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THE CONSTITUTION OF THE EUROPEAN UNION: CONTENT, PROSPECTS AND COMPARISONS TO THE U.S. CONSTITUTION

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I. INTRODUCTION

On October 29, 2004, atop Capitoline Hill, once the center of the Roman Empire,¹ European heads of government signed the European Union's (EU) first constitution. In the United States, the moment was anticlimactic and largely lost to audiences focused on the American presidential election.² In Europe, the signing represented fifty years of history and much hard negotiating over the past thirty months.

The European Constitution is an extraordinary document, not just for what it says, but for its very existence. To those steeped in the recent history of Europe, including two world wars and the Cold War, ethnic distrust, ancient feuds, and hardened nationalism, the notion of a united Europe seems an impossible fantasy. A united Europe was the dream of every would-be European conqueror, from Charlemagne to Napoleon to Hitler, but their dreams would have unified the continent by empire and force. This time, Europe may be united by diplomacy and mutual interest.

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1. The choice of Rome was symbolic. Rome was not only the center of the first attempt at European unity over two thousand years ago, it "was also the site of the 1957 birth of the European Economic Community" in the Treaty of Rome. Daniel Williams, *European Leaders Sign Constitution; Prospects for Ratification Uncertain*, THE WASH. POST, Oct. 30, 2004, at A15.

2. See generally Graham Bowley, *Heads of State Sign the European Union's First Constitution*, N.Y. TIMES, Oct. 29, 2004, at A3. Cf. Dan Bilefsky & Gabriel Kahn, *EU Standoff on Leadership Shadows Signing*, WALL ST. J., Oct. 29, 2004, at A13 (Note that the placement may be significant.).

While largely ignored by the U.S. media, public, and policy makers, the prospect of a united Europe has massive implications, not all of them positive, for American international policies. A politically unified Europe will necessarily provide a counterweight and a competitor to American power in the international arena. Europe now has an economy nearly as large as that of the United States, a population significantly greater than that of the United States, a currency that rivals the dollar at the international unit of exchange, and a workforce in many ways as modern and sophisticated as their American counterparts.

As Europe's wealth, military capacity, and collective character increase, so will its appetite for greater international influence. Just as America's will to extend its primacy stems not just from self-interest, but also from an emotional satisfaction derived from its leadership position – call it nationalism – so will Europe's rise inspire a yearning for greater status. As the United States currently sits atop the international pecking order, the EU's search for greater autonomy and status will, at least initially, take the form of resisting U.S. influence and ending its long decades of deference to Washington.³

The Draft Constitution for Europe was first presented by the European Convention on July 18, 2003. This Constitution (more precisely the Treaty Establishing a Constitution for Europe) was under consideration by the European Convention since February of 2002. On December 13, 2003, the leaders of the twenty-five current and prospective members of the European Union failed to reach agreement on the Constitution, and at least for a time the constitutional process was stalled.⁴ The chief issue was the definition of a "qualified majority vote" (QMV), the relative weighting of the votes of Member States needed to pass certain legislation. That issue was resolved in a meeting in Brussels on June 18, 2004.

The Constitution now moves to a two year process of ratification. Ratification must be unanimous among the twenty-five members of the EU, and the internal process of ratification is to be decided by each country. At least eleven of the members have indicated that they will hold a referendum,⁵ while

3. CHARLES A. KUPCHAN, *THE END OF THE AMERICAN ERA: U.S. FOREIGN POLICY AND THE GEOPOLITICS OF THE TWENTY-FIRST CENTURY* 154 (2002).

4. John Tagliabue, *European Union Can't Reach Deal on Constitution*, N.Y. TIMES, Dec. 14, 2003, at 1.1 (explaining that the reason for the inability to reach a deal was the voting formula in the Constitution between the large and small Member States, an issue reminiscent of the Great Compromise in the U.S. Constitution. In this instance, Spain and Poland wanted almost as much voting power as much larger states, while Germany and France did not want to share power to that degree).

5. *The European Union Constitution: The Constitution Ratification*, CITIZENSHIP AND DEMOCRATIC LEGITIMACY IN EUROPE (CIDEL), at http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const_Rat.htm (last visited Jan. 30, 2005) (explaining that the members include Belgium (non-binding consultative referendum), the Czech

three will subject the Constitution to a parliamentary vote.⁶ A significant number are undecided about the nature of the procedure to be used for ratification.⁷

The combined requirements of unanimous ratification and individualized ratification procedures make it highly unlikely that the constitution will indeed be ratified within the two years provided, if at all. However, the very idea of a European Constitution and the fact that it has proceeded this far shakes the popular American vision of a contentious and ineffective Europe. In fact, the notion of a federal Europe as a potential rival and competitor may give pause to American policy makers.⁸

In many ways the European Constitution merely formalizes existing practice within the European Union and incorporates within one document all of the treaties and compacts that have governed Europe for the past several decades. The creation of the Constitution clearly solidifies the federalization of Europe following a remarkable half-century that saw the creation of the European Community, the recent adoption of the euro by much of the continent, and the accession of former communist states into the EU itself. It is part of a

Republic, Denmark, France, Ireland, Luxembourg, the Netherlands, Poland, Portugal, Spain, and the United Kingdom).

6. *Id.* (noting that the three are Estonia, Germany, and Sweden).

7. *Id.* (noting that these are Austria, Cyprus, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Slovakia, and Slovenia).

8. Melissa Rossi & Christopher Dickey, *The 'Awkward' Squad*, NEWSWEEK, Dec. 22, 2003, at 28. The fears may be justified. A united Europe may well present a significant rival to the United States, economically and perhaps politically.

The EU's annual economic output has reached about \$8 trillion, compared with America's \$10 trillion, and the euro will soon threaten the dollar's global dominance. Europe is strengthening its collective consciousness and character and forging a clearer sense of interests and values that are quite distinct from those of the United States. The EU's member states are debating the adoption of a Europe-wide constitution . . . building armed forces capable of operating independently of the U.S. military, and striving to project a single voice in the diplomatic arena. As the EU fortifies its governmental institutions and takes in new members . . . it will become a formidable counterweight to the United States on the world stage. The transatlantic rivalry that has already begun will inevitably intensify. Centers of power by their nature compete for position, influence, and prestige.

. . . .

For the moment America remains largely oblivious to the challenges posed by a rising Europe. Policymakers in Washington tend to view the EU as at best an impressive trade bloc, and at worst a collection of feckless allies That the EU and the United States might part ways would seem to border on the unthinkable. These presumptions are dangerous illusions.

Charles A. Kupchan, *The End of the West*, ATLANTIC MONTHLY, Nov. 2002, at 42.

process that now seems inexorably moving toward political union, albeit at a slow and grinding pace.⁹

The American constitutional experience has deeply influenced the European constitutional process. Former French President Valerie Giscard d'Estaing, Chairman of the Constitutional Convention, carried a copy of David McCullough's best selling biography of John Adams on vacation with him. Europe's leaders have even considered a bicameral legislature similar to the American Senate and House of Representatives.¹⁰ Certainly the EU Constitution, once adopted, will be compared to the American Constitution in both its successes and its failures. Once the European Constitution is enacted, European judges and lawyers are likely to look to the American constitutional experience and American constitutional law for guidance, support, and judicial gloss.

The purpose of this article is threefold. First, it is to lay out the foundations for a discussion of the European Constitution, including a brief discussion of the background and history of the "federalization" of Europe and an overview of the document itself. Second, for American audiences, it is important to consider the European Constitution in the context of the U.S. Constitution.¹¹ This also means considering the role of the courts in a constitutional process, including the nature of judicial review and *stare decisis* in a European context.¹² Finally, it is

9. Even if a new constitution does not result from the current process, the discussion raises several important issues for the future of Europe. Puder argues that the integration process raises "at least four significant, cross-cutting promises and challenges for shaping the European integration process." They are (1) an "intent to dispense with the traditional process of intergovernmental conferences, patchwork revisions, and lengthy consolidation phases" and substitute "*finalité politique*, or, full political integration" (2) a shift from permissive consensus to positive identification and loyalty; (3) a full discussion of the issues of democracy and legitimacy within the context of a greater Europe; and (4) enhancement of Europe's posture in the global arena. Markus G. Puder, *Constitutionalizing the European Union – More Than a Sense of Direction from the Convention on the Future of Europe*, 26 *FORDHAM INT'L L.J.* 1562, 1569-70 (2003).

10. Tagliabue, *supra* note 4. A bicameral structure saved the American constitution from the "big-state small-state" power struggle, and could yet save the EU from the same controversy. A bicameral structure is not unique to the United States. For example, the German legislature includes two houses, but it too was modeled on the U.S. Congress following World War II. Chancellor Gerhard Schroeder of Germany proposed the establishment of a two chamber structure, with an upper house consisting of ministers from each country and a parliament consisting of popularly-elected representatives. KUPCHAN, *supra* note 3, at 142.

11. See Thomas C. Fischer, "*Federalism*" in the European Community and the United States: *A Rose by Any Other Name*, 17 *FORDHAM INT'L L.J.* 389 (1994) (providing an earlier comparison).

12. Cf., Mark C. Anderson, *A Tougher Row to Hoe: The European Union's Ascension as a Global Superpower Analyzed Through the American Federal Experience*, 29 *SYRACUSE J. INT'L L. & COM.* 83, 90-117 (2001).

necessary to assess the political prospects for the new Constitution and its likely impact on Europe and beyond.

II. THE DEVELOPMENT OF A FEDERAL EUROPE

The reorganization of Europe began with the dreams of Jean Monnet and Robert Shuman, close on the heels of the terrors of World War II. The success of the European Coal and Steel Community (ECSC) in 1951 led to the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) in 1957, which in turn led to economic success and desires for further integration.¹³ The original six members of the ECSC¹⁴ were joined by Denmark, Ireland, and the United Kingdom in 1973;¹⁵ Greece, Spain and Portugal between 1981 and 1986;¹⁶ Austria, Finland, and Sweden in 1995;¹⁷ and Cypress, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia in 2004.¹⁸ Currently, applications for membership are pending for Bulgaria, Romania, Croatia, and Turkey.¹⁹

The move from the commercial-based EEC to the more political European Union (EU) has been gradual and purposeful. Through a series of treaties during the 1970s and 1980s, the economic relations between the countries grew closer and closer. In 1986, the Single European Act created new institutions, accorded legal status to a variety of institutions, gave the Community new responsibility over policies that merely affected economic relations such as the environment, research and development, and regional policy, and made economic and monetary union an EC objective.

13. See generally *The History of the European Union*, EUROPEAN UNION, at http://www.europa.eu.int/abc/history/index_en.htm (last visited Feb. 3, 2005) (providing further information relating to the formation of the ESCS and the EURATOM).

14. *Id.* (listing the original six members as France, West Germany (East Germany united with West Germany in 1990), Italy, Belgium, the Netherlands and Luxembourg (the Benelux countries) known as "The Six").

15. *Id.* (increasing the total membership in the European Union to nine member states known as "The Nine").

16. *Id.* (increasing the total membership in the European Union to twelve member states known as "The Twelve").

17. *The History of the European Union-1994*, EUROPEAN UNION, at http://www.europa.eu.int/abc/history/1994/index_en.htm (last visited Feb. 3, 2005) (providing that although Norway was accorded membership into the European Union, a Norwegian referendum was held and the Norwegians decided against accession).

18. *The History of the European Union*, *supra* note 13 (increasing total membership in the European Union to twenty-five member states).

19. *Id.* Currently only Switzerland, Iceland, Norway, and Liechtenstein are not members of the EU within what is traditionally known as "Europe." *Europe*, EUROPEAN UNION, at http://www.europa.eu.int/abc/maps/index_en.htm (last visited Feb. 3, 2005).

Finally, the 1992 Maastricht Treaty, also known as the Treaty on European Union, introduced formal intergovernmental cooperation on a wide number of fronts and rechristened the arrangement of the "European Union," thus moving far beyond the commercial and economic beginnings of the old EEC. The Maastricht Treaty included agreements about consumer protection, public health, transportation, and education; established a timetable for the move to a single currency; created European citizenship; and accorded new powers to the European Parliament.

The Maastricht Treaty created a new organizational scheme for European organization. This is sometimes called the Three Pillars approach, based on "a Greek temple built on three thematic pillars that correspond to different integration depths and governance modes."²⁰ The Three Pillars included: the European Communities; a Common Foreign and Security Policy; and Cooperation in the Fields of Justice and Home Affairs.

The first pillar involved a reorganization of the existing three European Communities (EEC, ECSC and Euroatom); established union citizenship; created or changed a large number of institutional structures and procedures; and among other things created the EMU, now known as the Euro. The first pillar involved existing "autonomous institutions independent of the Member States [that] manage the government process."²¹ Meeting these goals involved amending the treaties of the three communities.

The second pillar stated that the Member States "shall define and implement a common foreign and security policy covering all areas of foreign and security policy."²² This goal was to be pursued in three ways: through systematic cooperation, through qualified majority voting in the Council, or through development of the Western European Union²³ as a defense component.

