

The Constitutional Success of Ratification Failure

*By Maria Cahill**

A. Introduction

The momentum behind the Constitutional Convention and the Constitutional Treaty was not that Brussels realised that the peoples of Europe were crying out for the drafting of a beautiful text, which they could take to their hearts as their very own constitution. That much, at least, has always been fairly clear. Of course, this should not present an impenetrable barrier to constitutional endeavour, because the constitutional possibility is the possibility that is generated by the effort of founding community in the honouring of community, honouring community in the recognition of community, recognising community in the identification of community, and identifying community in the founding of community. Every constitutional text is “guilty” of grasping and writing down its declarative commitment in this way. At two levels, then, the peculiarity of the European situation comes to light. First, this very fact that the people did not consider themselves part of a community that could be founded, honoured, recognised and identified through a constitutional register managed to become the crucial justifying motive *for* the production of a constitutional text. Secondly, and infinitely more significantly, this unspoken but widely-held belief in the constitutional impossibility becomes the register in which we seek to understand all the various positions and interests that emerge in the constitutional debate, and through which we seek to mandate those positions in the constitutional text.

The story told by the constitutional conversation which anticipated the Constitutional Convention and by the Constitutional Treaty itself, is a story of defensive, under-ambitious constitutionalism: the declarative commitment produced by the process goes to painstaking lengths to portray itself as neither declaratory nor committed, but as a tentative construction which seeks on the one hand to entrench that to which there can be no constitutional commitment, and on the other hand to compromise on everything, including the very idea of constitutionalism. But the sense of peoplehood which is so desperately sought does not emerge, we now realise, on this basis. It is now obvious that foundational

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entrenchment of agricultural policy in a document which tries to accommodate the interests of those who see Europe as an international organisation and those with federal purpose (and all the positions in-between, and all the positions that deny that there are important differences between these positions) does not make for a happy ending.

According to the terms of the Constitutional Treaty itself, of course, the process of ratification has not (or at least not yet) failed. Fifteen countries have successfully ratified the Constitutional Treaty: two of them, Spain and Luxembourg, by referendum; and six of them, Latvia, Cyprus, Malta, Luxembourg, Belgium, and Estonia, since the French and the Dutch “no” votes. Finland hopes to ratify the Treaty before the end of 2006. Technically, then, we should not speak about general ratification failure, or even “constitutional crisis”. That these terms come to be used conveys that the sense of ratification failure is rooted more deeply in the European political consciousness than the practical political problems which accrue because of the double “no”. There is a sense that in spite of all the “bad” reasons that induced the French and the Dutch to vote no, and irrespective of whether or not rejection of the Constitutional Treaty is the proper way to register protest for any potential “good” reasons, there is something somehow necessary and somehow honest about dwelling for a moment on inadequacy, on defectiveness, on failure.¹

It is clearer now that when presented with the fact and the result of the Constitutional Convention, the “peoples of Europe” in whose name the Convention convened were mystified, wondering: Why do we have to agree on a European constitution when we already have national constitutions which we consider to be perfectly adequate? What might a European constitution take away from the strength both of our national constitutionally-supported traditions of constitutionalism and the particularities of the protections afforded by our national constitutional provisions? And then, does it make a difference, in any case, whether or not we agree to this European “constitutional treaty”, since Brussels seems always to have a mind and agenda of its own?

On the other side of the referenda, politicians and academics can articulate their concerns more frankly: Does this double rejection mean rejection simply of this

¹ Some examples of academic efforts to explain and characterise this failure include: Richard Bellamy, *The European Constitution is Dead, Long Live European Constitutionalism*, 13 *CONSTELLATIONS* 181 (2006); Hauke Brunkhorst, *The Legitimation Crisis of the EU*, 13 *CONSTELLATIONS* 165 (2006); Gráinne de Búrca, *The European Constitution Project after the Referenda*, 13 *CONSTELLATIONS* 205 (2006); Gráinne de Búrca, *After the Referenda*, 12 *EUROPEAN LAW JOURNAL* 6 (2006); Renaud Dehousse, *The Unmaking of a Constitution: Lessons from the European Referenda*, 13 *CONSTELLATIONS* 151 (2006); JEAN-CLAUDE PIRIS, *THE CONSTITUTION FOR EUROPE: A LEGAL ANALYSIS* Chapter 1 (2006); Neil Walker, *A Constitutional Reckoning*, 13 *CONSTELLATIONS* 140 (2006); Neil Walker, *Big “C” or Small “c”?*, 12 *EUROPEAN LAW JOURNAL* 12 (2006).

particular text, or does it mean the rejection of the very idea of a constitutional treaty? Does it mean that Europe should make greater efforts to galvanise popular support and political legitimacy, or does it indicate that EU legitimacy is a product of the success of the market and should not try to have anything to do with rights or other more obviously constitutional questions? And, given that the Constitutional Treaty was mainly a codification of that which had been agreed and implemented for more than half a century, does rejection mean that all of those rules and agreements have been repudiated *ex post facto*?

