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How the New European Union Constitution Will Allocate Power Between the EU and Its Member States—A Textual Analysis

Stephen C. Sieberson*

ABSTRACT

The new European Union Constitution, if ratified by the EU's Member States, will replace the existing EC Treaty and Treaty on European Union. The Author analyzes the text of the Constitution to determine how it balances the functions and powers of the EU institutions with the role of the Member State governments within the EU system. Topic areas include the characteristics of the EU, the Union's values and objectives, and the substantive areas of EU activity. In each area the Constitution reveals a determined effort by its drafters to emphasize the corresponding characteristics, values, and powers of the Member States. The Author's conclusion is that the treaties' delicate balance between the competences of the EU and the states has been attentively maintained in the Constitution.

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I. INTRODUCTION AND THEORIES ON THE STRUCTURE OF THE EUROPEAN UNION

The Member States of the European Union (EU or Union) are now considering the ratification of a constitution (the Constitution) approved by the Intergovernmental Conference in June 2004.¹ The new instrument is intended to replace the two treaties currently serving as the EU's primary constituent documents, the Treaty Establishing the European Economic Community (EC Treaty) and the Treaty on European Union (TEU).²

The focus of this Article is to review the Constitution to determine how it will distribute power within the EU. The balance of power has been the subject of debate throughout the EU's history, a debate stimulated by questions such as: What institutions and procedures are necessary to ensure that the EU reaches its potential? In an expanding Union, how should the common market be managed? At what level of government should social policy be determined? How

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1. TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, CIG 87/04 (Aug. 6, 2004) [hereinafter CONSTITUTION]. The IGC approved a revised version of the draft produced by the European Convention on July 18, 2003, O.J. (C 169) 1 (2003).

2. *Id.* at art. IV-437. The treaties are: TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, O.J. (C 340) 173 (1957) and TREATY ON EUROPEAN UNION (MAASTRICHT), Feb. 7, 1992, O.J. (C 191) 1 (1992), each of which has been amended to its most current version by the TREATY OF NICE AMENDING TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Feb. 26, 2001, O.J. (C 80) (2001) [the treaties in their current versions are respectively referred to hereinafter as EC TREATY and TEU]. The European Union is the latest name for the organization that has been known as the European Coal and Steel Community, the European Atomic Energy Community, the European Economic Community, and the European Community. Although it is currently appropriate to refer to the European Community in relation to much of the body's activity, the name European Union is now in general use. Under the new Constitution, the European Union will legally succeed the European Community, and the term European Union will be used exclusively. CONSTITUTION, *supra* note 1, at art. IV-438. For convenience, this Article will simply refer to the entity as the European Union, the EU, or the Union.

should foreign affairs and defense be conducted? How much integration is necessary?

At the heart of the discussion lies the relationship between the Union and its Member States, and in particular, where the institutional power should reside. The discourse has revealed serious differences of opinion as to how the EU should be organized and how it should operate, because the structure and competences granted to the Union will necessarily tip the scales toward centralized authority in Brussels or away from the center and toward the national governments. The debate has produced three principal schools of thought regarding the EU:³

1. Intergovernmental. Many politicians and observers believe that the European Union is and must remain a treaty-based organization, with the Member States retaining their essential sovereignty as nations. The Union's powers must be carefully contained, and ultimate authority must remain at the national level. The EU must function as an intergovernmental organization (IGO), albeit a highly sophisticated one.

2. Federal. European federalists insist that the EU is evolving from its intergovernmental roots into a federation. For the Union to prosper and assume its rightful place as a major economic and political force in the world, further centralization is necessary, and the process of integration must inevitably create a "United States of Europe." National and cultural identity may be maintained, but substantial or ultimate political authority must shift to the Union. For the sake of efficiency and fairness, EU institutions must operate on majoritarian principles.

3. Hybrid or Confederal. A centrist position is espoused by those who assert that the EU has moved well beyond the IGO model but that it need not aspire to become a federation. Possessing both interstate and intrastate elements, the Union exists as a unique hybrid, a confederation of sorts.⁴ The EU is successful at consolidating activities such as the internal market, where centralization is advantageous. However, in many areas it makes

3. For a more detailed description of the three theories, see Stephen Sieberson, *The Proposed European Union Constitution—Will it Eliminate the EU's Democratic Deficit?*, 10 COLUM. J. EUR. L. 173, 180-88 (2004).

4. The blending of interstate and intrastate elements into a confederal system is well-described in Murray Forsyth's notable 1981 treatise. MURRAY FORSYTH, *UNIONS OF STATES* 10-16 (1981). Kalypso Nicolaidis describes the EU as "neither simply a *Union of democracies* [described in this Article as the IGO model] nor a *Union as democracy* [described in this Article as the federal model]," but a "third way," manifested as a "demoi-cracy" comprised of many peoples and their various states. Kalypso Nicolaidis, *The New Constitution as European Demoi-cracy?*, FEDERAL TRUST ONLINE PAPER NO. 38/03, at 5 (Dec. 2003), at http://www.fedtrust.co.uk/uploads/constitution/38_03.pdf.

more sense to recognize the diversity of Europe and reserve authority to the separate Member States.

Although form often follows function in architecture, the very ability of the EU to function depends upon the form it is given. Of critical importance are the competences granted to its institutions and the interface between those institutions and the Member State governments. The new Constitution is the culmination of the most recent debates on these matters.⁵ This Article will analyze the text of the Constitution to determine how it articulates the newest version of allocation of power between the Union and its members.

II. ANALYZING THE CONSTITUTION

The Constitution is divided into four parts. Part I, which is untitled, broadly defines the Union, its competences, and its institutions. Part II is captioned "The Charter of Fundamental Rights of the Union," and it sets forth the Charter that had previously been adopted as a "solemn proclamation" of the EU but was not included in the treaties.⁶ Part III, the longest section, is titled "The Policies and Functioning of the Union." It incorporates much of the EC Treaty and TEU, with considerable detail on internal market, social, economic, and monetary policy; external action; and the activities of the EU institutions. Part IV contains "General and Final Provisions" and is followed by various protocols and declarations.

5. The Intergovernmental Conference at Nice in 2001 called for a "deeper and wider debate about the future of the European Union" including "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity." Declaration on the Future of the Union, 2001 O.J. (C 80) 85. That same year the Commission issued its White Paper on European Governance, calling for a wide-ranging evaluation of the EU's mission and its methods. Among the many concerns addressed, the White Paper asserted: "The Union needs **clear principles identifying how competence is shared between the Union and its Member States.**" European Governance: White Paper from the Commission to the European Council, EUR. PARL. DOC. (COM 428) 34 (2001) [hereinafter White Paper]. Near the end of 2001 the European Council issued the "Laeken Declaration on the Future of the European Union," which mandated the European Convention that convened in February 2002 and produced the Draft Constitution in July 2003. Among the challenges facing the EU, the Declaration stressed the need to "clarify, simplify and adjust the division of competence between the Union and the Member States in light of the new challenges facing the Union." European Council, The Future of the European Union – Laeken Declaration (Dec. 15, 2001), available at http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm.

6. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 5 (2000). For an analysis of the Charter and its background, see Giorgio Sacerdoti, *The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe*, 8 COLUM. J. EUR. L. 37 (2002) (arguing that the charter will help to clarify European values, will serve as a foretaste of the European constitution, and will strengthen the unity of Europeans as to fundamental rights).

This analysis of the Constitution is organized into categories that are intended to illustrate critical aspects of the relationship between the Union and its Member States. First, certain key characteristics of the EU are examined, including its state-like attributes and the mandate and independence of its institutions. Second, the stated values and objectives of the Union are described, with special attention paid to protection of human rights. Third, there is a review of provisions that assign substantive authority to the EU based on a number of stated or implied principles underlying Union action. Finally, the analysis focuses on five exceptional articles that underscore the Union's continuing commitment to Member State sovereignty.

It should be noted that this Article is focused primarily on the textual content of the Constitution. It is beyond the scope of this analysis to conduct a detailed comparison of the Constitution's provisions with their counterparts in the treaties. Likewise, it will be left to others to evaluate the legislative history of the document.⁷ Comments in this Article on the substantive merits of the Constitution are for illustrative purposes only and are not meant to be comprehensive.

The text of this Article will be set out in point/counterpoint fashion. In general, matters of EU authority will be described first, followed by contrasting comments related to the power reserved to the Member States. For illustrative purposes, descriptions of EU competence will be given in Roman type, and their counterparts printed in italics.

Comment on unanimous voting. The Constitution prescribes that many decisions at the EU level will be adopted only by unanimous vote, also described as consensus or common accord, either of the European Council or Council of Ministers.⁸ Each of these instances affords each Member State the opportunity to block a decision,⁹ and the veto represents a substantial reservation of power to the Member States. To avoid repetition, the implications of unanimous voting will

7. An excellent narrative account of the Convention has been written by Peter Norman. He provides invaluable detail about the mechanics of drafting the Constitution and the politics of negotiating its more controversial provisions. PETER NORMAN, *THE ACCIDENTAL CONSTITUTION—THE STORY OF THE EUROPEAN CONVENTION* (2003).

8. In the Constitution, the European Council is always referred to with its full name, while in all provisions after Article I-19 the Council of Ministers is referred to as the "Council," and the European Commission is referred to as the "Commission." See CONSTITUTION, *supra* note 1, at art. I-19(1). This Article will generally follow those usage conventions.

9. In its 2001 White Paper on European Governance, the Commission observed: "The requirement for consensus in the European Council often holds policy-making hostage to national interests in areas which Council could and should decide by a majority of Member States." White Paper, *supra* note 5, at 29.

not be mentioned in each instance that this Article refers to such a requirement in the Constitution.

A. Characteristics of the EU

The European Union has been endowed with a number of characteristics that demonstrate its autonomy as a governmental entity. These include certain attributes that resemble those of modern nation-states. In addition, the EU is composed of official bodies that are similar to those found in a typical national government. However, a closer look reveals a variety of carefully crafted limitations on the Union and its institutions.

1. Basic State-Like Attributes

Independent existence; integrity. The European Union is an entity created by, but existing apart from, the Member States. It is established by the Constitution,¹⁰ which declares that “[t]he Union shall have legal personality.”¹¹ Within the territory of the Member States, the EU is allowed “such privileges and immunities as are necessary for the performance of its tasks.”¹² The Union is also granted “the most extensive legal capacity accorded to legal persons” under the laws of the states, and in particular, the rights to own property and to be a party to legal proceedings.¹³

The Constitution provides the EU with the typical symbols of nationhood such as a flag, an anthem, a motto, and an annual holiday, as well as a Union currency, the euro.¹⁴

The EU is to consist of “an institutional framework” and a specific set of institutions¹⁵ whose carefully delineated powers and responsibilities comprise a significant percentage of the Constitution’s text. The institutions are empowered to create law for the Union in its variety of forms, and much of the EU’s regulatory activity is to be carried out at the central, EU level.¹⁶ The activities of

10. CONSTITUTION, *supra* note 1, at art. I-1.

11. *Id.* at art. I-7. The EU had not been granted legal personality under the TEU, although the European Community had received such status under the EC Treaty. EC TREATY, *supra* note 2, at art. 281.

12. CONSTITUTION, *supra* note 1, at art. III-434.

13. *Id.* at art. III-426.

14. *Id.* at art. I-8.

15. *Id.* at art. I-19.

16. *Id.* at arts. I-33 to -36. To support its activities, the Union may collect any information necessary to its tasks. *Id.* at art. III-428. It may also compile statistics appropriate to its work. *Id.* at art. III-429. The Union may set the employment laws for its own employees. *Id.* at art. III-427. Union officials and employees are required not to disclose information “of the kind covered by the obligation of professional secrecy.” *Id.* at art. III-430.

the institutions are subject to review by a completely independent Ombudsman appointed by the European Parliament.¹⁷

Like a nation-state, the EU is intended to be a permanent entity with its Constitution intended to be in place “for an unlimited period.”¹⁸ However, the Union’s further expansion is also contemplated. The EU is to be open “to all European States” committed to promotion of the Union’s values.¹⁹

*The corresponding integrity of the Member States. The Constitution unequivocally requires the EU to “respect the equality of Member States . . . , their national identities . . . , [and] their essential state functions.”*²⁰ *The Union and the Member States are treated as equals, and each of them is required to adhere to “the principle of sincere cooperation.”*²¹ *Under this rule, both the Union and the states must “in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.”*²² *Ultimate homage to the integrity of the Member States is found in Article I-60 of the Constitution, which permits a state to unilaterally withdraw from the EU.*²³

*By granting the Union certain rights under Member State law, such as property ownership, the Constitution underscores the vitality of Member State law as well as the legal personality of the EU. Furthermore, the Union is specifically made subject to the contract law of individual Member States and to tort law based on “the general principles common to the laws of the Member States.”*²⁴

*Initial ratification of the Constitution is essentially the same process as ratification of the earlier treaties—each of the Member States must approve the instrument at the national level according to its own constitutional requirements, and the Constitution will become effective only when all states have ratified.*²⁵ *Amendments to the Constitution likewise require unanimous consent of the Member States, effectively giving each state a veto on even minor changes to the highly detailed document.*²⁶ *Furthermore, the accession of new Member States requires unanimous approval by the existing states acting through their national procedures.*²⁷ *And although the EU does have considerable power to run its own affairs, certain politically sensitive issues, such as the location of Union institutions and the*

17. *Id.* at art. I-49.

18. *Id.* at art. IV-446.

19. *Id.* at art. I-58(1).

20. *Id.* at art. I-5(1).

21. *Id.* at art. I-5(2).

22. *Id.*

23. *Id.* at art. I-60; *see infra* text accompanying notes 411-17 (analyzing withdrawal).

24. CONSTITUTION, *supra* note 1, at art. III-431.

25. *Id.* at art. IV-447.

26. *See infra* text accompanying notes 418-21.

27. CONSTITUTION, *supra* note 1, at art. I-58(2).

official use of languages within the institutions, are subject to unanimous adoption.²⁸

Like directives under the previous treaties, the Constitution provides that "European framework laws" will be binding "as to the result to be achieved" but leaving to the Member States "the choice of form and methods."²⁹ Similarly, certain "European regulations" may provide that the states will choose how to implement the desired policy.³⁰ Moreover, in limited circumstances the Member States may be empowered to initiate the EU legislative process.³¹

Budgetary independence. Unlike a typical IGO, the EU is not dependent on yearly contributions from its members. Rather, the Constitution calls on the EU to provide itself, through taxation, with the funds needed to carry out its programs "financed wholly from its own resources."³² The EU is required to adopt an annual budget,³³ which must be balanced,³⁴ and a five-year "multiannual financial framework" that sets annual ceilings for the various categories of expenditures.³⁵ The EU must live within its budget,³⁶ and the Member States are expected to cooperate with the Union to ensure proper use of budgeted monies.³⁷

Elements of Member State control. The Constitution does not give the EU institutions a completely free hand in creating the budget and imposing taxes. European laws "relating to the system of own resources of the Union" and those that create new categories of resources (as well as abolishing any existing category) are subject to both a unanimous vote of the Council and approval by the Member States.³⁸ Furthermore, each multiannual financial framework must be unanimously approved by the Council.³⁹ This consensus-based framework will establish the approved categories of expenditures and

28. *Id.* at arts. III-432 to -433.

