Exploring a European Union Constitution: Unexpected Lessons from the American Experience

Ken Gormley, Duquesne University School of Law

Available at: https://works.bepress.com/ken_gormley/2/
EXPLORING A EUROPEAN UNION CONSTITUTION: UNEXPECTED LESSONS FROM THE AMERICAN EXPERIENCE

Ken Gormley*

Editor's Note: On July 18, 2003, a Draft Treaty establishing a Constitution for Europe was submitted to the President of the European Council in Rome, after having been adopted by the European Convention. This event moves that historic document a step closer to approval and ratification. French statesman Valery Giscard d'Estaing, Chairman of the Convention, has expressed optimism that the finalized Constitution could be signed as early as May of 2004, in time to be approved in the European elections the following month. Yet at least one noted European Union (EU) scholar has expressed healthy skepticism, commenting: "This timetable seems ambitious and it remains to be seen if it is politically feasible." One way or another, 2004 is likely to produce a period of unprecedented constitutional activity in the EU, as leaders from the most influential

* Professor of Law, Duquesne University School of Law, Pittsburgh, Pennsylvania. B.A., University of Pittsburgh, 1977; J.D., Harvard Law School, 1980. This Article is an expanded version of a paper given at a conference held in Cologne, Germany, on "The European Union On Its Way To a Constitutionalized Federation of States – Perspectives of a European Constitution" sponsored by R.I.Z. (Law Centre for European and International Cooperation), on October 15-16, 2002. The author would like to thank Professors Ron Brand, Robert Williams, Patrick Sorek, Kirk Junker, Samuel Astorino and Dr. Kurt Riechenberg, who read and commented upon drafts of this paper. Their expert help made the author's foray into new terrain more enlightening and profitable. My thanks also to my brother-in-law, Professor Frank Pfennig, who narrated a video (in German) about the birth of the United States Constitution, for use at the conference. As well, the author wishes to thank Professor Dr. Stephan Hobe, who organized this extraordinary conference, and his assistant, Mr. Jan Wetzel, who brought the event together in a magnificent fashion. This Article is dedicated to the memory of my mother-in-law, Noreen Gallagher Kozler, who was interested in every aspect of this project, like every other one that I have ever undertaken. If only she could have been there, to be part of it.

Member States lobby for and against the draft constitution. During this unique time of constitutional gestation, there will be opportunities for revisions, counter-proposals and tinkering with respect to the draft document. It is during this final push for a workable EU Constitution, Professor Ken Gormley suggests in this essay, that certain unexpected lessons from the American constitutional experience, over two centuries ago, may become relevant and worthy of reflection.

It is fashionable, at least in the United States, to observe that the present effort to explore the drafting and ratification of an EU Constitution resembles the historic period following the American Revolution, during which the United States Constitution was produced. Beginning in May of 1787, delegates from twelve of the thirteen American colonies assembled in the sweltering heat of Philadelphia, to attend a Constitutional Convention at which they debated and wrangled over the details of a brief document that would serve as the foundation of an ambitious new democratic nation and its system of laws. Two hundred and fifteen years later, the United States Constitution and its companion Bill of Rights, introduced to Congress by James Madison in 1789 and ratified by the states in 1791, remain among the most potent, enduring governmental documents in the history of mankind. To say that there exist opportunities for the EU and its leaders, at this pivotal moment in history, to produce an unprecedented charter that has an even more profound impact upon world democracy for centuries into the future, is not an exaggeration. The European Council, which now ponders the Convention’s draft constitution, stands at an historical portal.

As a professor not only of American Constitutional Law, but also of State Constitutional Law and American Federalism, it is my goal to share a few observations concerning the current push to finalize an EU Constitution. Unlike some scholars who might urge that this body of nation-states should take more steps to follow an Anglo-American model, recreating the path taken by our Founding Fathers in Philadelphia over two centuries ago, I will lay out a less conventional thesis (at least from a United States perspective). Producing a carbon copy of the American Constitution or grafting more features of our U.S. Constitutional structure onto Europe, I believe, would be ill-advised. Rather, I will suggest that it is more useful to focus upon the often-ignored history and evolution of our individual state constitutions, and

4. See U.S. CONSTITUTIONAL SEQUENTENNIAL COMMISSION, THE STORY OF THE CONSTITUTION 18-19 (1937). Rhode Island, which was controlled by localistic radicals, refused to attend. Id. at 18.

5. JACK N. RAKOYE, ORIGINAL MEANING: POLICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 330 (1996); see also U.S. CONST. amend. I-X.
the interrelationship of those documents with the U.S. Constitution. By utilizing that history to explore the dual importance of a central European Constitution and individual Member State constitutions simultaneously, and by departing from the existing American model in order to give more (rather than less) force to the diverse nation-states’ bodies of law, I believe that one can construct a new European model that in many ways constitutes the inverse of the American federal system.

Unlike those American patriots such as James Madison, Alexander Hamilton, and George Washington who set out to construct a United States Constitution in the 18th century, today’s European leaders are not charged with assembling a group of colonies into a single nation, in which the individual components agree to entirely surrender their identities. Certainly, there already has been some abdication of autonomy, beginning with the Schuman Declaration in 1950, and continuing with the Treaty of Rome, the Maastricht Treaty, and the Treaties of Amsterdam and Nice. Yet the purpose was never to erase the identities of the Member States or their unique governments. Rather, European leaders must take fifteen individual nation-states, soon to be nearly double that number (there are expected to be twenty-five members in 2004), and allow them to continue to prosper as autonomous governmental entities, maintaining their rich histories and identities and customs and legal traditions without which there would be no Europe worth preserving. True, it is important to construct some broad jurisprudential umbrella under which all Member States may find common ground as economic and social partners. Yet it must be custom-built for a new, quite distinct political association. European democracies are well advanced in terms of their own legal systems. If there is to be a successful EU Constitution, it must be unlike anything we have yet seen in modern governance.