In this moment of failure, we have the chance to see that the constitutional vision which inspired the Constitutional Treaty was at once fantastical and (literally) self-effacing because it is a constructed and constructive project through which organic and trenchant positions of agreements and disagreements are moderated and appealed to the point of apathetic agonism. We need to be much more realistic than that and much more courageous than that if we are to engage in a process of European constitutionalism. If the crisis precipitated by the “ratification failure” helps us to see this, as I think it does, then that is an important kind of constitutional success. The constitutional vision proposed by this article is a constitutionalism which must be and see itself as being in an asymptotic relationship with the transcendent goals of the particular community. Because, I argue, it is only in this kind of “committed constitutionalism” that constitutional possibility can be harnessed: it is only then that the constitutional process can have direction or be transparent and democratic in very basic ways. And it is only then that organic agreements and disagreements can be finally, actually important. The essence of the “committed constitutionalism” concept is no more and no less than that the community which seeks self-consciously to make its common good the common ambition, must do so in a way that which displays its lack of indifference to the possibility that that common good has transcendent aspects: aspects which are beyond its creation, beyond its understanding, beyond its control.

This is not the basis upon which this recent constitutional conversation in Europe was conducted. Indeed, the opening remarks of Joschka Fischer constitute a very specific declaration of indifference to the possibility of a transcendent European common good. This is where this article takes up its challenge.

B. Fischer and the “Failure” of Functionalism

In his “Quo vadis Europa?” speech,² Joschka Fischer calls for a rejection, in European circles, of all things Monnetist. Monnetism, he argues, is plagued by crises which can no longer be overlooked and from which the method cannot rescue itself. First, by its very nature, Monnetism is “a gradual process of integration, with no blueprint for the final state” meaning that it is an inherently directionless enterprise. Second, it is untransparent. And third, it is undemocratic. Europe has borne the strain of Monnet’s functionalism in the past, he says, but Europe would soon no longer be able to support this burden.

When Fischer spoke in May 2000 he addressed a Europe which was about to face the two greatest challenges of her short history: enlargement to the east and south-east and institutional “deepening”, both to accommodate such expansion and to make Europe a credible, effective power in a world of increasing globalisation. These challenges, he warned, bring three attendant problems – “a loss of European identity, of internal coherence, as well as the danger of an internal erosion of the EU” – which cannot be resolved by Monnetism. Even before enlargement and even without “deepening”, Fischer adds, there are already signs that the Monnet Method is cracking under its own weight – that Europe’s problems (apparently this threatened loss of European identity and loss of internal coherence) cannot be addressed by the Monnet Method. If we are to overcome these burdens, we must reject functionalism. In the alternative, Fischer’s (personal) vision is for “a deliberate political act” that would be designed “to re-establish Europe.”

My interest, in this brief section, is to imagine how Monnet would have responded to Fischer if he could have.³ It seems to me, first of all, that Monnet would have

² The English translation of the text of the Humboldt speech is available at: <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/reden/2000/000512-FromConfederacyto.html>. All quotations used here are taken directly from this translation. For general reaction to the speech see Martin Kremer’s lecture “Preparing Europe’s Future: The Actuality of Joschka Fischer’s Berlin Speech” as part of the Cicero Foundation Seminar “The French Presidency and the Treaty of Nice” Paris, 17 November 2000, available at www.cicerofoundation.org/lectures/p4kremer.html, and the many thoughtful contributions in the Jean Monnet Working Paper series symposium entitled ‘Responses to Joschka Fischer’ *Jean Monnet Working Paper No. 7/00*, available at <http://www.jeanmonnetprogram.org/papers/papers00.html>.

³ In what follows, I do not mean to suggest that the Monnet Method was an unequivocal success, or that it should be reinstated the method of European integration but I do wish to point out the weakness and the inconsistencies in Fischer’s critique of Monnetism because I believe it is these weaknesses and inconsistencies which enable us to clearly evaluate the success and failure of the alternative “Fischer Method” or “Fischerism”: the “re-establishment” of Europe by means of a “deliberate political act”. I present the positions in dialogical form merely in the effort to bring clarity to rather complicated arguments. Obviously, I do not in the least pretend that Monnet is responsible for my hypothesis as to how he would have responded.

made a very different – and arguably a more credible – diagnosis of the contemporary problems of European integration. He would have perhaps begun by addressing the three problems Fischer identifies with a plea for somebody to put a memo outlining the “no demos” thesis on Fischer’s desk, or he would have questioned how Fischer would try to square his criticism of Monnetism as a haphazard, incoherent way of governing with the apparent loss of internal coherence of the EU as Monnetism goes into decline. But while these quips – taken seriously – would in themselves be difficult questions for Fischer to deal with, the thrust of Monnet’s response would go much deeper.

Monnet would say, as Dehousse recently pleaded for him, that “functionalism had the immense advantage of providing simple answers to the question: what does Europe stand for?” “The coal and steel Community stood for peace and freedom, the common market for economic prosperity, and so did the single market in the 1980s.”⁴ Functionalism was able, then, to answer the question “Quo vadis Europa?” simply and clearly. Fischer is wrong to say that functionalism does not have a blueprint or that it is without direction. Functionalism does have a blueprint, of course: that is the whole idea! The institutional structure and the distribution of competences among institutional authorities, under functionalism, were to be designed and directed to make possible the achievement of an identified purpose. The fact that this political method of integration was aware of the need for it to be a slow progression does not mean, Monnet would argue, that it was directionless.