Pillar three involved joint cooperation and agreement on a number of matters of common interest, including asylum policy, border security, drug addiction, international fraud, judicial cooperation in both civil and criminal matters, customs, terrorism, and drug trafficking. Under the Treaty, the Member States were required to establish coordinating mechanisms.

Pillars two and three were relatively new to Europe. Both pillars required laying down operating rules and guidelines, but generally relied on Member

20. Puder, *supra* note 9, at 1563.

21. *Id.* at 1563-64.

22. Treaty Establishing a Constitution for Europe, 2004 O.J. (C310) 1, art. III-294 para. 1, at 133, available at <http://europa.eu.int/eur-lex/lex/JOhtml.do?uri=OJ:C:2004:310:SOM:EN:HTML> (last visited Feb. 5, 2005) [hereinafter Constitution for Europe].

23. The Western European Union is an association of the Benelux countries, France, Germany, Italy, and the UK as a loosely structured defense-oriented organization founded in 1955. Obviously, this group encompasses the Member States with the greatest military potential and the widest international clout.

States for control and subjected them to national veto. Most importantly, both pillars created a policy base for future integration and cooperation between Member States. While both depended on intergovernmentalism, there is the faintest element of supranationalism when a qualified voting majority, rather than unanimity, was required for some policy issues. The Treaty was finally ratified with difficulty, and after negative votes in Denmark and protracted ratification struggles in the United Kingdom, France, and Germany.²⁴

Even after Maastricht, all was not well with the EU. Its procedures and laws were confusing, complex, and bureaucratic. Much of Europe's legal structure was embedded in a series of treaties stretching back over forty years, negotiated by different countries, administrations and individuals, in different political and economic contexts. The administration and political procedures had become complex, unwieldy, and burdensome.

The Treaty of Nice of 2000 produced procedures even more complicated and inefficient. Finally, the heads of state in the European Council began what was called the post-Nice process, including an open and public debate on the future of Europe resulting in the Laeken Summit.

III. THE LAEKEN DECLARATION

The Laeken Summit of December 14-15, 2001 created an intriguing document known as the Laeken Declaration. The Laeken Declaration unabashedly discusses the possibility of a political union of Europe and established a procedure for integrating the treaties into a constitution for Europe.²⁵ The Laeken Declaration contains three parts. Part I assesses the political changes in Europe since World War II and addresses many of the public perceptions and concerns about the EU, its goals, and its procedures.

Part II of the Declaration goes to the heart of the argument for a new constitution by identifying three basic challenges. First, the Declaration identifies the need for “[a] better division and definition of competence in the European Union.”²⁶ This part of the Declaration asks many more questions than it answers:

24. NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION* 69-70 (5th ed. 2003).

25. See generally *The Future of The European Union – Laeken Declaration*, EUROPA, Dec. 15, 2001, available at http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm (last visited Feb. 5, 2005).

26. *Id.* at pt. II, para. 2. The term “competence” in Eurospeak means a combination of “jurisdiction,” “power,” and “authority” in the parlance of American constitutional lawyers. Thus a critical question is whether a particular issue is within the competence of the EU, the individual states, or is a “shared competence” in which both the EU and the individual states may act. Similar

Can we thus make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States? At what level is competence exercised in the most efficient way? How is the principle of subsidiarity to be applied here?²⁷ And should we not make it clear that any powers not assigned by the Treaties to the Union fall within the exclusive sphere of competence of the Member States? And what would be the consequences of this?²⁸

The Declaration's second argument for a new constitution was the need to simplify the Union's instruments. The succession of treaties and amendments included more and more detailed legislation in the treaties. The density of the treaties led to a need for framework legislation giving the Member States the ability to maneuver within the guidelines set by the Union.

Finally, the third argument dealt with the need for democracy, transparency, and efficiency within the Union. There has been a perceived "democratic deficit" for some time, caused by two factors: first, there are a limited number of points of access for the public within the EU. Only the Parliament is directly elected, and the Parliament plays a limited role in the creation of legislation. Second, the proceedings of the EU are so dense and complex that few can maintain any sustained level of understanding or interest. The result is that most people maintain a stronger democratic connection to their national governments

American constitutional and legal issues abound, resolved through the Supremacy Clause, delegation of powers, and conflicts of laws issues.

27. The principle in European law that a power should be exercised at the lowest level possible for effective action. The principle was established in 1975, and later adopted in Article 3b of the Maastricht Treaty.

28. *Id.* at pt. II, para. 4. Further questions raised by the Declaration are as pertinent:

The next series of questions should aim, within this new framework and while respecting the "acquis communautaire" [the body of laws and policies already adopted by the EU], to determine whether there needs to be any reorganisation of competence. How can citizens' expectations be taken as a guide here? What missions would this produce for the Union? And, vice versa, what tasks could better be left to the Member States? What amendments should be made to the Treaty on the various policies? How, for example, should a more coherent common foreign policy and defence policy be developed? Should the Petersberg tasks be updated? Do we want to adopt a more integrated approach to police and criminal law cooperation? How can economic-policy coordination be stepped up? How can we intensify cooperation in the field of social inclusion, the environment, health and food safety? But then, should not the day-to-day administration and implementation of the Union's policy be left more emphatically to the Member States and, where their constitutions so provide, to the regions? Should they not be provided with guarantees that their spheres of competence will not be affected?

Id. at pt. II, para. 5.

than to the EU.²⁹ A series of issues revolve around the need for increased democracy while increasing transparency and efficiency.

IV. THE CONVENTION

The Laeken Declaration ended by convening a Convention under the leadership of former French President Valerie Giscard d'Estaing as Chairman. The Convention was made up of fifteen representatives of the Heads of State of the Member States, thirty members of the national parliaments (two from each Member State), sixteen members of the European Parliament, and two Commission representatives. Accession candidate countries were represented in the same way (one representative of the Head of State and two representatives of national parliaments), but were unable to prevent consensus. There were a total of 102 representatives, including those from the accession candidate states, plus alternates for each full member. Other representatives of EU institutions were invited for the purpose of observing or addressing the Convention. The proceedings began on March 1, 2002, and were to last a year. The final document "may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved. . . . [T]he final document will provide a starting point for discussions in the Intergovernmental Conference, which will take the ultimate decisions."³⁰

The Convention met in plenary session once a month at the European Parliament chambers in Brussels. The sessions were open to the public and each took place over two half-days. The real work of the Convention took place in working groups looking into specific issues more closely. There were a total of eleven working groups, each of which dealt with an important issue confronting the Convention, and each of which issued a report.³¹

The Convention's proceedings took place in three stages: a listening phase, aimed at identification of the expectations and needs of Member States and European society; a deliberating phase, during which the Convention would compare the various opinions and assess their implications and consequences;

29. JOHN MCCORMICK, UNDERSTANDING THE EUROPEAN UNION: A CONCISE INTRODUCTION 142-49 (2nd ed. 2002); see also NUGENT, *supra* note 24, at 214-15.

30. *European Convention – Debate on the Future of Europe*, EUROPA, at <http://www.deltur.ccc.eu.int/english/e-g-conven-future.html> (last visited Feb. 5, 2005). IGCs, or Intergovernmental Conferences, are the forum for formulating and adopting treaties, "and unanimity . . . is necessary for treaty provisions to be agreed." Since the Draft Constitution is in fact a treaty, at least to begin with, unanimity was required. NUGENT, *supra* note 24, at 93. See *id.* at 93-98 for a discussion of the workings of IGCs.

31. The working groups considered: Subsidiarity; Charter/ECHR (Fundamental Rights); Legal Personality; National Parliaments; Complementary Competencies; Economic Governance; External Action (Foreign Policy); Defence; Simplification; Freedom, Security and Justice; and Social Europe.

and a proposing stage, during which proposals would be synthesized and proposed.

On July 18, 2003, Chairman Valerie Giscard D'Estaing officially handed over the full Draft Treaty to the Italian Presidency of the European Council, and called upon the President to conduct the Intergovernmental Conference so that it could be brought to completion under the Italian Presidency in December 2003, and signed in May 2004, just before the next European elections. Obviously that did not happen. The Preface of the Draft Treaty first submitted in July 2003 identified responses to the Laeken Declaration's challenges with a general statement of what the convention identified as its strong points:

The Convention has identified responses to the questions put in the Laeken declaration:

- it proposes a better division of Union and Member State competences;
- it recommends a merger of the Treaties and the attribution of legal personality to the Union;
- it establishes a simplification of the Union's instruments of action;
- it proposes measures to increase the democracy, transparency and efficiency of the European Union, by developing the contribution of national Parliaments to the legitimacy of the European design, by simplifying the decision-making processes, and by making the functioning of the European Institutions more transparent and comprehensible;
- it establishes the necessary measures to improve the structure and enhance the role of each of the Union's three institutions, taking account, in particular, of the consequences of enlargement.³²

V. THE STRUGGLE OVER THE DRAFT CONSTITUTION

Following the Draft Constitution's presentation on July 18, 2003, a series of disagreements immediately arose over the powers of the EU itself and the balance of power between Member States. Those disagreements almost resulted in the failure of the Constitution. On December 13, 2003, the leaders of the twenty-five current and prospective members of the EU failed to reach agreement on the draft, signaling a period of intense negotiation.

Chief among the disputes was the definition of a QMV, the system of weighted votes among Member States, and to which issues the QMV would

32. Draft Treaty Establishing a Constitution for Europe, Preface, July 18, 2003, Convention 850/03, available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (last visited Feb. 5, 2005) [hereinafter Draft Treaty].

apply.³³ Other disputes centered on whether the Charter of Fundamental Rights could be used to change Britain's labor laws, whether the European Commission would have the power to enforce the European "Stability and Growth Pact," and Poland's campaign to insert a mention of God or Europe's Christian heritage over the objection of secular countries.³⁴

A number of issues decided by the Council of Ministers or the European Council require a vote by a "qualified majority." Under the original Draft Constitution, a qualified majority consisted of a simple majority of the Member States, "representing at least three fifths of the population of the Union."³⁵ If there was no requirement for the European Council or the Council of Ministers to act based on a proposal from the Commission, or on the initiative of the Union Minister for Foreign Affairs, the required qualified majority consisted of two thirds of the Member States.³⁶

The Constitution as submitted on October 29, 2004, changed those rules significantly. A "qualified majority" is now defined as "55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union."³⁷ A new "blocking minority" is defined as at least four Council members.³⁸ "[W]hen the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority shall be defined as at least 72 % of the members of the Council, representing Member States comprising at least 65 % of the population of the Union."³⁹

The change came about as a result of long haggling and negotiations, largely between the smaller Member States, largely newly-admitted Eastern

33. See *Finally, a constitution. Now the hard part*, THE ECONOMIST GLOBAL AGENDA, June 22, 2004, available at http://www.economist.com/research/backgrounders/displaystory.cfm?story_id=2783543 (last visited Feb. 24, 2005).

34. See *id.*

35. Draft Treaty, *supra* note 32, art. 24, para. 1. An attached "Protocol on the Representation of Citizens in the European Parliament and the Weighting of Votes in the European Council and the Council of Ministers" provided that for deliberations in the European Council and Council of Ministers, various voting weights would be provided. The largest were Germany, France, Italy, and the United Kingdom, each with 29 votes out of a total of 321. Close behind were Spain and Poland, each with 27. *Id.* at 232.

36. *Id.* art. 24, para. 2.

37. Constitution for Europe, *supra* note 22, art. I-25, para. 1, at 21.

38. *Id.*

39. *Id.* art. I-25, para. 2, at 21. Attached Protocol 34 "On the Transitional Provisions Relating to the Institutions and Bodies of the Union" provides the new weighting scheme for the period 2004-2009. Under that scheme, the weights remain the same as under the Draft Constitution. However, since the percentage required for a qualified vote has changed and since the number of items requiring a qualified voting majority has increased, the small states found sufficient protection to agree to the Constitution. See *generally id.* at 382.

European nations, and the larger Member States, principally France and Germany. The new arrangements assure that the smaller states cannot be simply overruled by a small group of large nations. The United Kingdom also "insisted on retaining its veto on key aspects of defence and foreign policy, taxation and social security."⁴⁰

The United Kingdom also insisted on some limitations on the application of the Charter of Fundamental Rights to its domestic labor markets. A declaration provided that the Constitution would give no new legal rights that would breach British industrial laws such as those on secondary picketing and secret ballots. This language was to be included in the text of the charter rather than in a preamble, where it would not have full legal effect.⁴¹

The Netherlands wanted the Commission to enforce the "Stability and Growth Pact," the EU effort for budgetary discipline in the EMU. The Stability and Growth Pact was adopted in 1997 and fully "took effect when the euro was launched on 1 January 1999."⁴² The Pact contained a variety of limits on national budgets as a condition of membership in the EU,⁴³ but it was largely unenforced. France and Germany were among the most egregious offenders, and their combined power led the Netherlands to back down from its position.

The European Constitution's Preamble does not mention God or a deity of any sort, and in fact draws its "INSPIRATION from the cultural, religious and humanist inheritance of Europe."⁴⁴ Catholic countries across Europe, led by Poland, objected to the lack of reference to God in the document, and in fact threatened the adoption of the document.⁴⁵ Secular nations, led by France, wanted to keep reference to God out of the document, in part because of their secularity, and in part because of the diversity of Europe itself.⁴⁶ The secular nations won that battle, and the Preamble remained secular in nature.⁴⁷

In the end, through compromise and negotiation, the contending factions were able to come to agreement on June 18, 2004. The Heads of State came together on October 29, 2004, and the document was signed and set for ratification.

