

Fordham International Law Journal

Volume 26, Issue 6

2002

Article 2

Constitutionalizing the European Union - More than a Sense of Direction from the Convention on the Future of Europe

Markus G. Puder*

*

Copyright ©2002 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Constitutionalizing the European Union - More than a Sense of Direction from the Convention on the Future of Europe

Markus G. Puder

Abstract

This Article discusses the latest episode in the history of one of the European Union. Part I provides an overview of the integration project. Part II highlights the significance of debating the future of Europe. Part III presents the vehicle of the European Convention. Part IV analyses selected constitutionalizing themes offered in Monsieur Giscard's blueprint. Finally, Part V offers findings and perspectives.

CONSTITUTIONALIZING THE EUROPEAN UNION — MORE THAN A SENSE OF DIRECTION FROM THE CONVENTION ON THE FUTURE OF EUROPE*

*Markus G. Puder***

INTRODUCTION

When the Convention on the Future of Europe (“European Convention”) officially inaugurated its future-of-Europe deliberations on February 28, 2002, at 3:00 pm in the Plenary Hall of the European Parliament, a new chapter in the making of Europe was solemnly opened. Only eight months later, on October 28, 2002, the President of the European Convention, the former *Président de la République Française*, Valéry Giscard d’Estaing, affectionately known as “VGE” among the acronym-enamored French, presented a preliminary draft of a constitutional treaty proposing to push the European Union (“EU”) toward the most ambitious reorganization in its young history.¹ Despite the rumblings about the initial activities of Monsieur Giscard, who, in true allegiance to the maxim *noblesse oblige* — in his case, nobility by sword² — fervently focused on salary matters and work-

* The views and the translations of foreign terminology offered in this Article are strictly those of the author. All translations from foreign languages are done by the author, unless otherwise mentioned. All foreign sources, including laws, court rulings, papers, dissertations, and internet sources, are on file with the author, unless otherwise noted. The Article expands on a faculty presentation made at the McGill University Faculty of Law, Montreal, Canada on January 27, 2003. Since the original presentation was made on the birthday of Wolfgang Amadeus Mozart, the author hopes that a healthy dosage of Mozart Effect permeated the drafting stage of this Article.

** Markus G. Puder is a researcher and attorney in the Environmental Assessment Division of Argonne National Laboratory, Washington, D.C. office. He is also an adjunct professor of law at the Georgetown University Law Center. His education includes: First and Second Legal State Examinations (Ludwig-Maximilians University, Munich, Germany), LL.M. (Georgetown University Law Center), and Ph.D. in Law (Ludwig-Maximilians University). Dr. Puder is currently a member of the New York State Bar and the U.S. Supreme Court Bar.

1. Praesidium of The European Convention, Preliminary Draft Constitutional Treaty, CONV 369/02 (Oct. 28, 2002) [hereinafter PDCT]. *See also* The European Convention, *Summary Report of the Plenary Session*, CONV 378/02 (Oct. 31, 2002) [hereinafter PDCT *Summary Report*].

2. Herbert v. Böckmann, *Schwertadel*, XLI Dt. Adelsblatt 391 (1923).

ing conditions,³ the new body with the ominous label has sent a resounding signal of political leadership.⁴

This Article discusses the latest episode in the history of one of the most audacious experiments in governance ever launched since the Philadelphia Convention that passed the U.S. Constitution. Part I provides an overview of the integration project. Part II highlights the significance of debating the future of Europe. Part III presents the vehicle of the European Convention. Part IV analyses selected constitutionalizing themes offered in Monsieur Giscard's blueprint. Finally, Part V offers findings and perspectives.

I. OVERVIEW OF THE INTEGRATION FRAMEWORK

The following description of the current framework of governance subsumed under the roof of the EU is intended to establish the baseline for approaching the finality deliberations in general, and Monsieur Giscard's blueprint in particular. The overview presents the current integration architecture, the process levers of integration, and the challenges associated with molding the integration project into a chiseled notion.

A. Snapshot: The Three-Pillar Architecture of the European Union

The framework of the EU currently displays a Greek temple built on three thematic pillars that correspond to different integration depths and governance modes.⁵ The First Pillar comprises the foundational European Communities: the European Community and the European Atomic Energy Community (collectively "Community").⁶ Within the Community dimension,

3. Bastian Bechtle, *EU-Verfassung—Chaotische Vorbereitungen für EU-Konvent*, SPIEGEL ONLINE 2002, available at <http://www.spiegel.de/politik/europa/0,1518,178838,00.html> (reporting that Monsieur Giscard, prior to the actual startup of the European Convention, sought to secure a net income of 20,000 Euro, establish a top-notch secretariat staffed with fifteen to twenty elite diplomats, and book a five-star hotel suite in Brussels for a one-year-and-a-half).

4. Annette Heuser, *The Convention Scores a Partial Success*, CAP Spotlight 2002/10 (2002).

5. The Three-Pillar structure was conceived by the Maastricht Treaty. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), 1 C.M.L.R. 719 (as amended) [hereinafter TEU]. See, e.g., Markus G. Puder, *Salade Niçoise from Amsterdam Left-Overs — Does the Treaty of Nice Contain the Institutional Recipe to Ready the European Union for Enlargement?*, 8 COLUM. J. EUR. L. 53, 54 (2002); Klaus-Dieter Borchardt, *The ABC of Community Law* 18 (2000), available at <http://europa.eu.int/eur-lex/en/about/abc.html>.

6. The two Foundational Communities were constructed by the two treaties of

which covers the civilian nuclear sector and general economic integration, autonomous institutions independent of the Member States manage the government process.⁷ The lawmaking prerogatives are allocated within the Community's institutional triangle. The European Commission embodies the permanent administration, in addition to exercising legislative and quasi-judicial functions.⁸ The Council of Ministers, which consists of the government delegates from the Member States, holds key legislative and appointment prerogatives.⁹ The European Parliament exercises legislative functions and political supervision.¹⁰ While directly elected by the Europeans, the membership of the body is not proportional in accordance with the democratic principle of population sizes, but is weighted in favor of the smaller countries.¹¹ After the European Commission provides the initial draft, the Council of Ministers and the European Parliament, in more and more cases coequally, work out the final version.¹² Decision-making within the Community triangle is, in most cases, no longer predicated upon unanimity. The judicial review in the Community system falls to the European Court of Justice and the Court of First Instance.¹³ Budgetary control is provided by the Court of Auditors.¹⁴ The Community approach of endowing independent institutions with real sovereign powers that go be-

Rome. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (as amended) [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Community, Mar. 25, 1957, 298 U.N.T.S. 167 (as amended) [hereinafter Euratom Treaty]. The TEU, *supra* n.5, redesignated the EEC Treaty into the Treaty Establishing the European Community. Treaty Establishing the European Community, Feb. 7, 1992, O.J. 224/1 (1992), [1992] 1 C.M.L.R. 573 (as amended) [hereinafter EC Treaty]. The first integration framework, the Treaty of Paris, which had launched the common management of the coal and steel sector, lapsed after fifty years in operation. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (as amended) [hereinafter ECSC Treaty]. Coal and steel operations are now covered under the EC Treaty. *See generally* Borchardt, *supra* n.5, at 18-20.

7. Puder, *supra* n.5, at 55, n.16.

8. EC Treaty, *supra* n.6, arts. 211-19; *see also* Borchardt, *supra* n.5, at 44-47.

9. EC Treaty, *supra* n.6, arts. 202-10; *see also* Borchardt, *supra* n.5, at 38-43.

10. EC Treaty, *supra* n.6, arts. 189-201; *see also* Borchardt, *supra* n.5, at 32-38.

11. EC Treaty, *supra* n.6, art. 190; *see also* Borchardt, *supra* n.5, at 34.

12. *See* Borchardt, *supra* n.5, at 72-84 (distinguishing among instruments of general validity generated through consultation, cooperation, decision, approval, or implementation measures, and simplified-procedure instruments); *see also* Puder, *supra* n.5 (noting the two advisory institutions in lawmaking, namely, the Economic and Social Committee, and the Committee of Regions).

13. EC Treaty, *supra* n.6, arts. 220-45; *see also* Borchardt, *supra* n.5, at 44-52.

14. EC Treaty, *supra* n.6, arts. 246-48; *see also* Borchardt, *supra* n.5, at 53.

yond the consensus-oriented mechanics prevailing in international organizations has been touted as supranational.¹⁵ In contrast to the Community's method of governance, the intergovernmental Second Pillar's Common Foreign and Security Policy and the Third Pillar's Police and Judicial Cooperation in Criminal Matters are still basically controlled by the Member States and the national veto.¹⁶ The overall Three-Pillar construct functions if the institutional triangle operates smoothly and liaises effectively with the intergovernmental fora and players. These include not only the European Council, the summit institution of the EU bringing together the Heads of State or Government and the President of the Commission,¹⁷ but also the Member States proper. If, on the contrary, the triangle gets bogged down or individual Member States proceed to slam the brakes, then the whole integration system comes to a grinding halt.

B. *Coordinate System: The Two Axes of Deepening and Widening*

Projected against a time line, the integration process exhibits two axes: deepening and widening. Deepening refers not only to the transfers of sovereign powers from the Member States to the Community plane, but also involves moving fields into progressive policy coordination under the Second and Third Pillars of the EU.¹⁸ Over the last five decades, the Member States have amended the institutional, procedural, and substantive contents of the relevant treaties. Grand treaty revisions are accomplished through a treaty-based process of international conclusion and domestic ratification.¹⁹ Since the construction of the Foundational Communities, four major revision thrusts have occurred.²⁰ Despite ups and downs, the integration project

15. Hans-Peter Ipsen, *Über Supranationalität*, in *EUROPÄISCHES GEMEINSCHAFTSRECHT IN EINZELSTUDIEN* 97 (1984). *But see* Jean Monnet, *Mémoires* 352 (1976) (summarizing his reservations relative to the term through "*mais ce mot ne me plaisait pas et m'a jamais plu*").

16. Puder, *supra* n.5, at 57.

17. TEU, *supra* n.5, art. 4; *see also* Borchardt, *supra* n.5, at 31.

18. Revisions are accomplished through a treaty-based, multi-phase process under Article 48 of the TEU. The provision couples a series of steps in the international stage with a domestic ratification requirement. TEU, *supra* n.5, art. 48.

19. For the legal requirements governing grand treaty revision, *see* TEU, *supra* n.5, art. 48(1).

20. *See* Single European Act, O.J. L 169/1 (1987) [1987] 2 C.M.L.R 741 [hereinafter SEA]; TEU, *supra* n.5; Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts,

has evolved from a trade zone to a single market with a common currency. A Community bridge allows for folding the remainder of the Justice and Home Affairs into the Community Pillar.²¹ And, by name, a more pronounced European Security and Defense Policy has been launched.²² The political gravity field created by the implementation of the euro, the persistent unemployment plaguing the national economies, and the recurring needs to avert against and respond to domestic crime and violence as well as external conflicts, will only accelerate the efforts to achieve the envisaged European space of prosperity, safety, security, and solidarity.²³

Widening refers to the spatial dimension of integration.²⁴ In terms of territorial applicability of the treaty framework, the integration club has grown from six to fifteen countries. Belgium, France, Germany, Italy, Luxembourg, and the Netherlands form the original six.²⁵ Four rounds of enlargements have added another nine: Denmark, Ireland, and the United Kingdom ("UK") in the first round; Greece in the second; Portugal and Spain in the third; and Austria, Finland, and Sweden in the fourth.²⁶ As a result, the EU encompasses a geographic area from Scandinavia in the North to the Mediterranean Basin in the South, and from the Atlantic Ocean to the Heart of the Con-

Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]; Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Feb. 26, 2001, O.J. C 80/1 (2001).