Functionalism did not, however, as Fischer and Monnet would agree, have a blueprint “for a final state.” Actually, Monnet would say, this is true in two senses. First, Monnetism is not a blueprint for a state (national, supranational, federal, confederal or other hybrid) at all, let alone a blueprint for a state which would be “a final state”. Rather, Monnetism is a blueprint for peace, for prosperity, and for some kind of transnational fellowship. That is, Monnetism is a blueprint for the approximation of an ideal, rather than for the systematic achievement of a particular political configuration or institutional set-up. Secondly (consequently), Monnetism is conscious of the fact that it can only ever be an asymptote for this purpose. Functionalism, as the orientation towards the fulfilment of an ideal the pure attainment of which is necessarily always beyond the capacity of the method itself, does not presume to have found or to even be capable of finding a conclusive solution (a metaphorical “final state”). Indeed, as a political method, functionalism eschews the necessity and even rejects the possibility of finding a conclusive solution. It remains instead in the realm of the possibilities that can be developed, which bring us closer to the things it identifies as important: things like peace and

⁴ Renaud Dehousse, *Rediscovering Functionalism* (Jean Monnet Working Paper, 7/00, 2000).

prosperity and fellowship. These aims of functionalism can never be subsumed by or within the method because they are non-constructed and non-constructible. They are transcendent of functionalism, and so exist – if they exist, and to whatever extent they do exist – independently of whether functionalism recognises them, and irrespective of the strength or accuracy of that recognition. Functionalism says that merely its lack of indifference to the possibility that these things exist and its humble effort to be in an asymptotic relationship with them is itself a worthy and worthwhile political task.

Worthy and worthwhile for many reasons, not all of which have directly to do with the benefits which accrue if functionalism actually does help to foster a more peaceful or prosperous society or increased mutual concern between its members. This essential feature of functionalism as an asymptote for a transcendent purpose should not be underestimated as an important source of political and social legitimacy. As Dehousse latterly argues: “[Functionalism] enabled people to make some sense of the project, and it provided some simple parameters to assess the performance of the whole system.”⁵ When a project clearly stands for something, merely that “standing for” is itself an important form of transparency. It means that it is easier for the people to know what their representatives and their governing bodies are supposed to be doing, and therefore easier to measure their performance and hold them accountable in a general way according to this identifiable and agreed measure. It is the decline of functionalism, Monnet might submit, which leads to growing problems of legitimacy and democratic deficits in the European Union. Today’s Europeans are jealous of their social participation and they will not participate in political life if the polity they live in stands for nothing particular. The curse of post-modern times is that “nothing particular” does not simply mean absence of a particular thing, but openness to any and every random thing. And when nothing means everything, people don’t participate, they consume: when nothing means everything, people don’t vote, they shop.

Precisely because it has a lack of indifference to the possibility of transcendence, functionalism does not have to worry too much about constructing perfect institutional structures and procedural mechanisms or exhaustively defining substantive values. These things are fluid because there is to be dialogue between institutional authorities – dialogue which is conducted on the basis that each side must accept within its own position that there is a possibility that the common good is a truth which transcends even the best articulation of its position. This is the essence of why functionalism is a workable method of government: it is pragmatic in its recognition that life is not lived in theory even though it is in

⁵ *Id.*

pursuit of ideals; that history is not made in the abstract even though the past and the future are somewhat speculative constructions; and that political goals are not realised as conceptions even though they can only be articulated in those terms. Thus, instead of seeking to negotiate and entrench a firm agreement on specific conceptions, the functionalist method strikes its balance by seeking to approximate one grand purpose through a multitude of small, iterative attempts. The natural diversity of interests, objectives, institutions, and peoples does not threaten the effective functioning of the polity so long as all consider their particular interest and objective to be subordinate to the overall aim. This happens precisely because the overall aim is a transcendent one – non-constructed and non-constructible – and so not the property of any one part.

All of this, I suggest, would be the first part of the response Monnet would make to Fischer: as a matter of definition, functionalism has not failed Europe in the way that Fischer believes. Europe's directionless is not the fault of functionalism, Monnet would probably suggest, but the problem of a Europe which did not engage the functionalist method. Rather than orienting itself around the search for the common good, and recognising the possibility that there are transcendent aspects to that good, Europe has oriented itself around its own capacity to construct Europe. The transcendent is subsumed within the construction and the European project serves to fulfil only its own perpetuity. This is not the same thing as functionalism, I argue; this is a corruption of functionalism which should instead be called "auto-functionalism".

Under auto-functionalism, there is no external point that can be held out as the measure of the system's legitimate purpose. And since there is no such external point against which the legitimacy of the system could be measured, the system can get away with (or at least believe that it can get away with) periodically flashing a general intention to be legitimate in dazzling neon lights, instead of letting legitimacy shine brightly through transparent panes. An obfuscation of input and output legitimacy is achieved through this ostentatious reiteration of intention, as paper after paper itemises in detail the multifarious facets of the importance for the system to be seen as transparent and democratic. And so, paper upon paper becomes part of a meaningless mass of words exactly because transparency and democracy are used chiefly in an instrumental way and come not to mean anything outside of that which the system has allowed, mandated, and intended. Dethroned from their natural positions as un-constructed, base-independent, moderating ideals, they become merely cogs in the wheel of the system which rolls, ceaselessly.

It is this kind of political method for a system which is directed only upon itself which will necessarily lead the system to be untransparent and undemocratic, Monnet would argue. It is this kind of method which induces directionless-ness

because the system is literally not going anywhere, but rather rolling in circles in order to turn more and more on itself. It is this kind of method which is haphazard and arbitrary because there is no constraint, there is no border, there is nothing which is not subsumed within the system and there is no possibility within the system of recognizing the existence of anything which is transcendent to the system. If everything is within the system and everything within the system is permissible, the coherence of the system is impossible. Something which subsumes everything within itself and then directs itself upon itself will inevitably be without direction, because there is simply nowhere left to go.

