A Constitutional Reckoning

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1. Introduction

For many supporters of European integration, the singular consequence of the French and Dutch ‘no’ votes on the ratification of the Constitutional Treaty (CT) in the Spring of 2005 is not the reduction of the EU to a state of political crisis – we have been there before – but that this time the crisis can hardly be viewed as “salutary.”¹ It is difficult, in other words, to construe this acute moment of political disaffection and disorientation as a turning-point, one that will lead in the fullness of time to the EU recovering its political health. On the one hand, for reasons to be discussed below, it is not easy to see how a wide-ranging agenda for the future structure and direction of the EU can now be developed in the absence of an explicit constitutional frame or of the contemplation of such a frame. Yet, on the other hand, popular rejection in two founding Member States – including one half of the couple franco-allemand for so long viewed as pivotal to the Union’s coherence and credibility – threatens to destroy the prospects for any such constitutional frame. Is such a bleak conclusion justified? Is it indeed the case both that the European supranational project is likely to founder in the absence of an overt constitutional register of debate, and that the failed documentary project must be dismissed as an unrepeatable experiment so removing the prospect of the future development of any such constitutional register? The answer here suggested is that it is only if the danger of an affirmative answer to the first question is broadly acknowledged that an affirmative answer to the second question may be avoided. That is to say, it is only if we concede that, however difficult, a constitutional reckoning – a settlement of accounts and treatment of differences in constitutional terms – remains indispensable to the future of the EU, that the political will may be found to revive or engage anew in such an experiment.

To begin to unpack this argument, we need to remember how we got here. We need to recall the initial reasons that were or might have been offered in support of a fallible constitutional process as it gradually unfolded over the course of the Laeken Declaration of 2001, the Convention on the Future of Europe of 2002–3, the Intergovernmental Conference (IGC) of 2003–4 and the subsequent (and now stalled) treaty ratification stage. First, it was claimed, or for the most part simply hoped or assumed, that the prospective prize of a ratified CT outweighed the negative consequences associated with failure. Secondly, the risk of these negative
consequences could in any case be dismissed as slight, or at least as more palatable than the risks associated with constitutional inaction. For many this was based on the complacent assumption that since, despite frequent prognostications of doom, no previous treaty had been rejected, the CT’s rejection was likewise highly unlikely. Alternatively, and in the event more pertinently – even if such an event came to pass, it should not undermine the relevance or destroy the prospects of the larger process or objective to which the CT sought to contribute. So while trying and succeeding was clearly better than trying and failing, trying and failing, on this view, was still preferable to not trying at all. On what basis were these claims made and calculations arrived at, and, crucially, how do they look and what do they suggest for the future now that the initial constitutional route appears to have been closed off?

2. The Case for the Constitutional Treaty

The first argument – the argument of substance – divides into three. The prospective value of the CT’s prize could be calculated in both material and symbolic terms, and also, if less obviously as regards its direct social effects, in terms of political morality. The argument from political morality is more appropriately considered in the context of our second argument – the comparative risks of failure against those of inaction, while for the moment we will concentrate on the more tangibly consequential material and symbolic arguments.

Materially, the case for the CT was that, like the Amsterdam Treaty before it, the Nice Treaty left unfinished institutional business in the face of the pending CCEE Enlargement, particularly with regard to streamlining the legislative voting procedures and refining the executive direction (through Commission and European Council) of an EU of twenty plus. But this calculation was never about the overall scale or scope of the reform program. Even if we define the urgent contemporary agenda more generously than the management of enlargement, and include other timely initiatives that found their way into the text such as greater foreign policy co-ordination through an EU foreign minister and steps towards a more extensive, but also more accountable, post 9/11 supranational capacity in the area of internal security, the changes contemplated by the CT were no more significant than those wrought by various earlier treaties. Indeed, they were arguably much less significant than achieved in the 1990s at Maastricht or Amsterdam. If, nevertheless, only a self-styled Constitutional Treaty could deliver the necessary additional reforms, however modest these might be, then the material case for the CT would be made out.