29. *Id.* at arts. I-33(1), I-37(1).

30. *Id.*

31. *Id.* at art. I-34(3).

32. *Id.* at art. I-54.

33. *Id.* at arts. I-56, III-404; see also *id.* at arts. III-403 to -415.

34. *Id.* at art. I-53(2).

35. *Id.* at arts. I-55, III-402.

36. *Id.* at art. I-53(5).

37. *Id.* at arts. I-53(6), III-407. The Member States are also required to take steps to "counter fraud affecting the Union's financial interests." *Id.* at art. III-415.

38. *Id.* at art. I-54(3). One commentator has criticized the unanimity requirement: "Unanimity is now required for all relevant decisions related to own resources. Majority voting only applies to implementing measures where specifically provided for in earlier unanimous decisions. In a Union of 25, with crucial decisions on financing on the horizon, this is far from satisfactory." Giovanni Grevi, *Light and shade of a quasi-Constitution*, EPC Issue Paper No. 14, at 8-9 (June 23, 2004), available at <http://www.theepc.net>.

39. CONSTITUTION, *supra* note 1, at art. I-55(2). Furthermore, until the end of 2006 the Constitution requires unanimous Council voting to adopt certain financial rules relating to the EU budget. *Id.* at art. III-412(3).

the annual appropriations ceilings for each category for periods of at least five years.⁴⁰

The requirement of Member State cooperation on the budget is to some extent attributable to the fact that substantial portions of the EU budget are passed along to the Member States in the form of financial support for agriculture and other programs,⁴¹ and these payments are of great importance to the states.

External action. Looking outward, the Union is expected to have “relations with the wider world,” and to contribute to peace, security, sustainable development, mutual respect among peoples, free and fair trade, eradication of poverty, protection of human rights, observance of international law, and respect for the principles of the United Nations Charter.⁴² The external action of the EU is examined in greater detail below, as one of the substantive areas of the Union’s activity.⁴³

Substantial limitations. As the discussion later in this Article will elaborate, the authority of the EU to act in external matters is carefully limited.

EU citizenship. Underscoring the EU’s resemblance to a state, and in stark contrast to a traditional IGO, is the fact that each national of a Member State is designated a “citizen of the Union.”⁴⁴ Citizens are granted numerous rights, including the right to “move and reside freely” in any Member State, the right as a resident to vote and stand as a candidate in municipal and European Parliament elections, certain rights to diplomatic and consular assistance from any Member State, and the right to deal with EU institutions in any official EU language.⁴⁵ The Union is mandated to serve the interests of its citizens⁴⁶ and to offer them “an area of freedom, security and justice without internal frontiers,” along with an effective single market.⁴⁷

To emphasize the benefits of EU citizenship, Part I of the Constitution contains a boldly expressed section titled “The Democratic Life of the Union.”⁴⁸ It begins with a mandate for the EU

40. *Id.* at arts. I-55(1), III-402(1).

41. Reuters, *Chronology—EU Common Agricultural Policy* (June 26, 2003), available at <http://www.forbes.com/business/newswire/2003/06/26/rtr1011815.html>. For the authority to support agriculture, see CONSTITUTION, *supra* note 1, at art. III-228(2).

42. CONSTITUTION, *supra* note 1, at art. I-3(4).

43. See *infra* text accompanying notes 320-41.

44. CONSTITUTION, *supra* note 1, at art. I-10(1).

45. *Id.* at art. I-10(2). Additional legislation relating these rights is contemplated in Part III of the Constitution. *Id.* at arts. III-125 to -129. Rights relating to voting and standing for election are reiterated in Part II of the Constitution. *Id.* at arts. II-99 to -100.

46. *Id.* at art. I-19(1).

47. *Id.* at art. I-3(2).

48. *Id.* at arts. I-45 to -52.

to treat all of its citizens equally,⁴⁹ but much more interesting from an analytical point of view are provisions that underscore the Union's commitment to the principles of "representative democracy" and "participatory democracy."⁵⁰ These articles guarantee citizens the right of direct representation at the Union level in the European Parliament, the right to "participate in the democratic life of the Union," the right to have EU decisions taken "as openly as possible and as closely as possible to the citizen," and the right to act through EU-level political parties.⁵¹ Citizens are also promised a public forum for their views, access for their representative associations, broad consultation from Union officials, and a right of initiative.⁵² Supplementing these concepts are provisions relating to EU dialogue with "social partners,"⁵³ the work of a Union Ombudsman,⁵⁴ a requirement of open meetings by most Union institutions, access to EU documents,⁵⁵ a right of personal data protection,⁵⁶ and respect for the national status of churches and non-confessional organizations.⁵⁷

Qualifications. Unlike a federal nation, the EU offers no more than a supplemental or dual citizenship. The Constitution states: "Citizenship of the Union shall be additional to national citizenship; it shall not replace it."⁵⁸

Rights to vote and stand as a candidate are limited to municipal and European Parliament elections. National and provincial elections are not mentioned, and "municipal" is not defined. Therefore, the Constitution calls for EU legislation to supplement these provisions, but such legislation requires unanimous Council approval and may provide for "derogations where warranted by problems specific to a Member State."⁵⁹ The Constitution also contemplates EU legislation expanding the general rights of citizens as described above, but such laws will require a unanimous vote on the Council and separate ratification by each of the Member States.⁶⁰ The potential for derogations and the requirement of unanimity represent clear limits on the authority of the EU to define the rights of its citizens.

49. *Id.* at art. I-45. Principles of equal treatment and non-discrimination are further discussed in Part II(B)(3) of this Article.

50. *Id.* at arts. I-46 to -47.

51. *Id.* at art. I-46.

52. *Id.* at art. I-47.

53. *Id.* at art. I-48.

54. *Id.* at art. I-49.

55. *Id.* at art. I-50.

56. *Id.* at art. I-51(1). Data protection is also required of Member States when carrying out EU-mandated activities. *Id.* at art. I-51(2).

57. *Id.* at art. I-52. In fact, the EU is required to maintain regular, open, and transparent dialogue with churches and similar organizations. *Id.* at art. I-52(3).

58. *Id.* at art. I-10(1).

59. *Id.* at art. III-126.

60. *Id.* at art. III-129.

Regarding the “democratic life of the Union,” it is significant that the same provision that references citizens’ direct representation at the Union level underscores that the Member States themselves are represented on the European Council and Council, whose respective members are “democratically accountable either to their national parliaments, or to their citizens.”⁶¹ Also, the EU’s mandate to respect churches and non-confessional organizations is specifically tied to their status under the national laws of the Member States.⁶²

In an area related to citizens’ rights, tort claims may be brought by injured persons against the EU “in accordance with the general principles common to the laws of the Member States.”⁶³ Also, the right to consular assistance from another Member State is based on that state’s legal practices in dealing with its own nationals.⁶⁴

2. Mandate and Independence of the EU Institutions

An overview of the EU’s institutions is presented in Part I of the Constitution.⁶⁵ This approach was lacking in the EC Treaty and TEU. Greater detail regarding the functioning of the institutions is relegated to Part III of the Constitution,⁶⁶ which closely resembles the institutional section of the EC Treaty.⁶⁷

General mandate of the institutions. The bodies identified collectively in the Constitution as the “institutional framework” of the EU are the European Parliament, European Council, Council, Commission, and Court of Justice.⁶⁸ Their mandate is to promote the Union’s values, advance its objectives and serve the interests of the Union, its citizens, and the Member States.⁶⁹ In all instances, the institutions are to act within the limits of the Constitution.⁷⁰ As described in a later section of this Article, a significant activity of the institutions is the creation of EU legislation.⁷¹

Respect and residual power. By requiring the EU institutions to serve the interests of the Member States, the Constitution underscores the continuing vitality of the Member States within the Union. But the Constitution requires far more. As noted above, the document requires the EU to respect the national identities of the Member States and

61. *Id.* at art. I-46(2).

62. *Id.* at art. I-52(1).

63. *Id.* at art. II-101(3).

64. *Id.* at art. II-106.

65. Title IV of Part I is titled “The Union’s Institutions and Bodies.” *Id.* at arts. I-19 to -32.

66. *Id.* at arts. III-330 to -401.

67. EC TREATY, *supra* note 2, at arts. 189-267.

68. CONSTITUTION, *supra* note 1, at art. I-19(1).

69. *Id.*

70. *Id.* at art. I-19(3).

71. See *infra* Part II(C)(2) (“How the EU exercises its competence”).

their functioning as states.⁷² The Union and the states appear to be afforded equal status by the Constitution, which uses terms such as "sincere cooperation" and "full mutual respect."⁷³

The residual power of the Member States vis-à-vis the EU institutions is affirmed by limiting EU activity to what is conferred on the Union "by the Member States in the Constitution to attain the objectives set out in the Constitution."⁷⁴ This limit is reinforced by the requirement of Member State unanimity to amend the Constitution.⁷⁵ In addition, the national parliaments of the states must be advised of all proposed EU legislation,⁷⁶ and they may object to legislative acts that might violate the principle of subsidiarity.⁷⁷ If objections do not obtain the desired results, groups of Member States may force reconsideration,⁷⁸ and any state may challenge the legislation by bringing an action in the European Court of Justice.⁷⁹

European Parliament. The Parliament resembles a traditional national parliament in that it is elected by popular vote of the EU citizens, meets annually, elects its own officers, and participates in enacting legislation and approving the EU budget.⁸⁰ Its members are affiliated with European-level political parties.⁸¹ The Parliament may set up committees of inquiry to investigate improper implementation of EU law,⁸² and it has the responsibility to appoint the permanent European Ombudsman to receive citizen complaints about EU institutions.⁸³ The European Parliament determines its own rules of procedure,⁸⁴ although the Constitution mandates that decisions of the Parliament generally require a majority of the votes cast.⁸⁵

72. CONSTITUTION, *supra* note 1, at art. I-5(1). See notes 20-31 *supra* and accompanying text.

73. CONSTITUTION, *supra* note 1, at art. I-5(2).

74. *Id.* at art. I-11(2).

75. *Id.* at arts. IV-443 to -445. See *infra* text accompanying notes 418-21.

76. Protocol on the Role of National Parliaments in the European Union, 2003 O.J. (C 169) 94, art. 3 [hereinafter Protocol on National Parliaments].

77. CONSTITUTION, *supra* note 1, at arts. I-18(2), I-11(3), III-259. See also Protocol on the Application of the Principles of Subsidiarity and Proportionality, 2003 O.J. (C 169) 95 [hereinafter Protocol on Subsidiarity] (establishing a system for the monitoring of the principles of subsidiarity and proportionality). Peter Norman reports that the Protocol on National Parliaments and the Protocol on Subsidiarity were "beefed up somewhat" at the Convention "to increase the Member States' safeguards against any centralising urges emanating from Brussels." NORMAN, *supra* note 7, at 252.

78. Protocol on Subsidiarity, *supra* note 77, at art. 6.

79. *Id.* at art. 7; CONSTITUTION, *supra* note 1, at art. III-365(2).

80. CONSTITUTION, *supra* note 1, at arts. I-20, III-336. Greater detail on the Parliament is found in Part III of the Constitution. *Id.* at arts. III-330 to -340.

81. *Id.* at art. III-331.

82. *Id.* at art. III-333.

83. *Id.* at art. III-335.

84. *Id.* at art. III-339.

85. *Id.* at art. III-338.

Upon a proposal by the European Council, Parliament elects the President of the Commission.⁸⁶ It further enjoys the power to approve the slate of Commissioners nominated by the President-elect,⁸⁷ and it can force the resignation of the entire Commission.⁸⁸ Notably, however, the European Parliament lacks the traditional power of a national legislature to appoint and remove the highest governmental officials – in the Union, both the European Council and Council are beyond Parliament’s supervision.⁸⁹ Even more noteworthy is the fact that Parliament is denied the most basic competence of a legislature, namely, the right to initiate legislation.⁹⁰ This power is generally reserved to the Commission.⁹¹

Member State authority. The system for electing the Parliament is subject to both a unanimous vote of the Council and separate ratification by the Member State governments.⁹² And while the Constitution sets a maximum size of the European Parliament and a minimum of six representatives per Member State, the actual composition of the European Parliament will be subject to a unanimous vote of the European Council.⁹³ In addition, the Council must vote unanimously on any rules relating to taxation of Parliament’s members.⁹⁴

The Parliament’s inability to control the European Council and Council reflects a significant power residing in the Member States, Representatives on the two Councils are ministerial-level officials of the national governments, and as such they are answerable to their national parliaments.⁹⁵ On the other hand, the limits of Parliament’s legislative power do not correlate to any broad reservation of authority to the Member States, because the power to initiate EU legislation is generally in the hands of the Commission.⁹⁶

European Council. The European Council has emerged from the haze of the EC Treaty and the TEU as a body the Constitution

86. *Id.* at arts. I-20(1), I-27(1).

87. *Id.* at art. I-27(2).

88. *Id.* at arts. I-26(8), III-340.

89. See *infra* text accompanying note 95.

90. The Parliament may, however, “request” the Commission to submit particular legislative proposals, and the Commission must inform the Parliament of its reasons if it does not comply with the request. CONSTITUTION, *supra* note 1, at art. III-332.

91. *Id.* at art. I-26(2). In certain instances legislation may be initiated by a group of Member States, the European Parliament, or other EU bodies. *Id.* at art. I-34(3).

92. *Id.* at art. III-330(1).

93. *Id.* at art. I-20(2).

94. *Id.* at art. III-330(2).

95. *Id.* at arts. I-21(2), I-23(2), I-46(2). See *infra* text accompanying notes 97-111 (describing the European Council), 112-28 (describing the Council).

96. See *supra* note 91 regarding exceptions to the Commission’s exclusive right to initiate legislation.

includes among the Union's institutions.⁹⁷ The Constitution calls on the European Council to meet quarterly⁹⁸ in order to set the "general political directions and priorities" of the Union.⁹⁹ However, actual legislating is reserved to the Council and the European Parliament,¹⁰⁰ because the European Council "shall not exercise legislative functions."¹⁰¹

The European Council consists of the heads of state or government of each of the Member States, a President, and the President of the Commission,¹⁰² although the latter two are not entitled to vote.¹⁰³ By virtue of the stature of its voting members, the European Council represents the supreme executive authority within the European Union, and even if it technically refrains from legislating, its members certainly possess the political power to instruct or influence their counterparts on the Council on legislative matters.

