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Paper:

Snell, J. (2017). European Union and National Referendums: Need for Change after the Brexit Vote?. *European Business Law Review*, 28, 767-784.

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European Union and National Referendums: Need for Change after the Brexit Vote?

JUKKA SNELL¹

Abstract

This article compares the referendums in France and the Netherlands on the Constitutional Treaty and the Irish referendum on the Lisbon Treaty with the Brexit vote. It is argued that the results have hinged on two key factors: voters perceive the EU as an agent for economic internationalization and increased competition, and there is a low level of understanding of the EU. The article then turns to solutions. The basic bargain where the EU took responsibility for bolstering economic growth while the distribution of the gains was left for the Member States may need revisiting. Further, Europeans need to be educated to become Union citizens, like the Member States educate their nationals for national citizenship. However, such a heightened role for the EU for redistribution and education, traditionally bastions of the Member States, raises uncomfortable questions about the competences and the nature of the Union.

1. Introduction

The Brexit referendum of June 2016 is widely perceived as a turning point or a wake-up call for the European Union. For the first time, a Member State, and a large one at that, is planning to leave the Union. Before, the Union has grown through successive waves of enlargements. Now it is shrinking. Reasons need to be analysed, lessons learned, and solutions crafted.

The Brexit referendum is commonly analysed in the context of the 'populist revolt' that has been said to be taking place in the West. The election of Donald Trump in the United States in November 2016 and the good performance of various populist parties of the right in elections on the Continent are widely seen as parts of the same phenomenon.² The present article does not disagree with this, but takes a different approach. It is argued that the referendum should (also) be seen in the context of the earlier national referendums on EU matters, where voters have regularly turned down the European Union when they have had an opportunity to do so. The trend started with the Danish rejection of the Maastricht Treaty in 1992, continued with the initial Irish rejection of the Nice Treaty in 2001, and led to the demise of the Constitutional Treaty in the hands of the French and the Dutch voters in 2005. In response, the Member States claimed to abandon the constitutional project and instead proceeded with a regular Treaty change to avoid the need for referendums. One was nevertheless held in Ireland, with the voters duly rejecting the Lisbon Treaty in 2008, before changing their mind in 2009. In addition to the referendums on the flagship Treaty changes there have been numerous referenda on individual EU policies, and the Union's track record is not much stronger. Since 2015, Greek voters have rejected EU bailout terms, Danish voters have refused to participate in EU's justice and home affairs policies, Dutch voters have rejected EU's Association Agreement with Ukraine, and Hungarian voters have said

¹ Formerly a PhD student of Mads Andenas to whom this contribution is dedicated. Now Professor of European Law, University of Turku and Swansea University. An earlier version was presented in a seminar in October 2016 at the University of Turku, and some of the themes were touched upon in my short editorial in ELRev 6/2016.

² See e.g. Philip Stephens, *Peace and Prosperity: It Is Worth Saving the Liberal Order*, Financial Times (9 Feb. 2017).

'no' to EU's migrant quotas, although the last referendum proved non-binding due to the low turnout.³ Altogether, it is clear that when people are given an opportunity to voice their opinion on matters related to European integration, there is a high likelihood that they will say no to it. The EU is a hard sell in a national referendum.⁴

One possible, if somewhat cynical, response would be to avoid referendums altogether. Indeed, this was precisely the strategy that the Member States attempted to pursue in the case of the Lisbon Treaty. Normatively, this proposal is not unattractive, given the chequered history of referendums in general. For example, they were used skilfully by the Nazis to advance their aims in Germany before the Second World War,⁵ and Germany has avoided national referendums since, except on the narrow issue of reorganizing the Länder. Few German constitutional scholars regard them with much affection today.⁶ Further, the various EU double referendums have shown that the voters can change their minds dramatically within a short period of time.⁷ Moreover, there is a danger that referendums devalue representative democracy: parliaments are no longer trusted with decisions and parliamentarians putting a referendum result into effect may have to suspend their judgement lest they be branded enemies of the people. However, to the extent that referendums express genuine and considered dissatisfaction with the European project among its citizenry, their message needs to be taken seriously. In democracies, policies or institutions that the majority opposes cannot survive in the long run. In any event, the referendum-genie may have escaped the bottle. Not only is there a constitutional requirement for them in Ireland,⁸ citizens elsewhere may also expect them, given the past practice and the examples from elsewhere.⁹ It may often suit politicians to promise a referendum for tactical reasons,¹⁰ and opponents of such proposals may find it difficult to respond effectively to emotional arguments about the need to 'consult the people' and to 'follow the will of the people'. Further, the increasing emphasis on direct democracy in both the European Union¹¹ and many of its Member States may create expectations of direct say also on the future of and participation in the integration project. In other words, referendums may be here to stay and it is important to come to grips with them.

The purpose of this article is to analyse the main lessons of the referendums on the Constitutional Treaty in France and the Netherlands, as well as the first Irish referendum on the Lisbon Treaty, and to compare them with the Brexit vote. They represent the most recent comprehensive rejections of European integration in the sense that they have not pertained only to a particular policy area, but have concerned the EU's overall legal framework or, in the case of Brexit, the membership in the Union. It will be argued that two important common themes emerge: the referendums have protested against increased international economic competition, in particular through the movement of natural persons, that may undermine the status and the economic security of the weaker members of the society.

³ See https://en.wikipedia.org/wiki/Referendums_related_to_the_European_Union.

⁴ See Anthony Arnull, *Broken Bats*, 41 ELRev 473 (2016) for a personal account.

⁵ See already at the time Arnold J. Zurcher, *The Hitler Referenda*, 29 American Political Science Review 91 (1935), who marvelled that referendum 'has suddenly been accepted as a leading constitutional practice in a Germany which is dedicated to the extirpation of political democracy'.

⁶ See e.g. Josef Isensee, *Demokratie ohne Volksabstimmung: das Grundgesetz*, in Christian Hillgruber and Christian Waldhoff (eds), *60 Jahre Bonner Grundgesetz – eine geglückte Verfassung?* (Bonn University Press 2010).