7. Id. at 13.
8. Id. at 22.
9. Id. at 23-24, 849.
10. Presently, the fifteen member states that comprise the European Union are Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, and the United Kingdom. EUROPA, EUROPEAN GOVERNMENTS ONLINE, http://europa.eu.int/abc/governments/index_en.htm (last visited Oct. 26, 2003). The ten countries currently under consideration for admission to the EU in 2004 are Cyprus, Malta, Hungary, Poland, Slovakia, Latvia, Estonia, Lithuania, Czech Republic, and Slovenia. Id. The three additional applicant countries are Bulgaria, Romania and Turkey. Id.
I do not profess to be an expert in European law or in the detailed workings of each of the nation-states' constitutions. Over the years, I have enjoyed dabbling in the constitutions and related laws of other nations, including European sovereigns; I have marveled at the richness that reposes in each of their distinct bodies of jurisprudence.12 But my goal is not to re-hash that extensive body of European and nation-state law; others are far more qualified to engage in that enterprise than myself. Instead, my more modest aim is to talk about the American constitutional experience over the past two centuries — focusing on our dual system of federal and state constitutions — and to propose a notion of an EU Constitution that borrows from the United States model but turns it upside-down. This European model would ratchet upward, dramatically, the power of the individual nation-states. It would reflect the fact that the EU is not a marriage of colonies that have linked themselves indissolubly as a single government, but a sui generis union of nation-states, unique to this moment in history, which have joined hands to achieve a common goal of economic and social betterment, while still preserving certain privileges of independent nationhood.

There exist plenty of history books from which one can extract the story of the framing of the United States Constitution.13 I therefore want to focus, instead, upon a single fact that is often overlooked, even by American lawyers and judges: There exists a distinct body of history and case-law relating to the United States Constitution and the fifty state constitutions.14 More and more, the differences between those two sets of documents have been recognized and respected.15 It is by using that two-tiered model of American constitutionalism, and taking it into new terrain, that I believe a novel European Constitutional model can be fine-tuned and perfected.


Justice Louis Brandeis, one of the great Supreme Court jurists in American history, wrote in 1932 that states were uniquely suited to serve as legal laboratories, where new ideas could be tinkered with and sharpened, before being introduced at the national level. The two-tiered constitutional system in the United States, that has existed since our nation’s founding, has fostered and preserved (at least to a large extent) the individual identities of the states. Although this aspect of American constitutionalism is often overlooked, it is of particular relevance to those working towards the formation of a European Constitution today.

An important fact, that is often lost to history, is that most of the original thirteen colonies adopted constitutions in the midst of the American Revolution, long before the United States Constitution came into existence. The Constitution of Virginia, the first major state charter to emerge, was approved on June 29, 1776, five days before the Declaration of Independence. New Jersey, Delaware, Pennsylvania, Maryland and North Carolina all followed suit in 1776; Georgia and New York adopted constitutions in 1777; Massachusetts, which preferred a more time-consuming convention process, approved a constitution in 1780.

The first state constitutions thus represented a rallying point for the colonists – an important symbol of self-determination in the midst of a revolution that was hazardous for all concerned. The story of their genesis is a dramatic one: On May 10, 1776, the Second Continental Congress issued a secret resolution, authorizing the thirteen colonies (in effect) to

---

16. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.


20. Id. at 73.

21. Id. at 73-93. New Hampshire and South Carolina adopted state constitutions even before Virginia, in early 1776, but they simply established frames of government without detailed provisions. Id. at 68-72. Connecticut and Rhode Island merely reaffirmed their old Colonial Charters in 1776, as temporary constitutions, and adopted new constitutions in 1818 and 1842, respectively. Id. at 66-68.

adopt their own forms of government. A bold preamble, added by John Adams of Massachusetts on May 15th, implicitly directed the colonies to begin drafting their own, separate constitutions. The response by the people of the colonies to this mandate was overwhelming. In Pennsylvania, despite a drenching rain, "four thousand [citizens] swarmed into a public meeting place [at the State House Yard] in Philadelphia and, with 'three rousing cheers,' approved the notion of adopting their own constitution." They selected the elderly statesman Benjamin Franklin as president of their Constitutional Convention and quickly convened in Carpenter's Hall in Philadelphia on July 5th, completing their work in less than three months. In his personal diary, John Adams later wrote that he believed that the true act of American independence occurred on May 15, 1776, rather than on the date of the formal Declaration on July 4, 1776: It was the dangerous declaration of self-determination by the Continental Congress, Adams believed, which allowed the colonists to gather momentum to finally sever ties with the British. As Pulitzer prize-winning historian David McCullough wrote in his account of John Adams' life: "[Adams] was elated. Congress, he wrote, had that day 'passed the most important resolution that was ever taken in America.'

Throughout the Revolutionary period, it is fair to say, state constitutions served an important function of solidifying, in written form, a diverse assortment of legal and moral codes, which ultimately guided the colonists. These were not the work of a unified people. They were tentative, breathing documents around which unity could be achieved over time. Each of the early constitutions was different; each contained unique elements. The Virginia Constitution was the first to include a Declaration

25. McCullough, supra note 24, at 117.
27. Gormley, Constitutional Vigor, supra note 26, at 216.
29. Id.
31. See Gormley, State Constitutions, supra note 22, at 690.
32. See generally Adams, supra note 19; Robert B. Dishman, State Constitutions: The Shape of the Document (1968); Bernardo Schwartz, The Bill of Rights: A Documentary History (1971); Francis Thorpe, The Federal and State Constitutions,
of Rights, the equivalent of a Bill of Rights.\textsuperscript{33} It explicitly protected a host of new rights, including freedom of press, which would later find their way into the U.S. Constitution.\textsuperscript{34} Pennsylvania’s charter, generally considered one of the most radical, pro-popular democracy documents ever drafted in the history of modern government, included a unicameral legislature heavily accountable to the citizenry.\textsuperscript{35} It also was the first to introduce “taxpayer franchise” – the notion that one who paid taxes was eligible to vote, rather than hinging that right upon property ownership.\textsuperscript{36} As well, the Pennsylvania Constitution of 1776 dispensed with special qualifications (such as land ownership) before a candidate could run for elected office, and provided for regular reapportionment of legislative seats.\textsuperscript{37} These concepts survive today in both state and federal provisions.\textsuperscript{38}

Thus, rather than springing like miniature fountains from the United States Constitution (as many lawyers and jurists in America still wrongly assume), the early state constitutions preceded the federal document by over a decade, and directly influenced that historic document’s formation.\textsuperscript{39} The central Constitution grew from the path-breaking state constitutions, not vice-versa.\textsuperscript{40} Many of the provisions of the Federal Bill of Rights, not ratified until late 1791, were derived directly from the state charters.\textsuperscript{41} Delaware’s Declaration of Rights contained provisions against quartering of soldiers and ex post facto laws.\textsuperscript{42} The Maryland Constitution prohibited bills

\textsuperscript{33} Adams, supra note 19, at 48; Howard, supra note 17, at 1-2.
\textsuperscript{34} Stanley Mosk, State Constitutionalism: Both Liberal and Conservative, 63 Tex. L. Rev. 1081, 1082 (1985).
\textsuperscript{36} Id.
\textsuperscript{38} See U.S. Const. art. I, § 3; PA Const. art. II, §§ 16-17.
\textsuperscript{40} Id.; Gormley, State Constitutions, supra note 22, at 691.
\textsuperscript{42} Del. Declaration of Rights, §§ 11, 21 (1776) (current version at 17 Del. Const. art. I); Mosk, supra note 34, at 1082.
of attainder. North Carolina's Constitution included a right of trial by jury, right to confrontation, privilege against self-incrimination, prohibition against cruel and unusual punishment, and a host of other rights that made their way into the United States Constitution. There is no question that the Founding Fathers relied heavily upon the state constitutions in forging the federal document. Moreover, they envisioned that the states would remain primarily charged with protecting individual rights. Statesman Roger Sherman of Connecticut stated at the U.S. Constitutional Convention that "[t]he State Declarations of Rights are not repealed by the Constitution; and being in force are sufficient."