The President of the European Council¹⁰⁴ is a new position created by the Constitution to replace the half-yearly rotating presidency under the treaties.¹⁰⁵ The President will serve a two-and-one-half-year term, renewable once,¹⁰⁶ and may not hold a national mandate during his or her term.¹⁰⁷ In addition to chairing the European Council, the President will provide cohesive external representation for the European Union,¹⁰⁸ along with another newly created official, the Union Minister for Foreign Affairs.¹⁰⁹

Representing the Member States. Because the representatives on the European Council are the heads of state or government of the Member States, each member of this body will be expected to promote and protect the interests of his or her nation. This is in stark contrast to other EU institutions—such as the Commission, the European Court of Justice (ECJ), and European Central Bank—whose members are required to act independently and without regard to any national consideration.¹¹⁰ Furthermore, the default voting rule for decisions of

97. CONSTITUTION, *supra* note 1, at arts. I-19(1), III-341. The European Council is not listed as an institution in the EC Treaty or TEU, but it is mentioned in the treaties. See, e.g., EC TREATY, *supra* note 2, at arts. 7, 11; TEU, *supra* note 2, at arts. 4, 5.

98. CONSTITUTION, *supra* note 1, at art. I-21(3).

99. *Id.* at art. I-21(1).

100. *Id.* at art. I-23(1).

101. *Id.* at art. I-21(1).

102. *Id.* at art. I-21(2).

103. *Id.* at art. I-25(4).

104. *Id.* at art. I-22.

105. EC TREATY, *supra* note 2, at art. 203.

106. CONSTITUTION, *supra* note 1, at art. I-22(1).

107. *Id.* at art. I-22(3).

108. *Id.* at art. I-22(2).

109. *Id.* at art. I-28.

110. *Id.* at arts. I-26(7), I-29(2), I-30(3).

the European Council is consensus, thus ensuring that each Member State has a veto in the broad policy decisions of the Union.¹¹¹

Council of Ministers. The Council serves as the upper legislative chamber of the EU. It must enact legislation jointly with the European Parliament.¹¹² It also serves as the Union's senior executive body, to exercise the budgetary function and "carry out policy-making and coordinating functions."¹¹³ Although it may not of itself initiate legislation, it may request the Commission to do so, and the Commission must either comply or justify its inaction.¹¹⁴

The Council meets in various "configurations" depending on the subject under consideration,¹¹⁵ but each configuration is composed of one ministerial level representative from each Member State.¹¹⁶ The presidencies of all configurations other than Foreign Affairs are to be shared by groups of three states, serving collectively for eighteen months, with each state holding all of the presidencies for six months during the eighteen-month term.¹¹⁷ The groups are to be assigned on the basis of "equal rotation among the Member States, taking into account their diversity and geographical balance within the Union."¹¹⁸ The Council is assisted by a full-time administrative staff, including a Committee of Permanent Representatives (COREPER) and a General Secretariat.¹¹⁹

The ordinary decisional requirement for the Council is that it will act on the basis of a qualified majority vote (QMV).¹²⁰ Beginning

111. *Id.* at art. I-21(4). The Constitution provides in specific instances for European Council decisions to be taken by less than unanimity. For situations calling for a qualified majority vote, see *id.* at arts. I-22(1) (election of the European Council President), I-27(1) (selection of the Commission President), I-28(1) (appointment or removal of the Union Minister for Foreign Affairs), III-382(2) (appointment of the Executive Board of the European Central Bank). Abstentions by a member of the European Council will not prevent unanimous decisions from being taken. *Id.* at art. III-341(1). The European Council may adopt its own procedural rules by simple majority vote. *Id.* at art. III-341(3). It may also decide by simple majority whether to examine proposed amendments to the Constitution and whether to convene a new constitutional convention. *Id.* at art. IV-443(2).

112. *Id.* at art. I-23(1). Further details on the Council are presented in Part III of the Constitution. *Id.* at arts. III-342 to -346.

113. *Id.* at art. I-23(1).

114. *Id.* at art. III-345.

115. *Id.* at art. I-24(1).

116. *Id.* at art. I-23(2). The Union Minister for Foreign Affairs is an additional member, and chair, of the Foreign Affairs configuration. *Id.* at art. I-28(3).

117. Draft Decision of the European Council on the Exercise of the Presidency of the Council of Ministers, art. 1, CIG 81/04, at 13 (June 16, 2004) [hereinafter Draft Decision]. See CONSTITUTION, *supra* note 1, at art. I-24(7) (mandating the European Council's decision).

118. Draft Decision, *supra* note 117, art. 1.

119. CONSTITUTION, *supra* note 1, at art. III-344.

120. *Id.* at art. I-23(3). The "ordinary legislative procedure" for adopting European laws or framework laws is set forth in Article III-396 of the Constitution. *Id.* at art. III-396.

in 2009, the usual formula for a QMV will be approval by “at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union.”¹²¹ Thus, because more than half of the states must be represented in a prevailing vote, no small group of the largest Member States will be able to dictate decisions. On the other hand, because of the sixty-five percent population rule, a small group of the largest states will be able to prevent a successful vote, although the Constitution requires at least four states to form a “blocking minority.”¹²² Under qualified majority voting, no single Member State will have the ability to block EU legislation.

An additional voice for the Member States. There is little question that members of the Council, like their counterparts on the European Council, are expected to represent the separate interests of the Member States. There is no requirement for the ministers to act independently, and in fact the Constitution speaks of them as having the authority to “commit the government of the Member State in question and cast its vote.”¹²³ The influence of each state is further protected by the guarantee that the presidencies of most Council configurations must be assigned on the basis of “equal rotation” among the states.¹²⁴

Despite the fact that the standard requirement is that Council decisions be made by qualified majority vote, the Constitution contains numerous provisions requiring the Council to act unanimously.¹²⁵ The

121. *Id.* at art. I-25(1); Protocol on the Transitional Provisions Relating to the Institutions and Bodies of the Union, art. 2(1), CIG 86/04, at 326 (June 28, 2004). The Constitution’s QMV formula represents a departure from the weighted voting formulas inserted into the EC Treaty through the Treaty of Nice. EC TREATY, *supra* note 2, at art. 205. The formula proposed by the Convention was a majority of Member States representing three-fifths of the EU population, but this had been blocked by Spain and Poland at the December 2003 meeting of the Intergovernmental Conference. Thomas Fuller, *Split on Weighted Voting Sinks the EU Charter Talks*, INT’L HERALD TRIB., Dec. 15, 2003, at 1. In addition to the standard sixty-five/fifty-five formula, in certain instances the voting requirement is seventy-two percent of Council members representing at least sixty-five percent of the Union population. CONSTITUTION, *supra* note 1, at art. I-25(2).

122. CONSTITUTION, *supra* note 1, at art. I-25(1). Giovanni Grevi observes that the requirement of four states to form a blocking minority will “prevent Germany, the UK, France or Italy from forming a blocking coalition of three.” Grevi, *supra* note 38, at 6. However, a draft Council decision will require the Council to reconsider any measure if requested by Member States with three-fourths of the population or three-fourths of the number of states necessary to form a blocking minority. Draft Council Decision relating to the Implementation of Article I-25 [previously Article I-24], art. 1, CIG 85/04, at 8 (June 18, 2004).

123. CONSTITUTION, *supra* note 1, at art. I-23(2).

124. *Id.* at art. I-24(7).

125. See *id.* at arts. I-27(2) (common accord), III-124(1), III-125(2), III-126, III-129, III-157(3), III-158(4), III-168(2), III-171(1), III-173, III-176, III-184(13), III-185(6), III-210(3), III-212(2), III-223(2), III-234(2), III-237, III-256(3), III-269(3), III-270(2), III-271(1), III-274(1), III-274(4), III-275(3), III-277, III-291, III-300(1), III-312(6) (certain Member States only), III-315(4), III-325(8), III-326(1), III-330(1)-(2), III-348(2), III-354,

Constitution does extend QMV to new areas,¹²⁶ but it retains the consensus requirement in many key policy areas, as noted at various points in this Article.¹²⁷ In addition, amending the Council's voting procedures in any area requires a unanimous decision by the European Council and the right of any national parliament to block the change.¹²⁸

European Commission. The Commission acts as the permanent executive and chief administrative body of the European Union, and it has the primary role in proposing new EU legislation.¹²⁹ The Commission serves as the promoter of "the general interest of the Union," guardian of the Constitution, and manager of the EU budget and programs.¹³⁰ It also has the task of enforcing EU law,¹³¹ and its enforcement responsibilities extend even to the Member States.¹³² The Commission is required to be independent at all times, and its members may not "seek nor take instructions from any government or other institution, body, office or agency."¹³³ It is, however, answerable to the European Parliament, which may censure the Commission and force its members' resignation.¹³⁴

In a controversial departure from the system under the treaties, which allowed each Member State full voting representation on the Commission at all times,¹³⁵ the Constitution provides for eventual reduction in the size of the body. Commencing in 2014 the

III-359(4), III-386, III-389, III-393, III-395(1), III-396(9), III-412(3), III-419(2), III-420(2), III-421, III-422(1)-(2), III-433, III-436(2). Note that this list is not exhaustive, because certain other provisions may contain cross-references to the unanimous voting requirements of these articles. See, e.g., *id.* at art. III-405(2).

126. Two commentators have described the additional areas for QMV as "technical policy areas with cross-border implications. . . ." Brendan Donnelly & Lars Hoffmann, *All change or no change? Convention, constitution and national sovereignty*, FEDERAL TRUST POLICY BRIEF, at 3 (Nov. 2003), at <http://www.fedtrust.co.uk/admin/uploads/PolicyBrief1.pdf>.

127. In a thought-provoking analysis, Andreas Føllesdal argues that the move toward more QMV decision-making in the EU "requires a well-developed trust in other Europeans and officials," and that it is "unsurprising that the default procedure [QMV] does not apply in a number of key cases involving legislation on matters close to national sovereignty." Andreas Føllesdal, *Achieving Stability? Forms and Arenas of Institutional and National Balances in the Draft Constitutional Treaty*, FEDERAL TRUST ONLINE PAPER NO. 06/04, at 5 (Mar. 2004), at http://www.fedtrust.co.uk/uploads/constitution/06_04.pdf.

128. CONSTITUTION, *supra* note 1, at art. IV-444(3).

129. *Id.* at art. I-26(2). Additional details regarding the Commission are found in Part III of the Constitution. *Id.* at arts. III-347 to -352.

130. *Id.* at art. I-26(1).

131. *Id.*

132. *Id.* at art. III-360.

133. *Id.* at art. I-26(7). Member States are required to respect the Commissioners' independence and "not seek to influence them in the performance of their tasks." *Id.* at art. III-347.

134. *Id.* at art. I-26(8).

135. EC TREATY, *supra* note 2, at art. 213.

Commission's membership will consist of representatives from two-thirds of the Member States, including its President and the Union Minister for Foreign Affairs¹³⁶—each of whom will serve a five-year term.¹³⁷ Representation on the Commission is to be assigned with demographic and geographical diversity in mind but also on the basis of a strictly enforced “equal rotation between the Member States.”¹³⁸

In keeping with the Commission's status as a central organ of the EU, members of the Commission, its President, and the Union Minister for Foreign Affairs are appointed by other EU institutions.¹³⁹ The President is nominated by a qualified majority vote of the European Council and elected by the European Parliament.¹⁴⁰ The European Council, with the consent of the President-elect, also “appoint[s]” the Union Minister for Foreign Affairs by qualified majority vote.¹⁴¹ Each of the Member States to be represented on the Commission then “suggest[s]” its candidate to the Council and President-elect; the Council and President-elect then, by common accord, adopt the list of candidates. The entire slate of President, Foreign Affairs Minister, and Commissioners is then submitted for approval by the Parliament and is thereafter appointed by a QMV vote of the European Council.¹⁴²

Once the Commission is approved, its President is empowered to determine its internal organization, while the Commission adopts its own rules of procedure.¹⁴³ Commission decisions are taken by majority vote.¹⁴⁴

Limited Member State influence. In general, the Constitution creates considerable institutional separation between the Member States and the Commission. The only Commission-related matters subject to direct state influence are the consensus voting requirement for the European Council to determine the Commission's rotation¹⁴⁵ and the exclusive right of each Member State to name its candidate for a seat on the Commission.¹⁴⁶

136. CONSTITUTION, *supra* note 1, at art. I-26(6).

137. *Id.* at art. I-26(3). A Commissioner must resign if so requested by the Commission President, or upon the order of the ECJ. *Id.* at arts. I-27(3), III-349. A replacement will be selected in the same fashion as the original appointment. *Id.* at art. III-348(2).

138. *Id.* at art. I-26(6).

139. *Id.* at arts. I-27, I-28(1).

140. *Id.* at art. I-27(1).

141. *Id.* at art. I-28(1).

142. *Id.* at art. I-27(2).

143. *Id.* at arts. I-27(3), III-350, III-352.

144. *Id.* at art. III-351.

145. *Id.* at art. I-26(6).

146. *Id.* at art. I-27(2).

Other bodies. The European Court of Justice (ECJ),¹⁴⁷ European Central Bank (ECB),¹⁴⁸ and Court of Auditors¹⁴⁹ are bodies that are central to the EU and independent of the other Union institutions and the Member States. The Constitution also provides for a European Investment Bank to carry out the financing of certain EU projects.¹⁵⁰ In addition, there are two EU advisory committees, the Committee of the Regions and the Economic and Social Committee,¹⁵¹ whose members are not to be subject to any mandatory instructions, are to be “completely independent,” and are to pursue “the Union’s general interest.”¹⁵²

Both the ECJ and the ECB are granted certain power over the Member States. The Court may try cases brought by the Commission against a state or by one Member State against another, the ground for action being that the accused state “has failed to fulfil an obligation under the Constitution.”¹⁵³ The ECJ may also issue judgments requiring the defendant state to comply with a Court decision, or, failing that, to pay a “lump sum or penalty payment.”¹⁵⁴ The ECB is given sweeping power over the monetary policies of the Member States within the euro-zone.¹⁵⁵

Member State involvement. *The ECJ is composed of one judge from each of the Member States, and the appointment of judges is to be accomplished by “common accord” of the states.*¹⁵⁶ *Supplementing the Court-related provisions of the Constitution, the Statute of the Court of Justice is set forth in a Protocol, which is attached to and part of the Constitution.*¹⁵⁷ *Certain provisions of the Statute may be amended only through the elaborate procedure required to amend the Constitution itself, which requires ratification by each Member State.*¹⁵⁸

The ECJ’s jurisdiction in suits against the Union is exclusive only to the extent that jurisdiction is specifically conferred by the

147. *Id.* at art. I-29. A great deal of detail about the ECJ, its related bodies, and its jurisdiction is found in Part III of the Constitution. *Id.* at arts. III-353 to -381.

148. *Id.* at art. I-30(3). For more detail regarding the ECB, see *id.* at arts. III-185 to -202.

149. *Id.* at art. I-31. Additional provisions are found in Part III of the Constitution. *Id.* at arts. III-384 to -385.

150. *Id.* at arts. III-393 to -394.

151. *Id.* at arts. I-32, III-386 to -392.

152. *Id.* at art. I-32(4).

153. *Id.* at arts. III-360 to -361.

154. *Id.* at art. III-362.