⁷ See for discussion Ece Özlem Atıkan, *The Puzzle of Double Referendums in the European Union*, 53 JCMS 937 (2015).

⁸ *Crotty v. An Taoiseach*, 2 CMLR 666 (1987).

⁹ France is thought to have been pushed to organize a referendum on the Constitutional Treaty by to the UK promise to hold one.

¹⁰ See Paul Craig, *Brexit: A Drama in Six Acts*, 41 ELRev 447 (2016) in the context of the Brexit referendum.

¹¹ Art. 11(4) TEU on the citizens' initiative.

Further, they have demonstrated very low levels of knowledge of the Union – many voters have had a poor grasp of what they are supposed to be voting on. The article then considers potential solutions, in particular a strengthening of the social dimension of integration and better EU education, but notes also problems associated with them.

2. The Lessons of the Referendums

This section will first set out the results and the reasons for them in the national referendums in France and the Netherlands in 2005 on the Constitutional Treaty and in the first Irish referendum on the Lisbon Treaty in 2008. These will be compared with the result and the reasons for the leave verdict in the Brexit referendum of the UK in 2016. The purpose is to discover similarities that go beyond the particular circumstances of a single national vote and explain more generally why the European integration project has been rejected.

The Treaty Establishing a Constitution for Europe¹² was a response to the failure of the Nice Treaty to agree far-reaching changes to the EU's legal framework; in fact, a Declaration annexed to it called for a deeper and wider debate about the future of the European Union.¹³ The issues identified in the Declaration, such as the simplification of the Treaties and the role of national parliaments, mainly reflected a desire to bring the EU closer to its citizens, but undoubtedly the looming accession of ten or more countries also focussed minds on the effective and efficient working of the Union. The result was the setting up of a Convention to reflect on the matters,¹⁴ which decided to use the 'c-word' and talk of a Constitution. This was a strategy designed to attract the attention of the citizenry by emphasizing that the exercise aimed to go beyond a normal Treaty change, although in truth the final document remained a Treaty as a matter of law and did not fundamentally alter the nature of the Union as regards the substance.¹⁵

The use of the constitutional rhetoric made it difficult to avoid the issue of referendums. If the change truly was 'constitutional', as the title of the new Treaty claimed, surely the consent of the people should be obtained, ran the argument. Although the majority of Member States stuck to the normal parliamentary ratification process and some national referendums did approve of the Constitutional Treaty,¹⁶ it was rejected in France in May 2005. The turnout was 69 per cent and the margin 55 to 45 per cent. A few days later the Dutch voters followed suit, with a turnout of 62 per cent and the margin of 61 to 39 per cent.

The reasons for the rejections emerge clearly from Flash Eurobarometers. They were post-referendum surveys commissioned by the European Commission to gain a better understanding of the results. The method used was telephone interviews with registered voters.

¹² OJ C 310/1 (2004).

¹³ Declaration 23 on the Future of the Union.

¹⁴ https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/68827.pdf.

¹⁵ See Andrew Moravcsik, *What Can We Learn from the Collapse of the European Constitutional Project?* 47 *Politische Vierteljahresschrift* 219 (2006) and Joseph Weiler, *On the Power of the Word: Europe's Constitutional Iconography*, 3 *I-CON* 173 (2005).

¹⁶ In Spain and Luxembourg.

In the case of France, the overwhelming reasons for the rejection were of socio-economic nature.¹⁷ The three main reasons for the 'no' vote were 'it will have negative effects on the employment situation in France/relocation of French enterprises/loss of jobs' (31 per cent), 'the economic situation in France is too weak/ there is too much unemployment in France' (26 per cent) and 'economically speaking, the draft is too liberal' (19 per cent). A small number of voters mentioned issues such as 'loss of national sovereignty' (6 per cent) or opposition to integration (4 per cent). Further, the complexity of the Treaty (12 per cent) and the lack of information (5 per cent) did lead to some no-votes, and more importantly the complexity and information issues were major reasons for abstentions - complexity was mentioned by 60 per cent and lack of information by 49 per cent of voters who abstained on the day.

The French vote needs to be viewed against the background of the almost contemporaneous debates about the original proposal for the Services Directive,¹⁸ which had been dubbed the Frankenstein directive and was castigated for its supposedly extreme neoliberal contents. Large mass protests against it, often organised by trade unions, took place in the spring of 2005, influencing the atmosphere. Another important factor was the enlargement of 2004. These combined to produce the figure of the Polish plumber, who entered the discussion and started to dominate it shortly before the referendum date. The fear that was expressed was that the internal market would lead to increased competition in particular from low paid East European service providers who would threaten French jobs and salary levels.¹⁹ Indeed, the opposition to the Constitutional Treaty proved to be the strongest among 'manual workers' (76 per cent). The referendum gave the voters an opportunity to voice their economic anxieties, which they had not been able to do when the enlargement was decided. In the words of Hobolt: '[I]n this campaign the troubles of the French economy and welfare state were linked to the liberal economic model promoted by the EU. The no-side thus managed to relate the fears over the pressures of globalization and the decline of the French social model directly to the issue of the Constitutional Treaty'.²⁰

In the case of the Netherlands,²¹ the lack of sufficient information played a major part in the outcome. It was the most important reason both for the abstentions and for the rejection: 51 per cent of those who abstained (38 per cent of voters) said this was due to lack of information while 32 per cent of those who voted 'no' cited it as a reason for the rejection, well ahead of the next reason, namely 'loss of national sovereignty', which was mentioned by 19 per cent of 'no' voters. Interestingly, the economic concerns voiced by the French were largely absent, with only 7 per cent worrying about the Constitutional Treaty's impact on employment.

As is well known, the Member States responded to the rejections with a period of reflection, after which they declared that the constitutional concept had been abandoned but that a new Treaty was nevertheless needed.²² The result was the Treaty of Lisbon, which shared much of the content with the Constitutional Treaty, but had been shorn of the symbolic elements such as the references to the EU's

¹⁷ http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl171_en.pdf.

¹⁸ Commission, *Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market*, COM 2 final (2004).

