

Chapter 2

Competing Models in the Proposed Constitution

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From the perspective of an American judge, the most striking characteristic of the proposed European Constitution is its length, about 75,000 words, compared with the American Constitution's approximate 7,500. Our own Constitution sets forth a handful of related principles, which, working in tandem, create a highly complex system of government. Those principles include: democracy, the protection of fundamental individual liberties, a degree of equality, separation of powers vertically and horizontally (so that no one group becomes too powerful), and the rule of law. Because the principles are so few (and combined coherently), they help make the Constitution transparent while providing guidance for those who would implement or interpret its provisions, legislatively, administratively, or judicially.

The European Constitution's length may reflect the fact that it was easier to reach agreement about specifics than to resolve ambiguities as to more basic matters, such as the set of principles that should underlie European government, the weight that should attach to each such principle, or how to combine those principles to create a coherent whole. I shall here highlight certain features of the proposed Constitution suggesting that is so. And, speaking always from the perspective of an American judge, I shall draw upon American experience to suggest possible resulting difficulties.

Treaty or Constitution?

First, is the Constitution 1) a treaty or 2) a constitution? On the one hand, the length and detail suggest a treaty. So does the right of each Nation to withdraw. So does the fact that amendment requires unanimity. So does the "two track" possibility allowing some Member States to integrate more quickly or comprehensively than others. Moreover, (and despite the silence of the Preamble on the point) the

source of legal authority is not “we the people,” but the Member States. Nor will the people ratify the Constitution through conventions and perhaps not otherwise.

On the other hand, the document establishes complex organs of government. It grants that government vast authority to control the lives of Europeans by, for example, legislating “harmonized” statutes directly applicable to the individual affecting many, perhaps most, areas of community life. And, of course, the proposed constitution says that it is establishing a “constitution,” not a treaty.

Does the basic model—treaty or constitution—matter? I think so, particularly because continuous amendment is a failing in a constitution, but it is not necessarily a weakness in a treaty. And the proposed Constitution’s length, its detail, taken together with the limitations of human foresight, mean that the document must foresee change, likely major change, in the detailed rules that it creates. Public expectations about the frequency of change matter, given the legal hurdle that the “unanimity” requirement may pose to modification.

It is sometimes thought that length and detail, by resolving potential legal disagreement in advance, will diminish dispute and help avoid the need for change. That may be so with a business contract, but it has not been my experience with fundamental laws. Rather, I have found that the longer the document, the more words it contains, the more likely those words will engender dispute. Each word carries with it the possibility of disagreement as to scope and meaning. Each carries the seeds of litigation. And, given certain characteristics of the EU’s legal system, litigation, as I shall later point out, will sometimes pose a further obstacle to the flexibility of interpretation needed to sustain the life of a constitutional document.

Federation or Confederation?

Second, to what extent does the Constitution create a form of *federal* government with power flowing from the people; to what extent does it create a kind of *confederation* of Member States, which delegate various limited forms of authority to other institutions? Giscard d’Estaing writes that initially this latter form of words better described the EU (or the Common Market). At the beginning, he says, one would have described the roles of the major European institutions as:

a) the Commission, an administrative body, which would determine what is in the best interests of the European Community and which would propose any necessary legislative action, b) the Parliament, which would give its advice, and c) the Council, which would decide¹. Over time, the Member States granted the European Union increased legislative authority, while somewhat modifying its institutions seeking in part to overcome a “democratic deficit.” The proposed Constitution delegates more legislative authority to the central government, while simultaneously seeking legislative institutions that are somewhat more democratically responsible.

To what extent does the new Constitution democratize the EU? On the one hand, it insists that the Parliament must ratify (or agree to) all EU legislation, and it grants the Parliament the power to confirm the EU President and the Commissioners and to remove the Commissioners as well. On the other hand, it keeps the power to initiate legislation almost exclusively in the Commission — which, to that extent, combines legislative with administrative functions. It makes the Commission President more like a Prime Minister, in that he chooses a cabinet and is subject to dismissal by the Parliament. But the Council, not the Parliament, nominates the Commission President, and that fact suggests that the Constitution does *not* consider the Commission President a Parliamentary Party Leader (though it does permit that kind of party-based democracy to evolve). The Constitution continues to leave major (perhaps primary) legislative power in the Council. It adds that Member State ministers (the Member State Prime Minister or President in the Council of Europe) normally must be present to cast their Nation’s vote; and to that extent it moves the Council a step away from the model of an upper house or Senate.