40. *Finally, a constitution. Now the hard part*, *supra* note 33.

41. *Id.*

42. *Economic and Financial Affairs: The Stability and Growth Pact*, EUROPA, available at http://europa.eu.int/comm/economy_finance/about/activities/sgp/sgp_en.htm (last visited Feb. 24, 2005).

43. *See generally* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 104, available at <http://europa.eu.int/eur-lex/en/treaties/selected/livre223.html#anArt6> (last visited Feb. 7, 2005) [hereinafter EC TREATY].

44. Constitution for Europe, *supra* note 22, at 3.

45. *Finally, a constitution. Now the hard part*, *supra* note 33.

46. *Id.*

47. *Id.*

VI. THE CONSTITUTION IN BROAD STROKES

To Americans accustomed to the ambiguous and concise U.S. Constitution, the sprawling and detailed European Constitution may seem strange indeed.⁴⁸ The European Constitution is spread across four titles divided into 448 sections covering 348 pages. An additional 382 pages of Protocols and Annexes are joined by 121 pages of declarations. It is also important to note that there are twenty-one official languages “the texts in each of these languages being equally authentic.”⁴⁹

Provisions range from the lofty and aspirational to the mundane and trivial. Large portions of the Constitution consider issues that are dealt with in U.S. law by federal or state legislation, or even administrative regulations. Large sections deal with the relationship of the European Union with the Member States. Other large parts deal with commercial policy, the nature and power of European institutions, and relations with foreign countries.

The Preface to the Draft Constitution stated that the Convention was asked to draw up proposals on three subjects, notably the so-called “democratic deficit,” how to organize politics and the expanding powers of the EU in an enlarged Union, and how to make the Union a stabilizing model. The preface notes that instead of simply answering the questions, the Convention went further and the proceedings “ultimately led to the drawing up of a draft Treaty establishing a Constitution for Europe, which achieved a broad consensus at the plenary session.”⁵⁰ The Preamble is a lofty, literary, and aspirational statement of the aims of Europe⁵¹ containing the purposes of the Constitution:

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

48. Before Americans should criticize the approach the Europeans have taken, they should perhaps look to what a newly-minted U.S. Constitution might look like in 2005. Special interests, media publicity, regional jealousies and two hundred years of experience and judicial gloss would likely yield a document quite similar to, and perhaps as voluminous as, that presented to the Europeans.

49. Constitution for Europe, *supra* note 22, art. IV-448, para. 1, at 191. Those languages are “Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish.” *Id.*

50. Draft Treaty, *supra* note 32, at Preface.

51. *Id.* at 3. The original preamble of the Draft Constitution began with a quote from Thucydides (II, 37), in both Greek and modern languages: “*Our Constitution . . . is called a democracy because power is in the hands not of a minority but of the greatest number.*” *Id.*

BELIEVING that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world,

CONVINCED that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny,

CONVINCED that, thus 'United in diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope,

DETERMINED to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union, by ensuring the continuity of the Community *acquis*,

GRATEFUL to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe.⁵²

The four major divisions of the Constitution are labeled as "Parts," each containing sections which are numbered consecutively throughout the document. Part I is untitled. This Part deals with such global themes as the definition and objectives of the Union, fundamental rights, Union competences, Union institutions, and other broad areas. Part I seems to be an introduction to many of the larger issues within the Constitution and approaches these topics in broad strokes. The document returns to many of these same issues in detail later in the document. The potentially differing phraseology found in Part I, and that found later, may prove to be a stumbling block to consistent interpretation.

Part II is entitled "The Charter of Fundamental Rights of the Union,"⁵³ and will be the Bill of Rights of the European Union. This document has already been signed by the then fifteen EU members in December of 2000 as a political declaration. The European Council, the European Commission and the Parliament jointly signed the Charter, but it is not yet accorded treaty status. The Charter contains fifty-four articles divided into seven chapters. The chapters are preceded by a separate preamble⁵⁴ and are labeled as Dignity, Freedoms,

52. *Id.*

53. *Id.* at 41.

54. A soaring paragraph in the Preamble to the Charter provides:

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity;

Equality, Solidarity, Citizens' Rights, Justice, and General Provisions. The document is remarkable to Americans for the nature of some of the rights included, which will be discussed further on.

The Convention considered three ways of dealing with the controversial Charter. First, there might have been an indirect reference to the Charter, placing the Charter outside of the Constitution but ultimately legally binding as an independent document; second, there might have been a more straightforward reference to the Charter, leaving it independent but giving it more legal status and formal recognition within the Constitution by incorporation; or third, wholesale incorporation of the document into the Constitution. The drafters have chosen the latter course.⁵⁵ It is likely to prove a controversial decision.

Part III, entitled "The Policies and Functioning of the Union," is the longest and most specific of the three parts. Part III is 242 pages and includes seven titles, with detailed provisions including both detailed rules and procedures and guiding principles on how policies are to be created within the Union structure. The Part includes specific guidance on such issues as the creation of the internal (common) market, rules on competition, economic and monetary policy, employment, social policy, agriculture and fisheries, the environment, consumer protection, energy, authority and jurisdiction of the courts, public health, culture, vocational training and sports, among many others.

Part III also provides the organization and legitimacy and authority of all of the EU's institutions, including the Parliament, the European Council, the Council of Ministers, the Commission, the Court of Justice, and the Court of Auditors, and provides authority for the European Investment Bank. It also establishes the financial framework of the EU itself, including the budget process. It is the true nuts and bolts of how the EU is to operate for the future.

Part IV is relatively short, including the continuity and scope and the ratification process. Under the terms of the treaty, the Constitution is to be ratified "by the High Contracting Parties in accordance with their respective constitutional requirements."⁵⁶ The same article provides that the Constitution may be amended through a relatively complex procedure requiring the convening of a Convention by a simple majority vote. The Convention is to be composed of representatives of: (1) the national parliaments of the Member States; (2) the Heads of State or Government of the Member States; (3) the European Parliament; and (4) the Commission. The Convention may adopt

it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

Id.

55. See generally Puder, *supra* note 9.

56. Constitution for Europe, *supra* note 22, art. IV-447, para. 1, at 191.

amendments by consensus, and the Conference of Representatives of the Member States then determines, by common accord, the amendments. There is a simplified amendment process in which the European Council may adopt a provisional amendment in the form of an authorization to act adopted by a qualified majority, followed by an opportunity for national parliaments to object.⁵⁷

Ratification was to have taken place within two years by four fifths of the Member States, but it is not at all clear what happens if ratification does not occur. By its very terms, “[i]f . . . four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.”⁵⁸

VII. SOME AMERICAN CONSTITUTIONAL ISSUES

A comparison of the EU Constitution to the American Constitution is inevitable. The American frame of reference must clearly be the basic document and the history and judicial gloss that have formed around it the last 215 years. During that time, a number of other national charters have been formed either based on or with an eye to the U.S. Constitution, including several European constitutions. As a result, American lawyers and others schooled in the history of the U.S. Constitution must have a long list of questions about the functioning of the proposed European Constitution. Among those questions are certainly the following:

(1) What is the function of the courts, and particularly the European Court of Justice, regarding the interpretation of the constitution? Do the concepts of *stare decisis* and judicial review apply, and with what force?

(2) How have the Europeans resolved the tension between federal and state power? How do the complex issues of EU and Member State “competences” relate to the American concepts of granted powers, the supremacy clause, and issues of pre-emption?

(3) How is legislation created?

(4) How does the Charter of Fundamental Rights of the Union compare to the American Bill of Rights?

(5) What is the central EU power to regulate commerce, and how will it be harmonized with Member State power to regulate commercial policies?

(6) How will the EU be financed? Will the EU have the power to tax?

57. *Id.* art. IV-445, at 190-91.

58. *Id.* art. IV-443, para. 4, at 190. The balance of that Article deals with procedures for revision and amendment, so it is not at all clear that the intent was to put a two-year “drop dead” provision for ratification of the main document.

(7) What is the practical effect of including specific “legislative” acts and policies within the Constitution, especially in light of cumbersome processes for amendment?

(8) How will the tension between the guarantees of a market economy and the specific guarantees of worker and consumer protection play out?

In addition, two overriding political issues require discussion:

(9) What is the effect of the document on the sovereignty of the Member States? Will the Member States willingly give up enough individual freedom of action to make the document work?

(10) Will the document – or one like it – ultimately be ratified?

The balance of this article will discuss the EU Constitution in the context of a comparison to its American counterpart and the manner in which the U.S. Constitution is applied in American courts. The first questions relate to the courts themselves and to basic doctrines such as precedent and judicial review essential to the American system of constitutional law. Other important issues deal with the relationships of power within the Constitution, the nature of the EU “bill of rights,” and the grants of authority that have been found critical in the American experience.

A. *The EU Courts and their Functions*

American lawyers and constitutional scholars have grown up imbued with the notions of *stare decisis* and judicial review. Most American legal scholars can quote verbatim the classic language from *Marbury v. Madison*:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

....

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.⁵⁹

59. 5 U.S. 137, 177-80 (1803).

1. Current Judicial Structures in the EU

Before venturing into the proposed new judicial arrangements, it is necessary to sketch out current judicial structure and practices in the EU. Under current EU arrangements, there are two EU Courts: the European Court of Justice (ECJ) and the Court of First Instance (CFI).

Generally speaking the ECJ serves as the supreme court of the EU, including taking appeals from the CFI under most circumstances.⁶⁰ The CFI was created in 1988 at the request of the ECJ in order to deal with its expanding docket. The CFI's jurisdiction was originally limited, but within five years the CFI received expanded "jurisdiction to hear and determine at first instance all actions brought by natural or legal persons."⁶¹

The ECJ is the court of first instance in a number of areas under the various treaties. Those cases of *direct action* (roughly similar to cases of original jurisdiction in the U.S. Supreme Court) include cases against Member States based on whether they have failed to fulfill obligations under the Treaty Establishing the European Community, brought either by the Commission or by other member states; applications by a Member State, the Council, the Commission or the EP to annul an act of the EU; actions by Member States, community institutions, and sometimes legal and natural persons against EU institutions for failure to act; and actions against the EU or its institutions to establish liability.⁶² Normally, the latter two cases are now dealt with by the CFI.⁶³

The Court of Justice also hears cases involving ruling on points of EU law that have been referred by national courts.⁶⁴ These cases are requests for *preliminary ruling*. A national court must make an appropriate referral. These advisory cases, largely foreign in American law, form one of the largest categories of cases before the ECJ. They provide consistency and uniformity of interpretation, and are generally accepted by all national courts as setting precedent.⁶⁵

The ECJ made an important contribution to the primacy of EU law in 1963 and 1964 when it declared that the Treaty of Rome was not just a treaty, but was a constitutional instrument providing obligations on member states, and took precedence over national law.⁶⁶

60. See NUGENT, *supra* note 24, at 242.

61. *Id.* at 257.

62. See *id.* at 248-52.

63. *Id.*

64. See *id.* at 242.

65. *Id.* at 252-53.

66. MCCORMICK, *supra* note 29, at 110.

Certain “decisions of the CFI are [also] subject to appeal to the Court of Justice on points of law.”⁶⁷ As in most American courts, appeals are not possible on the substance of the case, but only on points of law. “There are three broad grounds for appeal: the CFI lacked jurisdiction, it breached procedural rules, or it infringed Community law.”⁶⁸ To date, there have been few appeals, in part because the CFI has treated decisions of the ECJ as binding precedent.⁶⁹

Finally, “the Council, the Commission, or a member state plus the EP”⁷⁰ may ask the ECJ for an advisory opinion “on whether a prospective international agreement is compatible with the provisions of the [Nice] Treaty.”⁷¹ The Court’s decision is binding and an adverse ruling means that the agreement cannot enter into force without amendment.⁷²

The ECJ has become very busy as its importance has increased. In the 1960s, it heard about fifty cases per year, making about fifteen to twenty judgments; today, it hears 370-400 cases per year, and makes 200-300 judgments. It was this volume of cases that resulted in the creation of the CFI in 1988. The ECJ has fifteen judges, each appointed for a six-year renewable term of office, and the terms are staggered. Each is effectively a national appointee.⁷³

Traditionally, the doctrine of *stare decisis* has far less authority in the civil law systems of continental Europe.⁷⁴ However, the rulings of the European Court of Justice have played a significant role in the creation of European law. The Court has had a continuing duty to interpret and apply European law, and European statutory and treaty law is notoriously ambiguous.⁷⁵ EU law has been strengthened and extended by the ECJ, and it is clear that the precedent value of the ECJ decisions goes far beyond the usual weight given decisions in other European civil law courts.⁷⁶

67. See NUGENT, *supra* note 24, at 257.

68. *Id.* at 253.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. MCCORMICK, *supra* note 29, at 110-11.