¹⁹ See for background e.g. Kalypto Nicolaïdis and Susanne K. Schmidt, *Mutual Recognition 'on Trial': The Long Road to Services Liberalization*, 14 JEPP 717 (2007).

²⁰ Sara Binzer Hobolt, *Europe in Question: Referendums on European Integration*, 210 (Oxford University Press 2009).

²¹ http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl172_en.pdf

²² Presidency Conclusions of the Brussels European Council (21/22 June 2007), 11177/1/07 REV 1, available at https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf.

flag and anthem. Most Member States declined to hold a referendum on the Lisbon Treaty, citing its less ambitious nature.²³ However, in Ireland a referendum was held in June 2008 and the voters rejected the Treaty. The turnout was at 53 per cent much lower than in France or the Netherlands, and the margin was narrower, with 53 percent against and 47 per cent for the Treaty.

Like in the Netherlands, a Flash Eurobarometer²⁴ revealed that the lack of information was a key factor behind the low turnout and the most frequently mentioned reason for a 'no' vote.²⁵ Among the absentees, 52 per cent had not fully understood the referendum's issues, 42 per cent said they had not been informed about the issues at stake, and 37 per cent felt they were not informed about the Lisbon Treaty's content. For the 'no' voters, the key reason was '[b]ecause I do not know enough about the Treaty and would not want to vote for something I am not familiar with', which was cited by 22 per cent, well above the next most important matter, the protection of the Irish identity, which was brought up by only 12 per cent. Again, the economic anxieties of the French voters were absent.

In sum, the two key factors that emerge for the rejections were economic insecurity (France), and the lack of information and complexity of the Treaty on offer (the Netherlands and Ireland). In all countries a small number of voters also expressed concerns about sovereignty and national identity.

It is now time to turn to the Brexit referendum. It was held in June 2016. The question put to the UK voters was whether the country should remain in or leave the EU. The turnout was very high at 72 per cent – many voters who do not bother with the national general elections came to cast their votes.²⁶ The result was 52 per cent for 'leave'.

To understand the UK result, it is important to first consider the economic background against which the vote took place, namely the Great Recession since 2008. Two sets of figures supplied by the OECD stand out in particular. First, when it comes to wage growth, the UK had since 2007 recorded the second largest fall of real average annual wages in the EU.²⁷ According to the OECD, the UK annual average real wage growth between 2007 and 2015 had been -1.0 per cent. The only country that had a worse outcome was Greece with -2.4 per cent, while the other crisis countries in the EU had posted considerably better results, with Ireland 0.4 per cent, Portugal -0.5 per cent and Spain 0.6 per cent.²⁸ In other words, the real average wages in the UK had been falling for nearly a decade following the onset of the financial crisis.

²³ See e.g. <http://www.euractiv.com/section/future-eu/news/uk-mps-reject-referendum-on-eu-treaty/> on the UK position.

²⁴ http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_245_full_en.pdf

²⁵ The situation was much the same for the 2001 Irish referendum on the Nice Treaty: see http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl108_en.pdf, which reveals that 64 % of the voters were either only vaguely aware of the issues or had no knowledge at all of the Treaty.

²⁶ The last general election with a higher turnout had been held in 1992, see <http://www.ukpolitical.info/Turnout45.htm>.

²⁷ See OECD, *Employment Outlook 2016*, 237, available at http://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2016_empl_outlook-2016-en. For an analysis including *inter alia* social transfers and wealth, see Andrew G. Haldane, *Whose Recovery?*, available at www.bankofengland.co.uk/publications/Documents/speeches/2016/speech916.pdf. He states e.g. at 10: 'Recovery has not lifted all boats, especially some of the smaller ones. This pattern may go some further way towards solving the recovery puzzle. Whose recovery? To a significant extent, those already asset-rich.'

²⁸ However, the UK unemployment levels did remain low.

The second figure is the GINI coefficient, which is the standard way to measure income inequality. If it is 0, there is perfect equality; if it is 1, all income is in the hands of a single person. According to the OECD, the UK income inequality at 0.358 was the second highest in the EU, with only Estonia at 0.361 displaying a higher level of inequality.²⁹ In other words, not only had real wages been falling for nearly a decade, the income was also distributed very unevenly by European standards.³⁰

The falling wages and the high inequality may explain the deep split that the referendum displayed between social groups. The upper middle class of professionals and managers (AB) voted strongly for remain (57 per cent). The lower middle class of clerical and administrative workers (C1) was evenly split with 51 per cent voting leave. However, the working class, the unemployed and the pensioners voted overwhelmingly to leave (64 per cent).³¹ Those with income above £3,700 per month voted remain in large numbers (62 per cent), while those earning less than £1,200 predominantly voted leave (66 per cent). Of those with a university degree only 26 per cent voted leave, while 78 per cent of those with no qualification did so.³² In other words, voters with a higher social status, income and education were more likely to support remain, while those on the lower rungs of the ladder were for leave. In many national elections they might have abstained, but now they turned up in numbers not seen for almost 25 years.

What were the issues that concerned the leave voters? According to the data published by Lord Ashcroft Polls³³ the issues that resonated among many voters and spoke for leave were the NHS, fairness in the welfare system, the immigration system, and border controls.³⁴ The ability for the UK to control its own laws was also seen as something that the leave result would secure, but less than 30 per cent of voters thought that it was of great relevance. In other words the leave vote was about immigration and its supposed effects on the public services and welfare.

The parallels with France are not difficult to draw. In the UK, a large number of migrants had arrived over the last ten years or so from the new eastern Member States such as Poland. This had led to increased competition on the labour market for low-skilled employees and put pressure on the wages of some British workers. There was also a perception of an impact on schools, housing and health services, as well as on social benefits.³⁵

²⁹ <http://www.oecd.org/social/OECD2016-Income-Inequality-Update.pdf>. Data for the UK is from 2013.

³⁰ Countries like Chile, Mexico, Turkey and the US register even higher GINI coefficients.

³¹ <http://lordashcrofthpolls.com/2016/06/how-the-united-kingdom-voted-and-why/>. See also <https://yougov.co.uk/news/2016/06/27/how-britain-voted/>.

