

After “Non” and “Nee”: Plans B, C, and D for the European Constitution

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The proposed European Constitution, which was just voted down in France and the Netherlands, is technically a treaty containing far-reaching amendments to the present set of treaties governing the European Union. Article 48 of the EU treaty text currently in force specifies that any such amendments first be unanimously approved by the governments of the member states within an Inter-Governmental Conference framework and then ratified by each country. The first, intergovernmental step of ratification was completed October 29, 2004.

What has run aground now with the French and Dutch referenda is the second step—required, unanimous ratification by European member states. The likely halt to efforts to ratify the current document will force a reconsideration of the European Union’s legal alternatives for governance.

The treaty on the proposed Constitution is mute on the point of nonratification, since any such provision would not be applicable until the treaty was ratified. However, Declaration 30, which was appended to the Constitution, states:

The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.

The precedent for dealing with failure to ratify a constitutional treaty is both thin and only vaguely relevant to today’s situation. Historically, the European Council (made up of heads of member state governments) has been the forum for discussion after failed ratification. The Treaty of Maastricht (1992) and the Treaty of Nice (2002) are the two examples: Denmark and Ireland, respectively, failed to ratify the treaties. In both cases, the particular countries ratified the treaties in second referenda after the European Council allowed the adoption of strictly nonbinding but targeted declaratory measures intended to make the treaties more acceptable to the electorate in each specific country.

Such targeted bribes or opt-outs are of limited relevance to the current state of affairs. For example, the Danish rejection was founded upon the very specific and arguably narrow issue of monetary sovereignty. Once a waiver from the accession to European Monetary Union (EMU) was obtained, the Danish population voted for Maastricht by a significant margin. French and Dutch popular opposition to the European Constitution, on the contrary, is not founded upon a specific issue or a narrow concern. Instead, it has coalesced in part around general arguments concerning declining national sovereignty, lack of transparency, and the erosion of national social models. General dissatisfaction with current governments, economic performance, and the management of enlargement

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have also played a role. In this context, appending a country- or issue-specific declaration is unlikely to allay the prevailing concerns and criticisms.

Another possible outcome of failure to ratify would be a decision to hold a second referendum without any amendments, in hopes that fears of the “no” vote’s consequences would shift voter turnout and opinion. There are no explicit restrictions in the Maastricht, Amsterdam, or Nice treaties to the number of times a country may attempt to approve a proposed constitution. The decision to hold a second round would therefore be a political one. Yet in the absence of a sign that political elites are responsive to popular concerns, it is difficult to see how a second round would carry the day.

Other scenarios have been considered and discussed, both in the popular press and the academia. The main options are as follows (in ascending order of legal complexity):

- **Accept the status quo.** This default option would leave in place the present institutional framework in the treaties of Nice, Amsterdam, and Maastricht. While far from disastrous, the desirability of the status quo is not evident. There are reasons that a new constitution was proposed: in particular to address some of the problems with structure, as membership goes from 15 to 25. Moreover, certain provisions in the Nice treaty on qualified majority voting have only become operational since November 2004. This, together with the still relatively recent enlargement, makes the legal status quo less operationally familiar than one may at first conclude.
- **Append further documents to the treaty to address country-specific concerns—an opportunity provided for implicitly by Declaration 30.** Second-round referenda would then be undertaken. While legally the most straightforward, politically this would likely be ineffective given the nature of the opposition.
- **Convene a convention of an Inter-Governmental Conference (IGC) to change the Constitutional Treaty.** This would be a “back to the drawing board” decision. Judging by the length of time it took to produce and the fractious nature of the process, another European Constitution would only be a medium-term prospect. It is conceivable that a limited IGC could be convened solely to introduce greater flexibility to the constitutional ratification process (specifically, relaxing Article 48 of the present European treaties, which deals with amendments). Of course, there is no reason to expect that all heads of state would accept the result, or even if they did, that it would then be successfully adopted across all the 25 member states. As with any constitutional convention, the initially narrow agenda might be opened up to more controversial proposals.
- **Introduce aspects of the Constitutional Treaty by measures short of treaty amendment.** While this would not be without precedent, given the ambitious agenda of the new Constitution, attempts to implement it within the present structure would surely be both slow and piecemeal at best.
 - ***Informal application of the institutional or substantive rules contained in the draft Constitution.*** The recent establishment of the European Defense Agency, for example, anticipated the institutional proposal of the new Constitution, adopting it within the current legal framework. Similarly, the Employment Policy Title of the Treaty of Amsterdam was implemented through numerous European Council processes from

mid-1990s onward, ahead of that treaty's formal adoption in 1999. The European Court of Justice (ECJ) also has contributed to incremental constitutional change—for example, by eroding the “pillar” structure, which separates security and economic cooperation at the EU level. Further ECJ activism on this front may contribute to greater merging of the present pillars, which was an explicit goal of the proposed European Constitution.