C. Introducing Fischerism: The Idea of a Deliberate Political Act

Which is the reason, presumably, why, although he begins his speech with the question: "Where should Europe go?", Fischer abruptly abandons this question, assuming the answer to be obvious – Europe should become a European federation – and replaces it another: "How should Europe get to where Europe should go?" Then his real question emerges: "Can this vision of a Federation be achieved through the existing method of integration, or must this method itself, the central element of the integration process to date, be cast into doubt?" Fischer's response: we need "a deliberate political act." "Fischerism", then, is the championing of a "deliberate political act" as a way to establish a blueprint for a final state in Europe, based on the assumption that this final state will then produce greater democracy and transparency *simply because* it has been a deliberate political act that established a blueprint for a final state. Of course, Fischer's Humboldt speech is not the only enunciation of this concept. Indeed – unfortunately – the view permeates the entire process of the making of Fischer's "deliberate political act": the production of the text of the Constitutional Treaty, and the process of its ratification, and even many of the responses to the failure of the ratification process.

In the spirit of the Humboldt speech, the assumption behind the entirety of the generative process of this deliberate political act is that the diversity, which is indigenous to this old continent, of "different peoples, cultures, languages and histories" and "nation-states ... that cannot simply be erased," is a diversity which is or has become a kind of external threat to Europe's integration – something which undermines the already-existing European identity and coherence. This problem, according to Fischer, is heightened (as opposed to caused), by the new challenges of enlargement and deepening. His basic message is that Europe's wholeness, Europe's coherence, Europe's unity must be seen to be undergoing a test of strength, and that European integrity should defend European integration by rallying around the fundamentals of the European project and engraining them deeper into the public and political consciousness. The first problem to surface

would of course be the problem that there was no agreement on what those fundamentals should be!

I. The Instrumentalised Treaty

For some, the Constitutional Treaty was, first and foremost, a Treaty like any of the other Treaties in the process of incremental integration which has characterised the process of Europeanisation. In the usual, lengthy manner, and beginning with a typically uninspiring Preamble, it enumerates the basic rules of the internal market, outlines the policy on agriculture, consumer protection, employment, monetary regulation etc., lays down how the Community institutions should function, and concludes with a long list of protocols, declarations and annexes. Grudgingly, advocates of this Treaty-centred position will admit that this particular Treaty has some characteristics which set it a little apart from the previous treaties, most notably the inclusion of the Charter on Fundamental Rights. But, they insist, these additions serve merely to codify and clarify the existing status of the Union.⁶ Nothing of significance changes significantly.

The general motivations then for this Treaty-centred position were either that Europe already has an unwritten constitution that should not be unduly tampered with (“not ever”, or “not now”, according to the thickness of the position),⁷ or that Europe does not have and should not (again this comes in “not ever” or “not now”) have a constitution at all⁸. This position is typical of governments who want to

⁶ *But cf.* Paul Magnette, *In the Name of Simplification: Coping with Constitutional Conflicts in the Convention on the Future of Europe*, 11 *EUROPEAN LAW JOURNAL* 432 (2005) (Arguing that deliberation and constitutional conflicts were an inevitable part of the Constitutional Convention given the ambivalence at the heart of this Laeken mandate for “simplification.”).

⁷ This is Joseph Weiler’s position. *See generally* JOSEPH WEILER, *THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999); Joseph Weiler, *In Defence of the status quo: Europe’s Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 7 (Joseph Weiler & Marlene Wind eds., 2003); Joseph Weiler, *A Constitution for Europe? Some Hard Choices*, 40 *JOURNAL OF COMMON MARKET STUDIES* 563 (2002).

⁸ This general position is typified by Dieter Grimm and Andrew Moravcsik. Grimm’s arguments support the governments’ position that sovereignty should remain at the national level. *See* Dieter Grimm, *Does Europe Need a Constitution?*, 1 *EUROPEAN LAW JOURNAL* 282 (1995); Dieter Grimm, *Treaty or Constitution? The Legal Basis of the EU after Maastricht*, in *DEVELOPING A CONSTITUTION FOR EUROPE* 69 (Erik Eriksen et al. eds., 2004); Dieter Grimm, *Integration by Constitution*, 3 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 193 (2005). Moravcsik argues that the democratic deficit is not actually such an illegitimate position. *See* Andrew Moravcsik, *The EU Ain’t Broke*, *PROSPECT* (March 2003); Andrew Moravcsik, *In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union*, 40 *JOURNAL OF COMMON MARKET STUDIES* 603 (2002); Andrew Moravcsik, *Europe Works Well Without the Grand Illusion*, *FINANCIAL TIMES*, June 14, 2005.

retain sovereignty at a national level, or of those who believe that there is no requirement to subject Brussels to democratic control over and above that which has already been attained and can be attained through ordinary (i.e. non-constitutional) mechanisms. In all cases, the idea is that agreement in the detail – in the form of this “incidentally-constitutional” Constitutional Treaty – is to be preferred over a more open-ended commitment.

II. The Instrumentalised Constitution

For others, the deliberative drafting process of the Constitutional Convention was the sign that the EU had moved beyond functional intergovernmentalism and liberal intergovernmentalism and (finally) embraced its status as a supra-national or post-national polity.⁹ They allowed the constitution to bear the hallmarks of a Treaty (length, detail, etc.), but they neither intended nor foresaw that this could take away from its constitutional status. They complained that the Constitution’s “transformative potential was fatefully compromised”¹⁰ by those who insisted on maintaining the Treaty-centred position. And of course they are right that the transformative potential of the Constitutional Treaty was fatefully compromised by those who instrumentalised the Treaty as an international agreement. But, equally obviously, the transformative potential of the Constitutional Treaty would be destroyed if the positions of supranationalists were to be permitted to hijack the constitutional process. Those who accuse the Treaty-advocates of commandeering the constitutional process for their own intergovernmental ends must be sure not to commit the same constitutional foul.