74. With the exception of Great Britain and Ireland, of course. The ECJ does follow the notion of *stare decisis* in its decisions. See Peter Orebeck, *The EU Competency Confusion: Limits, “Extension Mechanisms,” Split Power, Subsidiarity, and “Institutional Clashes”*, 13 J. TRANSNAT’L L. & POL’Y 99, n.81 (2003).

75. The ambiguity stems from a number of factors, including the need for political compromise in the legislative process, the need for speed in decision-making and the legislative process, and the number of languages involved. See NUGENT, *supra* note 24, at 242.

76. The following language is relatively typical: “It is appropriate to bear in mind, . . . that in accordance with settled case-law the primacy of Community law requires any provision of national law which contravenes a Community rule to be disapplied” Case C-198/01, *Consorzio*

2. Judicial Structure Under the EU Constitution

So what does the EU Constitution have to say about the courts, the right of judicial review, and the concept of *stare decisis*? First, it is important to distinguish between the *Court of Justice of the European Union* and the *Court of Justice*. The former term refers to the entire EU court system, which is somewhat expanded and renamed under the Constitution.⁷⁷ The latter term is used to describe the current European Court of Justice. The Constitution also provides for a newly named General Court and for unnamed specialized courts.⁷⁸ There is no mention of the current CFI, although the General Court appears to take on all of its form and most of its functions. The Court of Justice consists of one judge from each Member State, while the General Court has *at least* one judge from each Member State. All are appointed by common accord of the Member States for renewable terms of six years.⁷⁹

The jurisdiction of the Court of Justice under the Draft Constitution is vastly expanded, but largely on an appellate basis only. A new court – the General Court – is given jurisdiction of first instance over virtually all of the prior issues of ECJ jurisdiction of first instance.⁸⁰ Those actions include actions to review the legality of actions of the EU institutions;⁸¹ actions for failure to act;⁸² compensation for damages;⁸³ disputes between the Union and its servants;⁸⁴ and arbitration clauses in contracts involving the Union.⁸⁵ In each of those cases, decisions of the General Court are subject to a right of appeal to the Court of Justice on points of law only.⁸⁶

The General Court also has jurisdiction to hear questions for a preliminary ruling. In such cases, the General Court may refer the case directly to the Court of Justice if it determines that the case “requires a decision of principle likely to affect the unity or consistency of Union law.”⁸⁷ Decisions referred for a

Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato, 2003 E.C.R. I-08055, § 48.

77. See generally Constitution for Europe, *supra* note 22, art. I-29, para. 1, at 14.

78. *Id.* (“The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts.”).

79. *Id.* art. III-358, para. 1, at 157.

80. *Id.*

81. *Id.*; see also *id.* art. III-365, para. 1, at 159.

82. *Id.* art. III-358, para. 1, at 157; see also Constitution for Europe, *supra* note 22, art. III-367, at 160-61.

83. *Id.* art. III-358, para. 1, at 157; see also *id.* art. III-370, at 161.

84. *Id.* art. III-358, para. 1, at 157; see also *id.* art. III-372, at 162.

85. *Id.* art. III-358, para. 1, at 157; see also Constitution for Europe, *supra* note 22, art. III-374, at 162.

86. *Id.* art. III-358, para. 1, at 157.

87. *Id.* art. III-358, para. 3, at 157.

preliminary ruling “may exceptionally be subject to review by the Court of Justice . . . where there is a serious risk of the unity or consistency of Union law being affected.”⁸⁸

The Court of Justice has jurisdiction of first instance in cases involving requests for preliminary rulings regarding interpretation of the Constitution and “the validity and interpretation of acts of the institutions . . . of the Union.”⁸⁹ The Court of Justice also has jurisdiction of first instance “in disputes concerning: . . . the fulfilment by Member States of obligations under the Statute of the European Investment Bank,”⁹⁰ measures adopted by the European Investment Bank,⁹¹ and “fulfilment by national central banks of obligations under the Constitution and the Statute of the European System of Central Banks and the European Central Bank.”⁹² Disputes between Member States as to the subject matter of the Constitution may be submitted by special agreement.⁹³

Some special jurisdictional provisions are also worth mentioning. Unless jurisdiction has been conferred by the Constitution, disputes involving the Union as a party may still be brought in the courts of Member States.⁹⁴ Jurisdiction is specifically withheld regarding fixing of customs duties⁹⁵ and all issues dealing with a common security and defense policy.⁹⁶ Similarly, jurisdiction is specifically withheld to review the validity or proportionality of police operations carried out by a Member State, or “the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”⁹⁷

Finally, the Draft provides that “specialised courts attached to the General Court”⁹⁸ may be established by law to determine certain classes of action. Appeals generally will be to the General Court on points of law only.⁹⁹

88. *Id.* art. III-358, para. 3, at 158.

89. *Id.* art. III-369, at 161.

90. *Id.* art. III-373, at 162.

91. Constitution for Europe, *supra* note 22, art. III-373 (b) & (c), at 162. This provision may be interpreted to give jurisdiction of first instance to the General Court.

92. *Id.* art. III-373 (d), at 162.

93. *Id.* art. III-375, at 162.

94. *Id.* art. III-375 para. 1, at 162.

95. *Id.* art. III-376, at 163.

96. *Id.*

97. Constitution for Europe, *supra* note 22, art. III-377, at 163.

98. *Id.* art. III-359, para. 1, at 158.

99. *Id.* art. III-359, para. 3, at 158.

3. Judicial Review of Central Government Actions

The issue of whether judicial review exists under the European Constitution is answered by Articles III-365 and 366. While a case of first instance for the General Court, these sections provide that the Court of Justice:

shall review the legality of European laws and framework laws, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties.¹⁰⁰

Article III-366 further provides:

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.¹⁰¹

Articles III-367 and 368 go on to provide a procedure for dealing with an EU institution which fails to act "in infringement of the Constitution."¹⁰² Article III-367 provides a procedure for establishing the infringement, including a prior demand that the institution act and a two month time period (which may be extended) within which to bring the action.¹⁰³ Article III-368 provides that an "institution, body, office or agency whose act has been declared void, or whose failure to act has been declared contrary to the Constitution, shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union."¹⁰⁴ It should be noted that these provisions, including Articles III-367 and 368, apply only to EU laws and institutions, not to those of Member States.

The result of all this is that the Court of Justice has in fact been given something very similar to the American right of judicial review, at least insofar as EU institutions are concerned. The Court of Justice has the right to rule on the legality of European laws and framework laws, as well as acts of the Council of Ministers, of the Commission, of the European Central Bank, and "acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties."¹⁰⁵

100. *Id.* art. III-365, para. 1, at 160-61.

101. *Id.* art. III-366, at 160.

102. *Id.* art. III-367, para. 1, at 160.

103. Constitution for Europe, *supra* note 22.

104. *Id.* art. III-368, at 161.

105. *Id.* art. III-365, para. 1, at 160-61.

This right of judicial review becomes particularly important in light of Article I-6, the Primacy Clause, which states that “[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.”¹⁰⁶ Thus, it appears that in the context of EU institutions and laws, the Court of Justice has something very similar to the American right of judicial review.

The same is not true for decisions from Member States. *Martin v. Hunter’s Lessee*¹⁰⁷ and *Cohens v. Virginia*¹⁰⁸ did not settle the issue of the authority of the U.S. Supreme Court until more than a decade after the right of judicial review of federal governmental actions was established in *Marbury v. Madison*. It is also likely to take some time for the issue of EU judicial authority over Member State actions to be resolved.¹⁰⁹ This may be the single most important area that needs to be settled to make the European constitution viable.¹¹⁰

B. EU and Member State “Competences” and the American Concept of Granted Powers

Unlike the rather vague concept of granted powers embedded in the U.S. Constitution, the EU Constitution seeks to specifically set out categories of “competences” as between the Union and the Member States.¹¹¹ The Union is given “exclusive competence” over some areas and “shared competence” with the Member States over others.¹¹² The Constitution attempts to draw bright lines around the areas of exclusive competence. There are no exclusive Member State competences. A simmering problem may center on areas that may have been omitted or will develop over time, since there is no residual clause like the Tenth Amendment to the U.S. Constitution.¹¹³

106. *Id.* art. I-6, at 12.

107. 14 U.S. 304 (1816).

108. 19 U.S. 264 (1821).

109. The issue is clouded somewhat by the removal of section (2) from what finally became Article I-6 of the Constitution. In the original draft, section (2) provided that “Member States shall take all appropriate measures, general or particular, to ensure fulfillment of the obligations flowing from the Constitution or resulting from the Union Institutions’ acts.” Draft Treaty, *supra* note 32, art. 10, para. 2. The removal of this duty could provide support for the position that Member States are not completely bound by Union decisions.

110. Some would argue that American federal courts did not finally gain the right to review state court decisions, even in the context of the federal constitution, until the issue was finally settled by the Civil War, and that *Martin* and *Cohens* were merely the opening volleys in the clash between the federal and state judicial authority.

111. Orebeck, *supra* note 74, 107-08 (providing an exhaustive treatment).

112. *Id.*

113. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

An exclusive competence conferred on the Union means that only the Union may legislate, unless the Union permits the Member States to act.¹¹⁴ Shared competences mean that both the Union and Member States may legislate.¹¹⁵ In what promises to be a critical phrase dealing with shared competences, the “Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.”¹¹⁶ These words appear subject to the interpretation that the Union has clear authority to act to the exclusion of Member States. These words also seem to indicate that the European framers considered the preemption question and it has been settled similar to the way American courts have interpreted the Supremacy Clause. They also have great import for issues of sovereignty and ultimate authority.

Article I-12 makes one area of exclusive EU competence crystal clear: the definition and implementation of a common foreign and security policy, “including the progressive framing of a common defence policy.”¹¹⁷ In the area of economic policy, Member States are required to “coordinate” their economic and employment policies.¹¹⁸ Thus two of the largest areas of governmental responsibility – the economy and foreign and defense policies – are placed squarely in the Union’s sphere of exclusive competence. Again, as indicia of sovereignty, the weighty issues of both guns and butter seem to put the thumb heavily on the Union side of the scale.¹¹⁹ Other areas of exclusive Union competence include the customs union, competition rules for those Member States whose currency is the Euro, monetary policy, a common commercial policy, and “the conservation of marine biological resources under the common fisheries policy.”¹²⁰

Areas of shared competence include issues of: “(a) internal markets; (b) social policy . . . ; (c) economic, social and territorial cohesion; (d) agriculture

114. Constitution for Europe, *supra* note 22, art. I-12, para. 1, at 15.

115. *Id.* art. I-12, para. 2, at 15.

116. *Id.*

117. *Id.* art. I-12, para. 2, at 15. “Member States shall actively and unreservedly support the Union’s common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. They shall refrain from action contrary to the Union’s interests or likely to impair its effectiveness.” *Id.* art. I-16, para. 2, at 17.

118. *Id.* art. I-12, para. 3, at 15. A prior draft provided that “[t]he Union shall have competence to promote and coordinate the economic and employment policies of the Member States.” Draft Treaty, *supra* note 32, at art. 11, at 11.

119. Art. I-15 and 16 explain further the Union’s competence in both economic/employment policies and foreign/security policies. Constitution for Europe, *supra* note 22, arts. I-15 & I-16, at 17.

120. *Id.* art. I-13, para. 1(d), at 15. The issue of fisheries has been critical in the EU for decades. Competition for fishing rights in the North Atlantic has been a driving and dividing force – and even a source of armed conflict – for hundreds of years.

and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) freedom, security and justice; (k) common safety concerns in public health matters.”¹²¹

There is also specific mention of “supporting, coordinating or complementary action”¹²² in areas of: “(a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, youth, sport, and vocational training; (f) civic protection; [and] (g) administrative cooperation.”¹²³

The Flexibility Clause of Article I-18 appears to be the EU’s approximation of the American Necessary and Proper Clause. If action is necessary within the framework of the policies of the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers “shall adopt the appropriate measures.”¹²⁴ A unanimous vote of the Council of Ministers and consent of Parliament is required.¹²⁵

The division of competences in the EU is an effort to resolve some of the most basic issues of federalism.¹²⁶ Those issues have been central to the American constitutional discussion since the days of *Gibbons v. Ogden*. The same issues are certainly going to arise in the context of the EU Constitution. While EU drafters have done an admirable job of trying to sharply delineate federal and state power and the areas of competence for the EU and the Member States, those issues will change with time. What was a shared competency will grow into an exclusive competency, and perhaps vice versa. What is undefined will have to be defined. Issues will arise under the Flexibility Clause that no one can imagine today. European constitutional lawyers and scholars will need to deal with the vagaries of federalism, much as Americans have done for two centuries.

Implicit in this tension is the fear of political centripetal force. In the American context, the historically loose association of states and weak central government has evolved into a strong federal union and relatively weak state governments. It sometimes seems that it is inevitable that power tends to centralize. Growing needs for uniformity, lack of tolerance for aberrant practices, and strong commercial, environmental and human rights pressures

121. *Id.* art. I-14, para. 2, at 16.

122. *Id.* art. I-17, para. 1, at 17.

123. *Id.*

124. *Id.* art. I-18, para. 1, at 18.

