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The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?

Grainne de Burca

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The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?

Gráinne de Búrca*

Table of Contents

I. Introduction	555
II. The Emergence of a Constitutional Debate.....	557
III. Why Enact a European Constitution?	560
A. Enhancing Legitimacy	561
B. Clarification and Consolidation	563
C. Reining in the EU	566
D. Marking the Historic Reuniting of Europe.....	567
E. Strengthening the EU's Unity, Representation, and Capacity for Action	568
IV. Which Objective(s) Does the Draft Treaty Establishing a Constitution for Europe Serve?.....	570
A. Internally Focused Changes.....	573
B. Externally Focused Changes.....	578
V. Europe's Madisonian Moment?.....	582

I. Introduction

The European Union (EU) stands at the brink of a major decision about its political future—in what has been described as an Ackermanian constitutional moment in its history¹—concerning whether it will enact a European

* European University Institute, Florence. Thanks are due to Neil Walker and Bruno de Witte for their helpful advice and comments. This text was delivered as the annual John Randolph Tucker Lecture at Washington and Lee University School of Law in October 2003.

1. See generally Neil Walker, *After the Constitutional Moment*, forthcoming, in *THE DRAFT CONSTITUTIONAL TREATY* (I. Pernice ed., 2004) (drawing on a body of Bruce Ackerman's

Constitution. Over the past two years, the EU has spent a great deal of political energy debating and designing proposals for such a constitutional document. During the Intergovernmental Conference that will take place in late 2003 and early 2004, Europe's political leaders will decide collectively whether to endorse and recommend a final version of this document and will decide individually whether to consign it to a popular vote or other form of national ratification. Comparisons (both favorable and unfavorable) with the Philadelphia Convention and the adoption of the United States Constitution in 1787 abound.² How is it that this apparently Madisonian moment has come about after more than fifty years of gradualist and incremental project-driven integration?

This Article explores some of the different reasons and objectives that proponents have forwarded for adopting an EU constitution, and examines the results contained in the Draft Treaty establishing a Constitution for Europe as presented by the Convention on the Future of Europe in July 2003,³ to see which, if any, of these objectives that the text achieves. My argument is that of the many objectives that proponents suggested, there are essentially two primary, competing reasons that explain the decision to adopt a constitution. Although the political rhetoric surrounding the establishment of the Convention and the drafting of a constitution focused primarily on one of these objectives, the process has in fact produced a text whose main achievement is the other.

work, beginning with his article *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989)); see also JOHAN P. OLSEN, COPING WITH CONFLICT AT CONSTITUTIONAL MOMENTS 1 (ARENA Working Paper WP 02/23, June 6, 2002) (providing a more skeptical view of whether the EU is indeed confronting a constitutional moment), at http://www.arena.uio.no/publications/wp02_23.dwt (on file with the Washington and Lee Law Review); see generally Dario Castiglione, *Reflections on Europe's Constitutional Moment*, Presentation for the CIDEL Conference on Deliberative Constitutional Policies in the EU, (offering "reflections on the present round of Europe's constitutionalization process"), at <http://www.arena.uio.no/cidel/workshopZaragoza/Dario.pdf> (June 22, 2003) (on file with the Washington and Lee Law Review).

2. See generally Michel Rosenfeld, *The European Convention and Constitution-Making in Philadelphia*, 2 INT'L J. CONST. L. 373 (2003) (discussing uncertainties about the European constitutional process).

3. For the website of the Convention, which contains virtually all of the documentation, speeches, accounts of meetings, and other information relating to the establishment and functioning of this body, see <http://european-convention.eu.int>. See also generally K. Lenaerts & M. Desomer, *New Models of Constitution-Making in Europe: The Quest For Legitimacy*, 39 COMMON MKT. L. REV. 1217, 1234-52 (2002) (discussing methods for drafting a constitution with concern for legitimacy); Jo Shaw, *What's in a Convention? Process and Substance in the Project of Constitution-Building*, Institute for Advanced Studies (discussing the Convention on the Future of the Union within the context of the larger constitution building process), at http://www.ihs.ac.at/publications/pol/pw_89.pdf (June 2003) (on file with the Washington and Lee Law Review).

More specifically, the rationale commentators most often articulate for the need for a European Constitution, and that on which the discourse of the participants in the Convention process mainly focused, was the *internal* legitimacy of the EU—the problems of democracy, decisionmaking, ‘closeness to the citizen,’ and the balance of power between the EU, the states, and their regions. However, the final text produced by the Convention is less concerned with addressing its internal crises and displays a much stronger orientation towards the *outside* world, particularly with strengthening Europe’s international identity, unity and global role.

II. *The Emergence of a Constitutional Debate*

The EU is an economic and political organization that has been in existence, albeit in changing form, for just over fifty years. During that time it has expanded geographically from six to (soon-to-be) twenty-five member states,⁴ it has deepened its level of economic integration with the establishment of economic and monetary union and a single currency, it has expanded into many new fields such as social, environmental and immigration policy, and it is gradually developing a capacity in political and foreign affairs. Yet, during these five decades, apart from within the specialized world of lawyers, who from the 1980s on have frequently analyzed the emergence and evolution of the European entity as a process of “constitutionalization,”⁵ the idea of a European Constitution was not a politically viable subject.⁶ Indeed, what lawyers meant

4. See ENLARGEMENT, THE ENLARGEMENT WEBSITE (discussing the scheduled expansion of the EU on May 1, 2004), at <http://europa.eu.int/comm/enlargement/enlargement.htm> (last visited Feb. 2, 2004) (on file with the Washington and Lee Law Review).

5. See Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1, 3–27 (1981) (analyzing the Court of Justice cases in which “constitutional law was made”); Giuseppe Frederico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 596–614 (1989) (discussing the effort of the Court of Justice to advance the constitution-making process); see generally Giuseppe Frederico Mancini, DEMOCRACY AND CONSTITUTIONALISM IN THE EUROPEAN UNION (2000) (providing a more general discussion of Europe’s constitutionalization process); JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE (1999) (same). The two key earlier cases in which the European Court of Justice referred to the EC treaties as a constitutional charter are Case 294/83, *Parti Écologiste “Les Verts” v. European Parliament*, E.C.R. 1339, [1985–1986 Transfer Binds] Common Mkt. Rep. (CCH) ¶ 14,317 (1986), and Case 1/91, *Opinion Delivered Pursuant to Second Subparagraph of Article 288(1) of the Treaty*, E.C.R. I-6079 (1991).

6. The idea of a European Constitution had inspired several of the reform proposals put forward by various *comités des sages* and by the European Parliament but never gained any kind of popular political acceptance until very recently. See, e.g., Draft Treaty Establishing the European Union, 1984 O.J. (C77) 33 (1984) (establishing the European Union).

by "constitutionalization" referred primarily to the process by which the European Court of Justice over time deemed provisions of an international treaty (the original EEC Treaty) to take primacy over national laws (the supremacy principle) and by which that court declared that provisions of the treaty could be directly invoked by individuals in their national and local courts (the principle of direct effect).⁷ No European political leader made any serious mention of the term 'constitution' until the surprising eruption in 2000 of an open debate, led by the German foreign minister Joschka Fischer,⁸ about the desirability or otherwise of a constitution for the EU, with virtually all of the major heads of state or government and many foreign ministers and leading political figures intervening to make a contribution to the debate.⁹

Why is it that the EU, which has been developing for over five decades in an incremental way through what some have dubbed a process of serial constitutionalism,¹⁰ is suddenly in the throes of a high profile, political, and explicitly constitutional debate? What is it that has made the notion of a constitution for Europe politically palatable for the first time? And, why is the EU seriously debating the adoption of a constitution? For some, this is a truly Madisonian moment for Europe;¹¹ the appropriate moment to recognize and instantiate a true European political community,¹² to mark the coming to

7. See Case 6/64, *Flaminio Costa v. ENEL*, E.C.R. 585 (1964) (laying down these doctrines); Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, E.C.R. 1 (1963) (same).

8. See *Symposium: What Kind of Constitution for What Kind of Polity: Responses to Joschka Fischer*, NYU School of Law, Jean Monnet Center (providing the text of the Fischer speech and a collection of essays responding to his arguments), at <http://www.jeanmonnetprogram.org/papers/00/symp.html> (last visited Nov. 16, 2007) (on file with the Washington and Lee Law Review).

9. See Bridget Laffan, *The Future of Europe Debate Part III*, Institute of European Affairs, Ireland (providing a discussion of many of these speeches), at http://www.iiea.com/futeuro/bl_tfoed.pdf (2002) (on file with the Washington and Lee Law Review).