21. TEU, *supra* n.5, art. 42. See Anke Gimbal, *Die Innen- und Justizpolitik der EU nach Amsterdam*, in *AMSTERDAM IN DER ANALYSE* 146 (1998). The transfer procedure is highly complicated. While it has never been invoked, the existence of the bridge suggests that at some point, the Third Pillar will be completely folded into the Community framework. *Id.*

22. See Cologne European Council, *Conclusions of the Presidency* (1999), available at <http://europa.eu.int/council/off/conclu/>. For the most recent developments, see Copenhagen European Council, *Conclusions of the Presidency* 7-8 (2002), available at <http://europa.eu.int/council/off/conclu/> [hereinafter Copenhagen Presidency Conclusions].

23. Werner Weidenfeld & Josef Janning, *Europas Zukunftsfähigkeit - Herausforderungen, Grundlagen, Perspektiven* 7-11 (CAP Working Paper, Dec. 2001).

24. The legal procedures and criteria for accession are contained in Article 49 of the EU Treaty. It stipulates a network of international treaties between the incoming countries and the extant Member States. Ratification must occur in all contracting states. EU Treaty, art. 49. The legal requirements have regularly been supplemented by political criteria. See Karolina Ristova, *The Legal Aspects of European Union Enlargement and the Balkan States* 41-51 (unpublished supervised elective research project).

25. DAVID A.O. EDWARD & ROBERT C. LANE, *EUROPEAN COMMUNITY LAW* 3-4 (1999).

26. *Id.* at 6, 13.

continent.²⁷ In light of Europe's economic and political stability, thirteen countries are vying for entry.²⁸ With a large convoy of ten countries — Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia — the treaty of accession was signed on April 16, 2003.²⁹ They are slated for accession before the next elections to the European Parliament in 2004. Two countries, Bulgaria and Romania, will continue the accession negotiations.³⁰ They are expected to enter in 2007.³¹ One country, Turkey, has not yet moved beyond candidacy status. A decision relative to opening accession negotiations will be taken in late 2004.³² Upon accession of all candidates, the magnet EU is on track to boast twenty-eight member countries, push its external borders to the Commonwealth of Independent States and the Near East, and break new ethno-cultural grounds.³³

C. Notional Elusiveness: The Futility of Classification Attempts

Despite the plethora of political and legal notions offered in the literature and judicature to capture the construct somewhere in the continuum between regional international organization and federal State,³⁴ categorization attempts seem futile

27. Puder, *supra* n.5, at 59.

28. These thirteen countries are Turkey, Cyprus, Malta, Hungary, Poland, Romania, Slovakia, Latvia, Estonia, Lithuania, Bulgaria, Czech Republic, and Slovenia.

29. *Informal European Council: Athens Declaration* (Apr. 16, 2003), available at <http://www.eu2003.gr/en/articles/2003/4/16/2531/>.

30. Copenhagen Presidency Conclusions, *supra* n.22, at 4.

31. *Id.*

32. *Id.* at 5.

33. See Josef Janning & Claus Giering, *Strategien gegen die institutionelle Erosion*, in *DEMOKRATIE UND INTERESSEN AUSGLEICH* 46-47, 70 (Claus Giering *et al.* eds., 1999) (listing as additional potential entrants the European Free Trade Agreement countries of Iceland, Norway, and Switzerland, the principalities of Andorra, Liechtenstein, Monaco, and San Marino, the Western Balkan States of Bosnia-Herzegovina, Croatia, Serbia-Montenegro, Macedonia, and Albania, and based on historical and geographic considerations, Belarus, Moldova, Russia, and Ukraine).

34. See Jan Müller, *Constitutionalism and the Founding of Constitutions: Carl Schmitt and the Constitution of Europe*, 21 *CARDOZO L. REV.* 1777, 1778 (2000) (adding a question mark relative to the characterization by German constitutional scholars that the European Union ("EU") is "permanently suspended between *Bundesstaat* (federal [S]tate) and *Staatenbund* (a federation of [S]tates)"). For terminology used to capture the integration framework, see, e.g., European Court of Justice, Case 294/83, *Parti écologiste "Les Verts" v. European Parliament*, Case 294/83, [1986] E.C.R. 1339, 1365, para. 23 ("Community based on the rule of law") [hereinafter *Les Verts Case*]; German Federal Constitutional Court, Cases 2 BvR 2134/92 & 2159/92 *Manfred Brunner and others v.*

because the multi-level network of European integration represents a moving and morphing target. Indeed, the most salient characteristic of the EU system stems from the open-ended process dynamics that continue to envelop and carry the integration project and go beyond the customary political, socioeconomic, and cultural changes experienced by any organization.³⁵ The European edifice was not constituted with a big bang based on one final foundational plan, but derives from incremental, carefully scoped progressions, and long consolidation periods.³⁶ The integration treaties that mark stages on the road to achieving an ever-closer Union,³⁷ expressly embrace gradualism pursuant to the Jean Monnet method³⁸ over constitutionalism, a model track associated with Altiero Spinelli.³⁹ In retrospect, this method has thus far provided the recipe for success to resolve conflicting interests, concepts, and goals among the Member States, while not alienating the public at large to a degree of paralysis.

D. Observations

Viewed over an extended period of time, the integration of Europe has made great strides. Yet, the series of “mini bangs” has also led to more complexity and less transparency within the evolving framework that now comprises a panoply of treaties,

the European Union Treaty, BVerfGE 89, 156 (Maastricht Treaty) (“*Staatenverbindung*,” or linkage of States)); Wolfgang Merkel, *Legitimitätsüberlegungen zu einem unionsspezifischen Demokratiemodell*, in *Demokratie und Interessenausgleich in der Europäischen Union*, *supra* n.33, at 27 (Claus Giering *et al.* eds., 1999) (“part-formed political system”); Leon N. Lindberg & Stuart A. Scheingold, *Europe’s Would-Be-Polity — Patterns of Change in the European Community (1970)* (“would-be polity”); Thomas Oppermann, *Die Europäische Gemeinschaft als parastaatliche Superstruktur, Skizze einer Realitätsbeschreibung*, in *FESTSCHRIFT FÜR HANS PETER IPSSEN 685* (1977) (“parastate superstructure”); Hans-Peter Ipsen, *Europäisches Gemeinschaftsrecht (1970)* (“framework *sui generis*”).

35. Forschungsinstitut der Deutschen Gesellschaft für Auswärtige Politik, *Weltpolitik.net, Europäische Union — Einführung*, available at <http://www.weltpolitik.net/sachgebiete/eu> [hereinafter *Weltpolitik.net*].

36. *Id.*

37. TEU, *supra* n.5, PmbI., art. 1; EC Treaty, *supra* n.6, PmbI.

38. Jean Monnet, *A Ferment of Change*, 1 J. COMMON MKT. STUD. 203, 211 (1962); see also *Centro Italia Europea — Eurit, Grand-Place Europe, Jean Monnet — His Life and Work*, available at <http://www.eurplace.org/federal/monnet.html> [hereinafter *Monnet, Life and Work*]. For an in-depth discussion of functionalism, see Renaud Dehousse, *Rediscovering Functionalism* (Jean Monnet Working Paper, Symposium, July 2000).

39. Monnet, *Life and Work*, *supra* n.38.

protocols, and declarations as well as numerous re- and over-writes.

II. SIGNIFICANCE OF DEBATING THE FUTURE OF EUROPE

Since European integration has been achieved through successive, open-ended construction phases, the deliberations on the future of Europe add the proverbial light at the end of the tunnel. Such discussions, albeit under different labels, are not a new phenomenon throughout the history of the integration project.⁴⁰ At present, most actors and commentators employ the phrase “finality debate” to shift the visor from gradualism towards constitutionalism, or, in other words, to move into a process of constitutionalization. Independent of terminology, the discourse about the ultimate destination of the integration process raises at least four significant, cross-cutting promises and challenges for shaping the European integration process.

A. *Break with the Conventional Templates of the Past*

The very launch of these deliberations signals the intent to dispense with the traditional process of intergovernmental conferences, patchwork revisions, and lengthy consolidation phases that seem outmoded for a growing and deepening Europe. In terms of substance, the deliberating parties pledge to pursue the answer to the question relative to what the Europeans are going

40. Since the establishment of the European Coal and Steel Community in 1951, the reflections upon a European finality have been documented in numerous drafts and reports authored by European institutions as well as national political parties, foundations, and private citizens throughout the foundational, the re-ignition, and the maturity periods of the integration project. They include, among others, the Draft Treaty for a Statute of the European Community (Jean Monnet/Paul-Henri Spaak, 1953), the Spinelli Draft (Altiero Spinelli, 1984), the work of the Confédération européenne (François Mitterand, 1990), the *Hermann Report/Constitution of the European Union* (Fernand Hermann, 1994), and the Freedom in Responsibility Manifesto (Christian Democratic Union, 1994). While ultimately not implemented, these efforts proved, at least partially, boosters in their own way. In 1957, the suite of the community treaties was completed. In 1986, the SEA reinvigorated the idling integration engine. And in 1992, the TEU conceived the Three-Pillar architecture of the EU. Forschungsinstitut der Deutschen Gesellschaft für Auswärtige Politik, *Weltpolitik.net, Zum Stand der Diskussion um eine europäische Verfassung*, available at <http://www.weltpolitik.net/policy-forum/article/252.html>. See Sonja Volkmann-Schluck, *Die Debatte um eine europäische Verfassung*, in LEITBIDER — KONZEPTE — STRATEGIEN 12-16 (2001). In addition, the author identifies three phases in the post-1999 constitutional debate: (1) from the beginnings of the German Council Presidency to Joschka Fischer’s Humboldt speech; (2) from Fischer’s speech to the Nice summit; and (3) the launch of the post-Nice process. *Id.* at 16-22.

to build — something that one can see, smell, taste, hear, and feel. In more concrete terms, the initiation of end games calls for the insertion of the last brick into the integration project: *finalité politique*, or, full political integration.⁴¹

B. *Move from Permissive Consensus to Positive Identification and Loyalty*

Debating the future of Europe signals the intent of all players to counter the pervasive exhaustion of the permissive consensus among the governed.⁴² The path towards finality requires avoiding the errors of the past that led to major flash points of crisis.⁴³ Beyond the importance of lessons learned, a new culture of bright sunlight, public discussion, and full communication loops holds the promise of finally relinquishing the old recipes of polity-building by stealth and elite bargaining that have for so long dominated the integration project.⁴⁴ Finally, this also means that transparency and openness must be deemed as important as effectiveness and efficiency relative to forging a stronger identification and loyalty within the envisioned framework. Overall, this process of sparking a more general interest among the peoples of Europe⁴⁵ demands from discussants, at a minimum, the active pursuit of togetherness.⁴⁶

C. *Vet the Lingering Democracy and Legitimacy Questions*

Finality involves a sincere attempt at conceptualizing for the

41. Bertelsmann Group for Policy Research at the Center for Applied Research (University of Munich), *Conceiving Europe's Reform, Discussion Paper for the Charlemagne Forum on Europe in Aachen 2-4* (2002), available at <http://www.bertelsmann-stiftung.de>.

42. HEINZ LAUFER & THOMAS FISCHER, *FÖDERALISMUS ALS STRUKTURPRINZIP FÜR DIE EUROPÄISCHE UNION* 11, n.8 (1996) (offering numerous references relative to a receding tacit consent).

