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The Framing of the EU Constitution: An American Constitutional Perspective

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The framing and enactment of the Constitution of the European Union invites comparison with its American counterpart, the Constitution of the United States. Many of the conflicts that animated the Philadelphia convention of 1787 were present during the EU conference: the question of power distribution among large and small states, the amount of power that a central government would exercise and the call for specific rights and protections to be codified within the text. Yet the European delegates did not resemble the American framers, nor did they craft a text that holds much resemblance to the U.S. document. The differences have enabled the EU to create a uniquely European constitution, but it has also resulted in a degree of complexity—in both its procedural and substantive provisions—that the U.S. Constitution was able to avoid. The document as approved faces considerable challenges concerning its scope, clarity and legitimacy as the ratification phase takes place.

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INTRODUCTION

In July of 2003, the European Commission's Constitution Committee released its draft document: a constitution that was a product of sixteen months of debate and deliberation. The Committee considered over 7000 amendments and revisions along the way to a final text of over 300 pages. The proposed Constitution had broad political and economic goals. In terms of its political arrangements, the European Union sought a single text that would codify the multiple and overlapping treaties that had preceded it. In an age of independence movements, nationalism and "Balkanization," Europe hoped that a well-crafted constitution would serve as a point of unification, bringing its citizens closer to the common purposes of the Union. The framers also hoped that it would assist Europe in becoming an effective competitor to the United States within the global economy. Finally, a Charter of Fundamental Rights was folded into the text as a manifesto of personal and collective rights that was to be an expression of 21st Century ethics and worldview.

Within a few months it was apparent that there were deep divisions between the member states, and that the reasons for arguing and disagreeing were stronger than the reasons for compromising and agreeing. A number of these disagreements concerned matters of substance, in particular the amount of power to be granted to a central EU government and the distribution of voting power among the member states. What underlay these conflicts was equally significant and far more difficult to address. Advocates of the draft constitution had to convince fellow delegates that acceptance would not threaten national sovereignty, nor exacerbate old tensions and rivalries.¹ This case had

¹ An intriguing challenge to advocates of EU enlargement and integration has been the emergence of new alliances and rivalries both during and following the accession of ten new member nations in May of 2004 (see note 3). While many questions of power distribution continues

to be made, moreover, while the EU was preparing to accept ten new members—most from the old Soviet bloc—and enlarge to 25 member states. A European Union of greater diversity and more pronounced differences was developing on a parallel track with the drafting of the constitutional text. By October, the leaders of the 25 present and future EU members broke off talks and headed home after reaching an impasse over voting power. By mid-December, negotiations collapsed and the constitutional treaty was, for the moment, shelved. Plans were made for reconsideration under new EU leadership² before the May, 2004 reception of the ten new member nations.³ In June of 2004, representatives from member nations agreed upon an end product that somehow endured the strain of satisfying the different interests of the 25 signatory nations.

In 2005, the EU Constitution faces approval debates and votes across the European continent. As an evaluation of the process of constitutional enactment and in anticipation of the process of ratification, this study will examine the content, structure and procedural mechanisms of the EU Constitution from the

bution can be seen in terms of “old” versus “new” Europe, or large versus small nations, some new partnerships have developed. One example was the alliance between Spain and Poland during the late 2003 conferences as discussed later in this text. Another is the economic pronouncements made by the more “euroskeptical” nations of Britain and Estonia concerning economic competition and the call for lower levels of taxation. This followed the writing of a joint article by Estonian Prime Minister Juhan Parts and British Prime Minister Tony Blair, “The Enlarged EU Must be Free to Compete,” *Financial Times*, 2 November 2003, p. 21.

² The rotating leadership of the EU passed from Italy to Ireland at the end of 2003. Many participants held out hope that the Irish, minus the controversial and divisive Silvio Berlusconi, would be able to bring the delegates back together in the Spring of 2004, and achieve an approved document by June. That did in fact prove to be the case.

³ The following nations acceded to EU membership on May 1, 2004: Estonia, Latvia, Lithuania, Slovenia, Malta, Cyprus, Czech Republic, Hungary, Slovakia, and Poland. They will join the current 15 member states: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, and the United Kingdom.

perspective of American constitutional theory. I posit that fruitful and intriguing avenues of analysis and evaluation are revealed when the framing and debate of the EU Constitution is compared and contrasted with that of its 1787 counterpart, the Constitution of the United States. My plan is to assess not only the content of the EU document (which has received considerable attention in the European press), but also its overall structure and design, or context. By locating and evaluating the main substantive and procedural challenges posed by the EU Constitution, and by drawing comparisons with the U.S. case, I provide both diagnostic and prescriptive insights. For the ratification and ultimate success of the document is not a foregone conclusion. European leaders struggled for over two years to draft and finalize one of the most ambitious and far-reaching governing documents in human history. The ultimate success or failure of this Constitution (and all of the smaller successes and failures along the way) will provide valuable lessons that will animate and inspire the task of constitution-making in the years to come.

CONTEXT:

THE WHO, WHAT, WHEN, WHERE, AND HOW OF CONSTITUTION MAKING

One of the main purposes of this study is to demonstrate that the process of constitution making can often be as important, if not more important, than the product that emerges from debate, deliberation, and writing. A number of historical and contextual observations indicate that certain advantages present during the American founding were not found within the recent Convention for the Future of Europe.

We The People?

A perusal of the proposed Constitution of the European Union shows some interesting parallels with, as well as some important

departures from, its American counterpart. The Preamble of the U.S. text makes clear where primary authority rests, and from where power and legitimacy are gained. All powers granted to government are from the people. States remain sovereign, and the constitutional language links the people and the states as sources of authority, but final authority is with the people.⁴ There is a sense of hierarchy throughout the document as powers are delegated to the national government, and then clearly enumerated, while others are reserved to the states and, ultimately, to the people. As J.H.H. Weiler (2001, 56) has noted, "In federations, whether American or Australian, German or Canadian, the institutions of a federal state are situated in a constitutional framework which presupposes the existence of a 'constitutional demos,' a single *pouvoir constituant* made of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted."