155. *Id.* at art. I-30. Monetary policy is dealt with in greater detail in Part III of the Constitution. *Id.* at arts. III-185 to -202.

156. *Id.* at arts. I-29(2), III-355. Advocates-General and members of the General Court (formerly the Court of First Instance) are also chosen by common accord of the Member States. *Id.* at arts. III-355 to -356.

157. *Id.* at arts. III-381, IV-442.

158. *Id.* at arts. III-381, IV-443.

*Constitution. In other cases, the courts of the Member States will have concurrent jurisdiction.*¹⁵⁹ *In general, the ECJ will have no jurisdiction in matters related to the common foreign and security policy or the common security and defense policy.*¹⁶⁰ *The Court's jurisdiction is also restricted in matters relating to the area of freedom, security, and justice, if such matters have been reserved to the Member States.*¹⁶¹

*The ECB does not eliminate the central banks of the euro-zone Member States. Rather, each state in the euro-zone will place its national central bank's governor on the ECB's Governing Council,*¹⁶² *and the national banks participate in carrying out the central monetary policy.*¹⁶³ *However, the national central banks must, in their EU activity, be completely independent of their national governments.*¹⁶⁴ *Those Member States that are outside the euro-zone continue to enjoy substantial autonomy over their own monetary policies,*¹⁶⁵ *although they are required to cooperate with the Union on matters such as exchange-rate policy.*¹⁶⁶

*The Court of Auditors is composed of one national from each Member State, with each member being proposed by his or her state.*¹⁶⁷ *Once appointed to the Court, the members must act with complete independence.*¹⁶⁸ *The members of the European Investment Bank (EIB) are the Member States themselves, and the EIB's Statute, which is a Protocol to the Constitution, can be amended only by a unanimous vote of the Council.*¹⁶⁹ *The members of the EU's two advisory committees are proposed by the Member States, and allocation of committee seats is by a unanimous vote of the Council.*¹⁷⁰

B. Values and Objectives

Both the EC Treaty and the TEU contain broad statements of values and objectives,¹⁷¹ and the drafters of the Constitution have seized the opportunity to include such expressions in the new

159. *Id.* at art. III-375.

160. *Id.* at art. III-376. *See infra* text accompanying notes 342-76 (discussing the CFSP and CSDP).

161. *Id.* at art. III-377. *See infra* text accompanying notes 377-96 (discussing the AFSJ and the rights of the Member States).

162. *Id.* at art. III-382(1).

163. *Id.* at art. I-30(1). National central banks, for example, may be authorized by the ECB to issue euro notes. *Id.* at art. III-186.

164. *Id.* at art. III-188.

165. *Id.* at arts. III-197 to -202.

166. *Id.* at art. III-200.

167. *Id.* at arts. I-31(3), III-385(2).

168. *Id.* at arts. I-31(3), III-385(3).

169. *Id.* at art. III-393.

170. *Id.* at arts. III-386, III-389 to -390.

171. *See* TEU, *supra* note 2, at pmb., arts. 1-3, 6; EC TREATY, *supra* note 2, at pmb., arts. 2-6.

document.¹⁷² However, in and among the goals for the Union, the authors of the Constitution have chosen to include affirmations of the Member States and their separate traditions.

1. Union Values

The Constitution's Preamble emphasizes the "cultural, religious and humanist inheritance of Europe" and the "universal values of the inviolable and inalienable rights of the human person, democracy, equality, freedom and the rule of law."¹⁷³ The Preamble to Part II of the Constitution, the Charter of Fundamental Rights of the Union, reiterates these ideas.¹⁷⁴

References to the EU's values may also be found within the body of the Constitution. The Union is to be open "to all European States which respect its values and are committed to promoting them together."¹⁷⁵ Article I-2 is titled "The Union's Values," and it identifies them as "respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."¹⁷⁶ Thereafter the Union and its institutions are called upon to promote its values;¹⁷⁷ for example, these values are to be the foundation for the EU's relationships with its neighboring states.¹⁷⁸ Member States may be requested to take action to "protect the Union's values and serve its interests."¹⁷⁹ To demonstrate the seriousness of the Union's commitment to its stated values, the Constitution permits the EU to suspend the Constitutional rights of a Member State if it commits a "serious and persistent breach" of the values articulated in Article I-2.¹⁸⁰

National traditions. Prefacing a statement about closer union and common destiny, the Constitution's Preamble speaks of the "peoples" of Europe (not "people") who remain "proud of their own national identities and history."¹⁸¹ The paradoxical phrase "united in its

172. See CONSTITUTION, *supra* note 1, at pmb., arts. I-2 to -3.

173. *Id.* at pmb.

174. *Id.* at pt. II(pmb.).

175. *Id.* at art. I-1(2).

176. *Id.* at art. I-2. The values expressed in Article I-2 are amplified in Part III of the Constitution, relating to the EU's external action. *Id.* at art. III-292(1).

177. *Id.* at arts. I-3(1), I-3(4), I-19(1).

178. *Id.* at art. I-57(1).

179. *Id.* at art. I-41(5).

180. *Id.* at art. I-59; see *infra* text accompanying notes 405-10 (discussing suspension of rights).

181. CONSTITUTION, *supra* note 1, at pmb. Commenting on "people" versus "peoples," Kalypso Nicolaidis argues that homogeneous European community is not necessary. "Our European democracy is predicated on the mutual recognition, confrontation and ever more demanding sharing of our respective and separate identities – not on their merger." Nicolaidis, *supra* note 4, at 5.

diversity” is also used, and credit is given to the European Convention for having written the Constitution on behalf of the “States of Europe” as well as for the citizens of Europe.¹⁸² The Preamble to Part II declares that the Union respects “the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.”¹⁸³

Article I-2 of the Constitution refers to values that are “common to the Member States.”¹⁸⁴ The Preamble to Part II also proclaims regard for “the constitutional traditions and international obligations common to the Member States.”¹⁸⁵ Elsewhere, the Constitution affirms the EU’s respect for the status of churches and other religious and secular associations under the national laws of the Member States.¹⁸⁶

2. Union Objectives

The Constitution’s Preamble speaks of a “reunited” Europe that “intends to continue along the path of civilisation, progress and prosperity.”¹⁸⁷ This Europe also “wishes to remain a continent open to culture, learning and social progress . . . to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world.”¹⁸⁸ In correspondingly broad terms the Preamble to Part II emphasizes the objective of strengthening the “protection of fundamental rights.”¹⁸⁹ This goal is the subject of a separate analysis below.

The substantive text of the Constitution likewise contains references to the EU’s objectives. The principal section is Article I-3, appropriately titled “The Union’s Objectives.” It describes the Union’s aims as promoting peace, well-being, freedom, security, justice, a single market, sustainable development, full employment, social progress, and protection of the environment.¹⁹⁰ Similar objectives are stated in the initial provisions of Part III of the Constitution.¹⁹¹ Article I-4 adds the goal of guaranteeing the “four freedoms” on which the internal market is based,¹⁹² and it prohibits within the EU “any discrimination on grounds of nationality.”¹⁹³

182. CONSTITUTION, *supra* note 1, at pmbl.

183. *Id.* at pt. II(pmbl.).

184. *Id.* at art. I-2.

185. *Id.* at pt. II(pmbl.).

186. *Id.* at art. I-52(1).

187. *Id.* at pmbl.

188. *Id.*

189. *Id.* at pt. II(pmbl.).

190. *Id.* at art. I-3.

191. *Id.* at arts. III-115 to -120.

192. *Id.* at art. I-4(1).

193. *Id.* at art. I-4(2); *see infra* note 286 (describing the four freedoms).

In broad terms, the EU institutions are required to “advance” the Union’s objectives,¹⁹⁴ not only within the Union, but in “the wider world.”¹⁹⁵ At the same time, the Member States are expected to “facilitate the achievement of the Union’s tasks and refrain from any measure which would jeopardise the attainment of the Union’s objectives.”¹⁹⁶ Interestingly, where the Constitution permits “enhanced cooperation” among groups of Member States—an activity that arguably undercuts the solidarity of the EU—even such programs are mandated to “further the objectives of the Union.”¹⁹⁷

Member State objectives. In establishing the EU, the Constitution’s stated purpose is “to attain objectives” that the Member States “have in common,” and the Union is required to “coordinate the policies by which the Member States aim to achieve these objectives.”¹⁹⁸ In the provisions of Article I-3, the Union is mandated to promote the well-being of its “peoples” rather than its “people.”¹⁹⁹ Its goals further include “economic, social and territorial cohesion, and solidarity among Member States,” as well as respect for the Union’s “rich cultural and linguistic diversity.”²⁰⁰ The EU is expected to take steps to achieve its objectives, but only by “appropriate means, depending on the extent to which the relevant competences are conferred upon it in the Constitution.”²⁰¹

In one of the more interesting turns of phrase in the Constitution, the EU is mandated to exercise its conferred competences “in the Community way.”²⁰² These words were inserted to replace an early draft’s more ambitious phrase “on a federal basis.”²⁰³ No doubt because of the anti-federalist sensitivities of many European leaders,

194. CONSTITUTION, *supra* note 1, at art. I-19(1).

195. *Id.* at art. I-3(4).

196. *Id.* at art. I-5(2).

197. *Id.* at art. I-44(1); *see infra* text accompanying notes 400-04 (discussing the significance of enhanced cooperation).

198. CONSTITUTION, *supra* note 1, at art. I-1(1). Andreas Føllesdal warns that the Constitution pays “insufficient attention to the relationship between the objectives of the Union institutions and those of Member States, and their relative importance.” Føllesdal, *supra* note 127, at 5.

199. CONSTITUTION, *supra* note 1, at art. I-3(1).

200. *Id.* at art. I-3(3).

201. *Id.* at art. I-3(5). The Constitution emphasizes that the authority of the EU to pursue its objectives arises directly and solely from the competences conferred upon it by the Member States. *Id.* at arts. I-1(1), I-11(1). *See infra* text accompanying notes 224-31 (discussing the principle of conferral).

202. CONSTITUTION, *supra* note 1, at art. I-1(1).

203. The Preliminary Draft of the Constitution described “[a] Union of European States which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain common competences on a federal basis.” Praesidium of the European Convention, Preliminary Draft Constitutional Treaty, CONV 369/02, Oct. 28, 2002, pt. 1, art. 1.

the “infamous F-word”²⁰⁴ is never used in the Constitution to describe the Union’s objectives or institutions.²⁰⁵

3. Protection of Rights of Individuals

As already noted, Part II of the Constitution incorporates the Charter of Fundamental Rights of the Union (the Charter) into European Union law.²⁰⁶ This development gives substance to the conviction held by many that the EU must extend its objectives beyond the economic sphere, and the inclusion of a human rights charter in the Constitution represents a potentially profound step in a new direction. The following brief analysis illustrates both the new responsibilities assigned to the Union and the considerable deference that the Constitution pays to the role of Member States in the field of individual rights.

The Charter begins with a Preamble that acknowledges the Union’s heritage and traditions, the diversity of its peoples, and the identities of the Member States. Against that background, the Preamble concludes with the following commitment: “The Union therefore recognizes the rights, freedoms and principles set out hereafter.”²⁰⁷ The ensuing text is divided into titles such as “Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights and Justice.” In a final title relating to general application of the Charter, it is noted that the provisions of the Charter “are addressed to the Institutions, bodies, offices and agencies of the Union . . . and to the Member States only when they are implementing Union law.”²⁰⁸ Thus, EU activity at all levels is subject to the Charter’s sweeping principles.

Apart from the Charter, the Constitution requires the Union to “accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.”²⁰⁹ A 1996 ruling of the ECJ had concluded that the European Community lacked the competence to do so.²¹⁰ The Constitution also incorporates as “general principles of the

204. Markus G. Puder, *Constitutionalizing the European Union – More Than a Sense of Direction From the Convention on the Future of Europe*, 26 *FORDHAM INT’L L.J.* 1562, 1583 (2003).

205. Kalypso Nicolaidis argues forcefully that the word “federal” might appropriately be used for the hybrid EU but in the sense of a “federal union, not as a federal state.” He concedes that the phrase “community way” is “an acceptable second best.” Nicolaidis, *supra* note 4, at 6.

206. CONSTITUTION, *supra* note 1, at pt. II, arts. II-61 to -114.

207. *Id.* at pt. II(pmb1.).

208. *Id.* at art. II-111(1).

209. *Id.* at art. I-9(2).

210. The ECJ ruled: “As Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms because no provision of the Treaty confers on the Community institutions in a general way the power to enact rules concerning human rights or to conclude international agreements in this field. . . .” Case 2/94, *Accession*

Union's law" the fundamental rights resulting "from the constitutional traditions common to the Member States."²¹¹ Last, a series of articles in Part III of the Constitution, titled "Non-Discrimination and Citizenship," provides for EU legislation relating to nationality-based discrimination and the rights guaranteed to EU citizens.²¹²

Member State law and practice. With respect to human rights, the most significant reference to the Member States in Part I of the Constitution is the provision that incorporates as general principles of EU law the fundamental rights resulting from "the constitutional traditions common to the Member States."²¹³ In essence, this imposes on private parties, Union institutions, and even the states themselves the daunting task of studying the laws of all of the EU nations to discern these common traditions.

Part II of the Constitution, the Charter, contains numerous references to national laws of the Member States. For example, the right to education is to be respected "in accordance with the national laws governing the exercise of such freedom and right."²¹⁴ The right to conduct business is recognized but "in accordance with Union law and national laws and practices."²¹⁵ The same joint reference to EU law and national laws and practices is found in provisions relating to certain rights of workers²¹⁶ and rights relating to social security and social assistance.²¹⁷ Moreover, health care rights and rights of "access to services of general economic interest" are tied to "the conditions established by national laws and practices."²¹⁸

In the general provisions at the end of the Charter, emphasis is given to the limits of Union competence and the principle of subsidiarity.²¹⁹ In forceful terms it is stated that the Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution."²²⁰

Last, the provisions on interpretation of the Charter reiterate the need, in certain circumstances contemplated in the Charter, to recognize the constitutional traditions common to the Member States

by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759 (advisory opinion).

211. CONSTITUTION, *supra* note 1, at art. I-9(3).

212. *Id.* at arts. III-123 to -129; *see supra* text accompanying notes 44-64 (discussing EU citizenship).

213. CONSTITUTION, *supra* note 1, at art. I-9(3).

214. *Id.* at art. II-74(3).

215. *Id.* at art. II-76.

216. *Id.* at arts. II-87 to -88, II-90.

217. *Id.* at art. II-94.

218. *Id.* at arts. II-95 to -96.

219. *Id.* at art. II-111(1).

220. *Id.* at art. II-111(2).

and to take “full account” of the national laws and practices of the states.²²¹ The Charter also prohibits any interpretation of its provisions in a manner that would adversely affect human rights recognized elsewhere by Union law, by international agreements to which the EU or individual states may be a party, or by Member State constitutions.²²²

C. Relationship Between EU and Member State Competences

In the preceding analyses of the essential nature and the values of the European Union, the Constitution’s textual emphasis on both the Union and its Member States has been demonstrated. Beyond these statements and affirmations, the Constitution addresses the separate competences of the EU and the states in a clearer, more formal manner than was articulated in the treaties. One of the great contributions of the Constitution may well be this increased attention to describing the allocation of power between the EU institutions and the governments of the Member States.

