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**Adopting the EU Constitution:
One Step Forward, Two Steps
Back**

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Summary

The purpose of this paper is to determine whether the Treaty to Establish a Constitution for Europe contains the basic and essential constitutional values necessary to safeguard citizens' fundamental rights. This is a significant question since any legal instrument that claims to have constitutional values for the benefit of its citizens should contain certain elements that protect its citizens.

This paper consists of five parts. First, I discuss general constitutional values, including the purpose of a constitution and its most basic and essential elements, and how constitutions differentiate from treaties. Next, I survey the current treaties for their constitutional structure and level of rights protection. I then turn to the new Constitutional Treaty to ascertain whether it expands upon citizenship and fundamental rights afforded under the existing treaty system, or whether it undermines, or even jeopardizes existing, constitutional values by its inclusion of a national identities clause and secession clause. Following that, I evaluate the Constitutional Treaty to determine its scope as a constitution versus a treaty, and in doing so I identify its weaknesses as a constitutional document. Finally, I consider the effects that the secession and national identities clauses have on citizen rights within the Constitutional Treaty.

Constitutions are created for the people for the purpose of restricting excessive government. The basic ingredient of a constitutional document is a guarantee of fundamental rights to citizens on a permanent and democratic basis. Without these latter elements, constitutions cannot safeguard citizen rights.

It's no secret that the current treaties, largely due to the ECJ's role as a guardian and promoter of constitutional values embodied in the current treaties, have created a supranational legal order with a constitutional charter in the EU. So too, then, European citizens should be able to rely on the new Constitutional Treaty provisions to safeguard their constitutional rights, particularly since the Constitutional Treaty would nullify the existing treaty system.

The Constitutional Treaty is a step forward in that it codifies the Charter of Fundamental Rights, simplifies the current treaty system into one working legal instrument, and arguably improves voting procedures and administrative efficiency. However, because it derives its powers from both the citizens and the Member States, the Constitutional Treaty puts its own constitutional rights at risk, and thus potentially negates its own advancements, by giving too much power to the Member States. This is evident in both the national identities clause and the secession clause. Precisely because the Constitutional Treaty would replace the current treaties, the secession clause, if utilized, would terminate the fundamental

rights of European citizens as if they never existed. In this sense, the EU Constitution takes two steps back.

Furthermore, in trying to be both a constitution and a treaty, the Constitutional Treaty undermines the very constitutional values it seeks to establish and belittles the notion of a constitution by maintaining treaty-based constitutionalism. The national identities clause yields too much power to the Member States, which could severely weaken further integration efforts at the European level, as well as the Court's ability to adequately safeguard citizen rights. Besides that, any progress made by the Union could be recoiled at the will of the Member States due to the inclusion of a secession clause. Because it leaves no ambiguity of the drafters' intention, the secession clause would render the Court helpless in protecting the constitutional rights of European citizens should a Member State withdraw from the Union.

Therefore, this particular 'Constitution' should not serve as a constitutional model. Rather, the Constitutional Treaty should be scrapped in favor of a constitutional instrument that truly reflects a guarantee of fundamental rights on a permanent basis for European Citizens. In the end, patience and persistence are the ultimate virtues necessary to achieve this goal, while in the interim, the existing treaty system would remain in place to protect those rights established by the current treaties.

Lastly, I should state that since I am an ardent supporter of constitutional rights, I would be inclined to support the Constitutional Treaty if the secession clause were removed because its removal would resolve the problem of permanence in a legal sense and thereby provide citizens with the fundamental guarantees necessary of a constitution. I would also take much more comfort if the national identities clause were removed, or at least reworded, in particular by omitting the statement of equality between the Constitution and the Member States. However, I am somewhat optimistic that the Court, and perhaps even the Member States, will interpret this provision in light of the Union supremacy clause and the overall purpose of creating a Constitutional Treaty for the people of Europe.

Abbreviations

AG	Advocate General
Commission	European Commission
Charter	Charter of Fundamental Rights
Community	European Community
Constitutional Treaty	Treaty Establishing a Constitution for Europe
Constitutional Convention	Convention for the Future of Europe
Council	The Council of the European Union
ECAS	European Citizen Action Service
EC Treaty or Rome Treaty	Treaty Establishing the European Community (Rome Treaty of 1957)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ or Court	Court of Justice for the European Communities
EU or Union	European Union
EU Treaty or Maastricht Treaty	Treaty on the European Union (Maastricht Treaty of 1992)
IGC	Intergovernmental Conference
Parliament	European Parliament
QMV	Qualified Majority Voting

1 Introduction

The Treaty Establishing a Constitution for Europe¹ is a monumental document, consisting of 448 articles plus protocols and annexes, that aims to bring the European Union closer to its citizens² by deepening the democratic and transparent nature of Europe's public life.³ The Constitutional Treaty was drafted under the leadership of former French President Valéry Giscard d'Estaing and signed by all twenty-five Member States plus three applicant states, namely Bulgaria, Romania and Turkey, on 29 October 2004, in Rome, Italy, which is the site of the signing of the original EC Treaty⁴ in 1957. The ratification process is expected to take a couple years, with ten Member States holding referendums and the others voting by their national parliaments,⁵ and it is hoped that all current Member States will have adopted the Constitutional Treaty by November 2006.⁶

The Constitutional Treaty is supposed to strengthen the social dimension of the Union more any other EU agreement has done thus far by solidifying the citizens' role in Union affairs. Parts I and II contain the constitutional rules and principles, which are considered the most important part of the Constitutional Treaty from the citizen's point of view.⁷ However, a key question is whether the EU Constitutional Treaty would reconcile many competing national interests and also safeguard the rights of Union citizens.⁸ While the Constitutional Treaty would advance European citizenship within the context of the European Union, the document contains a few provisions that are legally problematic – with the secession clause

¹ OJ C 310/11 16.12.2004.

² Merritt, Giles, "EU Constitution II: What's in a Document's Name? A Lot."

³ Constitutional Treaty, Preamble, para. 3.

⁴ Treaty Establishing the European Economic Community (Rome Treaty of 1957). OJ 24.12.2002 C 325.

⁵ The ten countries that have chosen to hold referendums are as follows: Czech Republic, Denmark, France, Ireland, Luxembourg, The Netherlands, Portugal, Poland, Spain, and United Kingdom. Note, however, referendums in Luxembourg, The Netherlands, Spain and the U.K. are non-binding such that their national Parliaments will have the final say in the matter. The remaining fifteen countries will have their national Parliaments solely decide.

⁶ To date, six Member States have already ratified the new Constitutional Treaty: Germany, Greece, Hungary, Italy, Lithuania and Slovenia. The Spanish Parliament will soon likely adopt the Constitutional treaty since Spanish citizens overwhelmingly approved it in a consultative referendum that took place in February despite a record-low turnout at the polls. The French referendum is scheduled for 29 May 2005 and the non-binding Dutch referendum will take place on June 1 2005.

⁷ ECAS, "50 Questions and Answers," p. 7. The European Citizen Action Service is an international non-profit organization created in 1990 that is independent of political parties, commercial interests and the EU institutions. The association's mission is to enable NGOs and individuals to make their voice heard with the EU. Source: www.ecas.org on 16 May 2005.

⁸ Merritt, G., *supra*, note 2.

being a fatal flaw – and would create problems for further integration and prevent citizens from asserting their constitutional rights.

1.1 Purpose

The purpose of this paper is to determine whether the Treaty to Establish a Constitution for Europe contains the basic and essential constitutional values necessary to safeguard citizen rights. This is a significant question since any legal instrument that claims to have constitutional values for the benefit of its citizens should contain certain elements that protect its citizens, or else the value of a constitution is greatly diminished.

While the Constitutional Treaty aims to be more efficient, more effective and more democratic,⁹ the resulting document is a political compromise that lacks constitutional values that are permanent, as demonstrated by the inclusion of a secession clause. In my view, the Constitutional Treaty drafters made too many political accommodations that allow Member States to retain too much legal power such that if the Constitutional Treaty is adopted and implemented, it could jeopardize the constitutional protections established under the existing treaty system.

1.2 Outline and Method

In order to ascertain whether the Constitutional Treaty contains the essential features that safeguard citizen rights, it is first necessary to determine what exactly is the new Constitutional Treaty. Precisely for this reason, I will intentionally refer to the Constitutional Treaty as just that, with the exception of my title – which denotes ‘Constitution’ for effectual purposes – or unless I am referencing material in which the Constitutional Treaty is called by another name. In answering this question, I will regard it as a constitutional instrument and analyze whether it lives up to that status.

By drawing on the works of legal and political scholars, I take a normative approach in explaining the basic purpose of a constitution and describing its persistent characteristics in Chapter 2. I also identify the essential features to be included in any constitutional document that are necessary to safeguard fundamental rights. I draw mainly upon the works of constitutional scholars to define these norms.

In Chapter 3, I then examine the current treaty system to demonstrate its constitutional nature, which is protected by the European Court of Justice and the Union’s institutions. Here, I rely on case law, books and articles to make the case that the EU already has a constitutional structure in place that safeguards fundamental rights embodied in the existing treaties.

⁹ See Constitutional Treaty, Preamble, para. 3: “...[Europe] wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity in the world.”

Next, in Chapter 4, I turn to the Constitutional Treaty and explore its contents to determine whether it goes further than the current treaty system in safeguarding citizen rights. Its efforts can be summed up as one step forward, two steps back. For this descriptive analysis I draw heavily upon the Constitutional Treaty provisions as well as commentaries by scholars, politicians, practitioners and journalists.

I then critically analyze the Constitutional Treaty to determine its capacity and its implications on citizens in Chapters 5 and 6. Here, too, I refer to commentaries by scholars, politicians, practitioners and journalists in developing my own arguments and conclusions. Ultimately, I conclude that the Constitutional Treaty tries to be both a constitution and a treaty, but in reality it is far from a constitution and more than a simple treaty.¹⁰ Moreover, it creates problems of interpretation and inefficiency in trying to be both. Significantly, because it lacks the vital elements that a constitutional document requires in order to properly protect citizen rights, I argue that European citizens are better off without the Constitutional Treaty in its current textual form. This is particularly true since European citizens can rely on their fundamental rights protection under the current treaty system, which would remain in place should the Constitutional Treaty fail to be adopted.

1.3 Delimitations

While this topic is highly political in nature, this paper analyzes the new Constitutional Treaty from a legal perspective to determine whether it guarantees protection for the fundamental rights of European citizens that as a constitutional document it should guarantee. I will not discuss in full every possible right provided in the Constitutional Treaty since there are many; rather I will focus on those that are most essential in ascertaining its constitutional value. Similarly, I will not discuss every defective provision; rather I will concentrate on those that truly diminish its constitutional value, such as the national identities clause and secession clause.

I shall be brief in my discussion of democracy as a constitutional value that provides legitimacy to an operable political system. Therefore, I will not contemplate the openness and transparency of the Convention process, nor will I delve into a deep discussion on voting referenda as the ultimate form of direct democracy and individual expression. These issues have been the primary topic in several recent legal works that discuss the democratic process and outcome of the Convention and IGC. Nor will I speculate on the likelihood of success of the ratification process and any potential “Plan Bs” should the Constitutional Treaty fail to be adopted.

Furthermore, I will not spend much time discussing the various legal theories on secession under the current treaty system except to say that the

¹⁰ Hettne, Jörgen, lecture given at Lunds University on 20 April 2005.

current status of the EU is viewed by most scholars as being more than a creature of international public law. Therefore, I suggest that it is insufficient for a Member State to rely solely on the Vienna Convention for the Law of Treaties if it wanted to leave the EU today. Because it serves as two sides of the same coin, I will avoid any speculation on whether the Union has a legal right to kick-out a current Member State for non-compliance or any other politically-motivated reason.

Lastly, with the caveat that I am an American who finds comfort in my federal form of government, I will avoid to the extent possible any references to federalism, except perhaps unintended or subtle inferences. It is my personal view that the EU is moving further in the direction of a federal model, particularly if the Constitutional Treaty is adopted, however I fully understand that the EU would fall short of true federalism under the Constitutional Treaty. Nonetheless, I am inclined to believe in Winston Churchill's vision of a "United States of Europe" as opposed to Charles de Gaulle's attitude that the Union will remain only a Europe of the States.¹¹

¹¹ Zetterquist, Ola, *A Europe of the Member States or of the Citizens?* p.314, ft. 1152. Citing <http://www.charles-de-gaulle.org/degaulle/citations/citeurop.htm> (2001-05-10) and Jean Monnet, *Memoirs*, p. 441. "The notion of the Community as an independent political being alongside the Member States belonged to fairy-tale land: "...qu'à l'heure qu'il est, il ne peut pas y avoir d'autre Europe que celle des Etats, en dehors naturellement des mythes, des fictions, des parades."

2 Constitutional Values

Law, which can take many forms, is simply the relationship between peoples in the Community in which the Community chooses to be bound. The concept of a constitution, which is considered the highest form of law, has many connotations, and may be viewed in absolute, relative, material, formal or substantial terms.¹² Constitutional documents are thus distinguished from other legal instruments in both their purpose and element.

2.1 Constitutions Differentiated from Treaties

Treaty law is basically different from constitutional law, since treaties are directed to governments and constitutions are directed to the people.¹³ In treaty agreements, the position of the individual is most often secondary to the treaty's context, which is aimed at diplomatic and political relationships between states.¹⁴

In many countries, including some Member States, treaties do not enjoy the status of higher law as constitutions do.¹⁵ There is also a presumption that states do not lose their independence as contracting parties to treaties, whereas constitutions limit the power of the government.¹⁶ To this extent, treaties usually allow for reservations and secession by the states, whereas constitutions typically do not.

Normally, treaties do not create governments with full legislative power. Even where treaties create organizations, their role is usually restricted to monitoring, implementing and sometimes interpreting treaty provisions rather than creating new laws and building upon the foundation of the treaty provisions. Thus, treaties create bodies that can govern or administrate, but they do not typically create a government that also has the power to make laws.

2.2 Purpose of a Constitution

As stated above, constitutions are directed to the people. This is so even if representatives sign or ratify the constitution on behalf of the people, as in a republican form of government.¹⁷ In providing guarantees to its citizens,

¹² Closa, Carlos, "Constitution and Democracy," p. 147.