In this regard, the Constitution of the European Union looks like a constitution. It defines and delineates powers, and makes demands upon constitutional actors, whether they be member states, citizens, or institutions, that closely resemble the requirements of other federal systems. In its preamble, it appears to draw its authority from both the people and the member states in a fashion that is strikingly similar to the U.S. Constitution. For Weiler (2001, 57), however, there is the rub: "Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European *demos* and, hence, as a matter of both normative and political principles and empirical social observation the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states

⁴ Constitution of the United States. See the language of the Preamble and the text of the Tenth Amendment.

where their federalism is rooted in the classic constitutional order.”

In 1787, thirteen colonies bound by a common language, heritage and religion came together as a constitutional demos. Rivalries and disagreements over economics, slavery and state sovereignty were overcome in order to produce a document that would sustain the recently won freedom. That which united the people was greater than that which divided them. But the current 25 member nations that are set to ratify the EU draft document do not share such characteristics. The cultural and ethnic identity and national sovereignty of many member states stretches back for centuries. Some have fought protracted wars against neighboring nations. Members are separated by language, custom, and religion (or the lack thereof), and some have just recently regained the freedom to express those beliefs and practice those customs. As a result, any attempt to forge a true Union of states will face challenges that simply did not exist in the America of the 1780s.

The question, then, is whether a constitution that lacks a demos—a “we the people” that both supports and calls forth the document—can legitimately claim the authority to bring about a new, comprehensive political order. Given the historic rivalries between (what are now) some member nations, and the emergence out of Soviet dominance by the majority of the newly acceded nations, scholars such as Weiler have remained skeptical. This is not to say a genuine union of European states cannot evolve, but only that a constitution may not be the most effective way to further develop and legitimate such a union.

The problem can be put another way. Since constitutions grant powers to governmental institutions and governments require legitimacy, any project in constitution-making must seek to clearly reflect popular will and secure popular support. The EU actors have been acutely aware of this, as one of their key goals

has been to lessen the “legitimacy gap” between the EU institutions and its citizens.⁵ That “gap” has been defined as the popular perception that government under the EU lacks accountability and responsiveness to the people. This has been reflected in two trends. First, each successive treaty has pushed power away from democratically elected national governments and toward institutions and bureaucracies far removed from democratic accountability. Second, there has been a long-standing perception that the democratically elected European Parliament, the most “representative” of the EU institutions, has lost power and prestige to the European Commission and the European Council of Ministers.⁶ The perception of a democratic deficit has dogged efforts toward greater consolidation and centralization of power in the EU in the past, and it remains a critical problem today.⁷ Since, as at least one seasoned constitution-maker has observed, the “success of constitutional government depends on the willingness of people to accept and be bound by legitimate governmental deci-

⁵ Expectations have remained high that this Constitution would help remedy the legitimacy gap. As Shaw (2003, 43) notes, “Since its creation was first announced in December 2001 at the Laeken European Council meeting, very substantial expectations have been invested in the Convention on the Future of the Union by many observers of the European integration process. Perhaps it could finally address the yawning legitimacy gap that appears to have opened up in European public affairs since the time of the Treaty of Maastricht, leading to a widespread alienation between the activities of the European institutions and those whom they are meant—like any public bodies—to serve, that is, the citizens and residents of the member states.”

⁶ For the student of American politics and government, understanding the key European Union institutions and their functions (Parliament, Commission, Council of the European Union, European Council) can be as daunting and difficult as figuring out the British game of cricket. For a primer on the EU institutions, see the section entitled “How does the Union work?” at Europa, the website of the European Union (<http://europa.eu.int>).

⁷ The significance of the democratic deficit was clearly shown with the Danish vote that turned down the Maastricht Treaty on European Union in 1992. The perception that power would be transferred from accountable national governments to unaccountable bureaucracies put a brake on further efforts toward integration. For a lucid and comprehensive discussion of the democratic deficit problem, see Andrew Moravcsik (2001, 161-187).

sions that they greatly fear or intensely dislike" (Seigan, 1994, 2), there is cause for concern. The past two hundred years are littered with constitutions that failed to accomplish such a degree of legitimacy and consent.

Size and Simplicity

Another problem for those who hope for success concerns the unavoidable complexity of the proposed Constitution. The U.S. Constitution is marked by brevity, clarity, and specificity. The history of constitutions and constitution-making indicates that smaller is better when it comes to crafting a constitution intended to endure for more than a few generations. Jack Straw (2000), Britain's foreign secretary, has added that "size tells another, more important story—that of coherence." With few exceptions, lengthy, detailed constitutions have been marked by redundancy, inconsistency, and complexity. Short, spare constitutions tend to be easier to read, understand, and interpret. Further, an accessible constitution can be read and understood by its citizenry. Given these considerations, the EU Constitution faces an uphill battle. As a consolidating document—one that brings together and harmonizes a cluster of already existing treaties—the EU text had to be comprehensive. The Convention on the Future of Europe was charged with the task of making the treaty system simpler and more coherent. It did not have the option of jettisoning the treaties and starting afresh, as the Philadelphia Convention did with the Articles of Confederation. As a result, the EU text is, of necessity, a lengthy and complex work.

Comparing Conventions

Analysis of the conventions that framed the U.S. Constitution in 1787 and the European Constitution in 2002-2003 yields some notable contrasts. For one, the delegates in attendance at each differed in number, task, and charge. During the summer of 1787, 55 men came together in Philadelphia as permanent, full-

time delegates to consider changes and propose amendments to the Articles of Confederation. Despite the fact that one state, Rhode Island, did not send a delegation and that some of the delegates departed before the end of the convention, the process was marked by unified purpose, consistent attendance and adherence to a code of secrecy. The framers locked themselves into a building by day, and enjoyed each other's company with dinner and drink by night. Many already knew each other either personally or by reputation, and they formed close associations with one another as the summer wore on. Importantly, the participants expected to control the system that they were creating.⁸ Although there were varied interests and priorities, and a few major conflicts, all the participants were chosen by state legislatures and were beholden to the same kind of political unit, the state.⁹

Also significant was the fact that most of the work done at the convention was accomplished in general debate. Smaller working committees ironed out the details of major propositions, but the most important decisions were made among the full convention assembled. Both general debate and ad hoc committees enjoyed the protection of secrecy from the press and from the inhabitants of Philadelphia. Note taking was restricted, and all were sworn to silence between sessions. As a result, bold and radical initiatives could be proposed, considered and debated on the merits, without fear of reprisals from the public or the press. The result was a remarkably efficient and determined process

⁸ As noted by Robinson (2003), the delegates consisted of most of the leading figures from their states: "Of the men at Philadelphia, two went on to become president, one to become vice-president, four to be federal cabinet ministers, 9 to be senators, 13 to be members of the House of Representatives, and four to be federal judges."