1. Principles Underlying EU Action

The Constitution reveals a number of foundational principles that both reinforce and restrict Union power. Most of these precepts are expressed in a series of articles in Part I, gathered under the heading “Union Competences.”²²³

Conferral. The Constitution grants a wide range of power and authority to the EU, but the first principle is one of limitation.

Power flows from the Member States. The first article in the Constitution states that “this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.”²²⁴ Furthermore, “[t]he limits of Union competences are governed by the principle of conferral.”²²⁵ Pursuant to this principle, “the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution.”²²⁶ The EU is to “ensure consistency” in its activities in light of its

221. *Id.* at arts. II-112(4), II-112(6).

222. *Id.* at art. II-113. One commentator has asserted that Article II-113, by deferring to these non-EU sources of law, undermines the principle of primacy of EU law. Michael Dougan, *The Convention’s Draft Constitutional Treaty: A ‘Tidying-Up Exercise’ that Needs Some Tidying-up of Its Own*, FEDERAL TRUST ONLINE PAPER NO. 27/03, at 3 (Aug. 2003), at http://www.fedtrust.co.uk/uploads/constitution/27_03.pdf; see *infra* text accompanying notes 232-39 (discussing the principle of primacy).

223. CONSTITUTION, *supra* note 1, at arts. I-11 to -18.

224. *Id.* at art. I-1(1).

225. *Id.* at art. I-11(1).

226. *Id.* at art. I-11(2).

objectives and “in accordance with the principle of conferring of powers.”²²⁷ For avoidance of doubt, the Constitution adds: “Competences not conferred upon the Union in the Constitution remain with the Member States.”²²⁸

The conferral concept is augmented by the fact that the Constitution must be ratified by all of the Member States “in accordance with their respective constitutional requirements,”²²⁹ and that upon ratification it will repeal the EC Treaty and the TEU.²³⁰ The Constitution will have no legal effect until it is ratified as a treaty, and the EU will have no existence or power under the Constitution until the ratification process has been completed.²³¹

Primacy. The effectiveness of EU action within the Union has its legal basis in the principle of primacy. The Constitution states that the Constitution itself and the “law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.”²³² The Member States in turn are required to “take any appropriate measure . . . to ensure fulfillment of the obligations flowing from the Constitution or resulting from the acts of the institutions of the Union.”²³³ Closely connected to the concept of primacy is the principle that “European laws,” which are legislative acts of the Union “of general application[,]” are binding in their entirety throughout the EU and are “directly applicable in all Member States.”²³⁴

Implied limits. Primacy flows from the propriety of the action taken. Any act of the Union that exceeds its conferred authority would presumably lack legal effectiveness and thus would not have primacy over Member State law. Also, European framework laws and certain regulations, both of which are included in the family of EU “legal instruments,” are subject to further action at the Member State level.²³⁵ These instruments are considered to be binding only “as to the result to be achieved” and not as to the “form and methods” of

227. *Id.* at art. III-115.

228. *Id.* at art. I-11(2). Two commentators have observed that Article I-11(2) “underlines that Union competences derive from the Member States who remain the ‘masters of the treaties.’” Lars Hoffmann & Jo Shaw, *Constitutionalism and Federalism in the ‘Future of Europe’ Debate: The German Dimension*, FEDERAL TRUST ONLINE PAPER NO. 03/04, at 7 (Feb. 2003), at http://www.fedtrust.co.uk/uploads/constitution/03_04.pdf.

229. CONSTITUTION, *supra* note 1, at art. IV-447(1).

230. *Id.* at art. IV-437(1).

231. Michael Dougan contends that the ratification requirement “reflects one of the organising principles of the Union order—of ultimate equality between the Member States in their capacity as Treaty authors.” Dougan, *supra* note 222, at 13.

232. CONSTITUTION, *supra* note 1, at art. I-6.

233. *Id.* at art. I-5(2).

234. *Id.* at art. I-33(1).

235. *Id.*

achieving that result.²³⁶ If each Member State is permitted to determine the details for governing the regulated activity within its own territory, then it might be argued that the control over that activity—the primacy of authority, so to speak—is shared between the EU and the state.

Primacy as a concept may have complexities not readily apparent in the Constitution's appealingly simple formulation. Paul Craig raises several concerns, including his assertion that the wording of Article I-6 leaves room to argue that EU law has primacy over national legislation but not over national constitutions.²³⁷ He also questions whether EU regulations should have primacy equal to EU legislation, whether the Member States retain a residual competence (*Kompetenz-Komtetenz*) to decide issues of primacy, and whether the principles of subsidiarity and proportionality limit the scope of primacy.²³⁸ He assures the academic world that Article I-6 will not "signal the death of one of the staple topics in EU law courses."²³⁹

Pre-emption. The concept of pre-emption is not mentioned as such in the Constitution, but it arises from the Constitution's classification of powers in terms of exclusivity. Certain delineated competences are granted to the EU alone,²⁴⁰ while all other competences conferred on the Union are shared between the EU and the Member States.²⁴¹ Where the Constitution assigns the EU an exclusive competence, only the Union may legislate, unless it assigns authority to the states or the Union act requires Member State implementation.²⁴² In areas where competence is shared, the EU may act at any time, and Member States may legislate only "to the extent that the Union has not exercised, or has decided to cease exercising,

236. *Id.*

237. Paul Craig, *What Constitution does Europe Need?*, FEDERAL TRUST ONLINE PAPER NO. 26/03, at 8 (Aug. 2003), at http://www.fedtrust.co.uk/uploads/constitution/26_03.pdf.

238. *Id.* at 8-9.

239. *Id.* at 8. Michael Dougan also questions "the merits of the Convention's attempt to codify a principle characterised by sophisticated nuance in the [EU] caselaw, and extensive debate among academics." Dougan, *supra* note 222, at 7. He suggests that "we should accept that this is a largely hortatory provision which offers little of substance to the complex debate on relations between the Union and domestic legal orders." *Id.* at 8.

240. CONSTITUTION, *supra* note 1, at art. I-13. In addition to the exclusive competence to legislate under Article I-13, the Union alone is granted the authority to take "supporting, coordinating or complementary action" relating to Member State activity in a number of areas. *Id.* at art. I-17. Such EU action does not supersede the underlying competence of the Member States in these areas and may not "entail harmonisation of Member States' laws or regulations." *Id.* at art. I-12(5). Paul Craig has noted the paradox posed by EU supporting acts that are on the one hand binding on the Member States but on the other hand may not pre-empt or require harmonization of national law. Craig, *supra* note 237, at 7-8.

241. CONSTITUTION, *supra* note 1, at art. I-14.

242. *Id.* at art. I-12(1).

its competence.”²⁴³ Thus, whether the EU has been granted exclusive or shared authority in a field, its lawmaking may completely preempt Member State legislation in the same area.

A role for the Member States. As previously noted, in the case of European framework laws and certain European regulations, it will be left to the Member States to pass implementing legislation.²⁴⁴ While such framework laws and regulations emanating from the EU are binding on the Member States “as to the result to be achieved,”²⁴⁵ by their nature they require, rather than preempt, Member State action in the subject field.

Subsidiarity and proportionality. The closely related concepts of subsidiarity and proportionality may be seen as logical extensions of the conferral principle. With the EU limited to the competences specifically granted under the Constitution, and with all other authority reserved to the Member States, it is not surprising that even where permitted to act the Union will be required to proceed conservatively.

Limits on Union action. The terms “subsidiarity” and “proportionality” smack of Euro-jargon, but the Constitution offers definitions. The principle of subsidiarity requires that “in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”²⁴⁶ Proportionality, on the other hand, is not limited to areas outside the Union’s exclusive competence. In all matters of EU activity, “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.”²⁴⁷ Both principles are obviously intended to protect the residuum of Member State power,²⁴⁸ and both are carryovers from the EC Treaty.²⁴⁹ However, the Constitution creates a new right of Member State parliaments to be advised of all proposed EU legislation,²⁵⁰ and they have a right to

243. *Id.* at art. I-12(2).

244. *Id.* at arts. I-33(1), I-37.

245. *Id.* at art. I-33(1).

246. *Id.* at art. I-11(3).

247. *Id.* at art. I-11(4).

248. Lars Hoffmann and Jo Shaw assert that “in reality the [subsidiarity] principle itself is both unclear and widely regarded as rather toothless.” Hoffmann & Shaw, *supra* note 228, at 6. They add that subsidiarity “has never been successfully invoked, for example, before the Court of Justice as a basis for a finding that a measure should not have been adopted by the EU institutions.” *Id.*

249. EC TREATY, *supra* note 2, at art. 5.

250. Protocol on National Parliaments, *supra* note 76, at art. I(2).

object to laws that they believe will violate the subsidiarity principle.²⁵¹

Flexibility. Even the highly detailed Constitution cannot anticipate every need for EU action. As a consequence, the drafters included a flexibility clause, Article I-18, which allows the Union in limited circumstances to take steps beyond its designated competences.²⁵² Peter Ludlow has called this provision “a potentially far-reaching enabling clause” that may “obviate the need for future IGC’s” to amend the Constitution.²⁵³

Detailed safeguards. *Substantively, any step taken under the flexibility clause must be “within the framework of the policies defined in Part III, to attain one of the objectives set by the Constitution.”*²⁵⁴ *Procedurally, the process begins with the Commission proposing an action and advising the Member State parliaments of the proposal.*²⁵⁵ *The parliaments may issue a challenge if they believe that the proposal will violate the subsidiarity rule.*²⁵⁶ *The next step is to obtain the consent of the European Parliament, and last the Council must vote unanimously to approve the action.*²⁵⁷ *One further restriction is that actions taken under the flexibility provision may not require harmonization of Member State law if such harmonization is prohibited by the Constitution.*²⁵⁸ *In other words, the flexibility procedure may fill Constitutional gaps, but it may not serve as a back-door method to exceed the Constitution’s limits.*

251. CONSTITUTION, *supra* note 1, at arts. I-18(2), I-11(3); Protocol on Subsidiarity, *supra* note 77, § 5.

252. CONSTITUTION, *supra* note 1, at art. I-18.

253. Peter Ludlow, *The Thessaloniki European Council*, EUROCOMMENT BRIEFING NOTE NO. 2.3, at 28 (July 3, 2003).

254. CONSTITUTION, *supra* note 1, at art. I-18(1). Michael Dougan has commented: “This means that the flexibility clause could not be used either to add new objectives to the Constitution, or to exceed the basic parameters of Union competence established in Part III.” Dougan, *supra* note 222, at 4. However, Dougan does note that Article I-18 is slightly broader than its predecessor, Article 308 of the EC Treaty, in that the new provision is not limited to action tied to the “operation of the common market.” *Id.*; see EC TREATY, *supra* note 2, at art. 308.

255. CONSTITUTION, *supra* note 1, at art. I-18(2).

256. See CONSTITUTION, *supra* note 1, at arts. I-11(3), III-259; see also Protocol on Subsidiary, *supra* note 77, at art. 5 (explaining that any national parliament may, within six weeks from the date of transmission of the Commission’s legislative proposal, send to the Commission a “reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiary.”).

257. CONSTITUTION, *supra* note 1, at art. I-18(1). Michael Dougan observes that in an enlarged EU the unanimity requirement “automatically reduces the practical significance of the flexibility clause.” Dougan, *supra* note 222, at 4. Nevertheless, Peter Ludlow contends that the need for consensus “need not inhibit boldness.” Ludlow, *supra* note 253, at 28-29. He notes that the “radical expansion of the European Community’s agenda in the 1970s” was accomplished through a series of unanimous decisions under the EC Treaty. *Id.*

258. CONSTITUTION, *supra* note 1, at art. I-18(3).

Stability. The Constitution is intended to be a permanent document, effective “for an unlimited period.”²⁵⁹ Because critical aspects of allocation of power—such as assignment of competences or designation of QMV versus unanimous voting—are found within the constitutional text, nothing short of an amendment to the document will legitimately change the express constitutional balance of authority between the Union and Member States.

Unanimity required to amend the Constitution. As explained in greater detail below, any amendment to the Constitution requires the unanimous approval of the Member States.²⁶⁰

2. How the EU Exercises Its Competence

In a section titled “Exercise of Union Competence,”²⁶¹ the Constitution describes the functioning of the EU institutions in their legislative and regulatory activity. Six “legal instruments” are to be employed, including “European laws, European framework laws, European regulations, European decisions, recommendations and opinions.”²⁶² These represent a simplification from the treaties, whose wider array of legislative and regulatory acts was unnecessarily complex.²⁶³ Among the six instruments, European laws and European framework laws are classified as “legislative acts” that are generally adopted through action involving the Commission, Council, and European Parliament.²⁶⁴ On the other hand, European regulations and European decisions are deemed “non-legislative acts” and may be issued, as specifically mandated in the Constitution, by the European Council, Council, Commission, or European Central Bank.²⁶⁵

259. *Id.* at art. IV-446.

260. *See infra* text accompanying notes 418-21.

261. CONSTITUTION, *supra* note 1, at arts. I-33 to -44.

262. *Id.* at art. I-33(1).

263. *See* EC TREATY, *supra* note 2, at art. 249. The Constitution’s forms of legislation are similar to the five types currently provided under Article 249 of the EC Treaty, with the addition of “European regulations” as a new form of action. Activities relating to the common foreign and security policy (the TEU’s Second Pillar) and cooperation and justice in home affairs (Third Pillar) are currently subject to their own types of legislation, such as “common strategies,” “joint actions,” and “common positions” in the Second Pillar, and “common positions,” “framework decisions,” “decisions,” and “conventions” in the Third Pillar. TEU, *supra* note 2, at arts.13-15, 34. Under the Constitution these types of legislative activities will be carried out within the same six categories as all other forms of EU legislation. CONSTITUTION, *supra* note 1, at art. I-33.

264. CONSTITUTION, *supra* note 1, at art. I-34.

265. *Id.* at arts. I-35 to -36.