³² The income and education data are from Kirby Swales, *Understanding the Leave Vote, Table Annex*, available at <http://whatukthinks.org/eu/analysis/understanding-the-leave-vote/>.

³³ <http://lordashcrofthpolls.com/wp-content/uploads/2016/06/Quadrant.jpg>. The data are based on a survey of more than 12,000 voters on the referendum day.

³⁴ These four issues were thought to be better if the UK left by more than 10% and of relevance to the final vote by more than 40%.

³⁵ However, research finds that the Central and Eastern European immigrants were a net benefit for the public finances: see Christian Dustmann and Tommaso Frattini, *The Fiscal Effects of Immigration to the UK*, 124 *The Economic Journal* F593 (2014).

The 'leave' campaign played skilfully on these concerns, at times resorting to gross exaggerations or untruths. For example, the official Vote Leave publication '*Paving the road from Ankara*': *the EU, immigration and the NHS*,³⁶ made the following prediction:

There are five more countries in the queue to join the EU including Turkey... This will mean net migration from the EU between about 170,000 and 430,000 each year. This will add between 2.58 million and 5.23 million people to the population of the UK by 2030. The consequences for the NHS will be a rise in... demand for A&E services of between 28% and 57%.

The prediction was based *inter alia* on Turkey acceding to the EU by 2020 without any transitional periods for the free movement of persons. Further, the UK's power to veto future enlargements either went unmentioned or was denied. Thus, the Defence Minister Penny Mordaunt told the audience in May 2016 in a BBC interview that 'we're not going to be consulted [on the Turkish accession]... they are going to join, it's a matter of when.'³⁷ The readers of this article do not need reminding that the accession of Turkey by 2020 is unlikely in the extreme, would certainly be accompanied by lengthy transitional measures, and could be vetoed by any Member State under Article 49 TEU.

Perhaps because of campaigning materials such as this, which were strongly refuted by the other side, in addition to the concern about Polish labourers and Turkish patients that evoked the French referendum, there were also echoes of the information deficits that had plagued the voters in the Netherlands and Ireland. The UK Electoral Reform Society summarised its findings in the following terms:

At the start of the [referendum] campaign in February, only 16% said they were well informed or very well informed about the referendum. This rose to 33% by a week before the referendum. Meanwhile 46% said in February they were poorly informed or very poorly informed, dropping to 28% in our final poll... [T]hese are low levels of informedness.³⁸

In other words, only a third of the electorate felt they had a good grasp of the issues just a few days before the referendum.

In sum, three central issues emerge from this brief survey of the EU referendums in France, the Netherlands, Ireland, and the UK: The voters in France and the UK had concerns that related to increased competition on the labour markets and the impact on welfare provision. In the words of Hobolt, commenting on the Brexit vote: 'the divide between winners and losers of globalization was a key driver of the vote.'³⁹ In all countries some voters felt ill-informed, resulting in abstentions, or votes against the EU. In all countries concerns related to sovereignty also played a part, but only among a relatively small group of voters.

To my mind, two key lessons emerge for the EU. The first is that the Union is perceived as an agent of globalisation and increased international competition that that may benefit the elites but puts pressure on

³⁶ Available at

https://d3n8a8pro7vhmx.cloudfront.net/voteleave/pages/24/attachments/original/1463745000/Vote_Leave_-_Paving_the_road_from_Ankara%27_the_EU_immigration_and_the_NHS.pdf.

³⁷ <http://www.bbc.com/news/uk-politics-eu-referendum-36352676>.

³⁸ Will Brett, *It's Good to Talk: Doing Referendums Differently after the EU Vote*, 13 (Electoral Reform Society 2016).

³⁹ Sara B. Hobolt, *The Brexit Vote: A Divided Nation, a Divided Continent*, 23 JEPP 1259, 1259 (2016). See also Matthew J. Goodwin and Oliver Heath, *The 2016 Referendum, Brexit and the Left Behind: An Aggregate-Level Analysis of the Result*, 87 *The Political Quarterly* 323, 331 (2016).

national workers with low skills. This becomes particularly pronounced when the movement of natural persons is involved, whether in the form of service providers or migrant workers. The enlarged Europe with free movement and large differences in salary levels between the East and the West is seen as a threat.⁴⁰

From the EU's perspective the perception is not entirely fair. It is true that the Union's key competences and policies are directed at market opening and increased competition. Member States are prohibited from sheltering their companies and workers for economic reasons, state aid to industry is strictly regulated, public procurement practices cannot favour national suppliers, and so on. However, this simply reflects the division of labour between the EU and its Member States. The basic bargain that was struck already early in the integration process is that the Union creates wealth by opening economic opportunities while the Member States offer protection with their social and other policies, distributing the wealth more fairly.⁴¹ This corresponds to the basic findings of economics: trade and increased competition are beneficial in the aggregate, but also create losers.⁴² To achieve Pareto efficient outcomes, in other words to ensure that no-one is worse off, redistribution needs to take place through tax and spend policies.

Unfortunately for the EU, the Member States have not always succeeded in distributing the proceeds of economic integration fairly. And when they have not, the blame is not necessarily allocated toward national decision makers, but may be directed at the EU. It is very difficult for a hard-pressed low skilled voter to know whether his or her plight is due to market opening by the EU or the failure of national policies; there is a problem of accountability.⁴³ The Brexit referendum offers an example: the high levels of immigration from Central and Eastern Europe since 2004 that played a major part in the result did not follow straightforwardly from the EU free movement rules but could rather be attributed to the fact that the UK decided not to take advantage of the lengthy transitional periods that the accession treaties provided for free movement of workers and which all other large EU countries applied. This seems to have been done for economic reasons: to allow 'new opportunities for trade and labour market flexibility and... for the economy to grow without risk of inflationary pressure resulting from insufficient labour supply.'⁴⁴

This brings us to the second lesson: the complexity of the integration project. Not only does it render accurate blame allocation difficult,⁴⁵ it also makes it hard for voters to sift through competing claims in a referendum. How does a voter decide whether the claims about the effects of the supposedly imminent Turkish accession or the counter claims by the opposing side are true? In the absence of a trusted neutral expert an average voter is hardly in a position to pick up the Treaty and consult Article 49 TEU, and even if he or she were to do so, deciphering its meaning would require an understanding of the institutional

⁴⁰ Dimiter Toshkov and Elitsa Kortenska, *Does Immigration Undermine Public Support for Integration in the European Union*, 53 JCMS 910 (2015) find empirically that immigration from Central and Eastern Europe has hurt EU support also at the regional level in Spain, France, Ireland, and the Netherlands.