⁹ For what still remains the classic statement on the aspirations and motives of the Philadelphia delegates, see Roche (1961). Roche provides compelling arguments explaining why the convention stuck together through the summer, suffered few departures and no breaches of secrecy, and found ways to compromise when compromise was necessary.

that saw the delegates emerge at summer's end with a spare, specific, and coherent product.

The Convention for the Future of Europe was markedly different. The sixteen month long European congress drew over 200 delegates from over twenty countries. They came from a wide variety of organizations and posts, and included members of national parliaments, Members of the European Parliament, members of the European Commission, the Economic and Social Committee, and nominated representatives of national governments.¹⁰ Many held no elected position, and it is especially noteworthy that ex-ministers outnumbered serving ministers three to one. Unlike the American founders, this was not a group that anticipated having to conduct and control the system that it was creating. Nor were the delegates sent as full-time or permanent representatives, and so attendance was often sporadic.

Hence the size and composition of the convention, and the transience of its delegates, led to a markedly different dynamic as the EU constitutional text was crafted. For the most part, the lack of full-time, permanent delegates meant that the core decision-making over and wording of the document took place in the smaller working groups, not in the main sessions.¹¹ One critic remarked that

One can see the effect in the plenary meetings of the European Convention, which are too large. At all times, members are strolling around, chatting quietly, reading newspapers and using their laptops... The atmosphere is neither particularly businesslike nor conducive to rigorous debate. Speakers have only three minutes to say what they want, and, as one of

¹⁰ *Supra* note 6.

¹¹ This was not accidental. Critics charge that this was a continuation of elite control over the drafting process, as the smaller groups were dominated by the Presidium.

the delegates told me, 'Everyone just makes their speech and there is no real dialogue.' As a result, the real work of the conference is done in the smaller working groups. Nobody has the time to attend all of these, and there is no obvious means to ensure coherence. Power thus slips into the hands of...[the] presidium, and...secretariat, who were not elected by the Convention but were chosen by the EU heads of government and are accountable to nobody.¹²

In general, European scholars have seen neither a net gain nor a net loss for the democratic deficit issue during the convention. The large number and plurality of the delegates has been seen as a plus, as this helped insure that all significant interests and perspectives were being voiced and noted. However, the process of the framing itself has been viewed as a minus, as many sections of the text were drafted and approved without broad debate and free-ranging discussion of the core issues.¹³

Audience

The European drafters found themselves accountable to a very different constituency than that of the Americans. As noted, the American delegates were sent by their state legislatures and were thus accountable to the citizens of those states. They debated and approved the constitutional language with a view to how such wording would play back home. Popular opinion, at least as it was thought likely to influence the ratification process, guided the debates and decisions of the delegates. John Roche (1961, 812) summed up the summer in Philadelphia as follows: "Drawing on their vast collective political experience, utilizing

¹² Robinson, Paul. 2003. "A Dodgy Constitution," *Spectator* 291(9105), 8 February, p. 15.

¹³ Personal interview with Dr. Miroslav Cerar, Assistant Professor of Law, University of Ljubljana and Advisor on Constitutional Issues to the National Assembly, Republic of Slovenia. Ljubljana, Slovenia, September 24, 2004.

every weapon in the politician's arsenal, looking constantly over their shoulders at their constituents, the delegates put together a Constitution."

The European delegates operated while rank-and-file Europeans expressed little knowledge of, or interest in, the proposed constitution. A poll commissioned in mid-2003 by the Elcano Royal Institute, a Madrid think tank, found that only 1% of Spaniards knew what the constitutional convention was meant to do. This poll took place after 16 months of meetings, and as the draft document was ready to be released. It should again be noted that the European convention did not take place in secret. If anything, it was a "media event," with regular press coverage and a dedicated website with updates and a copy of the draft document posted online at time of release. The lack of public interest and the presence of vested interests created a very different kind of accountability. The formation of the European Constitution took on the character of policy-making, with dozens of groups seeking to write protections, rights and regulations into the text. One commentator dryly remarked that "every conceivable interest group, from labor unions to nudist groups, has made suggestions" (Coughlan, 2003, 20). The sum total of all of the agreements, concessions and provisions swelled the document to an impressive size. While part of the reason behind this result is content specific, it is also a result of the process of constitution-making. The European delegates were beholden more to the ever-present lobbyists and representatives that worked the floor of the convention than they were to the home population of Italians or Poles or Belgians. What resulted was, again, a Constitution that bears little resemblance to the brief, structuring kinds of documents that have in the past effectively constituted a government and successfully stood the test of time.

Timing and Urgency

Two further, and intertwined, factors had a marked influence on how the EU Constitution was framed and received, and deserve consideration alongside the American experience. The timing of the constitutional convention and the perceived urgency of the task provided an impetus of the Philadelphia delegates that was lacking in Brussels.

Half of the time that the newly declared United States of America was governed by the Articles of Confederation took place during the War of Independence, from 1776-1781. As the U.S. emerged from that conflict, it faced mounting debts and the need for economic recovery and stability. However, the Articles of Confederation restricted the powers of Congress to requisition of funds from the states—that is, it could authoritatively request funds but it could not collect taxes. It had therefore to rely on the good will of the states to collect and forward taxes; in addition, the states could not be compelled to pay their share of government costs. The results of these arrangements were not impressive. Between 1781 and 1783, the national legislature requested \$10 million from the states but collected only \$1.5 million (Pritchett, 1984, 6). The mid-1780s shifted from economic malaise to economic crisis and back. By 1786, it was apparent that some reconsideration of the Articles was needed, since the procedure for amending the document—a unanimous vote by the states—hamstrung any effort to strengthen its taxing and spending powers.¹⁴

¹⁴ The key language of the amendment provision reads as follows: "And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State." Articles of Confederation, Article XIII. (<http://www.usconstitution.net/articles.html#Article13>).

