

DID SYMBOLISM SINK THE CONSTITUTION?
REFLECTIONS ON THE EUROPEAN UNION'S STATE-LIKE ATTRIBUTES

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After several years of debate and controversy, in June of 2007 the European Union abandoned its proposed Constitution. On December 13, 2007, representatives of the Member States signed a replacement document, a treaty amendment called the Lisbon Treaty. This new instrument will contain most of the substantive innovations of the Constitution. Furthermore, it will follow the Constitution’s lead in preserving virtually all of the Union’s state-like attributes that had been created under the existing EU Treaties. These attributes include the EU’s legal status, institutions, and other characteristics that closely resemble the characteristics of a typical nation state. However, the Lisbon Treaty will not contain certain state-like terms and symbols found in the Constitution. Chief among these discarded items is the title “Constitution.” This article examines the many structural and procedural aspects of the Union that closely mirror those of a nation state. At each point the discussion reflects on the role and utility of these features. Some elements are identified as essential to the EU’s success, others as optional. In the final section the author reviews the Constitution’s employment of state-like terminology and its enshrinement of typical national symbols. The author’s conclusion is that the inclusion of these largely promotional characteristics was a significant contributor to the Constitution’s downfall.

“It was beauty killed the beast.”
 – King Kong (1933)

INTRODUCTION

The demise of the European Union’s Constitution¹ was a slow and

¹ Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereafter Constitution].

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painful process that finally reached its close at the gathering of the European Council on June 21 through June 23, 2007. At that meeting the grand document was officially declared dead.² The European Council decided instead that a “Reform Treaty” (now called the Lisbon Treaty) would merely amend the EU’s two principal treaties, the Treaty Establishing the European Economic Community (EC Treaty) and the Treaty on European Union (TEU).³ The life-span of the Constitution, including its prominent rejection by the Dutch and French electorates in public referenda,⁴ stands out as a sequence of clearly defined incidents. One thing less certain, however, is *why* the document was rejected. The ratification process failed despite the best efforts of Europe’s political leaders. Furthermore, it was widely accepted that the Constitution offered treaty reforms that were necessary to permit the Union to function more efficiently and more transparently after its enlargement from fifteen to twenty seven members.⁵ The puzzle is put into sharper focus when one considers that the proposed Lisbon Treaty will likely contain most of the Constitution’s substantive innovations.⁶ If that is the

² Presidency Conclusions, Brussels European Council, CONCL 2, 11177/07, (June 23, 2007). At the time of the publication of this Article the most recent version of the Lisbon Treaty was the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, CIG 14/07, Dec. 3, 2007 [hereafter Lisbon Treaty].

³ The official citations to the Treaties are: Treaty establishing the European Economic Community, Mar. 25, 1957, 1957 O.J. (C 340) 173 [hereafter EC Treaty], and Treaty on European Union (Maastricht), Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereafter TEU]. Both of these have been most recently amended by the 2001 Treaty of Nice, which is officially cited as the 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. The most recent consolidated version of the Treaties is found at Dec. 29, 2006, O.J. (C 321) 1. The third foundational treaty is the Treaty establishing the European Atomic Energy Community (EURATOM), Mar. 25, 1957, 298 U.N.T.S. 259. This will also remain in effect, as amended by the Lisbon Treaty. In this article the term “Treaties” will refer only to the two primary treaties, the EC Treaty and TEU. Note that the Lisbon Treaty will rename the EC Treaty as the “Treaty on the Functioning of the European Union.” Lisbon Treaty art. 2(1). For convenience, references in this article to the current EC Treaty and the treaty as amended will use the label “EC Treaty.”

⁴ The French referendum took place on May 29, 2005, followed closely by the Dutch vote on June 1st. These events led the European Council to institute a “period of reflection” which lasted until the June 2007 session that dropped any further attempts to revive the Constitution. See European Council, *Declaration by the heads of state or government of the Member States of the European Union on the ratification of the Treaty Establishing a Constitution for Europe*, SN 117/05 (June 18, 2005).

⁵ The Lisbon Treaty was proposed by the June IGC “with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action.” IGC Mandate, Annex to Presidency Conclusions, *supra* note 2, at 2.

⁶ The IGC Mandate of June 26, 2007, states: “The [Lisbon Treaty] will introduce into the existing Treaties, which remain in force, the innovations resulting from the 2004 IGC [which approved the Constitution and referred it to the Member States for ratification]”

case, and if the Constitution was a lost cause, why then should any effort be invested in the new treaty revision?

This article proposes that the Constitution failed not due to its substance, but as a result of its symbolism. In the eyes of many Europeans, the European Union of the Constitution simply bore too much resemblance to a superstate, and that was perceived as a threat to Member State sovereignty. These concerns arose despite the fact that throughout its history the EU has possessed many structural and procedural components that mirror those of a national government. These features are generally accepted as tools for the Union to carry out the highly ambitious agenda that its members have mandated. This article puts the constitutional episode into perspective by broadly reflecting on all of the characteristics of the EU that have parallels in national governments. When viewed against this backdrop, the symbolic innovations proposed in the Constitution stand out as unnecessary and ill-advised.

As a prelude to examining the EU's state-like attributes, this article recognizes that the Union is in fact a hybrid entity comprised of both intergovernmental and federal elements.⁷ It was born as an intergovernmental organization (IGO), and in certain ways it still retains the characteristics of an IGO. To provide a context for the ensuing analysis, Part I of this article describes the EU's significant intergovernmental elements. Such elements are important, but the course of integration during the EU's first fifty years has enhanced the Union's nation-like features, moving it toward an increasingly federal model.⁸ Certain of these

Id. Except for the Lisbon Treaty's abandonment of the constitutional symbolism that was expressed in the Constitution (*see infra* Part IV), the Lisbon Treaty's variations from the substance of the Constitution are relatively minor. *See, e.g.*, IGC Mandate, Annex to Presidency Conclusions, *supra* note 2, art. 19, at 7-10.

⁷ The blending of interstate (IGO) and intrastate (federal) elements is described in Murray Forsyth's notable 1981 treatise as a confederal system. MURRAY FORSYTH, UNIONS OF STATES 10-16 (1981). Kalypso Nicolaidis describes the EU as a "third way." Kalypso Nicolaidis, *The New Constitution as European Democracy?*, THE FEDERAL TRUST FOR EDUCATION & RESEARCH, ONLINE PAPER 38/03 at 5, Dec. 2003, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=517423.

⁸ There has been a long-standing debate about what type of polity the EU should be. Many politicians and observers believe that the Union should resemble a classic IGO, with the Member States retaining their essential sovereignty as nations. The EU's powers should be carefully contained, and ultimate authority on all matters of importance should remain at the national level. In contrast, European federalists contend that the EU should continue to evolve from its intergovernmental roots into a more federal, state-like entity. The Union's success depends upon further centralization, perhaps even leading to a "United States of Europe." Although some form of national and cultural identity should be maintained, ultimate political authority should be lodged in Brussels. For the sake of efficiency and fairness, the national veto in decision-making should give way to majority voting. Both the intergovernmentalist and federalist positions must be viewed as extremes, with the more balanced argument being

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characteristics are arguably required for the EU to function effectively, and Part II of this article describes them as *essential state-like attributes*. Other EU features augment the Union's operations, but they are less critical than those in the first category. Part III addresses these *optional state-like attributes*. Finally, part IV analyzes the Constitution's proposals for certain *promotional state-like attributes* that would have contributed very little to the Union's actual operations. They may have been intended to create greater popular identification with the EU, but in retrospect their inclusion in the Constitution proved to be the document's fatal flaw. These symbols were the beauty that killed the beast.

I. RECOGNIZING THE EU'S INTERGOVERNMENTAL ELEMENTS

The European Union was conceived as a project of separate, sovereign nations whose leaders desired to create political stability through a measure of economic integration. Despite fifty years of "ever closer union," the EU has never entirely shed its intergovernmental origins. As a background to our focus on the EU's resemblance to a nation state, it is helpful to identify those characteristics of the Union that remain distinctly intergovernmental. To a great extent one might expect to find these elements in any treaty-based organization.

A. *Unanimous Decision-Making*

One of the EU's most significant intergovernmental characteristics is that it requires unanimity in making certain decisions. This requirement is consistent with the practice of intergovernmental organizations, as Stephen Zamora has observed:

Under traditional international law, as exemplified by early diplomatic conferences, two basic truths controlled the question of voting: every state had an equal voice in international proceedings (the doctrine of sovereign equality of states), and no state could be bound without its consent (the rule of unanimity). These rules were bound together, and were extensions of the general principle of the state's sovereign immunity from

that the EU should be the hybrid that it is. The EU is successful at consolidating activities such as the internal market, where centralization is advantageous. However in many areas, such as foreign affairs, it makes more sense to retain authority on the national level. For a more detailed description of this debate, see Stephen Sieberson, *The Proposed European Union Constitution—Will it Eliminate the EU's Democratic Deficit?*, 10 COLUM. J. EUR. L. 173, 180-88 (2004).

externally imposed legislation.⁹

According to Youri Devuyst the creators of the European Community were determined to avoid the shortcomings of previous intergovernmental organizations. He quotes Paul-Henri Spaak, one of the Community's founding fathers, for the proposition that "unanimity formulae are the formulae of impotence."¹⁰ If each member of an IGO can block a decision, then the threat of a veto may lead to watering down a proposal, granting concessions to the obstinate member or even abandoning the decision altogether. To avoid such a "unanimity trap" Spaak urged the Community's initial members to "leave ancient notions of sovereignty behind and accept the principle of majority voting."¹¹ This was grounded not merely in idealism, but in recognition that a successful European Community would advance the "substantive political and economic preferences" of its Member States.¹²

Notwithstanding the practical appeal of majority voting, the force behind it was by no means irresistible as the EU developed.¹³ To the contrary, national interests at times appeared to be an immovable object. One example was the 1965 episode of the French "empty chair" at the Council table to protest the Treaty of Rome's phase-in of qualified majority voting in certain policy fields.¹⁴ French representatives actually boycotted European Community activities for seven months, until the Luxembourg Accord was adopted to allow any Member State to halt actions that might threaten its vital interests.¹⁵ Paul Craig comments that this was "the prime example of negative inter-governmentalism."¹⁶ Twenty years later the Single European Act finally overcame the Luxembourg Accord to enable the

⁹ Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566, 571 (1980).

¹⁰ Youri Devuyst, *The European Union's Constitutional Order? Between Community Method and Ad Hoc Compromise*, 18 BERKELEY J. INT'L L. 1, 30 (2000).

¹¹ *Id.*

¹² *Id.* at 8.

¹³ It is appropriate to note that qualified majority voting as a means of making decisions among the Member States is a step well short of full delegation of authority to the EU institutions. Andrew Moravcsik describes QMV as an example of "pooling" of sovereignty, as contrasted with the delegating of sovereignty that takes place when Union institutions (the Commission one example) are given the power to make and carry out law without consulting the Member States. ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* 67 (1998).

¹⁴ JOSEPH H.H. WEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 3, 30 (1999).

¹⁵ *Id.* Devuyst, *supra* note 10, at 31.

¹⁶ Paul Craig, *The Community Legal Order*, 10 IND. J. GLOBAL LEGAL STUD. 79, 86 (2003).

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decision-making efficiency necessary for completion of the Community's internal market.¹⁷

Despite much progress toward qualified majority voting (QMV) in the past twenty years, the path has been marked with many concessions toward preserving Member State sovereignty. These include defining a qualified majority in such a way as to provide extra protection to the smaller states,¹⁸ along with opt-outs, derogations, and transition periods for new policies.¹⁹ Furthermore, according to Volker Röben, “[t]he trend to qualified majority voting in the Council of Ministers at the center is counter-balanced by the ever-increasing role on the periphery of the [consensus-based] European Council.”²⁰ Finally, despite the expansion of QMV, there remain many areas in which unanimity has been preserved, leaving much room for what Pavlos Eleftheriadis has termed “discretionary state action.”²¹ These areas include most activities in the EU's Second Pillar (the common foreign and security policy) and Third Pillar (police and judicial cooperation in criminal matters).²² Other areas in which unanimity is required are decisions relating to the structure of the Union's institutions, admission of new Member States, and matters relating to social policy and employment. The Lisbon Treaty follows the Constitution's lead in shifting certain decisions (especially those in the Third Pillar) to QMV, but most matters currently subject to unanimity would remain so.²³

¹⁷ *Id.* at 89-100. See Single European Act, Feb. 7, 1986, 1986 O.J. (L 169) 1.

¹⁸ Edward Best has noted:

[T]he “Founding Fathers” of Europe explicitly rejected “objective” keys and population, in favor of a distribution of votes reflecting a balancing act between the states. This balance was conceived in terms of clusters of states and responded to a general principle of “degressive proportionality” . . . by which the larger units are under-represented compared to the smaller ones. This in turn has loosely reflected the belief that, in such a diverse and sensitive union as the European Community, the pursuit of consensus and the protection of minorities are more important principles than simple majority rule.

Edward Best, *What is Really at Stake in the Debate over Votes?* EIPASCOPE, Jan. 2004, at 17, available at <http://aei.pitt.edu/5928/>.

¹⁹ Devuyt, *supra* note 10, at 20-21.

²⁰ Volker Röben, *Constitutionalism of the European Union After the Draft Constitutional Treaty: How Much Hierarchy*, 10 COLUM. J. EUR. L. 339, 359 (2004).

²¹ Pavlos Eleftheriadis, *The European Constitution and Cosmopolitan Ideals*, 7 COLUM. J. EUR. L. 21, 38-39 (2001).

²² See TEU arts. 11-28 (Second Pillar), 29-42 (Third Pillar).

²³ For detailed lists of how the Constitution would have moved decisions from unanimity to QMV and what it would have preserved for unanimity or consensus, see JEAN-CLAUDE PIRIS, *THE CONSTITUTION FOR EUROPE – A LEGAL ANALYSIS* 211-31 (Annexes 3, 4 and 5) (2006). The Lisbon Treaty adopts a similar approach. Its most significant movement to QMV arises from the elimination of the TEU's unanimity-based Third Pillar by shifting its

B. Unanimity to Amend the Treaties

Every major nation has a procedure for amending its constitution or other foundational legal acts.²⁴ In a democratic system one would expect the process to be carried out on the basis of majoritarian principles.²⁵ On the other hand, the Vienna Convention on the Law of Treaties provides that amending a treaty requires unanimous approval by the contracting parties.²⁶ The treaties of the European Union follow the international standard by requiring unanimity for any amendment.

The Treaties' amendment provisions are found in Article 48 of the TEU.²⁷ Procedurally, under Article 48 any Member State government or the Commission may submit an amendment proposal to the Council. The Council must "consult" with the European Parliament and may consult with the Commission. Thereafter the Council may deliver "an opinion in favour" of calling an intergovernmental conference (IGC) into existence. The Council President then convenes the IGC, and the conference's decision to approve the proposed amendment must be by common accord. If approved, the amendment must be ratified by all Member States in accordance with their respective national constitutional requirements, and the amendment takes effect after unanimous ratification.²⁸

The Lisbon Treaty retains the basic requirements of the TEU, while

provisions (generally on police and judicial cooperation in criminal matters) into the more QMV-based First Pillar of the EC Treaty. See Lisbon Treaty art. 1(51). For a review of the development of the Third Pillar, see Pieter Jan Kuijper, *The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects*, 41 COMMON MKT. L. REV. 609 (2004).

²⁴ Walter F. Murphy, *Constitutions, Constitutionalism and Democracy, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 3, 13 (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero & Steven C. Wheatley eds., 1993).

²⁵ For a comparative study of the constitutional amendment process, see Donald S. Lutz, *Toward a Theory of Constitutional Amendment, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237 (Sanford Levinson ed., 1995).

²⁶ Vienna Convention on the Law of Treaties, art. 40, May 23, 1969, 1155 U.N.T.S. 336 [hereafter Vienna Convention]. Article 40 provides that unanimity is required unless the treaty itself provides otherwise.

²⁷ TEU Article 48 refers to "the Treaties on which the Union is founded." Article 1 of the TEU explains that the EU "shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty." Thus, the EC Treaty is included in the TEU's amendment provision. One provision of the EC Treaty, Article 300(5), confirms this by providing that if an international agreement to be entered into by the Community would require an amendment to the EC Treaty, such amendment must be adopted pursuant to TEU Article 48.

²⁸ TEU Article 48 does not provide for a constitutional convention as a preliminary step to the IGC process, but the 2002-2003 Convention took place in any event.