10. See generally Walker, *supra* note 1.

11. See, e.g., FEDERAL UNION, SHOULD THERE BE A REFERENDUM ON THE EUROPEAN CONSTITUTION?, (Sept. 10, 2003) (advocating the need for a European constitution to determine whether a referendum should occur), at <http://www.federalunion.org.uk/europe/referendum.shtml> (on file with the Washington and Lee Law Review); YOUNG EUROPEAN FEDERALISTS, ICG MEMBERS—DON'T TOUCH THE CONVENTION'S CONSTITUTION (March 10, 2003) (asserting that European governments should support the Constitution), at <http://www.jef-europe.net/presscentre/archives/001721.html> (on file with the Washington and Lee Law Review).

12. See Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 5, 5–6 (Sept./Oct. 2001) (distinguishing the 18th century United States constitutional debate by referring to Europe's need to consolidate and maintain its achievements and the achievements of two centuries of democracy, rather than imagining a new and unprecedented project); see generally LARRY SIEDENTOP, *DEMOCRACY IN EUROPE* (Penguin Books 2000) (contrasting the energy and imagination that inspired the drafting of the American constitution with the absence

maturity of a polity which is inwardly harmonious and outwardly united. Yet, for others—as the active public and media debate over the last two years has demonstrated—it is an entirely misguided project, representing at best a premature attempt to force the pace of integration on an uncomprehending and alienated public, and representing at worst the buttressing and entrenchment on a continent-wide scale of either (depending on the political perspective of the observer) a democratically and socially impoverished model of government committed primarily to neo-liberal economic expansion,¹³ or of an interventionist socialist European superstate committed to eroding the independence, liberty, and vitality of the nation states.¹⁴

I will begin by outlining the complexity of the current European constitutional debate, a complexity that is evident in the many different and sometimes conflicting reasons proponents articulate for adopting an EU constitution and which is also evident in the continuing equivocation over the use of the term "constitution" for the document that policymakers drafted. What has come across during the process is the impression that relatively few bold and unambiguous claims have been made, that there has been no clear consensus, that there has been a great deal of nuance in the reasons put forward for and against the adoption of a constitution and in the types of instrument or text which are thought to be appropriate to the task, and that there is a multitude of actors with very different interests and ideas about the desirable future of European integration. Yet, these diverse views, actors and arguments have nonetheless engaged in a process of debate and drafting, the very existence and functioning of which some will see as a major achievement in itself.

of vision in Europe). It should be noted that Siedentop wrote this book before the heated constitutional debate fully erupted in the EU from 2000 onwards.

13. See Dorothee Bohle, *The Ties That Bind the New Europe: Neoliberal Restructuring and Transnational Actors in the Deepening and Widening of the European Union*, ECPR Joint Session Workshops, Workshop 4: "Enlargement and European Governance" (arguing that the EU is a neoliberal project), at <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/turin/ws4/Bohle.pdf> (March 27, 2002) (on file with the Washington and Lee Law Review). More generally, many of the citizen initiatives gathered within the European Social Forum argue that the European project, including the constitutional convention, is pursuing a neoliberal agenda. See, e.g., EUROPEAN SOCIAL FORUM CALL OF THE SOCIAL MOVEMENTS, MOBILIZATION FOR THE EUROPEAN SOCIAL FORUM (Nov. 12, 2002) (opposing a "European order based on corporate power and neoliberalism"), at <http://www.mobilise.org.uk/view/ESF/AboutWsfCall> (on file with the Washington and Lee Law Review).

14. See Pat Buchanan, American Patriots Battle to Retain USA's Character, Address (Aug. 21, 2002), ("Across the Atlantic, ancient states are yielding control of their frontiers, money and defense to a socialist superstate."), at <http://www.buchanan.org/pa-00-0821-patriots.html> (on file with the Washington and Lee Law Review).

Further, one can see the complexity and ambiguity of the whole process reflected well in the fastidiousness over the use of the core term "constitution." While many observers and participants speak of the drafting of an EU constitution, the official political discourse has certainly not settled on this term, and the language the drafters used in the legal texts and drafts has varied so far. The Laeken European Council Summit, which first established the Convention, used the term "constitutional text" (albeit alongside "Constitution").¹⁵ Many of the participants within the Convention itself used the more unequivocal language of "constitution." Convention President Valéry Giscard d'Estaing suggested the term 'constitutional treaty' in his opening address to the Convention.¹⁶ Finally, the term "treaty establishing a Constitution for Europe" appeared in the final text produced by the Convention in July 2003—an interesting compromise and perhaps the most prevalent term today.¹⁷ Subsequently, the October 6, 2003 declaration of the heads of state and government at the opening of the Intergovernmental Conference used the terms "constitutional text" and "constitutional treaty," but not the unambiguous term "constitution."¹⁸

III. *Why Enact a European Constitution?*

At this moment in time, commentators have identified and articulated a number of different reasons for the perceived desirability of a constitution for Europe.¹⁹ These are not merely hypothetical objectives that might be served by

15. See LAEKEN DECLARATION ON THE FUTURE OF THE EUROPEAN UNION § II, BELGIUM AT THE EU CONVENTION (last visited Jan. 3, 2004) (employing the term "constitutional text"), at <http://www.euconvention.be/static/LaekenDeclaration.asp> (on file with the Washington and Lee Law Review).

16. See President v. Giscard d'Estaing, Introductory Speech to the Convention on the Future of Europe, Address to the Convention of the Future of Europe (Feb. 26, 2002) ("In order to avoid any disagreement over semantics, let us agree now to call it: a 'constitutional treaty for Europe.'"), at <http://european-convention.eu.int/docs/speeches/1.pdf> (on file with the Washington and Lee Law Review).

17. Draft Treaty Establishing a Constitution for Europe, Official Journal of the European Union (C 169) I (2003) [hereinafter Draft Treaty].

18. See DECLARATION OF ROME, CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES (Oct. 6, 2003) (declaring the Conference's support of a constitutional text), at <http://ue.eu.int/igcpdf/en/03/cg00/cg00003.en03.pdf> (on file with the Washington and Lee Law Review) [hereinafter DECLARATION OF ROME].

19. See Andreas Follesdal, *Drafting a European Constitution: Challenges and Opportunities*, CONSTITUTIONALISM WEB PAPERS, ConWEB No. 4 at 3–9 (discussing a somewhat different set of arguments for and against a European Constitution), at <http://www.les1.man.ac.uk/conweb/papers/conweb4-2002.pdf> (2002) (on file with the Washington and Lee

the enactment of a constitution, but also views and positions that were actually expressed by many of the relevant actors in the course of the debate and the Convention process. The reasons and objectives of the proposed enactment of the United States Constitution were relatively small in number and well-defined. The reasons of why a new United States Constitution was necessary to replace the existing Articles of Confederation were presented and argued. They included primarily the enhancement of external security and unity and the prevention of internal political and commercial dissent from weakening the cohesiveness of the states. Conversely, the EU citizens have identified and expressed a range of widely differing reasons for enacting a constitution.

A. Enhancing Legitimacy

The first, and in some ways the most general, reason for a European constitution is that of enhancing the legitimacy of the European Union. The EU has experienced something of a legitimacy crisis since the "grand moment" of the Maastricht Treaty in 1993, which moved the previous "economic community" onto the legal footing of a "European Union" with explicitly political connotations and aims, and greatly expanded the ambitions and powers of the entity including the institution of economic and monetary union.²⁰ Commentators generally view that time to have signaled the end of the "permissive consensus"²¹ that characterized the first three decades of European integration and allegedly relied on the passive consent of the governed who did not actively object to their governments having created a common market and having ceded certain significant functions to the EEC in the interests of enhanced trade and economic welfare. Scholars now perceive the post-Maastricht era to have coincided with the growth and increasing expression of vocal public opposition to the European integration process. The political elites most acutely felt this opposition in the shape of several popular referenda: the initial Danish no-vote to the Maastricht

Law Review).

20. See Gráinne de Búrca, *The Quest for Legitimacy in the European Union*, 59 MOD L. REV. 349, 349 (1996) (suggesting that the legitimacy crises came into focus after the Maastricht Treaty); Joseph H.H. Weiler, *Fin de Siècle Europe in EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION?*, 203, 204 (Renaud R. Dehousse ed., 1994) (stating that after the Maastricht Treaty, "'Europe' is an ideal which lost its mobilizing force, it is a force which has lost its mobilizing ideals").

21. See generally LEON N. LINDBERG & STUART A. SCHEINGOLD, *EUROPE'S WOULD-BE POLITY PATTERNS OF CHANGE IN THE EUROPEAN COMMUNITY (1970)* (using the term "permissive consensus").