¹³ Mancini, G. Federico, "The Making of a Constitution for Europe," p.596.

¹⁴ Birkinshaw, Patrick, p. 45.

¹⁵ Mancini, G. Federico, p. 596, 599.

¹⁶ Ibid at p. 596.

¹⁷ For example, the U.S. Constitution was signed by representatives of each state, although it was created for the people.

constitutions limit the government's powers. Constitutions also reinforce credibility and legitimacy of the government system.¹⁸

2.2.1 Created for the People

Constitutions are created for the people, and are intended to provide rights and obligations on a particular group of people. The term 'people' has a wider scope than the term 'citizen' in that some rights, such as human rights, are granted to all people without geographical or political territorial limitations, whereas constitutional rights are granted to a particular citizenry. In granting such rights, constitutions obligate the government to protect the rights of its citizens, and allow citizens to defend their rights against the government. Even if a constitution were to extend rights to non-citizens, no harm can come to its citizens.

Constitutions are actually meant to frame citizens but not necessarily define them. Thus, a constitution sets the framework for the society to develop upon, however "it does not act as a straight jacket nor does it provide all the answers."¹⁹ More precisely, a constitution is said to be both a set of guidelines and a rule-book since it embodies constraints, aspirations, context and a discipline.²⁰

In many democratic societies, constitutions are considered a fundamental social contract among citizens.²¹ For example, European citizens identify with one another through a set of broadly shared values, such as democracy, which most Europeans associate with a social safety net.²² Therefore, constitutional provisions should express the common will of its citizens.²³ But one scholar reminds us that constitutions are not one-sided, coherent, ideological charters or platforms, rather they are the result of protracted negotiations among different political forces.²⁴ This may explain why some Europeans envision a fully-fledged constitution for the Union as being a "single text explicitly framed as the basic law of the Union order, and aping the written constitutions of States."²⁵

There are many who believe that without sovereignty there can be no constitution, and without a constitution there can be no sovereign state.²⁶ I agree that some form of democratic government – even the most simple form consisting of a legislative body and a court – is necessary for there to

¹⁸ Estella, Antonio, "Constitutional Legitimacy," p. 22.

¹⁹ Birkinshaw, Patrick, "Constitutions, Constitutionalism, and the State," p. 45.

²⁰ Ibid at p. 45.

²¹ Wikipedia Encyclopedia. Drawing on the works of Jean-Jacques Rousseau.

²² Bennhold, Katrin, "Quietly Spouting: A European Identity." According to periodic opinion polls conducted by the European Commission.

²³ Menéndez, Augustín José, p. 18.

²⁴ Estella, Antonio, p. 32.

²⁵ Dashwood, Alan, "States in the European Union," p. 204.

²⁶ McCormick, Neil, "Beyond the Sovereign State," p. 1. Also see Michael Ancram, "Comments on the EU Constitution," BBC News, 29 October 2004. "Countries have constitutions; nation states make treaties."

be an operable constitution. This is because constitutions define how governments function and limit their powers. In this sense, every democratic government has some form of constitution, whether codified or not.²⁷ But I consider it wrong to assume that constitutional law can only exist where it is created or validated by a pre-existing recognized state when in fact constitutional law has been used to describe the relationship between peoples from EU Member States even though there is no overriding state or single reference point of validity.²⁸ Since enforcement problems occur at both the municipal and international levels, it is the presence of binding rules rather than the presence of an established state or an international institution that provide recognition of what rules are legally valid.²⁹

Furthermore, it has been argued that there need not exist a certain degree of social cohesion among the groups, states, or peoples that seek integration in order to have a constitution, and that the creation of an EU Constitution would not necessarily result in the creation of such a *demos*.³⁰ Therefore, the goal of EU Constitutional Treaty drafters should be to create more efficient, accountable and transparent institutions to enforce the binding law, rather than trying to create a common identity.³¹

2.2.2 Limit on Government Power

The main purpose of any constitutional instrument is to protect the rights of citizens by restricting excessive government. Therefore, as mentioned above, constitutions define how governments operate since they limit government powers. An organization, or government, may be given specific powers on the condition that it abides by its constitution or charter limitation.³² In the EU, such powers are conferred to the Union by the Member States as laid out in the legal texts.³³ Laws falling outside the scope of that organization's powers are considered *ultra vires*, since that organization has not been granted the power to act. Constitutional law-making, then, should primarily be a matter of distributing power and limiting it, and should establish an equilibrium between the public and private spheres in order to make people better off.³⁴

²⁷ For example, Great Britain's constitution is largely based on precedent rather than being codified.

²⁸ Birkinshaw, Patrick, p. 39-40. "Law can only exist where it is effectively enforced or where it is given recognition as valid law according to officially accepted criteria of legal validity," and "law has been used to describe relationships between states and international organizations even though there is no overriding sovereign power or single reference point of validity."

²⁹ Ibid at p. 41. Referencing H.L.A. Hart, *The Concept of Law*, Ch. 10.

³⁰ Estella, Antonio, p. 23.

³¹ Ibid at p. 33.

³² Wikipedia Encyclopedia.

³³ Article 5 EC; See also Constitutional Treaty, Part I, Title III, Union Competences

³⁴ Estella, Antonio, p. 32-33.

Furthermore, constitutions “should open up and frame political decision-making without exhausting or confining it.”³⁵ By this I mean that there should remain some flexibility by incorporating both principles and rules.

2.2.3 The Role of Democracy

There are two competing views of a constitution with respect to democracy: a constitution as a limit upon democracy versus a constitution as an empowerment for democracy.³⁶ Some of these themes have already been touched upon above and will be touched upon again below.

2.2.3.1 Democracy as a Limit

Democracy in the form of an electorate is the most effective way to limit the government. It also increases credibility since legislators who have been democratically elected are seen as legitimate, whereas judges who are appointed are not viewed as accountable. Referendums are often used on significant matters having a great affect, such that the electorate represents the whole community rather than just the representative part of the community.

Democracy in a broad sense includes transparency, accountability and honesty of the government.³⁷ Ironically, it is the government that is entrusted to enforce the constitution, which at first seems at odds with the purpose of the constitution being to limit the power of the government. This is precisely how an alien body, such as the ECJ, can be helpful in separating the dual function of the EU and the Member States. While the ECJ is entrusted with the task of protecting the constitutional rights of the citizens belonging to the Member States, it is the Member States that are the protectors of democracy.

2.2.3.2 Democracy as Empowerment

The central idea of democracy is that “the rule of law cannot limit the sovereign will of the people expressed through democratic means.”³⁸ Since the founding of a constitutional act is a practice meant to bring forth a self-determining community of free and equal citizens, some believe that both the Constitutional Convention and the resulting Constitutional Treaty “mark an attempt to explicitly identify the basis of EU constitutionalism through constitutional policies.”³⁹

Commitments made by people and governments in the ordinary sense are duties, whereas in the strictest sense they may also impose obligations.⁴⁰ A constitution is the strictest form of commitment since it grants rights and

³⁵ Menéndez, Augustín José, p. 18.

³⁶ Closa, Carlos, p. 161.

³⁷ Estella, Antonio, p. 28.

³⁸ Closa, Carlos, p. 153.

³⁹ Ibid at p. 145.

⁴⁰ Estella, Antonio, p. 38.

imposes obligations for both governments and people. The credibility of strict legal commitments is increased by two factors: resistance to change and delegated power to independence agencies.⁴¹

Moreover, democratic legitimacy of a legal order is highly determined by the democratic legitimacy of the constitution itself because of the processes involved in law making.⁴² Initially, the law and institutions of the European Union were not the result of a democratically enacted constitution, but rather a diplomatically negotiated international treaty.⁴³ In 1967 the German Constitutional Court even found that the European Community had no lawful democratic basis because it lacked protection of human rights.⁴⁴ As explained in the next chapter, the EU has gained democratic legitimacy over the years and has proven to protect human rights, even though it cannot be considered a true democracy. Besides, the issue about Europe should not be whether it is totally or completely democratic, but whether it is adequately democratic.⁴⁵ Europe is a “commonwealth set up through agreements among pre-existing and still coexisting commonwealths, and that each of these, as a constitutional state, enjoys under its constitution the value of democratic answerability of executive and legislature, coupled with independence of its judiciary and some measures of separation of powers.”⁴⁶ Therefore, it is arguably adequate in protecting many of the rights of citizens of the Member States.

2.3 Essential Elements of a Constitution

Constitutions must reflect the basic consensus in a society and define issues that are not subject to democratic contest by setting norms and granting fundamental rights.⁴⁷ At its basic core, a constitution must contain a guarantee of rights made to citizens by the government on a permanent and democratic basis. I will now distinguish these essential elements and discuss why they are necessary in any constitutional document.

2.3.1 Rights Guaranteed to Citizens

One cannot talk about law or rights without consideration of their value, since fundamental rights reflect choices made by citizens about the sorts of values they wish to see protected as well as the best means of securing them.⁴⁸ A fundamental value is something basic and important in which other things are built upon. Fundamental law may refer to a constitution in

⁴¹ Ibid at p. 39.

⁴² Menéndez, Augustín José, p. 3-4.

⁴³ Ibid at p. 4.

⁴⁴ Mancinci, G. Federico, p. 609. Referencing *Bundesgerichtshof*, order of 18 October 1967, in BVerGE, 1967, 223.

⁴⁵ MacCormick, Neil, *Questioning Sovereignty*, p. 148.

⁴⁶ Ibid.

⁴⁷ Closa, Carlos, p. 153.

⁴⁸ Douglas-Scott, Sionaidh, *Constitutional Law of the European Union*, p.451.

particular,⁴⁹ and is defined as “the founding rules and principles or constitution on which a government is based, as distinct from its legislative acts.”⁵⁰ Together, fundamental rights and law-making provisions play a constitutional gatekeeper role since “fundamental laws contain the hierarchically superior set of norms of a legal order which determine the procedural and substantive conditions of validity of all other legal norms.”⁵¹

Classical theory dictates that the protection of citizens is best achieved by the recognition and safeguarding of fundamental rights, and the principle of division of powers.⁵² Bills of rights, such as The Charter of Fundamental Rights, are powerful tools of integration that also safeguard the civil liberties of citizens.⁵³ The French Declaration of the Rights of Man and of the Citizen states that “any society in which rights are not guaranteed, nor the scope of power determined, has no Constitution.”⁵⁴ Notably, it was American constitutional drafters such as James Hamilton and James Madison that argued in favor of adopting the U.S. Constitution without containing a bill of rights since “they took the view that the limited powers of the federal government made such a bill unnecessary.”⁵⁵ However, it is difficult to imagine the U.S. Constitution today without acknowledging the significance that the U.S. Supreme Court has given to the Bill of Rights in protecting individuals’ civil liberties over the last century.⁵⁶

Rights should also provide individuals with a rule of law and access to justice. If a rule of law is not respected by the government nor enforced by a judicial body, then that rule can no longer be termed law.⁵⁷ Thus, democracy is conditioned by overriding protection of individual rights.

2.3.1.1 Permanence

As previously mentioned, reservations and secession are typically permitted in most international treaties, however this is not the case for constitutions, which are most commonly considered to be “higher law” than treaties.

The philosophy behind permanence is that constitutions are mechanisms to guarantee citizen rights and limit government power. The only way to guarantee rights is to ensure their survival, thus constitutional documents that seek to guarantee rights must be permanent. Should constitutions fail to be permanent, then they fail to provide rights, which also leaves citizens without safeguards against excessive government regulation and intrusion.

⁴⁹ Oxford English Dictionary and Wikipedia Encyclopedia.

⁵⁰ Wikipedia Encyclopedia.

⁵¹ Menéndez, Augustín José, p. 3. Referencing Ignacio de Otto, *Derecho Constitucional*, Barcelona: Ariel, 1988, 14-7: “At the end of the day, the very concept of Constitution stems from the hierarchial ranking of legal norms,”

⁵² Closa, Carlos, p. 149.

⁵³ Mancini, G. Federico, p. 608.

⁵⁴ French Declaration of the Rights of Man and of the Citizen of 26 August 1789, Article 16.

⁵⁵ Mancini, G. Federico, p. 609. Citing Cappelletti, op. cit. note 24, at 171.

⁵⁶ Ibid.

⁵⁷ Ibid at p. 602. Citing Cappelletti et al, op.cit. note 7, at 38 et seq.

John Locke once stated that “the Constitution of the legislative is the first and fundamental act of society, whereby provision is made for the *continuation of their union*, under the direction of persons, and bonds of laws, made by persons authorized thereunto, by the consent and appointment of the people, without which no one man, or number of men, amongst them, can have authority of making laws that shall be binding to the rest.”⁵⁸ Consequently, law describes “functions that are necessary for maintenance and continuation of group life from the smallest of groups to those of international proportions.”⁵⁹

2.3.1.2 Democracy

In order for constitutions to protect fundamental rights, they must be drafted in such a way to insulate them from the ordinary operation of politics.⁶⁰ Accordingly, rigidity and immunization are an additional devices employed to guarantee rights.⁶¹ To restrict revision of rights may promote rather than undermine democracy.⁶² As evident in the U.S. Constitutional system, amendments to the Constitution are meant to be a lengthy, formal process with a higher qualified majority needed to adopt such changes. Similarly, changes to the current EU treaty system require ratification by all Member States.

⁵⁸ Locke, John, *Second Treatise*, § 212. Italics emphasized.

⁵⁹ Birkinshaw, Patrick, p.40.

⁶⁰ Closa, Carlos, p. 153.

⁶¹ Ibid.

⁶² Ibid at p. 154. Referencing Oliver Wendell Holmes, (1988) at 226. Holmes considered voluntary foreclosure of choices as liberating rather than confining.

3 Constitutional Nature of the Current Treaty System

Although the instrument giving rise to the European Community was a traditional multinational treaty, the EC Treaty created a peculiar form of international organization with a “unique institutional structure and unprecedented law-making and judicial powers.”⁶³ Indeed the unique structure of the EU institutions can be interpreted as a form of government, even if it is not a full-functioning democratic government. Also, as a result of its creation and authority, the European Court of Justice has been integral in protecting European citizens’ constitutional values imbedded in the current treaties and the constitutional traditions common to the Member States. In doing so, the national courts and the European Commission have been the Court’s biggest allies, since it is the national courts that both refer to and adhere to the Court and the Commission that has acted as both watchdog and enforcer of treaty rights.⁶⁴ Furthermore, the Council and the European Parliament have expanded upon the Court’s rulings and utilized their power to adopt binding legislation to benefit nationals of the Member States. In addition, the treaty amendment process has become “infused with elements of democratic constitution-making.”⁶⁵ As a result of all these developments, many scholars believe that Europe is now beyond the sovereign state.⁶⁶ Therefore, it is fair to suggest that the European Community already has a constitutional structure that is upheld by the Court of Justice, the national courts and the EU Institutions.