In the event, those who advocated the “incidentally-Treaty-based” version of the Constitution were to find it much harder to resist the temptation to foul, because of the unique circumstances created by the previous five decades of European integration. This “constitutional” moment, they believed, was the moment to “cash-in” on all the agreements which had been worked out over the preceding fifty-five years, to give them constitutional currency, and to use the added momentum of the moment in order to pull agreements on the most difficult remaining issues out of

⁹ This position is easy to associate with the players in the Constitutional Convention itself. In terms of academic articulation, see Armin von Bogdandy, *The Prospect of a European Republic: What European Citizens are Voting On*, 42 COMMON MARKET LAW REVIEW 913 (2005). In the aftermath of the Humboldt speech, see Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REVIEW 5 (2001). See also Joseph Weiler, *On the power of the Word: Europe’s constitutional Iconography*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 173 (2005); Miguel Maduro, *The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 316 (2005).

¹⁰ Bellamy, *supra* note 1, at 181.

the melting-pot.¹¹ It is no surprise, then, that it does transpire that, in the same way as those who advocate a Treaty-centred understanding of the Constitutional Treaty, Fischerists tend also to siphon questions of technical agreement from questions of peoplehood and democracy as part of their effort to protect European coherence and European identity from the threat of diversity caused by culture, values, history and peoplehood. While they use the language of constitutionalism, they are in fact instrumentalising constitutionalism. They only want constitutionalism which is obedient, in the first place, to the agreements which have preceded this “deliberate political act”, and constitutionalism which is subservient, in the second place, to the new agreements which this “deliberate political act” has hidden under its sleeve.

As regards the former, this general copper-fastening sought to give constitutional status to the primacy of European law, the institutional structures, the division of competences, the protection of human rights at the European level, etc. In this context, we must be wary about the inclusion of the Charter of Rights in the Constitutional Treaty. The principal reason for incorporation was perhaps not that there was an identified need at a popular level that personal rights be enshrined in a European constitution in order that personal rights could be more fully vindicated at the European level, but rather that there was an identified need at the European institutional level that personal rights be enshrined in order that European institutions and the European project itself could be more fully vindicated at the popular level. It is a position which, as Bellamy kindly puts it, is “back to front” because it is an “agreement on rights as establishing a demos, whereas it is the presence of a demos that produces agreement on rights.”¹²

In terms of the latter, the mechanism of constitutional expression sought to enshrine new agreements which would resolve remaining sticking points by riding the constitutional wave. It was recognised, as Walker explains: “[a]rguably only a

¹¹ Succumbing to the temptation is and was very understandable because it would finally give those agreements the stability of a constitutional backing. It was also entirely predictable, given that, among “Fischerists,” the advocacy of the constitutional project is grounded in the belief that diversity produces disagreements which risk undercutting the entire construct of the European polity. (For this reason, indeed, those who emphasise the constitutional side of the CT have an even greater incentive than those who concentrate on its Treaty-like qualities to seek to eliminate the opposite point of view.) Perhaps it was even reasonable, insofar as a constitution is always the product of the political climate in which it is formulated. But it fails to appreciate that a constitution must also somehow raise itself beyond the immediate political climate and context and self-consciously make a whispered appeal to transcendence in order just to be constitutional. In their agnostic pragmatism, those who hasten to build a constitution on top of an already-existing agreement relinquish the very constitutional possibility they seek to enshrine, making the most elementary constitutional error.

¹² Bellamy, *supra* note 1, at 184.

moment of constitutional *import* could provide the gravitas – the sense of history-in-the-making – required to concentrate minds on the importance of further reform.”¹³ This point also resonates on a deeper level because “the integrative promise of the Constitution inheres less in the sense of common performative meaning implicit in engaging in a constitutive political process, and more in the crude attempt to fast-forward to a supra-statist solution by granting concrete competences to the European centre in areas such as immigration and redistributive social policy which anticipate – and so beckon – such a solution.”¹⁴ If so, then far from being a response to transparency or democracy deficiencies, the effort to document constitutional expression without embarking on the journey of constitutional faith which would go beyond the existing agreement exacerbates, rather than eradicates, the existing transparency or democracy deficits.

Consequently, this “high-water mark” moment when this Constitution is presented to the peoples of Europe for ratification, is the moment when Fischerism stoops lowest. The Constitution (-al Treaty) presented by Fischerism is promoted as a method which overcomes the deficiencies of functionalism but instead it inherits and perpetuates all the deficiencies of auto-functionalism – system self-centredness, democracy deficits, transparency deficits, and polity directionless-ness – and then seems to believe that, through ratification, the peoples of Europe have a chance to legitimise these illegitimacies. That is, the people can confirm, from their position outside the system, that the system as it has developed so far is acceptable, that the new changes which are proposed are acceptable, and that the system can continue indefinitely to develop in this people-insulated, democracy-insulated, and therefore constitutionally-insulated way. Through the mechanism of the ratification process, peoplehood is “activated” by the system, as it were, in order principally that the system can confirm to itself that peoplehood is quite unnecessary. The “activation” is a deceit.