125. Constitution for Europe, *supra* note 22, art. I-18, para. 1, at 18.

126. Puder argues that the approach taken seems “German.” The overall approach is one of vertical federalism with “a catalog that divides sovereignty between the federation and the states.” Puder, *supra* note 9, at 1585-86 (discussing KARL-HEINZ SEIFERT & DIETER HÖMIG, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 200, 331 (1988)).

may well create a long slope toward centralization. Critics of the European federalization may well point to the long American experience as support for their contention that centralization is a necessary but unwelcome outcome.

C. *Forms of Legislation and Legislative Procedures*

The European legislative process is substantially more complex and ambiguous than the American system. The EU Constitution provides for four different legal "instruments," or forms of legislation including European laws, the European framework laws, European regulations, and European decisions.¹²⁷ In addition, there may exist recommendations and opinions, which by the terms of the Constitution, have no binding force.¹²⁸

The two legislative forms with the most potency are European laws and European framework laws. A European law is "a legislative act of general application"¹²⁹ and is "binding in its entirety and directly applicable in all Member States,"¹³⁰ while a framework law is "binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."¹³¹

The European Parliament and the Council jointly adopt European laws and framework laws.¹³² If the Parliament and the Council "cannot reach agreement on an act, it shall not be adopted."¹³³ The Commission ordinarily submits both types of laws to the Parliament and the Council, and both go through an identical process involving three "readings" and possibly a conciliation process.¹³⁴ Under the procedures, both types of legislation start in the Parliament with a first reading, at which the Parliament "adopts its position" and communicates it to the Council of Ministers.¹³⁵ If the Council of Ministers approves the Parliament's position, the proposed act is adopted.¹³⁶ If it does not approve the Parliament's position, the Council of Ministers adopts its position, communicates its position to the Parliament, and informs the Parliament of why it adopted its position.¹³⁷ The European Parliament may then adopt the Council's position, in which case it is adopted.¹³⁸ The Parliament may also reject the position or propose

127. Constitution for Europe, *supra* note 22, art. I-33, para. 1, at 26.

128. *Id.* art. I-33, para. 1, at 27.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* art. I-34, para. 1, at 27.

133. Constitution for Europe, *supra* note 22, art. I-34, para. 1, at 27.

134. *Id.* art. III-396, at 170.

135. *Id.* art. III-396, para. 3, at 170.

136. *Id.* art. III-396, para. 4, at 170.

137. *Id.* art. III-396, para. 5-6, at 170.

138. *Id.* art. III-396, para. 7(a), at 170.

amendments, followed by a conciliation process and possibly a third reading.¹³⁹ European laws and framework laws may also be proposed by recommendation of the European Central Bank, at the request of the Court of Justice, the European Investment Bank, or on the initiative of a group of Member States.¹⁴⁰ Generally speaking, the Parliament acts by majority of the votes cast.¹⁴¹

The Council of Ministers, consisting of a representative of each Member State, acts by a qualified majority of its members; however, if the Constitution specifies otherwise, it may act by a simple majority of its members.¹⁴² A qualified majority consists of “at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.”¹⁴³ In some instances, the qualified majority may shift to “at least 72 % of the members of the Council, representing Member States comprising at least 65 % of the population of the Union.”¹⁴⁴

A European regulation is “a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution.”¹⁴⁵ Regulations may be adopted by the Council of Ministers and the Commission, or may be adopted by the European Central Bank when authorized by the Constitution.¹⁴⁶ In addition, “European laws and framework laws may delegate to the Commission the power to adopt . . . regulations.”¹⁴⁷ The EU Constitution provides that “[t]he objectives, content, scope and duration of the delegation of power shall be explicitly defined in the European laws and framework laws.”¹⁴⁸ A delegation may not cover the essential elements of an area.¹⁴⁹ “A European decision shall be a non-legislative act, binding in its

139. Constitution for Europe, *supra* note 22, art. III-396, para. 8-14, at 170.

140. *Id.* art. I-34, para. 3, at 27. Those limited situations in which either European laws or framework laws may be adopted at the initiative of one-quarter of the Member States involve Sections four and five of Chapter IV, dealing with Judicial Cooperation in Criminal Matters and Police Cooperation. *See id.* art. III-264, at 114.

141. *Id.* art. III-338, at 152.

142. *Id.* art. III-343, at 153-54.

143. *Id.* art. I-25, para. 1, at 21.

144. Constitution for Europe, *supra* note 22, art. I-25, para. 2, at 21.

145. *Id.* art. I-33, para. 1, at 27.

146. *Id.* art. I-35, para. 2, at 27.

147. *Id.* art. I-36, para. 1, at 28. This delegated power parallels the ability of the American Congress to delegate the power to enact regulations to administrative bodies through an enabling act.

148. *Id.*

149. *Id.* The American experience involves substantial judicial gloss requiring that Congress provide first a “standard” by which it could be determined whether the agency had exceeded its grant of authority (*Cf. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935)), and later requiring merely a “policy” statement by Congress (*Cf. Yakus v. United States*, 321 U.S. 414

entirety," but a decision may specify those to whom it is binding.¹⁵⁰ "Recommendations and opinions [adopted by the various institutions] shall have no binding force."¹⁵¹

D. The Charter of Fundamental Rights of the Union: Comparison to the American Bill of Rights

Perhaps the most clearly formed part of the draft EU Constitution is Part II, which consists of the Charter of Fundamental Rights of the European Union. This document was already signed by the fifteen EU members in December of 2000 as a "political declaration." The Charter was not given treaty status at Nice, primarily because of the resistance of the U.K. and four other governments, but "it was 'solemnly proclaimed' at Nice by the Council, EP [European Parliament] and Commission."¹⁵² Thus, its current legal status is unclear.¹⁵³ It was dropped into the Constitution in one piece as Part II of the draft Constitution.

Much has already been written about the Charter.¹⁵⁴ It may well be the most controversial part of the Constitution, not because of the rights guaranteed, but because the mode of enforcement and the status of constitutional protection vary widely within individual states. As one commentator noted, "[s]ignificant difficulties will have to be overcome to find a consensus on the role fundamental rights should play as constitutional limitations to legislative and executive powers, on their inherent balance between individual and general interests and on their judicial protection."¹⁵⁵ The constitutional traditions of the constituent European states vary widely, from the grand British experience to the newest

(1944)). The "separation of powers" dispute is probably too "American" for the European Union at this time.

150. Constitution for Europe, *supra* note 22, art. I-33, para. 1, at 27.

151. *Id.*

152. NUGENT, *supra* note 24, at 91.

153. Thomas von Danwitz, *The Charter of Fundamental Rights of the European Union: Between Political Symbolism and Legal Realism*, 29 DENV. J. INT'L L. & POL'Y 289, 290 (2001); see also Agustín José Menéndez, *Chartering Europe: The Charter of Fundamental Rights of the European Union*, *Arena Working Papers*, (Faculdade de Direito da Universidade Nova de Lisboa Francisco Lucas Pires Working Papers Series on European Constitutionalism, Working Paper 2001/03), available at <http://www.fd.unl.pt/je/wpfp03a.doc> (last visited Feb. 25, 2005).

154. See, e.g., von Danwitz, *supra* note 153; see also Joseph R. Wetzell, Note, *Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion Between the Luxembourg and Strasbourg Courts*, 71 FORDHAM L. REV. 2823 (2003); Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95 (2003); Giorgio Sacerdoti, *The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe*, 8 COLUM. J. EUR. L. 37 (2002).

155. von Danwitz, *supra* note 153, at 290.

applicant states from Eastern Europe and beyond. Even among established members there is much confusion.

Denmark, Sweden and the Netherlands do not operate a system of constitutional jurisdiction and even under the French concept of preventive constitutional control, statutory laws are still largely conceived as *volonté général* Therefore the *Conseil constitutionnel* is generally tempted to a significant extent to uphold parliamentary statutes against Fundamental Right claims.¹⁵⁶

It may be that the intent of the Constitution is that the Charter shall protect individual rights in much the same way that the American Bill of Rights does, as a list of things the government may not do. The constitutionally limiting nature of the Charter is seemingly made clear by Part I of the Constitution, which provides in Article I-9 that “[t]he Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.”¹⁵⁷ The same article goes on to state in typically dense fashion: [f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms *and as they result from the constitutional traditions common to the Member States*, shall constitute general principles of the Union’s law.¹⁵⁸

The Primacy Clause, which states that “[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.”¹⁵⁹ This, taken with the broadening jurisdiction of the Court of Justice, seems to indicate that the Charter will likely have growing significance in years to come.

It remains to take a brief look at some of the specific provisions of the Charter and compare them to the U.S. Bill of Rights.¹⁶⁰ At first glance, the Charter is broader than the American version. The Charter contains fifty-four articles, and its provisions range from the expansive and aspirational¹⁶¹ to some surprisingly specific and direct provisions.¹⁶² Some mirror closely the

156. *Id.* at 291.

157. Constitution for Europe, *supra* note 22, art. I-9, para. 1, at 13.

158. *Id.* art. I-9, para. 3, at 13 (emphasis added).

159. *Id.* art. I-6, at 12.

160. We must resist the urge to enter the debate over the precise content of the U.S. Bill of Rights. For our purposes, a loose definition including Amendments I-X, XIII, XIV, and XV will suffice. See U.S. CONST. amends. I-X, XIII-XV.

161. “Human dignity is inviolable. It must be respected and protected.” Constitution for Europe, *supra* note 22, art. II-61, at 42.

162. For example:

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without

protections of the U.S. Bill of Rights, while others are new and perhaps surprising.

Both the Charter and the U.S. Bill of Rights came into existence with a long and detailed ancestry already in place. Some of the provisions of the Bill of Rights can be traced to earlier American documents such as the Virginia Declaration of Rights or the Mayflower Compact, while others trace their lineage to English history and rights from the Magna Charta forward. American founding fathers, legislators, and judges had reference points from which to infer meaning for the Bill of Rights. Those same founders, legislators, and judges spoke (and speak) a common tongue. This common history and common language serve us well with interpretation of the sparse language of the Bill of Rights.

The same is much less true for the framers of the Charter and the judges who will enforce it. There is little or no judicial gloss on the Charter since it has been in existence for such a short time, and its legal effect remains in doubt. European national experiences with civil rights and liberties vary a great deal. The British experience with human rights and individual freedoms is far different from that of Germany, Spain, the Czech Republic, or – perhaps in the near future – Turkey. For example, freedom of thought, conscience and religion¹⁶³ implies something quite different in each of those cultures. The difference in language and translation is equally important. The translation of the term “liberty”¹⁶⁴ or other terms in each of the twenty-one official languages may have at best some unexpected implications and shades of meaning.

Of course, the provisions of the Charter do have substantial meaning. As our Bill of Rights grew largely from our revolutionary experience, the emphasis of the Charter grew from the experiences of post-war Europe. Issues of immigration, citizenship, social welfare and solidarity seem to predominate, while American issues such as quartering of troops and the right to bear arms are absent. Each issue grew from the needs and experiences of each new nation. European judges and lawyers will interpret the Charter in the light of those needs and experiences, as American judges and lawyers have done.

Some of the parallel provisions between the Charter and the American Bill of Rights include: “[p]rohibition of torture and inhuman or degrading treatment

prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Id. art. II-92, at 48.

163. *Id.* art. II-70, at 44.

164. *Id.* art. II-66, at 43.

or punishment”;¹⁶⁵ prohibition of slavery, servitude, forced or compulsory labor, and trafficking in human beings;¹⁶⁶ “right to liberty and security of person”;¹⁶⁷ “freedom of thought, conscience and religion”;¹⁶⁸ freedom of expression, including “freedom and pluralism of the media”;¹⁶⁹ and “[f]reedom of assembly and of association”;¹⁷⁰ the right to property;¹⁷¹ freedom from discrimination on any ground;¹⁷² the right to vote;¹⁷³ right to fair and speedy trial, and to legal assistance;¹⁷⁴ the presumption of innocence;¹⁷⁵ and freedom from double jeopardy.¹⁷⁶

The right of privacy, “found” by the U.S. Supreme Court in *Griswold v. Connecticut*,¹⁷⁷ is reflected to some degree in Article II-67, which provides that “[e]veryone has the right to respect for his or her private and family life, home and communications.”¹⁷⁸ Two American amendments have no parallel within the Charter: the Second Amendment’s right to bear arms, and the Third Amendment’s limitations on the quartering of troops are simply not present.¹⁷⁹

165. *Id.* art. II-64, at 42; *accord* U.S. CONST. amend. VIII.

166. Constitution for Europe, *supra* note 22 art. II-65, at 43; *accord* U.S. CONST. amend. XIII.

167. Constitution for Europe, *supra* note 22 art. II-66, at 43; *accord* U.S. CONST. amends. V & XI.

168. Constitution for Europe, *supra* note 22 art. II-70, at 44; *accord* U.S. CONST. amend. I. This article includes the freedom “to manifest religion or belief, in worship, teaching, practice and observance” and also specifically recognizes the right to conscientious objection “in accordance with the national laws governing the exercise of this right.” Constitution for Europe, *supra* note 22 art. II-70, at 44.