3.1 Citizenship

First, it should be noted that citizenship, which is an essential prerequisite to protecting constitutional values since it defines the set of people granted such rights, has already been established under the existing treaty system. Article 17(1)⁶⁷ of the EC Treaty states:

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.”

⁶³ Mancini, G. Federico, p. 595-596.

⁶⁴ Ibid at p. 597.

⁶⁵ Menéndez, Augustín José, p. 4-5. Referencing John Erik Fossum, “Constitutional-Making in the European Union,” in *Integration Through Deliberation? Democracy in the European Union*. London: Routledge, 2000, pp.111-40. And John Erik Fossum and Augustín José Menéndez, “The Constitution’s Gift,” *European Law Journal*, forthcoming.

⁶⁶ MacCormick, Neil, “Beyond the Sovereign State,” p.18.

⁶⁷ Article 17(1) EC.

The last sentence of this provision was introduced as a result of the Amsterdam Treaty, and it means that European citizens do not give up their national identity, rather they look beyond it to become closer to one another as Union citizens.⁶⁸

One scholar asserts that Article 17 “makes clear that citizenship at both the Union and national levels is merely an incident of the primary status of nationality, and recognition of that status remains a prerogative of individual Member States.”⁶⁹ I acknowledge that Union citizenship is of course dependent upon citizenship in one of the Member States, and carries with it few Union-specific rights, although I suggest that the doctrines of direct effect and direct applicability of Community law necessitate that there exists substantial and important rights, notably the four freedoms and their corollaries which are discussed below.⁷⁰

Euro-skeptics also maintain that dependency upon national citizenship status to obtain EU citizenship status demonstrates that the survival of the Member States in the full sense is a basic assumption of the European constitutional order.⁷¹ This argument has been based on the interpretation of TEU Article 1, which states in part:

“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen....[The Union’s] task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.”

In my view, this argument is flawed since unification is expressed to the peoples rather than the states, and the process is envisioned as continuing indefinitely.⁷² In fact, this provision is evidence that the constitutional elements I’ve described above already exist within the current treaty system.

3.2 Constitutional Rights Defined by ECJ

According to Federico Mancini, a former Member of the Court, the initial Rome Treaty of 1957 resembled a treaty rather than a constitution because it “[did] not safeguard the fundamental rights of individuals affected by its application, nor [did] it recognize, even in an embryonic form, a constitutional right to European citizenship.”⁷³ However, the EC Treaty entitled free movement to individual citizens of a Member State “exclusively by virtue of their being workers, self-employed persons or providers of services.” Significantly, the main endeavor of the Court was to

⁶⁸ Bennhold, Katrin, “Quietly Spouting: A European Identity.”

⁶⁹ Dashwood, Alan, p. 203.

⁷⁰ MacCormick, Neil, *Questioning Sovereignty*, p. 148.

⁷¹ Dashwood, Alan, p. 203.

⁷² Dashwood, Alan, p. 203.

⁷³ Mancini, G. Federico, p. 596.

move or reduce differences between treaty law and constitutional law by “constitutionalizing” the Treaty.⁷⁴ Thus, there is no doubt that the European Court of Justice has used its powers over the years to make a vital contribution to the integration of Europe such that the case law of the Court “coincide[d] with the making of a constitution for Europe,”⁷⁵ even before the EC Treaty was amended to include provisions on citizenship.

3.2.1 EU as a Supranational Legal Order

The European Union is seen as an independent entity that is detached from the Member States in that it cannot be dictated to by Member States.⁷⁶ In its first momentous judgment, the Court in *Van Gand en Loos* stated that the European Community constitutes “a new legal order of international law for the benefit of Member States and its nationals.”⁷⁷ As such, the Court has stated that national constitutions cannot act as a barrier to the effectiveness of Community law.⁷⁸

In addition, the Court in *Les Verts* referred to the existing treaties as the Community’s basic constitutional charter.⁷⁹ Advocate General Lagrange first referred to the EC Treaty as a constitutional entity in his opinion in *Costa v. Enel*⁸⁰ in 1964, however the Court refrained from using such language until the *Les Verts*⁸¹ judgment delivered in 1986. In explaining the legal theory upon the nature of the European Community, AG Lagrange said that the EC Treaty creates its own legal system, which by virtue of certain precise provisions, bring about a transfer of jurisdiction to the Community Institutions, and thereby partly replace the internal legal system.⁸² The Court in *Costa v. Enel* agreed with AG Lagrange that the EC Treaty has given the Community its own legal personality.⁸³ Moreover, in the *EEA Agreement*⁸⁴ opinion, the Court stated that the Member States have adhered to an advanced constitutional order for whose benefit they have limited their sovereign rights in ever-wider fields.⁸⁵ Note, too, that this last statement implies a sense of permanence for the Community, which is further discussed below.

⁷⁴ Mancini, G. Federico, p. 596.

⁷⁵ Ibid at p. 595.

⁷⁶ Birkinshaw, Patrick, p. 39.

⁷⁷ Case 26/62, *Van Gand en Loos*, 1963 E.C.R.1, at p. 3.

⁷⁸ Birkinshaw, Patrick, p.36.

⁷⁹ Ibid at p.34. Citing Case 294/83, *Les Verts*, 1986 E.C.R. 1339 and Opinion 1/91 (*EEA Agreement*), 1991 E.C.R. I-6079.

⁸⁰ Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585.

⁸¹ Case 294/83, *Les Verts*, 1986 E.C.R. 1339.

⁸² Case 6/64, *Costa v. Enel*, 1964 E.C.R. 525. Opinion of Advocate-General Lagrange delivered on 25 June 1964.

⁸³ Ibid.

⁸⁴ Opinion 1/91 (*EEA Agreement*).

⁸⁵ Dashwood, Alan, p. 201-202. Citing Opinion 1/91 (*EEA Agreement*), at para. 21.

3.2.2 Fundamental Rights

The ECJ has protected fundamental rights of individuals such as freedom of movement, due process and privacy, for numerous years, and in doing so it has admitted that it looks beyond the basic text of the EC Treaty. In 1974, the Court in *Nold v. European Commission*⁸⁶ held that “fundamental rights form an integral part of the general principles of law.” In order to protect fundamental rights, the Court said it is “bound to draw inspiration from constitutional traditions common to the Member States,” and international treaties for the protection of human rights in which Member States are a party can serve as guidelines to be followed within the framework of community law.⁸⁷ For example, the Court in *AM&S*⁸⁸ derived the principle of lawyer/client confidentiality from a comparative survey of Member State laws.⁸⁹ The ECJ has since reiterated its reliance upon common national constitutional traditions and international treaties for inspiration in protecting fundamental rights on other occasions,⁹⁰ and has refused to “uphold measures which are incompatible with fundamental rights recognition and protection by the Member States.”⁹¹ Several years after *Nold*, the Court’s language was codified in Article 6(2) of the EU Treaty, which states that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of law.⁹²

One critique, however, is that the standards of protection are different in each Member State, and the Court limits its definition of a European standard of protection to that of the common constitutional traditions of the Member States.⁹³ Furthermore, the Court has admitted that its efforts to safeguard the fundamental rights of Community citizens have been somewhat constrained by the fact that it lacks the power to examine the compatibility of human rights laws concerning areas that are beyond its scope, rather the power resides with the national legislators.⁹⁴ However, for areas within its scope, the Court has held that even national implementing measures of a Community provision incorporating the protection of a human right must give full effect to this provision in such a way as to not disregard that right.⁹⁵

⁸⁶ Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491.

⁸⁷ *Ibid* at para. 13.

⁸⁸ Case 155/79 *AM&S Europe Ltd v. Commission*, 1982 E.C.R. 1575.

⁸⁹ Douglas-Scott, Sionaidh, p. 451.

⁹⁰ *Ibid* at p. 453. Citing Case 11/70, *International Handelsgesellschaft*, 1970 E.C.R. 1125 at 1134.

⁹¹ Case 44/79, *Hauer*, 1979 E.C.R. 3740.

⁹² Douglas-Scott, Sionaidh, p. 451. Citing Article 6, para. 2, TEU. (Formerly Article F, para. 2, TEU).

⁹³ *Ibid* at p. 452.

⁹⁴ Mancini, G. Federico, p. 611. Citing *Cinéthèque v. Fédération Nationale des Cinémas Français*, Joined Cases 60 and 61/84, 1985 E.C.R. 2605, para. 26.

⁹⁵ *Ibid* at p.611, ft. 47. Case 5/88, *Wachauf* 1989 E.C.R.

3.2.2.1 Freedom of Movement and Establishment

European citizens enjoy the freedom of movement under the law of the economic Community subsumed in the Union.⁹⁶ The principle of non-discrimination laid out in Article 7 of the EC Treaty applies free movement to goods, workers, services and capital, as well as the right of establishment. As stated above, this means that citizens of the Member States have the freedom to work, receive and provide services, and establishment themselves anywhere in the Community. In this sense, “individuals may have been said to derive their transnational rights from their constitutional position of being nationals of a Member State and from their functional status of being workers.”⁹⁷ Today, the right of a Union citizen to move and reside freely within the territory of the Member States is clearly expressed in Article 18⁹⁸ of the EC Treaty as part the European citizenship.

Moreover, the Court has used the EC Treaty’s principle of non-discrimination and provisions on free movement on numerous occasions as a vehicle to solidify and expand fundamental rights for the citizens of Member States, and at times has been relatively crafty in doing so. For example, in *Cowan*⁹⁹ the Court enabled a U.K. national visiting his son in France to recover for his injuries by equating his status as a tourist with a recipient of services. The Court then determined that the French law was in violation of the principle of non-discrimination with respect to the freedom to provide and receive services and granted compensation since it was provided to French nationals in the same situation.¹⁰⁰

3.2.3 Use of General Principles to Enforce Fundamental Rights

Supremacy, direct effect and pre-emption are typically regarded as the three principle doctrines encapsulating the judicial constitutionalization of the EC Treaty.¹⁰¹ Note that this view is incompatible with the notion of international public law. Significantly, these doctrines, which serve as an operating system to protect fundamental rights, have been given the status of general principles of Community law.

3.2.3.1 Direct Effect

Early on, the Court in *Van Gand en Loos*¹⁰² held that individuals could directly rely upon Treaty provisions so long as those provisions expressly grant them rights and impose a precise and unconditional obligation on the

⁹⁶ MacCormick, Neil, *Questioning Sovereignty*, p. 148.

⁹⁷ Mancini, G. Federico, p. 606-607. Citing Cappelletti et al, op. cit. note 7 at 48. See also Garth, “Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community and Citizenship in the Welfare State,” in Cappelletti et al, op. cit. note 1, Vol I, Book 3, p.85 at 103 et seq.

⁹⁸ Article 18 EC.

⁹⁹ Case 186/87, *Cowan v. Trésor Public*, 1989 E.C.R. 195.

¹⁰⁰ Ibid.

¹⁰¹ Mancini, G. Federico, p. 603.

¹⁰² Case 26/62, *Van Gand en Loos*, 1963 E.C.R. 1.

Member States that can be fulfilled without the Member State having to take further measures.¹⁰³ Recall that the Council and the Parliament have the power to adopt legislation, including Regulations that are immediately binding upon the Member States and their citizens as soon as they enter into force.¹⁰⁴ Thus, Regulations have direct effect.

Years later, in *Van Duyn v. Home Office*,¹⁰⁵ the Court ruled that direct effect also applies to Directives meeting the same conditions as laid out in *Van Gand en Loos*. Since Directives typically resemble international treaties in so far as they are binding only upon the Member States and only as to the result to be achieved rather than the particular method that is used to achieve the end result, this ruling is of particular interest in demonstrating the unique, higher nature of the EC Treaty such that citizens could directly rely on Directives interpreted by the Member States to uphold their Community rights.¹⁰⁶ Lastly, it has been suggested that the *Van Duyn* doctrine was a way for the Court to assure respect for the rule of law, by ensuring that Member States comply with and that the Community enforces Directives, in order to protect the “legitimate expectation of the Community citizens on whom the Directives confer rights.”¹⁰⁷

3.2.3.2 Supremacy

As noted in the previous chapter, treaties that establish international organizations do not usually enjoy higher-law status with regard to the contracting powers.¹⁰⁸ Recall, however, that the ECJ in *Van Gand en Loos* stated that the European Community constitutes “a new legal order of international law for the benefit of Member States and its nationals.”¹⁰⁹ The Court also stated that the “status of Community law and its relationship to national law is a matter for Community law alone.”¹¹⁰

No treaty provision actually states outright that European Community law has primacy over national law. Rather, existence of a supremacy clause is a product of judicial creativeness.¹¹¹ In *Costa v. Enel*, the Court ruled that through the creation of the EC Treaty, the Member States had limited their sovereignty by creating a body of law that binds both their nationals and themselves such that national courts are bound to apply EC law and subsequent national measures cannot take precedence over Community law.¹¹² Although the ECJ was widely criticized for being overzealous judicial activists in this holding, the Court persuaded Member States to accept the supremacy doctrine by making an “or else” argument to suggest

¹⁰³ Mancini, G. Federico, p. 601. Referencing *Van Gand en Loos*.

¹⁰⁴ *Ibid* at p. 600.

¹⁰⁵ Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337.

¹⁰⁶ Mancini, G. Federico, p. 601-602.

¹⁰⁷ *Ibid* at p. 602.

¹⁰⁸ *Ibid* at p. 599.

¹⁰⁹ *Van Gand en Loos*.

¹¹⁰ Birkinshaw, Patrick, p. 38. Citing Case 26/62, *Van Gand en Loos*, p. 10-12.

¹¹¹ Mancini, G. Federico, p. 599.