For our nation's entire history, the state constitutions have remained in place as autonomous documents. At the same time, certain factors have caused their importance to ebb and flow. The gradual "incorporation" of the Federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and its application to the states, from the 1920s through the 1960s, caused the significance of individual rights provisions in state constitutions to temporarily wane. As well, the liberal composition of the U.S. Supreme Court, particularly during the era of Chief Justice Earl Warren, along with the relatively conservative nature of the state courts during this time period, constituted one factor that caused the state constitutions to drift into a period of dormancy.

Since the early 1970s, however, there has been a strong resurgence of interest in the state constitutions in the United States, to the point that many scholars have termed it an era of "New Judicial Federalism." This emphasis upon state constitutions as independent forces in our governmental

---

43. MD. CONST. of 1776, art. XVI (1867); Mosk, supra note 34, at 1082.
44. Mosk, supra note 34, at 1082.
45. See FARRAND, supra note 41, at 128-29, 203-04; Williams, supra note 41, at 404.
46. Mosk, supra note 34, at 1082.
47. Id. at 1082 n.9.
49. For a discussion of this topic, see Brennan, Jr., supra note 14, at 493-94; Mosk, supra note 34, at 1083-88.
50. Gormley, State Constitutions, supra note 22, at 693-95.
structures has become increasingly strong over the past three years. Nor does the trend show any sign of reversing itself. In Massachusetts and California, the supreme courts have found death penalty statutes inconsistent with their state constitutions. Numerous states have incorporated equal rights amendments into their constitutions to provide explicit safeguards against gender discrimination, despite the failure of the Federal Equal Rights Amendment to gain passage. The Alaska Supreme Court has held that the guarantee of privacy in the Alaska Constitution precludes state criminalization of possession of marijuana for personal use within the confines of one’s home. A number of states have protected free speech on private property — such as in privately owned shopping malls and on private college campuses — despite federal case law that finds no protection for such speech under the First Amendment of the U.S. Constitution.

In Oregon and several other states, the courts have endorsed a “primacy approach,” declaring that they will examine individual rights issues exclusively under their own constitutions, even before addressing federal constitutional questions. Only if the rights claimed are not protected by the state constitutional provision, will the court in those states go on to examine

52. FRIESEN, supra note 15, § 1-1.
54. FRIESEN, supra note 15, § 3-1.
56. See FRIESEN, supra note 15, § 9-3(a)(1).
57. See id. § 9-3(a)(2).
58. See id. § 9-3(a)(4).
59. The “primacy approach” suggests that the proper sequence is to first analyze each constitutional issue under the state constitution. Only if the state constitution does not yield a dispositive result is the federal constitutional claim analyzed. See Hans A. Linde, First Things First: Rediscovering the States’ Bills of Rights, 9 U. BALTIMORE L. REV. 379, 383 (1980). A number of state courts, at one time or another, have announced this approach as controlling. See TRAYLOR v. STATE, 596 So. 2d 957, 962-63 (Fla. 1992); State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984); State v. Johnson, 719 P.2d 1248, 1254-55 (Mont. 1986); State v. Ball, 471 A.2d 347, 350-52 (N.H. 1983); Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981); Davenport v. Garcia, 834 S.W.2d 4, 11-12 (Tex. 1992); West v. Thompson Newspapers, 872 P.2d 999, 1004-07 (Utah 1994).
the issue under the federal provision. In my own state of Pennsylvania, the state supreme court in the case of Commonwealth v. Edmunds set forth a four-part protocol, requiring lawyers to brief and analyze the state constitutional issue in every case raising a constitutional claim, digging into the text, history, case law from other states, and policy considerations relating to the state constitutional provision. Based upon the Edmunds protocol, the Pennsylvania Supreme Court has departed from U.S. Supreme Court precedent in dozens of significant cases, underscoring that the state constitution remains vital even two centuries after its conception.

Indeed, many of the most controversial and divisive issues of our day have first been resolved by state courts under their own constitutions, and then embraced by the U.S. Supreme Court years later, after the wisdom of those decisions has become evident. For example, landmark cases at the state level involving the right to die with dignity, racial and gender discrimination in jury selection, and drunk driving roadblocks implemented by police, to name only a few subjects, have been hashed out under state constitutions and then embraced by the federal courts.

How is it even possible for state courts to apply their own constitutions independently, without running afoul of the Federal Constitution? This is an area that becomes quite relevant in considering the mechanics of a

60. See, e.g., Sterling, 625 P.2d at 126; see also Friesen, supra note 15, ¶ 1-6(a). This "primacy approach" was first advanced by Oregon Supreme Court Justice Hans Linde, in a piece appearing in the Oregon Law Review. See Hans Linde, Without "Due Process" - Unconstitutional Law in Oregon, 49 OR. L. REV. 125 (1970).


62. Id. at 895.

63. For a compilation of recent decisions in which the Pennsylvania Supreme Court has departed from federal precedent, relying upon an Edmunds analysis pursuant to the state constitution, see Professor Bruce Ledewitz's excellent website at http://www.paconstitution.duq.edu.