Treaty;²² the very narrow margin by which the same Treaty was accepted in the French referendum;²³ the more recent rejection of the Nice Treaty by referendum in Ireland;²⁴ and, perhaps to a lesser extent, in the Swedes' rejection of the Euro in their national referendum.²⁵ While there had long been a discussion among academics and policy analysts about the apparent 'democratic deficit' of the European Community after 1992, the starker reality of this repeated pattern of popular rejection, which arose whenever an opportunity for direct public input through referendum arose, highlighted sharply the precariousness of what the political elite had previously taken for granted as a stable economic and political community firmly fixed on the road to ever closer integration. As a consequence, and given their increasing awareness of what was at stake, there was evidence throughout the 1990s of EU leaders and officials seeking ever more determinedly for ways to win over the public and to bring Europe closer to its citizens. Evidence of this effort includes the introduction of a formal concept of European Union citizenship in the Treaty on EU,²⁶ the drafting of a showcase "Charter of Rights,"²⁷ a

22. See *Editorial Comments, The Danish Referendum*, 29 COMMON MKT. L. REV. 855, 855–59 (1992) (discussing the possible reasons for, and implications of, the Danish no-vote).

23. See Byron Criddle, *The French Referendum on the Maastricht Treaty, September 1992*, 46 PARLIAMENTARY AFF. 228, 228 (1993) ("On September 20th, 1992 the French electorate voted by 51% to 49% to ratify the [Maastricht] treaty enlarging the powers of the European Community.").

24. See generally Richard Sinnott, *Attitudes and Behavior of the Irish Electorate in the Second Referendum on the Treaty of Nice*, Millward Brown Irish Marketing Surveys Limited (discussing the results of a public opinion survey conducted to determine why the Nice Treaty was rejected by the Irish Electorate), at [http://www.euireland.ie/TreatyofNice\(2\)report.pdf](http://www.euireland.ie/TreatyofNice(2)report.pdf) (Feb. 26, 2003) (on file with the Washington and Lee Law Review); Gráinne de Búrca, *Post-Nice or Anti-Nice: The Debate on Europe's Constitutional Future after Ireland's No Vote*, 2 HIBERNIAN L.J. 1, 2 (2001) (stating that after Ireland's no-vote there is "a shared sense— even for once also amongst the elites that Europe cannot continue without the stronger support and involvement of the peoples of Europe").

25. This referendum took place on September, 14, 2003 and has been interpreted as a negative assessment by the Swedish population of EU membership more generally, and not just as a vote on adopting the Euro.

26. See Articles 17–22 (formerly 8–8e) of the European Constitution Treaty (conferring citizenship in the union upon member state nationals and granting those citizens the rights enumerated in the Constitution); see generally SIOTIA O'LEARY, *THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP: FROM THE FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP* (1996) (discussing EU citizenship).

27. CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, 2000 O.J. (C 364); see FUNDAMENTAL RIGHTS, COUNCIL OF THE EUROPEAN UNION (last visited Feb. 2, 2004) (providing archives of the drafting of the Charter), at <http://ue.eu.int/df/default.asp?lang=en> (on file with the Washington and Lee Law Review); see also generally Gráinne de Búrca, *The Drafting of the EU Charter of Fundamental Rights*, 26 EUR. L. REV. 126 (2001) (examining the process of drafting the Charter).

"governance reform" project,²⁸ and several other initiatives.²⁹ But, it was only in 2000 and thereafter that EU leaders openly articulated the more ambitious and far-reaching proposal to adopt a constitution for Europe as a politically plausible answer to the increasingly evident popular legitimacy deficit.

A constitutional process would achieve such legitimacy primarily through the mobilization of popular support for the project. In this sense, the very process of debating, discussing, and eventually adopting a constitution—whatever its ultimate content—would, due both to its community-galvanizing effects and its deep symbolic significance, create a greater sense of public identification with, and ultimately commitment to, the polity. The legitimacy would reside as much in the process of debating and enacting the constitutional settlement as in its content, although the latter would obviously also be important. On this view of the legitimating function of a constitution, the opportunity for some kind of "citizen baptism" is crucial. Member states should participate in the debate over a new constitution, and in so doing should engage in the process of identifying with and approving the new settlement and developing the foundations for constitutional patriotism.³⁰

B. Clarification and Consolidation

A second reason for the enactment of a European constitution is the alleged need for clarification and consolidation of Europe's legal, institutional, and political

28. See European Governance: White Paper from the Commission of the European Communities, COM(2001)428 (July 25, 2001) (proposing a series of changes aimed at reforming European governance, including "opening up the policy-making process to get more people and organizations involved in shaping and delivering EU policy"); see generally *Symposium, Mountain or Molehill?: A Critical Appraisal of the Commission White Paper on Governance*, NYU School of Law, Jean Monnet Center (providing a variety of academic commentaries on the governance reform process), at www.jeanmonnetprogram.org/papers/01/010601.html (2001) (on file with the Washington and Lee Law Review).

29. See Ulrich Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, CONSTITUTIONALISM WEB PAPERS, ConWEB No. 6, 2002, at 6–7 (providing an account of Europe's "stunning lack of social legitimacy"), at <http://www.les1.man.ac.uk/conweb/papers/conweb6-2002.pdf> (2002) (on file with the Washington and Lee Law Review).

30. See Carlos Closa, *Forging European Constitutional Patriotism: Deliberating on the Constitution Within the Convention*, Paper Delivered at CIDEL Workshop; *Deliberative Constitutional Policies in the EU* at 10 (stating that constitutional patriotism will result from discussions on adherence to values), at <http://www.arena.uio.no/cidel/workshopZaragoza/CClosa.pdf> (June 20, 2002) (on file with the Washington and Lee Law Review); see generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1996) (developing the theory that in order for democracy to achieve legitimacy, the persons affected must become engaged in, and approve of, the relevant discourse).

framework. Such a process could also, of course, have a popularly legitimating effect, but that would not be its primary purpose. From this perspective, the European Union is too labyrinthine, too bureaucratically dense, too complicated, and opaque a system of governing to be in any way comprehensible to the ordinary citizen. Thus, the point of adopting a constitution would be to make clearer, simpler and more transparent the structures of power and the instruments of government—the "who does what" of the European Union.³¹ The Constitution would articulate clearly and precisely the powers of the EU and the powers of the states. In this way, the exercise of adopting a constitution would not aim to bring about major change, but would really be primarily about streamlining and recording in a more comprehensible way the EU functions, and to a lesser extent consolidating and fine-tuning developments which were already well advanced. This process in itself would enhance the legitimacy of the EU, would render it less of a bureaucratic monolith to the average referendum-voting citizen, and would secure the stable future of the Union. The current United Kingdom government has professed itself to be an adherent to this particular vision of why an EU constitutional settlement is desirable, with the added goal of increased legitimacy through improved clarification and transparency.³² Indeed, this relatively minimalist view of why it is

31. See Thomas Fuller, *EU Puzzler: Who Does What?: Power and How to Wield It, at the Core of Constitutional Clash*, INT'L HERALD TRIB., June 5, 2003, at 2003 WL 56176693 (quoting Romano Prodi, President of the European Commission as saying that the Draft Constitution needs to designate "who does what [in a manner that is] easy to grasp for our fellow citizens").

32. See, e.g., *A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference 2003*, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs, para. 14-7, 42 (outlining the challenges to the current EU framework and explaining why Britain should support the EU Constitution), at http://www.fco.gov.uk/Files/kfile/FoE_IGC_Paper_cm5934_sm,0.pdf (Sept. 2003) (on file with the Washington and Lee Law Review). The Constitutional Treaty states:

14. This has led to two challenges. First, the EU's framework has become too complex and unwieldy. Second, now the EU has come to play a more important role in people's lives, they expect more clarity on its workings.

15. There is no single document to which someone could turn to find out about the Union's aims and objectives or processes of decisionmaking.

16. The EU needs a clearer statement of what it does, why it does it and how. Its legal structure should be made easier to understand. And Europe's citizens and businesses should know what powers national governments have conferred on the EU, and what powers they have kept for themselves.

17. On the second challenge: the EU now plays a greater role in people's lives. They therefore expect it to be more responsive to their needs and to listen to their concerns. So the Union must become more open and better understood. This is the test of the EU's legitimacy.

....

42. The Convention's draft meets important British goals:

appropriate to adopt a constitution for the EU has for some time been one of the most prevalent and politically acceptable views to articulate. In other words, this view defines constitutionalization as little more than consolidation and simplification,³³ where the basic shape of the polity and the basic rules of the game are put in documentary form and made clear and accessible to all. It is a perspective that can be somewhat reductively summarized in the suggestion by British Foreign Secretary Jack Straw that the significance of enacting a constitution for the EU need be no more and no less than the adoption of a constitution by a golf club,³⁴ and thus need not give rise to any antifederalist or sovereigntist fears.

Although one can easily link the aim of constitution-making in order to clarify and consolidate the EU's achievements to the second objective outlined above, that of increasing the legitimacy of the EU, these are nonetheless distinct aims in other ways. In particular, the objective of increasing the popular legitimacy of the EU through community mobilization and citizen involvement in the creation, enactment, and ongoing elaboration of the Constitution implies a rather different and deeper sense of legitimation than that of making the EU a more acceptable product through greater clarity and comprehensibility.