And given the relentless pace of change since the 1986 Single European Act and the growing evidence of popular skepticism towards the EU after Maastricht, Europe had indeed been showing signs of Treaty fatigue in general and growing disillusionment with the IGC process in particular. The prospect of more of the same threatened a replay of Nice’s weary compromise, if not downright failure. If
Nice was supposed to deal with Amsterdam’s institutional leftovers, but conspicuously failed to do so, where would the new momentum be found within the normal IGC cycle to deal with the “leftovers of the leftovers”? Arguably, only a 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. And only a constitutional process, complete with a relatively inclusive, public and consensual Convention, and so arguably tending towards a model of decision-making more attuned to deliberation than to the strategic bargaining of the pure IGC reform mechanism, and with the popular failsafe of a healthy spread of ratification referendums (however tardily and reluctantly conceded, and however dependent upon Tony Blair’s strategic calculation of the balance of domestic political advantage)! could provide a format capable of moving beyond the preference-entrenching strategic intergovernmental stand-off of Nice.

Symbolically, the case for a CT was less tangible but more profound. It spoke to the contribution of a documentary constitutional project to the cause of European integration over and above the normative content of the text. In its narrow neo-statist or federalist version – often caricatured as the only version – this is an argument about the crude expansion of European capacity and its concentration at the institutional centre. It holds that only through the development of a stronger sense of collective political community, for which a European Constitution would provide the catalyst, might Europe enhance its de facto and de jure competence in those areas where effective European action is presently frustrated by the significant residue of national sovereignty. Indeed, in the most extreme version of this argument, the Constitution becomes a kind of societal pressure-cooker. Here, 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.

Yet there is a more nuanced and inclusive version of the symbolic argument. This holds that 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 strike the balance between national and supranational action, the input (responsiveness) and output (efficacy) legitimacy of an entity that – short of retreat to the status of mere customs union – will in any event retain a decision-making capacity greater than any other transnational organization, can only be enhanced by an increase in the resources of dedicated political capital available at the European level. That political capital – defined as the propensity of a collectivity towards mutual engagement, trust and concern – might in turn be generated by the ongoing process of collective political self-identification and self-definition intimated in, stimulated by and recorded and preserved through the making of a constitution. The key to this argument lies in its questioning of the necessity or exclusivity of the inference from political community
to greater integration and concentration of government capacity. It does so by asserting that the idea of collective self-government or popular sovereignty that we find in the enlightenment thought of Locke and Sieyès and that inspired at least some of the protagonists of the English, French, and American revolutions was not intended, as has often subsequently been misunderstood or misappropriated, simply as an assertion of political authority as founded in popular opinion rather than proprietary right. Just as important a consequence of popular sovereignty as the empowerment of public authority in the name of the public good was that of the limitation or forbearance of government authority, for the idea of a indivisible collective foundational of government denies to any section of that collective, or to any government operating in the name of any section of that collective, final and unlimited exercise of constitutional authority. That is to say, if self-government properly rests in the constituent authority of the collective people, then any Constitution based upon an image of collective self-government must be concerned as much with checking governmental factionalism or abuse of minorities as with democratic empowerment of majorities.

What is more, this hypothesis should not be dismissed as mere philosophical speculation or pious hope. In the first place, as noted, there is a important historical legacy in place. For the normative strength of the aspirational model of political community contained in much of Western constitutionalism lies precisely in the promise (however imperfectly delivered) that investment in a shared political capital will engender a sufficient sense of a community of attachment not only to make the idea of non-unanimous decision-making – of sometime winners and losers – fair and palatable to all in a longer perspective, but also, and reciprocally, to restrain what may legitimately be done to any part of the community by the sometime winners in the name of the whole. And secondly, if it is nevertheless objected that the new Euro-Constiution, as opposed to its national predecessors, lacks the social preconditions to have the required mobilizing effect, then one may respond that this remains an open question. Of course, Constitutions cannot take root in entirely fallow ground. Yet it is often overlooked that Constitutions have historically been agents of integration, rather than mere endorsements of existing political communities, in just these circumstances where traditional sources of cultural or political identification are not readily available – think of eighteenth-century America with its diverse immigrant communities, or mid-twentieth-century Germany, defeated and divided by war. These examples, typically unfolding unevenly and across an extended period, give lie to the prejudice that only a community with a pre-existing ‘thick’ demos can establish and sustain a viable constitution. Rather, it is just these circumstances where the reflexive sense of a demos is emergent or contested, and in any event precarious, that Constitutions can perform their most vital symbolic or integrative work. And for all the failure of the CT in the French and Dutch referenda, the fact that as of Autumn 2005 it had nevertheless been ratified in 14 out of 25 member states – representing 235 million of the EU’s 454 million citizens, and that its supporters
in these national ratification forums and in the earlier more textually focused forum of the Convention included many across the entire spectrum of relative emphasis on the Constitution’s potential in social-democratic capacity building on the one hand and its importance as a check on public authority on the other,\textsuperscript{11} suggests that the European political imagination is by no means blind or entirely resistant to a more nuanced ‘qualitative’ rather than ‘quantitative’ conception of the integrative capacity of even a supranational Constitution.