¹¹² Case 6/64, 1964 E.C.R. at p.593, 599.

that the only "alternative to the supremacy clause would have been a rapid erosion of the Community."¹¹³

3.2.3.3 Pre-emption

Pre-emption precludes Member States from legislating in areas in which the Member States have transferred their powers to the EU. In *Simmmenthal II*,¹¹⁴ the Court stated that national courts must immediately give full force and effect of EC law, thereby overriding existing Member States laws that are incompatible. This general principle of direct applicability holds true even if the Community has not yet taken any measures, since the Member States already transferred their powers to the Community.¹¹⁵ Thus, in areas where the Community has exclusive competence, the Member States are only to act "as trustees of the Community interest, with the authorization and under the control of the institutions."¹¹⁶

In areas of shared competence, a Member State is pre-empted from adopting subsequent measures if such action would be deemed incompatible with Community law.¹¹⁷ This is due in part to the principle of loyalty. Moreover, even if the principle of subsidiarity expressed in Article 5 limits the scope of EU action, the fact remains that no policy area lies categorically beyond the reach of EU law.¹¹⁸ One need only look at the amount of tax law that has been harmonized as a result of the fundamental right to free movement to see this is so. Therefore, it's easy to assert that Community law takes priority where national law covers a Community competence, even in cases concerning "principles of a national constitutional structure."¹¹⁹

3.3 Silence on Secession

None of the current EU treaties include a secession clause. If you consider the purpose of those treaties, the intention was to create first an economic union and then a political union. No Member State necessarily considered the European Union as a project with specific time limitations, even if there had been some doubt as to its ability to survive infinitely. Besides, the ability to maintain itself is not the same as the ability to depart at will.

If the EU, under the current treaty system, is deemed more than creature of international public law, then permanence is implied without an express provision to suggest otherwise. If, however, the EU is solely a creature of

¹¹³ Mancini, G. Federico, p. 600.

¹¹⁴ Case 106/77, *Simmmenthal*, 1978, E.C.R. 629.

¹¹⁵ *Commission v. U.K.*, Case 804/79, 1981 E.C.R. 1045.

¹¹⁶ Dashwood, Alan, p. 212. Referencing *Commission v. U.K.*, Case 804/79, 1981 E.C.R. 1045.

¹¹⁷ See Case 51/74, *Holst v. Productschap voor Siergewassen*, 1975 E.C.R. 79 and Case 83/78, *Pigs Marketing Board v. Redmond*, 1978 E.C.R. 2347.

¹¹⁸ Bermann, George, p.365.

¹¹⁹ Birkinshaw, Patrick, p. 38. Citing Case 11/70, *International Handelsgesellschaft*, 1970 E.C.R. 1125.

international public law, a Member State would only need to look to Vienna Convention on Law of Treaties to formally and legally withdraw. I should acknowledge here that in some sense the judicial architecture of the EU still reflects an international public law view since citizens can rarely seek redress directly from the ECJ, despite the fact that the Court has given constitutional value to the Community.¹²⁰ Still, this limitation does not devalue or negate the constitutional nature of the current treaty system advanced by the Court entirely, particularly since citizens can go to their national courts to settle Community law issues. In my opinion, and that of numerous others, the EU is more than a creature of international public law. Therefore, I suggest that it is insufficient for a Member State to rely solely on the Vienna Convention for the Law of Treaties in order to leave the EU today.¹²¹

Furthermore, the EU Treaty text implies permanence of the Union in Article 3¹²² which states, “the Union shall be served by a single institutional framework which shall ensure the consistency and *continuity* of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.” It would be impossible for the EU Institutions to carry out their tasks without continuity of the Union.

The Court has also implied a sense of permanence of the Union. In *Costa v. Enel*, the Court specifically stated that the Member States created a “Community of unlimited duration” having its own personality and real powers as a result of a one-way transfer from the Member States to the Community.¹²³ For this reason, plus the creation of the Community institutions, the Court ruled that the Member States had limited their sovereign rights and thus created a body of law, which binds both their nationals and themselves.¹²⁴ Also, as previously mentioned, the Court in the *EEA Agreement*¹²⁵ opinion stated that the Member States have adhered to an advanced constitutional order for whose benefit they have limited their sovereign rights in ever-wider fields.¹²⁶ That transfer of power to the EU represents a loss of independence for the Member States, which cannot be taken back by a Member State. In short, Member States cannot simply divorce themselves from the EU.

Lastly, other organizations have weighed in on the permanence of the current treaty system. For example, the European Citizen Action Service, in interpreting and evaluating the Constitutional Treaty, stated that “for the

¹²⁰ Case-50/00, *Union de Pequenos Agricultores v. Council of the European Union*, 2002 E.C.R. I-06677.

¹²¹ Grant, Charles, “What if the British Vote No?” Charles Grant, Executive Director of the Center for European Reform, acknowledges that there is some legal doubt as to how Member States would apply the Vienna Convention on the Law of Treaties to withdraw from the existing treaty system.

¹²² Article 3, TEU. Emphasis added.

¹²³ *Costa v. Enel*.

¹²⁴ Mancini, Federico, p. 599-600. Citing *Costa v. Enel* at p.593.

¹²⁵ Opinion 1/91 (*EEA Agreement*).

¹²⁶ Dashwood, Alan, p. 201-202. Citing Opinion 1/91, *EEA Agreement* at para. 21.

first time the Constitution provides a possibility for a Member State to withdraw from the Union (Article I-60),” noting that the Constitution creates voluntary rather than permanent membership.¹²⁷ This is precisely the problem with the Constitutional Treaty, as will be discussed in the next chapter.

¹²⁷ ECAS, p. 6.

4 Constitutional Treaty: One Step Forward, Two Steps Back

In the previous chapter, I demonstrated that the current treaty system has a constitutional structure that protects citizens' fundamental rights and freedoms, even though it is not a real democratic constitution in the sense of a parliamentary democracy. According to one scholar, the complex character of the European Union explains why "democratic constitutional-making will only be possible after material constitutionalization of the supranational legal order into which national legal orders fuse...[as well as] the consolidation and simplification of the material constitution resulting from it."¹²⁸ It should be clear from the case law I presented in the previous chapter that the Union already is a supranational legal order. Since the new Constitutional Treaty would consolidate the existing treaties, the discussion that follows explains the motivation behind the drafting of the Constitutional Treaty and attempts to answer whether the Constitutional Treaty would expand upon citizens rights and improves upon the safeguards already in place, or whether it would jeopardize those values and make citizens worse off.

4.1 Purpose of the Constitutional Treaty

The Laeken Declaration on the Future of the Union, which took place in December 2001, began with a congratulatory note on the achievements made at the end of the Nice Treaty with respect to the institutional changes necessary for Union enlargement.¹²⁹ Only after the Convention on the Future of Europe was created was it truly acknowledged that the reforms from the Nice Treaty were insufficient to guarantee democracy, effectiveness, transparency and governability.¹³⁰

The Laeken Declaration was initially assigned to address the delimitation of competences, the status of the Charter of Fundamental Rights, simplification of the treaties, and the role of national parliaments in the European framework, while considering how to improve legitimacy and transparency of the Union and its Institutions so as to bring them closer to the citizens of the Member States.¹³¹ It was soon realized by those involved that the institutional balance of power within the EU must also be addressed and that simplification of the treaties would require substantial modification

¹²⁸ Menéndez, Augustín José, p. 2, ft. 4.

¹²⁹ Craig, Paul, p. 654. Citing Treaty of Nice, Declaration 23, 2001 OJ C80/1, paras. 1-2.

¹³⁰ Ibid at p. 659. Citing *Renewing the Community Method*, Communication from the European Commission on the Future of European Union, COM(2001) 727 final, Brussels, 5 December 2001, p. 4.

¹³¹ Ibid at p. 654. Quoting Treaty of Nice, Declaration 23, 2001 OJ C80/1, para. 5-6.

considerations.¹³² It also became clear that a common European interest could not emerge from the regular Intergovernmental Conference process,¹³³ consisting only of representatives of the governments of the Member States, since “traditional state diplomacy could not launch a full European constitutional process in a way in which will seem credible in the eyes of the people.”¹³⁴ Because the four issues identified in the Nice Declaration opened Pandora’s box for broader issues concerning the purpose and legitimacy of the EU as a whole, the reforms of Nice were to be negotiated using the Convention model, which consisted of 105 members reflecting all Member States plus candidate countries and the Institutions.¹³⁵ Still, it was thought that the Convention deliberations would only serve as a starting point for discussions and that the IGC would make the ultimate decision since it is the “Member States that hold the reins of power in grand constitutional moments.”¹³⁶

The main goal in drafting the Constitutional Treaty was three-fold: more democracy, transparency and efficiency.¹³⁷ Note, first, that these objectives can be interpreted as reinforcing the existence of a system already established, rather than viewing the Constitutional Treaty as a revolutionary document that invents a new EU.¹³⁸ Some changes are simply necessary to the current treaty system in order for an enlarged EU to function effectively.

The Convention was organized in three stages. First, there was the listening stage that included a succession of debates where the main emphasis was on general statements of the Union’s mission. Next, there was the examination period which set up working groups to consider specific topics and write first drafts. Finally, there was the proposal stage in which the drafters discussed each provision.¹³⁹ Many observers have come to believe that the Convention on the Future of Europe was actually created in order to produce a draft Constitutional Treaty, however others disagree since the wording of the Laeken Declaration suggests otherwise.¹⁴⁰ Nonetheless, momentum for a coherent document in the form of a Constitutional Treaty emerged through

¹³² Ibid at p. 655.

¹³³ Ibid at p. 658. Citing *Speech to the European Parliament’s Committee on Constitutional Affairs*, (former Italian Premier) Romano Prodi, Speech/01/343, 10 July 2001, p.3.

¹³⁴ Ibid. Citing *Building the Community and the New Challenges Facing the Union*, Romano Prodi, University of Pisa, Speech/01/458, 12 October 2001, p. 4.

¹³⁵ Ibid at p. 658-659. Referencing *Why Europe Matters*, 17 October 2001; *Speech to the European Parliament’s Committee on Constitutional Affairs*, 19 November 2001. See also ECAS, p. 10. The Convention consisted of 28 representatives of government, reflecting the 15 then-Member States plus 13 then-candidate countries, 56 representatives of national parliaments, 16 MEPs, and 2 members of the Commission. In addition, there was an equal number of substitutes, dozens of observers and a Secretariat.

¹³⁶ Ibid at p. 670. Referring to the Laeken European Council, SN 300/1/01/, 14-15 December 2001, p. 5.

¹³⁷ Constitutional Treaty, Preamble, para. 3-4.

¹³⁸ Peel, Quentin, “Britain has Obligations to Europe.”

¹³⁹ Craig, Paul, p. 660.

¹⁴⁰ Ibid at p. 661. Referring to the Laeken European Council, SN 300/1/01, 14-15 December 2001. The cautious language of the Declaration reads as follows: “the question ultimately arises as to whether this simplification and reorganization might not lead in the long run to the adoption of a constitutional text in the Union.”

the Convention process whereby the Convention eventually asked the European Commission to produce a draft Constitutional Treaty.¹⁴¹

The making of the draft Constitutional Treaty is said to have represented an exercise in outline constitutional architecture.¹⁴² However, a constitutional order of the states is bound to be defective in terms of both transparency and democratic accountability.¹⁴³ EU officials tout that the Constitutional Treaty would better link citizens' interests and policy interests than the current treaty system.¹⁴⁴ They assert that Constitutional Treaty is "supposed to inspire the citizenry to support a project of which all [are] a part."¹⁴⁵ Indeed, the act of acceptance of the Constitution would be among the first steps towards a thicker social and political notion of constitutional demos.¹⁴⁶

4.2 One Step Forward

The creation of the Constitutional Treaty has been identified as a move away from the past treaty track and on to a constitutional track for the future.¹⁴⁷ I will now describe some of the positive legal features included in the Constitutional Treaty.

4.2.1 Legal Personality and Democratic Life

Recall that the ECJ first gave legal personality to the Community in *Costa v. Enel*, and has reaffirmed this many times since.¹⁴⁸ There was a broad consensus among the Constitutional Treaty drafters that "there should be a single legal personality, which would supplant the legal personalities of existing bodies."¹⁴⁹ The result is Article I-7¹⁵⁰ of the Constitutional Treaty, which states that "the Union shall have legal personality." While this statement seems rather simple, it would give the EU significant power, independent from the Member States,¹⁵¹ to negotiate agreements with third parties that would bind all Member States, whereas currently the Union only has legal personality in relation to international trade negotiations.

¹⁴¹ Ibid at p. 662.

¹⁴² Ibid at p. 664.

¹⁴³ Dashwood, Alan, p. 216.

¹⁴⁴ Margot Wallström, lecture given at Lund University on 28 April 2005.

¹⁴⁵ Parker, George, "Europe is in Danger of Becoming Hollow at the Core."

¹⁴⁶ Closa, Carlos, p. 147. Citing Weiler, J.H.H., "A Constitution for Europe? Some Hard Choices," *Journal of Common Market Studies* 40, 2002, pp.563-580, at 567.

¹⁴⁷ *The Economist*, "Special Report: Europe's Constitution," p. 21.

¹⁴⁸ MacCormick, Neil, "Beyond the Sovereign State," p.4. Citing *Costa v. Enel* at 593, 602-603.

¹⁴⁹ Craig, Paul, p. 663. Referring to CONV 331/02, *Summary Report on the Plenary Session – Brussels*, 3-4 October 2002, Brussels, 11 October 2002.

¹⁵⁰ Constitutional Treaty, Article I-7.

¹⁵¹ *The Economist*, "Special Report: Europe's Constitution," 21 June 2003, p. 22.