64. See, e.g., In re Quinlan, 355 A.2d 647 (N.J. 1976).


successful EU Constitution. Yet it is an area where lawyers and judges, even in the United States, frequently become tangled in knots. The Supremacy Clause contained in Article VI of the U.S. Constitution provides that state law must yield to federal law “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”\textsuperscript{68} From the earliest stages of American history, however, it has been recognized that the states were meant to retain their own pockets of authority, particularly in the realm of individual rights but also in terms of structuring their own governments.\textsuperscript{69} Alexander Hamilton, lobbying for ratification of the U.S. Constitution in Federalist Paper 33 over two centuries ago, insisted that the Federal Supremacy Clause was not meant to exalt the central government over the states, or to threaten the states’ autonomy.\textsuperscript{70} Hamilton wrote:

If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed . . . But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land. These will be merely acts of usurpation and will deserve to be treated as such.\textsuperscript{71}

The language of the Supremacy Clause itself supports the notion that states are free to supplement federal constitutional law. When a state law or constitutional provision merely supplements a federal provision, it is not “contrary” to that provision, within the meaning of Article VI.\textsuperscript{72} State law can (and does) coexist with federal law. Thus, the Supremacy Clause has evolved in American jurisprudence such that federal law will invalidate state law only where the courts find that Congress has specifically intended to preempt it or where federal law actually conflicts with state law.\textsuperscript{73}

When it comes to specifically applying state constitutions, even those that may be identical in language to federal constitutional provisions, the Supremacy Clause has been interpreted to mean that states are free to

\textsuperscript{68}. U.S. Const. art. VI, § 2.
\textsuperscript{69}. Gormley, State Constitutions, supra note 22, at 696-97.
\textsuperscript{70}. Id.
\textsuperscript{71}. The Federalist No. 33 (Alexander Hamilton).
\textsuperscript{72}. Id.
\textsuperscript{73}. See generally Robert F. Williams, State Constitutional Law: Cases and Materials 132-64 (3d ed. 1999) [hereinafter Williams, Constitutional Law].
provide their own brand of protections, and to develop independent bodies of state law.\textsuperscript{74} The Federal Constitution sets a minimum standard under which states may not fall in protecting basic freedoms.\textsuperscript{75} States, however, are free to go beyond that minimum and employ unique approaches to law consistent with their own unique histories and "home-grown" bodies of precedent.\textsuperscript{76} As Justice Pollock of the New Jersey Supreme Court expressed the basic principle: "The first ten amendments [to the U.S. Constitution] establish a foundation for the protection of human liberty. A state may not undermine that foundation, but its constitution may build additional protections above the federal floor."\textsuperscript{77} Another pair of commentators has written: "It is an article of faith of the 'new federalism' that under state constitutions judges can give 'more' protection to rights claimants than what has been allowed by the U.S. Supreme Court in interpreting the U.S. Bill of Rights."\textsuperscript{78} Outside the area of individual rights, states routinely implement unique provisions of their state constitutions with respect to a host of structural matters,\textsuperscript{79} without creating friction with the U.S. Constitution or running afoul of the Federal Supremacy Clause.

Before addressing how the EU is uniquely positioned to adapt the American model as it creates its own distinct constitutional model, it is first necessary to discuss a relatively obscure principle known as the "adequate and independent state grounds doctrine."\textsuperscript{80} This precept of American constitutional law, which flowed from the 1874 decision of \textit{Murdock v. City of Memphis},\textsuperscript{81} addresses a crucial question in our federal system: When can the U.S. Supreme Court exercise jurisdiction over a decision of a state supreme court, and thus assume power to overturn that decision, without encroaching upon the sovereignty of that state? The Court in \textit{Murdock} held that federal courts do not have free reign to interfere with state court

\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Stewart G. Pollock, \textit{Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts}, 63 \textit{TEX. L. REV.} 977, 980 (1985); see also infra note 81 and accompanying text.
\textsuperscript{79} See generally \textit{Williams, Constitutional Law}, supra note 73, chs. 8-11.
\textsuperscript{80} See generally id. at 315-30; Pollock, supra note 77.
\textsuperscript{81} 87 U.S. 590 (1874).
decisions, except to the extent permitted by the United States Constitution and related federal statutes,\textsuperscript{82} which is a crucial starting point.

In other words, if there is no issue relating to a federal statute or constitutional provision, the U.S. Supreme Court simply lacks jurisdiction to involve itself in the case,\textsuperscript{83} pursuant to Article III of the U.S. Constitution (which spells out the foundation for federal courts' jurisdiction).\textsuperscript{84} The more complicated case arises, however, when state decisions contain mixed references to state and federal law.\textsuperscript{85} What happens when citations to state and federal law are jumbled together? That, after all, is commonplace in United States jurisprudence.\textsuperscript{86} Can the U.S. Supreme Court review the matter and "trump" the state court, if it rests its decision upon both federal and state precedent? Murdock stands for the proposition that so long as the decision of the highest state court was based on an "adequate and independent state ground" sufficient to sustain the decision apart from federal law, the U.S. Supreme Court cannot interfere.\textsuperscript{87} This doctrine, in many ways, tempers the Supremacy Clause. It has the result of safeguarding the autonomy of the states. It is based upon at least three considerations: judicial economy (i.e. efficiency); comity (i.e. respect for co-equal branches of government in a federal system); and the general prohibition in the American system against courts issuing advisory opinions (which means that the U.S. Supreme Court generally lacks jurisdiction to address an issue that will not be dispositive of the case).\textsuperscript{88}

In the early years after Murdock, the U.S. Supreme Court was extremely deferential towards the states.\textsuperscript{89} It presumed that any state decision that straddled the fence between relying on federal and state law was based upon

\textsuperscript{82} Id. at 635-36 (setting forth a seven-step inquiry to determine when federal courts properly have jurisdiction to review state court decisions).

\textsuperscript{83} Id.

\textsuperscript{84} See U.S. Const. art. III, § 2, cl. 1 (providing that "[t]he judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority").


\textsuperscript{86} For a discussion of recent cases that have reached the docket of the United States Supreme Court because of such intermingling of state and federal precedent, see Mathew G. Simon, Note, Revisiting Michigan v. Long after Twenty Years, 66 Alb. L. Rev. 969, 976-91 (2003).

\textsuperscript{87} Murdock, 87 U.S. at 635-36; Gormley, State Constitutions, supra note 22, at 699.

\textsuperscript{88} Gormley, State Constitutions, supra note 22, at 699-700.