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adding flexibility to the amendment process.²⁹ It offers two “simplified” revision procedures. The first permits amendments to Part Three of the EC Treaty (the internal policies of the Union) without a convention or IGC. However, the procedure requires a unanimous decision by the European Council and subjects the amendment to ratification by all Member States.³⁰ The second procedure adds a mechanism for changing unanimous voting requirements in the EC Treaty or TEU to a qualified majority vote. It also permits special legislative procedures in the EC Treaty to be changed to the ordinary legislative procedure. Each of these changes may be adopted by the European Council without the necessity of a convention or IGC. However, prior to voting the European Council would be required to notify the Member State parliaments of its proposed action. Opposition by any parliament within six months of such notification would block the amendment. If no parliament expresses opposition, the European Council may adopt the amendment unanimously.³¹

Unanimity to amend the Treaties represents the deepest guarantee to each Member State that it may expect maintenance of the status quo unless it specifically agrees otherwise. A state need not fear that its national powers will be eroded without its conscious and explicit approval. In the final analysis, the unanimity requirement protects each state from the unwanted imposition of an ultimate loss of sovereignty, which could occur if a majority or even super-majority of states were given the power to amend the Treaties. Such stability remains an integral part of the EU’s intergovernmental bargain.

C. Flexibility – Expansion and Contraction

The history of the European Union is one of steady enlargement. It has

²⁹ A frequently cited characteristic of the European Union is that, beginning with the Single European Act in 1985, the Treaties have been the subject of amendment every few years. In response to this phenomenon, various commentators have called for greater stability. One such critique was offered by Neil Walker, who suggested that the EU might benefit from a strict time limit of ten years between amendments to the new Constitution, if it is ratified. To counter concerns about the rigidity of such a limitation, Walker asserts: “To design a constitution in the knowledge that it must remain untouched for 10 years would concentrate the minds of present IGC and future Convention members not only on the profound consequences of the results of their deliberations, but also on the question of what matters should be excluded from the 10-year embargo.” Neil Walker, *Europe’s Constitutional Passion Play*, 28 EUR. L. REV. 905, 908 (2003).

³⁰ Lisbon Treaty art. 1(56)(6). This mirrors a proposal in the Constitution. See Constitution art. IV-445.

³¹ Lisbon Treaty art. 1(56)(7). This was proposed in the Constitution. See Constitution art. IV-444. European Council decisions are to be adopted by consensus unless the Treaties provide otherwise. Lisbon Treaty art. 1(16)(4); Constitution art. I-21(4).

grown from the original six nations that formed the European Coal and Steel Community to the group of twenty-seven resulting after the accession of Bulgaria and Romania on January 1, 2007.³² The EU's continuing expansion has necessitated treaty provisions to reflect and govern the process, and the TEU invites membership applications from any European state that respects the EU's core values.³³ After receiving unanimous approval by the Council and majority assent by the European Parliament, the application is submitted for ratification by all Member States.³⁴ With a few adjustments, the Lisbon Treaty preserves this process.³⁵

The Union's enlargement has recently proven to be a sensitive issue. At one point it was assumed that the EU would eventually admit Turkey and others.³⁶ However, the 2004 and 2007 accessions have caused something of an identity crisis within the Union as well as an administrative challenge.³⁷ Nevertheless, the provision for a formal accession process in the Treaties is based on the reality that the European Union is an entity whose geographical potential has not yet been reached. This is a characteristic peculiar to intergovernmental organizations, for nation states do not easily expand or contract. Indeed, while the EU has extended its boundaries, its Member States have remained geographically stable.³⁸

³² The original six members were France, Germany, Italy, Belgium, the Netherlands, and Luxembourg. Denmark, Ireland, and the United Kingdom acceded in 1973, followed by Greece in 1981, Spain and Portugal in 1986, and Austria, Sweden, and Finland in 1995. The 2004 "Big Bang" expansion took in Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Cyprus, and Malta.

³³ TEU art. 49. For an analysis of the interplay between expansion of the EU through accessions and the development of the Union as a constitutional system, see Neil Walker, *Constitutionalising Enlargement, Enlarging Constitutionalism*, 9 EUR. L.J. 365 (2003). For a discussion of the linkage between accession to the EU and a candidate country's respect for human rights, see Cesare Pinelli, *Conditionality and Enlargement in Light of EU Constitutional Developments*, 10 EUR. L.J. 354 (2004).

³⁴ The EC Treaty and TEU also contain a protocol addressing the accession process. Protocol on the Enlargement of the European Union, Dec. 24, 2002, 2002 O.J. (C 325).

³⁵ Lisbon Treaty art. 1(57). See also Constitution art. I-58.

³⁶ William Pfaff, *The EU Hangs Out a 'no vacancy' Sign*, INT'L HERALD TRIB. (Sept. 28, 2006), available at <http://www.iht.com/articles/2006/09/27/news/edpfaff.php>.

³⁷ Turkey has been approved as a candidate without a fixed accession timetable, but its possible accession has proven highly controversial, owing largely to its overwhelmingly Muslim population. All future accessions may be in jeopardy, because the French and Dutch referenda have been seen in part as a reaction to the impact of the EU's expansion in 2004. Katrin Bennhold, *EU Cuts Expansion from its To-Do List*, INT'L HERALD TRIB. (June 14, 2005), available at <http://www.iht.com/articles/2005/06/13/news/union.php>. Other states considered as prospects for future accession include Norway, Iceland, Switzerland, Albania, Moldova, Ukraine and the Balkan states that were formerly part of Yugoslavia.

³⁸ The principal geographical change among the Member States was the 1989 reunification of Germany, when the former East Germany merged into West Germany. A related development of political, but not geographical, significance was the attainment of true

Although it has steadily expanded, the EU has had little experience with contraction. No Member State has ever formally left the Union, although in 1985 Greenland, then a part of the Kingdom of Denmark, was permitted to withdraw from the European Community and change its status to that of an Overseas Country or Territory.³⁹ The Treaties do not address withdrawal, but the Constitution proposed a voluntary withdrawal clause⁴⁰ that will be preserved in the Lisbon Treaty.⁴¹ This was highly controversial at the Convention, but the prevailing sentiment was expressed by Convention President Valéry Giscard d'Estaing, who noted that the European Union “is after all not a prison.”⁴²

The act of withdrawal from a treaty, which threatens the existence of the enterprise created by the treaty, is considered illegal by some scholars.⁴³ Under international law, treaties are governed by the rule of *pacta sunt servanda*, that is, the expectation that a state will fulfill its solemn treaty obligations.⁴⁴ However, principles governing the interpretation of treaties recognize several grounds for revoking and withdrawing from a treaty.⁴⁵ For example, a state may be permitted to forsake a treaty if the terms of the compact so permit. If the treaty itself does not provide for such a step, a party may withdraw on grounds such as supervening impossibility of performance or a fundamental change of circumstances.⁴⁶ Drawing on these principles, the EU's movement toward a formal withdrawal clause underscores its basic intergovernmental character. Its members may

independence by Slovenia, Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Bulgaria, and Romania.

³⁹ For an analysis of the Greenland episode and a comparative review of withdrawal rights and restrictions in several different governmental systems, see Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, 53 INT'L & COMP. L.Q. 407 (2004).

⁴⁰ Constitution art. I-60.

⁴¹ Lisbon Treaty art. 1(58). For a discussion of withdrawal from the Union, see Peter-Christian Müller-Graff, *The Process and Impact of EU Constitution-Making: 'Voice and Exit,'* in THE EU CONSTITUTION: THE BEST WAY FORWARD? 71 (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

⁴² PETER NORMAN, THE ACCIDENTAL CONSTITUTION – THE STORY OF THE EUROPEAN CONVENTION 215, 255 (2003).

⁴³ WEILER, *supra* note 14, at 18. Cass Sunstein argues that provisions permitting secession may well endanger “ordinary democratic processes” and that they have no place in a constitution. Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 669-70 (1991). The United States Supreme Court has decreed secession to be in violation of American federal law. *Texas v. White*, 74 U.S. 700, 724-26 (1869).

⁴⁴ Vienna Convention, *supra* note 26, at art. 60; IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 84 (1984).

⁴⁵ Vienna Convention, *supra* note 26, at arts. 54-64. *See also* Sinclair, *supra* note 44, at 181.

⁴⁶ Vienna Convention, *supra* note 26, at arts. 61, 62.

ultimately assert their self-interest and their sovereignty by withdrawing.⁴⁷

D. Suspension of Rights

The TEU provides that the Council may, after complying with strict procedures, determine by a unanimous vote that a Member State has committed a “serious and persistent breach” of the EU’s core values.⁴⁸ Those values are “liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.”⁴⁹ A determination and subsequent action may lead to suspension of certain membership rights of the violating state, including its voting rights on the Council. The EC Treaty refers to the TEU suspension process, and it adds that a Member State whose voting rights have been suspended under the TEU will also lose its voting rights under the EC Treaty.⁵⁰ The Lisbon Treaty preserves these provisions.⁵¹ To date, the suspension procedure has never been carried out.⁵²

In legal terms, a suspension of rights represents a form of countermeasure imposed by treaty partners on a state that has breached its treaty obligations. The aggrieved states reciprocate by denying the violating state the benefit of the treaty relationship.⁵³ The bases for countermeasures are

⁴⁷ Raymond Friel sees secession as a distinctly anti-federal concept, and he writes: “The degree to which secession is controlled tells us much about whether the Union is simply an association of States or a true federal Union.” Raymond J. Friel, *The Draft Constitution: Issues and Analyses: Secession from the European Union: Checking out of the Proverbial “Cockroach Motel,”* 27 *FORDHAM INT’L L.J.* 590, 641 (2004). Michael Dougan describes the Constitution’s withdrawal provision as “the ultimate constraint upon Union competence.” Michael Dougan, *The Convention’s Constitutional Treaty: A “Tidying-Up Exercise” that Needs Some Tidying-up of Its Own*, THE FEDERAL TRUST FOR EDUCATION & RESEARCH, ONLINE PAPER 27/03 at 8, Aug. 2003, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=507782.

⁴⁸ TEU art. 7. The Council would meet in the “composition of the Heads of State or Government.” TEU art. 7(2).

⁴⁹ TEU art. 6(1).

⁵⁰ EC Treaty art. 309(1).

⁵¹ Lisbon Treaty arts. 1(9); 2(291). *See also* Constitution art. I-59.

⁵² In January of 2000 the EU Member States imposed an informal “diplomatic isolation” on Austria after a far right political leader, Jörg Haider, joined the country’s governing coalition. This situation, which did not constitute official EU action, lasted approximately 9 months before being withdrawn. However, the episode led directly to the later inclusion of TEU Article 7 in the Treaty of Nice. *See* Austria’s Haider affair gave the EU an “emergency brake,” *EURACTIV.COM*, Jan. 11, 2006, <http://www.euractiv.com/en/agenda2004/austria-haider-affair-gave-eu-emergency-brake/article-151443>.

⁵³ Vienna Convention, *supra* note 26, at art. 60. Notwithstanding the possibility of suspension of a Member State’s voting rights, Joseph H.H. Weiler has argued that legal remedies available within the EU have largely eliminated “the most central legal artifact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility with its

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twofold: the sovereignty of the violating state and the corresponding inability of the other states to enforce treaty compliance. From this point of view, the EU's suspension provisions tacitly recognize that the Member States are sovereign entities within the Union, and that they may thus be immune to centrally imposed enforcement of their core responsibilities. In contrast, in a strong federal system there should be no doubt about the ability of the central government to use force to ensure compliance with its constitution at all levels throughout the system.

E. Varying Levels of Commitment to EU Programs

Another hallmark of the EU is the fact that its Member States are not required to participate in every program, all the time. Although the programs themselves may evoke notions of statehood, the fact that they are optional is more reminiscent of an intergovernmental organization. Two prominent examples involve the euro and the Schengen programs.

The common currency: the euro. Like a national currency, the euro is intended to unify the EU's Member States under a single monetary program. Thus the euro, discussed further in Part III of this article, is itself a state-like attribute. However, several Member States do not participate in this program, and this optional characteristic is distinctly intergovernmental. Since Slovenia began fully participating in the common currency at the beginning of 2007, there are thirteen Member States within the Euro-Zone. Eleven new Member States must enter the zone when economically qualified. Two states (the U.K. and Denmark) are permitted to remain outside the Euro-Zone and one state (Sweden) qualifies but has chosen not to take all of the steps necessary to join the program.⁵⁴ Neither the Constitution nor the Lisbon Treaty has proposed any change in the program of the common currency or in its participation requirements.

The Schengen programs. These programs address the elimination of internal border controls, coordinated external border controls, certain visas, asylum, and other related matters. In 1985, when the European Community was unable to arrive at a mutually acceptable agreement on these issues, a core group consisting of France, Germany, Belgium, Luxembourg, and the

concomitant principles of reciprocity and counter-measures." Weiler, *supra* note 14, at 29.

⁵⁴ The current Euro-Zone countries are Finland, Ireland, the Netherlands, Belgium, Luxembourg, France, Germany, Spain, Portugal, Austria, Italy, Greece, and Slovenia. The new Member States required to join are Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Cyprus, Malta, Bulgaria, and Romania. Among this group Cyprus and Malta have been approved to join the Euro-Zone in 2008. Sweden has not yet created the necessary institutional independence for its central bank. For further details, see the EU's official web page, Europa, Institutional and Economic Framework of the Euro, <http://europa.eu/scadplus/leg/en/s01002.htm> (last visited Jan. 11, 2008).

Netherlands entered into an arrangement outside the European Community process. The accord eventually included thirteen countries, and it was thereafter incorporated into EU law in 1999 through the Treaty of Amsterdam.⁵⁵ However, through protocols the Treaty of Amsterdam afforded special treatment in these matters to Denmark, Ireland, and the United Kingdom.⁵⁶

Again, neither the Constitution nor the Lisbon Treaty has suggested any change in these programs.

The concept of varying commitment is unavoidable in the EU, and thus the Treaties contain detailed provisions for “enhanced cooperation” among groups of Member States in areas where the Council has determined that the Union as a whole cannot be expected to participate.⁵⁷ Demanding criteria must be met before a plan of enhanced cooperation may be undertaken, and the TEU refers to enhanced cooperation as a “last resort.”⁵⁸ The TEU further states that the enhanced cooperation process may not undermine the internal market or cause trade discrimination against non-participating Member States.⁵⁹ The Lisbon Treaty proposes to consolidate the treaty provisions while preserving their substance.⁶⁰ Note that neither the common currency nor the Schengen arrangements have taken place under the Treaties’ enhanced cooperation provisions, and the formal process has not yet been utilized.⁶¹

The opportunities for varying levels of commitment by the EU’s Member States are inconsistent with a truly federal system in which powers are divided vertically between the central government and the states.⁶² In a

⁵⁵ In subject matter related to the Schengen programs, the Treaty of Amsterdam also transferred certain Third Pillar matters to the First Pillar. *See* Protocol Integrating the Schengen *Acquis* into the Framework of the European Union, Nov. 10, 1997, 1997 O.J. (C 340) 144; Kuijper, *supra* note 23.

⁵⁶ Protocol on the Position of the United Kingdom and Ireland, Nov. 10, 1997, 1997 O.J. (C 340) 99; Protocol on the Position of Denmark, Nov. 10, 1997, 1997 O.J. (C 340) 101.

⁵⁷ The procedure is provided for in Articles 11 and 11a of the EC Treaty with respect to the First Pillar, in TEU Articles 27a through 27e for the Second Pillar, and TEU Articles 40 through 40b for the Third Pillar. Procedural details for all types of enhanced cooperation are provided in Articles 43 to 45 of the TEU.

⁵⁸ TEU art. 43a. The same words are found in Lisbon Treaty art. 1(22)(2); Constitution art. I-44(2).

⁵⁹ TEU art. 43(e), (f).

⁶⁰ Lisbon Treaty art. 1(22). For the Constitution’s approach, see Constitution arts. I-44, III-416 to III-423.

⁶¹ Dougan, *supra* note 47, at 12. Note that special arrangements exist among the EU’s Member States that lie wholly outside the EU framework. These include the Western European Union, NATO, and the Benelux regional union. The Treaties have approved such arrangements. *See* TEU art. 17; EC Treaty art. 306.

⁶² Robert Senelle, *Federal Belgium*, in *FEDERALISM AND REGIONALISM IN EUROPE* 27, 29

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federation, critical matters of policy are determined centrally and are applicable throughout the system. If there is insufficient support for a policy at the federal level, either no action will be taken or, at best, separate action might be taken at the state level. However, groups of states will not undertake to do as a bloc what the central government could not accomplish. Action by smaller groupings reveals a lack of collective will to maintain policy uniformity within the EU.⁶³ It also emphasizes the continuing autonomy of the Member States and thus the intergovernmental character of the Union.

F. Other Intergovernmental Elements

If the European Union were compared in detail to other intergovernmental organizations, the list of corresponding characteristics could be extensive. The focus in this section has been on the most critical intergovernmental elements in the EU system. Other examples of such elements might include rotating presidencies, equality among Member States, and conferral.

Rotating presidencies. The leadership of the Council and European Council rotates every six months, with each Member State having an equal opportunity to hold the presidency.⁶⁴ The Constitution would have created a more permanent president for the European Council⁶⁵ – a move toward a more state-like model. The Lisbon Treaty proposes to retain this innovation.⁶⁶

Equality of the Member States. Except in matters subject to qualified majority voting,⁶⁷ the Member States enjoy equal status regardless of population. This principle was implied but not clearly articulated in the Treaties.⁶⁸ The Constitution offered an unambiguous statement of

(Antonio d'Atena ed., 1998).