In addition, Part I, Title VI¹⁵² of the Constitutional Treaty proclaims the democratic life of the Union, which is “an important statement of democratic principle within a supranational entity.”¹⁵³ Among other things, these provisions assert the equality among EU citizens, promote representative and participatory democracy and transparency of Union action, and appoint an independent Ombudsman to address the specific concerns and complaints of European citizens and any natural or legal person residing or having its registered office in a Member State.¹⁵⁴

4.2.2 Primacy of Union Law

Article I-6 addresses the issue of supremacy. It clearly states, “the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the laws of the Member States.” Whereas the supremacy clause is a judicial creation under the current treaty system, the Constitutional Treaty would leave no ambiguity on this matter. Therefore, this provision represents a “qualitative change to enshrine the idea as a constitutional principle.”¹⁵⁵

Of course, supremacy of Union law would only apply to areas that the Union has competence to act. The principle of conferral categorizes the three types of competences that would be given to the Union, which include exclusive competence, shared competence and supporting, coordinating or complementary action.¹⁵⁶ Most tasks fall under shared competence, thus how such tasks would actually be divided between the EU and the Member States could only be determined on a case-by-case basis by looking at the detail of each policy in Part III.¹⁵⁷ Moreover, Article I-18,¹⁵⁸ which is called the flexibility clause despite the fact that it is quite restrictive,¹⁵⁹ would permit proposals for new EU activity where no such powers are provided for in the Constitution.

4.2.3 Codification of Fundamental Rights

The new Constitutional Treaty would codify the Charter of Fundamental Rights in Part II, which currently exists but is largely considered non-binding.¹⁶⁰ The Charter was initially created by a Convention convened by the Cologne European Council in 1999, and “solemnly proclaimed” by the Commission, Parliament and the Council in 2000 at the European Council

¹⁵² Constitutional Treaty, Part I, Title VI (Articles I-45 through I-52).

¹⁵³ Birkinshaw, Patrick, p. 43.

¹⁵⁴ Constitutional Treaty, Part I, Title VI, Articles I-45, I-46, I-47, I-49, I-50 and also Part II, Title V, Article II-103.

¹⁵⁵ The Economist, “Special Report: Europe’s Constitution,” 21 June 2003, p. 22.

¹⁵⁶ Constitutional Treaty, Articles I-11 through I-17.

¹⁵⁷ ECAS, p. 24.

¹⁵⁸ Constitutional Treaty, Article I-18. Corresponding to present Article 308 EC.

¹⁵⁹ ECAS, p. 25.

¹⁶⁰ According to the ECAS, the current legal status is unclear since it is separate from the treaties.

in Nice.¹⁶¹ Its aim was the creation of a European catalogue of human rights based on shared values, and it consists of fundamental political, economic, social and civil rights that are mostly universal and not limited to EU citizens.¹⁶² Note that the ECJ does not refer to the Charter in its jurisprudence, despite the fact that the CFI has referred to it once and the AGs sometimes refer to it in their opinions.¹⁶³

The Charter would serve as a bill of rights that would guarantee fundamental rights to EU citizens, in addition to their national rights. It includes six sections on individual rights that address dignity, freedoms, equality, solidarity, citizens' rights and justice.¹⁶⁴ These sections consist of traditional universal human rights, European rights linked to citizenship status and economic and social rights.¹⁶⁵ Although the wording of the text is not entirely clear, it appears that the only provisions in the Charter that would be limited to EU citizens are some of those in the section on European citizenship.¹⁶⁶ In addition to the Charter, Article I-4¹⁶⁷ of the Constitutional Treaty states that the free movements of persons, services, goods and capital, as well as the freedom of establishment, are fundamental freedoms to be guaranteed within and by the Union in accordance with the Constitution. Recall that under the current treaty system, it is the Court that deemed these freedoms fundamental in nature.

The Charter is more modern than a classic bill of rights in that it would create some new rights,¹⁶⁸ such as disability rights and the right to good administration,¹⁶⁹ which mandates that every person has the right to impartial, fair treatment of their affairs within a reasonable time limit, and the right to repair for any damages caused by the institutions. Furthermore, the Charter would impose an obligation upon the Union to assure the right to an effective judicial recourse,¹⁷⁰ which is more than just administrative recourse. The Charter also differs from the ECHR because it would include economic and social rights, which aim to promote social welfare even if such rights are relatively weak in value.¹⁷¹

The Charter would provide greater visibility and transparency of the protection available to EU citizens across the Union, as well as legitimacy to Union action since the Union would be bound to respect these rights.¹⁷² It is a "tool of civic education because it spells out the common values of

¹⁶¹ ECAS, p. 13.

¹⁶² Ibid at p. 12-13.

¹⁶³ Ibid at p. 13

¹⁶⁴ Constitutional Treaty, Part II, Titles I-VI.

¹⁶⁵ ECAS, p. 14.

¹⁶⁶ Ibid. See Part II, The Charter of Fundamental Rights of the Union, Preamble, which states, 'enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.'

¹⁶⁷ Constitutional Treaty, Article I-4.

¹⁶⁸ ECAS, p. 15.

¹⁶⁹ Ibid at p. 17. See also Article II-101.

¹⁷⁰ Constitutional Treaty, Article II-107.

¹⁷¹ ECAS, p. 15.

¹⁷² Ibid at p. 14, 17.

different European nations united in diversity by the fact of sharing those values.¹⁷³ Precisely in this sense, it would serve as “point of reference to building a sense of belonging and the common citizenship.”¹⁷⁴ By incorporating the Charter into the Constitutional Treaty, the Court would be able to refer to the Charter for clarity on the common constitutional traditions among the Member States so as to ensure that the same level of protection is applied universally throughout the Union.¹⁷⁵ Moreover, the Constitutional Treaty includes a provision stating that the Union shall adhere to the ECHR, which would ensure full respect of fundamental rights in the Union and “also encourage a harmonious development of the case law of both courts.”¹⁷⁶

The codification of the Charter has another positive aspect. In its current status, the non-binding Charter may underscore economic freedoms enshrined in the current treaty system because the “Charter grants fundamental status to what are usually labeled as civic, political and social rights, while denying such status to the four basic freedoms.”¹⁷⁷ The consequence of this is a narrowed scope of what can be said to be constitutionally-mandated by Union law.¹⁷⁸ Member States have already used this to pit certain fundamental rights against others. For example, in *Schmidberger*,¹⁷⁹ the Austrian government sought to justify a restriction of one of the fundamental freedoms laid out in the EC Treaty by arguing that it was necessary to protect other fundamental rights.¹⁸⁰ AG Jacobs remarked that “such cases have perhaps been rare because restrictions of the fundamental freedoms of the Treaty are normally imposed not to protect the fundamental rights of individuals but on the ground of broader general interest objectives such as public health or consumer protection.”¹⁸¹ Under the Constitutional Treaty, this conflict would be eliminated since it formally incorporates the Charter to the primary law of the Union, while at the same time reinforcing the “protection offered to values which undermine the actual legal force of socio-economic fundamental rights and principles.”¹⁸²

However, there are some critiques of the Charter. Many of its provisions are vague. The Declaration¹⁸³ to the Charter explains that principle provisions within the Charter can only be invoked in light of secondary

¹⁷³ *Ibid* at p. 16.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* at p. 14.

¹⁷⁶ *Ibid* at p. 17.

¹⁷⁷ Menéndez, Augustín José, p. 43.

¹⁷⁸ *Ibid*.

¹⁷⁹ C-112/00, *Schmidberger*. 2003 E.C.R. I-5659.

¹⁸⁰ Menéndez, Augustín José, p. 43, ft. 110. Citing *Schmidberger*.

¹⁸¹ *Ibid*. Citing *Schmidberger*, Opinion of Advocate General Jacobs delivered on July 11, 2002.

¹⁸² *Ibid* at p.45.

¹⁸³ Constitutional Treaty, Part II, The Charter of Fundamental Rights of the Union, Preamble, para 5, which states in part: “Explanations [were] prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidicum of the European Convention.”

legislation giving them substance.¹⁸⁴ Note that the legal value of the Declaration explanations is still unclear since the Declaration itself states that the explanations do not have the status of law, whereas the preamble of the Charter states that the Charter would be interpreted by the Courts and the Member States with due regard to the explanations.¹⁸⁵ In addition, some fear that the scope of the Charter is too limited since Article II-111¹⁸⁶ would only bind Member States when they are implementing Union law. Lastly, there is concern as to whether the ECJ could expand upon these rights to protect citizens. The Charter makes clear that its provisions would only apply to Union law and not national law and also that it does not extend the application of Union law beyond the powers of the Union defined elsewhere in the Constitutional Treaty, thus it seems that these rights would only be applied when implementing Union law in the strict sense.¹⁸⁷

4.2.4 Unity of Treaty System

Simplification was one of the main goals of the drafters of the Constitutional Treaty. Broad consensus in having a single legal personality of the Union is what led to the merger of the existing treaties into a single text that initially consisted of a fundamental part containing provisions of a constitutional nature and a second part consisting mainly of policies.¹⁸⁸

Consolidation was largely to be done for the benefit of European citizens because the existing system is viewed as too complex and incomprehensible to the average person. Undeniably, the law is more easily understood by fewer words. As Hobbes explained it, all words are subject to ambiguity, and therefore having more words in the body of the law only multiplies ambiguity.¹⁸⁹ Despite criticism that the Constitutional treaty is too lengthy and detailed, there is little doubt that it is simpler in form than the current compilation of treaties. The Constitutional Treaty would also simplify matters by ending any confusion between the European Union and European Community since the former name would be used exclusively.¹⁹⁰

Moreover, by consolidating the primary law of the Union, the Constitutional Treaty would lay the ground of a future democratic constitution-making process.¹⁹¹ Simplification of the Constitutional Treaty creates a uni-dimensional legal structure where the branches of government are more clearly defined and separated, and gives the instrument the feel of a

¹⁸⁴ ECAS, P. 16.

¹⁸⁵ Ibid.

¹⁸⁶ Constitutional Treaty, Article II-111. Note that in applying Union law, Member States would remain free to maintain their own standards so long as such standards meet those of the Charter, and they may even apply higher norms if they so choose.

¹⁸⁷ La Torre, Massimo, "Europe's Constitution in Times of Empire," p.51. Also see Constitutional Treaty, Article II-111.

¹⁸⁸ Craig, Paul, p. 663. Referring to CONV 331/02, *Summary Report on the Plenary Session – Brussels*, 3-4 October 2002, Brussels, 11 October 2002, pp. 2, 4.

¹⁸⁹ Hobbes, Thomas, *Leviathan*, p. 240.

¹⁹⁰ Constitutional Treaty, Article IV-438(1).

¹⁹¹ Menéndez, Augustín José, p. 50.

constitution.¹⁹² There is no more pillar system, and the Charter of Fundamental Rights is integrated into the Union legal framework.¹⁹³ The Union would have one voice in foreign affairs with the creation of the post of Minister of Foreign Affairs, even if the position creates a figurehead lacking discretionary powers.¹⁹⁴ Lastly, simplification of the existing treaty into one working document would also mean additional competences for the ECJ for those areas currently covered under pillars outside the Court's scope. Since the Court has been an avid protector of constitutional values under the current treaty system, these additional competences should be seen as a move in the positive direction for European citizens.

4.2.5 Improved Voting and Law-Making Procedures

4.2.5.1 Voting

The Constitutional Treaty would improve efficiency needed since enlargement took place by creating simpler voting rules. Indeed, one of the rationales for the Constitutional treaty was to prepare the EU for enlargement by reducing the threshold for a qualified majority in voting. During the Convention discussions in early 2003, it was clear that there were serious divisions of opinion concerning the roles of the institutions in relation to their executive powers.¹⁹⁵ In fact, the issue of voting within the Council proved to be one of the toughest issues discussed in the IGC and the likely reason for the Member States' initial vote of disapproval of the Constitutional Treaty in December 2003.¹⁹⁶ As a result of further negotiations and other influencing events,¹⁹⁷ the Constitutional Treaty was re-drafted so that "decisions of the Council will be taken by 55% of the Member States representing at least 65% of the Union's population (a double majority)."¹⁹⁸ Note that an added benefit of this arrangement is that QMV is more easily understood by citizens.¹⁹⁹

The drawback, however, is that Council members could attempt to block the adoption of QMV legislation if they think it jeopardizes fundamental aspects of their national legal systems by referring the matter to the European Council which would have 4 months to either refer the matter back or request the Commission to submit a new legislative proposal.²⁰⁰ Consequently, this blocking provision has been described as a stalwart, if

¹⁹² Birkinshaw, Patrick, p. 42.

¹⁹³ Bermann, George, p. 368.

¹⁹⁴ Ibid.

¹⁹⁵ Craig, Paul, p. 665. Referencing Paul Craig, "The Constitutional Treaty: Legislative and Executive Power in the Emerging Constitutional Order," EUI Working Paper (2004).

¹⁹⁶ Craig, Paul, p. 672-673. Referring to CIG 38/03, PRESID 4, IGC – *Qualified Majority Voting*, Brussels, 24 October 2003.

¹⁹⁷ Ibid. For example, the Madrid bombing in December 2003 played a role in Spain's willingness to accept QMV rules.

¹⁹⁸ Constitutional Treaty, Article I-25(1).

¹⁹⁹ ECAS, p. 22.

²⁰⁰ Ibid at p. 23, ft. 21.

not stall, tactic by a small group of the Member States to use when they feel their national interests are being impeded by impending legislation.²⁰¹

The Constitutional Treaty would also increase the number of issues by seventeen that will be dealt by QMV rather than unanimity, mostly in the area of freedom, security and justice.²⁰² Tony Blair is among the outspoken supporters for limiting the use of the national veto to “areas where it is truly necessary, otherwise decision-making becomes paralyzed.”²⁰³ More qualified majority voting also means that the Member States would have less power in those areas falling under QMV, which would give the EU an even more constitutional structure than exists now. However, the most sensitive national issues such as taxation and social security coordination would still require unanimity.²⁰⁴ Interestingly, Article IV-444²⁰⁵ would permit areas voted by unanimity to be converted to QMV should the Council unanimously decided after Parliament’s consent and without objection from the national parliaments for a six-month period. Converting areas from unanimity to QMV is further conditioned upon “an adequate guarantee that due respect will be shown for the right of each Member State and that decision will be transparent and democratically valid.”²⁰⁶

4.2.5.2 Law-Making

The Constitutional Treaty would replace regulations and directives by introducing a clear distinction between legislative acts, in the form of laws and framework laws, and non-legislative acts, such as decisions.²⁰⁷ Its effect should simplify and better correspond to national systems distinguishing between legislative and executive acts.²⁰⁸

The functioning of the EU Institutions would not change much under the Constitutional Treaty, except for the increased role of the European Parliament, which is the only direct-elected body of the EU. Some see signs of a shifting balance away from the prosecuting authorities, such as the Commission, in favor of the citizen due to Parliament’s increased role in decision-making under the new Constitutional Treaty.²⁰⁹ In fact, the Parliament’s budgetary and appointment control would be increased, as its legislative authority in the co-decision procedure which is extended to forty-nine new areas.²¹⁰ Perhaps the main consequence of the increased breadth of scope of co-decision is to make it possible for market integration to

²⁰¹ Constitutional Treaty, Article I-25(1) para. 2, which states that “a blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.”