-
- The draft Treaty consolidates the existing EU Treaties into a single logically ordered text, which sets out what the EU is, what its objectives are and how it will strive to achieve them. The text replaces the Maastricht Treaty's three "pillars" with a single Treaty structure. The draft Treaty streamlines the number of EU legal instruments.
 - The draft Treaty sets out a more transparent and accountable structure for the EU. It includes a definition of the Union's competences, which makes clear where the EU can and cannot act. It strengthens the role of national Parliaments through a new procedure to reinforce subsidiarity, that is, the principle whereby, in policy areas where competence is shared between the Union and Member States, the Union should act only when "the objectives of the intended action cannot be sufficiently achieved by the Member States" alone.

33. See Paul Magnette, *In the Name of Simplification: Constitutional Rhetoric in the Convention on the Future of Europe*, Paper Delivered at CIDEL Workshop; Deliberative Constitutional Policies in the EU, at 10 (analyzing the discourse around the Convention process), at <http://www.arena.uio.no/cidel/workshopZaragoza/PMagnette.pdf> (June 21, 2003) (on file with the Washington and Lee Law Review).

34. See *Straw Calls for EU Constitution*, THE GUARDIAN, Aug. 27, 2002 at <http://politics.guardian.co.uk/eu/story/0,9061,781293,00.html> ("Golf clubs all across Scotland have constitutions. The point about having a constitution is that it's a clearly understood word describing the basic rules for the operation of an institution, whether it's a golf club, a political party or in this case a European Union.") (on file with the Washington and Lee Law Review).

C. Reining in the EU

A third reason for enacting a constitution for the EU is one that responds to the concerns of national sovereignty. This reason derives from a liberal philosophy of constitutionalism and is the objective of limiting and reining in the powers and functions of the EU. In other words, there are those who see an advantage in drafting a constitutional text in order to restrain a potentially overweening EU and to bind it with a set of clear and entrenched constitutive rules. This vision sees the primary function of a constitutional treaty for the EU to be that of setting limits to the powers of the center and reinforcing and restating the powers of the member states, or in some cases, of their regions. This position has been articulated by some British conservatives and "Eurosceptics,"³⁵ as well as by certain politicians from the German Länder,³⁶ and it is a position that the economically liberal *Economist* magazine has endorsed.³⁷ This vision is also one purpose of an EU Constitution that may be rather different from the consolidation vision, in so far as one could view the enactment of a constitution as an opportunity to roll back, repatriate, or reduce the powers of a potential super state.³⁸ A further variant on this objective is the

35. See, e.g., William Hague, *Foreword to the Paper by Timothy Kirkhope: Simplifying the EU: A Conservative Alternative to the European Constitution*, Timothy Kirkhope Homepage, at 3 ("The draft European Constitution is a case in point. Instead of reinventing Europe as a dynamic, lightly regulated, democratic and accountable network of nation states, it has become a vehicle for yet more centralization—and there is *always* pressure from the top for yet more integration."), at <http://www.leedsne.demon.co.uk/> (last visited Jan. 4, 2004) (on file with the Washington and Lee Law Review).

36. See, e.g., Wolfgang Clements, Minister of the German Land of NordRhein-Westphalia, *Shaping—Not Administering—a New Europe: Allocation of Competences within the European Union after Nice*, Address at the Forum Constitutions Europae of the Walter Hallstein Institute for European Constitutional Law of Humboldt University, at http://europa.eu.int/futurum/documents/speech/sp120201_en.htm (Feb. 21, 2001) (stating that "areas of competence should be downgraded or even fully reassigned in the competence system I have presented in cases when action by the member states or regions is sufficient") (on file with the Washington and Lee Law Review).

37. See *The European Union's Summit: Towards a Bigger, Simpler Europe*, THE ECONOMIST, December 15, 2001 at 11, 12 ("Those who fear that a constitution would mean a superstate and with it the end of national independence should calm down. A good constitution would limit and separate powers as much as it would push the writ of the EU into the nooks and crannies of national life. It would also make no mention of 'ever closer union' as an objective.").

38. See Clements, *supra* note 36 (calling for EU regional policy to be returned, to a considerable degree, to the Member States and their regions); see also Timothy Kirkhope, *Simplifying the EU: A Conservative Alternative to the European Constitution*, Timothy Kirkhope Homepage (calling for the abolition of the common fisheries policy), at <http://www.leedsne.demon.co.uk/> (last visited Jan. 3, 2004) (on file with the Washington and Lee Law Review).

establishment of a truly neo-liberal economic constitution that sees the primary mission of the EU as being that of "negative integration"—the removal of obstacles to trade between states and the consequent promotion of economic growth—and which removes the danger of a socialist Europe by removing the EU's powers of distribution and redistribution and reducing its regulatory role to a minimum.³⁹

D. Marking the Historic Reuniting of Europe

A fourth reason for choosing to draft a constitutional document for the EU at this time is to mark the historic reuniting of Europe.⁴⁰ Apart from the obvious symbolism, a more practical dimension of this view about the desirability of enacting an EU constitution is that the unprecedented size and heterogeneity of the forthcoming enlargement of membership of the EU arguably precipitates the need to respond in a way that will guard against the risks of dilution, fragmentation, or weakening of the past *acquis*. In other words, the imminent doubling of the EU's size may make constitutional entrenchment desirable in order to embed and deepen the basic foundations of the EU legal and political order. There is both a positive and a negative dimension to this particular argument in favor of a European constitution. On the negative side, some may see it as an attempt to write, and as far as possible entrench, the rules of the game, before the newer and numerous members join the club and risk influencing it adversely from within. Some have interpreted Joschka Fischer's 2000 speech in favor of an EU constitution, in which he mooted the possibility of something like a two-speed or multi-speed Europe, with a vanguard of states at the inner core, and a periphery of states outside them not necessarily abiding by all of the same rules and policies, as an example of the latter.⁴¹ For many of the candidate states, this prospect of a two-speed or multispeed Europe would be unwelcome, carrying with it the

39. See generally J. GILLINGHAM, *EUROPEAN INTEGRATION 1950–2003: SUPERSTATE OR NEW MARKET ECONOMY?* (2003) (providing examples of those who share such a vision of Europe's role).

40. See Draft Treaty, *supra* note 17, Preamble Recital 3, at 8 ("Believing that reunited Europe intends to continue along the path of civilization, progress and prosperity."); see also Neil Walker, *Constitutionalising Enlargement, Enlarging Constitutionalism*, 9 *EUR. L. J.* 365, 375–83 (2003) (discussing the relationship between European constitutionalism and the enlargement process).

41. Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, Address at the Humbolt University, Berlin (May 12, 2000), at http://www.jeanmonnetprogram.org/papers/00/joschka_fischer_en.rtf (last visited Jan. 3, 2004) (on file with the Washington and Lee Law Review).

implication, not of choice and flexible membership, but rather the likelihood of a kind of second-class membership and constitutional status.⁴² A more positive version of this fourth reason for enacting an EU constitution, however, is the pursuit of an appropriate symbolic and legal recognition of the historical significance of the reuniting of much of Eastern and Western Europe and an opportunity to mark it by the "creation" and formal foundation of a continent-wide political community.

E. Strengthening the EU's Unity, Representation, and Capacity for Action

A fifth reason for adopting an EU constitution is to strengthen the external unity, representation, and capacity for action of the Union. While this may well be an objective that could also be achieved by the more traditional means of international treaty reform along the lines of the numerous EU treaties already adopted over the decades, the symbolic weight of a Europe united and *constituted* as a complete and sovereign political community, and not simply another internally fractious international organization or loose confederation, may strengthen considerably the argument for an EU constitution.

There are, once again, a number of different dimensions to this argument. First is the idea of strengthening the EU's international identity, given the complexity and fragmented nature of the EC's current international representation and the lack of clarity for third states and other actors in this respect. The fact that the EC has an express legal personality and can conclude agreements, but that the EU has not clearly been accorded such legal personality even though it has concluded a number of agreements in the name of the Union,⁴³ is a matter of some confusion. Further, and linked to this distinction between the 'first pillar' of the EC and the second and third pillars of the EU, is the fact that there is a range of different European actors with

42. See JAN ZIELONKA, ENLARGEMENT AND THE FINALITY OF EUROPEAN INTEGRATION 5 (Jean Monnet Working Paper no. 7, 2000) (arguing that "the creation of a core group would undo the greatest benefit of the enlargement project; namely, allowing the less advanced countries of Eastern Europe to join the most advanced countries of Western Europe on equal terms"), at <http://www.jeanmonnetprogram.org/papers/00/00f0801.rtf> (on file with the Washington and Lee Law Review).

