15] In his May 2000 speech at Humboldt Uni-

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[15] A number of scholars have noted the irony that the democratic process, through the referendum, would be the agent whereby the Constitution would fall. For Whitman, "It is ironic that the Treaty Establishing a Constitution for Europe should have been called into question by the citizens of the EU member states, as one of the original purposes envisaged for the treaty was to bring the EU and its institutions closer to those citizens." See Note continues

versity calling for a constitution, Germany's foreign minister, Joschka Fisher, warned

> [T]his process of European integration that is now being called into question by many people; it is viewed as a bureaucratic affair run by a faceless, soulless Eurocracy in Brussels—at best boring, at worst dangerous...

> Europe is not a new continent, so the criticism goes, but full of different peoples, cultures, languages and histories. The nation-states are realities that cannot simply be erased, and the more globalization and Europeanization create superstructures and anonymous actors remote from their citizens, the more the people will cling on to the nation-states that give them comfort and security...

> That is why it would be an irreparable mistake in the construction of Europe if one were to try to complete political integration against the existing national institutions and traditions rather than by involving them. Any such endeavor would be doomed to failure by the historical and cultural environment in Europe (Nelsen and Stubb 2003, 70-75).

Despite an extended and intensive effort, the proponents of the new constitution could not overcome the perception that the draft text threatened "existing national institutions and traditions rather than by involving them." In both France and the Netherlands, the fear of losing sovereignty and autonomy made the cost of ratification high and the cost of rejection low. In each country, the threats to existing benefits and arrangements were clear, while the potential benefits to further integration were not. Fisher's warning proved to be a prescient one.

Whitman, Richard. "No and After: Options for Europe." *International Affairs.* Vol. 81, No. 4. p. 673.

These issues of size, complexity and accessibility stand in stark contrast to the American experience. The Philadelphia Convention produced a spare, 7000-word text that contained both enumeration and detail (as seen in the Article I, Section 8 powers granted to Congress) and ambiguity (as seen in the power and role of the judicial branch described in Article III). For the most part, it was a structuring document that sought to remedy the shortcomings of the Articles of Confederation and be acceptable to the cluster of audiences awaiting it in the state ratifying conventions. Rather than touch off debate about what the document said, the months following the close of the Philadelphia Convention focused on what the text meant. There was no need to wallow through 200-plus pages of complex, and sometimes conflicting verbiage, wondering how the various guarantees and provisions would mesh. While many other factors come into play when comparing the American and European ratification processes, the size and complexity of the European text and the implications of those factors cannot be ignored. As one commentator quipped, "The U.S. Constitution of 1787 is short, lucid, reassuringly specific and yet usefully vague" (Garfinkiel 2005, 45). In comparison, the American experience largely lacked the "Rorschach test" quality that was so clearly seen in the Spanish, French and Dutch referenda. In America, the debate focused on the text, and not on what various audiences and groups "saw" hovering over the text. As Bernard Bailyn describes,

> The initial publication of the Constitution on September 17, 1787, and Congress's call for the states to vote on ratification touched off one of the most extensive public debates on constitutionalism and on political principles ever recorded. The entire political nation was galvanized in the debate. Literally thousands of people, in this nation of approximately one million eligible voters, participated in one way or an-

other. There were some fifteen hundred official delegates to the twelve state ratifying conventions, where every section, every clause, and every phrase of the Constitution was raked over. There was a multitude of newspaper commentaries, sermons, letters, broadsides and personal debates on the Constitution; they turned up in even the most remote corners of the nation (2003, 107).

Despite the claim that "the text of the Constitution for Europe is to a far greater extent the result of codification and consolidation of existing EU and EC law principles than of institutional change" (Ziller 2005, 251), the ratification process in Europe saw the constitution more as symbol than as substance. How else can the French vote be explained? Opponents to the text from opposite ends of the ideological spectrum could unite, play upon the public's lack of knowledge about the text, and shift the focus of debate. Cohen-Tanugi explains,

A clever, ad hoc opposition—to the treaty, European integration, EU enlargement, the market economy, globalization, and some national governments—took advantage of the public's mixed feelings about Europe by obscuring the basic fact that the constitutional convention's rational and well-intentioned central objective had been to address some of the EU's shortcomings and distill its main tenets into a single comprehensive and streamlined document (2005, 57).