In addition to employing the six legal instruments, the EU is authorized to engage in other types of activity.²⁶⁶ For example, it must adopt “guidelines” to assist Member States in coordinating their economic and employment policies,²⁶⁷ “define and implement a common foreign and security policy,”²⁶⁸ and “carry out actions to support, coordinate or supplement the actions of the Member States” in certain areas.²⁶⁹ Furthermore, the Commission is granted a variety of administrative, investigative, and enforcement powers to ensure the proper application of EU law.²⁷⁰ Article I-12 notes that specific provisions of Part III of the Constitution contain the “scope of and arrangement for” exercising the Union’s competences.²⁷¹

Unless the Constitution specifies the type of instrument or procedure that should be used in a particular instance, it will be left to the EU institutions to decide what form of action to take.²⁷² Likewise, in the case of a European regulation, the Union institutions must choose whether it will be “binding in its entirety and directly applicable in all Member States,” or binding simply “as to the result to be achieved, upon each Member State to which it is addressed.”²⁷³ If the latter, the national authorities are free to choose the appropriate “form and methods” of local implementation.²⁷⁴ Legal acts of the EU must state “the reasons on which they are based”²⁷⁵ and must be formalized and published prior to taking effect.²⁷⁶

Member State activity. In broad terms, the Constitution expects the Member States to “take any appropriate measure, general or particular” to fulfill their obligations arising directly from the Constitution or resulting from the acts of EU institutions.²⁷⁷ This means that the governments of the states must cooperate with EU

266. For a detailed analysis of the complexities reflected in the types of acts available to the EU institutions in their legislative and regulatory activities, see Herwig C.H. Hofmann, *A Critical Analysis of the new Typology of Acts in the Draft Treaty Establishing a Constitution for Europe*, EUROPEAN INTEGRATION ONLINE PAPERS NO. 9 (2003), at <http://eiop.or.at/eiop/texte/3003-009.htm>. Hofmann contends: “The structure of the typology of acts and the allocation of decision-making procedures is at the heart of the relation between the Member States (MS) and the EU powers.” *Id.* at 1.

267. CONSTITUTION, *supra* note 1, at art. I-15(1)-(2).

268. *Id.* at art. I-12(4).

269. *Id.* at art. I-12(5).

270. See, e.g. *id.* at arts. III-165, III-168 (discussing the Commission’s extensive role in enforcing EU competition law).

271. *Id.* at art. I-12(6).

272. *Id.* at art. I-38(1).

273. *Id.* at art. I-33(1).

274. *Id.*

275. *Id.* at art. I-38(2).

276. See *id.* at art. I-39 (explaining the process by which European and framework laws will enter into force).

277. *Id.* at art. I-5(2).

*institutions in their regulatory and enforcement activities.*²⁷⁸ As previously noted, in the case of European framework laws and certain European regulations, implementation by the Member States is a built-in requirement,²⁷⁹ and in these circumstances the Member States are free to choose the “form and methods” of how to fulfill their responsibilities.²⁸⁰ The actual means of implementation will depend upon national or local law and the particular legal mandates for national or local officials.

A further reservation in favor of the Member States is that in cases where the Union acts to “support, coordinate or supplement the actions of the Member States,” the Constitution notes that EU involvement will not supersede Member State competence in the field.²⁸¹

3. Subject Matters for EU Activity

In addition to its general principles and procedural overview of Union activities, Part I of the Constitution describes the basic substantive division of responsibilities between the EU and Member States. Part III offers even greater detail on these topics,²⁸² and the Constitution prescribes that “[t]he scope of and arrangements for exercising the Union’s competences shall be determined by the provisions specific to each area in Part III.”²⁸³ The following discussion identifies the major areas of EU activity.

Internal market. The Constitution grants the Union exclusive competence in common commercial policy, customs union, and conservation of marine resources, as well as monetary policy for Member States in the euro-zone and competition rules “necessary for the functioning of the internal market.”²⁸⁴ This authority includes activities within the EU and any external actions necessary to

278. See, e.g. *id.* at arts. III-165 to -168 (discussing the Member States’ cooperative responsibilities relating to enforcement of EU competition law). Another example of cooperation is the use of the rules of procedure and competent authorities of the Member States to enforce obligations imposed by EU law. See, e.g., *id.* at art. III-401. Andreas Føllesdal expresses concern about “the allocation of enforcement authority, which is still largely left with the Member States.” Føllesdal, *supra* note 127, at 7. Citing the current dispute over the Stability and Growth Pact, he warns that “partial compliance may unravel trust among citizens and officials.” *Id.*

279. CONSTITUTION, *supra* note 1, at arts. I-33(1), I-37.

280. *Id.* at art. I-33(1).

281. *Id.* at art. I-12(5).

282. See *id.* at arts. III-115 to -436 (Part III, titled “The Policies and Functioning of the Union,” contains two-thirds of the total text of the Constitution and incorporates the bulk of what has been contained in the EC Treaty, including the internal market, external action, monetary union, and EU institutional and budgetary matters).

283. *Id.* at art. I-12(6).

284. *Id.* at art. I-13(1); see also *id.* at arts. III-161 to -169 (detailing competition rules).

support the internal programs.²⁸⁵ The EU is given “shared competence” in managing the internal market and its “four freedoms.”²⁸⁶ As previously noted, in areas of shared competence the general principle is that the EU is free to act, while Member States may legislate only to the extent the Union has not done so.²⁸⁷

Member State rights are retained. The EU’s mandate to establish competition rules is specifically limited to rules “necessary for the functioning of the internal market.”²⁸⁸ Furthermore, the Constitution’s prohibitions of anti-competitive behavior specifically exempt various aids granted by Member States, such as promotion of economic development in disadvantaged areas.²⁸⁹ The Union’s authority over monetary policy is limited to the states that have adopted the euro,²⁹⁰ and the right of certain states to remain outside the euro-zone represents national autonomy in a highly significant sphere of activity.²⁹¹

The Member States are expected to take an active role in the functioning of the internal market.²⁹² Furthermore, they may to some extent limit the four freedoms. For example, the right of establishment does not apply to activities related to a state’s exercise of official authority,²⁹³ and states may restrict the rights of nationals of other Member States on the basis of public policy, public security, or public health.²⁹⁴ Free movement of goods may also be restricted by a state on grounds such as public morality or protection of national treasures,²⁹⁵ and Member States may operate state monopolies “of a commercial character.”²⁹⁶ Where the EU seeks to encourage “approximation of legislation” among the Member States to achieve a more successful

285. *Id.* at art. I-13(2).

286. *Id.* at arts. I-14(2)(a) (regarding shared competence in the internal market), III-133 to -136 (regarding free movement of persons), III-137 to -143 (regarding freedom of establishment), III-144 to -150 (regarding freedom to provide services), III-151 to -155 (regarding free movement of goods), III-156 to -160 (regarding free movement of capital).

287. *Id.* at art. I-12(1).

288. *Id.* at art. I-13(1).

289. *Id.* at art. III-167.

290. *Id.* at arts. I-13(1), III-197.

291. See Systems Modelling Ltd., *EMU/euro FAQ*, available at <http://www.sysmod.com/euro-emu.htm> (discussing the advantages and disadvantages of the European Monetary Union). The United Kingdom, Denmark, and Sweden have opted not to adopt the euro as their national currency. *Id.*

292. CONSTITUTION, *supra* note 1, at arts. III-131 to -132.

293. *Id.* at art. III-139.

294. *Id.* at arts. III-133(3), III-140(1).

295. *Id.* at art. III-154.

296. *Id.* at art. III-155(1). However, Member States must adjust their state monopolies “so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.” *Id.*

internal market, the Constitution contains many safeguards that protect the power of the Member States over their domestic law.²⁹⁷

Economic and social policy. In the broad fields of economic and social policy, the EU's role is described in various ways. The Union enjoys shared competence in the areas of the internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, the area of freedom, security and justice, and common safety concerns in public health.²⁹⁸ The EU is required to adopt guidelines to assist Member States in coordinating their economic policies²⁹⁹ and their employment policies.³⁰⁰ It is also permitted, but not required, to "take initiatives to ensure coordination of Member States' social policies,"³⁰¹ and to take "supporting, coordinating or complementary action" in matters of human health, industry, culture, tourism, education, civil protection, and administrative cooperation.³⁰² The Union is also empowered to promote development in disadvantaged regions within its Member States.³⁰³

Member State competences. Outside the areas of the Union's exclusive competence, the Member States retain extensive rights and responsibilities.³⁰⁴ Supplementing the Union's mandate to ensure coordination of Member State economic policies, the states themselves are required to "coordinate their economic policies within the Union."³⁰⁵ Member States continue to have authority to operate their

297. *Id.* at arts. III-172 to -176. In an ambitious move, the Convention proposed a provision that would have allowed QMV voting on certain aspects of company tax law harmonization. This was ultimately rejected by the IGC in favor of retaining the unanimity requirement in this field. Grevi, *supra* note 38, at 10.

298. CONSTITUTION, *supra* note 1, at art. I-14(2). Part III of the Constitution contains extensive provisions on these subject matters. *Id.* at arts. III-177 to -184 (regarding economic policy), III-203 to -208 (employment policy), III-209 to -219 (social policy), III-220 to -224 (economic, social, and territorial cohesion), III-225 to -232 (agriculture and fisheries), III-233 to -234 (environment), III-235 (consumer protection), III-236 to -245 (transport), III-246 to -247 (trans-European networks), III-248 to -255 (research and technological development, and space), III-256 (energy), III-278 to -285 (public health, industry, culture, tourism, education, civil protection, and administrative cooperation).

299. *Id.* at art. I-15(1). Greater detail on economic and employment policy is found in Part III. *See id.* at arts. III-177 to -184 (economic policy), III-203 to -208 (employment policy).

300. *Id.* at art. I-15(2).

301. *Id.* at art. I-15(3).

302. *Id.* at art. I-17. *See generally id.* at arts. III-278 to -285.

303. *Id.* at arts. III-222 to -224.

304. Giovanni Grevi describes the EU's ability to coordinate Member State economic policies as "extremely restrictive." Grevi, *supra* note 38, at 7.

305. CONSTITUTION, *supra* note 1, at art. I-15(1). Greater detail on the rights and responsibilities of the Member States regarding economic policy is found in Part III. *See, e.g., id.* at arts. III-177 to -184 (economic and monetary policy), III-220, III-221 (economic, social, and territorial cohesion).

own tax systems,³⁰⁶ although they are strictly prohibited from taxing in a discriminatory manner³⁰⁷ and tax harmonization is an EU objective.³⁰⁸

Employment policy is a field in which the EU is granted relatively little power. It is called upon to “ensure coordination” of the employment policies of the Member States,³⁰⁹ but the Union’s role is essentially limited to gathering information, making reports, and adopting guidelines.³¹⁰ The real authority remains firmly in the hands of the individual Member States. Social policy is treated in the same manner, with the EU encouraging coordination and harmonization, but with the states basically in control of their own national practices.³¹¹

Areas of shared competence in general allow Member State action only to the extent the EU has not acted.³¹² However, in the areas of research, technological development, and space, the Constitution states that the Union’s exercise of competence “may not result in Member States being prevented from exercising theirs.”³¹³ In other shared areas, states retain significant authority.³¹⁴

306. See, e.g., *id.* at art. III-158(1)(b) (Member States have the right to take “requisite steps to prevent infringements of national provisions” within the sphere of taxation.).

307. *Id.* at art. III-170.

308. *Id.* at art. III-171.

309. *Id.* at art. I-15(2).

310. *Id.* at arts. III-205 (“The Union shall contribute to a high level of employment by encouraging cooperation between Member States.”), III-206(2) (Council to adopt guidelines), III-208 (An Employment Committee will “monitor the employment situation and employment policies in the Union and the Member States.”).

311. *Id.* at arts. III-209 to -219 (regarding social policy). Andrew Moravcsik argues that “European social policy is more show than substance” because the EU’s fiscal resources are insufficient to allow meaningful accomplishment at the Union level. Andrew Moravcsik, *The Myth of a European “Leadership Crisis,”* EUROPEAN POLICY CENTRE, Issue 11 (Mar. 26, 2004), available at <http://www.theepc.net/en>.

312. CONSTITUTION, *supra* note 1, at art. I-12(2).

313. *Id.* at art. I-14(3). In matters of technological research, Union activity is described as “complementing the activities carried out in the Member States.” *Id.* at art. III-249. In some matters of research, some Member States may not be invited to participate. See *id.* at art. III-252(2) (“In implementing the multiannual framework programme, European laws may establish supplementary programmes involving the participation of certain Member States only.”).

314. See, e.g., *id.* at art. III-233(4) (The environment is an area of shared competence, but Member States are permitted to conclude international agreements in the field). Also, certain EU decisions on the environment are subject to unanimous approval of the Council, thus affording each Member State a veto. *Id.* at art. III-234(2). Furthermore, Member States may adopt their own measures more protective of the environment than those imposed by the Union. *Id.* at art. III-234(6). In the field of consumer protection, Member States may also impose protections more stringent than the EU has provided. *Id.* at art. III-235(4). If a trans-European transport, telecommunication, or energy network affects the territory of a Member State, the affected state must grant its consent. *Id.* at art. III-247(2). Notwithstanding an overall

Wherever the Union takes supporting, coordinating, or complementary action under Article I-17, its acts “may not entail harmonisation of Member States’ laws or regulations.”³¹⁵ In matters of public health, EU action is to be complementary to national law and must “respect the responsibilities of the Member States for the definition of their health policy and the organisation and delivery of health services and medical care.”³¹⁶ Likewise, regarding cultural affairs, education, vocational training, sport, and civil protection, Union action is complementary, with the states left as the guardians of their national policies in these fields.³¹⁷ If the EU offers to assist the Member States in improving their administrative capacity to implement Union law, any state may decline to accept such support.³¹⁸

Although the principle of conferral reserves all residual competences to the Member States, and although property ownership laws are not included in the Constitution, Article III-425 emphasizes that the Member State laws on property ownership are not to be “prejudiced” by the Constitution.³¹⁹

External Action. As noted earlier, the Constitution recognizes that the European Union has responsibilities in the world, and it is empowered to act accordingly. The Constitution requires the Union to establish relationships with the United Nations and other intergovernmental organizations,³²⁰ and it is required to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).³²¹ In addition, the EU may enter into agreements with neighboring countries to promote prosperity and peaceful relations.³²² It may create and implement a policy of development cooperation and humanitarian aid,³²³ and it may act in the field of world trade (referred to in the Constitution as “common commercial policy”).³²⁴ With respect to the euro, the Union may enter into exchange-rate agreements with third countries,³²⁵ and in certain

EU energy policy, Member States are free to choose their own energy sources. *Id.* at art. III-256(2).

315. *Id.* at art. I-12(5).

316. *Id.* at art. III-278(1), (7).

317. *Id.* at arts. III-280 to -284.

318. *Id.* at art. III-285(2).

319. *Id.* at art. III-425.

320. *Id.* at art. III-327; *see also id.* at art. III-324 (“The Union may conclude an association agreement with one or more third countries or international organizations.”), III-303.

321. *Id.* at art. I-9(2).

322. *Id.* at art. I-57.

323. *Id.* at art. I-14(4). *See generally id.* at arts. III-316 to -321 (discussing cooperation with third countries and humanitarian aid in greater detail).

324. *Id.* at arts. III-314 to -315.

325. *Id.* at art. III-326(1).

circumstances it may adopt restrictive measures in matters of trade.³²⁶

In its external activities, the EU is to be bound by a sweeping set of values and objectives, including promotion of peace and democracy, protection of human rights and the environment, and respect for the United Nations Charter.³²⁷ These values and objectives are to form the basis for decisions taken by the European Council in all external matters.³²⁸ International agreements concluded by the EU are binding on its institutions and also on the Member States.³²⁹

The relationship between the Union and the overseas countries and territories affiliated with certain Member States is treated in a separate section of the Constitution,³³⁰ but it clearly relates to the EU's external relationships. These countries and territories are to be "associated with the Union,"³³¹ enjoying many of the benefits of the internal market.³³²

In addition to the foregoing matters, the EU has significant obligations with regard to a common foreign and security policy and a common security and defense policy. Both of these are addressed below.