43. See Council Decision 2001/352/CFSP, 2001 O.J. (L 125) 1 (2001) (approving, on behalf of the EU, an agreement between the EU and the Former Yugoslav Republic of Macedonia); see also Jaap W. de Zwaan, *Legal Personality of the European Communities and the European Union*, 30 NETHERLANDS Y.B. OF INT'L L. 75, 77 (1999) (stating that the European Communities have a legal personality because they have been able to enter into several treaties with third party countries); see generally K. Lenaerts & E. de Smijter, *The European Union as an Actor Under International Law*, 19 YBEL 95 (2000).

apparently overlapping powers in the field of external representation in similar fields.⁴⁴ A second dimension is the objective of strengthening the EU's capacity for unified action and the effectiveness of its international action and instruments, both in foreign policy and in other external fields.⁴⁵

There is also a third and rather more specific aspect (albeit one that has less readily been articulated by the political elite) of this particular reason for enacting an EU constitution that relates to the debate on unipolarity versus multipolarity that has unfolded in recent years.⁴⁶ This is the objective of strengthening the EU as a polity in order to counterbalance the global strength and hegemonic position of the United States,⁴⁷ and to counter perceived attempts by the U.S. to "disaggregate" the EU.⁴⁸ The divisions over the Iraq war have served to heighten existing positions of this kind, and there have been notable interventions by public figures and intellectuals on both sides of the Atlantic. In particular, Robert Kagan's attention-grabbing

44. See Lenaerts & de Smijter, *supra* note 43, at 31 (stating that there is, for example, a Commissioner for external relations, a high representative for foreign and security policy, and of course, the holder of the rotating Presidency of the European Council, all of whom have arguably overlapping functions).

45. See, e.g., Javier Solana, *A Secure Europe in a Better World*, Paper Presented to the Thessaloniki European Council Summit, at 14 ("Greater coherence is needed not only among the EU instruments but also embracing the external activities of the individual member states."), at <http://ue.eu.int/pressdata/EN/reports/76255.pdf> (June 2003) (on file with the Washington and Lee Law Review).

46. See Charles Krauthammer, *The Unipolar Moment*, 70 FOREIGN AFF. 23, 23 (1990–1991) (stating that there is not a multipolar world, only a unipolar world with the United States at its center); Frank Biermann and Hans-Dieter Sohn, *Europe and a Multipolar Global Governance, India and Asia as New Partners*, the Development and Peace Foundation, Policy Paper No. 21, at 2 (arguing that "[i]f Europe wants to make progress towards a multilateral world order, it needs new allies—in addition to but not necessarily in competition with the United States of America"), at http://www.glogov.org/publications/pp21_en.pdf (April 2003) (on file with the Washington and Lee Law Review); Sarah Hal, *Blair: Chirac's World View "Dangerous,"* THE GUARDIAN (Apr. 28, 2003) (describing a conversation between President Jacques Chirac of France and Prime Minister Tony Blair of the UK concerning the Iraq war in which Blair criticized Chirac's vision of a "multipolar" world), at <http://www.guardian.co.uk/guardianpolitics/story/0,3605,944938,00.html> (on file with the Washington and Lee Law Review).

47. See Fraser Cameron & Andrew Moravcsik, *Debate: Should the European Union Be Able to Do Everything That NATO Can?*, NATO Review (debating whether the EU should develop a fuller range of military capabilities independently of NATO), at <http://www.nato.int/docu/review/2003/issue3/english/debate.html> (2003) (on file with the Washington and Lee Law Review).

48. See Javier Solana, High Representative For the CFSP, *Atlantic Drift*, THE GUARDIAN, July 10, 2003 ("The notion that the US would be better served by disaggregating Europe contradicts generations of American wisdom."), at <http://ue.eu.int/pressdata/EN/articles/76622.pdf> (on file with the Washington and Lee Law Review).

thesis in his "power and paradise" tract⁴⁹ stimulated responses from numerous Europeans,⁵⁰ including Jürgen Habermas and Jacques Derrida,⁵¹ who argued for the EU to unite more effectively, to develop a real common foreign, security, and defense policy, and to provide an alternative by way of global leadership to that of the United States.⁵² This third dimension of the objective of "strengthening Europe's international identity" as one of the reasons for enacting a European constitution has remained, until quite recently, relatively low-key and was not an explicit aspect of the constitutional debate. However, it may well be one of the more compelling factors that explains various aspects of the Draft Constitution which ultimately emerged.

IV. Which Objective(s) Does the Draft Treaty Establishing a Constitution for Europe Serve?

Given the wide range of different reasons—some contradictory and some overlapping—for seeking to draft and enact a constitution for the EU, and given the novelty and complexity of the Convention debating and drafting process and the multiplicity of different actors involved, it seems difficult to discern a clear picture or to gain a firm analytical grasp on what is occurring.

49. See generally ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003); see Steven Lukes, *The Question of Power: Europe Versus America*, 10 *CONSTELLATIONS* 352, 352–57 (2003) (assessing Kagan's argument that Europeans and Americans live in different worlds).

50. See generally, *Special Issue: The New Transatlantic Tensions and the Kagan Phenomenon*, 4 *GERMAN L.J.* 863, 863–990 (2003) (commenting on Kagan's analysis) (on file with the Washington and Lee Law Review), at <http://www.germanlawjournal.com>; *Special Issue*, 10 *CONSTELLATIONS* 289, 289–436 (2003) (analyzing Kagan's thesis), at <http://constellationsjournal.org> (on file with the Washington and Lee Law Review).

51. See Jürgen Habermas & Jacques Derrida, *February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe*, 10 *CONSTELLATIONS* 291, 293 (2003) (providing a response to Kagan's tract). Habermas and Derrida state:

At the international level and in the framework of the UN, Europe has to throw its weight on the scale to counterbalance the hegemonic unilateralism of the US. At global economic summits and in the institutions of the WTO, the World Bank and the IMF, it should exert its influence in shaping the design for a coming global domestic policy.

Id.

52. *Id.*; see also Habermas, *supra* note 12, at 12 (arguing that "we Europeans have a legitimate interest in getting our voice heard in an international context that is at present dominated by a vision quite different from ours."). It should be noted that Habermas wrote this piece prior to September 11, 2001 and before the Iraq war, although the Derrida/Habermas piece was written afterwards.

How can the questions—what is the meaning of this proposed EU Constitution?; what is its political significance?; and what does it imply for Europe or for the rest of the world?—be answered when there seem to be a great many different answers depending on which of the purported objectives for enacting a constitution it is designed to serve. One way to begin is by asking whether the eventual provisions of the draft constitutional text produced in July 2003 and debated by the subsequent Intergovernmental Conference achieved one or more of these objectives. Does the agreed upon text achieve a mixture of several objectives, or is it possible to discern a fundamental thrust emerging from the complex whole that points to the dominance of one of the objectives over others?

My argument, having examined the provisions of the new draft constitutional treaty and the Convention and IGC processes, is that what began as an exercise to enhance the internal legitimacy of the Union, with a clear focus on the much-invoked but under-involved and alienated citizen, and intended to bring this citizen closer to the Union through the constitutional process, has become an exercise focused on the external rather than internal domain, and has become preoccupied with enhancing Europe's international role rather than dealing with the familiar and intractable legitimacy deficit or with introducing significantly new internal institutional arrangements. Indeed, in the Declaration issued at the Rome European Council Summit in October 2003, at which the Intergovernmental Conference to decide on the draft constitution was launched, four of the six recitals make reference to the international role of the EU, one of which also mentions the need for a "strong and balanced transatlantic relationship."⁵³

53. DECLARATION OF ROME, *supra* note 18, at 2. This reference to the international role of the EU contrasts with the declaration made at the earlier Thessaloniki summit in June 2003, where the Convention President first presented the Draft Constitution to the European Council, in which the first two objectives listed were those of "bringing the Union closer to its citizens" and "strengthening our Union's democratic character," and only in third, fourth, and fifth place came the references to the international role of the Union. COUNCIL OF THE EUROPEAN UNION, THESSALONIKI EUROPEAN COUNCIL, PRESIDENCY CONCLUSIONS para. 2 (June 19–20, 2003), at <http://ue.eu.int/pressData/en/ec/76279.pdf> (on file with the Washington and Lee Law Review). In comparison, the relevant part of the Rome Declaration in October 2003 (my emphasis is added) reads that the heads of state and government and the presidents of the European Parliament and Commission:

- reaffirm that the process of European integration is our continent's essential calling as *the instrument for a more efficacious international role for the Union* in supporting peace, democracy, prosperity and solidarity in all member States;
- highlight the fact that the imminent enlargement constitutes a historical moment which renders the Union richer in terms of identity and culture and *extends the possibility of promoting shared values and of conferring*

One response to the argument this Article makes, of course, would be that the impression of an externally-focused constitution is more a product of the changing political rhetoric than of the actual substance and likely effect of the constitutional document. In other words, during the actual Convention process, when there were a great many actors involved and many working groups producing proposals on a whole range of policies, mostly internal, there was much more of a focus on the legitimacy, clarification, and consolidation questions. But, once the scene shifted and moved onto the high political stage of the European Council and the Intergovernmental Conference, where the foreign ministers and the heads of state and government were concerned, an inevitable focus outwards and a preoccupation with Europe's global role was apparent. This apparent preoccupation does not necessarily say anything about the actual content of the constitutional text or its concrete achievements.