169. Constitution for Europe, *supra* note 22 art. II-71, para. 2, at 44; *accord* U.S. CONST. amend. I.

170. Constitution for Europe, *supra* note 22 art. II-72, at 44; *accord* U.S. CONST. amend. I.

171. Constitution for Europe, *supra* note 22 art. II-77, at 45; *accord* U.S. CONST. amends. V & XIV.

172. Constitution for Europe, *supra* note 22 arts. II-80 & II-81, at 46; *accord* U.S. CONST. amend. XIV. The prohibition against discrimination extends to “any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation” Constitution for Europe, *supra* note 22, art. II-81, para. 1, at 46. In addition, Art. II-83 provides “[e]quality between women and men must be ensured in all areas, including employment, work and pay.” Constitution for Europe, *supra* note 22 art. II-83, at 46.

173. Constitution for Europe, *supra* note 22, arts. II-99 & II-100, at 50; *accord* U.S. CONST. amend. XV.

174. Constitution for Europe, *supra* note 22, art. II-107, at 52; *accord* U.S. CONST. amend. VI.

175. Constitution for Europe, *supra* note 22, art. II-108, at 52.

176. *Id.* art. II-110, at 52.; *accord* U.S. CONST. amend. VI.

177. 381 U.S. 479 (1965).

178. Constitution for Europe, *supra* note 22, art. II-67, at 43.

179. *See* U.S. CONST. amends. II & III.

The Charter also contains a number of provisions that may seem alien to American constitutional lawyers. Those provisions include a specific provision stating that “[e]veryone has the right to life,”¹⁸⁰ followed immediately by a prohibition of the death penalty;¹⁸¹ provisions guaranteeing respect for physical and mental integrity, and requiring free and informed consent to medical procedures and prohibiting eugenic practices and reproductive cloning,¹⁸² protection of personal data;¹⁸³ protection of the right to marry and found a family,¹⁸⁴ the right to education,¹⁸⁵ to choose an occupation and engage in work,¹⁸⁶ and to conduct a business.¹⁸⁷ An interesting provision provides that “[t]he arts and scientific research shall be free of constraint [and requires that] [a]cademic freedom shall be respected.”¹⁸⁸ Specific provisions deal with the right to asylum,¹⁸⁹ and others protect the rights of children,¹⁹⁰ the elderly,¹⁹¹ and persons with disabilities.¹⁹²

An entire chapter is entitled “Solidarity,” and includes provisions regarding collective bargaining,¹⁹³ placement services,¹⁹⁴ protection against unjustified dismissal,¹⁹⁵ protection of fair and just working conditions,¹⁹⁶ and family and professional life (including protection against dismissal for maternity leave and guaranteeing paid maternity and parental leave).¹⁹⁷ The same chapter provides protection of social security benefits and social services in cases of “maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment”¹⁹⁸ and provides that “[e]veryone has the right of access to preventive health care and the right to benefit from medical treatment.”¹⁹⁹ This

180. Constitution for Europe, *supra* note 22, art. II-62, para. 1, at 42.

181. *Id.* art. II-62, para. 2, at 42. Of course the two Due Processes protect “life, liberty and property.” U.S. CONST. amends. V & XIV.

182. Constitution for Europe, *supra* note 22, art. II-63, at 42.

183. *Id.* art. II-68, at 43.

184. *Id.* art. II-69, at 43.

185. *Id.* art. II-74, at 44.

186. *Id.* art. II-75, at 45.

187. *Id.* art. II-76, at 45.

188. Constitution for Europe, *supra* note 22, art. II-73, at 44.

189. *Id.* art. II-78, at 45.

190. *Id.* art. II-84, at 46.

191. *Id.* art. II-85, at 47.

192. *Id.* art. II-86, at 47.

193. *Id.* art. II-88, at 47.

194. Constitution for Europe, *supra* note 22, art. II-89, at 47.

195. *Id.* art. II-90, at 48.

196. *Id.* art. II-91, at 48.

197. *Id.* art. II-93, at 48.

198. *Id.* art. II-94, para. 1, at 48.

199. *Id.* art. II-95, at 49.

requires that “[a] high level of human health protection shall be ensured.”²⁰⁰ Similarly, the same chapter requires environmental²⁰¹ and consumer protection at a high level.²⁰²

Finally, in a chapter entitled “Citizens’ Rights,” the Charter protects the right to vote and stand as a candidate, and in the case of the European Parliament, it requires “direct universal suffrage in a free and secret ballot.”²⁰³ One of the longest articles provides a right to good administration and provides access to and accountability of Union bureaucrats.²⁰⁴

It seems clear that the Charter is primarily intended to protect against EU actions, just as the original ten amendments to the U.S. Constitution originally applied only to actions of the federal government.²⁰⁵ In Article II-111 the provisions of the Charter “are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.”²⁰⁶ It is just as clear that the Charter does not refer to private action.

In general, the aims of the Charter are very similar to those of the American Bill of Rights. Both aim to protect the citizen from arbitrary acts of the central government and both contain broad language that might extend protections to actions of the component states. The specific protections include virtually all of the protections of the American Constitution, at least in broad strokes, but go much further. The aims of the Charter also include what appear to be some extremely detailed (and to Americans, controversial)²⁰⁷ social welfare protections and guarantees. Each reflects the society that created it: in one case, post-revolutionary America of the late 18th century, in the other, post-cold war Europe of the early 21st century.

E. The Commerce Power

American constitutional scholars have long debated the meaning of Article I, Section 8, clause 3 of the American Constitution: “[t]he Congress shall have

200. Constitution for Europe, *supra* note 22, art. II-95, at 49.

201. *Id.* art. II-97, at 49.

202. *Id.* art. II-98, at 49.

203. *Id.* art. II-99, para. 2, at 49.

204. *Id.* art. II-101, at 50.

205. *See, e.g.*, *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Of course that limitation was effectively overruled by *Palko v. Connecticut*, 302 U.S. 319 (1937) and its introduction of the selective incorporation doctrine of the Fourteenth Amendment Due Process clause.

206. Constitution for Europe, *supra* note 22, art. II-111, para. 1, at 53.

207. This is not to say that the generous social welfare provisions largely available in Europe are accepted without comment by Europeans as well. While typically more generous than available anywhere in the U.S., they remain somewhat controversial in many European venues.

Power . . . [t]o regulate Commerce with foreign Nations, and among the several States"²⁰⁸ These few words have provided the soil for much constitutional law regarding the relative powers of the federal government and the states over commerce. Indeed, they have provided the source for most federal regulation of the economy and beyond. The American Commerce Clause has two chief functions: (1) it has provided the source of constitutional power and authority for innumerable federal actions; and (2) it has limited the ability of states to either discriminate against interstate commerce or unduly burden interstate commerce.²⁰⁹

The EU Constitution does not provide a single broad grant of power similar to the American Commerce Clause. The Europeans have instead attacked the problem piecemeal, by establishing a common commercial policy based upon a customs union between the Member States. For fifty years, the central purpose of European integration has been to abolish tariffs between Member States and present a common commercial front to the rest of the world.²¹⁰ European laws are to be used to establish the common commercial policy.²¹¹

An entire chapter of Title III of the Constitution deals with the internal market:²¹²

2. The internal market shall comprise an area without internal frontiers in which the free movement of persons, services, goods and capital is ensured in accordance with the Constitution.²¹³

3. The Council, on a proposal from the Commission, shall adopt European regulations and decisions determining the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.²¹⁴

Also, Member States are required to consult with each other in the event of serious internal disturbance, war or the threat of war.²¹⁵

The EU Constitution seeks to avoid the long debate on the relative allocation of power between the federal government and the state governments on commercial matters by dealing with "commerce" in a much more specific manner. Separate sections of Title III, Chapter I deal with free movement of

208. U.S. CONST. art. I, § 8, cl. 3.

209. In large measure the impetus for a change in the American Articles of Confederation came from that document's inability to stop individual states from favoring internal commerce over that from other states. In many ways the Common Market, the economic forerunner of the EU, was created from similar motives.

210. Constitution for Europe, *supra* note 22, art. III-314, at 142.

211. *Id.* art. III-315, at 142-43.

212. *Id.* tit. III, ch. I, at 58-173.

213. *Id.* art. III-130, para. 2, at 58.

214. *Id.* art. III-130, para. 3, at 58.

215. *Id.* art. III-131, at 58.

persons and Services;²¹⁶ free movement of goods;²¹⁷ capital and Payments;²¹⁸ rules on competition;²¹⁹ and fiscal provisions.²²⁰ An important section provides that “European laws or framework laws shall establish measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”²²¹

A great deal of authority is given to the EU to implement the free and open internal market through either European laws or framework laws. Important grants of power to the federal government are given to regulate and guarantee free movement of persons and services, capital and payments, and goods through European laws or framework laws. Section Five is nearly as specific as all of the American antitrust laws,²²² and goes much further to prohibit many forms of Member State assistance to domestic industries.²²³

While it appears that substantial authority is given to the central EU government, two overriding issues may somewhat enhance the power of Member States. First, the Constitution often grants authority to the EU to deal with a specific area, but only by establishment of European framework laws.²²⁴ As noted above, a European framework law is binding on the Member States “as to the result to be achieved,” but leaves the national authorities “the choice of form and methods” of achieving that result.²²⁵ Thus, Member States have the authority, within the guidelines established by the framework laws, to enact specific legislation tailored to the needs and desires of each State.

216. Constitution for Europe, *supra* note 22, art. III § 2, at 59.

217. *Id.* art. III, § 3, at 64.

218. *Id.* art. III, § 4, at 66.

219. *Id.* art. III, § 5, at 68.

220. *Id.* art. III, § 6, at 73.

221. *Id.* art. III-172, para. 1, at 73.

222. Constitution for Europe, *supra* note 22, art. III § 5, at 68. The EU has been particularly active in its enforcement of antitrust laws, more so than American antitrust authorities. International companies that must comply with the “highest common denominator” of antitrust laws often look to European enforcement authorities as their frame of reference.

223. For instance:

Save as otherwise provided in the Constitution, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.

Id. art. III-167, para. 1, at 71.

224. For example, art. III-147 provides that “European framework laws shall establish measures to achieve the liberalisation of a specific service.” *Id.* art. III-147, para. 1, at 64. There are numerous other examples throughout Title III, Chapter I.

225. *Id.* art. I-33, para. 1, at 27.

Second, the long-standing doctrine of subsidiarity guarantees that actions should be taken at the lowest possible level. Thus, outside of the constitutional grants of authority to the EU, the general rule will be that power should be exercised by the Member States if at all possible.

The European power over commercial matters is not likely to evolve in the same way that the American commerce power has done. The specificity of the powers granted are likely to be restricted to purely commercial undertakings, rather than acting as the fount and origin of vast power for the central government. The Commerce Clause has provided the source of power for much of American regulation today in the areas of competition, including environmental legislation, labor law, securities transactions, and even anti-discrimination law. Each of those areas and more are expressly considered in the European Constitution. Therefore, it is likely that the European commercial power will remain just that – power over commercial policy, limited by the principle of subsidiarity.

F. The Power to Tax and Union Finances

The power to tax is neither specifically granted nor denied in the Constitution. Article I-54 provides that “[t]he Union shall provide itself with the means necessary to attain its objectives and carry through its policies.”²²⁶ The same provision provides that a European law of the Council “may establish new categories of own resources.”²²⁷ However, that law must be approved in accordance with Member States’ respective constitutional requirements, and requires unanimous action of the Council of Ministers after consultation with the European Parliament.

A balanced budget is required.²²⁸ The budgetary process is done through a multiannual financial framework and an annual budget.²²⁹ The multiannual framework is provided by the Council “after obtaining the consent of the European Parliament” provided by a majority of the Parliament.²³⁰ The first multiannual financial framework after entry into force of the Constitution must be adopted by the European Council unanimously.²³¹

Currently the budget of the Union is relatively small. In 2002, it totaled E98.6 billion, representing just over one percent of the GNP of the member states and which is less than three percent of their total annual public

226. *Id.* art. I-54, para. 1, at 37.

227. *Id.* art. I-54, para. 3, at 37.

228. Constitution for Europe, *supra* note 22, art. I-53, para. 2, at 36.

229. *Id.* art. I-55, at 37; *see also id.* art. III-402, at 174.

230. *Id.* art. I-54, para. 4, at 37.

231. *Id.* art. I-54, para. 3, at 37.

expenditure.²³² This budget is small because few of the policy areas that traditionally make up the bulk of public expenditures are controlled by the EU.²³³ Expensive government operations such as defense, education, health, and social welfare all remain largely within the jurisdiction of the Member States.²³⁴

The revenue of the EU currently comes from four principle sources: (1) common customs tariff and other duties;²³⁵ (2) “[a]gricultural levies, premiums and other duties, which are collected in respect of trade with non-member countries within the framework of the [Common Agricultural Policy] CAP”;²³⁶ (3) a uniform VAT assessment to each nation, standardized but still permitting each nation some variation in VAT rates; and (4) an assessment based on the sum of Member States GNPs at market prices. The latter is very much like a national contribution based on relative GNP, based on the ability to pay.²³⁷

The issue of direct taxation is currently being avoided. As the level of activity by the central authority the EU increases, it is likely that the need for resources will increase. The need for resources will inevitably spur debate over the appropriate methods of funding the EU and over the appropriate use of funds. This sort of issue was another of the chief problems with the American Articles of Confederation, which depended on voluntary state contributions for most of its revenue. The EU, if it is to become a viable political entity, must obtain authority to directly obtain resources sufficient to support its activities.