⁴¹ See Floris de Witte, *The Architecture of the EU's Social Market Economy*, in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017).

⁴² For influential recent work, see e.g. David H. Autor, David Dorn, and Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 American Economic Review 2121 (2013).

⁴³ See generally on the issue the various essays in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002).

⁴⁴ Agnieszka Fihel et al., *Free Movement of Workers and Transitional Arrangements: Lessons From the 2004 and 2007 Enlargements*, 10, available at www.ec.europa.eu/social/BlobServlet?docId=14000&langId=en. Further Gareth Davies, *Brexit and the Free Movement of Workers: A Plea for National Legal Assertiveness*, 41 ELRev 925 (2016) argues that the UK would have had legal opportunities to limit immigration even within the normal free movement rules.

⁴⁵ See empirically Sara B. Hobolt and James Tilley, *Who's in Charge? How Voters Attribute Responsibility in the European Union*, 47 Comparative Political Studies 795 (2014).

structure of the Union. This may render referendum campaigns confusing and create opportunities for misinformation.⁴⁶

Unfortunately complexity is a part and parcel of the integration project and difficult to eliminate. The attempt at simplification in the Constitutional Treaty was sincere but fell short and failed to move the voters.⁴⁷ This is at least in part due to the nature of the Union. At its heart, it is a complex compromise between different interests and ideas. The Treaty is not a document that is based on a single overarching vision. It must contain the tensions between supranationalism and intergovernmentalism, economic liberals and dirigistes, those with an Atlantic outlook and those with more Continental views, the old Europe and the new Europe, the North v the South, and so on. The constitution of the European integration project cannot adhere to the often expressed ideal of brevity. Instead, it is bound to be a lengthy contract between parties that do not quite trust each other and have their own red lines they wish to be reflected in the text. The complexity is not accidental but endemic.

The complexity also supplies perverse incentives for national politicians.⁴⁸ It is perfectly rational for government ministers to seek to shift the responsibility for unpopular policies to the EU and to take all credit for the popular ones if they will not be easily exposed when doing so. Any pious calls for Member States to take ownership for hard decisions at home simply fly in the face of the incentive structure facing national politicians.

To sum up: when the recent French, Dutch, Irish, and British referendums are compared, the two common themes that emerge are the concerns about increased international economic competition, in particular as a result of the movement of natural persons, and the lack of information. For the EU the lessons are difficult: the power to shelter the voters affected most has been held in the hands of the Member States and the complexity of the European integration project is not accidental but due to its nature.

3. Solutions

It is now time to explore possible solutions. This section will argue that the basic bargain where the EU concentrates on wealth creation and the Member States distribute it may need to be revisited. The EU must do more to ensure its policies do not hinder national redistribution efforts. It may also have to become more active in providing protection directly. In fact, it seems that the EU is already travelling down this road. Second, a better job must be done to inform citizens about the Union. This will likely require the engagement of national education systems.

Before turning to the solutions, one unhelpful suggestion should be dismissed: a retreat towards less integration in general is unlikely to provide an answer. This is so for four reasons. First, as discussed in the previous section, although concerns related to sovereignty were expressed in the referendums, they only

⁴⁶ For a sustained assessment of the importance of the 'informational environment' in EU referendum campaigns see Hobolt, n. 20 above.

⁴⁷ The Final Report of the Convention Working Group IX on Simplification CONV 424/02 begins: 'nothing is more complicated than simplification'. The Constitutional Treaty itself contained more than 60,000 words even without the lengthy annexes and declarations.

⁴⁸ Sara B. Hobolt and James Tilley, *Blaming Europe?: Responsibility Without Accountability in the European Union*, Ch. 7 (Oxford University Press 2014) find that national politicians rarely try to blame the EU directly for the economic situation, but do use it to diffuse responsibility and redefine issues to limit electoral damage.

moved a relatively small number of voters. Second, successfully addressing the economic anxieties may well render issues relating to national identity less salient. Individuals tend to emphasise the high status categories they belong to; thus, a voter with a secure economic status may feel less need to stress his or her national identity.⁴⁹ Third, Member States remain sovereign today, as is clear from the fact that they may leave the EU,⁵⁰ and any retreat of integration may not in reality increase their autonomy,⁵¹ given the interconnected nature of modern economies and the prevalence of global problems from terrorism to climate change. Individual States cannot address such problems effectively but must do so in concert. Finally, a retreat towards something resembling a free trade area might not be enough to satisfy the opponents. For example, in the US the North American Free Trade Area has been subject to attacks that resemble those sometimes directed at the EU.⁵² The hard core opposition is not just to some advanced manifestations of 'globalism' but to all of them. This of course does not mean that integration must always forge forward and can never take any steps back.⁵³ Rather, the point is that a partial retreat is unlikely to satisfy the true nationalists.

A good place to start the discussion of solutions is a recent statement by Mario Draghi:

Today we must devote more attention to the redistributive aspects of integration, and especially to those people who have paid the highest price.... Recent discussions about tax fairness and a European unemployment insurance fund, about professional retraining funds and other projects with the same idealistic goals, all go in this direction.⁵⁴

When sentiments of this nature are expressed not only by leftist politicians but also by the President of the European Central Bank with a background *inter alia* at the investment bank Goldman Sachs, it is time to take notice. In fact, there are two aspects to Mr Draghi's suggestion: the EU must do more to ensure it is not hindering national redistributive efforts⁵⁵ and may need to engage also in its own projects independently of the Member States.⁵⁶

The 'discussions about tax fairness' mentioned by Draghi exemplify the former aspect. The fear is that the internal market with its right of establishment and free movement of capital has created conditions that allow corporations to avoid paying taxes. This can either reduce the ability of the Member States to collect revenue, thus affecting their power to redistribute, or it can force them to shift the tax burden from corporations towards labour and consumption in an unfair fashion. In a nutshell, the freedoms may not

⁴⁹ See Benjamin M. Friedman, *The Moral Consequences of Economic Growth*, 43 *Society* 15 (2006) for an eloquent exposition of the underlying idea in the US context.