\textsuperscript{89} Id. at 700.
an adequate and independent state ground, and was thus not subject to federal review. 90 In the past twenty years, however, with the dramatic increase in activity under state constitutions in the fifty states, 91 the U.S. Supreme Court has taken a more aggressive approach towards examining state constitutional decisions with which it may disagree. 92 In Michigan v. Long, 93 decided in 1983, the Supreme Court, per Justice Sandra Day O'Connor, essentially switched the presumption from being in favor of the states, to being against the states. 94 Long re-interpreted the adequate and independent state grounds doctrine to permit review by the U.S. Supreme Court, as a rule, unless the state court has made a “plain statement” in its judgment that it is relying squarely on its own law or constitutional provision, and has made explicit that “the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.” 95

By implementing this “plain statement” rule, the U.S. Supreme Court has given itself significant power to review and overturn decisions of state supreme courts that it views as unpalatable. This is true even where state supreme courts may have clearly thought that they were relying on their own independent constitutions. 96 The result has been, at least in certain cases, angry reactions from the state court judges, unhappy with federal intervention. 97 As Justice Sheehy of the Supreme Court of Montana wrote:

Instead of knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power, we should show our judicial displeasure by insisting that in Montana, this sovereign state can interpret its

90. See Minnesota v. Nat'l Tea, 309 U.S. 551 (1940) (vacating and remanding the case so that the Minnesota Supreme Court could clarify whether it was relying upon federal law, state law, or both); Lynch v. New York, 293 U.S. 52 (1934) (stating that if a judgment of the state court rests on two grounds, one federal and one state, the Supreme Court will presume that an adequate and independent state ground exists, and decline to take jurisdiction).

91. Gormley, State Constitutions, supra note 22, at 701.
94. Gormley, State Constitutions, supra note 22, at 701.
95. Long, 463 U.S. at 1040-41.
96. See, e.g., Commonwealth v. Lahron, 690 A.2d 228 (Pa. 1997).
97. Gormley, Silver Anniversary, supra note 85, at 801-05; Simon, supra note 86, at 976-91.
constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution.98

But an EU Constitution can avoid that problem. How is it possible to take this dual federal-state constitutional system in the United States, and adapt it as the European Union moves forward in finalizing its own constitution? The beauty of this enterprise is that it need not be constrained by any existing rules or pre-existing templates. Europeans are in the enviable position of beginning with a tabula that is not yet filled; there is room for considerable imagination and creativity. There need not be an experience in the EU akin to the painful experience under the failed Articles of Confederation that plagued the fledgling United States.99 Moreover, the proposal currently being debated in Europe is already quite different than anything ever extant in America; it is a proposal to create a treaty to establish a constitution, a document that maintains the status of the individual sovereigns and acknowledges that sovereign status.100 Thus, unlike the American model, it does not involve the direct establishment of a sovereign federal government with an independent legal identity. Allow me to lay out one sketch of a European Constitutional model, therefore, which draws upon our American experiences, but departs radically in some respects. The model I set forth, I believe, is consistent with the desire by the EU to make the transition from what was initially an effort to achieve economic integration, to something more formal and cohesive;101 while at the same time preserving the autonomy and rich identity of each member nation, not just in theory, but also in actuality. This rich diversity, after all, is what has made Europe a leader in world affairs far longer than the United States has been in existence.

Already in Europe, a sophisticated system of judicial, legislative and executive functions is in place, as well as a system of checks and balances.102 As was discussed extensively in the Cologne symposium at which this paper was initially presented, there exists potential for much more vertical integration103 in the EU than exists in the United States.104 Just as

99. See discussion infra notes 116-27 and accompanying text.
100. See Draft Treaty, supra note 1.
101. KENNEDY, supra note 11, at 12.
102. See generally KLAUS-DIETER BORCHARDT, THE ABC OF COMMUNITY LAW (1999); LEVASSEUR & SCOTT, supra note 12.
103. Vertical integration is the merger between entities "occupying different levels of operation." BLACK'S LAW DICTIONARY 1003 (7th ed. 1999).
the first three Articles of the U.S. Constitution set up the three branches of
government and establish their relative powers,105 the draft EU Constitution
creates a structure of government grounded solidly on decades of tradition
and experimentation.106 An evolving but strong tradition of acknowledging
the existence of certain fundamental rights has also developed in the
European Union.107 The Member States, by treaty, have bound themselves
to respect those basic fundamental rights guaranteed by the European
Convention for the Protection of Human Rights and Fundamental Freedoms
ratified in 1950.108 Article 46 of the Treaty of Amsterdam reinforces the
power of the European Court of Justice to determine whether the institution
have failed to respect fundamental rights.109 A unique European
constitutional model, of the sort embodied in the draft document, can easily
be embraced without an abrupt departure from the status quo.

Yet, one essential cornerstone of any EU Constitution, if it is to be
approved and ratified, is some shared consensus that such a written
document actually adds value to life as it presently exists. There must exist
some broad concordance among the Member States that there is, indeed,
benefit to having one single unifying document, beyond the existing treaty
and less permanent documents. This new document (in the form of a treaty
creating a constitution) may do little more than to organize and simplify
large number of rules and treaties already in existence, without causing
individual member states to surrender a greater degree of sovereignty.
However, this still has considerable value. As one commentator has
persuasively argued, "codifying a concept of 'citizenship' into the treaties
has not led to a European demos," nor has it created a people bound together
by a shared identity.110 A formal constitution can help guide a popu-
towards weaving together such a demos.\textsuperscript{111} True, the United Kingdom and a number of nations have survived nicely with unwritten constitutions,\textsuperscript{112} but that is a result of centuries of carefully nurtured tradition and history.\textsuperscript{113} It is my view that the still-expanding sovereign entity known as the EU would benefit enormously from having a written document, around which it can develop and gain such common purpose, much like the early American states rallied around their original constitutions and thus developed their own identities.\textsuperscript{114} As Jürgen Habermas has noted, this is a positive, circular process, by which an EU Constitution and the member-states can stabilize each other.\textsuperscript{115}

Indeed, one observation jumps out from the American experience: The existing European quasi-constitutonal system looks, in some ways, more like the loose alliance which existed in the American colonies under the Articles of Confederation, than the ultimate constitutional system which emerged. The Articles of Confederation, drafted by the Continental Congress in 1777, but not ratified by the states until March of 1781,\textsuperscript{116} ultimately proved to be a failure because they gave the central government too little power, causing it to become impotent as a functioning sovereign.\textsuperscript{117} The national government could not lay and collect taxes,\textsuperscript{118} It was powerless to quell internal rebellions and economic uprisings, such as Shay’s Rebellion in Massachusetts,\textsuperscript{119} nor could the national government

\textsuperscript{HARV. INT’L L.J. 411, 423 (1996) (stating that the EU relies on a network of “constitutional practices without any underlying . . . constitutionalism”).}

\textsuperscript{111.  For a less optimistic view that a European Union Constitution may be unattainable because it is not in the best interests of the nation-states, see Ian Ward, The European Constitution and the Nation State, 16 OXFORD J. LEGAL STUD. 161 (1996).}

\textsuperscript{112. Jack Straw, A Constitution for Europe, THE ECONOMIST, 55, 55-56 (Oct. 12, 2002).}