This Article's argument, however, is based on more than an analysis of the level of political rhetoric, but also on an examination of the text itself. From such an examination, the boldest and most notable provisions of the Draft Constitutional text appear to be those that relate to Europe's external role. These certainly seem to move in the direction of the fourth objective set out above, that is, that of highlighting the external identity, role, and representation of the EU. The changes that focus more on internal EU reform, by comparison, can at best be said to achieve a degree of consolidation of the *acquis* and a certain strengthening of the trend and direction of previous treaty amendments. They seem unlikely to address in any serious way the problems of lack of popular support and democratic

weight and authority to Europe's role in world;

- confirm the importance of the commitment to endow the European Union with a constitutional text based on the equality of its States, people and citizens *that assures the efficacy, consistency, and efficiency of Europe's role in the world* and take up the Convention's Draft Treaty as a good basis for starting in the Intergovernmental Conference;
- renew the expectation of a conclusion of the constitutional negotiations in advance of the European Parliament elections in June 2004 in order to allow European citizens to cast their vote in full awareness of the future architecture of the Union;
- stress that the adoption of a Constitutional Treaty represents a vital step in the process aimed at making Europe more cohesive, more transparent and democratic, more efficient and closer to its citizens, *inspired by the will to promote universal values above all through cooperation with international multilateral organizations and confirming a strong and balanced transatlantic relationship.*

DECLARATION OF ROME, *supra* note 18, at 1–2 (emphasis added).

alienation from the EU. The principal internally-focused and externally-focused changes introduced by the Draft Constitution are set out below with a view to substantiating this claim.

A. Internally Focused Changes

These reforms can be grouped into five main categories. A first, and perhaps the most symbolically significant set of changes, has been the incorporation of the Charter of Fundamental Rights and Freedoms, which policymakers drafted in 2000 but deliberately left with an undetermined legal status until the next Intergovernmental Conference in 2004.⁵⁴ The drafters incorporated the Charter into the second part of the Draft Constitutional text, thus placing it within the main body of the proposed new constitution rather than relegating it to a protocol or annex.⁵⁵ At one level, the incorporation of the Charter of Rights into the "constitution" is a very significant move: a Bill of Rights is a core component of modern liberal constitutions, and the EU has never had its own, referring instead to the Council of Europe's Convention on Human Rights as a source of inspiration. On the other hand, the Charter of Rights is something of a mixed bag.⁵⁶ Many of the rights contained in it are expressed in vague and weak terms.⁵⁷ Several of the rights relate to areas in which the EU has few or no powers of action. Some have deemed many of the "principles" contained in the Charter to be nonjusticiable,⁵⁸ and the general

54. See generally Gráinne de Búrca & J. Aschenbrenner, *European Constitutionalism and the EU Charter of Fundamental Rights*, 9 COLUM. J. OF EUR. L. 355 (2003) (summarizing some of the vast and growing body of literature on the Charter and its place in the constitutional debate).

55. A second significant and related change was the inclusion in Part I of the constitutional draft of Article 7(2). See Draft Treaty, art. 7(2), *supra* note 17, at 9 (declaring that the EU shall seek accession to the European Convention on Human Rights).

56. See, e.g., Francisco Rubio Llorente, *A Charter of Dubious Utility*, 3 INT'L J. OF CONST. L. 405, 426 (2003) (expressing doubt as to whether the charter can "act as the foundation for the future European Constitution"), at http://www3.oup.co.uk/ijclaw/hdb/Volume_01/Issue_03/pdf/010405.pdf (on file with the Washington and Lee Law Review).

57. See CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION ART. 37 and 38, 2000 O.J. (C364) at 53 (2000) (providing that merely "a high level of protection" shall be ensured within other EU policies). Other provisions have been characterized as being of trivial character. See, e.g., CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION ART. 29, 2000 O.J. (C364) (recognizing the right to a free placement service).

58. See Draft Treaty, art. II-52(5), *supra* note 17, at 29 (amending the Charter by the Convention on the Future of Europe). The amendment declared that:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies of the Union, and by

clauses at the end of the Charter are preoccupied with asserting and ensuring that it brings about no change whatsoever in the relations between the EU and the states⁵⁹ and that it simply restates and consolidates what has been developing through jurisprudence of the European Court of Justice over the years.⁶⁰

A second set of changes in the internal sphere is the listing of categories of EU powers and competences. This change, again, was a symbolically important issue because much of the early debate about the need for a constitutional text had focused on the fears of creeping EU powers, on the difficulties for states, regions, and citizens to know exactly what the scope of the EU's powers of action were, and about the need for clarification in this respect. Indeed, one of the four items on the so-called post-Nice agenda,⁶¹ which predated the decision to establish a Convention with a considerably broader mandate, was the question of clarification of the powers and competences of the Union. However, although the first part of the Draft Constitution now contains a certain systematization, in that it identifies and lists different categories of competence in Articles 11–17, this act of classification effects no real change. Certainly the *kompetenz-katalog* that had been envisaged by some, or the clearly power-limiting constitution envisaged by others, has not materialized. It is true that some of the associated changes the drafters made in relation to the exercise of powers by the EU—in particular the greater involvement of national parliaments in monitoring compliance by the EU institutions with the principle of subsidiarity—were clearly designed to address some of the internal legitimacy and parliamentary democracy concerns, but this particular mechanism is ultimately a soft and nonradical institutional

acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.)

Id.

59. See Draft Treaty, art. II-51, *supra* note 17, at 28 (emphasizing that the Draft Treaty respects the fundamental rights of the member states and grants no new power to the Union).

60. The preamble to the Charter declares that it is necessary to strengthen the fundamental rights on which the Union is founded "by making those rights more visible in a Charter." Draft Treaty, pt. II, *supra* note 17, at 23.

61. See EUROPEAN UNION, DECLARATION ON THE FUTURE OF THE UNION (setting out the agenda for reform of the EU following the conclusion of the fractious and unsatisfactory Intergovernmental Conference which took place in 2000), at http://europa.eu.int/futurum/documents/offtext/declaration_en.pdf (last visited Jan. 4, 2004) (on file with the Washington and Lee Law Review). The four items on the post-Nice agenda were the need to delimit the competences of the EU more precisely, the future status of the Charter of Fundamental Rights, simplification of the Treaties, and the role of national parliaments. *Id.*

addition to the existing panoply of arrangements, rather than a particularly bold new provision.⁶²

A third set of changes concerns the extension of qualified majority voting and of the "co decision" legislative procedure that gives the European Parliament a more equal say with the Council of Ministers in the lawmaking process. While one could certainly see this as part of an attempt to address the concerns of an "effective and democratic government" internally (in the sense that some see majority voting rather than unanimity as an obviously more efficient and thus arguably more effective decisionmaking procedure and in that the co-involvement of the directly elected European parliament strengthens the parliamentary dimension of democratic legitimacy), the scope of the extension is not dramatic, and compares with the introduction and gradual extension of the procedure in the Maastricht, Amsterdam, and Nice Treaties. To that extent, it consolidates a pattern of incremental change, rather than making a dramatic change of a different constitutional nature. Where the extension of codecision is perhaps most significant under the Draft Constitution, however, is in relation to many of the formerly "third pillar" issues of police and judicial cooperation in criminal matters.⁶³ One could argue, however, that the general change in the attitude of the Member States towards coordination and harmonization of aspects of criminal law, procedure, and policing following the events of September 11, 2001 facilitated the introduction of this change, and thus there is

62. Even the decision to grant national parliaments, which have objected to a particular Commission proposal on the ground of subsidiarity, an ex-post right to bring an action before the Court of Justice for annulment of the eventual measure adopted, was diluted in Article 7 of the new draft Protocol on the Application of the Principles of Subsidiarity and Proportionality, whose ambiguous language does not make entirely clear whether national parliaments may themselves lodge an action before the ECJ even without the consent or collaboration of their government:

The Court of Justice shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article III-270. of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.

DRAFT PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY, art. 7 (Feb. 27, 2003), at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> at 231 (on file with the Washington and Lee Law Review).

63. See Draft Treaty, ch. IV, tit. III, pt. III, § 4–5, *supra* note 17, at 60–61 (outlining measures for judicial cooperation in criminal matters and police cooperation). The extension of codecision to the fields of asylum, immigration, and judicial cooperation in civil matters that are also aspects of the "area of Freedom, Security and Justice" in Sections 2 and 3 of the same Chapter was undramatic because it is largely in line with the expectation that this would have taken place after the expiry of the 5-year transition period introduced by the Amsterdam Treaty to Title IV of the EC Treaty. *Id.*

a link with the perceived need to strengthen and unify internal processes in order to guard against external threat.