In response to this state of affairs, James Madison and Alexander Hamilton held a series of meetings to raise awareness of the shortcomings of the Articles and create interest in a forum for considering revisions to it. During one of these meetings, they urged the states to send delegations to Philadelphia for a meeting to be held the following May. As Epstein and Walker (2001, 5) explain, their "plea could not have come at a more opportune time. Just one month before, in August 1786, a former Revolutionary War captain, Daniel Shays, had led disgruntled and armed farmers to rebellion in Massachusetts. They were protesting the poor state of the economy, particularly as it affected farmers." Though Shays' Rebellion was suppressed by state forces, it was seen as another sign that the Articles needed amending. In February 1787, Congress finally issued a call for a convention to reevaluate the current national system.¹⁵

The American constitutional convention arose out of economic crisis, growing national identity and unity, a failed (or failing) charter of government, and a distant armed conflict that was both symbolic and galvanizing. The cost of failure was high, and the possibility of failure never far from the thinking of the delegates. By contrast, the European Union's decision to craft a constitution came about during a time of economic prosperity, post-independence nationalism (on the part of the newly independent eastern European states), a cluster of confusing though workable treaties, and a distant armed conflict in Iraq that served to fracture any sense of unity among the participant nations. For the delegates to the European convention, the cost of failure was a reversion to the status quo, not the prospect of economic crisis and an inability to effectively govern.

A sense of urgency, the experience of an ongoing crisis, and a prospect of systemic failure, were thus all absent in the European

¹⁵ See the *Introduction to the U.S. Constitution* in Epstein and Walker (2001, 5).

case, and these factors go a long way toward explaining why it took sixteen months for an acceptable draft document to be crafted. The slow, bureaucratic process reflected the fact that the existing treaty system, while complex and redundant, was not collapsing or on the verge of failure. Some of the key procedural mechanisms developed in the Treaty of Nice had not yet been fully implemented, and awaited a follow-up conference in 2004 for further refinement.¹⁶ Indeed, it was only as governmental representatives began to discuss potential changes to the draft in the Fall of 2003, that the document began to be described as a constitutional treaty. This seemed to better reflect the hybrid nature of the document: a constitution that sought to harmonize and streamline the basket of treaties under which the EU operated.

As noted, part of the sense of urgency felt in the American case resulted from Shay's Rebellion, which preceded the convention by less than a year. Perceived as a sign of the potential for riot and lawlessness in the face of weak government, this particular armed conflict became a catalyst for positive action. A more distant armed conflict intruded on the Brussels delegates as they were concluding their task in early 2003. The United States responded to the September 11, 2001 terrorist attacks by conducting military operations in Afghanistan and, in March of 2003, by invading Iraq. Both were among the countries targeted for supplying aid and assistance to the terrorist bombers. Further, it was alleged that Iraq was accumulating and stockpiling biological and chemical weapons and potentially could be a supplier of the same.

¹⁶ In December of 2000, the EU heads of state and government met as the European Council in Nice, France. Most of the discussion centered on making institutional decision-making processes more efficient before the ten countries of eastern and central Europe joined the EU. The summit produced a number of institutional changes that would require ratification by all of the (then) 15 member nations. For further detail on the Nice Treaty, see Wood and Yesilada (2002).

The United States invaded Iraq after extended debate and an eventual stalemate within the United Nations Security Council. These debates split the key players in the European Union. Great Britain, Spain, Italy, and Poland supported the U.S. action and sent military troops to join the U.S.-led coalition forces. France, Germany and the Benelux nations opposed military action absent United Nations sanction and became vocal opponents of what they perceived as naked aggression on the part of the US. While it is impossible to quantify the degree to which the Iraq war impacted the work of constitution-making in Europe, it is clear that the unfolding events in the Middle East created more tension and animosity than common purpose and agreement. As we will see below, Spain and Poland initially refused to give ground on a key political issue, the change in voting weight that lessened their Nice Treaty allotment (See Appendix A). At the same time, France and Germany were reneging on their economic commitment to hold debt levels to the percentage of GDP stipulated and agreed upon under the Stability and Growth Pact.¹⁷ Great Britain and Italy sought to bring the two sides together, but all the while seeking their own concessions as the price of diplomacy. Ironically, one of the core purposes of the constitutional project—to unite Europe and allow it to compete against the world's sole superpower—was sidelined by external events that had the member states choosing sides for or against that very country.

On one key issue, the creation of a foreign minister position that would provide a unified voice for EU foreign policy, the Iraq war proved to be a painful reminder that a common view and a common policy were distant ideals, and that the members states were anything but united. The war controversies firmed the re-

¹⁷ Under the terms of the European Union's Stability and Growth Pact, EU countries must maintain public deficits of no more than 3% of GDP and public debt of no more than 60% of GDP.

solve of a number of countries—Great Britain especially—to maintain a veto over foreign policy decisions. In whatever form a ratified EU Constitution takes, it is hard to imagine that the member nations will cede their sovereign powers in the areas of defense policy and foreign affairs.

CONTENT:

KEY THEMES AND PROVISIONS OF THE EU CONSTITUTION

A handful of much disputed subjects, which paralleled questions faced by the American framers, provided formidable challenges to the delegates in Brussels and the heads of government who met in Rome in late 2003. The most important questions involved the definition and distribution of power within the Union and between the Union and the member states.