\textsuperscript{113. Id.}

\textsuperscript{114. See discussion supra notes 19-31 and accompanying text.}

\textsuperscript{115. Jürgen Habermas, Why Europe Needs a Constitution, 11 NEW LEFT REV. 5, 16 (2001).}

\textsuperscript{116. See Stuart E. Eizenstat, Lessons From the American Experience, 8 AM. J. INT’L L. & POL’Y. 603, 603 (1993).}


\textsuperscript{118. SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 248 (1993).}

\textsuperscript{119. Id. at 245.}
regulate commerce among the several states.\textsuperscript{120} The Articles gave only a minor role to the national judicial courts.\textsuperscript{121} They established no written base-lines concerning the basic, fundamental rights of citizens.\textsuperscript{122} They gave the national government scant ability to control the states, except to the extent that the states authorized the federal government to do so.\textsuperscript{123} States were constantly quarreling over boundaries, currencies, rights of citizens, and economic matters. Connecticut and Pennsylvania briefly went to war with each other.\textsuperscript{124} This was a government built of straw, which could be blown into chaos by the contrary will of any one member.\textsuperscript{125} One can certainly make a compelling case that if the Articles of Confederation had continued in operation, rather than being scrapped and replaced with a written constitution, the United States would have dissolved long before the Founding Fathers were laid to rest and passed on their experiment to succeeding generations.\textsuperscript{126} As James Madison wrote in a memorandum as he prepared for the Constitutional Convention, the Articles lacked "the great vital principles of a Political Constitution," namely, the power to compel obedience to its provisions.\textsuperscript{127}

It is true that the EU has squarely addressed many of the most serious problems created by the Articles of Confederation. Most Member States have joined in a common currency, the Euro.\textsuperscript{128} A value added tax has been established, a portion of which is transmitted from the Member States to the EU government.\textsuperscript{129} The regulation of commerce has been thoroughly

\textsuperscript{120} Id.
\textsuperscript{122} Geoffrey R. Stone et al., Constitutional Law 2 (4th ed. 2001); John C. Yoo, Sounds of Sovereignty: Defining Federalism in the 1990s, 32 Ind. L. Rev. 27, 36 (1998).
\textsuperscript{124} John Arthur, The Unfinished Constitution: Philosophy and Constitutional Practice 9 (1989); Rakove, supra note 123, at 47.
\textsuperscript{126} The Founders themselves considered the Articles irreparably flawed, which is why they went beyond their charge to amend or supplement the Articles, and scrapped them entirely in favor of a new Constitution. Stone et al., supra note 122, at 4-5.
\textsuperscript{127} Rakove, supra note 123, at 47.
\textsuperscript{128} Margot Horspool, European Union Law 20 (2002). Twelve of the fifteen EU countries are part of the Eurozone, which embraces the Euro. Sweden, Denmark and the United Kingdom have opted to stay out of the Eurozone. See Lasok, supra note 6, at 588.
\textsuperscript{129} Lasok, supra note 6, at 485-87.
addressed by EU documents. Fundamental human rights had been addressed through the Treaty of Amsterdam and the European Convention for the Protection of Human Rights and Fundamental Freedoms, well before the European Convention sat down to produce a draft constitution. The European Court of Justice (ECJ) has handed down potent, far-reaching decisions. Yet there is still an element of impermanency about the arrangement, relying upon voluntary cooperation by the Member States in certain spheres (as illustrated by the Solange cases in Germany), without the cement provided by an articulated text. Like America after the Revolution, the European Union now finds itself at a critical crossroad. It has arrived at this point not haphazardly, but as a result of decades of careful exploration and planning. I concur with those commentators who contend that the adoption and ratification of a written EU Constitution in some form – whether one calls it a constitution or gives it a different name – is not only inevitable, but is essential if the EU is to move beyond its present, incomplete phase. It is crucial to underscore that constitutions not only reflect unity, but also help create unity over time through shared efforts revolving around a common mission.

Indeed, scholars generally agree that the United States has endured and prospered as a polity in large part because it was anchored, from the start, in a shared acceptance of the republican theory of government, which was embodied in its written Constitution. The theory of republicanism, derived from English origins as well as the writings of the French philosopher Montesquieu, postulated that power resided foremost in the citizenry and was delegated by choice to those leaders who governed. The notions of equality, due process, and equal justice before the law all constituted fundamental components of republicanism that made their way into the written Bill of Rights, and allowed American democratic ethics to develop over time. Indeed, the adoption of the Fourteenth Amendment

130. Horsepool, supra note 128, at 268-69.
131. Weiler, supra note 104, at 102-07.
133. See infra note 164.
134. See, e.g., Brewer, supra note 110; Habermas, supra note 115.
137. Id. at 543.
after the Civil War\textsuperscript{138} constituted an express reaffirmation of the same basic written principles that had united the colonists after the American Revolution.\textsuperscript{139} A written constitution not only captures shared values, but it can also serve as a vehicle that facilitates the ongoing development of a political ethos.\textsuperscript{140}

I do not believe that either civil law or common law countries will experience difficulties or discomfort if a written EU Constitution is ratified. Although the methodologies are admittedly different,\textsuperscript{141} interpreting constitutions should come naturally to most Member States. Civil law countries like Germany, France, Italy and Spain are accustomed to hierarchies, in which certain laws are superior, and take precedence over inferior laws.\textsuperscript{142} The United Kingdom, one of two common law countries in the EU, may not be used to such emphasis on written constitutional documents,\textsuperscript{143} but it has a long and sacred tradition of adhering to fundamental constitutional principles.\textsuperscript{144} Indeed, the United Kingdom has for centuries turned to written documents as a repository for fundamental rights and principles — including the Clarendon Assize,\textsuperscript{145} the Magna Charta\textsuperscript{146} and the English Bill of Rights\textsuperscript{147} — although none has the name

\textsuperscript{138} U.S. Const. amend. XIV.


\textsuperscript{140} See generally Habermas, supra note 115, at 15-16.


\textsuperscript{144} Straw, supra note 112, at 55.

\textsuperscript{145} The Assize of Clarendon (1166) was an English statute, which sought to improve the judicial procedures that applied in the case of criminals. BLACK'S LAW DICTIONARY 117 (7th ed. 1999).

\textsuperscript{146} The Magna Charta (1215) was a charter granted by King John of England to certain barons and others, at Runnymede, which was regarded as a cornerstone of constitutional rights and liberties. Id. at 963.