43. The various hours of truth found vivid expression in the adverse referenda in Denmark on the TEU as well as the country's entry into the eurozone, the audible stuttering of Franco-German engine, the undignified collapse of the Santer Commission, the initial plunge of the euro, the poor acceptance of the European Parliament, and the overall bad image of Brussels. This diagnosis is further embodied in the derisive slogans that were coined over the years, including "Monster of Maastricht," "dictatorship by the councils," "undemocratic super State," "faceless and soulless eurocracy," and "Nation-consuming Leviathan." *Id.* at 9-10.

44. Müller, *supra* n.34, at 1179.

45. TEU, *supra* n.5, art. 1.

46. See Bertelsmann Europa-Kommission, *Europas Vollendung vorbereiten — Forderungen an die Regierungskonferenz 2000*, 27 (2000), available at <http://www.cap.uni-muenchen.de> (using the term "*das Europa der Bürger*," or, "the Europe of the Citizens").

European integration order, the enabler of all governance or constitutionalizer — *ex nihilo* or from the extant *acquis*. In this realm of organizational theory and philosophy, Sieyès and Schmitt have offered the couplet of *pouvoir constituant* and *pouvoir constitué*, Spinoza has paired *natura naturans* with *natura naturata*, and Kelsen has used the notion of the basic norm (*Grundnorm*).⁴⁷ The notions hark back to the duality of constitution-giving and constitution-managing, and, transcended onto the European plain, a convergence on resolving the alleged European democracy and legitimacy deficits. Independent of whether one construes the two as distinct or overlapping in countless permutations, democracy and legitimacy are dynamic and alive.⁴⁸ They are ideal conditions requiring continuous approximation, yet seem forever incomplete and incapable of completion. Admittedly, the distillation of a common core with respect to democracy and legitimacy faces the challenge of disparate cultures of public law and administration in Europe.⁴⁹ The nucleus of democracy is expressed as the congruence of the governor and the governed.⁵⁰ All bets remain open with respect to translating this equation into the design of the European institutional order, since finding the sovereign people residing prior to and over, within, and next to the embodiment of governance,⁵¹ and construing the tractor beam between the will of the sover-

47. For an in-depth discussion and further references, see Andreas Kalyvas, *Schmitt and the Categories of the Political: Carl Schmitt and the Three Moments of Democracy*, 21 CARDOZO L. REV. 1525 (2000).

48. Müller, *supra* n.34, at 1778, n.3 (“democracy and legitimacy are not co-terminous”); Merkel, *supra* n.34, at 28-31 (describing three dimensions of legitimacy: (1) political community and *demos*; (2) democratic institutional order; and (3) efficiency); Stephan Mazan, *Das föderative Prinzip in der Europäischen Union*, in 19 SCHRIFTEN ZUM EUROPARECHT 36-37 (1996) (using the following distinction within the overarching subject term of “legitimacy”: (1) material legitimation that relates to safeguarding order and peace, individual and social freedoms, and welfare; and (2) formal legitimation that derives from democratic equality and rule of law); Gráinne de Búrca, *The Quest for Legitimacy in the European Union*, 59 MOD. L. REV. 349 (1996) (“the power of the [S]tate is legitimated through the democratic process”).

49. Müller, *supra* n.34, at 1778 (observing that in Britain, sovereignty resides in the Crown in Parliament, while France worships at the altar of the sovereign State, and Germany defers to the Constitutional Court as the final arbiter).

50. See Abraham Lincoln, *Address at Gettysburg, Pennsylvania (Nov. 19, 1865)*, in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859-65, 536 (1989) (“government of the people, by the people, for the people”); see also CARL SCHMIDT, VERFASSUNGSLEHRE 228, 234 (1989) (“the identity between the dominant and the dominated, the ruler and the ruled, the one who gives orders and the one who obeys them”).

51. Kalyvas, *supra* n.47, at 1529-30 (the three moments of democracy).

ign and the government, represent the central challenges. One might intriguingly enquire about the significance of a difference between people (*demos*) and peoples (*demoi*), and search for a formula beyond the triangle of people-State-constitution. Peoples *plus* Nation-States *equals* Europe could serve as a starting point or working hypothesis. In addition, invoking the image of a chain, the appropriate numbers and types of linkages between the sovereign and the government will have to be weighed. This relates to the criticism that the interposition of the Member States and their executive branches within the current framework has led to a pronounced executive tilt in the EU, also referred to as the democracy deficit.⁵²

While it has generally been accepted that the quest for legitimacy must go beyond Weber's triad of legal, traditional, and charismatic authority, as well as the minimal standard of the functionalist, success-based material self-legitimization,⁵³ the debating parties will have to resolve whether the desired objective involves nothing short of existential legitimization through a political constitution for Europe. Within the overall mix, answers with respect to identity-forging and loyalty-building will have to be offered. The finality debate promises to vet these existential questions.

D. *Enhance Europe's Posture in the Global Arena*

The output feature of the integration order relates to its effectiveness and efficiency.⁵⁴ The recent rifts within Europe over the stances of Member States and candidate countries within international organizations have painstakingly revealed rather unsettling performance deficits. In this light, the future-of-Europe deliberations must reignite the spirit that had prevailed in the early 1990s when the implementation of a single market pro-

52. Hans Peter Ipsen, *Zur Executiv-Rechtssetzung in der Europäischen Gemeinschaft*, in *FESTSCHRIFT FÜR PETER LERCHE* 425 (1993); Koen Lenaerts, *Some Reflections on the Separation of Powers in the European Community*, 28 *COMMON MKT. L. REV.* 11 (1991); Georg Ress, *Über die Notwendigkeit parlamentarischer Legitimierung der Rechtssetzung der Europäischen Gemeinschaften*, in *FESTSCHRIFT FÜR WILHELM GECK* 625 (1989). See also Dieter Grimm, *Does Europe Need a Constitution?*, 1 *EUR. L.J.* 282, 291 (1995) (stating that "[t]he difference lies in the reference back to the will of the Member States rather than to the people").

53. Müller, *supra* n.34, at 1778.

54. Volkmann-Schluck, *supra* n.40, at 10 (speaking of a legitimacy criterion); Welt-politik.net, *supra* n.35 (diagnosing that output has dominated over input legitimation).

gram was accelerated. The key borderless areas benefiting from a major boost include trade, the environment, research and development, and internal and external security.⁵⁵ In the final analysis, only a reinvigorated Europeanization will allow for pooling resources, avoiding redundancies, and, above all, speaking with one voice.

E. *Observations*

Within the finality debate, the constitutionalization theme is omnipresent because it involves the very heart and fiber of building a European organism through a marriage of politics and the law. The deliberations promise to spark the political process and shape legal vehicles in pursuit of a genuinely accepted governance framework. Conducting this discourse in sincerity requires political statesmanship, legal imagination, and civic engagement. This calls on politicians to be visionaries, inspirers, and doers. Lawyers are challenged to seek new horizons beyond the State-international organization dialectics. Most importantly, the citizen participant must not remain on the sidelines, but should become vested in the discussions with the perspective to provide actual input. The finality debate appeals to politics and the law not just as science disciplines, but as high art in the broadest sense.

III. *ANATOMY OF THE EUROPEAN CONVENTION*

The European Convention was created as a conduit for shaping the constitutionalization theme triggered through the finality debate. The novelty of the body warrants a closer look at its genesis, membership, organization, procedure and working methods, and schedule.

A. *Genesis*

The Nice Intergovernmental Conference, in Declaration Number 23, launched the so-called post-Nice process, however, it stopped short of charging a specific reform vehicle distinct from the traditional grand revision template.⁵⁶ The Laeken Dec-

55. Weidenfeld & Janning, *supra* n.23, at 7-10.

56. Treaty of Nice, Declarations Adopted by the Conference, Declaration on the Future of the European Union, O.J. C 80/1, 85-86 (2001) (identifying four topical areas: (1) the division of powers between the EU and the Member States, including their

laration, which on the substance formulated roughly 60 reform questions, tasked a convention to broadly and openly “consider the key issues for [Europe’s] future development and . . . identify the various possible responses.”⁵⁷ The composition of the convention was to reflect the multi-level, interwoven, and polycentric networks of public and private actors, institutions, functions, jurisdictions, and resources currently subsumed under the framework of the EU.

B. *Membership*

The membership of the European Convention features a Symphony of a Hundred-And-Five:⁵⁸ a President (Valérie Giscard d’Estaing), and two Vice Presidents (Giuliano Amato and Jean-Luc Dehaene, the former Prime Ministers of Italy and Belgium, respectively), twenty-eight government representatives from the Member States and candidate countries (one each), fifty-six delegates from the national parliaments of the Member States and candidate countries (two each), sixteen Members of the European Parliament, and two representatives from the European Commission.⁵⁹ In addition, the full members have one alternate each.⁶⁰ Another thirteen observer-invitees represent

political subdivisions; (2) the role of the national parliaments in the integration process; (3) the legal status of the Fundamental Rights Charter; and (4) the simplification of the integration treaties); *see also* Puder, *supra* n.5, at 82-83.

57. Laeken European Council, *Conclusions of the Presidency* (2001) Annex I, at 7, available at <http://europa.eu.int/council/off/conclu/> (posing questions with respect to four thematic blocs: (1) allocation and delineation of competences; (2) simplification of instruments; (3) more democracy, transparency, and efficiency; and (4) path toward a constitution); *see also* Claus Giering, *Die Verfassung im Visier, Europäische Zeitung* 01/2002, available at http://www.cap.uni-muenchen.de/aktuell/medien/2002/2002_01a.htm; Olaf Wittrock, *Gipfel-Fazit: Europa vor der Revolution*, available at <http://www.europa-digital.de/aktuell/dossier/nach1109/nachlaek.shtml>.

58. Ulrike Guérot, *Aktueller Stand der Diskussion im europäischen Verfassungskonvent* 3 (Gemeinsame Vortragsveranstaltung der Deutschen Gesellschaft für Auswärtige Politik in Kooperation mit dem Zentrum für Europäische Integrationsforschung, Apr. 30, 2002) (emphasizing that 25% of the delegates are women). *But see* JO SHAW, PROCESS, RESPONSIBILITY AND INCLUSION IN EU CONSTITUTIONALISM — THE CHALLENGE FOR THE CONVENTION ON THE FUTURE OF THE UNION 11 (2002) (diagnosing a paucity of women and party imbalances).

59. For a visually appealing compilation of the organization and composition of the European Convention, *see* Olaf Wittrock, *Wer kommt in den Konvent?*, available at <http://www.europa-digital.de/aktuell/dossier/konvent/konkand.shtml>.

60. For the tables of members and alternates, *see* The European Convention, *Composition*, available at <http://european-convention.eu.int/Static.asp?lang=en&Content=composition>.

two advisory Community bodies — the Economic and Social Committee (three) and the Committee of Regions (six), the social partners (three) and the European Ombudsman.⁶¹ Moreover, the European Convention Forum operates as a public participation or stakeholder involvement venue folding civil society and other interested individuals into the debate.⁶² Finally, in the summer of 2002, a three-day European Youth Convention brought together 210 young people between the ages of eighteen and twenty-five years to discuss the future of Europe.⁶³

C. Organization

The European Convention features a twelve-member bureau or Praesidium, which is to give the impetus to the proceedings.⁶⁴ The autonomous General Secretariat of the European Convention organizes the meetings and provides logistical support.⁶⁵ The overall budget stands at 10.5 million Euro.⁶⁶

D. Procedure and Working Methods

The President and the two Vice Presidents hold a weekly *tête-à-tête*.⁶⁷ The Praesidium meets every other week behind closed doors on the premises of the European Parliament in Brussels.⁶⁸ A public Plenary Session is convened roughly every

61. Wittrock, *supra* n.57.

62. The European Convention, Open Letter to the Editors of Newspapers in Member States and Candidate Countries (Mar. 27, 2002); The European Convention, Introduction to the Forum Website, available at http://europa.eu.int/futurum/forum-convention/index_en.htm; see also Olaf Wittrock, *Wie funktioniert der Konvent*, available at <http://www.europa-digital.de/aktuell/dossier/konvent/arbeit.shtml>.