Eurofederalism: How to Define and Divide Competences.¹⁸

The most vigorous debates over the draft document concerned the vague distribution of power between the Union and the member states. Like the lines drawn between the Federalists and the Anti-Federalists during the American founding, two different sides argued over the proper distribution of powers. Two years earlier, in 2001, the Laeken Declaration encouraged the member nations to clarify which competences would be exclusive to the Union, which would be reserved to the member states, and which might be designated shared competences between the central and national governments. In a section that calls for a better division and definition of competence in the EU, the Laeken delegates raised the following questions in anticipation of a constitutional convention: At what level is competence exercised in the most efficient way? How is the principle of subsidi-

¹⁸ The word “competences” is used to describe power and its distribution.

arity¹⁹ to be applied here? 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?²⁰ Hence, well in advance of the Brussels convention, the Laeken delegates pointed to the upcoming challenge of clearly defining the federal principle and of clearly distributing and limiting powers. Their concern was that, without precise enumeration of competences, there would be a “creeping expansion” of the powers of the Union and an “encroachment” on the competences of the member states.²¹

This concern was realized in 2003, during one of the last sessions of the Brussels convention. Three delegates presented convention president Valéry Giscard d’Estaing with a letter of dissent signed by 18 representatives from 13 current and future member states. The letter contended that the emerging draft document undermined national sovereignty by stealth. Echoing this point of view, former British Prime Minister John Major attacked the constitutional convention and Mr. Giscard d’Estaing in particular for construing competences and subsidiarity in ways never envisioned by the member states.

At the heart of Giscard d’Estaing’s proposals is the intent to replace intergovernmental decision-making with a new written constitution for a single European entity. The institutions of this European entity would exercise sovereign powers, with primacy over the laws of member states in a breathtakingly wide range of policy areas. Even worse, the existing protection

¹⁹“Subsidiarity” is the doctrine that government action should take place at the lowest possible, or most sensible, level.

²⁰Declaration of the Future of the Union, Nos. 3 and 4. Official Journal of the European Community, C 80/85, March 10, 2001. The Laeken Declaration. (<http://European-convention.eu.int/pdf/LKNEN.pdf>).

²¹*Ibid.*

ers inclusion of the Supremacy Clause in Article VI of the American Constitution. But the Supremacy Clause must be understood in context, and that context is one of clearly enumerated and delegated powers. The supremacy of the Constitution and the laws made pursuant to it was bound and limited by the specific grants of powers in the preceding articles. The Brussels Convention sought to create the spirit of the Supremacy Clause without having first set limits on competences via enumeration—the very recommendation given by the delegates in Laeken in 2001.²³ While it is true that the process of ratification was not a foregone conclusion in America in the 1780s, it can not be said that there was much confusion over the document itself. The clarity with which the American Constitution answers the three questions posed by the Laeken Declaration is both revealing and enlightening.

First, the Constitution of the United States answers the level of competence question by specifically and clearly delegating and enumerating powers. Enumeration both empowered and limited national government. Delegation presupposed that power was granted to government by the people, and that powers not delegated remain with the people. Given the failures of the Articles of Confederation, there was a common expectation that the newly proposed government would have the power to tax and spend and to regulate commerce, thus addressing the two most serious economic weaknesses of Congress under that government. Most of the other Article I, Section 8 powers granted to Congress involved the economy or the conduct of foreign affairs and war.

²³ Some scholars argue convincingly that this has been achieved, and that acceptance of the Constitution will ensure the supremacy of the law of the Union over the law of the member states. Personal interview with Dr. Theo Oehlinger, Professor of Constitutional Law, University of Vienna. Vienna, Austria, October 21, 2004. Also see Oehlinger (2004).

of a national veto largely disappears, as almost all the decisions would be under a system of majority voting. This is utterly unacceptable.

So is the treatment of the concept of 'subsidiarity' that was introduced in the Maastricht Treaty: it was a principle that was intended to ensure that the EU acted only where it could complement national actions. Giscard d'Estaing turns this on its head and re-defines the distribution of power by stating baldly that member states may take action in defined areas "only if and to the extent that the Union has not exercised its [competences]."²²

Mr. d'Estaing's "loose construction" of subsidiarity created a serious stumbling block for approval. Once the draft Constitution was presented to the intergovernmental meetings, specific criticisms over taxation, foreign policy and immigration brought debate and approval to a standstill. In each issue area, the claim was that the draft authorized interference with, or downright invasion of, national sovereignty. Although the Constitution has been finalized and enacted, it is likely that the ratification debates will need to re-visit and address these vigorous defenses of national sovereignty and a strict claim of subsidiarity.

It can be argued that the American Constitution could have run into the same obstacles and criticisms because of its silences and sometimes vague enumerations of the distribution of power. Certainly the ratifying conventions in New York, Massachusetts and Virginia were hotly contested, and could have led to rejection of the document as a new charter of government. And it might be argued that Mr. d'Estaing's attempt to bolster the power of the EU government was no different than the American fram-

²² Major, John. 2003. "Why We Must Veto this Alien Constitution," *Spectator*, 292(9120) 24 May, pp. 14-16.

Next, Sections 9 and 10 of Article I link the question of competences with the second challenge of the Laeken Declaration, that of subsidiarity. In the U.S. Constitution, the positive grants of power in Section 8 give way to the prohibitions of power given to the national government in Section 9 and to the states in Section 10. Section 9 reads like a Bill of Rights for the states, offering an array of protections from national government interference. Section 10 limits the power of the states, though much of this section is reflective of Section 8, as it prohibits actions by the states in the same spheres of economy and foreign affairs where power has been granted to Congress.

Third, the 10th Amendment bridges concerns over subsidiarity with the call for a clear statement of reserved competences. While the first eight amendments in the Bill of Rights cover the rights of individuals from actions of the legislative (1st), executive (2nd, 3rd, 4th) and judicial (5th through 8th) branches, the 10th Amendment protects the powers (not rights) of the states. While two centuries of Supreme Court interpretation and decision have served to either enhance or erode the reserved power of the states, the Amendment has maintained its vitality.

The enumeration of exclusive powers given to the central EU government in the draft Constitution is actually quite short. Most of the powers that are usually exercised by national governments are listed in the concurrent, or shared category. But the proposed EU Constitution also contains mechanisms that will allow euro-federal authorities to take over as many of those shared powers as they feel necessary.²⁴ What is missing from the EU text is a listing of the exclusive powers of the national governments. One could argue that this is not necessary, since member states retain all powers that are not otherwise listed—an “understood” 10th Amendment of sorts. But worries have persisted since the inter-

²⁴*Ibid*, at 402-405.

governmental debates that very little of significance was left at the national level, and that the movement of power was a one-way street, from the national to the federal level. Consequently, some critics continue to worry that the lack of clear enumeration of competences will steadily move power toward Brussels, and that this issue could become a stumbling block for at least one member nation as the ratification phase takes place.