⁵⁰ See for the UK also *Miller* [2017] UKSC 5, 60.

⁵¹ See Craig, n. 10 above, 456.

⁵² See e.g. Alan Beattie, *Fate of Free Trade Depends on the Whims of Donald Trump*, *Financial Times* (17 Jan. 2017).

⁵³ See e.g. the attempt in Maurizio Ferrera, *The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights*, 22 *ELJ* 791 (2016) to calibrate free movement rights for reasons of political sustainability.

⁵⁴ Mario Draghi, *Reviving the Spirit of De Gasperi: Working Together for an Effective and Inclusive Union* <https://www.ecb.europa.eu/press/key/date/2016/html/sp160913.en.html>.

⁵⁵ There is already a corpus of European legislation in the social field that is largely aimed at halting any race to the bottom among the Member States, but its production has slowed during the last few years. See Catherine Barnard, *EU Employment Law and the European Social Model: The Past, the Present and the Future*, 67 *Current Legal Problems* 199 (2014).

⁵⁶ See Kathryn Simpson and Matthew Loveless, *Another Chance? Concerns about Inequality, Support for the European Union and Further European Integration*, 24 *JEPP* 1069 (2017) for an argument that while many citizens are disappointed about EU's performance in tackling economic instability and inequality to-date, they are optimistic that integration can deal with these issues more effectively in the future.

only create wealth but may also undermine Member State ability to distribute it, and the EU may not have done enough to correct this. Similarly, it can be argued that the EU has created conditions for social dumping and has failed to address the matter sufficiently.⁵⁷

There are at least three ways in which the internal market may erode the ability to tax. First, it may engender generalized tax competition. Countries lower their corporate tax rates to attract investment from other Member States, given that companies and capital are free to move. This may generate competitive responses from other countries in a destructive race to the bottom. Indeed, corporate tax rates have declined steadily in Europe, although normally the reduction in rate has been accompanied by a widening of the tax base.⁵⁸ Second, countries may engage in targeted tax competition where they seek to attract particular tax payers by special arrangements that may not be available to others.⁵⁹ Third, the internationalization of economic activity may offer companies opportunities to exploit various gaps, mismatches, and information asymmetries by aggressive tax planning methods, such as transfer pricings and intra-group loans, that allow profits to be allocated to low tax jurisdictions and losses to high tax ones.⁶⁰

Helpfully, the European Union is engaging in a multi-pronged effort to deal with the issue of 'tax fairness'.⁶¹ First, the Court of Justice has recalibrated some of its earlier case law, giving Member States greater opportunities to maintain their tax rules against legal challenges on the grounds of the market freedoms. In particular through an increased use of justifications such as 'preserving the balanced allocation of the power to impose taxes'⁶² the Court has since 2005 displayed sensitivity to Member State efforts to protect their tax bases.⁶³ Second, the Commission has taken the issue of targeted tax competition seriously, and has begun to enforce state aid rules more strictly in the case of national tax advantages granted to particular companies.⁶⁴ Third, the EU legislature has passed directives on bulk exchange of information between national tax authorities, addressing the epistemic weaknesses of territorially bound national tax administrations.⁶⁵ It has also adopted a Directive authorizing Member States to take action against various forms of tax avoidance for example by using general anti-abuse rules.⁶⁶

⁵⁷ See for discussion e.g. Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999), de Witte, n 41 above, and Sacha Garben, *The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union*, 13 *EuConst* 23 (2017).

⁵⁸ See Commission Staff Working Document, *Corporate Income Taxation in the European Union*, SWD 121, 19-20 (2015).

⁵⁹ See e.g. Vanessa Houlder, *Leak reveals scale of corporate tax deals with Luxembourg*, *Financial Times* (6 Nov. 2014).

⁶⁰ This is a global concern: see in particular <http://www.oecd.org/tax/beps/> for detailed discussion and studies.

⁶¹ For discussion, see Jukka Snell and Jussi Jaakkola, *Economic Mobility and Fiscal Federalism: Taxation and European Responses in a Changing Constitutional Context*, 22 *ELJ* 772 (2016) and Peter J. Wattel, *Taxation in the Internal Market*, in Koutrakos and Snell (eds), n. 41 above.

⁶² See e.g. Case C-311/08 *SGI* EU:C:2010:26 para. 66.

⁶³ See e.g. Peter Farmer, *Direct Taxation and Fundamental Freedoms*, in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law*, 813-814 and 817 (Oxford University Press 2015).

⁶⁴ See e.g. Commission Decision 2016/1699/EU on the excess profit exemption State Aid scheme SA.37667 implemented by Belgium, OJ L 260/61 (2016).

⁶⁵ See Council Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 359/1 (2011), as amended.

⁶⁶ Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ 193/1 (2016), Art. 6.

Finally, the Commission has relaunched the proposal for a Common Consolidated Corporate Tax Base (CCCTB).⁶⁷ Here the stated primary intention is to reduce the opportunities for multinational companies to avoid taxation by exploiting differences in national tax rules. Interestingly, although the proposal is not a new one, its main aim has changed. When the CCCTB was first proposed in 2011, it was put forward in the name of removing tax obstacles for corporations.⁶⁸ The updated aim is reflected in some features of the current proposal; in particular, the proposed rules are compulsory rather than optional for large multinationals. This clearly demonstrates the Commission's awareness of the political mood and its change of emphasis.⁶⁹