In the end, the EU constitution failed in large part because its provisions were seen abstractly and symbolically rather than concretely and substantively. For the newly acceded nations of Eastern Europe, the document represented freedom, democracy and economic opportunity. For the Spaniards, it was symbolic of the significant economic gains that the country has made over the past fifteen years. But for the core founding countries— France and the Netherlands—it was seen (by a definitive majority of voters) as a departure from, and a threat to, the social con-

tract, economic security and national autonomy of each. Substantive debate, such as what was witnessed across the American states in the 1780s, was undermined and outwitted by a determined opposition. One of the EU's most cogent observers conceded

> One is forced to conclude that the constitution became controversial not because its content was objectionable, but because the content was so innocuous that citizens saw a chance to cast an inexpensive protest vote... So it was not the substance of the emerging constitutional settlement that triggered opposition. The objectionable aspect was its form: an idealistic constitution (Moravcsik 2005, 56-57).

Any future attempts to reconsider the European constitution will have to confront the size, scope and complexity of the original draft, and perhaps take into account the history and dynamics of the American ratification process. A shorter, more concise document may allow readers to comprehensively grasp its contents and to better focus on its substantive provisions.

PROCESS AND POLITICS: WHEN? HOW? HOW MANY?

In looking for reasons why the Constitution of the Europe failed, attention must be turned to the procedural choices made by the architects of the document. Care must be taken when making comparisons and drawing contrasts with the American experience—here more than in other sections. Paul Magnette's warning needs to be revisited and respected (2003). However, a distinction can be made between differences which prevent meaningful comparisons and those that provide and invite the same.

The Strategy of Sequence. The proponents of the new constitution hoped to build momentum by securing a number of enthusiastic "yes" votes at the beginning. The parliaments of

Lithuania and Hungary voted in late 2004 and approved the constitution (as did every parliamentary vote) by wide margins.[16] Slovenia's parliament followed in early February. The Spanish referendum was in late February. The Spanish vote became a matter of some speculation, not because the direction of the vote was in doubt, but because Spanish law mandated that a referendum would only be binding if 40% of the eligible electorate voted. A public relations blitz, which included high-profile visits from the French and German heads of state and the endorsements of a host of public figures and celebrities, garnered just enough interest and response by voting day. A slight percentage above the mandated minimum, 42%, came out to vote and 77% of those voted in favor of the constitution. After the Spanish referendum, the parliaments of Italy, Greece, Slovakia and Austria ratified the document by wide to near-unanimous margins. By the end of May, eight nations had ratified the constitution with the lowest parliamentary majority approving by 81%.[17] The hope was that the momentum of the earlier votes would influence the closer and, in some instances, more strategically important, referenda.

Emboldened by the outcome in Spain, the Dutch government fixed its own referendum for June 1st, and France moved its vote forward from June to May. Each hoped to benefit from the

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[16] The Lithuanian parliament voted 84-4 to ratify the constitution. The Hungarian parliament's vote was 304-9. A website for tracking ratification is sponsored by the BBC. For a rundown on each country's status, see "EU Constitution: Where member states stand" at http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/europe/395 4327.stm.

[17] It should be noted that the German *Bundesrat* surprised most observers by voting to ratify the constitution on May 27, 2005, just 48 hours before the French referendum. The *Bundestag* had voted its approval on May 12. This was widely seen as an effort to give the French a symbol of solidarity and provide one final motivational push. However, the German bill to ratify has never been signed by President Horst Koehler, and Germany remains in the "nearly ratified" category.

added to the momentum provided by the earlier parliamentary votes. Might more yes votes and more momentum changed the outcome in France and/or the Netherlands? The final section of this paper notes that, as of January 2007, seven countries have ratified the constitution since the French and Dutch votes. Perhaps more pressure could have been brought to bear on the German and Belgian governments to sign off on the approval from their parliaments. Add those seven yes votes to the mix, and a majority of the member states would have given approval to the text. What can now be seen as a tactical decision on the part of France and the Netherlands—hurrying to take advantage of the Spanish yes vote—may have been the right idea at the wrong time. However, leaders from each country saw an erosion of support for ratification—a trend moving counter to the accumulation of more yes votes from other member states. The "frontloading" of members strongly in favor of the constitution paralleled that of the early ratification debates in America. The outcome did not.