⁶³ For a detailed review of “flexible integration” within the EU, both as to historical experiences and future possibilities, see Franklin Dehousse, Wouter Coussens & Giovanni Grevi, *Integrating Europe: Multiple speeds – One direction?* (EPC, Working Paper No. 9 2004), available at <http://www.epc.eu/en/pub.asp?TYP=TEWN&LV=187&see=y&t=7&PG=TEWN/EN/detailpub&l=12&AI=353>. For an integrationist’s perspective on the value of enhanced cooperation, see Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, Speech at the Humboldt University in Berlin (May 12, 2000), (transcript available at <http://www.cie.gov.pl/futurum.nsf/0/1289AFAAE84E5075C1256DA2003D1306>).

⁶⁴ EC Treaty art. 203; TEU art. 4.

⁶⁵ Constitution art. I-22.

⁶⁶ Lisbon Treaty art. 1(16)(5).

⁶⁷ See discussion *infra* Part II(D).

⁶⁸ For example, Member States are to be treated equally with regard to representation on the Commission after the body is reduced in size to less than one commissioner per Member

equality,⁶⁹ and the Lisbon Treaty proposes a similar statement.⁷⁰ In contrast, national systems emphasize one vote per citizen. There are exceptions, such as equal representation in the Senate among the states of the United States, but democratic principles favor the equality of the individual over equality among geographic regions.

Conferral. The Treaties refer only once to the conferral of authority on the Community, which is stated in the EC Treaty to be granted “by the Treaty.”⁷¹ The Lisbon Treaty offers a stronger formulation: “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.”⁷² This new wording makes clear that the Member States have created the EU and endowed it with its authority. This approach starkly contrasts with the renowned opening words of the United States Constitution: “We the People of the United States, in Order to form a more perfect Union . . . do ordain and establish this Constitution for the United States of America.”⁷³ Where the national model envisions the central government arising from the authority of the whole people, the more overtly intergovernmental European Union is a creature of the Member States.

II. THE EU’S ESSENTIAL STATE-LIKE ATTRIBUTES

The EU has been endowed with many of the characteristics of a modern state, including several elements that lie at the heart of the Union’s ability to function. This section examines the state-like attributes that are most essential to the EU’s ability to carry out its programs.

A. *The EU’s Legal Status*

The Lisbon Treaty expands on the Treaties by defining the Union’s legal status in several ways. The EU exists as a discrete entity, it enjoys legal personality in its external relations, and internally it possesses legal

State. Protocol on the Enlargement of the European Union, *supra* note 34, at arts. 4(2), 4(3). Also note the unanimity requirement for legislation, decision-making or the ratification of a treaty amendment. Michael Dougan has argued that the ratification requirement “reflects one of the organising principles of the Union order – of ultimate equality between the Member States in their capacity as Treaty authors.” Dougan, *supra* note 47, at 13.

⁶⁹ “The union shall respect the equality of the Member States before the constitution . . .” Constitution art. I-5(1).

⁷⁰ Lisbon Treaty art 1(5).

⁷¹ “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.” EC Treaty art. 5.

⁷² Lisbon Treaty art. 1(6)(2). This language largely mirrors Constitution art. I-11(2).

⁷³ U.S. CONST. pmb1.

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capacity and certain privileges and immunities. These traits are reinforced by the EU's permanent existence.

1. Existence and Legal Personality

The European Union is an entity created by, but separate from, the Member States. The Lisbon Treaty provides a simple declaration: "The Union shall have legal personality."⁷⁴ Notably, this statement is not found in the Treaties. The TEU states that "the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION,"⁷⁵ but neither this provision nor any other section of the TEU mentions a grant of legal personality. The European Community, on the other hand, is granted such character. The EC Treaty states clearly: "The Community shall have legal personality."⁷⁶ The Lisbon Treaty will thus elevate the entire EU to the same legal status that had previously been granted to the Community. At the same time, the Lisbon Treaty will merge the Community into the Union, creating a single entity.⁷⁷

The lack of legal personality for the Union has been regarded as "one of the more pronounced oddities of the existing European treaty structure."⁷⁸ Consider, for example, the question of whether the Union may enter into binding international agreements. The TEU empowers the Council to "conclude" international agreements in the Second Pillar, on the following terms:

When it is necessary to conclude an agreement with one or more States or international organizations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.⁷⁹

The TEU further provides: "Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the

⁷⁴ Lisbon Treaty art. 1(55). This is identical to Article I-7 of the Constitution.

⁷⁵ TEU art. 1.

⁷⁶ EC Treaty art. 281.

⁷⁷ Lisbon Treaty art. 1(2). Because the Constitution would have repealed both the EC Treaty and the TEU, the Constitution described a new Union that would succeed both the Community and the existing Union. Constitution art. IV-438(1).

⁷⁸ Norman, *supra* note 42, at 84. For an extensive analysis of the legal personality of the European Communities and of the Union, see Jaap W. de Zwaan, *The Legal Personality of the European Communities and the European Union*, 30 NETH. Y.B. OF INT'L L. 75 (1999).

⁷⁹ TEU art. 24(1).

Union.”⁸⁰ Historically, the Council has in fact entered into agreements under the TEU,⁸¹ but the lack of full legal personality for the EU has raised questions as to the extent to which it could legally bind itself.⁸² There was no such concern about the Community,⁸³ and the Lisbon Treaty would clear up any doubts about the Union.

2. Legal Capacity

The legal personality described above might be labeled an “international law personality,” in that it most significantly relates to the Union’s ability to enter into agreements with third countries or international

⁸⁰ TEU art. 24(6).

⁸¹ Two recent examples of Article 24 agreements include Agreement Between the European Union and the Swiss Confederation on the Participation of the Swiss Confederation in the European Union Monitoring Mission in Aceh (Indonesia), Dec. 31, 2005, 2005 O.J. (L 349) 30; and Agreement Between the European Union and Canada Establishing a Framework for the Participation of Canada in the European Union Crisis Management Operations, Dec. 1, 2005, 2005 (L 315) 20.

⁸² Commenting on the Constitution’s proposed grant of legal personality to the Union (Constitution art. I-7), Juliane Kokott and Alexandra R  th have stated:

It might be briefly pointed out that the [Convention’s] Working Group charged with the question rightly took as its starting point the assumption that the Union does indeed already at present possess an implicit international legal personality. While this was not the case under the regime of the Maastricht Treaty, and while the situation after the reform of Amsterdam initially remained unclear due to the (deliberately) imprecise wording of the newly introduced article on treaty-making power [TEU Article 24], the actual practice confirmed the existence of an implicit legal personality of the Union. By deciding not to perpetuate this duality with the attribution of an explicit legal personality to the Union alongside those of the Communities, but instead to merge both into a single personality and to accompany this step by a merger of the Treaties, the Convention adequately put into practice what the Laeken Declaration had implied. This must be warmly welcomed for reasons of effectiveness, legal certainty, transparency and as it heightens the profile of the Union *vis-  -vis* third States and European citizens.

Juliane Kokott & Alexandra R  th, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 COMMON MKT. L. REV. 1315, 1323 (2003). See European Council, Laeken Declaration on the Future of the European Union, in Presidency Conclusions, Laeken European Council (Dec. 14-15, 2001), Annex I, SN 300/1/01 REV 1, at 19, 20, available at <http://www.poptel.org.uk/statewatch/news/2001/dec/lak168827.pdf>. [hereafter Laeken Declaration]. The Laeken Declaration instituted the Convention that produced the Constitution. See discussion *infra* Part IV(B).

⁸³ The European Community has authority under the EC Treaty to negotiate agreements in a variety of fields. See EC Treaty arts. 111, 133, 139, 170, 174, 181, 181a, 186, 300, and 310. Because of the clearly expressed legal personality of the Community (EC Treaty art. 281), the binding nature of these agreements has not been questioned.

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organizations. A second form of personality might be called “private law personality,” a status that permits the EU to be a party to private legal matters. The Treaties refer to this as “legal capacity.”⁸⁴

Under the EC Treaty the grant of legal capacity is expressed in the following simple formulation:

In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.⁸⁵

Furthermore, the Community as a legal person is specifically made subject to the contract law of individual Member States and to tort law based on “the general principles common to the laws of the Member States.”⁸⁶ Neither the EC Treaty nor the TEU mentions any legal capacity for the EU, and the Lisbon Treaty would extend the concept to the merged Union by changing the word “Community” to “Union” throughout the EC Treaty.⁸⁷

3. Privileges and Immunities

The EC Treaty provides that within the territory of the Member States the Community is allowed “such privileges and immunities as are necessary for the performance of its tasks.”⁸⁸ It also refers to a protocol that further delineates these privileges and immunities.⁸⁹ Examples include the inviolability of EU premises and records, exemption of the Union from taxes, undisturbed communication among EU officials, and their right to move freely throughout the Union. However, these characteristics relate to the Community only. Neither the TEU nor the EC Treaty mentions any privileges or immunities with respect to the Union. The Lisbon Treaty would simply change the word “Community” to “Union,”⁹⁰ and this development may be seen as strengthening the EU’s legal status.

⁸⁴ Jaap W. de Zwaan provides a valuable description of the different forms of legal personality and how they manifest themselves in practice. See De Zwaan, *supra* note 78, at 79-85.

⁸⁵ EC Treaty art. 282.

⁸⁶ EC Treaty art. 288.

⁸⁷ Lisbon Treaty art. 2(2)(a). The Constitution contained two specific provisions, substantively identical to EC Treaty Articles 282 and 288, that addressed the Union’s legal capacity. Constitution arts. III-426, III-431.

⁸⁸ EC Treaty art. 291.

⁸⁹ Protocol on the Privileges and Immunities of the European Communities, April 8, 1965, 1967 O.J. (152) 13.

⁹⁰ Lisbon Treaty art. 2(2)(a). A specific provision of the Constitution would have mirrored the substance of the EC Treaty. Constitution art. III-434.

4. A Permanent Entity

The EC Treaty and TEU both state: “This Treaty is concluded for an unlimited period.”⁹¹ The Lisbon Treaty uses identical language.⁹² The continued existence of the Union under the Lisbon Treaty and the continuation of the Community (by merger into the Union) provide essential stability and predictability for all nations, IGOs, and private parties who wish to deal with the EU. Coupled with the unanimity requirement for amending the Treaties, the EU’s permanence presents to the world an entity that is not to be reinvented, replaced, or reconfigured easily.

5. The Importance of Legal Status

The concepts of legal personality, legal capacity, and privileges and immunities essentially provide the Union with the status and capabilities that are afforded to any nation. Without them, doubts might exist as to whether the EU could enter into legally binding international agreements or engage in business transactions necessary to its ordinary operations. Without its own legal capacity, every step taken by the Union might arguably depend for its validity on an endorsement or ratification by a different entity that enjoyed legal personality – likely one of the Member State governments. The Union’s officials and employees would need to rely on their national citizenship for their rights to move freely and carry out their responsibilities. In short, an EU without a state-like legal status would be a more nebulous organization, always at risk of being questioned as to the firmness of its commitments.

⁹¹ EC Treaty art. 312; TEU art. 51.

⁹² Lisbon Treaty art. 3. Whereas the Lisbon Treaty will amend the Treaties, the Constitution would have replaced them entirely. Nevertheless, Article IV-438 of the Constitution was carefully crafted to preserve the concept of the Treaties’ permanence by declaring the continued existence of the EU. Article IV-438(1) states that the EU under the Constitution would be the “successor” to the TEU’s European Union and the EC Treaty’s European Community. Under Article IV-438(3) the acts of the EU and Community would have remained in force until specifically “repealed, annulled or amended,” and the “other components of the *acquis* of the Community and of the Union” would have been similarly “preserved until they have been deleted or amended.” Likewise, Article IV-438(4) mandated that the jurisprudence of the Court of Justice and Court of First Instance would continue as the “source of interpretation of Union law and in particular of the comparable provisions of the Constitution.” The same would have held true for existing administrative and legal procedures, according to Article IV-438(5). Thus, by its own terms the Constitution would not have ended the existence of the “permanent” treaty organizations, but instead it would have preserved them in a new form and under a new constituent document.

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B. Primacy

If the legal status of the EU is the threshold for its actions to be recognized and considered legally effective, the next consideration is whether the Member States will comply with its acts. Legal existence and capacity have little meaning if the organization's members are free to ignore its rules. The effectiveness of EU action within the Union, that is, within each of the Member States of the Union, has its legal basis in the principle of primacy.⁹³ Although the term "primacy" is not found in the Treaties, the EC Treaty imposes the following obligations:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.⁹⁴

Thus, for example, if a Member State has law that is inconsistent with Community law on the same subject, and if the state is required to "ensure fulfilment" of the Community law, then the treaty obligation would require the state to follow Community law in preference to its national law. The practical result would be the superiority or primacy of Union law.

Despite the imprecise manner in which the Treaties deal with primacy, case law has firmly established the principle. The first decision was the 1963 ruling in the matter of *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.⁹⁵ In that case the Court of Justice ruled that the authority of the EC Treaty was not dependent upon any national implementing legislation or any other measure taken by a Member State. The second ruling was in the 1964 case of *Costa v. ENEL*,⁹⁶ in which the Court declared

⁹³ In American constitutional parlance, primacy is referred to as "supremacy," with Article VI of the United States Constitution declaring that the Constitution itself and federal law "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Another term commonly used in American jurisprudence is "pre-emption," and the U.S. Supreme Court has declared that "under the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 108 (1992). See also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 376-401 (2002).

⁹⁴ EC Treaty art. 10. Furthermore, Article 249 of the EC Treaty defines a "regulation" of the Community as a measure that "shall have general application. It shall be binding in its entirety and directly applicable in all Member States." EC Treaty art. 249.

⁹⁵ Case 26/62, *van Gend en Loos v. Nederlandse Administratie Der Belastingen*, 1963 E.C.R. 1.

⁹⁶ Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

that Community law must be superior to national law because of the nature of the Community legal order:

[T]he law stemming from the [EC] Treaty could not, because of its special and original nature, be overridden by domestic legal considerations, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.⁹⁷

A further ruling in 1970 affirmed the primacy of European Community law even over a national constitution. In *Internationale Handelsgesellschaft m.b.H v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* the Court declared:

[T]he validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it runs counter to either the fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.⁹⁸

The drafters of the Constitution proposed a textual affirmation of the primacy principle by including as Article I-6 the following straightforward statement: “The Constitution and law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.”⁹⁹ This appealingly simple formulation set off a post-Convention flurry of speculation as to whether it should be taken at face value.¹⁰⁰ Paul Craig raised several concerns, including his assertion that the wording of Article I-6 would leave room to argue that EU law has primacy

⁹⁷ *Id.* at 594.

⁹⁸ Case 11/70, *Internationale Handelsgesellschaft m.b.H v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1134.

⁹⁹ Constitution art. I-6. In addition, Article I-5(2) offered a statement similar to EC Treaty Article 10. Likewise, Article I-33(1) stated that “European laws,” which are legislative acts of the Union “of general application,” would be binding in their entirety throughout the EU and would be “directly applicable in all Member States.” Under Article I-33(1) certain “European regulations” would also have been binding in their entirety and directly applicable in all of the Member States.

¹⁰⁰ For a review of the supremacy issue as the subject of long-standing judicial and academic attention, see Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 EUR. L.J. 262 (2005).

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over national legislation, but not over national constitutions.¹⁰¹ He also questioned whether EU regulations should have primacy equal to EU legislation, whether the Member States retain a residual competence (*Kompetenz-Kompetenz*) to decide issues of primacy,¹⁰² and whether the principles of subsidiarity and proportionality limit the scope of primacy.¹⁰³ He assured the academic world that Article I-6 would not “signal the death of one of the staple topics in EU law courses.”¹⁰⁴ Mattias Kumm likewise commented that “the supremacy clause does not by itself say who should settle the question whether EC legislation is or is not *ultra vires*, even though this is exactly the issue [that] has been the subject of disagreement between the Court of Justice and some national courts.”¹⁰⁵ Michael Dougan also questioned “the merits of the Convention’s attempt to codify a principle characterised by sophisticated nuance in the [EU] case law, and extensive debate among academics.”¹⁰⁶ He suggested that “we should accept that this [Article I-6] is a largely hortatory provision which offers little of substance to the complex debate on relations between the Union and domestic legal orders.”¹⁰⁷

In the end, the Constitution’s statement on primacy evidently proved to be too controversial to survive. The June 2007 IGC decided to omit the

¹⁰¹ Paul Craig, *What Constitution does Europe Need?* THE FEDERAL TRUST FOR EDUCATION & RESEARCH, ONLINE PAPER 26/03 at 8, Aug. 2003, http://www.fedtrust.co.uk/uploads/constitution/26_03.pdf.