How do these two arguments look today? Paradoxically, in some respects they may have been strengthened in adversity. The material argument has patently failed by its own highest standards. If a process of explicit constitutionalization was invested in as a means to keep the reform ball rolling, then this particular investment has not paid off. Opposite inferences may be drawn. Either it was, after all, a profound strategic miscalculation, and an old-fashioned IGC process, with its familiar low-visibility, elite-driven compromise politics, would more likely have delivered the goods; or, more probably, in the wake of Maastricht and an increasingly poor record of popular ratification of EU treaties in western Europe, most recently apparent in the initial Irish rejection of the Nice Treaty in 2001 and in the Danish and Swedish rejections of the Euro in 2000 and 2003 respectively, whatever the procedural route taken – treaty or constitution – high-level structural reform of the EU is just becoming more difficult, as too, crucially, is the possibility of approving such reform anywhere it may be seriously contested without resort to referendum. If this is true, then to blame the (latest) messenger, now dressed for the first time in full constitutional garb, rather than the (long-term) message seems perverse, and to contemplate a return to a sub-constitutional elite-driven process for just those questions that are increasingly unlikely to slip below the radar of popular politics might simply be wishful (and self-defeating) political thinking.

The symbolic argument, too, is sharpened by the troubles of the current CT. While no one can deny that the French and Dutch rejected this CT, it is much less clear that they renounced the very idea of a European Constitution. Indeed, immediately after the French vote, which provoked an intensity of domestic political discussion unknown since the Socialist-Communist coalition bid for power in 1981,\textsuperscript{12} 75 percent of the French people maintained that a constitutional text of some sort was nonetheless indispensable to sustain the European integration process. In the Netherlands and elsewhere, likewise, the picture is not one of clear-cut rejection of the principle of a constitutionally self-constituted European political community. Rather, both the curse and the hope of the referendum process and debate in these countries lay in its merging of different levels of constitutional debate. Given the historical peculiarity of the initiative to invest in the symbolic register of formal or documentary constitutionalism for the first time simultaneously with a change in the material content of the 50 year-old legal-normative order to which the constitutional label was to be newly attached, it was possible to vote ‘no’ in quite different, and potentially inconsistent registers: either to the second-order idea of an EU Constitution worthy of a democratic mandate
tout court, or to the first-order changes in the detail of that ‘constitution.’ Yet as well as possibly exaggerating hostility to the CT, the depth and complexity of the decision structure – the fact that the performative meaning of the constitutional event was as a formal founding as well as a substantive revision – also served to galvanize debate. Indeed, for those looking for light at the end of the constitutional tunnel, we may be faced with the contradictory scenario of the pilot script for a supranational political community being the subject of such lively contestation as to suggest, the negative result notwithstanding, an intensification of public engagement with the very question of how European politics ought to be configured from which an embryonic sense of European political community might in due course develop.