The other notable change that is linked with the change in decisionmaking procedures is the way in which the EU is to determine qualified majority voting within the Council with a kind of double-majority rule combining a majority of member states with three-fifths of the EU's population overall.⁶⁴ Drafters intended this change to simplify, to render more effective and also more proportionate to population size, the way in which the EU would calculate voting weight, but rather than answering to aspects of the internal legitimacy critique, the proposed change has created considerable political controversy, in part because it departs from the bargain agreed at the time of the signing of the Nice Treaty and weakens the voice of medium-sized member states at the expense of the larger states. Similarly, the proposal in Article 25(3) to reduce the number of voting members of the Commission has given rise to heated debate and opposition, particularly on the part of smaller member states. Both of these sets of changes—versions of which had clearly been anticipated for some years as part of the institutional changes that would be necessitated by enlargement—have generated dissent and dissatisfaction, and were amongst the main issues on the agenda of the Intergovernmental Conference that followed the Convention.

A fourth set of internal changes concerns the abolition of the so-called "pillar structure" originally introduced by the Maastricht Treaty, whereby foreign and security policy and policing and criminal cooperation respectively were governed by two treaty "pillars" of the EU whose provisions differed from those of the first (supranational) pillar of the European Community. However, although this change may be a significant symbolic one in highlighting the conceptual unity of the Union, some critics note that in practical terms the pillars will continue their existence "underground"⁶⁵ in that what distinguished them from the Community pillar, including the different lawmaking methods, legal effects, and greater degree of intergovernmentalism, will continue to exist in various respects, even if the new constitutional treaty brings about a formal institutional unity.

64. See Draft Treaty, art. 24, *supra* note 17, at 13 (describing the qualified majority); Article 2 of the Protocol on the Representation of Citizens in the European Parliament and the Weighting of Votes in the European Council and the Council of Ministers (promulgating rules for the representation of citizens in the European Parliament and the weighting of votes in the European Council and the Council of Ministers).

65. See, e.g., Shaw, *supra* note 3, at 22 n.62 (citing Kalypso Nicolaïdes) (arguing that the "pillars" will continue to exist underground).

A fifth set of changes concerns the simplification of legislative instruments. This set of changes is mixed and rather technical, although it may be said to introduce a degree of simplification by reducing the number of different types of instruments (particularly helpful for lawyers from those member states, such as France and Belgium, that use a similar classification), it is difficult to discern the significance and meaning of each of the new categories.⁶⁶

Few of these "internally oriented" changes that the Draft Constitution has introduced—with perhaps the exception of the Charter of Rights, which one can more readily argue to be a move effectively designed to enhance the legitimacy of the EU—can realistically serve in a clear or unequivocal way to advance the objective of strengthening the legitimacy of the Union from the perspective of its alienated citizens. While they may well move in the direction of consolidating the past *acquis*, they do not in any significant way address the problems of democratic legitimacy that seemed to motivate the impetus for a constitutional debate at its outset. While a single provision for a weak form of citizens' legislative initiative was included in Article 46 of the Draft Constitution, along with some general provisions and exhortations concerning dialogue with and consultation of civil society,⁶⁷ the Draft Constitution makes no provision for citizen participation in the adoption of the document. Not only is there no provision on a Europe-wide referendum, as many had hoped, but the method prescribed in Article IV-8 for adopting the text remains the basic intergovernmental treaty procedure whereby each state ratifies the document in accordance with its own constitutional requirements. And, while Article IV-7, which specifies the mechanism for future amendment, makes provision for the establishment (although not necessarily in the case of any amendments) of a Convention, this Convention

66. See, e.g., HOUSE OF LORDS, SELECT COMMITTEE ON THE EUROPEAN UNION, 12th Report at 7–8 (March 11, 2003) (finding the new categories and terminology unhelpful), at <http://www.parliament.thestationeryoffice.co.uk/pa/ld200203/ldselect/lducom/71/71.pdf> (on file with the Washington and Lee Law Review).

67. See Draft Treaty, art. 42, para. 4, *supra* note 17, at 20 (providing for a weak form of citizen's legislative intent). Specifically the provision states:

No less [sic] than one million citizens coming from a significant number of Member States may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. A European law shall determine the provisions for the specific procedures and conditions required for such a citizens' initiative.

will be followed by the traditional Intergovernmental Conference procedure and individual member state ratification.

B. Externally Focused Changes

Let us turn then to the reforms that most affect the external face of the Union. There are three principal changes of significance and a number of lesser, though nonetheless noteworthy, provisions. The key changes are the express conferral of a single legal personality on the Union,⁶⁸ the creation of a foreign minister of the Union, assisted by a diplomatic service⁶⁹ to amalgamate the role of several institutional actors currently responsible for aspects of external policy,⁷⁰ the creation of a more permanent, nonrotating president of the European Council,⁷¹ and the more general and significant strengthening of the role of the European Council.⁷² There are also a number of other changes that, while perhaps less immediately notable than these, also go clearly in the direction of enhancing the external role, dimension, and capacity of the Union. These include the "solidarity clause" in Articles 42 and III-231,⁷³ which

68. See Draft Treaty, art. 6, *supra* note 17, at 9 (declaring that "[t]he Union shall have legal personality").

69. See Draft Treaty, art. III-197(3), *supra* note 17, at 66 (calling this new arrangement the European External Action Service); see also THE DECLARATION ON THE CREATION OF A EUROPEAN EXTERNAL ACTION SERVICE, Annex to Draft Treaty, *supra* note 17, at 99 (noting the need for a joint service of officials to assist the Union Minister of Foreign Affairs); Steven Everts & Daniel Keohane, *The European Convention and EU Foreign Policy: Learning from Failure*, 45 SURVIVAL 167, 172-73 (2003) (describing the importance of the joint service) (on file with the Washington and Lee Law Review), available at http://www.cer.org.ukpdf/everts_keohane_survival.pdf.

70. See Draft Treaty, art. 27, *supra* note 17, at 14 (describing the position of the Union Minister for Foreign Affairs); Draft Treaty, art. 20(2), *supra* note 17, at 12 (describing the composition of the European Council); Draft Treaty, art. 23(2), *supra* note 17, at 13 (describing the duties of the Foreign Affairs Council); Draft Treaty, art. 26(2), *supra* note 17, at 14 (describing the selection process for European Commissioners, including the new minister for Foreign Affairs).

71. Draft Treaty, art. 21, *supra* note 17, at 12.

72. See Draft Treaty, art. III-159, *supra* note 17, at 57 (noting that the European Council is responsible for defining "the strategic guidelines for legislative and operational planning within the area of freedom, security, and justice"); Draft Treaty, art. III-194, *supra* note 17, at 66 (describing the European Council's duty to identify the strategic objectives of the Union); Draft Treaty, art. III-196, *supra* note 17, at 66 (noting that the European Council will define the guidelines for foreign and security policy, including defense); see also Draft Treaty, art. 39, *supra* note 17, at 17 (outlining the European Council's role in developing foreign security policy). The breadth of the European Council's general role and decisionmaking power in the field of external relations as expressed in Article III-194 is particularly striking.

although now phrased in terms of solidarity in the event of a natural disaster as well as against the threat or occurrence of a terrorist attack, clearly carries with it the implication of internal cohesiveness against external threats, and the provision for the establishment of a European Armaments, Research and Military Capabilities Agency in Article III-212. Finally, Paragraph 4 of Article 3 of the Draft Constitution contains an interesting provision that one might view as reflecting the third dimension of the fifth objective for enacting a constitution that this Article suggested above, namely the strengthening of the EU's external role as a means of providing a counterweight to United States power.⁷⁴ Article 3, which is otherwise rather bland and vague in its setting out of the various broad objectives of the Union, suddenly becomes specific in the fourth paragraph by referring to the commitment to "strict observance and development of international law, including respect for the principles of the United Nations Charter."

It is certainly true, however, that one could challenge the apparent boldness of each of the various changes outlined above on the basis that they are already weakened in various ways and that key features of the new provisions remain undefined. For example, some take the view that the curious combination of being simultaneously vice-president of the Commission and yet subject to the political mandate of the Council will inevitably compromise the new foreign minister's role and render the role very difficult to operationalize. Others surmise that the drafters have downgraded the originally strong vision of the role of a long-term (five-year) president of the European Council due to

73. See Draft Treaty, art. 42, *supra* note 17, at 19 (enhancing the dimensions of the Union with the "solidarity clause"). Article 42 states:

(1) The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack; (b) assist a Member State in its territory at the request of its political authorities in the event of a disaster.