Despite all these changes, the basic democratic problem remains: *If the average citizen asks, “How do we throw the rascals out?” the Constitution does not respond with a clear, easily understood, answer.*

At the same time, the proposed Constitution expands the EU’s governmental powers, setting up institutional methods for developing and coordinating defense and foreign policies, while leaving the EU’s

¹ Giscard d’Estaing, “Introduction,” *La Constitution pour l’Europe*, Paris: Fondation Robert Schuman, 2003, p. 24.

powers to tax limited. It affirms the EU's broad powers to legislate in most other areas of human activity, including trade, the maintenance of a common market; intellectual property; workplace conditions; health, safety, and environmental conditions; aspects of social security; consumer protection; transport; energy; aspects of education; research; immigration; aspects of police cooperation; criminal law enforcement; and others. And it permits the Council to legislate by "qualified majority" in most of these areas.

The proposed constitution nonetheless seeks to maintain "decentralized," *i.e.*, Member State, power by imposing limitations on centralized EU power. It does so in three basic ways: a) in certain areas by limiting the scope of the delegation of power (*e.g.*, workplace organization; education; culture); b) through use of the principle of "subsidiarity;" and c) by requiring unanimity (not a "qualified majority") in the Council in order to enact.

My own experience with similar efforts to maintain state power, and limit federal power, under the American Constitution suggests that the effectiveness of these limitations depends upon political circumstances, not upon the legal conditions set forth in a constitutional document. Consider, for example, the American Constitution's efforts to limit the scope of the document's delegation of power to the federal government. The best known is contained in the Commerce Clause, which delegates to Congress the power to "regulate commerce . . . among the States." Over two centuries, as our economy has become more integrated, this Commerce Clause language has come to authorize Congressional legislation on almost any subject, no longer imposing serious restrictions upon the kind of legislation Congress may enact. Recent judicial efforts to find restrictions in the Clause operate, in my view, only at the margins.

The European Constitution's language may prove similarly expansive. Article III-183, for example, gives the EU authority to enact legislation that "will contribute to the achievement" of Article III-182's objectives, which include "supporting" or "complementing" the efforts of Member States to cooperate in providing "quality education" — language that might be read as encompassing most American federal education statutes. To take another example, the effectiveness of Article III-104's efforts to impose voting-unanimity requirements on EU laws relating to unions are limited due to the provisions allow-

ing non-unanimous votes in respect to laws relating to “working conditions”—thereby permitting the EU (non-unanimously) to impose terms in respect to traditional subjects of collective bargaining.

The Constitution also foresees enforcing the principle of subsidiarity by a) providing appropriate notification for national parliaments; b) permitting those parliaments to force consideration, or reconsideration, of proposed EU legislation; and c) allowing court actions to enforce the subsidiarity principle. I am skeptical of the practical impact these provisions will have. That is because American experience suggests that notification and explicit consideration or reconsideration (*e.g.*, “federalism impact statements”) have not made much difference. More importantly, our own judicial efforts in the nineteenth century to develop workable standards that would enable courts to enforce principles of decentralized “federalism” simply did not work.

My subjective conclusion is the following: From the perspective of *democracy* the proposed Constitution’s EU is a “confederation plus;” from the perspective of *centralized power* it creates, at least potentially, a “federation minus.”

Towards Social Democracy

Third, by placing the Charter of Fundamental Rights in Part II, the Constitution also helps move the EU away from the model of a “common market” and towards the model of a European “social democracy.” What are those rights? The Charter contains most of the rights the American Constitution sets forth. It does not contain certain of our constitutional criminal defense rights, perhaps reflecting different criminal trial traditions. (It is missing, for example, rights to grand jury indictment; jury trial; compulsory process to obtain witnesses; confrontation of witnesses; no excessive bail; no self incrimination; trial in place where crime committed).

I recognize language that may generate issues that have concerned our Court in statutory, as well as constitutional, contexts: For example, does forbidden “age” discrimination [II-21] include discrimination that favors older workers? Do “children’s rights” [II-24] include the right to contribute to political campaigns? It protects additional individual rights that may generate issues that we have not had to face

so far: For example, does the prohibition of “eugenic practices” [II-3(2)(b)] forbid abortion? Does the right to marry [II-9] include homosexual marriages? Does the “freedom of expression” [II-11] prohibit laws forbidding spam? Does the explicit authorization of gender-based affirmative action [II-23] require reading anti-discrimination provisions as forbidding race-based affirmative action? Does the requirement that criminal sentences be proportionate [II-49] require the development of Charter-based “sentencing guidelines?” Perhaps more importantly for present purposes, the Constitution includes rights to education [II-14], to protection of health [II-35], the environment [II-37], social assistance [II-34] and employment, including protection against “unjustified dismissal” [II-30].