*The power of the Member States. The institution of external policies in general is to be based on European decisions taken unanimously by the European Council.*³³³ International agreements are also subject to unanimous approval in certain circumstances.³³⁴

*The act of acceding to the ECHR is subject to the limitation that accession "shall not affect the Union's competences as defined in the Constitution."*³³⁵ Furthermore, the Constitution states that its own terms must not affect treaty obligations entered into by Member States before their accession to the EU, although such states are required to take "appropriate steps" to renegotiate their treaties to eliminate any aspects that are incompatible with Union membership.³³⁶

In the areas of development cooperation and humanitarian aid, the Constitution provides that the Union's exercise of competence "may not result in Member States being prevented from exercising

326. *Id.* at art. III-322(2).

327. *Id.* at art. III-292.

328. *Id.* at art. III-293(1).

329. *Id.* at art. III-323(2).

330. *Id.* at arts. III-286 to -291.

331. *Id.* at art. III-286(1).

332. *See, e.g., id.* at art. III-287 (requiring Member States to apply the same treatment to trade with overseas countries and territories and other Member States).

333. *Id.* at art. III-293(1).

334. *Id.* at art. III-325(8).

335. *Id.* at art. I-9(2).

336. *Id.* at art. III-435.

theirs.”³³⁷ The policies of the EU and the states must “complement and reinforce each other.”³³⁸ In the field of common commercial policy, EU action must not interfere with the Constitution’s internal division of competences between the Union and the Member States.³³⁹ Furthermore, certain trade policy decisions are subject to a unanimous decision of the Council.³⁴⁰ European regulations and decisions relating to the association of the overseas countries and territories are also subject to unanimous approval by the Council.³⁴¹

Common Foreign and Security Policy (CFSP). The Constitution grants the Union the authority to “define and implement a common foreign and security policy.”³⁴² This policy, corresponding to the “Second Pillar” under the TEU,³⁴³ will cover “all areas of foreign policy and all questions relating to the Union’s security,” including development of a defense policy, discussed below.³⁴⁴ Preparation and implementation of the CFSP will be carried out by a new official, the Union Minister for Foreign Affairs, who will be assisted by a European External Action Service,³⁴⁵ a standing Political and Security Committee,³⁴⁶ and special representatives appointed as needed.³⁴⁷

The Member States must “actively and unreservedly” support the CFSP “in a spirit of loyalty and mutual solidarity” and refrain from taking any action contrary to the Union’s interests.³⁴⁸ The states must use their diplomatic and consular missions to cooperate with EU officials,³⁴⁹ and at international conferences and in international organizations the states must coordinate their action and uphold Union positions.³⁵⁰ Furthermore, a Member State is expected to consult with the other states, through the workings of the European Council or Council, before “undertaking any action on the international scene or any commitment which could affect the Union’s interests.”³⁵¹

337. *Id.* at art. I-14(4). See also *id.* at arts. III-317(2) (cooperation with third countries and humanitarian aid), III-319(3) (economic, financial, and technical cooperation with third countries), III-321(4) (humanitarian aid).

338. *Id.* at arts. III-316(1), III-319(1).

339. *Id.* at art. III-315(6).

340. *Id.* at art. III-315(4).

341. *Id.* at art. III-291.

342. *Id.* at art. I-12(4); see also *id.* at arts. I-40(1)-(2) (repeating the authority as a mandate), III-294 to -313 (discussing this authority in greater detail).

343. TEU, *supra* note 2, at arts. 11-28.

344. CONSTITUTION, *supra* note 1, at art. I-16(1).

345. *Id.* at arts. I-28(2), III-296(3).

346. *Id.* at art. III-307.

347. *Id.* at art. III-302.

348. *Id.* at arts. I-16(2), III-294(2).

349. *Id.* at art. III-306.

350. *Id.* at art. III-305(1).

351. *Id.* at art. I-40(5).

Cooperation and final authority. *The mandate to the Union is based not on the relinquishment of Member State competence on matters of foreign and security policy, but on "the development of mutual political solidarity among Member States . . . and the achievement of an ever-increasing degree of convergence of Member States' actions."*³⁵² *The EU will conduct its policy by defining guidelines and adopting European decisions, but also by "strengthening systematic cooperation between Member States in the conduct of policy."*³⁵³ *Union officials are required to "work in cooperation with the diplomatic services of the Member States,"*³⁵⁴ *and pursuit of the CFSP will be undertaken jointly by the EU and the states, "using national and Union resources."*³⁵⁵

*Implementation of the CFSP may not affect the EU and Member State competences as delineated in Part I of the Constitution.*³⁵⁶ *Moreover, despite the goal of a common policy, it is the states that continue to have the last word in this area. The general requirement for determination of EU policy is a European decision adopted unanimously by the European Council and Council.*³⁵⁷ *Even where the Council has been granted the authority to take decisions by qualified majority vote, a Member State may block Council action on the grounds of "vital and stated reasons of national policy."*³⁵⁸ *Furthermore, in cases of "imperative need," and where the EU has not been able to act, a state may take its own action.*³⁵⁹

Common Security and Defence Policy (CSDP). One stated goal of the common foreign and security policy, also found within the TEU's Second Pillar, is the "progressive framing of a common defence policy,"³⁶⁰ and the Union is granted competence in this field.³⁶¹ The EU is to seek an "operational capacity drawing on assets civil and military" and use its assets outside the Union for peace-keeping

352. *Id.* at art. I-40(1).

353. *Id.* at art. III-294(3).

354. *Id.* at art. III-296(3); *see also id.* at art. III-301 (providing that the Union Minister for Foreign Affairs and the Ministers for Foreign Affairs of the Member States shall coordinate their activities).

355. *Id.* at art. I-40(4).

356. *Id.* at art. III-308.

357. *Id.* at arts. I-40(7), III-300(1); *see id.* at art. III-325(8) (providing that decisions to conclude agreements between the EU and neighboring states may also require unanimity in some circumstances). Note, however, that the European Council may unanimously decide that certain decisions relating to the CFSP may be taken by the Council by qualified majority vote. *Id.* at arts. I-40(8), III-300(3).

358. *Id.* at art. III-300(2).

359. *Id.* at art. III-297(4).

360. *Id.* at art. I-12(4); *see TEU, supra* note 2, at art. 17 (regarding the scope of the common foreign and security policy). *See generally* CONSTITUTION, *supra* note 1, at arts. III-309 to -312.

361. *Id.* at art. I-16(1).

missions, conflict prevention,³⁶² and combating terrorism.³⁶³ A European Armaments, Research, and Military Capabilities Agency will be established to develop information and generally promote the CSDP.³⁶⁴

Unanimity; Member State action. Despite the stated intention of developing a common policy, the Constitution repeatedly emphasizes the defense needs of the individual Member States,³⁶⁵ and it leaves ultimate power in this field in the hands of the Member States. If a state becomes a victim of armed aggression, the other states must provide “aid and assistance by all the means in their power.”³⁶⁶ The Union and the states are required to “act jointly” to assist a state that has been subject to a terrorist attack, and the military resources to be used will be those “made available by the Member States.”³⁶⁷ The CSDP and any other provisions of the Constitution may not restrict any Member State from preserving secrecy vital to its security or from taking “such steps as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material.”³⁶⁸ Defense policies of “certain Member States,” whether acting in NATO or otherwise, are not to be prejudiced by the CSDP.³⁶⁹ Most important, decisions on the common policy are to be taken unanimously by the Council,³⁷⁰ and the actual creation of a common defense is subject to a consensus vote of the European Council.³⁷¹

There is considerable emphasis on the fact that military resources will remain in the hands of the Member States, who are urged to progressively improve their individual military capabilities.³⁷² Even in the case of a unanimous decision taken at the EU level, it is state assets that will be used,³⁷³ and the Constitution contemplates assigning the execution of an agreed task to a group of states.³⁷⁴ Likewise, there are mechanisms created for “permanent structured

362. *Id.* at art. I-41(1).

363. *Id.* at art. III-309(1).

364. *Id.* at arts. I-41(3), III-311.

365. *Id.* at art. I-41(2).

366. *Id.* at art. I-41(7). It is of interest that the “aid and assistance” obligation is tied to the requirements of Article 51 of the United Nations Charter rather than to a new tenet of EU law. Also, action in this area must be consistent with Member States’ NATO obligations, which are described as “the foundation for their collective defence and the forum for its implementation.” *Id.*

367. *Id.* at art. I-43; see also *id.* at art. III-329 (further details on support for a Member State).

368. *Id.* at art. III-436(1).

369. *Id.* at art. I-41(2).

370. *Id.* at art. I-41(4).

371. *Id.* at art. I-41(2).

372. *Id.* at art. I-41(3).

373. *Id.*

374. *Id.* at arts. I-41(5), III-310.

cooperation" among groups of Member States that might act on the Union's behalf.³⁷⁵ Furthermore, a Member State's participation in the European Agency is optional.³⁷⁶

Area of Freedom, Security and Justice (AFSJ). Another goal delineated in the Constitution is the creation of "an area of freedom, security and justice" within the European Union.³⁷⁷ This was the essence of the TEU's "Third Pillar,"³⁷⁸ and the Constitution permits the Council to establish a European Public Prosecutor's Office³⁷⁹ and develop policies on border control, asylum, immigration, and judicial, and police cooperation.³⁸⁰ The Constitution includes the AFSJ in the EU's areas of shared competence.³⁸¹

Member State authority reserved. The EU is permitted to legislate and develop policies on the AFSJ, but considerable deference is paid to the Member States. The Constitution speaks of the Union developing "strategic guidelines"³⁸² while respecting the principle of subsidiarity.³⁸³ While EU legislation is possible, greater emphasis is placed on developing "mutual confidence" and "cooperation" among the Member States, than on creation of a comprehensive, centralized body of law.³⁸⁴ Union action must take into account "the different legal traditions and systems of the Member States."³⁸⁵ EU efforts may not affect the ultimate responsibility of each state "with regard to maintenance of law and order and the safeguarding of internal security."³⁸⁶

In matters of border checks, asylum and immigration, notwithstanding any policies developed by the Union, Member States retain the competence to determine the "geographical demarcation of their borders, in accordance with international law"³⁸⁷ and to determine the number of third country nationals to be permitted to enter and seek work.³⁸⁸ In the field of judicial cooperation in civil matters, the EU may develop laws or framework laws, but any policies

375. *Id.* at arts. I-41(6), III-312.

376. *Id.* at art. III-311(2).

377. *Id.* at art. I-42.

378. TEU, *supra* note 2, at arts. 29-42.

379. CONSTITUTION, *supra* note 1, at art. III-274(1) (requiring the Council decision to be taken unanimously). In addition, the European Council may, by unanimous vote, extend the powers of the Prosecutor. *Id.* at art. III-274(4).

380. *Id.* at art. III-257(2)-(3). See generally *id.* at arts. III-257 to -277 (detailing the subject areas of the AFSJ).

381. *Id.* at art. I-14(2).

382. *Id.* at art. III-258.

383. *Id.* at art. III-259.

384. *Id.* at arts. I-42(1), III-260 to -261.

385. *Id.* at art. III-257(1).

386. *Id.* at art. III-262.

387. *Id.* at art. III-265(3).

388. *Id.* at art. III-267(5).

affecting family law must be unanimously adopted by the Council.³⁸⁹ With regard to judicial cooperation in criminal matters, certain Union acts must receive unanimous approval on the Council.³⁹⁰ Furthermore, a Member State which believes that a European framework law under consideration by the Council (which would eventually make a decision by QMV) might “affect fundamental aspects of its criminal justice system” can force the proposal to be referred to the European Council, where unanimous approval will be required.³⁹¹ Also, Member States in some instances may adopt higher levels of protection of individual rights than are mandated by the Union,³⁹² and EU law promoting crime prevention may not require approximation of state laws.³⁹³ Last, EU laws regarding cross-border police cooperation are subject to unanimous vote on the Council.³⁹⁴

National parliaments are specifically empowered to participate in evaluating the Union’s efforts in the AFSJ.³⁹⁵ Also, in one of the relatively rare instances in which the proposing of EU legislation is not reserved to the Commission, Union acts pertaining to judicial or police cooperation may be initiated by one-fourth of the Member States.³⁹⁶

D. Five Remarkable Provisions

This Article has focused on how the Constitution structures the European Union, establishes its institutions, and defines its areas of activity, all of which are subject to restrictions on the EU and reservations in favor of the Member States. Among the Constitution’s many provisions mentioned in this analysis, five deserve additional attention, because each of the five in its own unique way offers a powerful statement on the status of Member States within the Union.

Article I-5: Respect. The EU is required to “respect the equality of the Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”³⁹⁷ The Union must “respect their essential state functions, including ensuring

389. *Id.* at art. III-269(3).

390. *Id.* at arts. III-271(1) (regarding expanding the list of serious cross-border crimes), III-274(1) (establishment of the European Public Prosecutor’s Office).

391. *Id.* at arts. III-270(3), III-271(3). This procedure in the AFSJ realm has been referred to as an “emergency brake.” Grevi, *supra* note 38, at 7 (discussing art. III-270(3), previously numbered art. III-170(3)).

392. CONSTITUTION, *supra* note 1, at art. III-270(2).

393. *Id.* at art. III-272.

394. *Id.* at arts. III-275(3), III-277.

395. *Id.* at arts. III-259 to -261.

396. *Id.* at arts. I-34(3), I-42(3), III-264.

397. *Id.* at art. I-5(1); see TEU, *supra* note 2, at art. 6(3) (detailing a similar but less elaborate provision requiring the Union to respect Member State identities).

the territorial integrity of the state, maintaining law and order and safeguarding national security.”³⁹⁸ The EU and the Member States are mandated to treat each other with “full mutual respect.”³⁹⁹ These instructions to the EU are clearly intended to prohibit a hegemonic relationship. They prescribe a partnership in which the central authority will carry out a necessary coordinating function without asserting complete dominance.

Article I-44: Enhanced cooperation. Article I-44 follows the precedent of the EC Treaty and TEU by permitting groups of Member States to engage in “enhanced cooperation” in areas where the Council has determined that the Union as a whole cannot be expected to participate.⁴⁰⁰ Although there are demanding criteria to be met before a plan of enhanced cooperation may be undertaken,⁴⁰¹ once the process has been approved the participating states may make use of the EU institutions to implement the program.⁴⁰²

However useful, enhanced cooperation is uncharacteristic of a true federal system in which powers are divided vertically between the central government on the one hand and the states on the other.⁴⁰³ In a federation, critical matters of policy are determined centrally and are applicable throughout the system. If there is insufficient support for a policy at the federal level, either no action will be taken or, at best, separate action might be taken at the state level, but groups of states will not undertake to do together what the central government could not accomplish. Group action through enhanced cooperation reveals a

398. CONSTITUTION, *supra* note 1, at art. I-5(1).

399. *Id.* at art. I-5(2).