Big States, Small States. What is also true of both processes is that, while all ratifying votes were important, some were essential. In the American instance, certain states had to ratify if the new constitution (and the new nation that it constituted) was to succeed. Virginia, Pennsylvania, Massachusetts and New York were the bell weather states. The first three states held 45% of the free population. New York was of signal geographical importance—its territory could split the union into two, noncontiguous sections. If one or more of these states voted down the constitution, the future of "a more perfect union" envisioned in the Preamble was in serious doubt.

Likewise, the votes in France, Germany, Italy and the United Kingdom were equally necessary. An impressive 57% of the population and 66% of the economic productivity came from these four nations. The Italian and German votes were handled in

accumulation of yes votes and to ride Spain's momentum. Public opinion polls indicated that the Dutch were growing steadily more disenchanted over immigration and with the country's status as the largest net per capita contributor to the EU budget. In France, polls showed that the yes votes had fallen from 69% to 61% in the first three months of 2005 (Crumley 2005). "The Dutch wanted to set an early referendum date before resentment grows too high," explained Dominique Reynie, a European affairs expert at Paris' Foundation of Political Science. "The French want to hold theirs first because the risk of a no vote in the Netherlands is greater and the probable yes vote in France will increase pressure on the Dutch not to drop the ball. They hope each successive passage will make it harder for voters to break ranks and reject the text" (in Crumley 2005, 40).

There is an intriguing parallel here with the state ratifying conventions that debated and voted on the US Constitution. The first five state conventions' votes were quickly taken and overwhelming positive, with three conventions voting unanimously to ratify. Between December 7, 1787 and January 8, 1788, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut placed themselves in the "yes" column. But these were the easy votes. With only one exception, Maryland, all of the succeeding ratification votes would be closely contested and the winning margins would be considerably smaller.[18]

While hindsight always provides a degree of clarity and confidence, it can be said that the proponents of the new constitution had the correct strategy but may have failed to get the timing right. The Spanish referendum was a confidence builder, and it

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[18] It should also be noted that North Carolina, the 12th state to vote, rejected ratification by a wide margin (184-84). It would take another fifteen months before North Carolina's convention would reconvene, reconsider their position, and vote to ratify. A chart showing the state convention votes can be seen in Farber, Daniel A. and Suzanna Sherry. 1990. *A History of the American Constitution*. St. Paul: West Publishing. p. 216.

the respective parliaments. The French and British governments resisted, but eventually gave into, popular approval via the referendum. While such can only be surmised, a no vote from Malta and Slovenia would not have the impact of a no from France or Germany. Despite the unanimous vote requirement (discussed below), all votes are not created equal. A single no from a newly acceded Eastern state against 24 yes votes would likely have occasioned a re-vote or the possibility of exclusion from the rest of the EU going forward under the new constitution. But the no votes in two of the six founding nations of the EU, and the wide margin by which they prevailed, could not be countered, dismissed or interpreted away.

E Pluribus Unum? The most telling factor in Europe's ratification process was the requirement that all member states say yes. As the Convention on the Future of Europe began to consider the possibility that the constitutional treaty would replace, rather than be incorporated into the existing legal framework, questions arose concerning the risk to the continuity of the acquis communautaire.[19] Along with this issue arose the question of how the new constitutional treaty would be ratified and enforced. One scholar observing the Convention in late 2002 reported that,

> This discussion focused on the possibility that the Constitutional Treaty might enter into force while it has not been ratified by every Member State. In a working document outlining a draft Constitution of the European Union, the European Commission underlined that under current Treaty rules, one Member State Could block the entry into force of the new Constitutional Treaty. To

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[19] The entire body of European laws is known as the *acquis communautaire*. This includes all the treaties, regulations and directives passed by the European institutions as well as judgments laid down by the Court of Justice. The term is most often used in connection with preparations by candidate countries to join the union.

avoid such a situation, the Commission working docu-
ment proposed that Member States failing to ratify the
Constitutional Treaty would be deemed to withdraw
from the Union. While Convention President Giscard
had spoken in a similar vein, the proposal was immedi-
ately rejected by the representative of the UK govern-
ment, who argued that Member States could not be held
'at gunpoint' like that (Devuyst 2003, 36).