The Constitution elevates the Charter, which previously existed as a precatory statement of intentions, into Constitutional form, making its provisions enforceable as law. At the same time, it limits its practical consequences by stating 1) that the Charter provisions concern only the “institutions, organs, and agencies of the Union” along with the Member States when they “put” EU law “into effect” [II-51]; and 2) that the provisions can be invoked in a court only in respect to interpreting, or determining the legal validity of, “executive and legislative acts” of the EU or Member State acts putting those EU acts into effect. This language suggests that the “criminal trial” provisions will have little, if any, immediate effect. What about other areas of individual rights? What about social rights? Does the Charter simply give and then immediately take away? I think not.

Given the broad legislative powers that the Constitution provides, including the power to harmonize many (*e.g.*, trade, business-related, environmental, safety, *etc.*) laws, the Charter—as constitutional law—may indeed have significant impact. For one thing, placing the social and employment rights in the constitution itself means that the Luxembourg Court, the European Court of Justice (ECJ), not a specialized labor or employment tribunal, will have to interpret them. In the past that Court has interpreted the EU’s treaty provisions in light of what it believed the treaties’ basic purposes to be, namely the creation of a common market, an area of free commercial movement, of free trade. The presence of these social and employment rights could lead the Court to view the Constitution’s fundamental purposes differently — as, for example, seeking both a common market and a social

democracy. If so, the court will have to balance these basic purposes when they conflict — as they frequently do.

Moreover, in the past, the Member States have been free to change internal legislation in order to facilitate the mobility of capital and labor. Will the Charter in its new role as enforceable constitutional law mean that those who disagree with such changes can challenge them in court — at least where the changes flow from efforts to implement, say EU-harmonized social legislation? Suppose, for example, the EU's harmonized environmental rules, or workplace safety rules, require dismissals at certain plants, say of those who work with environmentally-hazardous chemicals or in unsafe areas. Will dismissed workers be able to challenge those dismissals as “unjustified” [II-30] because (in their view) the EU might have enacted a different, more job-protective, set of harmonized regulations? And will the ECJ have to decide such matters?

The upshot, I believe, is uncertainty. The Charter's application limitations make it less than a Bill of Rights. The EU's broad legislative powers, however, mean that it has important areas of application, with uncertain effects. Perhaps it is best characterized as “a sleeping giant.”

Role of the European Court of Justice

Fourth, what is the EU Court's role in all this? The Constitution grants the Court broad authority in most areas to interpret and apply the Constitution, most EU legislation, and other EU actions. This authority is particularly broad in that the Constitution provides, in order to overturn a Court decision—a constitutional amendment, which requires unanimity; or new legislation, which also often requires unanimity. The unanimity requirement may well mean that Court decisions are simply final, for they cannot be changed. There is irony here. The more important the provision in question, the less willing the Member States are to entrust the outcome to democratic, say “qualified majority,” EU processes, the more they have entrusted that outcome to an unelected court.

At the same time the Constitution specifies that the court will have one judge from each Member State. Thus, the present court of fifteen will expand to twenty-five, which will hear cases presented in any of twenty-one different languages. The rapid two-thirds expansion in

membership; the different legal traditions represented; the complexity of the issues; may mean that the Court's decisions, like the decisions of my own Court or any court, will prove mistaken from time to time, creating unforeseen and undesirable consequences. If so, how can they be changed?

Conclusion

Though I am an outsider, I should like to make one technical suggestion. Most of the difficulties I have raised are, in fact, uncertainties that can be alleviated by modifications in the Constitution in light of experience. Would it not help to take some of the Constitution's details, including much of Part III ["The Policies and Functioning of the Union"] and place them in an organic law? The Constitution could state that after a certain time, Parliament (or Parliament and the Council) could amend those laws by specified majorities. Robert Badinter has written an example of a draft Constitution that does just this.

I should also like to close on an optimistic note. When the Founders wrote the American Constitution, few informed individuals, perhaps none outside America, believed it would work. Yet it has worked. And many in Europe believe the proposed Constitution will work as well. That is cause for considerable hope. After all, the proposed European Constitution takes an important further step in the direction of European integration—an integration of democratic institutions and free economies that mid-Twentieth Century statesmen believed necessary to achieve peace. Has history not proved them right? We outsiders, I believe, may point to problems and suggest modifications, but we must also hope for the success of the enterprise.