3. The Implications of Failure

But perhaps this more positive interpretation is entirely moot. For if we turn to the second question – the risk involved in the failure of the CT – on what basis can we avoid the conclusion that that risk has proved to be fatal? Certainly, attempts to revive this constitutional process seem doomed, and properly so. Practically, there seems no likely combination of circumstances that would allow a text which has failed to negotiate the formidable obstacle course of a strictly unanimous ratification procedure\textsuperscript{13} at a point when the political momentum behind the Convention and IGC agreement was its greatest, to be successful a second time round, when the terms of the bargain are growing stale, the dramatis personae have changed, and the goods are so patently damaged. It would in any case be democratically inappropriate to try to revive the form of the present agreement, even if some of its content might conceivably survive to be adopted another day and in a different form.\textsuperscript{14} A referendum should not be treated as a ‘neverendum,’ a process whose conclusion is ignored unless and until a palatable answer is received. And it is no answer to such democratic scruples that the bar of ratification was set unfeasibly – or even ‘undemocratically’ – high to begin with, since collective confidence in the adequacy of majoritarian criteria as a measure of the democratic credentials of our quotidian political institutions depends at least in some measure upon the rules or conventions constituting and generating such criteria themselves meeting higher standards of affirmation.

However, the same practical and normative objection need not prevail against the development of a new constitutional process. We cannot predict what will issue from the year long ‘period of reflection’ on the derailed CT decided by the June 2005 European Council. However, given the impracticality of an indefinite moratorium on the sorts of material reform required to address stalled ‘old’ and emergent ‘new’ urgencies, it is hard to imagine that the political pressure for reform will go away. And, as already noted, there is no reason to think that the elimination of the c-word will smooth the passage of such reform. On the one hand, proponents of reform may seek to revert to the classical IGC method of
Treaty amendment, but it is precisely because many believed this to be a superannuated process in the first place that the documentary constitutional turn was taken after Nice; and, in any case, the threshold of success – ratification by all member-states – is just as formidable here\textsuperscript{15} as in the case of the CT. On the other hand, resort may be had to low-profile methods of informal constitutional reform, such as inter-institutional agreements,\textsuperscript{16} but here there can be no expectation that those who opposed the Constitution so resolutely will not be just as vigilant in ensuring that its reforms are not implemented by indirect means and just as diligent in exposing those who would pursue such a strategy.

The unlikely prospects for structural reform by other means do not, of course, in and of themselves make the case for a renewal of a formal process of constitutional reform. To make that additional argument, we have to move back to the normative domain, for in the final analysis the practical and the moral case for a new constitutional initiative are closely interwoven. Let us again start in negative vein, with the possible objection. It may be argued that there is no moral difference between trying to revive a failing constitutional process and trying to replace a failing constitutional process with a new one. In both cases, is there not a kind of obduracy at work, one which not only is destined to practical failure but which also evinces a certain moral blindness – a refusal to accept uncongenial conclusions? Beyond a certain point, does not the claim “that the answer to failed democracy is more democracy and the answer to a failed constitution is another constitution”\textsuperscript{17} stray beyond the ingenuous towards the disingenuous, and indeed reveal an anti-democratic sensibility?

The answer to this objection is twofold. First, there is a not insignificant formal difference between reactivating the old constitutional machinery and developing a new engine, and indeed the history of state constitution-making knows many examples of iterative attempts at constitution-building before an effective model is finally produced.\textsuperscript{18} The new machinery will require its own self-generated pedigree or constitutive rules – its own institutional pathway for reform, and it is only if such new generative rules or procedures are, first, agreed,\textsuperscript{19} and secondly, successfully applied, that a constitutional package will be forthcoming. The negotiation of these two stages of democratic renewal is a quite different thing from the truncated strategy favored by the ‘reactivators’; namely a rerun, on the basis of a tendentiously stretched reading of its constitutive rules, of the second or application stage of the original constitutional process.

Secondly, the defensibility, and, finally, the viability of a new constitutional initiative cannot be considered in isolation from the defensibility and viability of the available alternatives. And if we look at these alternatives, then it is arguable that just as the current constitutional episode has not delivered a mandate for constitutional reform, equally it has not delivered a mandate either for non-constitutional reform or for constitutional non-reform. The impracticality of non-constitutional or sub-constitutional reform has already been noted, to which one can add the moral objection that that which cannot be delivered by more exacting
democratic means should not be delivered by less exacting means. But what of the other option – the more chastened response involved in taking the ‘no’ on the detailed mandate seriously and so committing Europe to a constitutional steady state for the indefinite future?