The Convention considered, but rejected, changes to the
standing rules. This meant that the locus of power remained with
the individual member state and not with the European Union as
a collective whole. Each country was a veto of one, at least on
paper. This brought about a difficult arrangement. The final draft
document contained so many protections, regulations and provi-
sions that there was something for virtually everyone to oppose.
And, the unanimous vote requirement caused many observers to
doubt that the document could pass unscathed through 25 sepa-
rate votes. From legal scholars who insisted that the constitution
must be ratified to those who did not think that failure would
bring about a crisis, most expressed some doubt or reservation
about the chance for success. Why? The unanimity requirement.
Carlos Closa concluded, "In a 12 or 15 member community,
unanimity (costly as it was) allowed the accommodation of even
antagonistic visions through strenuous efforts. With 25 members,
unanimity seems a recipe for disintegration" (Closa 2005, 5).

Consider the American ratification process in the late 1780s.
The US Constitution called for a supermajority (67% or 9/13) of
the states to ratify the document before it became the new charter
of government. The Americans had faced the same dilemma as
the EU Convention did in late 2002. Under the Articles of Con-
federation, amendments required a unanimous vote. During the
time that the Articles were in force, no amendments came close

to passing. Boylan's earlier prior study of the US and EU consti-
tutional framing concluded,

> The framers of the [US] Constitution looked back on [the
> Articles'] shortcomings as they developed the procedures
> for ratifying the document... This framework still re-
> quired a substantial amount of agreement on the part of
> the states, but eliminated the threat of an absolute veto
> from any individual state. As a result, each state ratifying
> convention had to face the possibility that it could reject
> the new government and that it would still be brought
> into being by the other states. The ability to veto and
> thwart the process was replaced by the potential to reject
> and be left as an outcast. While many of the state debates
> were heated and the final tally close, the whole process
> took less than one year and the overall vote was, eventu-
> ally, unanimous. Much of this success can be linked to
> the rules set for ratification (2005, 30).

How might the EU process have changed with a supermajority
requirement for ratification? France could have still played the
role of spoiler, and a crisis would have ensued as the EU could
not effectively operate without France. But it can be surmised
that the other nations would have continued the process, to de-
termine if whatever supermajority requirement agreed upon was,
in fact, met.

This brings up an interesting "what if." What if the EU con-
stitution mandated a supermajority requirement for ratification—
say, 21 of 25 yes votes were needed to bring the document into
force. What if the French and Dutch votes were followed by a
rejection from the Czech Republic, but all other members voted
to ratify. What then? The "glass half empty" view would wonder
if the EU could continue to further integrate without the three
rejecting countries. However, the "glass half full" camp could
counter with the question of whether those three could, or would
want to, make it alone without the European Union. Rules de-

termine outcomes (witness, for example the institution of the Electoral College in the United States and the outcome of the 2000 presidential elections) and procedural choices confer power. The unanimity requirement enabled French and Dutch votes to stop ratification in its tracks. A supermajority requirement could have allowed the process to finish, and may have left the rejecting members with a strong motivation to reconsider and to ratify.

Without a unanimity requirement, the rejecting countries would have to confront the rather potent symbolism of being left behind by 22 member states under a new constitution. There is a vast difference between a unanimity requirement that allows lone dissenters to retain the present arrangement and a supermajority requirement that effectively votes lone dissenters out of membership. In the early history of the new American republic, North Carolina and Rhode Island were left to consider the implications of going it alone after the 11 other states voted to ratify. In that case, the survival of a new nation was at stake. Today, the power, prestige and influence of Europe in an increasingly globalized and competitive world system arguably hinges upon its ability to further integrate. Thus, any reconsideration of an EU constitution—in whatever form it takes—will have to confront the implications of procedure, and seriously consider revising the rules away from the "veto of one" format for ratification.