All of this must then be overlaid with a more sophisticated idea. Not only is the idea of constitutionalism instrumentalised in order to approach these “constitutional goods” to do with rights and immigration, but it is also instrumentalised in order that Europe can get closer to the very concept of European constitutionalism itself. This is where the cyclical nature of the “constitutional possibility” mentioned in the opening paragraph is, itself, instrumentalised. This is the “however much” argument presented by Walker: “however much the European people want to put things in common, whether more so than presently, much the same, or perhaps even less, and wherever they want to

¹³ Walker, *supra* note 1, at 141.

¹⁴ *Id.* at 142.

strike the balance between national and supranational action, the input (responsiveness) and output (efficacy) legitimacy of that entity that ... will in any event retain a decision-making capacity greater than any other transnational organisation, can only be enhanced by an increase in the resources of dedicated political capital available at the European level."¹⁵ In other words: political capital on the European level is needed in order to make good and informed and democratic decisions about the future of the European Union and the nature and extent of its competences, because whatever that future, it should be one which the peoples of Europe have chosen. It makes sense, then, to create a constitution with the purpose of generating the sense of shared political community which is necessary in order for that political capital to accrue.

This argument only holds, of course, if, when this increased political capital arrives in Brussels, it will actually have purchasing power. One cannot help thinking from the length and detail of the Constitutional Treaty that there are few important issues which are open for democratic constitutional settlement by supplementary political capital. There is also the risk that this kind of argument misses the point that there is already some political capital in Brussels; perhaps not enough to ground a federal state, but perhaps enough to make the decision about whether a federal state is appropriate and perhaps (little) enough to realise that a federation is currently not a possible or legitimate institutional framework. By turning the spotlight on the extent to which political capital is lacking, it is possible to draw attention away from the messages that the already-existent political capital is sending. To me, it seems the greater problem is the opposite problem: if the process of constitutionalism in Europe is in some unique way hampered by its transnational status, that burden is not the burden of "fallow ground" in the sense that "traditional sources of cultural or political identification are not readily available",¹⁶ but the problem of over-cultivation. The over-emphasis on agreement and the desire to ultimately entrench incompatible agreements in painstaking detail means that, through abusive over-use, the European land becomes constitutionally barren.

¹⁵ *Id.*

¹⁶ *Id.* at 143.

III. *The Instrumentalised Constitutional Treaty*

It is a very common European tendency to assume, in this agonistic kind of way, that different seeds can be planted beside each other and can grow up without obscuring each other's basic requirements for light and nutriment. This is what is made manifest most famously in the idea of constitutional pluralism:¹⁷ the idea that, in circumstances of mutually incongruous agreements, constitutionalism is the product (or the byproduct?) of inchoate disagreements between those agreements. Both the agreements and the disagreements are governed by the principles of pluralism, which means that there is no objective conclusion or common truth which could unite both perspectives and that the "debate" must be conducted on the basis that each position is incommensurate with the other. Essentially, though, there is no debate. Or there is debate, but without the possibility of conclusion because each position is a comprehensive position that cannot recognise the existence of another, except perhaps to facilitate the occasional attribution of blame. This is the dark side of the "however much" argument: that Europe becomes a place where fundamentally incompatible visions of the European future are held and maintained in a way that isolates them from each other in an apparently justifiable, and even supposedly constitutional, way.

In this sense, there is a "constructive ambiguity" in European discourse. It is this constructive ambiguity that gives rise to new bywords for European integration, like "unity in diversity": being one *in* being various. (Note: this is not based on an idea that we can be one in spite of being various, or that, despite the fact that we are different, what binds us together is stronger than what divides us; but that, in being various, we are one. One might ask whether this actually has a reasoned meaning?) It is this constructive ambiguity that means that a continuing strange relationship exists between the ever-beginning "process" of European integration and the project of "*finalité*": each is reified in the search for the other and Europe must accommodate the search for both at the same time, all the time. It is this constructive ambiguity that seeks to articulate a tolerance and even to hint at a

¹⁷ There is a growing literature on constitutional pluralism. See generally, Mattias Kumm, Who is the Final Arbiter of Constitutionality in Europe?, 36 COMMON MARKET LAW REVIEW 351 (1999); Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 EUROPEAN LAW JOURNAL 262 (2005); NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH (1999); Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in SOVEREIGNTY IN TRANSITION 539 (Neil Walker ed., 2005); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN LAW REVIEW 317, 338 (2002).

compatibility between sovereign “self-confident” nation states and a fully sovereign, though “lean”, European federation.¹⁸

The essence of this constructive ambiguity is impeccably represented in the very title and concept of the Constitutional Treaty itself. Indeed, it is instructive that the shorter “Constitutional Treaty” has become the vernacular term in place of the official “Treaty establishing a European Constitution”. As shown above, discussion on the Constitutional Treaty is split by the chasm between those who see the Constitutional Treaty principally as a Treaty with some quasi-constitutional features and those who see the Constitutional Treaty as a Constitution dressed up in flimsy treaty robes. There is animosity between the two sides,¹⁹ but that animosity never develops into dialogue because the constructive ambiguity inherent in the very idea of the Constitutional Treaty perpetuates the notion that both positions can be distinctly maintained by the European project --- even by the discrete context of a single “deliberate political act”, and even by and within the same document.