63. See *Welcome to the Youth Convention*, available at <http://www.youth-convention.net/en/home.html>.

64. The European Convention, *Praesidium*, available at <http://european-convention.eu.int/praesidium.asp?lang=en> (providing helpful background information, including pertinent documents).

65. Wittrock, *supra* n.57. The European Convention's General Secretariat has been established at the General Secretariat of the Council of Ministers in Brussels. Sir John Kerr is the Secretary General. See Shaw, *supra* n.58, at 11 (observing that, while the membership of the highly influential Secretariat is diffused, the powerful deputy Secretary General of the Council, Pierre de Boissieu, is said to have wielded considerable influence with respect to certain (non-) appointments).

66. See SHAW, *supra* n.58, at 11.

67. Wittrock, *supra* n.57.

68. *Id.* For the chronologies and topics, see Das aktuelle Dossier, Die Plenardebatten im EU-Verfassungskonvent, available at <http://www.europa-digital.de/aktuell/dossier/konvent/plensr>.

three weeks.⁶⁹ All documents are available to the public.⁷⁰ The speaking time has been limited to three minutes, creating a sense of pragmatism.⁷¹ “Consensus-building” is the magic buzzword for avoiding formal and contested vote counting.⁷² Working Groups composed of members of the European Convention were launched in June 2002 to explore topical themes and issues more closely, and to generate detailed opinions.⁷³ Their number has increased from originally six to meanwhile eleven.⁷⁴ At the end of each Working Group meeting a summary is published.⁷⁵ Moreover, ten Working Groups have meanwhile published a final report.⁷⁶ Numerous contributions and written interventions by individual members, which are circulated to all their colleagues, have been released into the public domain.⁷⁷ Finally, a first discussion circle, suggesting more free-flowing deliberations, was launched.⁷⁸

E. Schedules

The European Convention’s proceedings, scheduled to run from February 2002 through June 2003, are to unfold in three stages: (1) a listening phase — ascertaining the expectations and needs of the Member States, their governments and parlia-

69. Wittrock, *supra* n.57.

70. *Id.*

71. Matthias Zier, *Revolution in der Warteschleife*, available at <http://www.europa-digital.de/aktuell/dossier/konvent/zwibil.shtml>.

72. Wittrock, *supra* n.57. See also Eric Philippart, *The Convention on the Future of the EU*, No. 11 CEPS Policy Brief 5 (2002).

73. See The European Convention, *Proceedings*, available at <http://european-convention.eu.int/travaux.asp?lang=en>.

74. See Annette Heuser, *Structure of the Convention Determines Outcome — Organization of the Working Groups*, CAP SPOTLIGHT 2002/03 (2002) (recommending nine working groups with chiseled objectives); Kristian Kampfer, *Eine Verfassung für Europa? Die deutschen Ausgangspositionen und eine Zwischenbilanz des Konvents*, available at <http://www.europa-digital.de/aktuell/dossier/konvent/meyer.shtml> (summarizing a presentation at the German Parliamentary Society by Professor Jürgen Meyer, the delegate from the German Parliament).

75. The European Convention, *Working Groups*, available at <http://european-convention.eu.int/grprtrav.asp?lang=en>.

76. The European Convention, *Working Groups: Introduction*, *supra* n.73 (posting the final reports).

77. The European Convention, *Contributions of Members of the Convention*, available at http://european-convention.eu.int/doc_register.asp?lang=en&Content=CONTRIB.

78. The European Convention, *Discussion Circles*, available at http://european-convention.eu.int/doc_CIRCLE.asp?lang=en. The first circle revolves around the European Court of Justice.

ments, and the European society; (2) a deliberating phase — comparing and assessing the various opinions offered on the various reform topics; and (3) a proposing phase — synthesizing and drafting proposals.⁷⁹

Following the third phase, the proposal is relayed to the intergovernmental conference envisioned for the time frame between November 2003 and April 2004.⁸⁰ In other words, this process should be concluded well before the elections to the next European Parliament in 2004. Others already foresee the signature of a new Treaty of Rome at the occasion of the summit concluding the Italian Council Presidency in December 2003.⁸¹

F. Observations

The Laeken formula for a convention was pushed by those seeking stronger parliamentary and public participation components. Moreover, it reflects a general fatigue with the traditional summits and the hustle and bustle of the bazaar in the kasbah.⁸² The convention format differs from previous vehicles used in the history of intergovernmental conferences.⁸³ It is neither a gathering of special representatives, delegates, and envoys converging in quasi-diplomatic privacy,⁸⁴ nor a selection of wise men and women deliberating aloofly,⁸⁵ nor a parliament engaging in constitutional revision.⁸⁶ Rather, the European Convention features a group of men and women seeking “to propose a new frame-

79. The European Convention, *Timetables of Meetings*, available at <http://european-convention.eu.int>. For an evaluation of the first phase, see Werner Weidenfeld, *From Listening to Consensus-Building — The Second Working Stage of the Convention*, CAP SPOTLIGHT 2002/07 (2002) (welcoming the general direction provided by The European Convention's initial round of consultations).

80. See Guérot, *supra* n.58, at 9-10 (referring to discussions about the alternative of a Europe-wide referendum on the basis of “one person, one vote”).

81. See Olaf Wittrock, *Der Konventionsfahrplan*, available at <http://www.europa-digital.de/aktuell/dossier/konvent/fahrplan.shtml>.

82. The wee hours of Nice — grueling confession chair procedures, merciless fights for food and thought papers, and endless haggling and almost incomprehensible compromises — had caused lasting memories among negotiators and reporters. See Puder, *supra* n.5, at 63, nn. 88-91.

83. Phillippart, *supra* n.72, at 1 (noting that Roman Herzog's convention that drafted the Charter of Fundamental Rights was not directed to prepare an intergovernmental conference).

84. *Id.* For an example of this template, see Puder, *supra* n.5, at 62 (describing the process that culminated with the Nice summit).

85. Phillippart, *supra* n.72, at 1 (emphasizing the personal capacity of this format).

86. *Id.* (explaining that this formula was used when the *ad hoc* Assembly (the pre-

work and structures for the European Union, which are geared to changes in the world situation, the needs of the citizens of Europe and the future development of the European Union."⁸⁷

However, as the convention process has been maturing, it has become clear that the Member States, not so eager to totally hand away the reigns of control, have resorted to more subtle means of influence. This diagnosis is reflected in the choice of a troika of elder statesmen chairing the European Convention.⁸⁸ Moreover, the government delegates hold two thirds of the Praesidium, while the fifty-six parliamentarians account for the majority in the overall body.⁸⁹ The preliminary rules of procedure were heavily tilted towards the President with respect to determining the agenda, the length of the debates, and the point in time for sittings.⁹⁰ On the other hand, the Praesidium has had to back down on several occasions.⁹¹ The working groups were launched against the will of the Chair.⁹² In a similar vein, the candidate States had to win their guest-participant status in the Praesidium and the emancipation of their official languages.⁹³ Finally, many view the lapse of time between the availability of the expected proposals and the decisive intergovernmental conference as a firewall allowing the ball to sit in the court of the Member States for a while.⁹⁴

IV. MONSIEUR GISCARD'S BLUEPRINT

The Preliminary Draft Constitutional Treaty presents a first

cursor of the European Parliament) led the effort of drafting a Treaty for the European Political Community).

87. Europa, *European Commission, Audiovisual Library, European Convention — Album*, available at http://europa.eu.int/comm/mediatheque/photo/select/convention3_en.htm.

88. Zier, *supra* n.71. For other considerations, see Kristian Kampfer, *Die Zukunft Europas in Joschkas Händen*, available at <http://www.europa-digital.de/aktuell/dossier/konvent/haende.shtml> (diagnosing that Joschka Fischer's move to replace a university professor reflects a power struggle between the Foreign Office and the Chancellor's Office).

89. Zier, *supra* n.71.

90. *Id.*

91. *Id.* See also Martin Banks, *Giscard Control over Convention Speaking Rights under Attack*, *European Voice*, available at http://www.cap.uni-muenchen.de/aktuell/medien/2002/2002_02_28.html.

92. Zier, *supra* n.71.

93. *Id.*

94. *Id.*

pragmatic product marking the European Convention's entry into the final proposing phase.⁹⁵ After describing the layout, the major reform themes central to a constitutionalization drive will be analyzed.

A. Layout

1. Designation

While the subject line of the cover note from the Praesidium to the Convention reads Preliminary Draft Constitutional Treaty,⁹⁶ the attached body of the document titles Treaty Establishing a Constitution for Europe.⁹⁷ One might argue that "Constitutional Treaty" emphasizes the continued anchoring of the integration project in the international law basis,⁹⁸ whereas "Constitution for Europe" intimates finality through a constitutional leap.⁹⁹ The designations Basic Treaty, merely bundling provisions,¹⁰⁰ Constitutional Charter, invoking the judgments of the European Court of Justice,¹⁰¹ or Constitutional Pact, connot-

95. Monsieur Giscard celebrated the occasion by removing the document from a sealed envelope after having arranged for a personal distribution only at the very beginning of the session. In the Praesidium, he even had the text collected again at the end of the sitting. See Arne Schneider, *Wegmarke für ein neues Europa*, available at <http://www.europa-digital.de/aktuell/dossier/konvent/fahrplan.shtml>. The proposing phase has been characterized by the rise of numerous constitutional drafts offered by players inside and outside of The European Convention. See CAP, EU-Reform, *EU-Konvent, Verfassungsentwürfe*, available at <http://www.cap.uni-muenchen.de/konvent/entwuerfe.htm>. For a juxtaposition of the two main parliamentary constitutional drafts authored by the Brok Group (European People's Parties) and Andrew Duff (Liberals), see Claus Giering, *Different Ways — One Target — Convention Members Present First Draft Constitutions*, CAP SPOTLIGHT 2002/08 (2002) (providing a summary side-by-side in table format). A rather copious working document was prepared under the aegis of the European Commission at the request of President Romani Prodi. See FRANÇOIS LAMOUREUX ET AL., FEASIBILITY STUDY, CONTRIBUTION TO A PRELIMINARY DRAFT— CONSTITUTION OF THE EUROPEAN UNION (2002) (offering a comprehensive introductory narrative as well as a proposed document).

96. PDCT, *supra* n.1, at 1.

97. *Id.* at 4.

98. Volkmann-Schluck, *supra* n.40, at 31. See also Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795) (predicting that states will contractually bind themselves together, like private individuals within the State, which will give rise to a republic of the republics and overcome the state of war of the lawless space).

99. Heuser, *supra* n.4; Kampfer, *supra* n.74.

100. Volkmann-Schluck, *supra* n.40, at 31. For an example of such a consolidated treaty, see Bertelsmann Group for Policy Research, *A Basic Treaty for the European Union — Draft Version for the Reorganization of the Treaties* (2000).