\textsuperscript{147} The English Bill of Rights (1689) was an act that established certain prerogatives from the Crown, but also declared certain rights and privileges of the subjects. Originally
constitution. Thus, both civil and common law countries have a certain amount of familiarity and comfort in both domains. In the United States, our common law tradition — inherited directly from Great Britain — has gradually merged with an increased reliance upon codes and restatements, adding a civil law dimension to our jurisprudence. It is quite easy for the two types of systems to co-exist, and to produce a sturdy body of jurisprudence.

Second, however, it seems that any successful EU Constitution has to break free of the constraints of pre-existing models and place an unprecedented degree of emphasis upon the autonomous and independent vitality of the Member States. Here, the history of the state constitutions in the United States, which preceded the Federal Constitution, provides a fascinating lesson. A finalized EU Constitution should be viewed as a document constructed to work in conjunction with the individual constitutions of the Member States, rather than being designed to swallow them up. The present wave of New Judicial Federalism in the United States, placing renewed emphasis upon the independent constitutions of the fifty states, is proof that a dual system of constitutionalism can exist and thrive in the proper climate. However, a European model should push even further in this direction.

The ECJ and the European Court of Human Rights have built an impressive foundation, constructing a body of quasi-constitutional jurisprudence from treaty provisions and unwritten notions of fundamental liberties that inhere in citizens of this Union. Yet there is still a residue of concern that adoption of a central constitution will send the Member States sliding down a slippery slope, encouraging the ECJ to engage in judicial activism. This (the theory goes) could allow the EU to gradually establish a threatening preeminence over the individual Member States, eventually blotting out their identities and turning them into subservient entities as if

---


149. For a defense of the notion of a written European Union from a British perspective, see Straw, supra note 112, at 55.


they were the "United States of Europe." As former French Prime Minister Michel Débré stated twenty-three years ago, mincing no words: "J'accuse la Cour de Justice de mégalomanie maladive." That may not be a common sentiment today, but it raises a fair issue. Former Irish President Mary Robinson has correctly noted: "The challenge for today's architects of tomorrow's Europe is not to run away from these anxieties, nor to dismiss them as irrational outpourings of irredentist nationalism. They need to be respected - and addressed."

Even in the United States today, there is a great deal of debate among the citizenry and political leaders as to whether the federal government, over time, has usurped too much power in our dual-constitutional system. In the case of the EU, there is even more reason to fear that possibility. This novel union consists not of thirteen colonies that desire to cede their autonomy to a single national government flying a single flag. Rather, it remains fifteen nations, soon to be twenty-five or thirty. A fortiori, these nations must be vigilant in finalizing a constitution. There is nothing improper about building a protective wall around the autonomous nation-states, so that a hundred years from now they have not been devoured by the lion placed at the gate to protect their kingdom.

Third, one tangible way to accomplish that goal, drawing upon the American experience but modifying it, is to provide for federal supremacy with a uniquely European twist. The Supremacy Clause of Article VI of the United States Constitution provides that federal laws and constitutional provisions are supreme, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The text of an EU Constitution’s supremacy language, currently contained in part I, article 10 of the draft constitution, states as follows: "The Constitution, and law adopted by the

153. Id. Before Jean Monnet initiated the Coal and Steel Community at the close of World War II, which ultimately led to formation of the European Union, Winston Churchill called for precisely this, a governmental construct he called "a kind of United States of Europe." BIRTWISTLE, supra note 107, at 1.


157. See list of member states and countries applying to be member states, supra note 10.

158. U.S. CONST. art. VI, § 2.
Union’s Institutions in exercising competences conferred on it, shall have
primacy over the law of the Member States; [Constitutions of the Member
States to the contrary notwithstanding].”¹⁵⁹ A new clause could be added to
that provision, emphasizing the importance of Member State and local laws,
as follows: “However, the provisions of the EU Constitution shall be
interpreted to whatever extent practicable in a manner consistent with the
laws, customs, traditions, case law and constitutional jurisprudence of the
Member States, recognizing the overriding importance of maintaining the
sustained, vigorous autonomy of the Member Nations.”

Not only the Member States themselves, but also their unique political
subdivisions, must be carefully protected. The Austrian and German Länder,
the Belgian regions, and the Spanish autonomous regions, all contribute to
vigorou bodies of independent laws and customs.¹⁶⁰

Fortunately, the well-entrenched European doctrine of subsidiarity – a
fascinating concept for American Constitutional scholars – already dictates
that actions are more appropriately left to the Member States except where
they are unable to deal with a particular issue at a national or local level.¹⁶¹
Although the ECI’s landmark 1964 decision Costa v. ENEL¹⁶² established
the concept of supremacy of Community law,¹⁶³ the Member States have
embraced that principle with an interesting ambivalence, as demonstrated by
the Solange cases in Germany.¹⁶⁴ There is a strong pre-existing foundation

¹⁶⁰. See generally Watts, supra note 12.
¹⁶¹. Johson, supra note 125, at 1073.
¹⁶². Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 1141 (1964) (“By creating a
Community of unlimited duration, having its own institutions, its own personality and its own
legal capacity . . . the Member States have limited their sovereign rights, albeit within limited
fields, and have thus created a body of law which binds both their nationals and themselves.”)
¹⁶³. Davies, supra note 104, at 73.
¹⁶⁴. See, e.g., Internationale Handelsgeellschaft mbH v. Einfüh rung und Vorratsstelle
für Getreide und Futtermittel (Solange I), Federal Constitutional Court (second senate), Case
Handelsgeellschaft (Solange II), Federal Constitutional Court (second senate), Case 2 BvR
19783, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225; Manfred Brunner and Others v. the
European Union Treaty (Solange III), Federal Constitutional Court (second senate), Joined
Cases 2 BvR 2134 & 2159/92, 89 BVerfGE 155, [1994] 1 C.M.L.R. 57. (This series of cases
initially balked at the supremacy of European Community law with respect to fundamental
rights, concerned that the European legal system did not sufficiently protect basic rights
outlined in the Grundgeset vol but ultimately acquiesced to European law supremacy, only
because it concluded that the Grundgeset granted such authority.) For a discussion of these
cases, and the German courts’ delicate handling of the ECI’s proclamation of supremacy, see
Brewer, supra note 110, at 564-82.
for a European brand of supremacy which incorporates a healthy degree of
deferece towards the Member States. The doctrine of subsidiarity,
embodied in part I, article 9 of the draft constitution,165 will likely be
explicit or implied in any finished EU Constitution. That, in itself, will make
the final document quite different than the U.S. Constitution, and allow it to
evolve with its own European jurisprudential personality.