Big States and Small States: Weighing Power and Votes

The struggle to establish a balance of power between large, populous states and smaller, less populated ones has been as difficult in Europe as it was during the founding period in the US. In 1787, the big states such as Virginia, New York and Massachusetts were the main proponents of the Virginia Plan, the scheme of representation that would allot power proportionately by population. In present-day Europe the 6 biggest states—Germany, France, Britain, Italy, Spain and Poland—account for 74% of the population in an enlarged EU of 25 member states and 450 million inhabitants. The question of population politics is compounded by the economic equation: the same big 6 nations account for 84% of the European Union's yearly economic output. Under the current voting rules established in the Treaty of Nice, the big 6 could be outvoted by the other nations, 170-175 (See Appendix A).²⁵ The Benelux nations—Belgium, Netherlands and Luxembourg—have the same total votes as Germany, though their combined population is one-third of Germany's.

In the case of the US, the ideological and practical difficulties within the big state/small state conflict led to the Great Compromise of 1787, which split the legislative branch into a House

²⁵ Note that the Treaty of Nice includes the potential voting weights of both Bulgaria and Romania, thus bringing the total number of EU members to 27. Both countries are slated to join the EU in 2007. Without these two nations, the "big six" would actually have a majority vote of 170-151 over the other 19 members.

of Representatives designed to reflect popular will and whose membership is proportional to population, and a Senate that gives each state equal standing and equal representation.²⁶ By contrast, the European Constitution has proposed a complicated system of representation with a number of institutions exercising “shared competences.”²⁷ Two elements of the EU document’s legislative scheme became focal points of debate and disagreement, and led to significant changes in the document prior to its final approval in mid-2004.

First, the EU Constitution calls for most measures to pass with a “qualified voting majority,” or QVM. As it applies to the Council of Ministers, which has the authority—jointly with Parliament—to enact legislation and control the budget, the key language reads as follows: “A qualified voting majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them, representing member states comprising at least 65% of the population of the Union.”²⁸ This provision emerges from a big state/small state compromise. Smaller nations can resist legislative measures that threaten their interests by a simple up-or-down vote, since the Council’s composition is one minister per member state. However, more populous nations

²⁶ The Great Compromise solved an important ideological question as well as addressing the struggle over the proper framework of representation. Many delegates to the Philadelphia convention were present as representatives of the states, and the Constitution was a creation of the states. For others, the convention was a gathering of representatives of the people, and the Constitution was a charter of the people. The text of the Constitution reflects this tension, as it begins, “We the People of the United States...” in the Preamble and closes (if we assume the ratified text closed with the 10th Amendment) with “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.” The Great Compromise allowed partisans of both sides to secure a power base.

²⁷ See section entitled “European Parliament” in *Europa*. http://europa.eu.int/abc/12lessons/print_index4_en.htm.

²⁸ Draft Constitution of the European Union, Article I-24. <http://european-convention.eu.int>. Also, note that on questions such as amending treaties, proposing common policy, or allowing a new country to join the European Union, a unanimous vote is required.

are able to protect their interests through the 65% population requirement. Three or four of the largest nations allied together can effectively block legislation favored by a large percentage of the member states. The provision changes the weightings of votes agreed to in Nice, but fortifies Nice's original intent. As much as the Nice format has been criticized, its intent reflected one of the aims of the Great Compromise: to protect the interests of both big states and small states.

This aim is also reflected in the voting distribution in the Council of the European Union. In this institution, the Nice treaty awarded votes in such a way that clustered the larger countries together, and weighted votes to give the larger current members a greater voting weight relative to smaller members (See Appendix A). The small states were compensated by having the ability to block a measure if a simple majority of countries voted against it regardless of size or population. The voting weights agreed to in Nice will remain in place if the ratification of the Constitution is either delayed or if it fails.

During the framing phase, Spain and Poland had the most to lose under the Constitution's proposed qualified majority system of representation. Under Nice, both had voting power far in excess of their respective populations. Poland also had a political problem to deal with. It had promoted EU membership to its citizens based on the Nice agreements, and the Polish referendum on membership reflected those understandings. Polish leaders did not want to be accused of running a "bait and switch" scam on the voters, and "not surprisingly, weren't keen on committing political suicide by giving in" during the talks in Rome.²⁹ Spain's power would also be reduced under the new system. Political considerations also came into play as the Spaniards considered

²⁹ Editorial, "Europe's Fortunate Failure," *Wall Street Journal*, 16 December, 2003, p. A-16.

their options during the Fall. One American newspaper commented that,

The Spaniards also got a worse deal than at Nice. Spanish officials are all too aware that the “double majority” provisions were drafted in a back room at the time when Spain and Poland were signing up for a major role in post-war peacekeeping in Iraq. France and Germany never hid their desire to institutionalize the anti-Americanism underpinning of their crusade against the war in Iraq. The double majority would have made it easier for them to set EU policy.³⁰

The combination of political, legal, and institutional problems led Spain and Poland to oppose the double majority provision of the constitution. In many ways, the debate over the double majority was the only agenda item within the discussions of late 2003. Although a raft of other concerns waited their turn on the sidelines, the difficulties of big states/small states politics dominated the enactment debates.

Spain and Poland did not prevail in maintaining their voting weights in the new constitution. Mid-2004 elections brought in a new government in Spain, and there was a clear indication that the new administration was going to drop its threat of resisting passage. Poland, suddenly the lone voice of dissent, soon began to soften its stance toward the new voting weights. Within a few weeks, the view that the draft text would be approved and sent forward for ratification became the prevailing one.

After the debate over voting weights, a second important big state/small state conflict lurked in the shadows. The smaller EU states had already voiced their concerns over the proposal to reduce their power and visibility by trimming back the number of

³⁰ *Ibid.*

EU commissioners. A tentative decision reached at Nice allowed the possibility of capping the number of commissioners at twenty, without further indication of what would happen when the ten new member states were brought into the Union. There was some speculation that the smaller nations would have to develop a system of rotating commissioners, as it was generally accepted that the Commission had reached its size limit for effective and efficient decision-making.