PROSPECTS AND POSSIBILITIES: WHAT NEEDS TO CHANGE

Though the word "failed" figures prominently in the title of this essay, it is a bit misleading. As of this writing, the constitutional treaty is in limbo, as the European Union announced, and then extended, a "period of reflection." After the French and Dutch no votes, European leaders were faced with two conflicting trends. The "Euroskeptics" hailed the rejection of the document and claimed to have the power, influence and momentum

to make permanent its defeat. Yet, other governments, most no-
tably Luxembourg, were distressed at the sudden call to curtail
further ratifying votes. In response, the European Council sought
a form of procedural compromise. As one observer noted,

> Faced with these conflicting tendencies, the European
> Council took not one decision but two: in effect, both to
> continue with the ratification process despite the two re-
> jections (but without the original deadline of October
> 2006) and, at the same time, to engage in a year's reflec-
> tion, with no specified purpose, about the future of
> Europe. Commentators, both in the media and in the
> European Parliament, were unsympathetic. Nobody
> could satisfactorily explain how it is possible to simulta-
> neously both to ratify and to reflect (Duff 2005, 4).

In June 2005, parliaments in Latvia, Cyprus and Malta ratified
the document as scheduled. Luxembourg held a referendum in
mid-July. The parliaments of Belgium and Germany have al-
ready voted to ratify and final disposition awaits final signatures
and formalities. Estonia and Finland ratified the document in
mid-2006. Seven countries have put ratification voting on in-
definite hold.

A number of commentators have observed that there is sig-
nificance to the post-France/Netherlands votes, as a majority of
the member states have now approved the document. The fact
remains, however, that many of the seven holdout members are
likely no votes. This makes it unlikely that a meaningful super-
majority of yes votes will be obtained in the next year or so. A
key provision in the constitution itself calls for a meeting of EU
leaders in the event that four-fifths of the member states have
ratified and the other members have not within two years of its

signature.[20] Given the fact that most of the prominent EU leaders want little to no change in the constitutional text, they consider this threshold to be important. For them, reaching 20 ratification votes will mean that a supermajority will have ratified the text in its present form. Opponents of the Constitution have been critical of using this provision to try to revive what is, in their eyes, a dead letter.

A working conclusion is that the current constitutional text cannot and will not be ratified by all (or nearly all) of the current EU member states even after the extended period of reflection has passed. As a consequence of this, some revision of the text, the procedures for ratification or both need to be considered. The author is very aware that these suggestions for change would have been considered far-fetched at best before the season of ratification began. At this point, it is impossible to predict which, if any, of these options will receive serious consideration. Yet, two uncomfortable and unavoidable facts remain. First, the problems and challenges that brought about the Convention on the Future of Europe have not disappeared. The economic challenges of globalization, the questions surrounding enlargement and the ongoing need for more effective and streamlined decision mak-

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[20] The original deadline for ratification was November, 2006. Since four-fifths of the member states had not ratified at that point, the period of reflection (and, by implication, the deadline) was extended. Declaration 30 to the Constitutional Treaty provides that the European Council can consider what next steps may be taken with the constitution al treaty if the 4/5 mark is reached. However, it also built into the text (Article IV-445.2) that unanimous agreement would still be needed for any change to the text, which would place serious limits on the Council's ability to propose alternatives. See, in this regard, Kurpas, Sebastian and Justus Schonlau. 2006. "Deadlock Avoided, But Sense of Mission Lost? The Enlarged EU and its Uncertain Constitution." *CEPS Policy Brief.* Centre for European Policy Studies. No. 92. February. pp. 1-9.

Carlos Closa has asserted that Declaration 30 implicitly commits national governments to take some action—referendum, parliamentary vote, or both—in order to verify whether 20 or more members will ratify the Constitution, and then take appropriate action. Closa, p. 2.

ing all need to be addressed. Second, two core member states have rejected the constitution by substantial margins. The lesson gained from Ireland after its rejection of the Nice treaty in 1992 simply will not do here. In Ireland's case, a short pause, a minor reworking of the text and a re-vote worked for a small, single rejection.[21] However, few, if any, observers see this pattern as applicable to France and the Netherlands. So, in short, something needs to happen, but not a recycling of the current text.[22] To accommodate realities, the author offers the following possibilities:

(1) Form a Council on Revision to shorten, streamline and simplify the document. This is not a proposal to drastically change the substance of the constitution. Rather, an effort to simplify the text would be a necessary first step toward making its provisions more accessible and more understandable to the European citizenry. I am cautioned by the scene in the film *Amadeus*, where Emperor Joseph II, the superficial and self-absorbed ruler who could not tell the difference between a great opera and a mediocre one, complained that Mozart's music had "too many notes." At the risk of voicing a complaint of "too many words" with little sound constitutional theory to back the

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[21] Whitman surveys the key reasons why responses to past referendum no votes do not offer guidance for the present situation. He points to the importance of the French and Dutch positions as founding members of the EU, the high turnouts for the vote (nearly double that of the Irish turnout for the Treaty of Nice referendum), and the difficulty in determining which specific parts of the Constitution occasioned the no votes. For a more detailed treatment, see Whitman, pp. 681-682.