Arguably, the very referendum results which on one reading seem to elevate this to the status of the default option, on another and broader understanding seem to rule out any such alternative. This conclusion does not depend upon the convenient argument, popular amongst disappointed supporters of the CT, that the referendum is a blunt device for expressing preferences, and especially inarticulate in its expression of negative preferences. So much is doubtless true, but this is but one variant of the more general limitations upon the eloquence of any of the institutional methodologies of large-scale democracy as an expression of political choice, and thus not a reason to discount the result. Rather, it is again the peculiar double significance of the constitutional question in its novel transnational context which casts significant doubt on the defensibility of the status quo ante. For if, as already indicated, the performative meaning of the first constitutional endorsement of the EU was ambiguously located between the fundamental second-order question of whether the Union was deserving of a democratic imprimatur at all and the first order question of the adequacy of the amendments to its detailed 50 year old acquis, then a ‘no’ vote invites the conclusion that the legitimacy not just of the mooted modest reforms, but of the basic structural template of the Union – whether or not modestly reformed – has been cast in severe doubt.

This, however, is not the end of the argument, for there is one final and more fundamental objection to such a challenging conclusion as to the nature of the strategic bind in which the EU now finds itself which takes us, finally, to the core argument of political morality for or against a documentary constitutional process. This more fundamental objection involves switching the emphasis away from the negative content of the answer to the supposed inappropriateness of the question. On this view, the original sin rests with the European political class, guilty of a “category error” in supposing that the EU was the kind of entity of which the documentary constitutional question should be asked. Instead, constitutions qua constitutive settlements are exclusively affairs of states, with their original and potentially unlimited political and legal authority, rather than of supranational organizations with derivative and textually limited competence. Since, regrettably, the constitutional question was nonetheless posed at the supranational level, and given its inappropriateness was unsurprisingly met with a negative answer, we have to deal with the potentially damaging political consequences of that answer. And the best way to mitigate these consequences, from this state-centered perspective, would be readily to admit the hubristic error of the big-C constitutional way and to return instead to the small-c tradition of incremental system-building which has served the EU so faithfully over the previous 50 years.

Yet the conservative quality of the premises from which such a response is fashioned are readily apparent. As already noted, the big-C constitutionalization
of the EU polity debate is more persuasively seen as a response to the more insistent challenges to the legitimacy of the EU polity which surfaced from Maastricht onwards rather than as the cause of or cue for such challenges. In turn, this reflects the growing belief that the idea of an autonomous democratic (re)founding which is central to the second-order constitutional question is indeed just as appropriate to the transnational domain as to the state domain, and in some respects even more pressing. Granted, certain features of the supranational domain, including the size and diversity of its popular constituency, its unusual dependence on technocratic expertise for the performance of many of its functions, its lack of the clearly developed party cleavages and public sphere which aid democratic opinion-formation at the state level, its absence of clear lines of democratic accountability due to institutional plurality and cross-institutional sharing of the functions of government, and, last but by no means least, its need to co-exist with and resilient practical subordination to national sites of democracy, mean that democracy is and will remain a complex and somewhat muted virtue of the quotidian politics of the EU. Nonetheless, the sheer scope of so-called “pooled” supranational sovereignty – of the EU’s wherewithal, positively, to influence the life-chances of its citizens independently of the will of any particular national government and, negatively, to compromise the capacity of any particular national government to influence the life-chances of its citizens\textsuperscript{23} – make it all the more important that the primary regulatory structure with its inevitable attenuation of democracy itself be directly democratically mandated at the level of polity-generative rules.

On this view, the root case for a renewal of the EU’s constitution-making efforts in the face of initial failure becomes a simple one of political morality. As is corroborated by the flavor of much of the constitutional debate in and after the Convention as well as by the mere fact of such a constitutional debate – redolent with the symbolism of democratic polity-building – being allowed to proceed, the EU is increasingly viewed as the type of entity which has passed a threshold of authoritative capacity and normative penetration beyond which its structures of government require a direct rather than indirect and state-mediated mandate from those who fall within its jurisdiction. The written constitutional form, with its classical double hierarchy of normative pedigree and popular endorsement, remains the best way of securing such a mandate whether as an act of foundation, or, as in the case of the EU, one of popular re-appropriation.\textsuperscript{24}