The new Constitution proposed to cut the number of Commissioners down to fifteen. What looked problematic coming out of Nice now looked disastrous. Suddenly, the biggest issue for the smaller nations was that each should retain the right to have its own commissioner—shades of the New Jersey Plan! Not surprisingly, the larger states had no taste for this, as they regarded it as a recipe for an overly large and unwieldy commission. Further, they saw the one-state, one-commissioner system as unfair. It ceded too much power to the low population, weak economy states.

In April of 2003, representatives from seven smaller nations met in Luxembourg in what the German newspapers derided as a summit of the “Seven Dwarfs.” The concerns raised at this meeting and at others that followed led to a postponement of changing the makeup of the Commission. Ultimately, the smaller states prevailed. Between December 2003 and the approval of the final draft six months later, the Commission’s structure was revised to reflect equal representation of the member states. From November 1, 2004 forward, the new Commission held 25 members—one commissioner per country. The constitutional text maintains the one-representative-per-nation allotment.

Back to Legitimacy

Beyond the discussion of competences lies the more general and perhaps deeper, more difficult problem of democratic legiti-

macy. The EU constitution must root its identity and legitimacy in the people. The earlier cited poll that revealed either ignorance or ambivalence among Spaniards during the convention process is indicative of the problem here. Whether we describe the constitutional treaty as federal or confederated in structure, it cannot be described as a product of "we the people." It remains far more a treaty among nation states than a constitution of the governed. Historian Jack Rakove has determined that

The Convention on the Future of Europe was conceived both as a means of rationalizing, redacting, and (to some extent) superceding the past treaties that have been instruments of European integration, and of further defining and refining the "competences" and the institutions of the EU. Though the ambition of promoting a genuine constitution for Europe has a laudable ring to it, the reality still seems far from prosaic. Can a set of institutional arrangements that ultimately depends on negotiations among member states ever form a constitution in the robust sense? Can a constitutional treaty ever become more constitution than treaty? For what remains most difficult to conjure is the political identity of the new entity that Eurofederalists contemplate creating. Critics charge that this new community's political vision is indelibly elitist, bureaucratic and technocratic and that the new Europe being fashioned will never mobilize the patriotic affections of the citizens whose lives it will regulate. There is little in the draft constitution that will alter this view (Rakove, 2003, 33).

The EU draft document seeks to coordinate institutions and arrangements that have been agreed upon within successive treaties over the last few decades. It has in this sense "inherited" the legitimacy problem, as it seeks to better codify and integrate the past treaties. This is why it reads in places more like an adminis-

trative handbook than a manifesto of political integration. By whatever name you call it, constitution, constitutional treaty or charter, the fact remains that the problem of ratification can be directly linked to the distance between the document and the people.

There, again, is the rub. The people of Europe must play a central role in the process of ratifying and confirming the document. In order to gain popular consent and widespread legitimacy, a constitution must reflect and embody popular will. The clear disconnect between the content of the EU Constitution and the process of its approval—as each member nation submits it to some form of vote—may prove to be the most daunting challenge of all.

**CONFIRMATION:
THE STIPULATIONS AND PROCEDURES FOR
RATIFICATION**

Rules Determine Outcomes

The American presidential election of 2000 bore witness to the consequences of the rules determining the outcome. The EU Constitution's provisions for debate, amendment proposal, and ratification are not neutral and inconsequential guidelines. Rather, the document's process of confirmation contains as many challenges and potential pitfalls as its content and its distribution of powers.

Unanimous Approval. Spain and Poland were able to press their claims over voting distribution because each had the power of the veto. The EU Constitution requires that ratification be unanimous. In this regard, the EU Constitution bears greater resemblance to the Articles of Confederation than to the Constitution of the United States. While the Articles had many notable weaknesses, its fatal flaw was the requirement that any amend-

ments to it be approved unanimously by the thirteen colonies. This proved impossible, and no amendments were passed during the time that the Articles were in force. The economic, cultural and social differences between the colonies virtually ensured that any proposed amendment would intrude on some power or prerogative of one of them. The Articles were thus hidebound, and the other weaknesses that emerged over time could not be adequately addressed. This took place against a background of a cluster of colonies that were, comparatively, never sovereign in the full sense of the term, and that had much in common.³¹ The American population consisted in the main of immigrant groups that were tied more to land than to political units. They were also quite mobile, able to cross political boundaries in search of economic opportunity or social advancement. For historian Jack Rakove, the contrast of America in the late 18th Century with modern Europe could not be more profound.

All EU members are nation-states possessing full political sovereignty and a self-conscious sense of their historical peoplehood. For many of these nations, the relative novelty of their status as self-governing entities (as compared to the United States) may deepen, rather than weaken, their reluctance to relinquish national sovereignty to the faceless bureaucrats in Brussels and to obscure parliamentarians in Strasbourg. Each European nation-state has conducted its own foreign relations, and each is aware of the consequences of losing its capacity to assert its national interests (Rakove, 2003, 33-4).

At present, each of the voting EU member states is a veto of one. Each has the power and ability to procedurally block the passage of the Constitution or threaten to block passage until

³¹ See earlier discussion and Weiler (2001, 56-57).

certain concessions are made. The unanimous confirmation requirement enabled Spain and Poland to bring the approval process to a standstill over the first conflict that arose. If agreement can be reached on voting distribution, all of the rest of the constitutional provisions potentially face a similar response from at least one member state.

The 1787 Philadelphia convention succeeded in part because the delegates knew that the Articles of Confederation needed to be replaced rather than revised. The framers of the Constitution looked back on its shortcomings as they developed the procedures for ratifying the document. Out went the unanimity requirement. The text called for a supermajority—9 of the 13 colonies—to ratify before the Constitution became the law of the land. This framework still required a substantial amount of agreement on the part of the states, but eliminated the threat of absolute veto from any individual state. As a result, each state ratifying convention had to face the possibility that it could reject the new government and that it would still be brought into being by the other states. The ability to veto and thwart the process was replaced by the potential to reject and be left as an outcast. While many of the state debates were heated and the final tallies close, the whole process took less than one year and the overall vote was, eventually, unanimous.³² Much of this success can be linked to the rules set for ratification.