- ***Adoption of the framework for enhanced cooperation, set up under the Amsterdam Treaty but never used (yet).*** The framework, which has received the most attention in the popular press, allows “willing and able” states to pursue deeper integration outside the EU institutional process. It could be a legal basis for a “multispeed Europe.” However, restrictions in the Nice Treaty limit this avenue, by restricting enhanced cooperation in “areas of exclusive EU competence” as well as in areas that “affect the normal operations of the EU institutional mechanisms.” Furthermore, cooperation must involve at least eight of the member states and must not be opposed by those that are not participating (Shaw 2003). For example, the mechanism could not be used to further integrate European foreign policy decision making (a key goal of the new Constitution) because it would extend EU competencies beyond their present level and, separately, lead to vigorous opposition from some member states.
- ***More inventive use of Article 308 of the present European Treaty—what has become known as the flexibility clause.*** The clause allows for new marginal competencies to be taken up by European-level governance in the event that there is unanimous agreement at the Council of Ministers. In parallel, a “soft” legal base for certain institutional innovation may be founded through intra-institutional agreements at the level of supranational European institutions. The weakness of such proposals is that they are strongly contingent on a favorable political atmosphere.
- **Create a “two-speed” Europe through partial entry into force of the new Constitution among states that do ratify it (whether through referenda or national legislatures’ votes).** This sometimes happens in international treaties, not just in Europe, as seen with the International Criminal Court and the Kyoto Protocol.
 - The draft Constitution proposes substantial institutional and regulatory reform. ***Some countries, being party to both the present EU agreements and also to a hypothetical framework of closer cooperation, could voluntarily be bound by both.*** Such maintenance of two sets of rules, while feasible in theory, would be difficult to implement in practice.
 - ***Automatic entry into force of the Constitution after an agreed-upon quorum of states ratified it.*** The de facto legal dissolution of the previous institutions of the European Union would lead to the exclusion of the nonratifying states—effectively a “forced withdrawal.” While Giscard d’Estaing, former French president and chair of the Constitutional Convention, has threatened such an option, in legal terms it is highly dubious. Unanimous adoption of the present draft Constitution must still precede repeal of the previous European treaties. In the absence of *voluntary* withdrawal from the Union by a nonratifying state (see below), that state remains a

member of the Union and its consent is required to modify the existing rights of any EU member.

- ***Collective action by a committed inner group of member states outside the EU institutional framework, perhaps through a separate international treaty between the relevant states.*** This would represent a less wholesale approach to entry of the Constitution among a limited number of member states. The Schengen Accord on migration and border controls is the prime example of such integration, in that it was initiated outside the EU framework and in spite of vocal concerns over its incompatibility with the EU treaties. Eventually it was integrated into the Treaty of Amsterdam, notably with exceptions for the United Kingdom and Ireland and a special legal status for Denmark. This approach is limited in that it may not infringe upon any rights enjoyed by the nonparticipating member states, and therefore in practical terms it may need at least the tacit support of those states to avoid being contested.
- **Nonratifying member states could voluntarily leave the European Union, and the treaty would then automatically enter into force among the remaining members.** Some commentators have gone so far as to suggest that the final outcome of rejection of the constitution would be the fracturing of the European Union.¹ More careful analysis suggests that voluntary secession from the European Union would be far from easy or likely under the present legal framework.

Right of Voluntary Withdrawal by an EU Member State

The existing EU treaties do not contain any exit clause for a member state that wishes to withdraw from the Union. The only precedent in this connection is the withdrawal of Greenland in 1985, a change in the territorial application of the treaties that was only possible following an amendment ratified by all member states.²

In the event that a single or a small number of states wish to withdraw from the European Union before a draft treaty is ratified, the general rule of Article 54 of the Vienna Convention on the Law of Treaties could be invoked. The article permits unilateral termination of an international treaty if all its co-contracting parties agree. The Vienna Convention, however, stipulates that this provision “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination” (Article 70). In other words, a unilateral withdrawal by, say, the United Kingdom, would require a complex set of negotiations to replace the current framework of trade and political cooperation with transitional mechanisms, as well as new long-term arrangements.