¹⁰² George Bermann notes:

[The] slowly growing number of Member States whose supreme or constitutional courts have, following the German example, in effect stated that, while they intend for them and their national judiciaries to show the highest degree of respect for the pronouncements of the Court of Justice (even on matters as sensitive and important as protection of human rights and fundamental freedoms), they will not in principle cede to that Court ultimate authority for determining the outer boundaries of the EU’s legislative and policy powers. Under that view, *Kompetenz/Kompetenz* does not lie in Luxembourg (except of course for Luxembourg); it lies in the seats of the highest courts of the Member States, almost as if in the USA it lay, as it assuredly does not, in the state capitals.

George Bermann, *The European Union as a Constitutional Experiment*, 10 EUR. L.J. 363, 367 (2004). For a general analysis of the Constitution and its impact on the sovereignty of the Member States’ constitutional courts, see Anneli Albi & Peter Van Elsuwege, *The EU Constitution, National Constitutions and Sovereignty: An Assessment of a “European Constitutional Order,”* 29 EUR. L. REV. 741 (2004).

¹⁰³ Craig, *supra* note 101, at 8-9.

¹⁰⁴ *Id.* at 8.

¹⁰⁵ Kumm, *supra* note 100, at 296.

¹⁰⁶ Dougan, *supra* note 47, at 7.

¹⁰⁷ *Id.* at 8.

provision from the Lisbon Treaty, and in its place a declaration will state the following:

The Conference recalls that, in accordance with well settled case-law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of member States, under the conditions laid down by said case-law.¹⁰⁸

Through its declaration the Lisbon Treaty thus offers both an affirmation of the primacy principle and a continuing opportunity for scholars to debate its limits. Regardless of the manner in which it is expressed, primacy serves as an essential and state-like means of ensuring the effectiveness of EU policies and programs.

C. Institutions

An organization may exist on paper, but without people assigned to carry out specific tasks it will accomplish little. Significant intergovernmental organizations quickly develop their own bureaucracies, but the European Union's institutions most closely mirror those found in a typical national government. George Bermann has described the EU as possessing:

a complex institutional apparatus enabling it to deliver a variety of state-like functions, among which we may discern functions broadly recognizable as law-making, law-applying, and law-enforcing. The very fact that the EU even has departments that we can liken, however approximately, to legislative, executive and judicial distinguishes it from most other such regimes. Not even NAFTA, the WTO, or the International Criminal Court – which are among the best-equipped international governance

¹⁰⁸ Presidency Conclusions, *supra* note 2, Annex I at 16, n. 1. The Annex also refers to a legal opinion of the Legal Service of the Council entitled “Primacy of EC law,” which states, in its entirety:

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgement of this established case-law (Costa/ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

Opinion of the Legal Service of the Council, 11197/07 (2007).

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regimes – are nearly as well equipped.¹⁰⁹

1. The Essential Institutions

It is beyond the scope of this Article to delve deeply into the institutions and how they are viewed by their proponents and critics. The following brief descriptions illustrate the fact that certain EU institutions are both state-like in their character and essential to the EU's operations.

Council of Ministers.¹¹⁰ The Council acts as the senior legislative body of the EU. It has an intergovernmental flavor in its rotating presidencies¹¹¹ and in the fact that each Member State provides one representative, “authorised to commit the government of the Member State.”¹¹² Further, when unanimity is required for an action, each minister (and thus each Member State) has the opportunity to veto any action. Nevertheless, the Council decides many issues by a qualified majority vote,¹¹³ thus resembling the upper chamber of a national bi-cameral legislature. Every organization requires a body to create laws of general application and to make decisions that address specific problems. Although the Council lacks the power to *initiate* legislation, it has all of the other tools to serve as the EU's legislature.

Commission.¹¹⁴ The permanent executive of the Union provides the administration needed to ensure that EU law is carried out.¹¹⁵ It differs from a typical European cabinet in that its members are not members of a parliament. Furthermore, once appointed, the Commissioners must act independently of any government or party influence.¹¹⁶ Another unique aspect of the Commission is that it has the primary right to initiate EU legislation.¹¹⁷ Nevertheless, on a day-to-day basis the Commission resembles a national executive charged with managing its country's affairs.

European Court of Justice.¹¹⁸ Notwithstanding the *Kompetenz-*

¹⁰⁹ Bermann, *supra* note 102, at 365.

¹¹⁰ See EC Treaty arts. 202-10. Note that the Council and the other institutions and organs that are the subject of this section are identified initially in EC Treaty arts. 7-9. Notably absent is the European Council.

¹¹¹ See discussion *supra* Part I(F).

¹¹² EC Treaty art. 203.

¹¹³ See discussion *infra* Part II(D).

¹¹⁴ See EC Treaty arts. 211-19.

¹¹⁵ EC Treaty art. 211.

¹¹⁶ EC Treaty art. 213.

¹¹⁷ There is no direct statement in the Treaties as to the right of legislative initiative. However, the two primary legislative procedures under the EC Treaty begin with a proposal being submitted by the Commission. EC Treaty arts. 251, 252.

¹¹⁸ See EC Treaty arts. 220-45.

Kompetenz debate described above, the European Court of Justice (ECJ) is seen as the final authority in the interpretation of the Treaties and EU law and in determining the legality of the activities of the other Union institutions. It functions like a national supreme court, and its decisions have effect throughout the Union. One might argue that a separate judicial body may not be strictly necessary. For example, the Council or Commission arguably could sit in the arbiter's chair,¹¹⁹ but an organ such as the Court offers the independence and objectivity that lend credibility to dispute settlement. Nation-states are best served by an independent judiciary, and the European Union has wisely emulated that model.

2. Other Institutions

There are a number of other EU institutions and organs that have counterparts in the national governments. These include the European Parliament,¹²⁰ the European Central Bank,¹²¹ the European Investment Bank,¹²² the Court of Auditors,¹²³ and even the EU's two advisory bodies, the Committee of the Regions¹²⁴ and the Economic and Social Committee.¹²⁵ Part III of this article discusses the Parliament and Central Bank, describing them as significant but "optional" state-like elements within the EU. The others on this list serve limited, albeit useful, functions. As to the Court of Auditors, its role as an independent organ offers credibility, but it could easily be replaced with an audit committee from within the Council, Commission, or Court. Likewise, the Investment Bank and the two committees add a measure of value to the EU, but they could hardly be classified as essential.

3. The Unique European Council

In the pantheon of EU institutions the European Council stands out as

¹¹⁹ The General Council of the WTO, which consists of a representative of each member nation, serves as the general decision-making authority for the organization, but it also sits as the appellate body for disputes relating to members' compliance with the WTO treaty and its related agreements. Agreement Establishing the World Trade Organization, April 15, 1994, art. IV:3, 33 I.L.M. 1197 (1994).

¹²⁰ EC Treaty arts. 189-201.

¹²¹ EC Treaty arts. 112-15.

¹²² EC Treaty arts. 266-67.

¹²³ EC Treaty arts. 246-48.

¹²⁴ EC Treaty arts. 263-65.

¹²⁵ EC Treaty arts. 257-62.

something of an enigma.¹²⁶ For one thing, it is not clearly identified in the Treaties as an EU institution,¹²⁷ although its responsibilities are described in a number of provisions.¹²⁸ The Lisbon Treaty corrects this omission by including the European Council in its list of Union institutions.¹²⁹ The new treaty also mandates the European Council to “provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.”¹³⁰ But there is a catch, because the same provision states that the European Council “shall not exercise legislative functions.”¹³¹ The question is whether policy-setting can be cleanly separated from legislating. The reality is that the members of the European Council possess the political muscle to instruct their Council counterparts with regard to any level of legislative detail. Thus the body might be characterized as a super-legislature or even as a super-executive, both of which are decidedly state-like. The other side of the coin is that the

¹²⁶ For a review of the increasing importance of the European Council, see Jan Werts, *The Unstoppable Advance of the European Council*, in *THE EU CONSTITUTION: THE BEST WAY FORWARD?* 297 (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

¹²⁷ From the earliest days of the Community the heads of state met from time to time, and formal recognition of this process eventually followed. The first textual mention of the body was included in the Single European Act in 1986. Single European Act, Feb. 7, 1986, 1986 O.J. (L 169) 1. It is cited just eight times in the EC Treaty (EC Treaty arts. 11, 99, 113, 128) and eight times in the Treaty on European Union (TEU arts. 4, 13, 17, 23, 40a). It is not identified in Article 7 of the EC Treaty in the list of Community institutions, nor in the articles that extensively describe the institutions in Part Five of the treaty. Nevertheless, the TEU defines the group as consisting of the heads of state or government of the Member States, assisted by the foreign affairs ministers of the states and a Commission member. The European Council is to meet at least twice a year under the chairmanship of the head of state or government of the state that holds the Council’s rotating presidency. TEU art. 4. *See also* EC Treaty art. 203 (describing the rotating Council presidency).

¹²⁸ The most prominent treaty reference may be found in TEU Article 4, which mandates the European Council to “provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.” The remaining references to the European Council in the TEU relate to the EU’s Second and Third Pillar. Article 13 requires the group to define principles, guidelines, and common strategies in the Second Pillar, the common foreign and security policy (CFSP – TEU arts. 11-28). Article 17 assigns the European Council the task agreeing on a “common defence” should it so desire. The final mention of the European Council in the TEU is in the Third Pillar section, TEU arts. 29-42, relating to police and judicial cooperation in criminal matters. TEU Article 40a calls for a Council decision on programmes of enhanced cooperation within the Third Pillar, but permits any member of the Council to have the matter referred to the European Council, presumably for consultation only, because the article notes that the Council will nevertheless be responsible to act on the proposal.

¹²⁹ Lisbon Treaty art. 1(14)(1). This mirrors Article I-19(1) of the Constitution.

¹³⁰ Lisbon Treaty art. 1(16)(1). *See* Constitution art. I-21(1).

¹³¹ Lisbon Treaty art. 1(16)(1). This is identical to Article I-21(1) of the Constitution.

European Council must normally make its decisions by consensus,¹³² which is clearly intergovernmental in flavor. In effect, this single institution represents the hybrid character of the EU as a whole – it resembles a national institution while operating like an intergovernmental organization. Given the political delicacy of so many activities carried out by the EU, it is fair to conclude that the European Council, even with its hybrid nature, has proven itself to be essential to the functioning of the Union.

4. Institutional Changes under the Lisbon Treaty

Because the structure and function of the Union's institutions are sufficiently developed and broadly accepted, neither the Constitution nor the Lisbon Treaty has offered any new institutions or significant changes in their competences. However, the Lisbon Treaty will carry forward two proposals from the Convention that may affect the EU's visibility and the operational efficiency of several institutions.

Under the Lisbon Treaty the European Council will no longer be chaired by a presidency that rotates every six months along with the presidency of the Council. Instead, the European Council will appoint a "permanent" president for a term of two and one-half years with the possibility of one renewal for a similar term.¹³³ The president would not be the elected leader of a Member State government. In fact, he or she would be prohibited from holding any national office.¹³⁴ In addition to this change, the Lisbon Treaty will create a "permanent" chair for the foreign affairs formation of the Council, replacing the semiannually rotating leadership post held by the foreign affairs minister of the Member State holding the EU presidency.¹³⁵ This position will be called the High Representative of the Union for Foreign Affairs and Security Policy.¹³⁶ The appointment by the European Council will be for an indefinite period, and the High Representative will also hold the external relations portfolio on the

¹³² The only reference to voting on the European Council is found in TEU Article 23, which permits the Council to refer matters relating to the common foreign and security policy to the European Council "for decision by unanimity." The Lisbon Treaty recapitulates Constitution Article I-21(4) by clearly stating that except where the Treaties otherwise provide, the European Council will take its decisions by consensus. Lisbon Treaty art. 1(16)(4).

¹³³ Lisbon Treaty art. 1(16)(5). This development is drawn from Article I-22 of the Constitution.

¹³⁴ Lisbon Treaty art. 1(16)(6).

¹³⁵ Lisbon Treaty art. 1(19). This was proposed in Article I-28 of the Constitution.

¹³⁶ Lisbon Treaty art. 1(19)(1). The Constitution designated the position as the Union Minister for Foreign Affairs. Constitution art. I-28(1). The Lisbon Treaty rejected that title. See discussion *infra* Part IV(A).

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Commission.¹³⁷

Internally and externally the new European Council President may offer a more recognizable and consistent leadership presence than is offered by the Treaties' rotating presidency. However, this office has the potential to usurp the position of the Commission President (and even the High Representative) as the day-to-day face of the Union. Would this necessarily be a positive development? Jürgen Schwarze is skeptical:

First, how much weight will the word of the President of the [European] Council have, and what will his position be among the Member States' Heads of State or Government? Second, who will be willing to accept this position, if the President of the [European] Council cannot occupy a position in the Member States simultaneously? Besides these issues, there may be some tension between the President of the [European] Council and the President of the Commission, but also between the President of the [European] Council and the – also new – Union Minister for Foreign Affairs [renamed in the Lisbon Treaty as the High Representative]. This possibility arises especially with regard to the Union's foreign and security policy.¹³⁸

Yet another concern is that the “double-hatted” High Representative might at times be confronted with conflicting masters and conflicting goals. On the Council he or she would be required to carry out policy “as mandated by the Council.”¹³⁹ On the Commission the individual would be “bound by Commission procedures” to the extent they are consistent with the policies of the Council.¹⁴⁰ Priority is given to the Council, but the traditional independence of the Commission could be affected by having one of its members subject to instruction by another institution.¹⁴¹

¹³⁷ Lisbon Treaty art. 1(19)(4).

¹³⁸ Jürgen Schwarze, *The Convention's Draft Treaty Establishing a Constitution for Europe*, 40 COMMON MKT. L. REV. 1037, 1039 (2003). In the same vein, Michael Dougan warns that the European Council President, especially if he or she is supported by a permanent professional staff, “could create a competing centre of executive power which might undermine the influence of the Commission, or at least create inefficiencies by setting the two institutions against each other.” Michael Dougan, *The Convention's Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers*, 28 EUR. L. REV. 763, 775 (2003). Juliane Kokott and Alexandra R  th suggest that the new President should “avoid conflicts by exercising his/her duties in the spirit of the political compromise that led to the creation of the post and by meticulously respecting the division of responsibilities within the institutional system without encroaching on the role of the Commission's President, the [High Representative] or even the Council.” Kokott & R  th, *supra* note 82, at 1338.

¹³⁹ Lisbon Treaty art. 1(19)(2).

¹⁴⁰ Lisbon Treaty art. 1(19)(4).

¹⁴¹ J  rgen Schwarze has commented:

Regardless of the operating challenges facing the new European Council President and the new High Representative, it is clear that these new posts will enhance the state-like character of the EU. Both positions more closely resemble the national model than do their predecessors.

D. Qualified Majority Voting

As discussed in part I of this Article, unanimous decision-making is a hallmark of intergovernmental organizations. In contrast, democratic states are committed to majority rule. An IGO that wishes to maintain its intergovernmental essence will hold fast to unanimity, but at a significant cost – unanimity inhibits the actual achievement of results. Stephen Zamora comments:

The disadvantage of the rule of unanimity, of course, is that international agreement is impossible to obtain when any single participant can block a decision; to achieve unanimous consent, the strength of a decision must be diluted so as to please everyone. Either result is unsatisfactory for an effectively functioning international organization that is charged with making and implementing decisions to meet urgent, practical problems.¹⁴²

Andreas Føllesdal concurs. Referring to voting patterns within the European Union he notes that “the multiple veto points ensuring stability easily leads to stagnation, preventing common action even where required.”¹⁴³ Even worse than inaction, according to Føllesdal, is the risk that a nation may threaten a veto to exact concessions in its favor: “Thus

Notwithstanding all the difficulties, the creation of the position of Union Minister for Foreign Affairs is a sound decision. Yet, from an idealistic point of view, the improvements in the field of foreign and security policy remain unsatisfactory. With the principle of unanimity still in effect, the strength of Europe’s foreign policy will remain rather limited. Realistically, the claim for national sovereignty, especially in the field of foreign policy, seems difficult to overcome in the near future. The office of the Union Minister for Foreign Affairs and the proposed solution of a ‘double-hat’ both reflect the current situation with regard to the different positions on foreign policy existing in the Member States. At the moment, a greater extent of common policy in this field does not seem achievable.

Schwarze, *supra* note 138, at 1040. See also Kokott & R  th, *supra* note 82, at 1327.

¹⁴² Zamora, *supra* note 9, at 574.

¹⁴³ Andreas F  llesdal, *Achieving Stability? Forms and Areas of Institutional and National Balances in the Draft Constitutional Treaty*, THE FEDERAL TRUST FOR EDUCATION & RESEARCH, ONLINE PAPER 06/04 at 5, Mar. 2004, http://www.fedtrust.co.uk/uploads/constitution/06_04.pdf.

many hold that this safety valve has been abused by some Member States to extort unfair benefits from cooperation.”¹⁴⁴ According to Zamora, the consequence of these challenges is a movement toward majority voting, with the EU at the forefront of that trend.¹⁴⁵ To achieve the significant results its members demand, the Union has gradually shifted from intergovernmentalism toward a more state-like use of majority voting in much of its agenda. This, however, has proven controversial.