Inevitably, each position is incommensurate with the other. However, their very incommensurability is, I submit, as much a product of the discourse as it is a consequence of their starting-positions:²⁰ because the system requires that each “starting position” can only enter the discourse on the basis that the discussion takes place according to the rules of constitutional pluralism: there can be no recognition of common ground, or common truth, because each position is necessarily isolated and insulated from the other. They cannot have a common aim and they cannot imagine a shared future. They cannot see beyond the ceaseless a-temporality of their own positions because they do not permit the development of a dialogue that would allow for the possibility that both what is common and what is different might be seen differently if there was an ongoing iterative search for a common conclusion. In this way, the constructive ambiguity of the system is deliberately maintained by the system.²¹ And in the maintenance of this

¹⁸ Because, as Fischer continued in the Humboldt speech, “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.”

¹⁹ “If strong advocates [constitutional advocates] attribute the Constitution’s rejection to its not going far enough, weak advocates [treaty advocates] contend it was rebuffed for going too far.” Bellamy, *supra* note 1, at 181.

²⁰ In this way, I would dispute the “epistemic-ness” of “epistemic pluralism” as defended by Walker. Walker, *supra* note 17.

²¹ I am grateful to Andrew Glencross for this insight, without presuming that he concurs with the manner of its representation here.

constructive ambiguity, Europe maximises the possibility that Europe will be taken into account. By generating this discourse at the European level – that is, by compelling the advocates of both the intergovernmental and the supranational positions to present those positions in the terms that fulfil the requirements of constitutional pluralism – Europe maximises the possibility that it looks like it has a political purpose. Europe begins to look like it might mean something.

D. Evaluating Fischerism: the Failure of the Deliberate Political Act

The Constitutional Treaty reifies “*finalité*” in the two contradictory senses proposed on one side by the Treaty advocates and on the other by the Constitutional advocates, and it reifies “process” in the agonistic and agnostic “balancing” of those contradictions. Herein lies the constitutional failure of the Constitutional Treaty. This constitutional failure (to borrow and adapt Mr. Fischer’s words) exposes the “crisis of Fischerism”: “a crisis which cannot be solved by the logic of that method.” The crisis of Fischerism is that it is a method that is incapable of incorporating into itself the features that it deems to be indispensable to a legitimate method of political integration in Europe, because it has no way of attributing importance to anything other than the importance of itself. The crisis of Fischerism is that it is a method that believes that *finalité* can be achieved by a single deliberate political act which is based on the agonistic “balancing” of fundamental contradictions. The crisis of Fischerism is that it seeks to “re-establish” Europe as a community of peoples embarking on a common constitutional journey through a deliberate attempt to entrench the idea that we are already at the end of that journey. And since community, polity, and constitutional development are organic processes, a single act that purports to achieve their *finalité* actually does violence to their organic nature, and so inevitably leads to chaos.

The Constitutional Treaty, in keeping with the Fischer method and auto-functionalism generally, supposes itself capable of holding opposing fundamental agreements within the same document, assuming that there is no way *and no need* to reconcile those contradictory (and even cumulatively incomprehensible) claims. The Constitutional Treaty says that Europe is at once an intergovernmental and a supranational organisation, that this is the only pivotal political question Europe should concern itself with, but that there is no answer to the “debate” that ensues.²²

²² This is, I submit, why the phenomenon of “coalitions of opposites” is particularly common in European circles – whereby people who have nothing in common ideologically find themselves transiently and unimportantly on the same side and arguing for the same thing. In these coalitions of opposites there is no real understanding, no real progress towards common goals, there is only short-lived collaboration when interests happen to overlap on specific issues.

Thus far, I have used the term “Fischerism” to describe this effort to construct constitutionalism on the basis of indifference to the transcendent elements of what the common goals of the community should be. Of course, the idea itself is not specific to this constitutional conversation, and it is not even specifically European. On the contrary, it is probably as old as constitutionalism itself, and it is manifest every time we forsake constitutional possibility in the name of the necessity to nail down a constitutional agreement.

National constitutionalism can sometimes seem like it is based on the idea of constitutional agreement because, particularly in contradistinction to the transnational constitutional ambitions of entities like the EU and the WTO, national constitutions appear to be about stabilising the sense of community among a people that is already rather organically homogenous. But in all of history, there is no community – national, political, social, religious, sporting, or even familial – which has been fostered among members who were not heterogeneous. What builds bonds of commonality is not sameness, but commitment. If, in the national context, disagreements seem less trenchant, that is perhaps not because disagreements do not exist but because they are placed in the framework of a patient process of constitutional commitment that promises to take these disagreements seriously – not as external elements that seek to overthrow constitutional agreement but as internal elements that must be taken seriously because the common good of all the members of the community can only be approached on the basis that these disagreements are important. On the other hand, if, in the national context, disagreements are seen as being intrinsically incongruous with constitutionalism, then the constitutional possibility is sacrificed. In other words, if the whole of the constitutional process is seen to have been captured within the four corners of single text (as understood by the methodologies of constitutional interpretation such as originalism and textualism), then constitutionalism becomes “a dead hand” because it has no possibility of serving the community it claims to constitute as that community grows over time. In short, if constitutional agreement is the sum total or the outer ambition of constitutionalism, then constitutionalism is both impossible, and very undesirable.