Draghi's comments about the creation of a European unemployment insurance fund go further: they do not just seek to maintain the national capacity to redistribute, but also provide the EU with it. The European unemployment insurance fund has in the past been discussed mainly from the point of view of economic and monetary union.⁷⁰ It would provide a macroeconomic stabilisation tool that could offset economic slowdown in particular regions of the euro area; for example, an increase in unemployment in a country could automatically result in payments of European unemployment benefits there, boosting economic activity. However, at the same time it undoubtedly also serves redistributive purposes.⁷¹ In this way, the EU could become not just a provider of economic opportunities but also of protection, not just a wealth creator but also distributor, countering perceptions that integration only serves the interests of businesses and wealthy mobile elites.⁷²

Very recently, the Commission has announced a major effort to strengthen the EU's role and visibility in the field of social protection. It has launched a European Pillar of Social Rights, where it seeks to set out 'a number of key principles and rights to support fair and well-functioning [sic] labour markets and welfare systems'⁷³ in particular for the euro area. Again the focus is twofold: the aim is both to advance social justice and to strengthen EMU through further convergence. The Commission hopes that the Pillar will be solemnly proclaimed by the EU institutions and then put into practice by new legislation on issues such as work-life balance and access to social protection, as well as stronger enforcement of existing legislation, such as the Working Time Directive.⁷⁴

⁶⁷ Commission, *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, COM 383 final (2016).

⁶⁸ Commission, *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, COM 121 final (2011).

⁶⁹ The Commission efforts to modify the Posted Workers Directive to address unfair practices and to promote the principle of the same pay for the same work in the same place are a part of the same pattern: see Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, COM 128 final (2016).

⁷⁰ See for a review of the literature Miroslav Beblavý, Gabriele Marconi and Ilaria Maselli, *A European Unemployment Benefit Scheme: The Rationale and the Challenges Ahead* (CEPS 2015), available at www.ec.europa.eu/social/BlobServlet?docId=14491&langId=en.

⁷¹ See e.g. László Andor, *Basic European Unemployment Insurance – The Best Way Forward in Strengthening the EMU's Resilience and Europe's Recovery*, 49 *Intereconomics* 184 (2014). Commissioner Andor writes: 'It would provide an answer to the simple question of a disillusioned European voter: "Where is Europe when we need it most?"'

⁷² European Social Fund and European Globalisation Adjustment Fund represent more modest steps that have already been taken; see <http://ec.europa.eu/social/main.jsp?catId=86&langId=en>.

⁷³ Commission Communication, *Establishing a European Pillar of Social Rights*, COM 250 final, 2, (2017).

⁷⁴ Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, OJ L 299/ 9 (2003).

The European Pillar of Social Rights provides clear evidence that the Commission is well aware of the challenges and determined to push the social dimension of integration. It is not seeking to protect only vulnerable minorities or free movers but instead also promises things such as ‘right to fair wages’, ‘work-life balance’ and adequate pensions that will appeal to the median voter, who may not have any intention to migrate or is not personally concerned about race or disability discrimination and suchlike.⁷⁵ At the same time, there is a danger of widening the expectations-delivery gap that the EU often suffers from.⁷⁶ A right to fair wages and adequate income is difficult to deliver for anyone, and doubly so for the EU, given that the key competences and policy tools remain in the hands of the Member States or the social partners.⁷⁷ Any possible enthusiasm may soon be replaced by cynicism when the rights fail to materialise.

The European Social Pillar, as well as the initiatives in the field of taxation, also show an attempt to communicate more effectively with the citizens. In taxation, the narrative has changed from removing business obstacles to ensuring tax fairness. The Social Pillar is distilled into 20 catchy principles that could be proclaimed with pomp and circumstance.⁷⁸ The web sites for the initiatives no longer feature just links to Commission documents but also embed videos and glossy factsheets.⁷⁹ This brings us to the second issue: how to deal with the lack of information.

It is notable that the lack of information has plagued numerous EU referendums for over a decade in advanced countries with hard fought campaigns. Undoubtedly there are improvements that could be recommended, such as reliable provision of basic factual information and setting up of official bodies that can take action against outright falsehoods, which were lacking in the case of the Brexit referendum. However, it seems that the root causes lie deeper and simple adjustments to the campaigns may not suffice.⁸⁰

Again, there is a helpful quote to start the discussion:

[W]hat is needed most of all is a more informed and engaged electorate in the first place – and for that, much-improved political education in schools is essential... Citizenship education should be extended in primary and secondary schools... This would lay the groundwork for a more informed and engaged electorate better equipped to deliberate on the issues around a referendum.⁸¹

The quote is from a study by the UK Electoral Reform Society following the Brexit referendum. The point is simple but powerful: if referendums are to be used as a major decision-making mechanism, then the voters

⁷⁵ Commission Recommendation on the European Pillar of Social Rights C 2600 final (2017), principles 6, 9, and 15.

⁷⁶ This has been flagged up as a particular concern in Commission, *White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025*, COM 2025, 13 (2017).

⁷⁷ See especially Art. 4(2)(b) and 153 TFEU.

⁷⁸ Commission, *Proposal for a [sic] Interinstitutional Proclamation on the European Pillar of Social Rights* COM 251 final (2017).

⁷⁹ See e.g. https://ec.europa.eu/taxation_customs/sites/taxation/files/ctr_factsheet2016.pdf and https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

⁸⁰ To illustrate, in the context of the first Irish Nice referendum the voters were asked three multiple choice questions on issues such as the name of the Commission President and the number of Member States. Professor Sinnot reports: ‘Putting the answers to the three political/institutional questions together to form an index of political knowledge shows a sorry picture - 63 per cent score zero, 25 per cent score 1, 10 per cent score 2 and a mere 2 per cent score 3’, n. 25 above at 4.

⁸¹ See Brett, n. 38 above at 9 and 56.

need to be properly equipped to assess the issues;⁸² otherwise involving the populace will only reduce the quality of decisions. Any short campaigns are unlikely to be enough. Without a sufficient understanding of the background voters may fall prey to opportunistic misinformation. Only the school systems seem to be able to provide this.

In nation states schools have been used extensively to bring up national citizens. Pupils are taught the country's history, the basics of its political system, the institutions of the state, and so on. This allows them to take reasonably informed decisions in national elections. They may not have received similar instruction on European matters. They have not been educated to become European citizens. Yet in referendums they are expected to take decisions on European matters directly.