The first battleground on majority decision-making within the EU has been the formula for what constitutes a qualified majority on the Council. The EC Treaty provides for Council decisions to be made by “a majority of its Members” unless the Treaty provides otherwise.¹⁴⁶ The treaty assigns a number of votes to each Member State, weighted by population, and a qualified majority is defined in most situations as 232 votes from Member States representing sixty-two percent of the EU population.¹⁴⁷ Under the Lisbon Treaty, qualified majority voting will remain the ordinary decisional requirement for the Council, with the EC Treaty formula in effect until 2014. Thereafter, a qualified majority will consist of “at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union.”¹⁴⁸ This triple formula would always require a number of the smaller or mid-sized Member States to consent to a Council decision. Furthermore, to prevent a small number of the largest states from obstructing legislation, a blocking minority must include at least four Member States.¹⁴⁹ The Lisbon Treaty’s

¹⁴⁴ *Id.* The EU Commission White Paper of 2001 (which provided a conceptual foundation for the Constitution) echoed this concern, noting that a consensus requirement often “holds policy-making hostage to national interests.” *Commission White Paper on European Governance*, at 29, COM (2001) 428 final (July 25, 2001) [hereafter White Paper]. The White Paper is discussed in Part III(B) of this article.

¹⁴⁵ Zamora, *supra* note 9, at 574.

¹⁴⁶ EC Treaty art. 205(1).

¹⁴⁷ EC Treaty art. 205(2), (4).

¹⁴⁸ Lisbon Treaty arts. 1(17)(3) and 1(17)(4). The percentage formula will take effect on November 1, 2014, although between that date and March 31, 2017 a Council member may force a reversion to the treaty formula on any vote. *See* Lisbon Treaty, Protocol on Transitional Provisions. For a detailed analysis of QMV formulas and suggestions for alternative allocations of voting power, see Bela Plechanovová, *Draft Constitution and the Decision-Making Rule for the Council of Ministers of the EU – Looking for an Alternative Solution*, (Eur. Integration Online Papers, Working Paper No. 12, 2004), <http://eiop.or.at/eiop/texte/2004-012.htm>.

¹⁴⁹ Lisbon Treaty art. 1(17)(4). Giovanni Grevi has observed that the requirement of four States to form a blocking minority would “prevent Germany, the UK, France or Italy from forming a blocking coalition of three.” Giovanni Grevi, *Light and shade of a quasi-Constitution – An Assessment*, THE FEDERAL TRUST FOR EDUCATION & RESEARCH, ONLINE PAPER 38/03, June 23, 2004, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=517423. For a detailed analysis of the various majority and blocking formulas possible under the

provisions mirror those proposed in the Constitution, although the path to agreement on these terms was highly contentious.¹⁵⁰

The second question regarding qualified majority voting is to which subjects it should be applied. Simply put, the more that is determined by qualified majority, the more the EU will resemble a democratic state. The more that is reserved for unanimity, the more the Union retains its intergovernmental flavor. The trend during the EU's first fifty years has been for each treaty amendment to expand the corpus of qualified majority decisions. It is beyond the scope of this article to address these matters in detail, but it is clear that further extension would take place under the Lisbon Treaty.¹⁵¹ The most significant development would be the transfer of the Third Pillar (which is largely subject to unanimous decisions) into the QMV-based EC Treaty.¹⁵² In addition, new areas of EU activity such as space, public health, tourism, sports, and energy would be subject to qualified majority voting. Overall, these changes lack the drama of a major development such as the Maastricht Treaty's creation of the European Union, but they do represent further EU integration. Qualified majority voting is essential to the EU's efficient operation, and thus the Member States continue to extend its reach.

Constitution and its predecessors, see Janis A. Emmanouilidis, *Historically Unique, Unfinished in Detail – An Evaluation of the Constitution*, Centre for Applied Policy Research, 2004/3 EU Reform, at 5-8, 12-13. For an earlier review of coalition-forming and negotiations that have led to QMV decisions on the Council, see Madeleine O. Hosli, *Coalitions and Power: Effects of Qualified Majority Voting in the Council of the European Union*, 34 J. COMMON MARKET STUD. 255 (1996).

¹⁵⁰ The original voting scheme proposed for the Constitution by the Convention was that a qualified majority would consist of a majority of the Member States representing three-fifths of the EU's population, but this formula was rejected at the IGC meetings that took place in December, 2003. Thomas Fuller, *Split on Voting Rights Sinks the EU Constitution*, INT'L HERALD TRIB., Dec. 15, 2003, at 1. The chief problem was that Spain and Poland wished to protect the favorable weighting of their Council votes as assigned to them in the Treaty of Nice, and the proposed QMV percentage formulas negated the special advantage they had come to expect. See Best, *supra* note 18, at 14. After much effort by EU leaders, the result was a revised voting scheme that somewhat increased the percentages necessary to achieve a qualified majority, to fifty-five percent of the Member States and sixty-five percent of the EU population. Constitution art. I-25(1).

¹⁵¹ For a list of decisions which the Constitution proposed to change from unanimity to QMV, see PIRIS, *supra* note 23, Annex 3, at 211-214. For a list of new subjects under the Constitution, for which QMV would have applied, see PIRIS, *supra* note 23, Annex 4, at 215-217. At the time of publication of this Article, similar lists for the Lisbon Treaty were not available, but the Lisbon Treaty appears to have preserved all of the QMV matters described by Piris.

¹⁵² See PIRIS, *supra* note 23, at 164-172. See also *supra* note 23 and accompanying text.

E. Resources and Budget

A typical intergovernmental organization is dependent on yearly contributions from its members.¹⁵³ In contrast, the EC Treaty provides that the Union's budget "shall be financed wholly from its own resources."¹⁵⁴ These "own resources" include customs duties on goods entering the Union, a value added tax, fines, and earned interest.¹⁵⁵ The Lisbon Treaty further emphasizes the EU's independence by stating: "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."¹⁵⁶ Under both the current regime and the Lisbon Treaty the EU's budget must be "in balance,"¹⁵⁷ and the Commission is prohibited from proposing any law or taking any action that would exceed the Community's resources.¹⁵⁸ The Lisbon Treaty adds a significant innovation in the form of a "multiannual financial framework" that offers a five-year set of ceilings for the various categories of EU expenditures.¹⁵⁹

Although the EU enjoys a measure of state-like independence in possessing its own sources of funding, its range of motion is carefully restricted. The EC Treaty requires that provisions "relating to the system of own resources of the Community" are subject to both a unanimous vote on the Council and approval by the Member States in accordance with their national constitutional requirements.¹⁶⁰ The Lisbon Treaty preserves these requirements and adds that each multiannual financial framework must be unanimously approved by the Council.¹⁶¹ The actual annual budget, based on these unanimous decisions, is approved by majority votes of the Council and European Parliament.¹⁶²

¹⁵³ See, e.g., Agreement Establishing the World Trade Organization, *supra* note 119, at art. VII.

¹⁵⁴ EC Treaty art. 269. EC Treaty Articles 271 to 280 contain details about the process of adopting the budget.

¹⁵⁵ See Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources, Oct. 7, 2000, 2000 O.J. (L 253) 42-46.

¹⁵⁶ Lisbon Treaty art. 2(259)(a). The Lisbon Treaty includes all of the innovations on resources and budget as were proposed in the Constitution. See Constitution arts. I-53 to I-55, III-403 to III-415. The Lisbon Treaty counterparts may be found in Lisbon Treaty arts. 2(257) – 2(276).

¹⁵⁷ EC Treaty art. 268. The Lisbon Treaty preserves this provision.

¹⁵⁸ EC Treaty art. 270. Where the EC Treaty refers to maintaining compliance with the annual budget, the Lisbon Treaty refers to the multiannual financial framework. Lisbon Treaty art. 2(257)(c)(4).

¹⁵⁹ Lisbon Treaty art. 2(261). See also Constitution arts. I-55, III-402.

¹⁶⁰ EC Treaty art. 269.

¹⁶¹ Lisbon Treaty art. 2(259)(b), 2(261)(2). However, note that a unanimous vote of the European Council can change this to approval by QMV. Lisbon Treaty art. 2(261)(2). For counterpart provisions in the Constitution, see Constitution arts. I-54, I-55.

¹⁶² EC Treaty art. 272; Lisbon Treaty art. 2(265).

Giovanni Grevi has criticised the unanimity requirement relating to Union resources. Commenting on provisions in the Constitution that are now reflected in the Lisbon Treaty, he argues:

Unanimity is now required for all relevant decisions related to own resources. Majority voting only applies to implementing measures where specifically provided for in earlier unanimous decisions. In a Union of 25, with crucial decisions on financing on the horizon, this is far from satisfactory.¹⁶³

It is certain that the already heavily-taxed Europeans will always be leery of new assessments from yet another level of government. It may also be the case that each Member State wishes to keep its fair share of the substantial sums that are passed along from the EU to the national governments in the form of financial support for agriculture and other programs.¹⁶⁴ Regardless of the motives or history behind the unanimity requirements, each Member State possesses a veto over critical decisions on EU resources. Even so, the EU's ability to finance Union activities through its own resources is a state-like attribute that is arguably essential to its distinctive character and extraordinary success.

F. Internal Activities – the Four Freedoms and More

All of the state-like attributes discussed to this point reflect the tools with which the EU is enabled to carry out its substantive activities, both internally and externally. This section and the following will address how the EU puts those tools to use.

Within its borders the EU has created the gold standard for how a group of nations can collectively manage their commercial dealings. The EU's internal market is the principal aspect of its First Pillar, and the "four freedoms" lie at the heart of this activity. The first and foremost of these is the free movement of goods within the EU.¹⁶⁵ This entails the prohibition of internal customs duties, quantitative restrictions, and "all measures having equivalent effect,"¹⁶⁶ thus creating an EU-wide free trade area. The second

¹⁶³ Grevi, *supra* note 149. For a socio-economic analysis of the challenges facing the EU in setting its future budgets, see Charles B. Blankart & Christian Kirchner, *The Deadlock of the EU Budget: An Economic Analysis of the Ways In and Ways Out*, in A CONSTITUTION FOR THE EUROPEAN UNION 109-38 (Charles B. Blankart & Dennis C. Mueller eds., 2004).

¹⁶⁴ Agriculture subsidies consume nearly half the EU budget. For the authority to support agriculture, see Constitution art. III-228(2).

¹⁶⁵ EC Treaty arts. 23-31.

¹⁶⁶ EC Treaty arts. 23, 25, 28, 29.

freedom is the free movement of persons, meaning workers.¹⁶⁷ A citizen of one Member State may take up employment in any other Member State. Third is the free movement of services and the related right of a citizen of one Member State to establish a business in another Member State.¹⁶⁸ The fourth freedom relates to movement of capital among the Member States.¹⁶⁹ Each of the freedoms may be subject to restrictions on grounds such as public morality, public policy, or public security.¹⁷⁰ Furthermore, temporary restrictions may apply to recently acceded Member States.¹⁷¹ Nevertheless, the four freedoms form the substantive foundation of the European Community.¹⁷²

Beyond the four freedoms, the EU regulates competition law,¹⁷³ and it addresses other internal matters such as agriculture,¹⁷⁴ transport,¹⁷⁵ and employment.¹⁷⁶ Indeed, there are few areas of commercial activity that are not governed or at least affected by policies emanating from Brussels. The sweep of EU oversight is a natural consequence of the Member States' commitment to creating a truly open European market.

Central oversight of internal trade is necessary to provide fairness and consistency, and it has led to the development of a trade zone unmatched by any other group of nations. The internal market is not only essential to the European Union; it is the Union's signature accomplishment. Neither the Constitution nor the Lisbon Treaty has proposed any significant changes in this area.

G. External Action

A free-trade area such as the European Union could content itself with regulating its internal market, but this would limit its effectiveness. Trade in goods and services is now a global affair, and it is vital for the EU to take a

¹⁶⁷ EC Treaty arts. 39-42.

¹⁶⁸ EC Treaty arts. 43-48 (right of establishment), 49-55 (freedom to provide services).

¹⁶⁹ EC Treaty arts. 56-60.

¹⁷⁰ *See, e.g.*, EC Treaty arts. 30, 39(3), 46, 58(1)(b).

¹⁷¹ *See, e.g.*, Article 1 of Annex VI to Protocol Concerning the Conditions and Arrangements for Admission of the Republic of Bulgaria and Romania to the European Union, June 21, 2005 O.J. (L 157) 104 (temporarily restricting the free movement of workers from Bulgaria).

¹⁷² For recent case law developments relating to the four freedoms, *see* Eleanor Spaventa, *From Gebhard to Carpenter: Towards a (non-)economic European Constitution*, 41 COMMON MKT. L. REV. 743 (2004).

¹⁷³ EC Treaty arts. 81-89.

¹⁷⁴ EC Treaty arts. 32-38.

¹⁷⁵ EC Treaty arts. 70-80.

¹⁷⁶ EC Treaty arts. 125-130.

uniform approach in its trade relationships with non-EU countries. Furthermore, both as a powerful trading bloc and as a group of nations with shared goals and aspirations, the Union is in an excellent position to assert itself generally in international affairs. Some areas of activity are subject to national vetoes, and the EU's effectiveness in those fields has yet to reach its full potential. Nevertheless, the range of the Union's permitted external action is impressive.

The EU's Second Pillar is a common foreign and security policy, which includes a common defense policy.¹⁷⁷ Although activity in this pillar is held back by the general requirement of Member State unanimity, the concept of an IGO having its own foreign policy goes well beyond the typical intergovernmental arrangement. The Third Pillar, also largely subject to the national veto, contemplates that on the international scene the Member States will defend common positions on police and judicial cooperation in criminal matters.¹⁷⁸ Likewise, the Member States are required to coordinate their visa and asylum policies in the First Pillar,¹⁷⁹ and the Euro-Zone states share a common approach to foreign exchange.¹⁸⁰ External trade relations are handled on behalf of the entire Union as a "common commercial policy."¹⁸¹ In addition, Member States are expected to take common positions in certain matters relating to the environment,¹⁸² public health,¹⁸³ culture,¹⁸⁴ development cooperation,¹⁸⁵ and economic, financial, and technical cooperation with third countries.¹⁸⁶ The TEU even anticipates a sharing of humanitarian activities.¹⁸⁷

The Lisbon Treaty largely maintains the foregoing approach. In fact, it amplifies the existing treaty provisions with new articles that provide a broad overview of the EU's external action.¹⁸⁸ Significantly, it transfers much of the Third Pillar into the First Pillar, resulting in the loss of certain Member State veto rights.¹⁸⁹ It also beefs up the prospects for EU humanitarian aid activity,¹⁹⁰ and for the first time it permits the Union to

¹⁷⁷ TEU arts. 11-28.

¹⁷⁸ TEU art. 37. TEU arts. 29-42 (laying out the Third Pillar).

¹⁷⁹ EC Treaty arts. 61-69.

¹⁸⁰ EC Treaty arts. 105, 111.

¹⁸¹ EC Treaty arts. 131-134.

¹⁸² EC Treaty art. 174.

¹⁸³ EC Treaty art. 152.

¹⁸⁴ EC Treaty art. 151.

¹⁸⁵ EC Treaty arts. 177-181.

¹⁸⁶ EC Treaty art. 181a.

¹⁸⁷ TEU art. 17(2).

¹⁸⁸ Lisbon Treaty art. 1(24).

¹⁸⁹ Lisbon Treaty art. 1(51).

¹⁹⁰ Lisbon Treaty art. 2(168).

adopt restrictive measures against non-EU countries and other parties.¹⁹¹

To facilitate this wide variety of international activities, the EU is permitted to set up its own relationships with international organizations and with non-EU countries.¹⁹² The Commission establishes its own embassy-like delegations around the world and sends representatives to international conferences.¹⁹³ Furthermore, the Union as an entity is empowered to enter into international agreements consistent with its international competences.¹⁹⁴ Absent a national constitutional limitation, these agreements also bind the Member States.¹⁹⁵ These tools and concepts are maintained in the Lisbon Treaty.

Using its array of external competences, the EU has emerged as a powerful member of the world community well beyond the individual stature borne by many of its Member States. This state-like attribute is an essential characteristic of the organization that was once called the Common Market. Euroskeptics like the British may chafe at an EU foreign policy that competes with Britain's, but a globally prominent European Union is likely here to stay.

III. THE EU'S OPTIONAL STATE-LIKE ATTRIBUTES

The European Union possesses many additional characteristics that resemble those found at the national level. Some of these attributes offer substance to individual rights or enhance EU programs, but they do not seem strictly necessary. Thus, this article classifies them as *optional* attributes. This section addresses the principles and programs that augment the EU endeavor without being vital to its success.

A. *Union Citizenship and Citizen Rights*

The Maastricht Treaty introduced the novel concept of "EU citizenship" for citizens of each Member State.¹⁹⁶ The TEU provides that one Union objective is the "introduction of a citizenship of the Union."¹⁹⁷ The details

¹⁹¹ Lisbon Treaty art. 2(169).