G. Legislation, Specificity, and the Amendment Process

The Constitution includes a significant number of sections dealing with areas that would appear to be non-constitutional in significance. Part III, Title III, entitled Internal Policies and Actions, deals, in Chapter III, with a number of very specific areas including employment, social policy, the environment, consumer protection, transport, and energy, among others. While the constitutional coverage of those issues is often less complete than full legislative enactments would be, it often involves far more detail than American constitutional lawyers would expect. Provisions often involve limitations on either Union or Member State activities or the establishment of procedures to deal with special problems in the area. Normally, the provisions establish goals

232. NUGENT, *supra* note 24, at 366. For comparison purposes, the budget of the State of Illinois alone for FY 03 was \$23.3 billion.

233. *See id.*

234. *Id.*

235. *Id.* at 370.

236. *Id.* at 393(These “are not fixed import taxes, but are fluctuating charges designed to have the effect of raising import prices to EU levels.”).

237. *Id.* at 370-71. “The Common Agricultural Policy (CAP)—essentially a program of farm subsidies and price guarantees—comprises almost 50 percent of the EU’s overall budget.” KUPCHAN, *supra* note 3, at 147-48.

for the area in broad and ambiguous terms,²³⁸ limitations on what the EU may do regarding the area,²³⁹ and how the laws governing the area are to be enacted.²⁴⁰

Inclusion of these specific legislative areas in the Constitution has both advantages and disadvantages. These provisions are clearly meant to provide guidance and avoid disputes later. Often, they have been lifted intact from hard-won treaties or other agreements, and constitutional authors are probably loathe to erase months or years of negotiations. On the other hand, these specific

238. For example, art. III-233 provides that:

- 1. Union policy on the environment shall contribute to pursuit of the following objectives:
 - (a) preserving, protecting and improving the quality of the environment;
 - (b) protecting human health;
 - (c) prudent and rational utilisation of natural resources;
 - (d) promoting measures at international level to deal with regional or worldwide environmental problems.

Constitution for Europe, *supra* note 22, art. III-233, para. 1, at 103.

239. For example, art. III-233 provides that:

- 3. In preparing its policy on the environment, the Union shall take account of:
 - (a) available scientific and technical data;
 - (b) environmental conditions in the various regions of the Union;
 - (c) the potential benefits and costs of action or lack of action;
 - (d) the economic and social development of the Union as a whole and the balanced development of its regions.

Id. art. III-233, para. 3, at 103.

240. For example, art. III-234 provides that:

- 1. European laws or framework laws shall establish what action is to be taken in order to achieve the objectives referred to in Article III-233. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.
- 2. By way of derogation from paragraph 1 . . . the Council shall unanimously adopt European laws or framework laws establishing:
 - (a) provisions primarily of a fiscal nature;
 - (b) measures affecting:
 - (i) town and country planning;
 - (ii) quantitative management of water resources . . . ;
 - (iii) land use, with the exception of waste management;
 - (c) measures significantly affecting a Member State's choice between different energy sources

The Council . . . may unanimously adopt a European decision making the ordinary legislative procedure applicable

In all cases, the Council shall act after consulting the European Parliament, the Committee of the Regions and the Economic and Social Committee.

Id. art. III-234, paras. 1-2, at 104.

provisions tie the hands of future legislators. The constitutional provisions require that legislators consider certain policies, follow certain procedures and be bound by certain limitations for all time. If policies change, the political forces shift, or priorities are altered, the constitutional provisions still remain.

Constitutional specificity becomes extremely important in the light of the procedures for revision and amendment of the Constitution. Article IV-443 provides that an amendment requires a constitutional convention to be convened by the President of the European Council following consultation with the European Parliament and the Commission and a majority vote of the European Council.²⁴¹ The convention is composed of representatives of the national Parliaments of the Member States, of the Heads of State of the Member States, the European Parliament, and the Commission. The convention adopts “by consensus” a recommendation for the Member States.²⁴² The conference of representatives of the governments of the Member States also determines by common accord the amendments to be made.²⁴³ The amendments become effective after ratification by *all of* “the Member States in accordance with their respective constitutional requirements.”²⁴⁴

The procedure for amendment is substantially more difficult than amending the U.S. Constitution. While there is no specific supermajority rule in the Parliament, the convention, or the conference of representatives, the requirement of a “consensus” or a “common accord” imply near unanimity. The procedure clearly requires unanimity for ratification by the Member States. This burden is substantially higher than the two-thirds majority in both Houses of Congress and three-fourths of the States that was required for the twenty-six amendments in 214 years for the United States.²⁴⁵

The hidden danger here is that the European Constitution will become out-of-date and unworkable as foundational law for Europe. Popular and progressive provisions in the first years of the twenty-first century may quickly become archaic, or even counter-productive, a decade or two later. Amendment is at best slow and clumsy, and at worst, impossible.

There are only two real solutions. Either the Constitution must become *less* specific, granting substantial freedom to European legislators to fashion laws for their time in history and trusting in the courts and the legislatures themselves to

241. *Id.* art. IV-443, para. 2, at 189-90.

242. *Id.*

243. *Id.* art. IV-443, para. 3, at 189-90.

244. Constitution for Europe, *supra* note 22, art. IV-445, para. 2, at 191. A “Simplified Revision Procedure” is provided by Article IV-444, wherein the European Council may adopt a European decision authorizing the Council to act by a qualified majority in certain cases, followed by notification to national parliaments and the opportunity by those parliaments to object, thereby eliminating the need for a convention, but not the need for unanimity. *Id.* art. IV-444, at 191.

245. U.S. CONST. art. V.

keep within the banks of constitutional policy; or the procedures for amendment within the constitution must become far more efficient. In either case, European constitutionalists must trust in their future legislative and political counterparts.

H. The Requirement of a Market Economy and European Social Policies

One of the most obvious tensions in the document relates to the requirements of both a market economy and Euro-style social welfare and employment philosophy. A number of provisions refer to "an open market economy with free competition."²⁴⁶ The Constitution prohibits excessive government deficits,²⁴⁷ defines them, and even provides a method of measuring deficits and an enforcement mechanism for dealing with Member States that run such deficits.²⁴⁸ It seems that Thatcherism is the dominant economic philosophy behind the new Constitution.²⁴⁹

However, the explicit choice of a market economy in the new constitution is belied by provisions which support, or even require, a traditional European welfare state. Provisions of the Charter of Fundamental Rights, for example, provide for the right to property, but then provide that the "use of property may be regulated by law insofar as is necessary for the general interest."²⁵⁰ Another article protects a limitation on "maximum working hours, to daily and weekly rest periods and to an annual period of paid leave,"²⁵¹ while others prohibit child labor,²⁵² protect paid maternity and parental leave,²⁵³ protect entitlement to

246. See Constitution for Europe, *supra* note 22, art. III-177, at 76; see also *Id.* art. III-178, at 76.

247. *Id.* art. III-184, para. 1, at 78.

248. *Id.* art. III-184, at 78-81.

249. Contrary to arguments by American economic conservatives, there is no such choice of economic systems in the American constitution. Perhaps the clearest exposition of this fact was found in Justice Holmes' famous dissent in *Lochner v. New York*:

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

198 U.S. 45, 75-76 (1905). The triumvirate of decisions in 1937 affirming federal and state power to regulate commerce also implied that a market economy was not constitutionally mandated. *E.g.*, *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). It would appear that the constitutional choice of a market economy based on competition may be a limiting factor on choices to be made in the future, both by the EU and by Member States. However, the definition of a "market economy" will certainly vary substantially.

250. Constitution for Europe, *supra* note 22, art. II-77, para. 1, at 45.

251. *Id.* art. II-91, para. 2, at 48.

252. *Id.* art. II-92, at 48.

253. *Id.* art. II-93, at 48.

social security benefits and social services “in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment,”²⁵⁴ and protect access to preventative health care.²⁵⁵ Proponents of laissez faire market economics would find each one anathema.

Aside from the requirements of the Charter of Fundamental Rights, there are significant portions of the Constitution dealing with employment and social policies that guarantee workers’ rights and assure equal opportunities and treatment, social security, and workers’ health and safety.²⁵⁶ This tension may be more illusory than real. The requirement of a market economy is broad and general at best, while the provisions requiring labor and social protections are quite specific. It will be easy – and probably politic – to give lip service to the market economy while providing social and labor protections consistent with the last half century of European history. Those free market provisions are more likely provided as assurance against any sort of communist or outright socialist-style economic systems, rather than as stringent requirements for adoption of laissez faire economic systems.

I. Sovereignty, Foreign Affairs and Defense

Underlying the entire European constitutional process is the issue of the effect of the Constitution on “sovereignty.” At the outset, sovereignty is a surprisingly difficult concept to define.²⁵⁷ The term has been defined by the U.S. Supreme Court as “the Supreme, absolute, and incontrollable, power of Government” by which any independent state is governed.²⁵⁸ It is also sometimes used to mean international independence, or the right and power of regulating its internal affairs without foreign dictation.²⁵⁹

One way to look at sovereignty is like property, as a “bundle of rights.” Sovereignty consists of a series of national powers, including the right to close borders and exclude others, the right to coin money, the right to deal with its own citizens, the right to raise armies, and the right to be recognized internationally as an independent state, among others. Just as the rights of ownership of property can be divided and dispersed (possession, the right to use,

254. *Id.* art. II-94, at 48.

255. *Id.* art. II-95, at 49.

256. Constitution for Europe, *supra* note 22, art. III-203, at 91; *see also id.* art. III-210, at 93.

257. *Cf.*, Ian Ward, *The End of Sovereignty and the New Humanism*, 55 STAN. L. REV. 2091 (2003) (comparing the concepts of unlimited or “parliamentary” sovereignty, as exemplified by the strongest British traditions and described at length by Albert Venn Dicey in his *Introduction to the Study of the Law of the Constitution*, and the concepts of dualist sovereignty, as described by Lord Denning in *McCarthy’s v. Smith*, 1981 Q.B. 180, which provided for limited sovereignty within the context of greater European sovereignty).

258. *Chisholm v. Georgia*, 2 U.S. 419, 461 (1793).

259. *See generally* *Moore v. Shaw*, 17 Cal. 218 (1861); *State v. Dixon*, 213 P. 227 (Mont. 1923).

the right to receive profits, etc.), the rights of sovereignty can be divided and dispersed. For example, by giving up the right to close borders or coin money. Regardless of the definition, the problem of sovereignty presents issues and undercurrents for the whole issue of EU federalism. Those issues threaten both the idea of Europe and the ability of the EU to function as a single entity in some of its most important aspects. Perhaps the most important and the most vulnerable aspect deals with foreign relations.

One of the most dramatic episodes implicating sovereignty is being played out in the European Court of Justice. EU Commission Rules require that national budget deficits be capped at three percent of gross domestic product. France and Germany flouted those rules in 2002, 2003, and again in 2004. The European Union voted to suspend the rules, since they would have forced France and Germany to make deep budget cuts which threatened economic recovery. The Commission sued the fifteen members who voted in favor of suspending the rules.²⁶⁰ It was clear that “Germany and France wanted to make a point, namely that they can’t be pushed around by the commission.”²⁶¹ A defeat would weaken the commission’s position, even though smaller members have acceded to the commission’s power.²⁶²

The most compelling issues of sovereignty involve foreign affairs. The Constitution attempts to deal with external relations in a number of provisions. Both Article I and Article III provide for a common foreign and security policy in slightly different contexts and wording.²⁶³ The policy is to be defined and adopted by the European Council,²⁶⁴ but is to be implemented by the Union Minister for Foreign Affairs (who also chairs the Council of Ministers for Foreign Affairs and represents the Union on matters relating to the common foreign and security policy).²⁶⁵ “[T]he Union Minister for Foreign Affairs shall

260. Mark Landler, *European Commission to Sue Over Deficits of 2 Countries*, N.Y. TIMES, Jan. 14, 2004, at C1.

261. *Id.*

262. *Id.* On March 21, 2005, EU finance ministers agreed to revamp the Stability and Growth Pact to allow more flexibility in the rules and permit a number of factors that will excuse a Member State from complying with the Pact. Exact wording of the changes had not been established. *EU reaches budget deficit deal*, CNN.COM, Mar. 21, 2005, at <http://www.cnn.com/2005/BUSINESS/03/21/eu.pact.reut/?section=cnn-latest> (last visited Mar. 31, 2005).

263. Constitution for Europe, *supra* note 22, art. I-40, para. 1, at 29; *see also id.* art. III-294, at 133.

264. *Id.* art. III-295, at 134.