The European dimension of education is not a new idea. Earlier, it was connected to a more general effort to build a European identity that took hold in particular in the 1980s and resulted in symbols such as the EU flag and anthem. It was pushed in particular in the field of history, with the view to alter the supposed nationalistic biases in how the subject was taught in schools. The aim was to create a European perspective of history. For example, an attempt was made to write a common textbook with many language versions, although that particular project ran into difficulties on issues such as whether Sir Francis Drake should be called a 'pirate' and whether the invasions that spelled the end of the Roman empire should be titled 'barbarian' or 'Germanic'. More recently, the emphasis has shifted from the common identity building to exchange programmes and other devices that allow interaction across borders.⁸³ Further, some of the activity takes place outside the EU's framework.⁸⁴

The issue of competence provides a particular stumbling block for further progress at the Union level. According to Article 6 TFEU the EU only has the competence to support, coordinate or supplement the actions of the Member States in the field of education, while Article 165 TFEU commands full respect to 'the responsibility of the Member States for the content of teaching'. Further, 'any harmonization of the laws and regulations of the Member States' is specifically excluded. Yet this does not have to mean that nothing can be done. There is a specific power to adopt 'incentive measures', as well as recommendations, for 'developing the European dimension in education'. As long as there is no harmonization and the Member States have the final word on the precise content, for example Grimonprez suggests defining 'specific "EU civic key competences" as learning outcomes' which could be linked to 'common EU citizenship education databases for schools'.⁸⁵ In this way, Member State educational autonomy would be respected, but with an added European dimension.

Any EU involvement in education has to tread a fine line so that it does not descend into propaganda. The goal does not need to be the creation of a European identity that would compete directly with national identities. Instead, what is needed is the provision of sufficient information about the integration project and its values, aims and institutions to allow European citizens to act as informed decision makers and to assess

⁸² See also Bryony Hoskins, *Brexit and its implications for Citizenship Education across Europe*, available at <https://ec.europa.eu/epale/en/blog/brexit-and-its-implications-citizenship-education-across-europe>.

⁸³ See e.g. Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union*, 230-233 (Yale University Press 2013) and Cris Shore, *Building Europe: The Cultural Politics of European Integration*, 56-60 (Routledge 2000).

⁸⁴ See e.g. <http://www.ehea.info/> on the Bologna Process and the European Higher Education Area, which has 48 Member States.

⁸⁵ Kris Grimonprez, *The European Dimension in Citizenship Education: Unused Potential of Article 165 TFEU*, 39 ELRev 3, 22-23 (2014).

claims made in the course of national political campaigns involving Union matters. Undoubtedly some Member States already do this, but the challenge is to ensure it across the Union.

4. Conclusion

This article has examined the national referendums in France and the Netherlands on the Constitutional Treaty, the first Irish referendum on the Lisbon Treaty, and the Brexit referendum. Some common themes have emerged. First, both the French referendum and the Brexit referendum demonstrated anxiety about the effects of international competition and especially the movement of natural persons after the 2004 EU enlargement on jobs and welfare. In all referendums the lack of information was an issue, resulting in abstentions or votes against the integration project. The EU has been perceived as an agent of economic globalisation, and the failures of Member States in redistributing the proceeds of trade and competition may have been attributed to the EU instead. This has not been helped by the endemic complexity of European integration, or the incentives that national politicians have for blame shifting and credit taking. It has been argued that the solutions lie in revisiting the basic bargain where the EU creates wealth and the Member States are in charge of distributing it, and by involving school systems in educating pupils to become European citizens, so that they can act as informed decision makers.

The solutions that the article has suggested are uncomfortable. In its current form, the Union lacks the deep democratic foundations needed for redistribution.⁸⁶ Regulatory policies that aim at efficiency and lack salience, say a directive harmonizing the safety requirements for widgets or the technical features of bloodlet networks, can be legitimized through systems that ensure transparency, procedural fairness, expertise, and accountability by results. By contrast, salient policies that redistribute, 'stealing from the rich to give to the poor', can only be legitimized through classic democratic means. Indeed, national elections are usually lost and won on such tax and spend issues. Despite the presence of the European Parliament and the various efforts to deal with the EU's democratic deficit, the Union is still not able to offer the kind of democratic contestation that redistributive policies need.⁸⁷ The extension of EU's powers and activities would also require a corresponding adjustment of its structures and institutions.⁸⁸ Further, a deeper EU involvement in education would undoubtedly trouble states that have used national mass education systems to build and safeguard national identities and cultures.⁸⁹

An alternative to the suggested changes would be to avoid referendums. In the words of one senior politician who shall remain nameless: 'The main lesson of the Brexit referendum is that one should not hold

⁸⁶ See generally eg Giandomenico Majone, 'Europe's Democratic Deficit': *The Question of Standards*, 4 ELJ 5 (1998) and Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 JCMS 603 (2002). For a critical discussion, see Jukka Snell, 'European Constitutional Settlement', *an Ever-Closer Union, and the Treaty of Lisbon: Democracy or Relevance?*, 33 ELRev 619 (2008).

⁸⁷ Tanja A. Börzel, *From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics*, 54 JCMS 8, 16 (2016) argues that EU activities already today have major redistributive effects but this has been masked behind regulatory policies.

⁸⁸ This has been recognized in many reform proposals; see e.g. Commission, *Completing Europe's Economic and Monetary Union: Report by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz* (2015), available at http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf, which argues at 17 that '[g]reater responsibility and integration at EU and euro area level should go hand in hand with greater democratic accountability, legitimacy and institutional strengthening.'

⁸⁹ E.g. Eric J. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (2nd ed., Cambridge University Press 1992) 91-94 sees compulsory mass education as a crucial step for the invention of the nation.

referendums.' From a normative perspective, the direct involvement of voters who lack information and may be prone to blaming the EU for the sins of the Members States is not attractive. Yet it may be impossible to put the referendum genie back in the bottle and in any event the disaffection of the citizenry needs to be tackled for integration to proceed and even survive. No matter how difficult the solutions are, in the long run the failure to engage with them might prove worse.