[22] Of all the proposals following the French and Dutch vote, most agree that the text cannot be resubmitted to voters in France and the Netherlands (following a "cooling off" period of an appropriate length) so that they can "get it right" on the second go-round. Nor can either country entertain a procedural change whereby popular consent is bypassed in favor of a safer, more predictable, parliamentary vote. According to one scholar, "To suggest that the genie of public opinion can be put back into the bottle, and replaced once again by elite-led, low-key, technocratic management of EU affairs is not only politically unrealistic but also democratically disdainful" (de Burca 2006, 7).

claim, evidence from the ratification debates indicate needed pruning and tightening.

A shorter, more coherent document is a document that can be understood by its readers and critics. And this appears to be a key element to securing approval. As the ratification process began in late 2004, it was reported that polling across Europe had shown that there was a widespread lack of knowledge about and interest in the constitution.[23] In one study, "a mere 11% of respondents said they knew what the constitution contains; 56% said they knew little; and 33% said they had never even heard of it." The poll went on to discover that "[t]he sort of people who take the time to familiarize themselves with the document are also the sort who support it—75% of the respondents who knew its contents said they would vote for it. Only 22% of those who have never heard of it are in favor" (Crumley 2005, 40).

If debate is to move from symbol to substance, the text will need to be made more accessible and more cohesive. Most scholars admit that the document could be shortened. It is hard to deny the claim made on a campaign poster for French right-wing politician Phillippe de Villiers that, with a text of 448 articles, "we all have a reason to say no" (in Dehousse 2006, 160). The question is how and where such shortening occurs.

(2) Mandate a uniform ratification mechanism for all member states that would reflect popular will and address the "legitimacy gap." Ratifying conventions, anyone? Perhaps the European Union can tear a page out from the American handbook and write a more specific ratifying procedure into the document that would dictate a particular format. Further, let that format draw from the strengths of both parliamentary debate and

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[23] See Eurobarometer findings from the November, 2004 field study at: http://ec.europa.eu/public_opinion/archives/ebs/ebs214_en_first.pdf. Also, see conclusions from June, 2004 Eurobarometer poll, p. 41, note 13.

popular discourse. Ratifying conventions similar to the ones held by the nascent American states could provide an intriguing and innovative alternative to the mish-mash of referenda, parliamentary votes and combination of the two exercised by the EU member states last year (Warleigh 2003).[24] The composition of the participants would reflect representation across the cultural, political and social spectrum and would address the ongoing complaint that the framing of the constitution was dominated by bureaucrats and elites. This would have to be a major compromise hammered out by the revision committee suggested above. It would supersede constitutional mandates in a number of countries, which could lead to some political conflicts and constitutional challenges.[25] But, as a one-time event, it could rekindle interest and focus attention on the core questions and challenges that face the European Union at this pivotal time in its existence. Andrew Duff, a member of the European Parliament, identifies the connection between a shorter, more streamlined constitution and the process of beginning a fresh round of ratification votes.

> One problem will be to persuade the countries that have already ratified the existing constitution to go through the process all over again with an amended text. The new

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[24] Alex Warleigh has suggested reconvening a constitutional convention that would draft two potential constitutions. One would be an intergovernmental model, with a greater focus on the sovereign powers of the member states. Here, each member would hold considerable power to both formulate and limit EU policies. The other model would be a unitary one, in which EU leaders would be chosen directly from the overall European electorate. The two draft documents would then be subject to pan-European referenda. If one model was favored by a clear majority, member states that had voted for the other model would hold a second vote to determine whether to stay in the EU. See details of Warleigh's plan in Glenn, David. 2005. "Making the Case for a United States of Europe." *Chronicle of Higher Education.* Vol. 51, Issue 44. pp. A12-A14.