Id.

74. See Draft Treaty, art. 3(4), *supra* note 17, at 9. The provision states:

In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter.

Id.

opposition from smaller member states who would prefer to strengthen the leadership role of the Commission. Further, critics may highlight the failure to introduce any really significant reform of the decisionmaking processes of the common foreign and security policy as a failure in the attempt to strengthen the unity and effectiveness of the EU's international role. One could also argue that some of the externally-focused changes are simply consolidating trends that were already developing, such as in the emerging recognition of the legal personality of the European Union.⁷⁵

Yet, such arguments underestimate the combined significance of the several changes and their potential future evolution. In particular, the changes proposed to the European Council are clearly aimed at giving greater visibility and a coherent identity to the political leadership of the EU, and they clearly aim to concentrate power in the hands of the heads of government and state. The fact that the European Council would also, under the Draft Constitution, be empowered to make decisions across all areas of EU external relations and not simply in specified fields such as the former second and third pillars or economic policy, reflects a considerable reinforcement and strengthening of its overall role.⁷⁶ More symbolically, the fact that all of the existing provisions on external relations that were previously scattered across different parts of the EC and EU Treaties have been gathered into one section is indicative of the intention to strengthen the legal coherence and unity of this field. All of the reforms introduced are aimed at giving greater definition, focus, and unity to the external representation and identity of the Union in relation to the outside world and each would bring about a distinctive, even if qualified, change to the existing situation. And, even the controversial nature of the changes, with the exception of the relatively consensual move to single legal personality, is arguably itself indicative of their potential importance.

In sum, the objectives that one could most plausibly view to be served by the Draft Constitution produced by the Convention are the enhancement and promotion of its external profile and international role, on the one hand, and the consolidation of its internal structures and *acquis* on the other. But, the drafters have not made much progress at this stage towards the apparently most pressing of the original aims that motivated the drafting of an EU constitution, namely the endeavor to address the internal legitimacy deficit of the EU. While few of

75. See *supra* note 43 and accompanying text (noting that the EU has already concluded agreements in the name of the Union, despite the fact that the EU does not have official legal personality).

76. See *supra* note 72 (providing references to the European Council's strengthened role in defining the "strategic interests" of the EU in external relations in general and the common foreign and security policy, and in the area of freedom, security and justice).

the internally focused reforms set out above are negligible, or without any constitutional significance, neither do they contribute much—with the possible exception of the visibility of the Charter of Fundamental Rights—to the legitimacy-enhancing objective of adopting a constitution. The failure to devise a way of involving "civil society" within the Convention process, and the absence of any provisions in the Draft Constitution to provide for a popular role in the ratification of the new document underscore this argument further. Nor has the Draft Constitution achieved much in relation to the third objective outlined above, that of limiting and reining in the EU. While there has been a consolidation of existing powers, the drafters have not adopted an exhaustive competence catalogue and have not attempted to reduce or repatriate EU powers to the member states. The new subsidiarity-monitoring mechanism is interesting but does not in itself bring about any major change or institutional limitation. Further, in terms of the fourth objective suggested above, the focus on enlargement has, perhaps surprisingly, not been very great during the Convention, even though representatives from the candidate countries were present and had voice.⁷⁷

None of this is to say that the Draft Constitution, if it is duly enacted following a process of public debate and discussion within what should by then be twenty-five member states, will not come to have the kind of legitimating effects that cannot currently be discerned or predicted from what has taken place and been agreed,⁷⁸ nor that future generations will not see and understand it as the symbolic moment that marked the reuniting of eastern and western Europe. What I argue, nevertheless, is that it is undeniable that the boldest features of the draft treaty, and the weight of significance of the changes that it has so far introduced, lie in the external domain: in the conferral of legal personality on the union, in giving greater power and leadership to the European Council, and in creating a single post for foreign affairs. More cause for worry, it is arguable that there may in fact be a tension between these two primary objectives: that is, between that of enhancing the internal legitimacy of the EU and strengthening its external role and representation.⁷⁹ Consider the effect of strengthening the role of the

77. Although the candidate states had no vote, in the sense that they could not, according to the mandate given by the Laeken European Council summit to the Convention, prevent a consensus within the Convention, this seems to have had little effect on their ability to participate on broadly equal terms with all other representatives within the process.

78. See generally Maignette, *supra* note 33 (examining the legitimizing effects of the Convention on the Future of Europe); Walker, *supra* note 1 (analyzing the constructivist potential of the constitutional process, in its epistemic and community mobilization functions, and making the specific point that the latter may well be a long-term gambit).

79. See Robert Keohane, *Ironies of Sovereignty: The European Union and the United*

European Council, for example, which of all the EU actors is the least subject to the constraints of institutional accountability, to constitutional requirements of transparency, or to judicial or parliamentary control, and the enhancement of whose role is very likely to alter and even undermine the status and power of other European and national institutions.

V. Europe's Madisonian Moment?

Returning finally to the title of this Article, and to the idea of the present time as Europe's Madisonian moment, are there in fact any real parallels with the adoption of the U.S. Constitution in 1787 as a replacement for the Articles of Confederation, or do the great differences in historical context and circumstance render such a comparison entirely inappropriate? According to a number of influential commentators, the two processes do not bear serious comparison.⁸⁰ However, if we leave aside the undeniably great and numerous differences in context and circumstance and look only in the broadest terms at the reasons that the key advocates of a U.S. constitution gave in the Federalist Papers, we see in fact that the emphasis then was placed on two main factors: first, the need for external security—to which four of the first five Papers are dedicated—and second, the prevention of internal dissent. While the framers

States, 40 *JCMS* 743, 751–52 (2003) (making a comparable point). Keohane discusses the changes in American and European approaches to sovereignty, emphasizing that the more the United States became focused on the importance of its external sovereignty, the more the need for internal unity and control—which is certainly not always to the benefit of internal democratic processes—became apparent. *Id.*

80. See Habermas, *supra* note 12, at 5–6 (asserting that Europe's constitutional process differs from the United States process because Europe is moving away from the concept of a federal state and the European constitutional movement is not "without historical precedent"); see also Magnette, *supra* note 33, at 7 (arguing that the parallels between Europe's and the United States' constitutional process are misconceived). Magnette argues that:

It was however naive to think that the Convention could be "Europe's Philadelphia." First because, before the Convention, the EU was already much stronger than the loose American confederation: it was a firm and largely accepted legal order based on federal principles; it comprised stable and permanent institutions, some directly elected by citizens; and was based on a intensely regulated single market and a common currency. Secondly, European states at the beginning of the twenty-first century, with their long history, strong national identities, large fiscal resources and redistributive policies, cannot be compared to the young, weakly populated and recently independent "states" which formed the American Confederation. Finally, nothing in the present European situation could create a pressure comparable to the context of military, commercial, political, moral and religious crisis that had given rise to the Philadelphia process.

Id.

also put forward many other arguments for the "insufficiency of the confederation to preserve the Union," such as the need to safeguard commerce and common interests, the importance of protection from external threat and promotion of internal cohesion were the primary and dominant reasons and objectives proposed by the framers.⁸¹ At first sight these may seem quite inapposite to the EU, which does not feel under threat from hostile foreign states (as opposed to its fear of unspecified "terrorist attack") and is not internally driven by the risk of economic wars. Nonetheless, taking the different circumstances of history and time into account, it is clearly the case that much of the political energy directed towards the promotion and justification of a constitution for the EU at the present time is focused on its relation to the external world, and in strengthening its perceived internal unity. Not only is the political rhetoric increasingly concerned with Europe's international role, but many of the most notable new provisions of the draft constitution are clearly intended to strengthen the EU's external representation and identity, to concentrate the power of government in the body responsible for foreign policy, and, though this goal has only been obliquely admitted in political discourse, to strengthen the EU as a global actor as a counterbalance to the power of the United States.

Whether the proposed enactment of a constitution proves instead to be a "moment of madness," an attempt to force on Europe's national populations a settlement which presupposes an as yet nonexistent European demos and a strong degree of citizen identification and political allegiance to the EU, cannot easily be predicted at least until some of the national ratification processes—which in some cases will include a popular referendum—on the new constitutional text take place. The optimistic scenario is that the first of the four reasons proponents gave for adopting a constitution, namely the aim of constructing a degree of constitutional commitment and community precisely through the process of deliberating, debating, and enacting a constitution, will be borne out over time, even if that prospect remains for now at quite a distance. Yet, to pursue the more optimistic line of argument, perhaps that distance is inevitable, given that the community-mobilization potential of a constitutional process is an ongoing feature that is not frozen and cannot be measured at the precise moment of adoption of a text, but that may develop and deepen over time if and when the Constitution becomes a living instrument.

81. See Keohane, *supra* note 79, at 750 ("America's lack of external sovereignty was a key reason for the Federalist movement to create a constitution.").

ARTICLES