²⁰² ECAS, p. 23.

²⁰³ Blair, Tony, “Let the People Have the Final Say on New European Treaty,” Statement to the House of Commons, London, 20 April 2004.

²⁰⁴ ECAS, p. 23.

²⁰⁵ Constitutional Treaty, Article IV-444, para. 1.

²⁰⁶ Ibid. See also ECAS, p. 23.

²⁰⁷ Menéndez, Augustín José, p. 28. See also ECAS, p. 9.

²⁰⁸ ECAS, p. 9.

²⁰⁹ Silverman, Jon, “Rewriting Europe’s Rule Book.”

²¹⁰ ECAS, p. 21. If the Constitutional Treaty is adopted, the President of the Commission will be elected by the Parliament.

proceed more quickly such that social integration will follow, at least politically if not legally.²¹¹

Notably, one of the biggest changes that the Constitutional Treaty would make with respect to law-making powers is the increased role of national parliaments, which would have the power to challenge EU legislation to the ECJ based on alleged infringement of the principle of subsidiarity, and also the collective power to request a review of the legislative proposal to the Commission.²¹² Given that the principle of subsidiarity aims to limit the Union's activity to that which is necessary and proportional, national parliaments would act like the watchdog on subsidiarity.²¹³ Since national parliaments consist of elected representatives, its supervisory role would arguably strengthen democracy at both the national and European levels, since not all EU legislation is decided by the democratically-elected European Parliament.²¹⁴

It should also be noted that Article I-47²¹⁵ of the Constitutional Treaty allows citizens to propose legislation to the Commission if they meet certain conditions which would be more carefully detailed by the Commission should the Constitutional Treaty be adopted. This is a rare provision of participatory democracy rather than representative democracy seen throughout the Constitutional Treaty.²¹⁶ The conditions would require European citizens to be well-organized in order to make their collective voices heard.²¹⁷ Fortunately, European citizens would have the opportunity to become better informed since Article I-50 would extend the right of access to documents,²¹⁸ thus Article I-47 would likely be used in practice by citizens wishing to influence the EU agenda.²¹⁹

4.3 Two Steps Back

While the Constitutional Treaty would promote citizens' rights in some areas, it fails to properly safeguard those rights since it leaves vital discretion to the Member States rather than the Union. The failure to protect the fundamental rights of EU citizens can be easily detected by the wording of two articles of this Constitutional Treaty, namely the secession clause and the national identities clause. Together these provisions send the wrong message that Member States would retain too much legal power and influence, which severely undercuts the benefits citizens gain from the Constitutional Treaty. As noted by one scholar, "politics in the new Union

²¹¹ Menéndez, Augustín José, p. 36.

²¹² Ibid at p. 39. Also see Constitutional Treaty, Article I-11(3).

²¹³ ECAS, p. 25.

²¹⁴ Menéndez, Augustín José, p. 38.

²¹⁵ Constitutional Treaty, Article I-47.

²¹⁶ ECAS, p. 20.

²¹⁷ Ibid at p. 21.

²¹⁸ Constitutional Treaty, Article I-50. Also see ECAS, p. 18.

²¹⁹ ECAS, p. 20.

still maintains the privilege of states, heads of state, and ministers.”²²⁰ Worse, these provisions, if applied by the national authorities, would jeopardize citizens’ constitutional rights and therefore negate constitutional rights already solidified in the current treaty system. The effects of these clauses will be discussed below and also in later chapters.

4.3.1 Secession Clause

The Constitutional Treaty states that it is concluded for an unlimited duration.²²¹ However, the first paragraph in Article I-60²²² simply states that “any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.” In doing so, the departing Member State would have to notify the European Council, so that the Union may negotiate with the Member State on the arrangements for its withdrawal and the framework for its future relationship with the Union.²²³ The resulting agreement between the Union and the withdrawing Member State would be negotiated and concluded by the Council, acting by qualified majority and after obtaining consent of the Parliament, in accordance with the provision that describes the Union’s procedures when making international agreements.²²⁴ Note that a withdrawing agreement is not mandated, as the Constitutional Treaty would cease to apply two years after notification was given by the departing Member State.²²⁵ Note, too, that a former Member State could reapply for membership subject to the conditions in the provision for accession, among which requires unanimity by the Council.²²⁶

The ability to withdraw from the Union under the Constitutional Treaty is legal suicide for citizens’ constitutional rights, and it raises two critical issues. First, Article I-60 can be likened to an emergency brake on European integration, since secession actually reverses integration. Secession is a natural consequence of the national identities clause because Member States that are unsatisfied with their role in EU decision-making could either threaten to or actually invoke the secession clause as a way to voice their displeasure. Second, and consequently, there would be no way to secure constitutional rights that should be guaranteed permanently, even on a temporary or limited basis through a withdrawal agreement since one is not actually required. For these reasons, I maintain that the inclusion of a constitutional exit clause cannot be justified in any circumstance.

4.3.1.1 Mere Threats

There is a real possibility that Member States would use the existence of an exit clause to threaten to leave the Union when it is unsatisfied with Union

²²⁰ La Torre, Massimo, p. 53.

²²¹ Constitutional Treaty, Article IV-446.

²²² Constitutional Treaty, Article I-60(1).

²²³ *Ibid* at para. 2.

²²⁴ *Ibid*. Also See Constitutional Treaty, Article III-325.

²²⁵ *Ibid* at para. 3.

²²⁶ *Ibid* at para. 5. Also see Constitutional Treaty, Article I-58.

activity. In the past, there have been “real threats of withdrawal over budgetary imbalances, last minute nail-biting negotiations at virtually every intergovernmental conference looking to amend the basic treaties...[and] rejections and near rejections in national referenda on important stages in the integration process,”²²⁷ despite there not being a secession clause in the current treaty system. By incorporating a secession clause into the Constitutional Treaty, the bargaining power of the Member States increases.²²⁸ This is precisely how threats to withdraw would only serve to undermine the legitimacy of the Union and impede progress made at the European level, which in turn would negatively impact European citizens.

4.3.1.2 Actual Withdrawal

If a Member State were to utilize its right under the text of the new Constitutional Treaty to withdraw from Union membership, it would automatically forfeit the European rights guaranteed to its citizens. In this sense, individuals become the sacrificial lamb to Member State action. This is precisely why permanence is an essential feature of a constitutional document. Once the Union grants rights to its citizens, it shouldn't be able to take them back or let the Member States do so. This is because the transfer of the Member States' powers to the Union is a one-way street. In the case of the Constitutional Treaty, the Member States are conferring some of its powers to the Union for the direct benefit of European citizens.²²⁹ Logically, the Member States should have no authority to take those powers back unilaterally. Although it has been argued by Member States that an exit clause represents the ultimate form of democracy against an activist judiciary or overzealous Union law-making institutions, this view cannot be justified since the inclusion of a secession clause challenges the permanence, and thus legitimacy, of the Union's law-making powers.

Furthermore, denying citizens a voice when removing their rights creates a democratic legitimacy problem in that there is no electorate of the whole, rather only an electorate of a small part.²³⁰ Recall that Article I-60 is directed at the Member States rather than individual citizens, and it allows a Member State to withdraw in accordance with its national procedures.²³¹ Therefore, it would be possible for a Member State to withdraw from the Union without hearing from its citizens on the matter in cases where a Member State's national procedural rules do not mandate a vote, albeit a non-binding vote, by its national citizens. The overall effect of this is that citizens feel like they lack a proper say in shaping important constitutional decisions.

²²⁷ Bermann, George, p.363.

²²⁸ Straw, Jack, “Comments on the EU Constitution,” BBC News, 29 October 2004. The inclusion of a secession clause “will ensure that the nation states set the Union's agenda and drive it through. That makes it pretty hard to argue that this constitution represents the end of national sovereignty as we know it.”

²²⁹ Constitutional Treaty, Article I-11(1).

²³⁰ Everts, Steven, and Keohane, Daniel, “A New Era in European Democracy,” CER Bulletin, Issue 38, October/November 2004.

²³¹ Constitutional Treaty, Article I-60(1).

4.3.2 National Identity Versus Principle of Loyalty

Article I-5²³² addresses the relationship between the Union and Member States. The first paragraph, commonly referred to as the national identities clause, states:

“The Union shall respect the equality of 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. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.”²³³

The national identity clause was initially included in the Maastricht Treaty under the heading “democracy and fundamental rights,” and stated that the “Union shall respect the national identities of the Member States,” even after revisions of the Amsterdam Treaty.²³⁴ However, the national identities clause in the Constitutional Treaty adds that the Union shall also respect the *equality* of the Member States before the Constitution.²³⁵ Rather than discussing rights, this provision discusses constraints on EU competencies. For example, this provision states that it is the sole competence of the Member States to maintain law and order.²³⁶ The real danger of this provision is that it implies the equality or even superiority of Member States’ constitutions over that of the EU Constitutional Treaty. This is precisely why the EU needs clear rules to avoid temptation by Member States to revert to national identities in the sense of sovereignty.²³⁷

The second paragraph of Article I-5 expresses the principles of sincere cooperation and loyalty, and specifically states:

“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Constitution. The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain

²³² Constitutional Treaty, Article I-5.

²³³ *Ibid* at para. 1.

²³⁴ Formerly Article F, TEU (Maastricht Treaty); now Article 6, para. 3 as a result of changes to the TEU made by the Amsterdam Treaty.

²³⁵ Constitutional Treaty, Article I-5(1).

²³⁶ *Ibid*.

²³⁷ Margot Wallström lecture at Lund University on 28 April 2005.

from any measure which could jeopardize the attainment of the Union's objectives."²³⁸

Interpreting Article I-5 of the Constitutional Treaty is a bit tricky. While the national identity clause is directed to the Union, the principle of loyalty is directed at the Member States. If this article is read as a whole, it mixes national identity with the principle of loyalty, and thus undermines the principle of loyalty and Union supremacy provided for in Article I-6.²³⁹ There are problems even if the paragraphs of Article I-5 are read separately. Some argue that the national identity provision essentially defines a Union of sovereign states,²⁴⁰ which completely undermines constitutional values of the Union. One author insists that there remains a democratic deficit in the EU in part because Member States are perceived by their citizens as the natural ground on which to play democratic games such that their survival is likely to inhibit the development of the game at the EU level.²⁴¹ This statement reflects the Hobbesian view that there can only be one sovereign.²⁴² Accordingly, the national identities clause is only comforting to those who are "wedded to the notion of the Union will continue to a constitutional order of States."²⁴³

²³⁸ Constitutional Treaty, Article I-5(2).

²³⁹ See discussion on Union primacy in Chapter 4.2.2.

²⁴⁰ Straw, Jack, "Comments on the EU Constitution." BBC News 29 October 2004. "The EU constitution strengthens the role of national governments in the European Union."

²⁴¹ Dashwood, Alan, p. 216.

²⁴² Hobbes, Thomas, *Leviathan*, p. 240.

²⁴³ Dashwood, Alan, p. 216.

5 Neither Constitution Nor Treaty

First, I acknowledge that the Treaty Establishing a Constitution for Europe does not purport to be a traditional constitution since the intent of the Member States was not to create a state. This is most obvious by its title, *Treaty Establishing a Constitution* for Europe. Furthermore, the new Constitutional Treaty is so vast in scope and convoluted because it contains most of the provisions from the existing treaties that it differs widely from most modern traditional constitutions.²⁴⁴

In this chapter, I conclude that the Constitutional Treaty is neither a constitution nor a treaty. While its name is ultimately irrelevant in determining its content, the real problem is that its drafters attempted to create a constitutional document to expand upon the supranational legal order without providing the proper substance in its provisions. Moreover, the fact that the Constitutional Treaty tries to be both poses real problems in the future should the Constitutional Treaty be implemented. As the Union further integrates, the inclusion of both the secession clause and national identities clause would likely become a seedbed of future conflict, which is further discussed in the next chapter.

5.1 What's in a Name?

The decision to call the Constitutional Treaty a “constitution” was not without controversy and much negotiation, first by the Convention and later by the IGC, which ultimately concluded that it should be presented as “Europe’s first-ever Constitution.”²⁴⁵ It has been suggested that the debate among the drafters did not produce a clear understanding of what a constitution was; rather the name was chosen as a mechanism for diffusing fears between integrationists and skeptics.²⁴⁶ It appears that ambiguity was the preferred choice in order to forge a compromise between opposing sides.

Certainly, the name of the Constitutional Treaty generates confusion and disagreement. In a recent lecture I attended on the Constitutional Treaty given by Margot Wallström, EU Commission Vice President in charge of communications, she repeatedly described the Constitutional Treaty as a ‘European project’ and likened the Union to a ‘value-based corporation,’ rather than using the term ‘constitutional’ or ‘treaty.’²⁴⁷ Nor did British Prime Minister Tony Blair recite the word ‘constitution’ once during his speech to the House of Commons calling for a referendum on the

²⁴⁴ Parts I and II only have 114 articles combined, which is comparable to most national constitutions. See ECAS, p. 27.

²⁴⁵ Merritt, Giles, “EU Constitution II: What’s in a Document’s Name? A Lot.”

²⁴⁶ Closa, Carlos, p. 148-149.

²⁴⁷ Margot Wallström, lecture given at Lund University on 28 April 2005.

‘Treaty.’²⁴⁸ Yet several other prominent political figures and the media frequently use the term ‘Constitution’ to describe the Constitutional Treaty. Paradoxically, the Constitutional Treaty refers to itself as ‘Constitution’ in Parts I, II and III, which cover the Union’s definition and objectives, the Charter of Fundamental Rights and the policies and functioning of the Union, but uses the term ‘Treaty’ in Part IV, which is its smallest part detailing its general and final provisions.