¹⁹² EC Treaty arts. 302-304; TEU art. 20. *See* Lisbon Treaty arts. 1(39), 2(175), 2(288).

¹⁹³ TEU art. 20. *See* Lisbon Treaty art. 1(39).

¹⁹⁴ EC Treaty art. 300; TEU art. 24. *See* Lisbon Treaty arts. 1(43), 2(173), 2(288).

¹⁹⁵ TEU art. 24(5); EC Treaty art. 300(7). *See* Lisbon Treaty art. 2(171).

¹⁹⁶ Jaap W. de Zwaan, *European Citizenship: Origin, Contents and Perspectives*, in *THE EU CONSTITUTION: THE BEST WAY FORWARD?* 245 (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans eds., 2005).

¹⁹⁷ TEU art. 2. Note that the preamble to the TEU also mentions the resolve of the

are provided in EC Treaty, whose primary citizenship provision states:

Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.¹⁹⁸

The treaty adds that EU citizens “shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.”¹⁹⁹

The rights attached to EU citizenship include the right to “move and reside freely” anywhere in the Union,²⁰⁰ a benefit that Jaap W. de Zwaan has described as the “core business” of EU citizenship.²⁰¹ The other components of the four freedoms are also of direct importance to Union citizens.²⁰² Beyond these basics, EU citizens are granted the right to vote and to stand as

Member States “to establish a citizenship common to the nationals of their countries.”

¹⁹⁸ EC Treaty art. 17(1).

¹⁹⁹ EC Treaty art. 17(2).

²⁰⁰ EC Treaty art. 18.

²⁰¹ De Zwaan, *supra* note 196, at 247. Union citizenship under the Treaties has been interpreted in a number of decisions by the European Court of Justice, described by De Zwaan as follows:

In fact it took the Court some time to give European Citizenship, notably the free movement dimension thereof, a proper dimension. This, however not so much with respect to *economically active* EU citizens. Indeed their situation is already governed in clear terms by the rules of the internal market, notably the provisions of the EC Treaty and secondary law concerning the free movement of workers and the right of establishment for independents.

No, the developments initiated by the Court of Justice concern the scope of – what is called – *non-economic* EU citizens who claim a right of residence in another Member State . . . such as

- persons whose status under Community law is not clear;
- job seekers;
- students; or
- family members.

Id. at 247-48. For De Zwaan’s full description of the various Court decisions, see *id.*, at 247-52.

²⁰² For a discussion of the connection between EU citizenship and the four freedoms, see Eleanor Spaventa, *From Gebhard to Carpenter: Towards a (non-)economic European Constitution*, 41 COMMON MKT. L. REV. 743, 768-71 (2004). For another extended analysis of the rights attached to EU citizenship, see Dennis C. Mueller, *Rights and Citizenship in the European Union*, in A CONSTITUTION FOR THE EUROPEAN UNION 61-84 (Charles B. Blankart & Dennis C. Mueller eds., 2004).

candidates in municipal elections wherever they reside within the Union.²⁰³ They are promised a certain level of diplomatic and consular protection from other Member State governments.²⁰⁴ They are ensured the right to petition the European Parliament, the right to apply to the European Ombudsman, and the right to communicate with Union institutions in any of the official EU languages.²⁰⁵ Several other EC Treaty provisions make passing references to EU citizens.²⁰⁶

The Lisbon Treaty follows the lead of the Constitution by emphasizing the benefits of EU citizenship.²⁰⁷ The Lisbon Treaty also offers several new substantive rights. These include increased access to meetings of the EU institutions,²⁰⁸ access to documents produced by all institutions,²⁰⁹ a citizens' legislative initiative procedure,²¹⁰ and the right to privacy of personal data.²¹¹ Most notably, the Lisbon Treaty formally adopts the Charter of Fundamental Rights as a text that will have "the same legal value as the Treaties."²¹² In addition, the EU must accede to the European Convention on Human Rights.²¹³ These two steps will inject into all aspects of Union activity a detailed citizens' bill of rights. De Zwaan comments that these additions will strengthen and promote EU citizenship as "a principle of EU law of major importance."²¹⁴

One may well ask why the European Union has chosen to confer a second form of citizenship on individuals who already possess national citizenship. By definition the members of an intergovernmental organization are nations, as represented by their governments. The IGO provides them certain rights, privileges, and services. A benefit like the free movement of goods and persons may well flow through the states to their respective citizens. However, the operating relationships are state-to-state, and complaints – even those relating to individuals – are settled among the

²⁰³ EC Treaty art. 19.

²⁰⁴ EC Treaty art. 20.

²⁰⁵ EC Treaty art. 21. Article 22 contemplates supplemental legislation on these matters.

²⁰⁶ See EC Treaty arts. 62, 154, 191, 194, 195, 255.

²⁰⁷ See Lisbon Treaty art. 2(34)(b); Constitution art. I-10(2).

²⁰⁸ Lisbon Treaty art. 2(28)(a). See Constitution art. I-50(2).

²⁰⁹ Lisbon Treaty art. 2(28)(b). See Constitution art. I-50(3).

²¹⁰ Lisbon Treaty arts. 1(12)(8B)(4), 2(37). See Constitution art. I-47(4).

²¹¹ Lisbon Treaty art. 2(29). See Constitution art. I-51. Legislation on personal data privacy is mandated in EC Treaty art. 286, but a basic right to such privacy is not expressed in the treaty.

²¹² Lisbon Treaty art. 1(8)(1). The Constitution incorporated the Charter into its main text. Constitution pt. II.

²¹³ Lisbon Treaty art. 1(8)(2).

²¹⁴ De Zwaan, *supra* note 196, at 257 (commenting on the Constitution, whose provisions are mirrored in the Lisbon Treaty).

participating national governments. A traditional intergovernmental organization does not grant “citizenship.” A citizen of one member state does not generally expect to enjoy a direct relationship with the organization or with the other member states except through his or her own national government.²¹⁵

One motivation undoubtedly behind the citizenship provisions in the Treaties is to encourage greater mobility within Europe. A person wishing to find employment or set up a business in another Member State need not feel like an expatriate if he or she can vote in municipal elections. Europeans traveling abroad will benefit if they can seek consular assistance from other Member States. Another motivation may be that direct access to the Union’s institutions through requirements of openness and transparency is far more efficient than second-hand dealings through national bureaucrats. Furthermore, requiring the EU to observe a bill of individual rights will make it look like an organization that is devoted to a greater societal good than mere management of the internal market. All of this makes sense, but it still does not explain why EU “citizenship” is granted. The panoply of European rights could be offered directly to the citizens of all Member States without calling them something other than Czech citizens, Dutch citizens, and so on. Designating them as “EU citizens” seems unnecessary.

The primary reason for granting EU citizenship appears to be familiarity. If a person who receives certain rights at the national level is called a citizen of that nation, then it seems consistent to call a person an EU citizen if he or she receives similar rights from the Union. Citizenship becomes a metaphor for the possession of certain individual rights. No harm should be seen in this exercise in semantics, unless one is generally suspicious of the supranational manifestations of European integration.

Despite the appeal of EU citizenship and its conceptual parallelism with other supranational characteristics of the EU, neither citizenship nor any of its attendant rights adds any substance to the Union’s activities as a free trade zone or international power. The Union could carry out all of its programs without direct engagement with individual Europeans, leaving it to the Member State governments to be the guardians and advocates of the rights of their citizens. The EU’s state-like grant of citizenship must therefore be seen as an option rather than a necessity.

²¹⁵ One notable departure from this norm is the right of a citizen from one NAFTA country to enter into dispute settlement directly with the government of another member country if the individual claims that the right to equal treatment in investments has been violated. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, Ch. 11, 32 I.L.M. 639 (1993).

B. Democracy at the Union Level

Democracy is a concept closely tied to citizen rights. The European Union presents an impressive array of democratic features, largely unprecedented in an intergovernmental organization. Impressive as they are, the question is whether they are necessary to the success of the EU project.

The TEU states that democracy is a principle to which the people of Europe are attached, and it expresses their collective desire to “further the democratic and efficient functioning of the institutions.”²¹⁶ The text of the TEU refers to a union in which “decisions are taken as openly as possible and as closely as possible to the citizens.”²¹⁷ It declares that the Union is founded on the principles of democracy, liberty, “respect for human rights and fundamental freedoms, and the rule of law.”²¹⁸ The EC Treaty applies these principles in its procedural and substantive provisions. For example, it creates the right of direct representation in the European Parliament,²¹⁹ and it recognizes the importance of EU-level political parties.²²⁰ The EC Treaty guarantees public access to documents created by the Council, Commission, and Parliament,²²¹ and it requires the Council to set a procedure for accessing its documents.²²² Legislation providing for privacy of personal data is mandated,²²³ but the treaty does not declare such protection to be a right.

To further promote the Union’s democratic credentials, the Lisbon Treaty adds a new title to the TEU, called “Provisions on Democratic Principles.”²²⁴ It begins by requiring the EU to treat all of its citizens equally.²²⁵ Subsequent articles guarantee citizens the right of direct representation at the Union level in the European Parliament, the right to “participate in the democratic life of the Union,” the right to have EU decisions taken “as openly as possible and as closely as possible to the citizen”²²⁶ and the right to act through EU-level political parties.²²⁷ The

²¹⁶ TEU preamble.

²¹⁷ TEU art. 1.

²¹⁸ TEU art. 6(1).

²¹⁹ EC Treaty art. 189, 190.

²²⁰ EC Treaty art. 191.

²²¹ EC Treaty art. 255.

²²² EC Treaty art. 207.

²²³ EC Treaty art. 286.

²²⁴ Lisbon Treaty art. 1(12). The Constitution contained a somewhat longer section entitled “The Democratic Life of the Union.” Constitution arts. I-4 – I-52. Several of its provisions are scattered throughout the Lisbon Treaty.

²²⁵ Lisbon Treaty art. 1(12)(8).

²²⁶ Without waiting for the Constitution or Lisbon Treaty to be ratified, the European Council has recently decided that certain meetings of the Council of Ministers shall be open to the public. This decision is taken under the Treaties, but without a specific textual mandate in

Lisbon Treaty also promises citizens a public forum for their views, access for their representative associations, consultation with the Commission on the coherence and transparency of EU actions, and a right of initiative.²²⁸ Other provisions address issues such as EU dialogue with “social partners,”²²⁹ the work of an ombudsman,²³⁰ a requirement of open meetings by most Union institutions,²³¹ increased access to EU documents,²³² a right of personal data privacy,²³³ and respect for the national status of churches and non-confessional organizations.²³⁴

Although the Lisbon Treaty does add substantive provisions, its primary expansion on the Treaties is one of emphasis.²³⁵ The Lisbon Treaty goes far beyond the Treaties by offering a cohesive section on democratic principles.²³⁶ Furthermore, it uses ambitious terms such as “representative democracy” and “the right to participate in the democratic life of the Union.”²³⁷ As noted above, the Lisbon Treaty also recognizes for the first time the constructive role of representative associations and social partners,

the Treaties. Presidency Conclusions, Brussels European Council, (June 16, 2006).

²²⁷ Lisbon Treaty art. 1(12)(8A).

²²⁸ Lisbon Treaty art. 1(12)(8B).

²²⁹ Lisbon Treaty art. 2(115). See Constitution art. I-48.

²³⁰ Lisbon Treaty arts. 2(34)(d), 2(183); Constitution art. I-49.

²³¹ Lisbon Treaty art. 2(28)(a); Constitution art. I-50.

²³² Lisbon Treaty art. 2(28)(b); Constitution art. I-50.

²³³ Lisbon Treaty art. 2(29)(1); Constitution art. I-51(1). Data protection is also required of Member States when carrying out EU-mandated activities. Lisbon Treaty art. 2(29)(2); Constitution art. I-51(2).

²³⁴ Lisbon Treaty art. 2(30); Constitution art. I-52. In fact, the EU is required to maintain regular, open and transparent dialogue with churches and similar organizations. Lisbon Treaty art. 2(30)(3); Constitution art. I-52(3).

²³⁵ Kokott and Ruth have commented on “increasing democratic legitimacy and transparency of the Institutions” as follows:

The Constitution, in principle, maintains the present institutional design, which, in spite of its well-known deficiencies with regard to the separation of powers and democratic legitimacy, seems to be the most appropriate at the Union’s current state of integration. Attempting a major overhaul of the institutional set-up would have not only been premature and therefore unlikely to lead to satisfying results, but would have endangered the whole project of a Constitution. It thus appears, for the time being, preferable, to bring about the necessary changes not by a single “constitutional stroke”, but through the European integration process of progressive reforms and adjustments of the Union’s institutional architecture, all the while striving for the utmost transparency.

Kokott & Ruth, *supra* note 82, at 1331. For their expanded analysis, see *id.* at 1331-33.

²³⁶ Lisbon Treaty art. 1(12).

²³⁷ Lisbon Treaty art. 1(12)(8A).

as well as the national status of churches and other such groups. Overall, the Lisbon Treaty offers a heightened sense of the EU's democratic legitimacy. This should not suggest, however, that the Member States have somehow failed at conducting themselves in a democratic way. The Lisbon Treaty acknowledges that the representatives to the European Council and Council are "democratically accountable either to their national Parliaments, or to their citizens."²³⁸

The question still remains as to why it is important to bring the trappings of democracy into the EU. A classic intergovernmental organization does not offer citizenship, nor does it offer its own democratic rights and processes to the citizens of its member states. Citizens of the member states are protected at the IGO by the accountability of their democratically chosen representatives.

G.F. Mancini notes that the European Community was not in fact founded as a democratic institution.²³⁹ He observes that a full national-style parliamentary system was not considered feasible, and that the founding members preferred to take a traditional IGO approach by seeking consensus in their decisions.²⁴⁰ However, by 2001 the European Union had developed far beyond its origins as a "small, exclusive, and elitist club."²⁴¹ The scope of EU activity had expanded beyond coal and steel management and a customs union to include programs that affected many areas of people's lives. It had grown from six to fifteen Member States, with further enlargement on the horizon.²⁴² It had thriving institutions occupying impressive buildings in Brussels and elsewhere. Nevertheless, despite these apparent successes, the Commission observed that all was not well. In a "White Paper on European Governance" published that year, the Commission noted that "[m]any people are losing confidence in a poorly understood and complex system . . . The Union is often seen as remote and at the same time too intrusive."²⁴³ To correct this perception the Commission proposed significant reforms to the EU institutions, based on "principles of good governance," including openness, participation, and accountability.²⁴⁴ These principles were described as the underpinning of democracy, not only for the Member States, but also for the Union.²⁴⁵ The

²³⁸ Lisbon Treaty art. 1(12)(8A)(2). *See* Constitution art. I-46(2).

²³⁹ G.F. MANCINI, DEMOCRACY AND CONSTITUTIONALISM IN THE EUROPEAN UNION: COLLECTED ESSAYS 31-33 (2000).

²⁴⁰ *Id.*

²⁴¹ JOHN MCCORMICK, UNDERSTANDING THE EUROPEAN UNION 64, (2005).

²⁴² *See supra* text accompanying note 27.

²⁴³ White Paper, *supra* note 144 at 3.

²⁴⁴ *Id.* at 10.

²⁴⁵ *Id.*

White Paper added: “Democracy depends on people being able to take part in public debate. To do this, they must have access to reliable information on European issues and to be able to scrutinise the policy process in its various stages.”²⁴⁶ The Commission insisted that both the EU institutions and the Member States “need to communicate more actively with the general public on European issues.”²⁴⁷

Later in 2001 the European Council took up the cause. At the conclusion of its meeting in Laeken, Belgium, it issued a “Declaration on the Future of the European Union.”²⁴⁸ The statement noted that the EU “derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses” as well as from its “democratic, transparent and efficient institutions.”²⁴⁹ The Declaration described a need for the EU “to become more democratic, more transparent and efficient.”²⁵⁰ Thus, it called for a convention to resolve the challenge of “how to bring citizens . . . closer to the European design and the European institutions.”²⁵¹ The ensuing Convention responded enthusiastically to these mandates, and it imbued the Constitution with the democratic elements that have been transposed into the Lisbon Treaty.

These developments demonstrate that the simple reason for creating and enhancing the democratic elements within the European Union is that European leaders believe that their citizens expect no less. Without these elements, the EU would suffer from a “democratic deficit”²⁵² that would alienate the people and ultimately threaten the Union’s existence. This may be the political reality, but there is an alternative. The Union could be an IGO, a project of the Member States whose separate governments take the responsibility of selling the centralized programs to their citizens. Popular influence on EU institutions and processes would flow from the citizens through their national governments. Democracy would be manifested

²⁴⁶ *Id.* at 11.

²⁴⁷ *Id.*

²⁴⁸ Laeken Declaration, *supra* note 82, at 19, 20.

²⁴⁹ *Id.* at 22-23. The Laeken Declaration stated: “The first question is . . . how we can increase the democratic legitimacy and transparency of the present institutions.” *Id.* at 23. The Laeken Declaration also called on EU institutions to be more open. *Id.* at 20.