Amendment Proposals. The months following the unveiling of the EU draft constitution included time for member states to propose and discuss potential changes to the text. From October 2003 to March 2004, EU governments planned to meet and come

³² I mark the closing point with New York's vote in July of 1788 as the eleventh state to ratify. North Carolina and Rhode Island did not endorse the Constitution during this time and briefly left the Union. Their eventual decision to ratify and join was more an addendum to the process than an essential component of it. But, their actions did make the process of ratification unanimous.

to agreement on amendments, although there was pressure from the delegates to the Brussels conventions to tinker with the text as little as possible.³³ The deadline for signing off on the text was in June, with each country holding its ratification vote in 2005-2006. While some leaders groused about the timeline for initial approval, the schedule itself did not occasion much debate. Yet the lengthy draft text presented too inviting a target and contained something for everyone to question or dislike. As a result, although the main debates centered on competences and voting rights, members began to propose amendments concerning taxation, the conduct of foreign affairs and the inclusion of the Charter of Fundamental Rights. By year-end 2003, the mammoth text proved to be too hard to swallow in one, unanimous, gulp. And though approval was secured in June of 2004, it seems unlikely that all of the built-in compromises and silent omissions will go unnoticed during the months of ratification debates. As the enacted document was being printed and distributed, a common observation was that many key decisions had been pushed aside or rolled back for the time being.

This situation presents another striking contrast with the American experience. The draft document produced in Philadelphia was spare, barely 7000 words in length, limiting itself to providing a framework of government and an enumeration of core powers. And when the Constitution was presented to the states, it required that approval be without revision or amendment. Amendments could be recommended but could not be required for approval. Article V, itself a model of brevity, spelled

³³ Note the charge from convention chairman Valéry Giscard d'Estaing, as he warned the delegates against seeking to amend the document: "If you touch the equilibrium, the system collapses. If you try to gain by getting satisfaction here and there, the system collapses and you have the whole thing starting again" (Mitchener, Brandon. 2003. "Birth of a Nation? As Europe Unites, Religion, Defense Still Stand in the Way," *Wall Street Journal* 11 July, pp A-1 & A-6).

out the procedures for proposing and ratifying amendments, and could be utilized once the Constitution was in force. But, for ratification of the Constitution itself, the Federalist leaders prevailed in requiring that the approval of the individual states be independent of any amendment proposals.

What enabled the ratification process to succeed in the 1780s, majority approval of the document without amendments, cannot be duplicated within the European experience. The European Constitution is neither spare nor brief, and is brimming with substantive and procedural detail. The prolix Charter of Fundamental Rights is a constitution within a constitution, and will require considerable debate and review. While it is possible to think that the unanimity requirement could be dropped in the months to come, it is difficult to imagine how the EU text could be subject to a straight "up or down" vote without amendments, or subject to amendments only after ratification. The length, detail and complexity of the document make such streamlined procedures virtually impossible.

CONCLUSION:

VOX POPULI, RATIFICATION, AND PROSPECTS FOR THE FUTURE

As the EU member states begin the process of ratification, they will do so by referendum, by parliamentary vote, or, in some cases, by both methods.³⁴ We can note one other difference between this smorgasbord of European approval procedures and the American counterpart. The Philadelphia convention asked the states to arrange for state ratifying conventions, separate bodies that would come together for the sole purpose of considering the

³⁴At the time this is being written, nine nations will hold a referendum to decide the new constitution's fate: Czech Republic, Denmark, France, Ireland, Luxembourg, Netherlands, Portugal, Spain and the United Kingdom.

new Constitution and that would reflect popular will in ways that the individual legislatures could not. The European member states, by contrast, are subject to the specific mandates within their own national constitutions.

This is likely good news and bad news for the new Constitution's prospects. The referendum process may link the document to the people in ways that the framing process has not yet been able to do. The votes will extend media coverage and enlarge discussion of the provisions in the text. A much higher percentage of citizens will weigh the costs and benefits of unity and integration (with the attendant compromises and concessions) versus continued sovereignty and disaggregation (with the attendant complexity and lack of coordination within the Union).

The bad news is that one or more member states may vote the Constitution down. The contentious and controversial issues that have occasioned calls for amending the text may be the same issues that spell its doom at the ballot box or on the floor of a national parliament. While governmental officials, bureaucrats and media elites have at the time of this writing begun to "talk up" the ratification votes, rank-and-file Europeans remain slightly supportive of but also largely ignorant about what the proposed Constitution does and what effect it will have on their lives. Support, while mildly positive, is perhaps more of a perception that the proposed Constitution would be a good development rather than a vote of support for its specific policy changes.

While comparing the development of the first constitution of the 21st Century with one of the last constitutions of the 19th Century is fraught with difficulty and subject to spurious connections and correlations, a survey of the surrounding context, key conflicts and rules for ratification yields important and intriguing insights. Long and complex constitutions have not had good sur-

vival records over the past three centuries. The grant of power from sovereign to government must be clear, explicit and bounded. The procedural rules for ratification must streamline rather than hamstring the approval process.

The conclusion is not that the European Constitution should pattern itself after its American counterpart. However, the European framers may want to take a second look back across the Atlantic and back across time if the current document is to be ratified as the new charter of government and successfully implemented as the law of the land.

APPENDIX A
VOTING WEIGHTS IN THE COUNCIL OF MINISTERS
as Projected in the Treaty of Nice

Country	Population	Current	New
Germany	82.0	10	29
Britain	59.2	10	29
France	59.0	10	29
Italy	57.6	10	29
Spain	39.4	8	27
Poland	38.7		27
Romania*	22.5		14
Netherlands	15.8	5	13
Greece	10.5	5	13
CzechRepublic	10.3		12
Belgium	10.2	5	12
Hungary	10.1		12
Portugal	10.0	5	12
Sweden	8.9	4	10
Bulgaria*	8.2		10
Austria	8.1	4	10
Slovakia	5.4		7
Denmark	5.3	3	7
Finland	5.2	3	7
Ireland	3.7	3	7
Lithuania	3.7		7
Latvia	2.4		4
Slovenia	2.0		4
Estonia	1.4		4
Cyprus	0.8		4
Luxembourg	0.4	2	4
Malta	0.4		3

* Bulgaria and Romania aspire to join the EU in 2007.

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