There also seems to be flexibility in the use of the term ‘constitution,’ since it is often used as a rulebook for various organizations,²⁴⁹ which weakens its significance to some. For example, Jack Straw, British Secretary of State for Foreign and Commonwealth Affairs, once quipped that even his golf club has a constitution.²⁵⁰ This may explain why the first commandment of a democrat is not to take the name of the Constitution in vain.²⁵¹ But flexibility in the use of the term constitution doesn’t change the value of its substantive core no matter what level the entity is. Perhaps any dislike of the use of the word ‘constitution’ in the Constitutional Treaty arises from its threat to national sovereignty or to national constitutions as an expression of national will.²⁵²

Still, the very term ‘constitution’ in the title of the Constitutional Treaty often evokes the very process to which “what once were international treaties were transformed into the material constitution of the Union.”²⁵³ Thus, the word ‘constitutional’ is said to carry with it “an essence of consciousness-raising and is an ideological resource for the advancement of human rights and human dignity.”²⁵⁴

However, the mere presence of the word ‘constitution’ will neither create nor resolve problems.²⁵⁵ Therefore, the name is ultimately irrelevant since it is the content and powers it confers that critically matters. As John Locke has remarked, “for it is not names that constitute governments, but the use and exercise of those powers that were intended to accompany them.”²⁵⁶ It is the daily procedures and practices of the Constitution Treaty, especially in terms of individual protection under the law, that are significant rather than the terminology.²⁵⁷

²⁴⁸ Blair, Tony, “Let the People Have the Final Say on New European Treaty,” Statement to the House of Commons, London, 20 April 2004.

²⁴⁹ Birkinshaw, Patrick, p. 34.

²⁵⁰ Ancram, Michael, “A Safer Britain – A Safer World,” Speech to Conservative Party Conference, October 2002. “Jack Straw tells us that the EU constitution need not be feared because - golf clubs have them!”

²⁵¹ Menéndez, Augustín José, p. 51. Citing Jürgen Habermas, “Why Europe Needs a Constitution?” 11 (2001) *New Left Review*, pp.5-26.

²⁵² Birkinshaw, Patrick, p. 35.

²⁵³ Menéndez, Augustín José, p. 50.

²⁵⁴ Birkinshaw, Patrick, p. 45.

²⁵⁵ *Ibid.*

²⁵⁶ Locke, John. *Second Treatise*, § 216.

²⁵⁷ Birkinshaw, Patrick, p. 33-34.

5.2 Scope: Constitution or Treaty?

While the Constitutional Treaty would move us closer to the Constitution for Europe, it is not a Constitution yet.²⁵⁸ The Constitutional Treaty is created for European citizens and would afford them constitutional rights, however it is also created for European States.²⁵⁹ The Union's dual legitimacy would not restrict the power of the Member States enough to recognize it as a constitution. The national identities clause further clouds the distinction. Moreover, the inclusion of a secession clause strongly indicates that the Constitutional Treaty is a treaty in nature as opposed to a constitution. Consequently, the ambiguity of the institutional construction of a legal-political European order has not been fully sorted out.²⁶⁰

5.2.1 People Versus the Member States

Article I-1²⁶¹ of the Constitutional Treaty states that it reflects the will of the citizens and States of Europe to build a common future by establishing the European Union on which the Member States confer competences to attain objectives *they* have in common.²⁶² An initial question is who is “they” to which this provision refers? The answer could be the Member States and the citizens, or it could be the Member States themselves. In all likelihood, the answer is both, which indicates that the Constitutional Treaty does not live up to its constitutional purpose.

5.2.1.1 Created for the People?

For a Euro-skeptic who formalizes the Constitutional Treaty as an international treaty, the very idea of a constitution for Europe is wrong because the “Union draws its legitimacy from the democratic legitimacy of its Member States.”²⁶³ However, as one scholar notes, the width and breadth of the Union's competences makes it impossible to characterize the EU as a classical international organization when in fact the actions of the EU institutions directly affect the lives of European citizens in multiple ways.²⁶⁴ Therefore, the writing of a constitution for the people is the best method to democratically legitimize the Union, and the only way to ensure democracy within the Union.²⁶⁵

As evident in Article I-1, the Union derives its authority from both citizens and Member States, giving the Union dual legitimacy.²⁶⁶ To some, the fact that the Constitutional Treaty is “aimed primarily at the Union society and

²⁵⁸ Menéndez, Augustín José, p. 51.

²⁵⁹ Article I-I(1).

²⁶⁰ La Torre, Massimo, p. 50.

²⁶¹ Constitutional Treaty, Article I-1(1).

²⁶² Ibid.

²⁶³ Menéndez, Augustín José, p. 7.

²⁶⁴ Ibid.

²⁶⁵ Ibid at p. 7-8.

²⁶⁶ ECAS, p. 5.

its citizens and those who occupy that space,”²⁶⁷ gives it a constitutional-like quality since international treaties don’t normally address citizens, rather they address only states.²⁶⁸ In addition, the Constitutional Treaty includes a statement of principles, as can be seen throughout Parts I, II and IV, which would be of essential value in providing coherence, stability and direction for the European people.²⁶⁹ Alas, Union citizenship would find a more natural place since the Constitutional Treaty derives its legitimacy from citizens and not just the Member States, even if there is no substantial change from the citizenship rules existing under the current treaty.²⁷⁰ However, since only people can have constitutions, the constitutional character of the Constitutional Treaty is called into question by dual legitimacy.

5.2.1.2 Limit on the Member States?

The foundational view of the Constitutional Treaty is that it is an instrument that would serve to strengthen and further integrate the political and institutional architecture of the European project, which equates to a further loss of sovereignty by Member States.²⁷¹ The opposing view is that the role of the nation state would not disappear in the process of European construction since it serves as the foundation of EU legitimacy and democracy, as well as the source of identities and citizens roots.²⁷² The question, then, is whether the Constitutional Treaty would adequately limit the power of the Member States in order to protect citizens’ rights.

The Constitutional Treaty would assign the Union tasks to be performed that are constitutional because they relate to the basic manner in which the European Union is to be organized in law,²⁷³ however Member States would not surrender all of their powers to the Union. In legal terms, the safeguard of Member State sovereignty is the principle of conferral expressed in Article I-11.²⁷⁴ Granting Member States the flexibility to retain their derogations from existing treaties also challenges the constitutional aspect of the Constitutional Treaty.²⁷⁵ Derogations, which allow Member States to remain indefinitely outside certain activities being pursued within the institutional framework of the Union, essentially resemble reservations as a mechanism of international law, even though they have been accepted in the EU since the Maastricht Treaty.²⁷⁶

Furthermore, the rigidity of some of the Constitutional Treaty provisions, such as requiring Member State unanimity to amend the Constitutional Treaty, is a “trait of treaties rather than the looser nature associated with

²⁶⁷ Birkinshaw, Patrick, p. 45.

²⁶⁸ ECAS, p. 5.

²⁶⁹ Birkinshaw, Patrick, p. 44.

²⁷⁰ ECAS, p. 17.

²⁷¹ Closa, Carlos, p. 147-148.

²⁷² Ibid at p. 148. Referring to Blair (2000), Chirac (2000) and Fischer (2000).

²⁷³ Birkinshaw, Patrick, p35.

²⁷⁴ ECAS, p. 6. Also see Constitutional Treaty, Article I-11.

²⁷⁵ For example, Great Britain would retain its derogation on defense and security policy.

²⁷⁶ Dashwood, Alan, p. 210.

constitutions,”²⁷⁷ since it leaves the ultimate power in the hands of the Member States. However, as Thomas Madison opined, “the unavailability of constitutional amendment as an ordinary political strategy would encourage democratic processes of bargaining and mutual learning.”²⁷⁸ Notably, the past effects of having rigid reform processes within the EU treaties have not proven to increase the democratic effects that Madison referred to since there have been numerous revisions to the current treaties.²⁷⁹ Thus, Member States retain their control over constitutional reform.²⁸⁰

5.2.2 Citizen Rights

A vital function of the Constitutional Treaty is the general recognition of citizen rights, as demonstrated by the inclusion of the Charter of Fundamental Rights and the strengthening of European citizenship by legally reinforcing and amplifying existing free movement and political rights.²⁸¹ Some of the Charter’s provisions introduce a clear obligation or prohibition, while others are more aspirational in character.²⁸² Under the Constitutional Treaty, the limitations laid down in the Charter would be applicable to both the EU and the Member States when applying Union law.²⁸³ For this reason, it has been stated that the Charter represents a constitutionalized legal order as distinct from a treaty-based association of nation states.²⁸⁴ As such, it will likely help solidify a European identity since it will have full legal force and will be ranked at the top of the hierarchy of European law along with the other constitutional provisions.²⁸⁵ This is true even for its principled provisions that are formulated in a general way and will require legislation in order to impose concrete standards.²⁸⁶ Therefore, the codification of the Charter demonstrates the constitutional nature of the Constitutional Treaty, even if its placement in Part II of the Constitutional Treaty is “peculiar in comparative constitutional terms, given that bills of rights are usually placed at the beginning of the formal constitutional text.”²⁸⁷

It has been suggested that the value of some of the rights established in the Charter are overstated, since the civil rights are primarily framed on economic rights and the social rights under solidarity can be likened to the status of ordinary rights since they are not well defined.²⁸⁸ In addition, although Article I-7 of the Constitutional Treaty states that fundamental

²⁷⁷ Closa, Carlos, p. 155, 158.

²⁷⁸ Ibid at p. 159. Citing Thomas Madison, *The Federalist*, no 49.

²⁷⁹ Ibid at p.159.

²⁸⁰ Ibid.

²⁸¹ ECAS, p. 5, 12.

²⁸² Ibid at p. 14.

²⁸³ Constitutional Treaty, Article II-111(1).

²⁸⁴ Birkinshaw, Patrick, p. 45.

²⁸⁵ ECAS, p. 13.

²⁸⁶ Ibid at p. 14.

²⁸⁷ Menéndez, Augustín José, p. 19.

²⁸⁸ La Torre, Massimo, p. 52.

rights are general principles of the Union's law, this provision only refers to those rights in the ECHR and to the constitutional traditions common to the Member States rather than mentioning the civil and social rights supplied by the Charter in Part II.²⁸⁹

5.2.2.1 Adequately Protected?

The Constitutional Treaty cannot not guarantee of the protection of citizen rights since it is permits Member States to leave the Union. The secession clause represents the end of European rights for citizens of the departing Member State. Moreover, withdrawal by a Member State impacts other European citizens, particularly those acting on their rights of free movement. Therefore, the inclusion of the secession clause in the Constitutional Treaty negates its constitutional value.

Furthermore, the constitutionality of the Constitutional Treaty is called into question with respect to procedural guarantees that are normally included in constitutions since they are necessary to protect rights.²⁹⁰ This is because it does not grant European citizens the direct right to request judicial review of their European constitutionality to the ECJ, since its drafters thought that effective judicial protection of private parties could be ensured within the European legal order by national courts.²⁹¹ Thus, it is possible for Member States to retain influence on Union law through their national courts.²⁹²

5.3 Weakness in Trying to be Both Constitution and Treaty

Many advocate that the Constitutional Treaty is both a treaty and a constitution.²⁹³ For example, the European Citizen Action Service claims that the Constitutional Treaty is undoubtedly a treaty in the formal sense of an international agreement between states, while at the same time insists that the Constitutional Treaty has an added value by introducing more provisions of a constitutional nature.²⁹⁴ By trying to function as both a constitution and a treaty, the Constitutional Treaty creates an issue of dual legitimacy that undercuts the purpose of its constitutional values. There is also the problem of treaty-based Constitutionalism versus over-constitutionalization, which renders confusion and inefficiency. Both of these concepts are a result of too much power retained by Member States in Union affairs.

²⁸⁹ Ibid at p. 52.

²⁹⁰ Menéndez, Augustín José, p. 46.

²⁹¹ Ibid at p. 47.

²⁹² Ibid at p.48. It is doubtful that this solution guarantees effective judicial protection within the European legal order because the right to an effective remedy remains dependent on the national courts.

²⁹³ ECAS, p.5.

²⁹⁴ Ibid. With respect to added value, ECAS acknowledges that the current treaties have been called a "constitutional charter" by the ECJ because they represent the basic law of the Union at the top of the hierarchy of the European legal order and also because "they contain the constitutional rules concerning the division of competences between the EU and the Member States and the distribution of powers among the European Institutions."

5.3.1 Dual Legitimacy

Dual legitimacy is problematic because it does not effectively limit the Member States. Italian Premier Silvio Berlusconi stated that it serves as the first “example of nations voluntarily deciding to exercise their sovereign powers jointly in the exclusive interests of their peoples.”²⁹⁵ His statement reflects the Constitutional Treaty’s weakness in trying to appease the Member States and individual citizens, since it is not possible for nations and peoples to retain the same powers.²⁹⁶ One need not look beyond the current treaty system to see how the Union is limited in protecting citizen rights when Member States retain too much sovereignty. Not surprisingly, to most people the Constitutional Treaty reflects a constitution granted or conferred by the Member States, rather than a grassroots constitution reflecting the will of its citizens that produces a legitimate legal order from the bottom up.²⁹⁷

5.3.2 Interpretation Difficulties

The Constitutional Treaty, in trying to maintain itself as both a constitution and a treaty, creates problems of interpretation and execution.

Since Part III of the Constitutional Treaty is merely an exercise of re-codification of the EC Treaty, it is suggested that the Constitutional Convention has maintained the influence of Treaty-based constitutionalism, which yields greater power to the Member States.²⁹⁸ Yet, the Constitutional Treaty is silent on the hierarchy among its parts, so it seems that all parts of the text are of equal legal value.²⁹⁹ Critics argue that assigning constitutional status to the entire document would over-constitutionalize the Constitutional Treaty and would consequently undermine the democratic decision-making process by assigning Part III constitutional status despite it not having been debated extensively.³⁰⁰

In addition, if all parts are given equal legal value, they must be interpreted as such. If Part I, which defines general rules and competences, were given the same hierarchal status as Part III, which address the specific common market rules, it would be difficult to interpret specific and general rules to the same degree of status than if Part I were given higher status over Part III, since Part III would more easily be read in light of Part I.³⁰¹ The effect is that detailed constitutional regulation of specific rules would reduce legislators’ ability to regulate sectoral policies.³⁰²

²⁹⁵ “Leaders Sign European Union’s First Constitution,” Associated Press, 29 October 2004.