101. *Les Verts Case*, [1986] E.C.R. at 1365. See also J.J. Zwartveld and Others, *Case C-2/88*, [1990] E.C.R. 3365, 3372; *Opinion 1/76 of 28 April 1977*, [1977] E.C.R. 758,

ing the usage by the European Movement,¹⁰² are not offered.

2. Architecture

In pursuit of treaty simplification, the eighteen-page draft presents a single consolidated document designed to supplant the extant panoply of treaties and protocols.¹⁰³ It exhibits a trifurcation into a constitutional structure reflecting the convention proposals, an administrative part folding in the policy and action clauses from the existing treaties, and a final part offering general provisions.¹⁰⁴ Once finalized, the constitutional text will boast more than 400 provisions.¹⁰⁵

3. Drafting Method

In light of its outline format, the document has already come to be known as the skeleton.¹⁰⁶ The constitutional part features ten title headings with a total of forty-six articles.¹⁰⁷ The contents of each provision are a function of the consensus method and the desire to achieve a blueprint rather than a mere batch of options.¹⁰⁸ Emphasis was placed on clarity and readability.¹⁰⁹ In general, more flesh on the bones reflects a stronger sense of consensus.¹¹⁰ Rudimentary language signals emerging trends, offers choices, or identifies issue areas for further discus-

para. 12; *Beate Weber v. European Parliament*, Case C-314/91, [1993] E.C.R. 1093 (para. 8). See also Udo di Fabio, *A European Charter: Towards a Constitution for the Union*, 7 *COLUM. J. EUR. L.* 159, 165 (using the term Charter to describe the constitution of an association of States).

102. Jean-Claude Piris, *Does the European Union Have a Constitution? Does It Need One?* (Harvard Jean Monnet Working Paper, May 2000), available at <http://www.jeanmonnetprogram.org/papers/00/000501.html>.

103. *PDCT Summary Report*, *supra* n.1, at 2.

104. See *PDCT*, *supra* n.1, at 2-7; *PDCT Summary Report*, *supra* n.1, at 1-2.

105. Heuser, *supra* n.4, at 2. Claus Giering, *Bewährungsproben auf dem Weg zur Verfassung*, *Europäische Zeitung* 2 (Nov. 2002), available at http://www.cap.uni-muenchen.de/aktuell/medien/2002/2002_11a.htm.

106. See Ian Black, *Giscard Unveils Draft for "United Europe"*, *GUARDIAN UNLIMITED*, Oct. 29, 2002; Kristian Kampfer, *Die Zehnte Plenartagung: Vorentwurf einer Verfassung, die Rolle einzelstaatlicher Parlamente und Charta der Grundrechte*, available at <http://www.europa-digital.de/aktuell/dossier/konvent/plenar/pt10.shtml>.

107. See Black, *supra* n.106.

108. See Phillippart, *supra* n.72, at 1 (advocating "precise recommendations, and not a catalogue of options").

109. See *PDCT Summary Report*, *supra* n.1, at 13 (describing the positive reactions among the members during preliminary debate).

110. *Id.* at 3.

sions.¹¹¹ The elastic styling of the provisions is intended to allow the Praesidium to successively complete building blocs and present full-fledged draft sections and articles, and thus attain its goal of constructing a whole final draft constitutional treaty before the European Convention adjourns *sine die*.¹¹²

B. Reform Themes

The principal constitutionalizing reforms thematized in Monsieur Giscard's skeleton include the nature and foundations of Europe, the protection of fundamental rights, the allocation of the competences, and the institutional government. Moreover, other important topics are materializing on the horizon.

1. Nature and Foundations of Europe

The assortment of choices floated in Monsieur Giscard's blueprint relative to the official title of the integration framework, signals the intent to articulate a hiatus ushering in a practical re-foundation and solemn re-endowment of Europe.¹¹³ Identifying potential guiding visions (*Leitbilder*) sets the stage for resolving the logical question that must precede any drive towards a constitution, namely, what it is that shall be constituted.¹¹⁴

The term "European Community" connects to the beginnings of European integration and the image of a Europe governed by a Table of Prime Ministers and run by an economic government that conducts the political management of the euro in counterbalance to the European Central Bank.¹¹⁵ The title "European Union" reflects the present structure built around

111. *See id.* For example, the proposal reflects a stronger consensus among the members on values and legal personality, whereas the language relative to the categories of competences and the injection of suspension and withdrawal procedures represents a first tendency. Choices are floated with respect to the designation of the integration framework and the road to fundamental rights. The installation of Presidencies for the European Council and Commission, and the modalities for the entry into force warrant further discussions.

112. *Id.*

113. PDCT, *supra* n.1, art. 1.

114. *See* Volkmann-Schluck, *supra* n.40, at 23 (quoting the former Governor of Saxonia, Kurt Biedenkopf).

115. *See* Bertelsmann Group for Policy Research at the Center for Applied Research, *supra* n.41, at 4 (describing this scenario as a "deepened trade zone" with room for enhanced cooperation among the eurozone countries); Volkmann-Schluck, *supra* n.40, at 28 (encapsulating the British ideal of Europe as an economic power station).

the Community core and the open status quo.¹¹⁶ The vision of the United States as an example for Europe has inspired much euphoria over the past centuries.¹¹⁷ However, in the words of the history major and former Chancellor of Germany Helmut Kohl, who stopped invoking the reference in the early 1990s: “the formula . . . leads to error, because anybody who hears this formula immediately thinks . . . of the United States.”¹¹⁸ The notion of a United Europe, which is favored by Monsieur Giscard, is less fraught with pre-established connotations.¹¹⁹

The following articles in Monsieur Giscard’s blueprint offer more direction. They envision the future Europe as a Union of European States organized on a federal basis,¹²⁰ and equipped with legal personality.¹²¹ This sounds reminiscent of Joschka Fischer’s speech that had ricocheted throughout Europe in the spring of 2000.¹²² The German Foreign Minister is now Ger-

116. See Volkmann-Schluck, *supra* n.40, at 27 (identifying the Commission, the European Parliament, and the smaller Member States as proponents of this vision); see also Heuser, *supra* n.4, at 3 (emphasizing that the current name has not only created an identity for the fifteen Member States, but also “elicited a positive integrational dynamism in the accession states”).

117. For an overview of the history of the European unity movement, see WOLFGANG W. MICKEL, ed., *Handlexikon der Europäischen Union XIII-XLII* (1998) (describing, *inter alia*, the Pan-Europa Union founded by the Austrian Count Coudenhove-Kalergi).

118. For the full 1993 quote in German, see LAUFER & FISCHER, *supra* n.42, at 22. See also Mazan, *supra* n.48, at 76 (“no realistic scenario”); Freedom in Responsibility Manifesto, *supra* n.40 (“des notions telles que . . . ‘Etats-Unis d’Europe’ ne sont pas de nature à rendre manifeste le caractère original de la construction juridique européenne.”); Mark C. Anderson, *A Tougher Row to Hoe: The European Union’s Ascension as a Global Superpower Analyzed through the American Federal Experience*, 29 SYRACUSE J. INT’L L. & COM. 83, 90-117 (2001) (discussing the presence of themes that led to the rise of the United States of America, while the absence of corresponding features poses obstacles to the European Union’s transformation: (1) the common enemy; (2) only as strong as its weakest link; (3) blank slate; (4) *e pluribus unum*; (5) manifest destiny; (6) democracy deficit; (7) common defense; and (8) World War II effect).

119. Black, *supra* n.106.

120. PDCT, *supra* n.1, art. 1 (“A Union of European States which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain competences on a federal basis”).

121. PDCT, *supra* n.1, art. 4 (“Explicit recognition of *legal personality* of the [European Community/Union, United States of Europe, United Europe]”).

122. JOSCHKA FISCHER, *VOM STAATENBUND ZUR FÖDERATION — GEDANKEN ÜBER DIE FINALITÄT DER EUROPÄISCHEN INTEGRATION* (2000). For the English language version, see JOSCHKA FISCHER, *FROM CONFEDERACY TO FEDERACY — THOUGHTS ON THE FINALITY OF EUROPEAN INTEGRATION* (2000). See generally Volkmann-Schluck, *supra* n.40, at 18-21 (providing contexts and reactions).

many's high-profile delegate to the European Convention.¹²³ The resurrection of federalism, the infamous F-Word which had been exiled in the course of the Maastricht debate, as an organizing principle in the finality deliberations seems stunning.¹²⁴ The Germans construe federalism as a lever for devolution, whereas the British connect with federalism the rise of a Super-state.¹²⁵ Since the two schools have stubbornly proved unbridgeable, the word "federalism" had never entered the treaty system.

At present, the European Communities, as opposed to the EU, are endowed with legal personality.¹²⁶ The conferment of unitary legal personality makes Europe an actor and notary-public on the international scene, signals treaty and pillar consolidation, and spurs greater transparency and identity-building.¹²⁷

2. Protection of Fundamental Rights

At the time of the Nice Intergovernmental Conference, a Charter of Fundamental Rights of the EU was drafted.¹²⁸ The UK has balked at equipping the document with legal force.¹²⁹ The British generally oppose the addition of new social rights beyond the already extant European Convention on Human Rights.¹³⁰ However, Monsieur Giscard's blueprint considers it essential that fundamental rights be enshrined in the future constitutional treaty.¹³¹ A Union-based avenue¹³² and a route

123. Kampfer, *supra* n.88.

124. The term "federal" was dropped during the negotiations to avoid placing into jeopardy the entry into force of the Maastricht Treaty. See LAUFER & FISCHER, *supra* n.42, at 12, 18-25 (offering further references).

125. See, e.g., Volkmann-Schluck, *supra* n.40, at 27; Ludger Kühnhardt, Towards Europe 2007 – Identity, Institution-Building and the Constitution of Europe 10 (2001); LAUFER & FISCHER, *supra* n.42, at 19.

126. EC Treaty, *supra* n.6, art. 281; Euratom Treaty, *supra* n.6, art. 184. See also Matthias Pechstein & Christian Koenig, *Rechtspersönlichkeit für die Europäische Union? in Europäische Zeitschrift für Wirtschaftsrecht* 225 (1997) (explaining that the EU exists through the coordinated, unified appearance of the European Communities as well as the Member States in joint leverage of their respective competences).

127. Chairman of Working Group III on Legal Personality, *Final Report*, CONV 305/02 (Oct. 1, 2002).

128. Charter of Fundamental Rights of the European Union, O.J. C 346/1 (2000).

129. "The Charter is simply a statement of policy and the United Kingdom is not the only Member State to oppose something of a binding legal nature." Tony Blair, British Prime Minister, Nov. 14, 2000, available at http://europa.eu.int/comm/justice_home/unit/charte/en/charte03.html.

130. *Europe's New Shape*, ECONOMIST, Dec. 14, 2001, available at <http://www.globalpolicy.org/globaliz/politics/1214europe.htm>.

131. PDCT, *supra* n.1, art. 6. See also *PDCT Summary Report*, *supra* n.6, at 7-12;

through the European Convention on Human Rights (“ECHR”)¹³³ are conceivable as complements or alternatives.¹³⁴

The blueprint sketches out three options under the Union-based avenue:¹³⁵ first, an indirect reference to the Charter that stands alone, binding yet sub-constitutional;¹³⁶ second, a straight reference in the Constitutional Part to another part of the treaty or an annexed protocol;¹³⁷ or third, a full incorporation in the Constitutional Part.¹³⁸ Under any of the three options, the Charter content would not change, the allocation of competences between Europe and the Nation-States would remain unaltered, and the national courts would be competent to hear appeals.¹³⁹ The Charter Working Group has also been broaching the question of enabling the Union to accede to the ECHR.¹⁴⁰ Similar to the Union-based route, no new competences for the EU would arise, since the accession would concern only extant fields of EU law.¹⁴¹ Overall, both avenues promise to enhance the protection of citizens’ rights, leave intact the balance of responsibilities, and forcefully assert ethical and moral values within the integration system.¹⁴²

Chairman of Working Group II, Incorporation of the Charter/Accession to the ECHR, *Final Report*, CONV 354/02 (Oct. 22, 2002) [hereinafter 2002 Working Group II Final Report].