²⁵⁰ *Id.* at 21.

²⁵¹ *Id.*

²⁵² The idea of a democratic deficit can be traced to David Marquand who in 1979 championed a strong European Parliament. See DAVID MARQUAND, PARLIAMENT FOR EUROPE (1979). See also Yves Mény, *De la démocratie en Europe: Old Concepts and New Challenges*, 41 J. COMMON MKT. STUD. 1 (2002). See also Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 EUR. L.J. 5, 6 (1998). For an extended analysis of the European Union’s “democratic deficit” and how the Constitution might have affected democratic rights and processes within the EU, see Siebersson, *supra* note 8.

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naturally – and exclusively – in and through the Member States.²⁵³ Strictly speaking, democracy at the EU level is not necessary.

C. *The European Parliament*

The European Parliament²⁵⁴ serves as the second legislative chamber in the Union and is identified in the EC Treaty and TEU as a primary EU institution.²⁵⁵ Most EU legislation must be approved by a majority of the Parliament.²⁵⁶ The Parliament must also assent to appointment of the Commission,²⁵⁷ and it possesses the power to discharge the Commission through a vote of censure.²⁵⁸ Parliament members are elected by popular

²⁵³ Peter Lindseth argues that the EU could remain “in essence, a supranational administrative body, the legitimacy of which derives from its ability to solve practical problems reasonably efficiently, as a regulatory agency of the Member States representing their particular national communities.” Peter Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 683 (1999).

²⁵⁴ The primary provisions describing the Parliament are EC Treaty arts. 189-201.

²⁵⁵ EC Treaty art. 5; TEU art. 7.

²⁵⁶ This is the co-decision procedure. EC Treaty art. 251. Majority voting is mandated in EC Treaty art. 198.

²⁵⁷ EC Treaty art. 214. The appointment of the Commission in late 2004 illustrated that the Parliament’s approval powers under EC Treaty Article 214 can be significant. Because of controversy surrounding certain Commissioners nominated by incoming president José Manuel Barroso, the Parliament threatened to reject his entire slate. In the face of such unprecedented opposition, Mr. Barroso made adjustments to the slate, and the newly configured Commission was accepted by the Parliament on November 18, 2004. One commentator has observed:

This marked a new stage in the development of the powers of the European Parliament, not through Treaty revisions, or soft law, or recourse to the European courts, but instead through the constitutionally mandated procedure for approving the members of the European Commission. Naturally, in flexing its legal muscles, the European Parliament improved its position in inter-institutional politics, notably in relation to the Commission. But the most significant gain was not to a specific institution but instead to the EU’s constitutional system: it strengthened representative, democratic EU government.

Francis Snyder, *Editorial: Enhancing EU Democracy, Constituting the European Union*, 11 EUR. L.J. 131, 377-78 (2005).

²⁵⁸ EC Treaty art. 201. The censure procedure has never been formally carried out. However, in 1999, when certain members of the Commission were charged with corruption, the threat of censure by the Parliament led to the resignation of the entire Commission. See Reginald Dale, *Commission’s ‘Crisis’ Is a Good Sign*, INT’L HERALD TRIB., Mar. 19, 1999, at 11.

vote, with seats assigned to each Member State on the basis of population.²⁵⁹ Parliamentarians are affiliated through EU-wide political parties rather than through national affiliations.²⁶⁰

The Lisbon Treaty would affect the Parliament in two significant ways. First, the Lisbon Treaty expands the Parliament's role to full participation in the EU's budgeting process.²⁶¹ Second, the little-used cooperation procedure under the EC Treaty, by which the Parliament could affect EU legislation but could not block measures, is finally eliminated.²⁶² Under the Lisbon Treaty the ordinary legislative procedure is the co-decision procedure.²⁶³ Co-decision allows the Parliament to prevent a legislative measure from taking effect. These two expansions in the Parliament's power reflect the steady movement toward full legislative participation by the assembly that was once merely consultative.²⁶⁴

Unlike its national counterparts, the European Parliament lacks the traditional power to appoint and remove high political officials -- both the European Council and Council are beyond Parliament's control. Parliament is also denied the basic right of a legislature to initiate legislation. That

²⁵⁹ EC Treaty art. 190.

²⁶⁰ EC Treaty art. 191.

²⁶¹ Under Article 2(265) of the Lisbon Treaty (which mirrors Article III-404 of the Constitution) the Parliament must approve all aspects of the budget and may propose amendments to it. Under Article 272 of the EC Treaty the Parliament's right to amend was limited to compulsory expenditures. Article 272(4) states that Parliament has a right "to amend the draft budget, acting by a majority of its Members, and to propose to the Council, acting by an absolute majority of the votes cast, modifications to the draft budget relating to *expenditure necessarily resulting from this Treaty or from acts adopted in accordance therewith.*" EC Treaty art. 272(4) (emphasis supplied).

²⁶² For the cooperation procedure see EC Treaty art. 252. The only instances in which the cooperation procedure is found after the Treaty of Nice relate to certain matters of economic and monetary union. See EC Treaty arts. 99, 102, 103, 106. The removal of Article 252 from the EC Treaty is accomplished through Lisbon Treaty art. 2(240).

²⁶³ See Lisbon Treaty arts. 2(2)(c), 2(239). See also Constitution art. I-34(2), III-396. Under the EC Treaty the co-decision procedure is set forth in Article 251.

²⁶⁴ The Treaty of Rome created a Parliamentary Assembly with minimal supervisory powers over the Commission and a consultative role in legislation. Following a name change to European Parliament in 1962 and the first direct elections in 1979, the Parliament has gradually received greater supervisory, legislative, and budgetary authority through subsequent treaties. The most significant step was the Maastricht Treaty's grant of co-decision authority with the Council in specific areas of legislation. Expansion of these areas, more supervision over the Commission through censure and Committees of Inquiry, and more involvement in the Union's budgetary procedures have enhanced Parliament's role as an important Union Institution. For an overview of the development of the Parliament see Ricardo Passos, *The Expanding Role of the European Parliament*, in *THE EU CONSTITUTION: THE BEST WAY FORWARD?* (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans eds., 2005). See also MICHAEL NEWMAN, *DEMOCRACY, SOVEREIGNTY AND THE EUROPEAN UNION* 174-83 (1996).

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power is generally reserved for the Commission,²⁶⁵ although the Parliament may “request” that the Commission submit particular legislative proposals.²⁶⁶ The Lisbon Treaty expands on this procedure by requiring the Commission to explain its reasoning to Parliament when it chooses not to comply with a request.²⁶⁷ Despite this development, the Parliament’s lack of legislative initiative consigns it to a reactive rather than proactive role on EU legislation.²⁶⁸

This brief description of the European Parliament raises the question, why have a Parliament at all? Certainly not for efficiency – the activity of the Parliament clearly delays and complicates the legislative process. Furthermore, the Parliament adds no professionalism to the process; to the contrary, it creates an extra layer of politicization. In truth, the Parliament exists as a means of fostering a stronger connection between the Eurocrats in Brussels and the ordinary European citizen. The EC Treaty says as much

²⁶⁵ This reservation arises from EC Treaty art. 251(2), which describes the initiation of legislation as follows: “The Commission shall submit a proposal to the European Parliament and the Council.” Note that in certain instances legislation may be initiated by Member States. *See, e.g.*, EC Treaty art. 67; TEU arts. 34(2), 40a, 42. The Lisbon Treaty refers more broadly to the possibility of initiatives being submitted by a group of Member States, the European Parliament or other EU bodies. Lisbon Treaty art. 2(239)(b)(15). *See also* Constitution art. I-34(3).

²⁶⁶ EC Treaty art. 192.

²⁶⁷ Lisbon Treaty art. 2(181). This amplification was proposed in Constitution art. III-332.

²⁶⁸ While the Parliament’s lack of legislative initiative is often viewed as a weakness in the EU system, particularly as regards the democratic legitimacy of the Union’s legislative process, at least one commentator has seen a positive side to the matter. John Temple Lang has observed:

One advantage of the “Community method” has been greatly underestimated. Since only proposals made by the Commission can be considered by the Council and the Parliament, it is impossible for lobbyists to get Members of the European Parliament to propose legislation. The “Community method” is a tremendous constraint on excessive legislation, and a valuable limitation on the powers of big business and vested interests. One has only to look at the United States to see how easily lobbyists can get Senators and Congressmen, anxious for re-election, to propose Bills on every conceivable subject. If the power of the Commission to influence policy is sometimes resented, its value as a safeguard against pressure groups should also be welcomed.

John Temple Lang, *The Commission: The Key to the Constitutional Treaty for Europe*, 26 *FORDHAM INT’L L.J.* 1598, 1601 (2003). Interestingly, although the Lisbon Treaty does not offer a general legislative initiative to the European Parliament, it does create the citizen initiative referenced earlier in this Article. Lisbon Treaty arts. 1(12)(8B)(4), 2(37). Carrying forward the Lang sentiments, this is arguably even worse than creating a parliamentary competence, and commentators have complained that this is a procedure that could “hijack” the Union’s normal legislative processes. *Editorial, A Constitution Whose Bottle is Definitely Half-Full and Not Half-Empty*, 28 *EUR. L.REV.* 449 (2003).

when it states that Parliament's pan-European political parties "contribute to forming European awareness and to expressing the will of citizens of the Union."²⁶⁹ In an IGO that awareness would be transferred to the people by their national representatives, and the will of the citizens would flow upward through the same officials. Regardless of the Parliament's appeal, everything it does could more easily be handled by the Council alone. The European Parliament is not essential to the functioning of the Union.

D. *The Common Currency*

Although the internal market is the most sweeping success of the European Union, the program most visible to the average person is the EU's common currency, the euro. This development was a long-time aspiration of the Union's visionaries. They understood that the internal market would function more efficiently if it did not necessitate repeated currency conversion and if a central authority could set monetary policy for all Member States. Despite these advantages, the EU's monetary union was a controversial program that represented a significant transfer of power to the Union. The release of euro bills and coins in 2002 and the phasing out of national currencies were the culmination of a series of politically challenging moves. Leading up to the euro's release, the EU had fixed exchange rates, created the European currency unit (ecu) and founded the European Central Bank.²⁷⁰

Despite its success, the euro is not the sole currency within the EU. Only fifteen of the twenty-seven Member States are currently within the Euro-Zone.²⁷¹ Nevertheless, even with less than full participation the euro has emerged as a major currency, rivaling the U.S. dollar as a world standard.²⁷²

The EU's goal of institutional reform through the Constitution and the Lisbon Treaty does not include any ambitions to significantly change the Union's monetary system. The EC Treaty describes the Union's monetary

²⁶⁹ EC Treaty art. 191.

²⁷⁰ For a concise and useful history of the euro and the European Central Bank see McCormick, *supra* note 241, 173-179.

²⁷¹ The current Euro-Zone countries are Finland, Ireland, the Netherlands, Belgium, Luxembourg, France, Germany, Spain, Portugal, Austria, Italy, Greece, Slovenia, Cyprus and Malta. The new Member States are required to join when economically qualified. These are Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Bulgaria, and Romania. Two states (the U.K. and Denmark) are permitted to remain outside the Euro-Zone. Sweden would easily qualify for participation, but it has not yet created the necessary institutional independence for its central bank. *Id.*

²⁷² *Id.* at 177.

policy,²⁷³ as well as relevant institutions²⁷⁴ and the various stages of monetary union.²⁷⁵ It does not mention the euro by name, but several provisions refer to the ecu.²⁷⁶ The EC Treaty also grants legal personality to the European Central Bank and mandates its independence from the EU and the Member States.²⁷⁷ The Lisbon Treaty leaves the EU monetary system and its institutional structure firmly in place. However, it modernizes the EC Treaty by inserting the term “euro”²⁷⁸ and by adjusting the historical transitional provisions relating to introduction of the euro.²⁷⁹ The new treaty also adds a chapter dealing with the functioning of the Euro Group.²⁸⁰

A currency is a symbol of nationhood, and the European Union’s common currency is one of its most overt state-like attributes. One might well argue that the euro is as significant as a system of own resources or a program of external activities – both of which this article classifies as essential. However, for several reasons the euro is more appropriately categorized as an optional feature. First, the EU prospered and grew without the euro. There is no indication that the failure of monetary unification during the past fifteen years would have inhibited further European integration or further success of the other Union programs. Second, the intentional lack of participation by three economically successful Member States – the United Kingdom, Denmark, and Sweden – has not obviously weakened the EU. Third, the EU is currently a success on many levels despite the fact that the current members of the Euro-Zone are only a minority of the Member States. Finally, cross-border trade continues to expand throughout the world, despite the fact that neither the WTO nor any regional free-trade zone involving economically successful nations has taken meaningful steps toward a common currency.

IV. THE EU’S PROMOTIONAL STATE-LIKE ATTRIBUTES

Although this article’s classification of the EU’s state-like attributes as essential or optional should be regarded as flexible, all of the foregoing

²⁷³ EC Treaty arts. 105-11.

²⁷⁴ EC Treaty arts. 112-15.

²⁷⁵ EC Treaty arts. 116-24.

²⁷⁶ *See, e.g.*, EC Treaty arts. 111(1), 117(2), 118.

²⁷⁷ EC Treaty arts. 107, 108. The European Central Bank’s statute is attached as a protocol to the treaty. Protocol on the Statute of the European system of Central Banks and of the European Central Bank 1992 O.J. 191, 68 (July 7, 1992).

²⁷⁸ *See, e.g.*, Lisbon Treaty art. 2(85)(b).

²⁷⁹ Lisbon Treaty arts. 2(101) – 2(110).

²⁸⁰ Lisbon Treaty art. 2(100).

attributes have survived. Neither the Constitution nor the Lisbon Treaty has proposed shedding any of these characteristics, and thus all of them will continue to play a role in the process of European integration. In contrast, the promotional attributes proposed in the Constitution have not survived the document's death. These characteristics might foster greater identification with the EU, but they offer no substance at all. They were cut from the Lisbon Treaty because they were considered unnecessary and controversial. The ensuing analysis will identify and reflect on these lost items.

A. Mottoes and Anthems and Names – Oh My!

Article I-8 of the Constitution, entitled “The symbols of the Union,” offered textual recognition of the EU’s flag, anthem, motto, and annual holiday.²⁸¹ These mimic the typical symbols of a nation. The Union adopted them in the 1980s,²⁸² but they were never incorporated into the Treaties. Their inclusion in the Constitution was an apparent attempt to formalize their significance and to augment the EU’s “look and feel” of a state. In mandating the Lisbon Treaty, the European Council rejected this approach with the following succinct comment: “[T]here will be no article in the amended Treaties mentioning the symbols of the EU such as the flag, the anthem or the motto.”²⁸³

The Lisbon Treaty similarly rejects the Constitution’s proposal to rename certain of the Union’s legal acts. Where the EC Treaty permits “regulations,” the Constitution called them “European laws.” A “directive” under the treaty was designated in the Constitution as a “European framework law,” while “decisions” were to be called “European decisions.”²⁸⁴ The European Council dismissed these developments, commenting that “the denominations ‘law’ and ‘framework law’ will be abandoned, the existing denominations ‘regulations’, ‘directives’ and ‘decisions’ being retained.”²⁸⁵

²⁸¹ The Constitution described the flag as “a circle of twelve gold stars on a blue background.” It stated that the anthem was “based on the ‘Ode to Joy’ from the Ninth Symphony by Ludwig von Beethoven.” It identified the motto as “United in diversity.” It also designated May 9 as “Europe Day.” The constitutional provision also made reference to the euro. Constitution art. I-8. Note that the same flag and anthem had previously been adopted by the Council of Europe. See Flag, Anthem and Logo: The Council of Europe’s Symbols, http://www.coe.int/T/E/Com/About_Coe/emblems/emblemes.asp (last visited Jan. 11, 2008).

²⁸² See http://europa.eu/abc/symbols/index_en.htm (last visited Jan. 11, 2008).

²⁸³ Presidency Conclusions, *supra* note 2, Annex I, art. 3.

²⁸⁴ See Constitution art. I-33(1); EC Treaty art. 249.

²⁸⁵ Presidency Conclusions, *supra* note 2, Annex I, art. 3. In addition, the European Council ignored the Constitution’s proposal for a new legislative act called a “European regulation.” See Constitution art. I-33(1). The Lisbon Treaty does not include such an act.