[25] Germany, for example, mandates a parliamentary vote for the approval of treaties. This kept the German prime minister from having to confront the possibility of a referendum in 2005, as the leaders of France and Great Britain chose to. Constitutional provisions such as these would complicate the call for a separate ratifying convention.

version will clearly have to be much more attractive to the general public if governments are to dare to seek a second round of ratification and campaign hard for it. But that in itself is an argument for making the new version more obviously responsive to public criticism and to the real needs for better policies and decision-making procedures in Brussels (Duff 2005).

Evaluations of why the ratification failed can be placed in two broad and conflicting camps. One sees the defeat as a serious setback that was occasioned by ignorance. Voters rejected a move towards integration that was clearly in their best interests. For supporters of the constitution, the season of reflection should be used to educate the citizens in the direction of reconsideration and ratification. The second camp sees the ratification failure as "a chance to review the model of European integration, to welcome the fact that at least some of the people of Europe have finally had a say in the matter and to take their views into account in deciding where to go next" (Dale 2005, 4). This camp would see the needed process of education pointed at leaders, not citizens—addressing the democratic deficit by listening to what the citizenry actually favors and opposes.

The ratifying convention format coupled with a more accessible constitutional text could potentially carve out a middle ground between these two conflicting perspectives.

(3) Substitute a supermajority for the unanimous vote requirement. This is the easiest and perhaps most effective adaptation that can be made, though it would be subject to similar complications as surveyed above (Closa 2005).[26] Again, a

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[26] Closa asserts that a "mini-Intergovernmental Conference" could reform Article 48 of the Treaty of European Union and remove the unanimity requirement. At the same time, Article 477 of the Constitution (stipulating a unanimous vote for its entering into force) would have to be removed. Unfortunately, "the resulting Constitution would technically be a new one, (and) it would require a new round of ratification"(Closa 2005, 3).

change in the rules can have an impact upon the outcome. The diversity of opinion among the current EU members virtually ensures that some major constitutional provision will alienate some member states. One assessment concluded that

> Different counties have problems with different aspects of the text. While many people in France object to the treaty because it does not go far enough toward a harmo-nized European social policy, the British and the Poles are against any further social policy integration. The French find serious fault with the treaty's failure to abol-ish the national veto on tax policy, whereas any reference to taxation in the constitution is anathema to the UK and Ireland (Spinant 2005, 4).

Earlier, member states, especially Britain, strenuously argued against changing unanimous ratification. The outcome of the French and Dutch votes may have softened this stance.

As of this writing, the treaty arrangement has not caused enough complications or discomfort to push some member states to change their stance on the unanimous vote requirement.[27] It may take some further economic problems, a keener perception of Europe's eroding power base in global affairs, a security cri-sis, or an emerging post-constitutional dialogue that looks to this procedural requirement to answer "what went wrong." In what-ever way it does happen, it is almost mandatory that this re-quirement changes before any reconsideration of the constitution—in any form—has a chance at success.

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[27] This is not to say that there are no calls for reform. In February 2006, British Prime Minister Tony Blair said, "I accept we will need to return to the issues around the Euro-pean Constitution. A European Union of 25 cannot function properly with today's rules of governance. Having spent 6 months as EU President, I am a good witness to that (in Baldwin 2006, 14)."Baldwin concludes that a "tipping point" will be reached in the near future and a broad consensus will emerge that institutional reform is imperative (p. 14).

CONCLUSIONS

The assessment of the ratification of the EU constitution and the suggestions for the future are pointedly and unavoidably American in perspective. It may come too close to the line where comparative method lapses into constitutional chauvinism. It could be charged that someone who spent a full year visiting in most every EU country should be able to do better than simply graft the American experience of centuries past onto to European experiment. The author is not aware of these problems when comparing the two ventures in constitution-making.

And yet, somewhere along the way, the EU constitution failed. It was not scripted to do so. The motives were good, the time and effort expended over 16 months was extraordinary and the finished product did what it was intended to do. But other choices, dealing with the size and scope of the text and the procedures for its ratification, scuttled the project. If this is a project worth reviving and a goal worth achieving, some changes and adaptations will need to be made. The square peg of the EU text does not need to be jammed into the round hole of the American experience. However, guidance may be gained from looking at an American Constitution's framing, ratification and endurance as a viable and workable charter of government. A balance can be found between using the American model as a blueprint and ignoring it completely. This study identifies selected areas that may inform and assist future efforts to secure a Constitution for the European Union.

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