132. PDCT, *supra* n.1, art. 6, para. 1 (“The wording of this article will depend on the proceedings of the Working Group of the Charter”).

133. *Id.* art. 6, para 2 (“It could be modeled on Article 6 of the Treaty on European Union”).

134. Many members have articulated their support for considering the incorporation and accession routes as complimentary initiatives. See *PDCT Summary Report*, *supra* n.1, at 9; 2002 Working Group II, *Final Report*, *supra* n.131, at 12. A smaller group has expressed reservations relative to the ECHR route. See *PDCT Summary Report*, *supra* n.1, at 11.

135. PDCT *supra* n.1, art. 6, para. 3.

136. *Id.* (“either refer to the Charter”).

137. *Id.* (“or state the principle that the Charter is an integral part of the Constitution, with the articles of the Charter being set out in another part of the Treaty or in an annexed protocol”).

138. *Id.* (“or incorporate all the articles of the Charter”).

139. 2002 Working Group II, *Final Report*, *supra* n.131, at 4-8.

140. *Id.* at 11-15.

141. *Id.* at 13-15.

142. The European Convention, *Fundamental Rights: An Integral Part of the Future Constitutional Treaty*, Points No. 4. For discussions on access to the Court of Justice, see 2002 Working Group II, *Final Report*, *supra* n.131, at 15-16.

3. Allocation of Competences

In absence of a *Kompetenz-Kompetenz*, the powers transferred by the Member States into the Community core are of attribution.¹⁴³ However, the unsystematized, elastic, and pragmatic handling relative to the seat of a particular action competence, explicit or implied, through formulation of objectives and judicial resolution, was preferred by the treaty framers over a comprehensive and chiseled catalogue. While the former did allow a novel order of governance to move forward, this no longer necessarily rings true for a system that has matured. The blueprint proposes a separate title relative to the allocation of competences.¹⁴⁴ It carves out three tiers of powers — exclusive,¹⁴⁵ shared,¹⁴⁶ and supporting¹⁴⁷ — scaled along the level of European control and linked up with specific policy spheres of action.¹⁴⁸ Exclusive competences are Europe's very own, including the customs union, the internal market, and the currency union.¹⁴⁹ Shared powers, exercised in common, involve treaty-essential fields with cross-border elements like the four freedoms, the protection of the environment, and social cohesion.¹⁵⁰ Under a supporting mode, Europe does not legislate, but rather promotes and complements, for instance, in the areas of social policy, education, culture, and consumer protection.¹⁵¹

The overall approach does seem German. The Germans were the first to ask for a clearer division of powers to be laid

143. Mazan, *supra* n.48, at 95-97. *But see* Larry Cata Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 225-26 (2001) (diagnosing that this conundrum of German theory in search of sovereignty "ignores the fundamental basis of structural ordering within Europe").

144. PDCT, *supra* n.1, title III ("Union Competence and Actions"). *See also* Chairman of Working Group V, Complimentary Competences, *Final Report*, CONV 375/1/02 at 2 (Nov. 4, 2002) [hereinafter 2002 Working Group VI, *Final Report*].

145. PDCT, *supra* n.1, art. 10 ("The article indicates the areas of *exclusive Union competence*").

146. *Id.* art. 11 ("The article indicates the areas of *competence shared* between the Union and the Member States. It establishes the principle that, as and when the Union takes action in these areas, the Member States may act only within the limits defined by the Union legislation.").

147. *Id.* art. 12 ("This provision indicates the areas in which the Union *supports or coordinates action by the Member States*, but does not have the competence to legislate.").

148. *Id.* at 2-3.

149. *See also* 2002 Working Group V, *Final Report*, *supra* n.144, at 6-7.

150. *Id.*

151. *See also* 2002 Working Group V, *Final Report*, *supra* n.144, at 3-5, 8-10. The Working Group recommends usage of the term "supporting measures." *Id.* at 1.

down in a charter of competences, partly because the sixteen *Länder* feared that European integration was chipping away at their prerogatives.¹⁵² The German Constitution embraces a model of vertical federalism sporting a catalogue that divides sovereignty between the federation and the states.¹⁵³

The counter-thematic type of action power advanced in the blueprint is almost surprising. The salient provision states that in certain areas, the Member States may define and pursue common policies within the Union framework and according to specific rules.¹⁵⁴ The meaning of this clause has yet to be clarified. From its wording, it could signal a resurrection of a Member State margin of maneuver or a silent repatriation of powers.¹⁵⁵ The Germans and the British, for example, advocate that agricultural and regional aid should be re-nationalized, since they gobble up most of the EU's budget.¹⁵⁶ Spain and France strongly oppose such a change.¹⁵⁷

4. Institutional Government

The design and prerogatives of the institutional architecture of Europe exhibit a pronounced tilt toward the executive branch rooted in the Nation-State.¹⁵⁸ The Member States are the masters of the treaties.¹⁵⁹ They dominate the intergovernmental decision processes and summits.¹⁶⁰ Within the suprana-

152. See, e.g., *ECONOMIST*, *supra* n.130 (presenting the example of bail-outs of local industry); Volkmann-Schluck, *supra* n.40, at 40 (offering quotes from Governors Edmund Stoiber of Bavaria and Wolfgang Clement of Northrhine-Westphalia).

153. Under the German *Grundgesetz* (GG), the states are the presumed repositories for all legislative activities. However, the federation enters the picture through absolute, concurrent, and framework competences as well as tacitly implied powers. In practice, most areas, except police, culture, and education, have been overlain by federal legislation. The states exercise input through the Federal Council. GG, arts. 30, 71-75. See KARL-HEINZ SEIFERT & DIETER HÖMIG, *GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND* 220, 331 (1988).

154. PDCT, *supra* n.1, art. 13 ("In certain areas the Member States may define and pursue common policies, within the Union framework and according to specific rules. This article indicates these areas").

155. Volkmann-Schluck, *supra* n.40, at 40-41 (describing players and positions in the context of renationalization of policy fields).

156. *ECONOMIST*, *supra* n.130 (noting that the budget is disproportionately financed by Germany).

157. *Id.*

158. Mazan, *supra* n.48, at 146-54, 160-64.

159. Ulrich Everling, *Zur Stellung der Mitgliedstaaten der Europäischen Union als "Herren der Verträge,"* in *FESTSCHRIFT FÜR RUDOLF BERNHARDT* 1161 (1995).

160. Puder, *supra* n.5, at 57

tional fold, they enjoy central appointment powers and their delegates make up the chief legislator.¹⁶¹ Finally, implementation of European law is ensured by each Member State.¹⁶²

In the area of institutional government, the blueprint is notably rough merely throwing out topical headings.¹⁶³ However, the reforms relative to the Presidency of the European Council,¹⁶⁴ the Presidency of the European Commission,¹⁶⁵ the Council of Ministers,¹⁶⁶ and the Congress of the Peoples of Europe¹⁶⁷ signal major surgery. While not explicitly stated in the blueprint, this overhaul will interconnect with the future design of the European Parliament¹⁶⁸ and the role of the national parliaments.¹⁶⁹

Conceived as a treaty architect and pacemaker, the European Council retains the character of an intergovernmental body.¹⁷⁰ Although not a Community institution,¹⁷¹ the European Council has increasingly become the repository for micromanaging and resolving stalled first pillar issues deadlocked in the Community's institutional triangle. The trend of bumping up difficult questions into the European Council has led to overloaded summit agendas. Issues are frequently

161. Mazan, *supra* n.48, at 146-155.

162. See Claus-Dieter Ehlermann, *Ein Plädoyer für die dezentrale Kontrolle der Anwendung des Gemeinschaftsrechts durch die Mitgliedsstaaten*, in *FESTSCHRIFT FÜR PIERRE PESCATORE* 205 (1987).

163. PDCT, *supra* n.1, Title IV ("Union Institutions").

164. *Id.* art. 15 ("When the Convention has discussed it, this article could establish the term of office and appointment procedure for the *Presidency of the European Council*, its role and responsibilities.").

165. *Id.* art. 18 ("This article would establish the role and appointment procedure for the *Presidency of the Commission*.").

166. *Id.* art. 17 ("This article lists the composition and the duties of the *Council*, and would refer to the Council's formations.").

167. *Id.* art. 19 ("This article would raise the possibility of establishing a *Congress of the Peoples of Europe*, determine its composition and the procedure for appointing its members, and define its powers."). It would be drafted in the light of the Convention's work.

168. *Id.* art. 16, para. 1 ("This article establishes the composition of the European Parliament, the members of which are elected by direct universal suffrage."); PDCT, art. 16, para. 2 ("It lists the powers of the European Parliament introducing a motion of censure on the activities of the Commission, and the procedure and consequences of such a motion.").

169. *Id.* art. 8, para. 3 ("It would set out the rules for effective monitoring of subsidiarity and proportionality. The role of the National Parliaments would be mentioned.").

170. Puder, *supra* n.5, at 57.

171. *Id.*

brokered through packaged deals or along shopping lists. This has given the summit institution *de facto* prerogatives not foreseen by the treaty system. Similar considerations apply to the increased usage of the open method of coordination under the aegis of the European Council.¹⁷² Further strengthening the European Council through scratching the short-breathed rotational system in favor of a multi-annual presidency, as mooted by Monsieur Giscard,¹⁷³ might be viewed as a recipe for developing a European executive based on intergovernmentalism.

Those seeking compensation for a strengthened European Council advocate the creation of a dual or twin presidency by placing the installation of the President of the European Commission into the hands of the European Parliament.¹⁷⁴ The alternative to this Franco-German parliamentary model envisions a presidential track based on the direct election of the President of the European Commission.¹⁷⁵ The UK opposes both these proposals since stronger reigns retained by the Nation-States are favored.¹⁷⁶ However, making the Commission Presidency accountable to the peoples, directly or through a parliamentary intermediary, promises to strengthen the European Commission's democratic legitimacy and move the body closer to a European Government.¹⁷⁷

The creation or approximation of a European Government could conceivably unleash pressure dynamics and domino into the rise of a bicameral legislature consisting of a Chamber of

172. See Claus Giering, "Offene Koordinierung" — Sachstand, Vorzüge und Probleme, CAP-THESENPAPIER 05/2001 (2001).

173. Heuser, *supra* n.4, at 3 (predicting enhanced leadership primarily in the foreign and security policy arena). See also Dominique de Villepin & Joschka Fischer, *Deutsch-Französischer Beitrag zum Europäischen Konvent über die institutionelle Architektur der Union*, CONTRIB 192, CONV 489/03, at 3 (Jan. 16, 2003) (proposing a five-year term); Janis A. Emmanouilidis & Claus Giering, *Enhancing the Political Leadership in the EU — How the EU Could Work with Two Presidents*, CAP SPOTLIGHT 2003/01 2-3 (2003).