4. Conclusion: A New Constitutional Reckoning

For some, the EU’s hour of constitutional reckoning has clearly passed, and either the opportunity has been missed, or a hard lesson has been learned that the EU’s ongoing political narrative is simply not appropriately framed in constitutional terms. Yet there is another view which treats a full constitutional reckoning, both as a matter of democratic baptism and subsequent monitoring, as a continuing and
unavoidable imperative give the uniquely empowered postnational polity the EU has become. In some measure, as we have seen, this is a material and a symbolic imperative – a matter of finding the necessary normative means to avoid the EU becoming a blocked political system, incapable of authorising even broadly endorsed avenues of structural reform, as well as a way of mobilizing the sentiments of political community through which any polity may find the best and avoid the worst manifestations of the sense of the common good it seeks to articulate. However, underpinning these there is also a basic imperative of political morality – a backstop guarantee of democratic self-legislation particularly appropriate to a polity whose everyday regulatory politics cannot and often should not place large-scale democratic participation or responsiveness in the foreground. None of this means, of course, that the EU will move quickly, or even slowly, to a new constitutional reckoning, and here the muted nature of the post-referendum response is an early reminder of the difficulties ahead. What does seem certain, however, is that the plausibility and legitimacy of the alternative strategies – non-constitutional reform and constitutional non-reform, not to mention attempted resuscitation of the present CT – will remain significantly overshadowed and compromised by the constitutional dramas of the last few years. The fear is that the political crisis of the EU has not yet touched bottom; the hope is that when eventually it does, the experience will after all prove to be a salutary one.

NOTES


6. Historians will disagree about the extent to which Tony Blair’s abrupt change of heart in favor of a British referendum in April 2004 influenced many of his fellow European Heads of Government – including Jacques Chirac – to follow suit and take a late decision to hold a referendum. However, clearly Blair’s choice did have some influence, and, equally clearly, the sense this conveyed of their responding to external pressure rather than taking a principled initiative placed the late converts to plebiscitary democracy at a strategic disadvantage in some of the subsequent referendum campaigns.

7. On this depiction of the extreme version of the Eurofederalist social democratic position, see A. Moravcsik, “A Category Error,” *Prospect* (July 2006): 25. Moravcsik explicitly associates this line with the approach of Jürgen Habermas. While this is one possible reading of his work, another reading aligns him to the more subtle ‘qualitative’ approach to the mobilisation of political


11. On the diversity of polity-oriented constitutional strategies at play in the Convention, see Walker, “Europe’s Constitutional Momentum.”


15. See Art. 48, Treaty on European Union.

16. For example, to ensure that the new powers the Constitutional Treaty sought to confer upon national parliaments as watchdogs of “subsidiarity” are granted de facto.


18. See e.g. A. Arato, *Civil Society, Constitution and Legitimacy* (Lanham: Rowman and Littlefield, 2000) ch. 7.

19. Which agreement, in the absence of an explicit and “revolutionary” break from the previous constitutional system, will also have to remain consistent with that previous framework. The decisive area here tends to be the “rules of change” themselves, with discontinuous constitutional initiatives distinguished by their disregard for the amendment rules set out under the *ancien régime*. In the case of the European constitutional debate, there has been little public discussion of or support for the idea of a discontinuous or revolutionary framework. Accordingly, the rules for the adoption of the Constitutional Treaty as contained in its Art. IV-447, namely approval by all member states in the framework of an IGC followed by unanimous national ratification, were consistent with the existing Treaty amendment rules in Art 48 TEU, even if the procedure was importantly modified by the insertion of the Convention at the earlier stage of deliberation and proposal. This rather reinforces the double signification of the CT discussed in the text, as not only a formal founding of a *new* order but also a substantive revision of an *existing* order.

20. See e.g. B. Waterfield “No means no: which part of “non” doesn’t Brussels understand,” May 31, 2005, http://www.spiked-online.com/Articles/0000000CAB82.htm

21. See e.g. Moravcsik, “A Category Error.”


23. With the shortfall between the negative and positive – between what is lost from national capacity and what, absent the requisite development of new transnational political capital, is added to supranational capacity – giving rise to the famous supranational “problem-solving gap.” See e.g., F. Scharpf, “Problem Solving Effectiveness and Democratic Accountability in the EU” *Max Planck Working Papers* (2003).


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