265. *Id.* art. III-296, para. 1, at 134; *see also id.* art. I-28, at 23.

be assisted by a European External Action Service,²⁶⁶ which seems to be the Union's version of an EU diplomatic corps.²⁶⁷

The creation of foreign policy is cumbersome at best. If "operational action" by the Union is required, the necessary European decisions are adopted by the Council, consisting of a representative of each Member State at the ministerial level. Such actions are to be adopted by the Council unanimously, although abstentions do not prevent adoption of the decisions unless at least one-third of the Member States representing one-third of the population of the Union have abstained.²⁶⁸ "[T]he Council shall act by qualified majority" in certain instances, especially if the European Council has already acted.²⁶⁹ Likewise, the European Council (consisting of the Heads of State or Government of all Member States) may adopt European decisions, again unanimously.²⁷⁰

The relation of Member States and their foreign activities are, of course, vital to these issues. The Constitution is full of precatory phrases, arguing that the common foreign and security policy should be "based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions,"²⁷¹ and requiring that Member States "consult one another . . . on any foreign and security policy issue which is of general interest" and shows mutual solidarity.²⁷² Similarly, "[t]he Member States shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity,"²⁷³ and "[t]hey shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations."²⁷⁴ Member states are required to "coordinate their action in international organisations and at international conferences."²⁷⁵

On the other hand, realities are recognized in a provision that requires that:

[t]he policy of the Union . . . shall not prejudice the specific character of the security and defence policy of certain Member States, it shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation, under the North Atlantic

266. *Id.* art. III-296, para. 3, at 134.

267. Draft Treaty, *supra* note 32, at 239.

268. Constitution for Europe, *supra* note 22, art. III-300, para. 1, at 135.

269. *Id.* art. III-300, para. 2, at 136.

270. *Id.* art. I-40, at 29-30; *see also id.* art. III-293, para. 1, at 133-34.

271. *Id.* art. I-40, para. 1, at 29.

272. *Id.* art. I-40, para. 5, at 30.

273. Constitution for Europe, *supra* note 22, art. III-294, para. 2, at 133.

274. *Id.*

275. *Id.* art. III-305, para. 1, at 137.

Treaty, and be compatible with the common security and defence policy established within that framework.²⁷⁶

The military means on which Union policies are ultimately dependent is to be provided by the Member States, who are to "make civilian and military capabilities available to the Union for the implementation of the common security and defence policy."²⁷⁷ Member States are also required to "undertake progressively to improve their military capabilities," and a European Defense Agency is created to aid in the development of those capabilities.²⁷⁸

European military operations in recent years have largely been concentrated in peace-keeping operations and conflict resolution, even though Europe has many more soldiers in uniform than the United States.²⁷⁹ However, it is likely that the European military presence will increase in the future.²⁸⁰ Substantial reforms are being made in national military programs, including collective procurement systems and the phasing out of universal military service in favor of a more professional military in France and Germany.²⁸¹ The ability to create a common security policy, and the need for a coordinated military presence on the fringes of Europe to deal with emerging trouble areas will likely goad the Europeans toward a flexible military as an arm of its new coordinated foreign policy.²⁸²

The Europeans have adopted what appears to be a very pragmatic and incremental approach to sovereignty. Rather than creating one large cataclysmic event in which centuries-old nations yield their sovereign swords to the EU, the Europeans have taken small steps, each involving small incidents of sovereignty. Open borders, commercial cooperation, the Euro, and now a common foreign and security policy all lead to the conclusion that the bundle of rights of sovereignty is being divided between Member States and the EU. It seems likely that the division will continue.

J. Ratification

As discussed earlier, the ratification process is itself somewhat unclear. Article IV-447 provides that:

1. This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall be deposited with the Government of the Italian Republic.

276. *Id.* art. I-41, para. 2, at 31.

277. *Id.* art. I-41, para. 3, at 31.

278. *Id.*

279. See KUPCHAN, *supra* note 3, at 148.

280. *Id.*

281. *Id.* at 149.

282. *Id.*

2. This Treaty shall enter into force on 1 November 2006, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the second month following the deposit of the instrument of ratification by the last signatory State to take this step.²⁸³

However, an earlier provision in Article IV-443 (4) states: “[i]f, two years after the signature of the treaty amending this Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.”²⁸⁴ This has been interpreted to mean that there is a two year limit on the ratification process, and if it has not been adopted unanimously, “the European Council will review the situation.”²⁸⁵

The Conventions’ Draft Constitution was the subject of the Intergovernmental Conference (IGC) that began in the fall of 2003. The IGC brought together the representatives of the governments of the fifteen current member states and the ten acceding countries. Three candidate states (Bulgaria, Romania and Turkey), had observer status. The objective was that the IGC complete its work prior to the European Parliamentary elections on June 15, 2004. A further objective, was to have the Constitution signed as quickly as possible after May 1, 2004, the date of accession of the ten new Member States. According to the terms of the Draft, the Member States would then have to ratify the Treaty in accordance with their existing constitutional rules.²⁸⁶

Clearly, this process was not followed. The vote on December 15, 2003 meant that the draft went back for reconsideration and restructuring. A compromise document emerged, but one that may be capable of pulling together the diverse strands of European politics into a single document. Whatever the result, the current draft will form the backbone of any new effort at federalizing Europe.

On January 1, 2004, the presidency of the European Union rotated from Italy to Prime Minister Bertie Ahern of Ireland. Immediately, a new debate began between Ahern and Romano Prodi of Italy, the President of the European Commission. Mr. Prodi argued for what has been termed a “two-speed” Europe, in which some parts of Europe would adopt the Constitution or something like it, while other parts of Europe would join at later times. Mr. Ahern argued that any “new talks must include all members, including 10 new nations set to join in

283. Constitution for Europe, *supra* note 22, art. IV-447, at 191.

284. *Id.* art. IV-443, para. 4, at 190.

285. *Draft Constitution: Citizens’ Guide: Presentation to Citizens*, 27, EUROPEAN COMMISSION SECRETARIAT GENERAL, available at http://europa.eu.int/comm/press_room/presspacks/constit/guidetocitoyen_en.pdf (last visited Feb. 6, 2005).

286. *Id.*

May.”²⁸⁷ Those talks indeed involved all of the acceding members, sometimes to the consternation of the original members of the EU.

The politics of ratification are at two levels. At the EU level, much of the political infighting is now concluded, and the document has been nominally accepted by each of the governments of the twenty-five Member States. This in itself is a significant accomplishment and perhaps a high point in European politics in the last 2000 years. The politics of ratification now moves largely to the domestic politics in each of the Member States. A key issue remains the so-called “democratic deficit” – the general lack of interest and concern by the European public with the workings of the European Union. Significant numbers of Europeans are “euroskeptics,” that is, they see little to gain and much to lose by ceding sovereignty or a part of sovereignty to what is largely seen as an undemocratic bureaucracy in Brussels.²⁸⁸ Many nations that will ratify through a referendum, including some of the largest and most influential nations in Europe, must first overcome some fairly basic prejudice against European federalization.

The sheer size and complexity of the Constitution adds to the democratic deficit. It will be a rare European who actually reads the entire document. The 300 plus pages are, as a practical matter, inaccessible to all but the most intrepid voters, and contributes to the image of the EU as a complex, dense and inaccessible bureaucracy. It is far easier to vote against such an organization than to vote for it.

The ratification process will involve more local politics than grand designs for Europe. The interests of Poles, Swedes, Spaniards and Irishmen will all weigh in on the future of Europe, each considering its own parochial interests in the context of a broad vision for Europe. The requirement for unanimity will likely result in delays and setbacks.

VIII. PROSPECTS AND IMPLICATIONS FOR U.S. POLICIES

It is easy for Americans, jaundiced by decades of political divisiveness, media posturing, and political ambitions to be cynical about the prospects for European federation.²⁸⁹ The very existence of the Draft Constitution implies that Europeans have, at least for now, agreed to set aside at least some differences for the greater good of all. Those nations, or many of them, have

287. Brian Lavery, *European Officials Meet on Agenda*, N.Y. TIMES, Jan. 7, 2004, at A10.

288. Joschka Fischer, Germany's Foreign Minister and a moving force toward integration, “admitted, the EU is often ‘viewed as a bureaucratic affair run by a faceless, soulless Eurocracy in Brussels at best boring, at worst dangerous.’” Joschka Fischer, *From Confederacy to Federation – Thoughts on the Finality of European Integration*, Speech at Humboldt University, Berlin (May 12, 2000), quoted in KUPCHAN, *supra* note 3, at 141.

289. Cf., Jeffrey E. Garten, *Europe: Staring Into The Abyss*, BUS. WEEK, Aug. 2, 2004, at 24.

come together many times in the past for purposes of the various Treaties of Rome, Amsterdam, Nice, and Maastricht, as well as for the Single European Act and the Charter of Fundamental Rights. There is reason to believe that even this massive restructuring could be successful.

American lawyers who are comfortable with the ambiguities of the American Constitution will nonetheless be ill at ease with some of the conditional, exhortative, and equivocal language of the EU constitution. Perhaps the single most difficult phrase requires “a high level” of protection of various rights or liberties. For example, the Charter requires “[a] high level of environmental protection,”²⁹⁰ and “a high level of consumer protection.”²⁹¹ American environmentalists and consumer advocates would applaud the concepts even finding their way into the constitution, but lawyers and judges who must decide specific cases will assuredly have difficulty defining a “high level.”²⁹²

While the European Constitution is ambiguous, perhaps it needs to be. The American Constitution was developed for people who spoke a common language and was developed in one language (only for transplanted Englishmen). The European Constitution was translated into twenty-four languages on the official website. It was developed for Germans, Spaniards, Greeks, Italians, Englishmen, Lithuanians, Latvians, and perhaps Turks, among others. The meaning of “a high level” and other phrases is likely to have slightly different shades of meaning in French, Polish, and Portuguese. How all this will unfold in a judicial setting, or a legislative one, is not clear.

The potential implications for American foreign policy of increasing European integration and the potential for real political federation are staggering. Since the fall of the Soviet Union, the United States continues to be the sole power center in the international arena. Admittedly, the United States’ response to this level of responsibility has been schizophrenic, shifting from isolationism to unilateralism, and often blending the two in curious combinations. However, American policymakers have at least accepted and guarded their role as the sole repository of international power.

A united Europe, with its economy, population, and more genuine international outlook, has the potential to challenge American global primacy in the long run.²⁹³ While military confrontation between the EU and the U.S. is

290. Constitution for Europe, *supra* note 22, art. II-97, at 49.

291. *Id.* art. II-98, at 49.

292. Other provisions require “a high level of employment.” *Id.* art. III-205, at 70.

293. Kupchan presents the interesting analogy of the division of the Roman Empire, then the “unipolar” power center of the world, into eastern and western zones (Rome and Byzantium) by Diocletian in the third century, the consequent creation of a “bipolar” world, and the inevitable competition and conflict between Rome and Constantinople. Kupchan argues that a similar disintegration of “the West” into two powers, the U.S. and the EU, will inevitably also result in

extremely improbable, the international influence of the EU is likely to grow, especially in the face of what is perceived in many parts of the world as American arrogance and unilateralism.

U.S. and EU competition in trade and finance is also likely to increase, especially as Europe begins to solve its productivity issues centering on its aging population. Solutions include: expansion of the European workforce through immigration reform; expansion of the EU to the east; and incorporation of millions of younger and highly motivated workers from the former Soviet bloc and perhaps the Middle East.

The United States and the European Union are also likely to compete rather than cooperate over multilateral organizations, including the United Nations. Europe's relation to the United Nations and other international organizations has largely been supportive and positive. American views of such organizations shift from benign neglect to outright hostility, as evidenced by the U.S. response to the Kyoto Treaty, the International Criminal Court, and actions in Iraq. The rest of the world may soon see a choice between perceived American arrogance and unilateralism, and European internationalism and cooperation.

In what Charles A. Kupchan sees as a shift from a unipolar American-dominated world to a bipolar U.S.-EU competitive system, there are few, if any, competitors. The former Soviet bloc countries, including Russia, are either rapidly aligning with the European Union or too weak to be very relevant in the international system. Far on the horizon loom China and the rest of Asia, rapidly developing as economic powers, but far from being competitive players in the geopolitical arena of the twenty-first century. However, those nations present the first faint glimpses of a new, multipolar balance of power system in the distant future.

The European Constitution is an important step towards the creation of Europe as a world power, but it is not an essential one. Europe is already a strong player in the world system, through its integrated economy, the strength of the euro, and the perception that it represents a more balanced and internationalist focus than the U.S. It is likely that some form of constitution for Europe will be adopted, if not during the current ratification process, then certainly during the next few years. As political organizing principles, it will be useful; as a rallying symbol and a foundation for European self-confidence and future integration, it is essential.

The European Constitution has a long way to go, and the present version may well be a false start. Almost certainly, Europe will have a constitution in the near future, if not this version, one much like it. And, as the European courts

competition and conflict. He does not foresee the possibility of armed conflict, but rather competition at the diplomatic, geopolitical and economic levels. KUPCHAN, *supra* note 3, at 153-54.

interpret the document, as scholars analyze specific provisions, as clarifying amendments are passed and as the document achieves a level of acceptance and veneration, it will form a context and organizing foundation for Europe as both a political entity and an international force.