Thus, if it is to learn a real lesson from the national constitutional experience, constitutionalism in Europe must not be based on the frantic fantastical quest to find a fundamental constitutional agreement. The quest for one-ness – the quest to unify this diversity of European identities – is misguided as well as hopeless because sameness is not a constitutional requirement. (For this reason, the change in nomenclature from European Community to European Union was perhaps a step backwards, in constitutional terms.) Constitutionalism cannot be built on a fundamental agreement because such a foundational agreement eradicates constitutional possibility by denying the importance of the plurality of views and

interests that should properly be taken on board by a democratic constitutional process, even in a homogenous (national) political context. Neither can constitutionalism be based on the kind of impotent disagreement advocated by constitutional pluralism, because constitutionalism is incompatible with the kind of apathetic agonism that results when organic disagreements are thus dissolved. Rather, the essence of constitutionalism must be sustained by the notion of commitment, beyond agreement and beyond disagreement. This is why, to reiterate, “committed constitutionalism” is constitutionalism built on a lack of indifference to the possibility that the common goals of the community have transcendent aspects. In this way, it allows agreements and disagreements to be important and mandates pragmatic government in the space between the recognition of these disputes and their ultimate perfect resolution.

Constitutionalism – or functionalism, or, for that matter, any political method that is serious about generating or galvanising a sense of political community and shared goals among peoples – should empower dialogue that is focused on goals and aims that are acknowledged as transcendent of the political process. Because only when goals are transcendent is it possible (or even necessary) that each position recognises and entrenches *within its own argument* the possibility that there is a truth that *transcends both its own argument and the opposing argument*. Because only when goals are transcendent can each side recognise that the agreements and the disagreements between its position and others’ positions are, in fact, important. And only when each position is presented in this way as an incomplete but nonetheless important position is there a chance that constitutional dialogue will begin to beget a constitutional commitment.

In the particular political context of the European Union, this concept can come into its own because in the EU, it is even more obvious than usual that any constitutional settlement cannot be built on a fundamental European agreement, since there is none. And because the effort to find such a common agreement will always end in failure, as it does in the case of the Constitutional Treaty. The point is that this ratification failure is not a constitutional failure.

E. The Constitutional Success of the Ratification Failure

On the basis of a model of committed constitutionalism, one can – indeed, one should – vote “no” to the Constitutional Treaty out of a belief that the peoples of Europe are capable of finding, through dialogue, a common European good. This is the constitutional success of ratification failure. Because perhaps what the two “no” votes do, and what the crisis they precipitated does, is strip away the illusion that Europe is or can be built on any kind of fundamental agreement, or on the textually-mandated agonistic and irreducible disagreement between positions of

fundamental agreement. Also uncovered by the crisis is the attempt to activate peoplehood in this false sense, where peoplehood is engaged only in order to undermine the already under-acknowledged importance of peoplehood in the entire process of European integration. Moreover, the crisis gives us an opportunity to recognise a common effort to find a common solution. The blessing of the constitutional failure is that it may uncover a more determined political will, which is the essence of a stronger proto-constitutional settlement.

The diversity that Fischer was so afraid of endures, and will endure. But the crisis precipitated by the “no” votes presents an opportunity to recognise that Europe stayed standing even when everything fell apart, and that the reason everything stayed standing was not because we finally managed to make everything the same, and not because we surrendered difference to indifference about difference, but because we recognised that beyond sameness and difference, beyond agreement and disagreement, there was a possibility that we could make a constitutional commitment. Which means, finally, that in the midst of all of this darkness created by the presumption of constitutional impossibility, we have uncovered a proto-type of a European constitutional possibility.

This moment of crisis is not “a” constitutional moment²³ – except insofar as every moment is a constitutional moment in a process of committed constitutionalism – but it is, or it could be, a moment of heightened awareness of the importance of constitutionalism. It could be a moment where we realise that it is not acceptable that the enumeration of technical considerations eradicates all constitutional possibility, making the most constitutional of questions constitutionally meaningless. It could be a moment that recognises the need for a constitutional blueprint without allowing that blueprint to be articulated in final terms, relying instead on a relatively under-articulated division of power, a minimal set of practical rules to get the ball rolling, and a whispered appeal to transcendence to take us somewhere beyond ourselves. It could be a moment where diversity

²³ Bruce Ackerman’s detailed analysis of American constitutionalism in which he “uncovered” three “constitutional moments” has become a yoke on the shoulders of European academics as they try to replicate that study in European terms. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE LAW JOURNAL* 453 (1989). In 1999, Joseph Weiler identified Maastricht as a European constitutional moment. See Weiler, *supra* note 7, at 3-4. See also John Fossum and Agustín Menéndez, *The Constitution’s Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union*, 11 *EUROPEAN LAW JOURNAL* 380 (2005) (analyzing the constitutional convention in these terms); Ingolf Pernice, *The Draft Constitution of the European Union: A Constitutional Treaty at a Constitutional Moment*, in *A CONSTITUTION FOR THE EUROPEAN UNION: FIRST COMMENTS ON THE 2003-DRAFT OF THE EUROPEAN CONVENTION* (Ingolf Pernice & Miguel Maduro eds., 2004); Dario Castiglione, *Reflections on Europe’s Constitutional Moment*, CIDEL Conference on “Deliberative Constitutional Politics in the EU,” Zaragoza, June 19-22, 2003. For an overview of the aptness of these “moment” analyses in the EU, see Neil Walker, *After the Constitutional Moment* (Federal Trust Online, Paper 32/03, 2003).

between people and fellowship between peoples is treated seriously and patiently in the context of a constitutional commitment that allows them the possibility – rather than dismissing it out of hand – that their common good might be something greater and better than they would ever have imagined.

It is not a moment that signals a return to Monnetism, but it is a method that, I think, would make Monnet smile. And, if we harness it, committed constitutionalism could be the constitutional method by which the peoples of Europe will bring Europe to Brussels.