²⁹⁶ Hobbes, Thomas, *Leviathan*, p. 240.

²⁹⁷ La Torre, Massimo, p. 50.

²⁹⁸ Closa, Carlos, p. 158.

²⁹⁹ ECAS, p. 8.

³⁰⁰ Menéndez, Augustín José, p. 21, 49.

³⁰¹ *Ibid* at p. 22.

³⁰² Closa, Carlos, p. 158.

It is possible, however, that the ECJ and other Institutions will interpret Parts I and II as having precedence over Part III, since the first two parts are the product of the Constitutional Convention, and also because Title III within Part III is subject to a simpler method of revision than all other parts of the Constitutional Treaty.³⁰³ However, the selected revision procedure in Title III, Part III should not be overly estimated since the different treatment assigned to it is likely the result of its internal policy content rather than principles expressed in the first two titles of Part III which may be thought of as a way of putting into practice the Union's values in Part I.³⁰⁴

³⁰³ ECAS, p. 8.

³⁰⁴ Ibid.

6 Constitutional Treaty's Effect on Citizens

Although the Constitutional Treaty would advance citizen rights in a number of areas, particularly by incorporating the Charter of Fundamental Rights into its text, legally speaking, the Constitutional Treaty fails to adequately protect these rights, which only serves to undermine their existence. Consequently, balance weighs against its adoption, since individuals are better off with current treaty system for now, even if that system will require some changes to improve efficiency under an enlarged Union.

6.1 No Security with Secession Clause

One scholar daringly states that codification of the Charter, along with the manner in which the Constitutional Treaty lays out constitutional principles and Union objectives and competencies, suggest the Union's permanence.³⁰⁵ Yet, in acknowledging the Union's unlimited duration, he justifies a Member State's right to withdraw because the EU is not a prison.³⁰⁶ Two points can be made from this argument. First, it likens the Union to a club you can join rather than a family you cannot leave, which is precisely what the language in the Constitutional Treaty conveys. Second, this line of reasoning is totally flawed since the right of secession makes permanence, and thus rights, impossible to guarantee.

Despite the fact that a session clause renders it impossible to effectively guarantee citizen rights, if the heads of Member States felt it was necessary to include an exit clause then they should have been thoughtful enough to specify a set of conditions in the Constitutional Treaty for doing so that safeguard European fundamental rights to the extent possible. It is not satisfactory from the citizen's perspective to rely on the Council's ability to negotiate terms on behalf of the Union with the departing Member State, since no specific conditions have been pre-arranged and because the political-sensitivity of the situation may complicate negotiations.

Moreover, Article I-60 clearly states that a Member State may voluntarily withdraw from the Union,³⁰⁷ the ECJ would be forced to uphold the clause based on its precise wording. Thus, citizens would not prevail in challenging a Member State's decision as a violation of their constitutional rights since it was the drafters' intention to permit withdrawal. The only remote possibility would be if the ECJ found this provision incompatible

³⁰⁵ Birkinshaw, Patrick, p. 43.

³⁰⁶ Ibid at p. 44.

³⁰⁷ Straw, Jack, "Comments on the EU Constitution," BBC News, 29 October 2004. "For the first time, there is also a clear procedure for any country wishing to leave the EU entirely to do so."

with the fundamental rights conferred to citizens throughout the Constitutional Treaty, however this goes beyond all previous accusations of judicial activism by the Court. Therefore citizens should not rely on the Court in the event that a Member State withdraws.

6.1.1 Obsolete Provision?

Many people have suggested that I overestimate the importance of the secession clause since withdrawal from the EU would be political suicide for most Member States, and therefore it is highly unlikely to be used. Precisely my point: if the secession clause is superfluous, then why include it?

Some argue that the inclusion of a secession clause is an ultimate expression of democracy, since it grants Member States the will to leave a political union they no longer want to be part of. This argument has merit to those who consider that the secretive process in drafting the Constitutional Treaty falls short of what deliberative democratic standards require of a proper democratic constitution,³⁰⁸ except for the fact that it was delegates from each Member State that created the Constitutional Treaty and the heads of government from each Member State who unanimously agreed upon its text and signed it last October. Therefore, the Member States were fully aware of the powers they transferred to the Union. Moreover, since the Member States maintain considerable amount of sovereignty, particularly with the incorporation of the national identities clause that “respects the equality of Member States before the Constitution,”³⁰⁹ there should be no desire by Member State to leave the Union.

The Hobbesian view is that unnecessary laws are not good laws; rather they are traps for money.³¹⁰ To draw upon Hobbes’ analogy of obsolete laws, the inclusion of a secession clause at best leaves uncertainty, in which lawyers can profit; at worst, it leads to conflict and division and ultimately violence.

Another likely consequence of obsolete provisions is that they have proven difficult to remove since they don’t garner attention for both naïve and obvious reasons. Under the Constitutional Treaty, it would be all the more difficult to nullify the secession clause because if Member States don’t consider it at all likely to be evoked, then in reality they won’t bother tinkering with such a politically-sensitive subject matter.

6.2 Risk of Nationalism Over EU-ism

I have already indicated the national identities clause in Article I-5 would give too much influence to the Member States, including local and regional

³⁰⁸ Menéndez, Augustín José, p. 49.

³⁰⁹ Constitutional Treaty, Article I-5(1).

³¹⁰ Hobbes, Thomas, *Leviathan*, p.240.

governments. The effect of this would leave citizens in the middle of a continuous power-struggle between the Union and the Member States. So too, a reinforced cooperation clause included in the Constitutional Treaty would allow Member States to establish closer cooperation among themselves to develop a particular policy.³¹¹ This clause is troubling because it could create fragmentation among European peoples and undermine progress in favor of citizens at the European-wide level.

Fortunately for citizens, the Court may have some wiggle room to interpret the meaning of the national identities clause against the principles of loyalty and Union supremacy in order to protect citizen rights. Although the national identities clause provided in the first paragraph of Article 5 may undermine the principle of loyalty expressed in the second paragraph, the supremacy clause provided in Article 6 leaves no doubt the EU law has primacy over national law. Note, however, there is no guarantee the Court would necessarily agree with this view.

6.3 Survival of the EU Through Current Treaty System

There have been numerous speculations made in recent months as to what will become of the European Union should the Constitutional Treaty fail to be ratified by all existing Member States. Despite the strong likelihood of a political mess, legally speaking, the EU will not dissolve should the Constitutional treaty be rejected since the legal framework under the Nice Treaty would remain in effect.

If anything, failure to adopt the Constitutional Treaty may put a brake on any momentum for further integration because it would imply that Europeans are not able to agree on long-term policy issues. It has been repeatedly suggested that its defeat would leave things as they are, with a possible paralysis of decision-making and stagnation in Brussels.³¹² Margot Wallström maintains that without the ratification of the Constitutional Treaty, the EU retains a patchwork of treaties that are outdated and complex.³¹³ Moreover, she worries that we will all mistrust democracy if we can't adapt at the EU level.³¹⁴

Throughout its existence the EU has proven to be resilient despite previous failures, therefore its ability to move forward should not be underestimated.³¹⁵ Even if renegotiation of a failed Constitutional Treaty seems unlikely anytime in the near future, the best parts of its text could be

³¹¹ ECAS, p. 26.

³¹² Norris, Floyd, "Who Cares About the EU Charter?" *International Herald Tribune*, 29 April 2005.

³¹³ Margot Wallström lecture given at Lund University on 28 April 2005.

³¹⁴ *Ibid.*

³¹⁵ Jamieson, Bill, "Desperately Seeking a Plan B for the European Project," *The Business*, 10 April 2005.

salvaged at a later date. In the interim, the existing treaties remain in place. Furthermore, some parts of the Constitutional Treaty, such as QMV improvements, can be incorporated into the current treaties to help deal with Union enlargement without requiring adoption of the entire Constitutional Treaty.

6.4 Citizens are Better Off Without the Constitutional Treaty

While no one suggests that the Constitutional Treaty is an ideal constitutional document, many supporters say that it's a useful document and the best possible compromise the Member States could agree upon. However, on balance, it is not worthy of adoption. It is no great leap forward from the existing treaty system, rather a technical necessity that could be resolved under the current treaty system. Moreover, the national identities clause can be likened to a bomb, and the secession clause a nuclear bomb, on rights protection. These two Constitutional Treaty provisions are deeply at odds with one another, yet the both serve to undermine legitimacy of constitutional rights granted to citizens. Therefore it is not a viable Constitutional Treaty.

In some sense I give credit to the drafters of the Constitutional Treaty for attempting to formalize in law what already exists in practice, even though they missed the mark. The EU has already been constitutionalized, albeit in a fashion that is unfamiliar to those who are accustomed to the constitutions of the nation states.³¹⁶ The chronic character of the EU has been demonstrated over the years by its move away from the kind of intergovernmentalism often characterized by institution-based international regimes to a constitutional experiment, even if it retains international elements.³¹⁷ This is not to say that the current treaty system should be maintained as status quo. Admittedly, there are legitimacy problems with the current system that have repercussions for the people, particularly when national courts do not comply with Community law or fail to refer Community law questions to the ECJ.³¹⁸ In addition, judicial law-making lacks transparency, due to legal jargonizing, and accountability, since judges are not elected.³¹⁹

However, it's easy to comprehend why a European citizen isn't passionately in favor of the Constitutional treaty that is "more often described by the damage that would flow from its rejection than by the gains that would follow ratification."³²⁰ Should the Constitutional Treaty be ratified by all Member States, citizens get a flawed constitution that includes an exit clause that threatens the Union's survival, whereas if it fails to be ratified

³¹⁶ Bermann, George, p. 363.

³¹⁷ Ibid at p. 364.

³¹⁸ Estella, Antonio, p. 34-35.

³¹⁹ Ibid at p. 36-37.

³²⁰ Stephens, Philip, "Curious Temptation of a French No," Financial Times, 21 April 2005.

the existing treaties remain in effect. Neither should the Constitutional Treaty nor the EU be presented to European citizens as a win-or-lose struggle between national and European interests.³²¹ One positive note as a result of the referendum process taking place now is that, whether the Constitutional Treaty is approved or rejected, European citizens would likely be in a better position to decide what type of Union they want for the coming years since national referendums to decide matters on the European level are being used now more than ever before.³²²

In summary, the effect of incorporating the national identities clause and the secession clause into the Constitutional Treaty, if adopted and implemented, would leave the EU in legally murky waters as integration progresses, which thereby increases the risk of investment for the benefit of EU citizens. It has been said that when nations embark on a stated program of closer integration, while leaving over several decisions and conditions for doing so, the constitutional-making that occurs will be messy and incomplete.³²³ This is particularly true when all that has been predetermined is that the Member States will in principle continue to deliberate among themselves, and in knowing that any Member State has the “express right to withdraw if it should become sufficiently disenchanted or come to look at the EU as a sufficiently bad bargain.”³²⁴ Consequently, there is an intellectually honest reason to reject the Constitutional Treaty since citizens will be worse off if it is adopted in its current textual form. Accordingly, where given the choice, European voters should reject the new Constitutional Treaty and demand something better and everlasting.³²⁵

³²¹ Ibid.

³²² Menéndez, Augustín José, p. 51.

³²³ Bermann, George, p. 369.

³²⁴ Ibid.

³²⁵ “The Right Verdict on the Constitution” *The Economist*, 24 June 2004.

7 Concluding Remarks

In this paper, I have shown that constitutions are created for the people for the purpose of restricting excessive government, and that the basic ingredient of a constitutional document is a guarantee of fundamental rights to citizens on a permanent and democratic basis. Without these latter elements, constitutions cannot safeguard citizen rights.

I have also demonstrated that the current treaty system already has a constitutional structure in place. The ECJ, as a guardian and promoter of constitutional values embodied in the current treaties, has stated on numerous occasions that the current treaties have created a supranational legal order with a constitutional charter in the EU. The EU institutions have expanded on this to create binding legislation at the European level for the benefit of its citizens. So too, then, European citizens should be able to rely on the new Constitutional Treaty provisions to safeguard their constitutional rights, particularly since the Constitutional Treaty would nullify the existing treaty system.

In evaluating the Constitutional Treaty, I have described it is a step forward in that it codifies the Charter of Fundamental Rights, simplifies the current treaty system into one working legal instrument, and arguably improves voting procedures and administrative efficiency. However, because it derives its powers from both the citizens and the Member States, the Constitutional Treaty puts its own constitutional rights at risk, and thus potentially negates its own advancements, by giving too much power to the Member States. This is evident in both the national identities clause and the secession clause. Precisely because the Constitutional Treaty would replace the current treaties, the secession clause, if utilized, would terminate the fundamental rights of European citizens as if they never existed. In this sense, the EU Constitution takes two steps back.

Furthermore, in trying to be both a constitution and a treaty, the Constitutional Treaty undermines the very constitutional values it seeks to establish and belittles the notion of a constitution by maintaining treaty-based constitutionalism. The national identities clause yields too much power to the Member States, which could severely weaken further integration efforts at the European level, as well as the Court's ability to adequately safeguard citizen rights. Besides that, any progress made by the Union could be recoiled at the will of the Member States due to the inclusion of a secession clause. Because it leaves no ambiguity of the drafters' intention, the secession clause would render the Court helpless in protecting the constitutional rights of European citizens should a Member State withdraw from the Union.

Therefore, this particular 'Constitution' should not serve as a constitutional model. Rather, the Constitutional Treaty should be scrapped in favor of a

constitutional instrument that truly reflects a guarantee of fundamental rights on a permanent basis for European Citizens. In the end, patience and persistence are the ultimate virtues necessary to achieve this goal, while in the interim, the existing treaty system would remain in place to protect those rights established by the current treaties.

Lastly, I should state that since I am an ardent supporter of constitutional rights, I would be inclined to support the Constitutional Treaty if the secession clause were removed because its removal would resolve the problem of permanence in a legal sense and thereby provide citizens with the fundamental guarantees necessary of a constitution. I would also take much more comfort if the national identities clause were removed, or at least reworded, in particular by omitting the statement of equality between the Constitution and the Member States. However, I am somewhat optimistic that the Court, and perhaps even the Member States, will interpret this provision in light of the Union supremacy clause and the overall purpose of creating a Constitutional Treaty for the people of Europe.

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