Although withdrawal under Article 54 would void the European treaties’ obligations, Article 69 of the Vienna Convention states that “acts performed in good faith” before the treaties were invalidated are not annulled. Therefore, any intergovernmental agreements made with other parties to the EU

¹ “French ‘non’ would spark major EU crisis,” *Agence France Presse*, March 21, 2005.

² Commentators have pointed out that this case is *sui generis*—Greenland was not a state but a sovereign territory of a member state.

framework would still be in force and would also require a reconsideration of the nature of that relationship. For instance, the United Kingdom currently is party to a large number of bilateral defense cooperation agreements signed in the late 1990s.³ These are intertwined with the European Defense Initiative and would have to be decoupled. Other areas of such extra-treaty cooperation include patent law and civil aviation. Of course, this point is essentially moot, since the member states rejecting the constitution are France and the Netherlands, for which voluntary withdrawal from the European Union is inconceivable.

One of the innovations of the proposed Constitution is that it would introduce a voluntary withdrawal clause (Article I-60). The proposed article posits that withdrawal may take place at any time and is not tied to revisions of the Constitution or other conditions. A member state that wishes to withdraw notifies the European Council, which examines this notification. The Union then negotiates a withdrawal agreement with the state in question that sets out arrangements for its withdrawal and regulates the future relationship between this state and the Union. The Council of Ministers concludes this agreement on the part of the Union, acting by a qualified majority and after obtaining the consent of the European Parliament. The representative of the withdrawing member state may not participate in the discussions or in the vote.

The Constitution would then cease to apply to the state in question from the date laid down in the withdrawal agreement or, failing that, two years after the notification of the European Council of the wish to withdraw. The European Council may extend this period but only if acting unanimously and with the agreement of the member state concerned. This implies that the withdrawal may enter into force even if the Union has not given its consent. However, in the interim period—after the notification of intent for withdrawal but before the Union’s assent—the European Constitution would remain binding on the seceding member state.

It must be repeated, however, that the application of Article I-60 cannot occur without the proposed Constitution entering into force, and that requires the assent of any current members considering withdrawal. One could conceive of a member state that would ratify the proposed constitution in order to then voluntarily withdraw, but it is difficult to see how such an approach would be superior to trying to negotiate a treaty that better suited continued membership (or at least blocking a treaty that would make membership unpleasant). In the absence of the new treaty coming into force, the relevant secession procedure would be the politically and legally messier one outlined above.

A Comparison to US Law on Secession

The ability of individual American states to secede, unilaterally or after a mutual agreement, has been debated ever since the Philadelphia Constitutional Convention in 1787. The discussion pivots on the interpretation of the origin of the US Constitution—whether it is a voluntary treaty between sovereign states or a contract entered into by these states, which thereby relinquished specific sovereign rights.

Secessionists in America have argued that Article VII of the US Constitution states that the document only entered into force through the ratification of nine states, and it was enforceable only in the states that have ratified it. Consequently, as Congress effectively derives its power from the voluntary act of

³ Details on http://www.mod.uk/issues/cooperation/uk_french.htm

consent by the individual states, it is within the states' rights to unilaterally withdraw that consent. A further line of argument posits that the original debates at the Philadelphia Convention presumed the right of secession and the Constitution's silence on the issue is not accidental. In his book *Daniel Webster* (1883), Sen. Henry Cabot Lodge wrote, "It is safe to say that there was not a man in the country, from Washington and Hamilton to Clinton and Mason, who did not regard the new system as an experiment from which each and every State had a right to peaceably withdraw."

In reply, Abraham Lincoln's First Inaugural Address in 1861 put forth the three important arguments against unilateral secession. Lincoln asserted that the fundamental law of every national government rejects the idea of its own termination. And indeed, as of 1861, no national constitutions expressly provided for their own dissolution. He also went on to deny that the Union was a mere voluntary association—and claimed that even if it were, ordinary principles of contract law would bar unilateral secession. Lincoln noted that while one party can breach a contract unilaterally, the consent of *all* parties is required to *rescind* a contract. Finally, Lincoln claimed that the Union was older than the Constitution. In his view, it dated as far back as the Articles of Association of 1774, when the signatory parties were all colonies of England.

Most legal commentators believe that the American constitutional debate was decided once and for all by the 1868 Supreme Court ruling *Texas v. White* (if not by the Civil War). The Supreme Court upheld Lincoln's general approach, ruling that "the Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States." Subsequently, states entering the Union gave up important attributes of sovereignty in doing so. In the words of Michael Dorf (2004), "The door of the Union swings in but not out."

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