174. Villepin & Fischer, *supra* n.173, at 4. See also Emmanouilidis & Giering, *supra* n.173, at 3 (disfavoring the route of a "double-head" within one person). See also Kommission der Europäischen Gemeinschaften, *Für die Europäische Union — Frieden, Freiheit, Solidarität, Mitteilung der Kommission zur Institutionellen Architektur*, KOM (2002) 728, at 19 ((2002) (supporting election of the Commission President by the European Parliament and subsequent confirmation by the European Council).

175. ECONOMIST, *supra* n.130 (identifying Guy Verhostadt of Belgium as the major proponent of the presidential model).

176. *Id.* (at the time also listing France).

177. Puder, *supra* n.8, at 67-68 (discussing the Government Model that was floated in connection with the Nice reforms relative to the European Commission).

States and a Chamber of the Peoples.¹⁷⁸ A conversion of the Council of Ministers into the Chamber of States¹⁷⁹ could be modeled after the U.S. Senate with two directly elected Senators per state, or the German *Bundesrat* template with a fixed range of delegates from the *Länder*.¹⁸⁰ A full parliamentarization of the European Parliament into the Chamber of the Peoples, further down the road, would require relinquishing the weighted composition and switching to a proportional key in consonance with the democratic principle of population sizes.

The proposed Congress of the Peoples of Europe, an annual super-assembly of members of the European Parliament and the national parliaments, would present a new critter in the institutional grid of the integration framework.¹⁸¹ A personal pet-peeve of Monsieur Giscard's,¹⁸² the added benefits of such a new institution are unclear, especially if its mandate were confined to merely hosting a debating club.¹⁸³ If the European Convention proves successful, it might be more opportune to retain and formalize it, and raise its stature from mere preparer to doer when it comes to constitutional revision,¹⁸⁴ rather than adding complexity to the system through the addition of yet another new body.¹⁸⁵

Similar considerations apply to the role of national parliaments.¹⁸⁶ The current treaty system does not entrust the national parliaments with a direct institutional role. Yet, they are central players and a vital conduit in the overall integration process, since they represent the linkage between the citizens and

178. *Id.* at 76 n.221.

179. Villepin & Fischer, *supra* n.173, at 5-6; Emmanouilidis & Giering, *supra* n.173, at 4. Qualified majority would be the general decision mode prevailing in the Chamber of States. All its meetings would be public. *See also* Thinking Enlarged Group, Bridging the Leadership Gap – A Strategy for Improving Political Leadership in the EU, at 7 (2002) (advocating that the Member States come together in Steering Councils relative to fields not (yet) subject to communitized lawmaking).

180. Janning & Giering, *supra* n.33, at 55.

181. Kampf, *supra* n.106.

182. Heuser, *supra* n.4, at 3.

183. *See* Kampf, *supra* n.106 (reporting reservations held by many members against this new institution).

184. Heuser, *supra* n.4, at 3.

185. *Id.* at 4.

186. *See id.* (reporting that “the incorporation of the national parliaments in [the annual] congress is not perceived to be a great improvement”).

Europe.¹⁸⁷ In many Member States, the parliaments enact the ratification laws and scrutinize government action.¹⁸⁸ In parliamentary systems, they exercise direct political control of the national governments, and thus indirectly over the delegations to the Council of Ministers.¹⁸⁹ In other words, the national parliaments anchor and legitimize the integration framework in the Members States.¹⁹⁰

Monsieur Giscard's blueprint envisions a role for the national parliaments within an early warning system designed to monitor European legislation relative to the subsidiarity and proportionality principles.¹⁹¹ This may include a right of appeal before the European Court of Justice.¹⁹² The proposal thus ignores any attempts at institutional tricameralism through making the national parliaments a screening chamber relative to proposals emerging from the European Commission, or through transforming the Conference of the Community and European Affairs Committees of Parliaments of the EU (*Conférence des Organes Spécialisés dans les Affaires Communautaires* or "COSAC") into a full-fledged institution.¹⁹³ Rather, the trend points to recognizing the constitutional significance of the national parliaments, formalizing the convention format,¹⁹⁴ and forging multilateral networks or mechanisms,¹⁹⁵ including interparliamentary conferences and an annual European week.¹⁹⁶

5. Other Emerging Topics

Monsieur Giscard's blueprint offers a reminder to make en-

187. Villepin & Fischer, *supra* n.173, at 7.

188. See Working Group IV, The Role of National Parliaments, *Final Report*, CONV 353/02, at 4-9 (Oct. 22, 2002) (speaking of national scrutiny systems).

189. Kampffer, *supra* n.106. See also LAUFER & FISCHER, *supra* n.42, at 156 (discussing the idea to revise Article 203 of the EC Treaty and open the Council of Ministers to national parliamentarians).

190. Working Group IV, *supra* n.188, at 2.

191. *Id.* at 9-12; Chairman of Working Group I on the Principle of Subsidiarity, CONV 286/02 (Sept. 23, 2002).

192. *Id.* at 7-9.

193. PDCT Summary, *supra* n.1, at 5 & 14; Working Group IV, *supra* n.188, at 13-14. See also LAUFER & FISCHER, *supra* n.42, at 153 (referring to a French proposal circulated during the Maastricht debate).

194. PDCT Summary, *supra* n.1, at 5.

195. *Id.* at 5; Working Group IV, *supra* n.188, at 12-15; Kampffer, *supra* n.106.

196. Working Group IV, *supra* n.188, at 15.

hanced cooperation workable.¹⁹⁷ The feature itself is not new as such. In an attempt to overcome the potentially conflicting pressures between deepening and widening the concept of flexible integration was introduced into the integration system by the Treaty of Amsterdam and overhauled by the Treaty of Nice.¹⁹⁸ Discussed throughout the 1990s, flexible integration ideally combines the firm commitment by all members to a common supranational base with the option of further integration through open partnerships in other areas. Yet, the many brakes injected into the feature make flexible integration a rather cumbersome vehicle.¹⁹⁹ It is therefore not surprising that it has never been invoked thus far. Identifying salient principles governing flexibility mechanisms in a Europe of more than twenty-five members, the blueprint recognizes that vanguards or pioneer groups must be allowed to press forward in particular fields, especially foreign, security, and defense arrangements, justice and home affairs, and finance and economic policy.²⁰⁰

Monsieur Giscard's blueprint offers language declaring that Europe's budget is fully financed by its own resources.²⁰¹ In contrast to the term financial contributions,²⁰² this concept suggests

197. PDCT, *supra* n.1, art. 32 ("This provision should establish: — the conditions for undertaking *enhanced cooperation* within the framework of the Treaty; — if necessary, areas of the Treaty excluded from enhanced cooperation; — the principle of applying the relevant provisions of the Treaties in adopting the acts necessary for implementing enhanced cooperation; — the obligations of states participating in enhanced cooperation, and of those not so participating.").

198. The provisions on closer cooperation now apply to all pillars of the EU. TEU, *supra* n.5, arts. 43-45 (general provisions); EC Treaty, *supra* n.6, art. 11 (first pillar); TEU, *supra* n.5, arts. 27(a)-27(e); TEU, *supra* n.5, arts. 40-40(b) (third pillar). The second pillar also allows for the possibility of a constructive abstention. TEU, *supra* n.5, art. 23(1). For an overview of the genesis and content of the provisions, see Xenophon A. Yataganas, *The Treaty of Nice, The Sharing of Power and the Institutional Balance in the European Union* 46-49 (Harvard Jean Monnet Working Paper, Jan. 2001).

199. Joseph Janning, *Dynamik in der Zwangsjacke — Flexibilität in der Europäischen Union nach Amsterdam*, 4 *INTEGRATION* 285 (1997) (using the image of the "dynamic in the straight jacket"); Françoise de la Serre & Helen Wallace, *Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea?* 2 (Groupement Notre Europe, Research and Policy Paper, 1997) (characterizing the feature as a placebo for France and Germany); Werner Weidenfeld & Claus Giering, *Die Europäische Union nach Amsterdam — Bilanz und Perspektive*, in *AMSTERDAM IN DER ANALYSE* 82-84 (Werner Weidenfeld ed., 1998) (fearing that safeguards may lead the *acquis ad absurdum*).

200. Weidenfeld, *supra* n.79, at 3.

201. PDCT, *supra* n.1, art. 38 ("This provision states that the Union budget is fully financed by *own resources* and sets out the procedure for establishing the system of own resources.").

202. See RUDOLF GEIGER, *EG-VERTRAG — KOMMENTAR ZU DEM VERTRAG ZUR*

a tax levied directly on economic operators and collected by European institutions exclusively for Europe's benefit. Yet, under the present system, these pre-allocated and capped resources²⁰³ are levied by the Member States according to their laws and regulations.²⁰⁴ Integrationists envision relinquishing the fund transfers from the Nation-States to finance most of the EU's budget.²⁰⁵ They argue that a direct European tax,²⁰⁶ such as a share of the sales taxes,²⁰⁷ would make the finances of Europe more open.²⁰⁸ In the long run that could increase revenues.²⁰⁹ However, it would add another dynamic tax layer and more red tape that could further dampen the investment appetite of economic operators in Europe.

At present, the EU's international stature derives from the leverage of the Community core and the sovereignty reservoirs of the Member States. Monsieur Giscard's blueprint recognizes the need to harmonize the substance of common policies and the representation on the international stage,²¹⁰ especially when it comes to the EU's embryonic foreign policy.²¹¹ In this field the supranational Commission has been given little influence.²¹² The European telephone number is housed with the High Representative for Foreign Policy in the Council of Minister's Gen-

GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT 681-82 (1993) (providing the background information relative to the switch from "financial contributions" to "own resources" accomplished by the Maastricht Treaty).

203. Thea Emmerling, *Von der Strukturpolitik zum europäischen Finanzausgleich?* 4 (CAP Working Paper, June 2002) (observing that the budget represents a little more than 1% of the gross national product of the EU, while the government share in the Member States amounts to just under 50%).

204. GEIGER, *supra* n.202, at 683.

205. ECONOMIST, *supra* n.130.

206. See Heuser, *supra* n.4, at 4.

207. ECONOMIST, *supra* n.130.

208. *Id.* See also Emmerling, *supra* n.203, at 6-8 (lamenting the absence of a debate in the European institutions with respect to a substitution of the complex structural and cohesion funds with a general financial equalization scheme).

209. ECONOMIST, *supra* n.130.

210. PDCT, *supra* n.1, art. 41, para. 1 ("This provision should set out who represents the Union in *international relations*, taking into account of competences already exercised by the Community."); *id.* art. 41, para. 2 ("In the light of the Convention's future work, it would define the role and future rank of the High Representative for Common Foreign and Security Policy.").

211. See Janis Emmanouilides & Franco Algeri, *Strengthening Foreign Policy Coherence and the Capacity to Act*, CAP Spotlight 2002/02 1 (2002) (calling the split "anachronistic").

212. Puder, *supra* n.5, at 57.

eral Secretariat. In addition to preserving and synergizing the status quo,²¹³ the basic options in this context include creating the new post of European Minister of Foreign Affairs under the direct authority of the President of the European Council,²¹⁴ moving the High Representative into a Commission Vice Presidency for Foreign Relations,²¹⁵ or combining both offices in one person or double-head with the new title of European External Representative.²¹⁶

The events in America have exposed a strengthening air of intergovernmentalism in the EU process. For example, the recently established Eurojust agency, tasked with facilitating cross-border criminal investigations, has been housed in the Third Pillar.²¹⁷ Similarly, the diversity of the constitutional and political situations in the Member States have fragmented individual postures and caused the proliferation of special arrangements among Member States and with third countries, thus increasingly posing roadblocks with respect to the rise of a common policy and capability in the security and defense arena.²¹⁸

Although a full-fledged withdrawal has never occurred in the fifty-year history of European integration,²¹⁹ Monsieur Giscard's blueprint advances the insertion of a unilateral termina-

213. Working Group VII, *External Action, Final Report*, CONV 459/02, at 19 (Dec. 16, 2002).

214. *Id.* at 22.