400. *Id.* at arts. I-44, III-416 to -423; see EC TREATY, *supra* note 2, at arts. 11-11a (identifying requirements to establish enhanced cooperation between Member States); TEU, *supra* note 2, at arts. 43-45; see also Dougan, *supra* note 222, at 12-13 (analyzing the Constitution’s changes to the enhanced cooperation procedures).

401. Enhanced cooperation may be undertaken only in areas outside the EU’s exclusive competence and only as a “last resort” if Union-wide action is not feasible. The cooperative activity may not undermine the internal market, cause any discrimination in trade within the EU, distort competition, or interfere with the rights of non-participating Member States. Further restrictions include a requirement that one-third of the Member States must participate, that any other Member State may join the cooperation at any subsequent time, and that the activity must “further the objectives of the Union, protect its interests and reinforce its integration process.” CONSTITUTION, *supra* note 1, at art. I-44. See also *id.* at arts. III-416 to -417.

402. *Id.* at art. I-44(1). A concept related to enhanced cooperation is the requirement that certain Member States with superior military capabilities must engage in “structured cooperation” in connection with the EU’s common security and defense policy. *Id.* at art. I-41(6). Provisions relating to enhanced cooperation are applicable to structured cooperation, including the right of a Member State initially outside the program to subscribe at a later date. *Id.* at art. III-312(3). One further example of the EU’s tolerance for special relationships among its Member States is the Constitution’s explicit permission for continued “regional unions” among the Benelux countries. *Id.* at art. IV-441.

403. Robert Senelle, *Federal Belgium*, in FEDERALISM AND REGIONALISM IN EUROPE 27, 29 (Antonio D’Atena ed., 1998).

lack of collective will to maintain policy consistency within the EU. If utilized to any significant extent, the cooperation procedure will result in a multi-track Union that tolerates varying levels of commitment from its Member States.⁴⁰⁴

Article I-59: Suspension of rights. The amenability of Member States to suits and judgments in the EU courts is a manifestation of power vested in the central authority,⁴⁰⁵ and this phenomenon would be expected in a strong federal system. The European Union, however, has a separate procedure that is decidedly un-federal. The Constitution provides that the European Council may, after complying with strict procedures, determine that a Member State has committed a “serious and persistent breach” of the EU’s core values.⁴⁰⁶ Upon such a determination, the Council may suspend certain of the violating state’s rights under the Constitution, including its voting rights within the Council.⁴⁰⁷ Despite such a suspension, the state in question will “continue to be bound by its obligations under the Constitution.”⁴⁰⁸

Suspension of the voting rights of a state within a multi-state system is problematic for two principal reasons. First, it reveals an inherent weakness on the part of the central government—the inability to engage the coercive tools necessary to impose its will on the state officials responsible for the violation. Second, it effectively

404. It might well be noted that the EU is already a two-track system with regard to monetary policy, in which the Union permits several Member States to remain outside the euro-zone. However, this policy is not being carried out under the existing enhanced cooperation provisions in the EC Treaty. See Franklin Dehousse et al., *Integrating Europe: Multiple speeds—One direction?*, EPC WORKING PAPER NO. 9 (April 2004), available at <http://www.epin.org/pdf/CoussensIRRI-KIIB160404.pdf> (providing a detailed review of “flexible integration” within the EU, both as to historical experiences and future possibilities); see also Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, Speech at the Humboldt University in Berlin, 9-12 (May 12, 2000) (transcript available at <http://www.auswaertiges-amt.de/www/de/infoservice/download/pdf/reden/redene/r000512b-r1008e.pdf>) (outlining an integrationist’s perspective on the value of enhanced cooperation).

405. The ECJ is granted jurisdiction to hear cases in which a Member State is accused of failing “to fulfil an obligation under the Constitution.” CONSTITUTION, *supra* note 1, at arts. III-360 to -361. Such cases may be brought by the Commission or another Member State, and the ECJ has the authority to impose financial penalties or order the defendant state to comply with the Court’s decision. *Id.* at arts. III-360 to -362.

406. *Id.* at art. I-59(2). The values are those expressed in Article I-2, namely, “respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” *Id.* at art. I-2. The procedures include a preliminary determination by the Council and the consent of the European Parliament. *Id.* at arts. I-59(1)-(2). The decision by the European Council must be unanimous, with the accused Member State ineligible to vote on the matter. *Id.* at arts. I-59(2), (5).

407. *Id.* at art. I-59(3). Similar provisions for the suspension of rights are contained in the Treaties. TEU, *supra* note 2, at art. 7; EC TREATY, *supra* note 2, at art. 309.

408. CONSTITUTION, *supra* note 1, at art. I-59(3).

disenfranchises the citizens of that state, because their state government is rendered incapable of fully representing them at the central level.⁴⁰⁹ In actuality, suspension of rights is akin to a countermeasure imposed by treaty partners on a state that has breached its treaty obligations. Lacking a strong central authority, the aggrieved states may have no choice but to reciprocate by denying the violating state the benefit of the treaty relationship.⁴¹⁰ The underpinnings of countermeasures are twofold: the sovereignty of the violating state and the corresponding inability of the other states to enforce treaty compliance. From this point of view, Article I-59 tacitly recognizes that the Member States are sovereign entities within the Union, and in their sovereignty they may be immune to centrally imposed enforcement of their core responsibilities.

Article I-60: Withdrawal from the Union. Part I of the Constitution presents an overview of the European Union, a kind of promotional summary of its values and objectives, its competences, the authority of its institutions, the rights of its citizens, and the commitment of the Member States to its success. Ironically, after all of that, the final provision of Part I creates the right of a Member State to voluntarily withdraw from the Union.⁴¹¹ This is a procedure not found in the Treaties. Article I-60 calls for notification by the withdrawing state, negotiation of a withdrawal agreement, and an exit date two years after first notification is given to the EU unless the parties agree otherwise.⁴¹² A state that has withdrawn may later apply to rejoin the Union pursuant to the ordinary accession procedure.⁴¹³

Secession of a constituent part from a federation, as the U.S. Civil War demonstrated, is a threat to the very existence of the federal entity and is generally considered to be illegal.⁴¹⁴ On the other hand, despite

409. Anticipating such fallout, the Constitution provides that "the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons." *Id.*

410. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 346. Notwithstanding the possibility of suspension of a Member State's voting rights, Joseph Weiler has argued that legal remedies available within the EU have largely eliminated "the most central legal artifact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility with its concomitant principles of reciprocity and counter-measures." J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 29 (1999).

411. CONSTITUTION, *supra* note 1, at art. I-60.

412. *Id.* at art. I-60(2)-(3).

413. *Id.* at art. I-60(5); *see also id.* at art. I-58 (regarding accession procedures).

414. The United States Supreme Court has decreed secession to be in violation of American federal law. *Texas v. White*, 74 U.S. 700, 724-26 (1868). Joseph Weiler has noted the "juridical" conclusion that under the current Treaties unilateral withdrawal from European Union would be illegal. WEILER, *supra* note 410, at 18. Cass Sunstein argues that provisions permitting secession may well endanger "ordinary democratic processes" and that they have no place in a constitution. Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 669-70 (1991).

the rule of *pacta sunt servanda*—the expectation that a state will fulfill its treaty obligations⁴¹⁵—international law recognizes a variety of grounds for revoking and withdrawing from a treaty.⁴¹⁶ Under the law of treaties the concept of state sovereignty would allow withdrawal either in accordance with the terms of the treaty itself or on the basis of an ultimate expression of self-interest. The Constitution's inclusion of Article I-60 underscores the fact that in many ways it is still a treaty—its parties, the Member States, may assert their autonomy by withdrawing from the Union.⁴¹⁷

Article IV-443: Amending the Constitution. The ordinary procedure for amendments to the Constitution requires either a constitutional convention or an IGC, plus ratification by all of the Member States, acting in accordance with their own constitutional requirements.⁴¹⁸ There are also two “simplified” amendment procedures relating to Part III of the Constitution. Under the first, unanimous voting requirements in Part III can be changed to QMV, and special legislative procedures in Part III can be replaced with the ordinary procedure, without the necessity of a convention or IGC. However, the European Council must unanimously approve any such amendment, and it must be referred to the national parliaments. Opposition by any parliament will block the amendment.⁴¹⁹ The

415. Vienna Convention on the Law of Treaties, *supra* note 410, at 332; IAN SINCLAIR, *THE VIENNA CONVENTION OF TREATIES* 84 (2d ed. 1984).

416. Vienna Convention on the Law of Treaties, *supra* note 410, at 344-47; see SINCLAIR, *supra* note 415, at 181.

417. Raymond Friel sees secession as a distinctly anti-federal concept, and he writes: “The degree to which secession is controlled tells us much about whether the Union is simply an association of States or a true federal Union.” Raymond Friel, *The Draft Constitution: Issues and Analyses: Secession from the European Union: Checking out of the Proverbial “Cockroach Motel,”* 27 *FORDHAM INT’L L.J.* 590, 641 (2004); see also Dougan, *supra* note 222, at 8 (discussing art. I-60, previously numbered I-59, as “the ultimate constraint upon Union competence”).

418. CONSTITUTION, *supra* note 1, at art. IV-443(2)-(3). Herwig C.H. Hofmann has commented that the ratification requirement relating to constitutional amendments “can be regarded as the last direct link between EU law and public international law principles. A strong intergovernmental aspect accompanies it.” Hofmann, *supra* note 266, at 18. As noted earlier, the intergovernmental school of thought emphasizes ultimate Member State power. See *supra* Part I.

419. CONSTITUTION, *supra* note 1, at art. IV-444. Commenting on this procedure, Giovanni Grevi has written: “[c]onsidering the sometimes twisted dynamics of national politics in relation to Europe, this is absurd and seriously undermines the effectiveness of a very important procedure, allowing for a minimal degree of flexibility to overcome unanimity.” Grevi, *supra* note 38, at 7. It is of interest that there is one streamlined amendment procedure that avoids referral to national parliaments or Member State ratification: Article III-422 permits the Council representatives of Member States participating in a program of enhanced cooperation to unanimously decide to move from unanimity to QMV or from a special legislative procedure to the ordinary procedure. The European Parliament must be consulted on a change of legislative procedure, but the national parliaments and Member State governments have no role in either process. CONSTITUTION, *supra* note 1, at art. III-422.

second procedure permits revisions to Title III of Part III (the internal policies of the Union) without a convention or IGC, but a unanimous decision of the European Council is required, and the amendment is subject to ratification by all of the Member States.⁴²⁰ Regardless of which amendment procedure is followed, any formal change in the competences of the Union and its institutions will be subject to procedural safeguards and full consensus.⁴²¹ The majoritarian ideal yields to the ultimate power of the veto and the absolute right of each state to preserve what it has previously agreed to, including the Constitution's careful balancing of authority. The unanimity requirement protects each state from the unwanted imposition of an ultimate loss of sovereignty.

III. CONCLUSION: A FINAL BALANCING

A question never far from the minds of those who follow Union developments is, "Will the Creation come to dominate its Creators?" Federalists might answer, "It must, and it will." Intergovernmentalists would counter, "No, never." Confederalists could raise their hands and urge, "Stop! There is a middle ground, and we are standing on it. The European Union can be a significant force in Europe and the world, but the Member States need not slide into oblivion or irrelevance."

The intergovernmental and federal camps are entitled to press their opposing points of view, but this Article has demonstrated that the Constitution will maintain the EU as a hybrid system. The Union will continue to possess competences considerably more sweeping than those granted to a typical IGO, but it will stop far short of becoming a true federation. The following is a brief summary of the Constitution's salient provisions relating to its allocation of powers.

A. *Emphasis on the Union*

Many, but not all, of the central features assigned to the Union under the Constitution will be carryovers from the treaties. Whether presently existing or not, the Constitution will endow the EU with the following striking characteristics:

Citizenship. EU citizenship is granted to nationals of the Member States, affording them the freedom to reside, work, and vote anywhere in the Union.

420. *Id.* at art. IV-445(1)-(2).

421. Several attempts were made at the Convention to permit constitutional amendments by less than unanimous approval, but these were rebuffed. See NORMAN, *supra* note 7, at 81, 293, 332.

Budgetary independence. The EU raises its own revenue and sets its own budgets. It does not depend on contributions from its members.

The euro. The EU has its own currency, managed by its own central bank.

European Parliament. An increasingly important institution, the Parliament is popularly elected and not answerable to the Member State governments. Its role in the Union's legislative process, while limited in some respects, is significant.

Council of Ministers. Its members represent the national governments, but much of its decision-making is by qualified majority.

Commission. Under the Constitution, the EU's permanent executive will as of 2014 no longer be composed of voting commissioners from all Member States, and the Commission will retain its independence.

Majoritarian principles. A considerable amount of Union legislation may be adopted by majority voting in the Council and European Parliament.

Primacy. EU law has primacy over the laws of all Member States, including those that might have opposed the EU action.

B. Emphasis on the Member States

The text of the Constitution is replete with language that speaks to the Member States' integrity and competence within the EU system. A few of the most significant concepts are:

Conferral. *The EU may act in many fields, but only within the limits of authority conferred on it by the Member States. Competences not granted to the Union under the Constitution remain with the states.*

Unanimous voting. *The general requirement for policy-setting on the European Council is unanimity, and the Council must reach consensus on many of its key decisions. Unanimity is distinctly anti-majoritarian, and a single Member State can block a decision or exact concessions as the price for its vote. To avoid gridlock, reservations and opt-outs may be necessary.*

Foreign policy and defense. *Activity in these critical areas, which could be employed to enhance the Union's stature as a world power, is largely left to the Member States.*

Respect for the states. *In its own Constitution the Union is mandated to respect the integrity of the Member States as sovereign nations.*

Enhanced cooperation. *Where the EU is unable to act, groups of states may proceed to act on their own. This is evidence of a certain weakness at the central level and a certain measure of autonomy left in the Member States.*

Suspension of rights. This provision underscores the fact that the Constitution retains many characteristics of a treaty.

Withdrawal right. This is a singular concept. Although the economic and political ramifications of withdrawal will likely inhibit this provision from ever being invoked, its presence in the Constitution is a bold affirmation of ultimate national sovereignty.

Unanimity to amend. The Constitution cannot be amended without the consent of each Member State.

C. Holding the Middle Ground

Given the constantly shifting winds of global affairs, regional politics, and national sentiment, it is impossible to predict whether the Constitution, if indeed ratified, will yield success for the European Union. Will its balance of power be workable? Can its political compromises be sustained? Will there be continuing pressure to hand more power to Brussels, or will there be a drift toward enhanced cooperation among a core group of states? What is clear is that the Constitution is intended to maintain the Union's current system of dual authority, with the Member States retaining their status as sovereign nations in a union with significant central features. Under the Constitution the middle ground between intergovernmentalism and federalism will be held.