Another blow to the Constitution's nomenclature came when the European Council rejected the name "Union Minister for Foreign Affairs" to designate the person serving as both the Council's chair of foreign affairs and the Commission's vice-president responsible for external relations.²⁸⁶ Currently, the TEU designates the Secretary-General of the Council as the "High Representative for the common foreign and security policy."²⁸⁷ The Commissioner for External Relations chairs the Commission's external affairs group.²⁸⁸ The Lisbon Treaty will retain the Constitution's proposal to endow one official with these joint responsibilities. However, it will name the position, "High Representative of the Union for Foreign Affairs and Security Policy."²⁸⁹

Two additional stylistic changes proposed at the Convention failed to survive the drafting process. The preliminary outline of the Constitution proposed alternative designations for the EU itself, including "United States of Europe" and "United Europe."²⁹⁰ Convention President Valéry Giscard d'Estaing personally favored "United Europe," but his Praesidium insisted on retaining the name European Union.²⁹¹ A subtler but equally volatile proposal was the use of the word "federal." An early draft of the Constitution referred to the Union as carrying out its activities "on a federal basis."²⁹² This created a "storm" of "hostile criticism and amendments,"²⁹³ with the result that the "infamous F-word"²⁹⁴ is never used to describe the Union's pursuit of its objectives. Instead, the Constitution contained the safer phrase, "on a Community basis."²⁹⁵ The Lisbon Treaty contains no reference to either a federal or community basis.

²⁸⁶ See Constitution art. I-28(1). See also *supra* text accompanying notes 128-130.

²⁸⁷ TEU art. 18(3).

²⁸⁸ See Commission's Home Page: http://ec.europa.eu/commission_barroso/ferrero-waldner/index_en.htm (last visited Jan. 10, 2008).

²⁸⁹ Lisbon Treaty art. 1(19)(1).

²⁹⁰ Preliminary Draft Constitutional Treaty, Oct. 28, 2002, CONV 369/02.

²⁹¹ Norman, *supra* note 42, at 72, 192, 250.

²⁹² The Preliminary Draft of the Constitution described "[a] Union of European States which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain competences on a federal basis." Praesidium of the European Convention, Preliminary Draft Constitutional Treaty, Oct. 28, 2002, CONV 369/02, Part One, art. 1.

²⁹³ Norman, *supra* note 42, at 192. See also Kokott & Ruth, *supra* note 82, at 1321.

²⁹⁴ Markus G. Puder, *Constitutionalizing the European Union – More Than a Sense of Direction From the Convention on the Future of Europe*, 26 *FORDHAM INT'L L.J.* 1562, 1583 (2003).

²⁹⁵ Constitution art. I-1(1). Kalypso Nicolaidis argues that the word "federal" might appropriately be used for the EU in its current form, but in the sense of a "federal union, not as a federal state." He concedes that the phrase "Community way" is "an acceptable second best." Nicolaidis, *supra* note 7, at 6.

B. *Calling It a Constitution*

In matters of symbolism, the Convention's single most controversial proposal was to call the EU's new foundational document a "constitution." The Constitution's drafters did not pull this term out of thin air. The idea of a "constitution" had been floated prior to the Convention. In the concluding paragraph of its 2001 White Paper the Commission teasingly referred to "the wider process of constitutional reform."²⁹⁶ Thereafter the European Council suggested – perhaps even invited – the use of the C-word when it entitled a key section of the Laeken Declaration, "Towards a Constitution for European citizens."²⁹⁷ Arguing that the complications of existing treaty arrangements should be remedied, the Declaration stated:

The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be?²⁹⁸

There was much debate at the Convention whether its creation should be called a constitution or a constitutional treaty. According to Peter Norman, the two terms "were bandied about without clear distinction throughout the life of the Convention."²⁹⁹ Reflecting this lack of accord, the first published outline of the Constitution was released in a document entitled "Preliminary Draft Constitutional Treaty."³⁰⁰ However, the draft's proposed title for the document – and this was the title in the final text as well – was "Treaty Establishing a Constitution for Europe."³⁰¹

More than one year after the French and Dutch referenda, during Finland's 2006 presidency, Finnish Foreign Minister Erkki Tuomioja foresaw the demise of the Constitution. He suggested that a future treaty revision should retain "as much as possible" of the Constitution's text, but should avoid using the title "Constitution."³⁰² Similarly, commentator Honor Mahony observed that the term "European Constitution" had proven

²⁹⁶ White Paper, *supra* note 144, at 35.

²⁹⁷ Laeken Declaration, *supra* note 82, at 23.

²⁹⁸ *Id.* at 24.

²⁹⁹ Norman, *supra* note 42, at 79.

³⁰⁰ Preliminary Draft Constitutional Treaty, Oct. 28, 2002, CONV 369/02.

³⁰¹ *Id.* at 2. The terms "constitution," "constitutional," and "constitutional treaty" each appear twice in the outline headings or text of the Preliminary Draft. *See id.* at 2, 8, 10, 18.

³⁰² Lucia Kubusova, *Finland Seeks Better Climate for Revised EU Constitution*, EUOBSERVER (June 30, 2006), available at <http://www.eu-digest.com/2006/06/finland-seeks-better-climate-for.html>.

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to be “a psychological step too far for several countries, particularly Britain.” Mahony noted that a British minister had also argued that the use of the name constitution was the “key issue” in France, the Netherlands, and the UK.³⁰³ Likewise, Juliane Kokott and Alexandra Ruth note that for the British the term “constitution” was “as much a taboo as the term ‘federal’ itself.”³⁰⁴ They add:

It seems, therefore, all the more remarkable that the Convention, backed by the political momentum of its convocation, quite quickly managed to raise the necessary support for picking up the Laeken reference to a ‘constitutional text’ and, in the end, by calling the text a ‘Treaty establishing a Constitution’ even went beyond what was terminologically expected³⁰⁵

In the first half of 2007, as the German presidency continued the effort to salvage the Constitution, newly elected French President Nicolas Sarkozy entered the fray. He expressed a preference for a more modest document that would rescue the Constitution “by boiling it down to its legal essence.”³⁰⁶ During that same period Commission President José Manuel Barroso was described as delivering “last rites” to the Constitution by soundly criticizing the decision to so name it.³⁰⁷ At the same time he publicly pledged his support for the document’s institutional reforms.³⁰⁸ Facing the inevitable, the European Council decided to abandon the “constitutional concept” and proceed with the Reform Treaty.³⁰⁹

C. *Summing Up the Symbols*

The symbols and terminology described above are state-like attributes, but they are not essential to the EU’s success and they do not add any substantive depth to the EU programs. They are merely promotional, designed to foster popular identification with the Union. The Convention’s

³⁰³ Honor Mahony and Mark Beunderman, *Pro-EU Constitution States Discuss Tactics*, EUOBSERVER, Jan. 25, 2007, <http://euobserver.com/9/23345>.

³⁰⁴ Kokott & R  th, *supra* note 82, at 1320.

³⁰⁵ *Id.*

³⁰⁶ *Nicolas Sarkozy’s European Plans*, THE ECONOMIST (May 10, 2007) available at http://www.economist.com/world/europe/displaystory.cfm?story_id=9149133.

³⁰⁷ Nicholas Watt, *Barroso Calls for EU to Move Beyond Constitution Debacle*, GUARDIAN (Oct. 16, 2006), available at http://www.guardian.co.uk/print/0,,329602_512-106710,00.html.

³⁰⁸ *Id.*

³⁰⁹ Presidency Conclusions, *supra* note 2, at 15. The European Council stated that “the constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called ‘Constitution’, [was] abandoned.” *Id.*

proposal to grant them textual recognition was arguably nothing more than a public relations gimmick. If so, then in light of the importance of European integration and the EU project, the abandonment of textual references to symbols and names appears relatively unimportant. Moreover, the EU will continue to use the symbols in the “real world,”³¹⁰ and the Constitution’s substance will carry over into the Lisbon Treaty. If the steak remains, there should be no reason to rue the loss of the sizzle.

However, the fact is that words and other symbols are powerful. The medium may well be the message. Does anyone doubt the ability of art or slogans or music to elicit strong reactions? Some symbols, such as the swastika, are so evocative that everyone would agree that it is more than a mere image. Calling a document a “constitution” arguably signals its difference from a treaty, even if in substance it resembles a treaty. Designating an organization’s legal instrument as a “framework law” rather than a “directive” offers a different sense of who or what is issuing the instrument. Calling an official a “minister” rather than a “high representative” suggests that the person bears a relationship to a nation rather than to a different type of entity. Many intergovernmental organizations have flags and logos, but their symbols and terminology are not as plentiful or state-like as those of the EU. What, then, was the Convention suggesting? Honor Mahony has commented that to some Europeans, such as the Dutch, “this looks too much like statehood.”³¹¹ Similarly a Luxembourg official stated that the Constitution’s reference to symbols raised concerns over a European “superstate.”³¹²

If not a superstate, did the Constitution at least imply a new legal order for the Union?³¹³ The European Council seems to have thought so. In its Presidency Conclusions of June 2007 it declared:

The *TEU* and the *Treaty on the Functioning of the Union* will not have a constitutional character. The terminology used throughout the Treaties will reflect this change: the term “Constitution” will not be used, the “Union Minister for Foreign

³¹⁰ Dutch Minister for European Affairs Frans Timmerman has stated his support for excluding the flag and other symbols from the text of the Treaties, but “not from the real world.” Jens-Peter Bonde, *Comment: Constitution by the Backdoor*, EUOBSERVER, (Apr. 13, 2007), available at http://www.free-europe.org/blog_english.php?itemid=362. Indeed, there is no indication of any desire on the part of the European Council to require the EU to stop using its symbols.

³¹¹ Mahony and Beunderman, *supra* note 303.

³¹² *Id.*

³¹³ One commentator has argued that when the IGC of 2004 approved the Constitution and sent it to the Member States for ratification, the European Council “underestimated the importance of the change of paradigm which the constitutional treaty brings with it.” Jacob Hoeksma, *Beyond the Constitution*, THE FED. TR. EUR. NEWSL., January 2006, at 3, 6.

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Affairs” will be called High Representative of the Union for Foreign Affairs and Security Policy and the denominations “law” and “framework law” will be abandoned, the existing denominations “regulations”, “directives” and “decisions” being retained. Likewise, there will be no article in the amended Treaties mentioning the symbols of the EU such as the flag, the anthem or the motto. Concerning the primacy of EU law, the IGC will adopt a Declaration recalling the existing case law of the EU Court of Justice.³¹⁴

The same statement referred to abandonment of the “constitutional concept,” and this is far more than a fuss over outward manifestations. The character of the Constitution was of concern. The European Council was expressing its reluctance to revive a document that had apparently raised deep political anxiety over an unwanted new direction for the EU.³¹⁵ In the end, the Constitution’s terms and symbols were not worth the trouble they caused. While attractive on the outside, the inner fruit of these promotional attributes proved sour.

CONCLUSION

Did symbolism sink the Constitution? Consider the most prominent events that doomed the Constitution, namely, the French and Dutch referenda in 2005. Several other countries, including the United Kingdom, Poland, and the Czech Republic, may well have given the thumbs down eventually. The fatal blow to ratification, however, was delivered by the plebiscites in France and the Netherlands. Were the negative votes attributable to antipathy toward the Constitution’s terminology and its endorsement of the European flag? Interestingly, the majority of “no” voters in the two countries reported that their votes were based on other concerns. In France, voters were predominantly concerned with the country’s economic and employment situation, and the referendum was a convenient opportunity to vent this broader frustration.³¹⁶ In the Netherlands, many of

³¹⁴ Presidency Conclusions, *supra* note 2, at 3.

³¹⁵ The difference in perceptions on the Constitution and the Reform Treaty may be found in the attitude of the Dutch Government, which in 2005 had put the Constitution to a public referendum. In 2007 the government concluded that a referendum on the Lisbon Treaty was not necessary. The later conclusion was based in part on the opinion of the government’s advisory body, the Council of State. The Council advised that the new treaty “differs fundamentally” from the Constitution in that the new instrument does not have a “constitutional nature.” Government.nl, Press Release, Normal Procedure for New EU Treaty (Sept. 21, 2007), http://www.government.nl/News/Press_releases_and_news_items/2007/September/Normal_procedure_for_new_EU_treaty.

³¹⁶ In surveys taken immediately after the 2005 referenda, EU officials found that fifty-seven percent of French who voted no stated that they voted out of concern over the economic

those voting “no” expressed concern over national sovereignty and the pace of EU integration, but most cited other concerns.³¹⁷

Beyond the surveys, one commentator speculated that the results of the referenda might have been a reaction to a number of things, including the Union’s 2004 enlargement or economic competition from the new low-wage Member States.³¹⁸ It could also have represented anxiety over the prospect that Muslim Turkey might soon become a member. Other analyses focused on difficulties with large immigrant populations and the attendant loss of national identity.³¹⁹ Commission President Barroso echoed these thoughts when he spoke of a “federation of fear” arising in Europe.³²⁰ Another possibility is that the average voter was simply unable to understand the lengthy and highly technical Constitution.³²¹ The political leaders in France and the Netherlands may have dropped the ball and failed to effectively sell the Constitution to their constituents.³²²

Even if the Constitution’s symbolic aspects were not the driving force behind the failed referenda, symbolism did achieve prominence during the ensuing two years. The attempted salvage operation during the “reflection period”³²³ was stymied by the very idea that the EU might have a “constitution.” The European Council eventually concluded that it could not

and employment situation in France. Only ten percent based their negative vote on “loss of national sovereignty,” “the draft goes too far/advances too quickly,” or “I do not want a European political union/a European federal State/the ‘United States’ of Europe.” *The European Constitution: Post-referendum Survey in France*, EUROBAROMETER, June 2005, at 18, http://ec.europa.eu/public_opinion/flash/fl171_en.pdf.

³¹⁷ In the Netherlands nineteen percent cited “loss of national sovereignty,” with an additional twenty-four percent basing their votes on “I am against Europe/European construction/European integration,” “the draft goes too far/advances too quickly,” “I do not want a European political union/a European federal State/the ‘United States’ of Europe,” or “Europe is evolving too fast.” The largest single group of Dutch “no” voters was a thirty-two percent bloc who cited “lack of information.” *The European Constitution: Post-referendum Survey in The Netherlands*, EUROBAROMETER, June 2005, at 15, http://ec.europa.eu/public_opinion/flash/fl172_en.pdf.

³¹⁸ Graham Bowley, *EU’s Coming Agenda: Addressing its Divisions*, INT’L HERALD TRIB. (Sep. 6, 2005), available at <http://www.iht.com/articles/2005/09/05/news/union.php?page=1>.

³¹⁹ Marlise Simons, *Discontented Dutch Follow French on EU Treaty*, INT’L HERALD TRIB. (June 2, 2005), available at <http://www.iht.com/articles/2005/06/01/news/dutch.php>. See also Richard Bernstein, *Europeans in Revolt Against EU’s Elites*, INT’L HERALD TRIB. (June 3, 2005), available at <http://www.iht.com/articles/2005/06/02/news/eu.php>.

³²⁰ *France Votes ‘non,’* INT’L HERALD TRIB. (June 1, 2005), available at <http://www.iht.com/articles/2005/05/31/opinion/edvote.php>.

³²¹ Giles Merritt, *EU Constitution II: What’s in a Document’s Name? A Lot*, INT’L HERALD TRIB. (April 23, 2005), available at <http://www.iht.com/articles/2005/04/22/opinion/edmerritt.php>.

³²² Simons, *supra* note 319.

³²³ See Devuyst, *supra* note 10, at 8.

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and would not invest any further effort in the “constitutional concept.”

Although calling the foundational EU document a “constitution” may have seemed a bold proposal, scholars have long discussed the “constitutional development” of the European Union. In 2004 Michiel Brand described an “already existing European constitutionalism.”³²⁴ He argued that the current constitutional process was not meant to *create* a European constitution, but rather sought to “bring about a *new, modified, different and more explicit form of constitution for Europe.*”³²⁵ In the same year Joseph Weiler concurred, stating that “[t]he European constitution now before us does not introduce constitutionalism to the European construct. It is in fact a different form of European constitution from the constitutional architecture we already have.”³²⁶ Putting a finer point on it, he noted: “It is not the content of the [Constitution] which gives it epochal significance but the (mere) fact that an altogether run-of-the-mill Treaty amendment has been given a grand name: Constitution.”³²⁷ He added that had it not been so named it would have been seen as a “sensible adaptation of the Treaties. . . . No one would have used any superlatives to describe its content, it would have attracted very limited public attention or debate in most Member States”³²⁸

The spell-check feature of Microsoft Word does not recognize the term “constitutionalising.” It suggests that the writer may have intended to say “constitutional zing.” That peculiar alternative seems to sum up where the Convention’s leaders went wrong: they put too much “zing” into the Constitution. Constitutional development may have been business as usual, but by injecting state-like symbols into a document they called a Constitution, the Convention was guilty of overreaching. Like the beast in *King Kong*, the Constitution’s authors were bedazzled by a beauty which was not meant for them, and they were shot down.

³²⁴ Michiel Brand, *Affirming and Refining European Constitutionalism: Towards the Establishment of the First Constitution for the European Union* at 6, EUR. UNIV. INST., Working Paper No. 2004/2). Brand’s article contains an in-depth exploration of different theories of European constitutionalism.

³²⁵ *Id.*

³²⁶ Joseph H.H. Weiler, *On the Power of the Word: Europe’s Constitutional Iconography*, in *THE EU CONSTITUTION: THE BEST WAY FORWARD?* 16 (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans eds., 2005).

³²⁷ *Id.* at 3.

³²⁸ *Id.* at 6.