215. *Id.* at 20. See also The Economist, *supra* n.130 (identifying this option as the approach favored by Germany, but met with reluctance by France and the United Kingdom).

216. ECONOMIST, *supra* n.130; Emmanouilides & Algeri, *supra* n.211, at 2. But see Thinking Enlarged Group, *supra* n.179, at 5 (explaining that the single-face approach would upset the equilibrium between the institutions and curtail the autonomy of the European Commission).

217. See Chairman of Working Group X, *Freedom, Security and Justice, Final Report*, CONV 426/02, at 15 (Dec. 2, 2002).

218. See Chairman of Working Group VIII, *Defence, Final Report*, CONV 461/02 (Dec. 16, 2002). See also Emmanouilides & Algeri, *supra* n.211 (recommending, *inter alia*, to (1) overcome the pillar structure; (2) strengthen the Commission; (3) merge the High Representative and External Relations Commissioner; (4) move the common foreign and security policy from the General Council to a separate function; (5) introduce majority voting in non-military questions; (6) integrate the European Parliament into all non-military aspects; (7) reform the decisionmaking and coordination procedures in the military domain; and (8) forge an overall foreign policy strategy).

219. In the mid-1980s, Greenland, although remaining a part of the Danish state territory, was released from the scope of applicability of the EC Treaty. See EC Treaty, *supra* n.6 art. 188. See also GEIGER, *supra* n.202, at 486.

tion clause.²²⁰ In light of the unlimited duration of the treaties, the conspicuous absence of withdrawal provisions, the control voluntarily relinquished by each Member States over certain areas, the elastic balancing valves of general escape clauses, mini-derogation schemes, and phase-in regimes sprinkled throughout the integration system, the autonomists²²¹ have argued that withdrawal, even through *actus contrarius*, would amount to a constitutional breach.²²² The traditionalists²²³ advocate that, in the absence of a treaty-immanent regime, the general rules of public international law should be applied.²²⁴ Short of a joint treaty termination by all Member States,²²⁵ it is argued that unilateral withdrawal requires a basic change of the underlying circumstances (*clausula rebus sic stantibus*).²²⁶ In terms of constitutionalization, the insertion of a withdrawal clause would seem counterproductive to the eternity of a solemn foundational document.²²⁷ Interestingly, voluntary withdrawal is not matched in Monsieur Giscard's blueprint by a corresponding expulsion clause.

Finally, Monsieur Giscard's blueprint recognizes the significance of the amendment power within a federal system of checks and balances.²²⁸ At present, constitutional revision is exclusively controlled by the Member States in unison. A constitutionalized revision process may involve lowering the threshold and injecting an emancipated democratic parliamentary component.²²⁹

V. *Findings and Perspectives*

The *tour de force* of constitutionalizing themes tackled in Monsieur Giscard's blueprint indicates that it is not easy to write

220. PDCT, *supra* n.1, art. 46 ("The article would mention the possibility of establishing a procedure for voluntary *withdrawal* from the Union by decision of a Member State, and the institutional consequences of such a withdrawal").

221. MICHAEL SCHWEITZER & WALDEMAR HUMMER, *EUROPARECHT* 207 (1993).

222. GEIGER, *supra* n.202, at 780-81.

223. SCHWEITZER & HUMMER, *supra* n.221, at 207.

224. GEIGER, *supra* n.202, at 781.

225. *Id.* at 781.

226. *Id.* at 782. See also BVerfGE 89, 255, 290, 305 ("*ultima ratio*").

227. See Heuser, *supra* n.4, at 4-5 (admonishing caution relative to the insertion of a withdrawal provision, since singular States might instrumentalize the new tool).

228. PDCT, *supra* n.1, art. X ("Procedure for revision of the constitutional treaty").

229. See Backer, *supra* n.143, at 190 (describing that amendments to the U.S. Constitution require large concurrent majorities within the general government—two-thirds of both houses of Congress, and the states—three-quarters).

a European Constitution, even when heeding the advice to take only the respectively best from the national constitutions of the Member States.²³⁰ In basic terms, modern constitutions marry a set of rules for the institutional organization of governance and a catalogue of fundamental rights.²³¹ Measured against this linkage, Monsieur Giscard's blueprint is promising. The innovative body has been said to invoke the spirit of the Philadelphia Convention.²³² Independent of solemn comparisons, the success of the European Convention's search in the dark for the political truth will be determined by the character of the final proposal.²³³ On this path, the European Convention is actively putting meat on the bones of the skeleton.²³⁴ The method of incrementally completing building blocks is yielding steady progress,²³⁵ and a final document, rather than a mere batch of options, in sight.

Traditionally, however, the concept of a constitution has been associated with the rise of the democratic Nation-State.²³⁶

230. Martin Kremer, *Europäische Verfassungsdiskussion – Anregungen aus den nationalen verfassungsrechtlichen Vorverständnissen der Mitgliedsstaaten*, available at <http://welt.politik.net> (attributing this *bon mot* to Carlo Schmid).

231. Di Fabio, *supra* n.101, at 162. The author argues that the European Charter of Fundamental Rights laid "a first foundation for the political constitution of Europe." *Id.* at 159. See also Grimm, *supra* n.52, at 284 (offering that a Constitution for Europe denotes "a basic legal order of the sort that arose at the end of the 18th century in the wake of two successful revolutions in America and in France, which has since steadily spread and now come to apply almost world-wide").

232. Kühnhardt, *supra* n.125, at 38; Thomas KAR, *Das Vorbild heisst Philadelphia*, *Financial Times Deutschland* (Mar. 28, 2002).

233. Leader, *Give Giscard a Chance – His EU Plan is Better than Our Leaders Say*, *GUARDIAN UNLIMITED*, available at <http://www.guardian.co.uk/eu/story/0,7369,821179,00.html>.

234. See The European Convention, *Articles and Protocols*, available at <http://european-convention.eu.int/ArticlesTraites.asp?lang=en>. For the vast array of alternatives already offered with respect to the draft articles, see Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, available at <http://european-convention.eu.int/amendemTrait.asp?lang=en>.

235. See Heuser, *supra* n.4, at 1 (summarizing that Monsieur's Giscard's blueprint (1) provides for procedural target orientation; (2) integrates points of consensus; (3) contains important suggestions for reforms; (4) provides structure; and (5) leaves open decisions with respect to intractable matters); Shaw, *supra* n.58, at 10-15 (finding, albeit caveated, that the European Convention meets the criteria of being autonomous, representative, deliberative, receptive, and decisional).

236. The European Court of Justice seems to subscribe to the avant-garde posture that Europe has a constitution and does not need one. European integration under this reasoning stems from a steady constitutionalization process driven in particular by jurisprudence.

The *étatiste* school of thought advances the formula “where no [S]tate, no constitution, and where no population, no [S]tate.”²³⁷ Intermediary approaches recognize that the Community core wields State-like powers²³⁸ and offer the magic elixirs of post-national or multi-level constitutionalism,²³⁹ neoconstitutionalism,²⁴⁰ or cosmopolitanism.²⁴¹ Since organisms of governance beyond the local circles retain a sense of high abstraction, it is argued, the sentiments connecting the citizens and societies in Europe do not necessarily have to be confined to the framework of a State-like entity; rather, these loyalties can conceivably arise over time relative to a State-transcending clearinghouse. Moreover, these voices offer a European notion of *demos* construed through multi-level prisms²⁴² and dynamic societal interaction.²⁴³

Even in light of a departure from the State template as such, serious challenges exist when it comes to achieving the expression of the collective democratic self-determination of the peoples in Europe. A *lingua franca* does not exist.²⁴⁴ Similarly, enticing a public at large for the construction of the European

237. Paul Kirchof, *Kompetenzaufteilung zwischen den Mitgliedstaaten unter der EU*, in VERTRETUNG DER EUROPÄISCHEN KOMMISSION IN DER BUNDESREPUBLIK DEUTSCHLAND (ED): EUROPÄISCHE GESPRÄCHE 2/94: DIE KÜNFTIGE VERFASSUNGSORDNUNG DER EU — EINE DOKUMENTATION at 59 (1994).

238. Grimm, *supra* n.52, at 288.

239. Ulrike Guérot, *The Constitutionalization of Europe and Its Impact on the United States*, available at <http://www.aicgs.org/eu/ug/shtml>.

240. Mark Killian Brewer, *The European Union and Legitimacy: Time for a European Constitution*, 34 CORNELL INT'L L.J. 555, 560-574 (2001) (identifying three basic assumptions relative to neoconstitutionalism: (1) traditional international law terms do not capture the notion; (2) the EU suffers from structural deficiencies; and (3) the EU has no *demos*).

241. Pavlos Eleftheriadis, *The European Constitution and Cosmopolitan Ideals*, 7 COLUM. J. EUR. L. 21, 39 (2001) (concluding that “the cosmopolitan suggestion achieves the elusive balance between the requirements of democracy and the pressures of integration.”).

242. See Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995) (arguing for a European notion of membership where individuals belong to multiple *demos* defined in different ways).

243. Jürgen Habermas, *Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'*, 1 EUR. L.J. 303, 306 (1995) (“The ethical-political self-understanding of citizens in a democratic community must not be taken as an historical *a priori* that makes democratic will-formation possible, but rather as the flowing contents of a circulatory process that is generated through the legal institutionalization of citizens' communication”).

244. For a key role of language, see, for example, Grimm, *supra* n.52, at 295. Jürgen Habermas, *Faktizität und Geltung* 372 (1992) (diagnosing that ultimately it is the ‘linguistic bond’ that keeps any communicative community together).

house has thus far proven a sluggish process at best. Despite the trumpets and fanfares associated with the European Convention, 64% of the citizens have never heard of the European Convention. And more tellingly, only 25% have expressed faith in its proceedings.²⁴⁵ It is in this context that the convention process must gather steam and become a catalytic lever.²⁴⁶ The European Convention's Hamiltons, Jays, and Madisons must step forward and publish powerful intellectual prose of import comparable to the Federalist Papers.²⁴⁷ More importantly, Monsieur Giscard and his colleagues may consider formalizing the convention template as the final constitution giver and push for a Europe-wide referendum on their final document, thus creating a European public space.²⁴⁸

Viewed in the light of its substantive and procedural promises, regardless of the ever-elusive *finalité finale*, Monsieur Giscard's sketch composition does not contain too many notes. As we said initially, *noblesse oblige: allons-y, VGE!*

245. See *Civil Society and the Convention — Enhancing Public Awareness*, CAP Spotlight 2002/06 (2002) (presenting summer 2002 survey results, and recommending organized civil society as a link between the European Convention and the citizens). But see Guérot, *supra* n.80, at 2 (reporting 16,000 daily entries submitted through the mailbox under the menu *futurum* of the EU's web-based Europa portal).

246. Guérot, *supra* n.58, at 5 (describing Monsieur Giscard's sense of a convention spirit that must reflect the Greek "En-thousiasmus" — inspired by God).

247. Kühnhardt, *supra* n.125, at 38.

248. Guérot, *supra* n.58., at 10 (emphasizing one person/one vote); *A Constitution for the European Union*, ECONOMIST, Oct. 28, 2000, at 22 ("We, the people of Europe . . .").