Fourth, a doctrine similar to the American “adequate and independent
state grounds doctrine,”166 could be added to the European Constitution
featuring a European-twist to require heightened deference to the Member
States. This would help ensure that the federal courts would not encroach
upon Member State terrain unnecessarily. Thus, for instance, the draft EU
Constitution could be amended to incorporate a fourth section in part I,
article 28, relating to the Court of Justice and related courts.167 It could
specifically embrace a rule that is implicit in present EU judicial practice,
providing that: “The courts of the EU shall have jurisdiction only over
matters arising under the laws or Constitution of the Union. Decisions of the
courts of the Member States, which rest upon an adequate and independent
Member State ground, shall not be reviewable by the courts of the EU. In the
event that any ambiguity exists as to whether a judicial decision of a
Member State implicates that nation’s laws, the laws of the EU, or both, a
presumption shall exist that it is premised upon an adequate and independent
Member State ground, and the courts of the EU shall lack jurisdiction to
review it.”

Fortunately, section 234 of the Treaty of Nice168 already gives power to
the Member State courts to refer issues of community law to the ECJ for
interpretation - a provision that would be a wonderful addition if adapted
and grafted onto the United States Constitution; it is an excellent mechanism
for fostering dialogue between the two groups of courts to minimize the risk
of conflict. A carefully-constructed “adequate and independent state
grounds” provision, such as the one set forth above, could further ensure that
the EU courts do not interfere with the independent jurisprudence of
Member States in the future.

165. Draft Treaty, supra note 1, pt. I, art. 9. That provision states in relevant part, in
clause 1: “The limits of Union competences are governed by the principle of conferral. The
use of Union competences is governed by the principles of subsidiarity and proportionality.”

166. See supra notes 80-88 and accompanying text (discussing the adequate and
independent state grounds doctrine).

167. Draft Treaty, supra note 1, pt. I, art. 28. That provision establishes the
composition and jurisdiction of the European Court of Justice and other EU courts.

Fifth, the notion of a broad, unbounded ability of the Federal European Union courts to interpret the EU Constitution, and to imply rights not explicitly found in that document, could be limited in a gentle fashion. In the United States, one of the first cases that constitutional law professors teach, as a matter of tradition, is Chief Justice John Marshall’s famous 1819 decision in *McCulloch v. Maryland*.\(^{169}\) There, Chief Justice Marshall concluded that the U.S. Constitution impliedly authorized the new federal government to establish its own banks, notwithstanding the fact that Article I of the Constitution nowhere explicitly gave Congress that power.\(^{170}\) In a famous line of that opinion that forms the basis for a sweeping view of the ability of the federal legislature and courts to imply powers or rights not explicitly listed in the document, Marshall wrote that “we must never forget that it is a constitution we are expounding.”\(^{171}\)

Two centuries later, Supreme Court justices and scholars still debate the legitimacy of the Court interpreting the Constitution to identify rights, liberties and powers that are not expressly set forth in the text and not discernible from the “original intent” of the Framers.\(^{172}\) It is true that too much rigidity in interpreting a fundamental charter, as Marshall suggested, is contrary to the very notion that the Constitution is designed to establish a general jurisprudential framework, rather than to create “the prolixity of a legal code.”\(^{173}\) Yet there is nothing undemocratic about the notion of constructing a constitution that, by its very terms, prevents the EU courts from straying too far from the text and Constitutional history of a particular provision. This is one way that Member States can be offered a level of comfort that the rules will not change in midstream. To accomplish this goal, a provision of the following sort could be added to the end of part I, article 10\(^{174}\) of the current draft EU Constitution: “Each provision of this Constitution shall be interpreted by the courts and other branches of government, to whatever extent practicable, in a fashion that closely adheres to the text and recorded history of such provision.”

\(^{169}\) 17 U.S. 316 (1819).

\(^{170}\) *Id.*

\(^{171}\) *Id.* at 407.


\(^{173}\) *McCulloch*, 17 U.S. at 407.

\(^{174}\) Draft Treaty, *supra* note 1, pt. I, art. 10. This provision states in relevant part: “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.” *Id.*
It is beyond dispute that the ECJ and the European Court of Human Rights have led the way in safeguarding individual rights that may not have otherwise been protected in particular Member States.\textsuperscript{175} Yet ratification of a fresh constitution with an extensive recorded history (some of which incorporates prior ECJ decisions) makes it both sensible and practical to place a heavier reliance upon that text and written history. The courts will still maintain the ultimate power to interpret the language of the EU Constitution in a fashion consistent with the over-arching principles of EU law, as well as the jurisprudential traditions of the nation-states, by applying familiar doctrines such as subsidiarity\textsuperscript{176} and proportionality.\textsuperscript{177} Thus, the courts will continue to play a central role. Yet incorporating language, such as that suggested above, will ultimately assist the courts in their work by placing special weight upon the text and history of the new document.

Sixth, in order to avoid the staleness and obsolescence that creeps into any document over time, particularly one interpreted literally, the EU Constitution could simultaneously make allowances for more flexible amendment and adjustment than occurs with the United States Constitution. In 215 years of American history, the U.S. Constitution has only been amended twenty-seven times, the first ten amendments consisting of the Bill of Rights, which came shortly after the birth of the Constitution.\textsuperscript{178} In large part, this reluctance to tinker with the original charter is derived from its own internal mechanisms. Article V of the U.S. Constitution constrains a daunting process: In order to amend the Constitution, two-thirds of both houses of Congress or the legislatures of two-thirds of the states must call a convention for the purpose of considering a proposed amendment, and three-fourths of the states must ratify the amendment.\textsuperscript{179} As a practical matter, this is almost an insurmountable hurdle, not unlike (in the case of my family) getting all four children to agree on which video to rent on a Friday night. Any proposed amendment even mildly controversial, such as the Equal Rights Amendment which fizzled out after ten years,\textsuperscript{180} is almost doomed to


\textsuperscript{176} Birtwistle, supra note 107, at 6-7 ("The principle of subsidiarity says that no policy issue should be settled at a higher level than necessary. The proper place for action is as close to the citizen as possible.").

\textsuperscript{177} Id. at 38-39 (The doctrine of proportionality "states that the means used to achieve some legislative object must not be more than is appropriate and necessary to achieve that end").

\textsuperscript{178} U.S. Const. amends. I-X.

\textsuperscript{179} Id. art. V.

\textsuperscript{180} In 1972, Congress approved the ERA and submitted it to the states for
failure, making it difficult to bring the Constitution in line with changing times, changing technologies, and changing societal norms. This is not always a healthy equation. Thomas Jefferson believed that the then-fledging U.S. Constitution should be overhauled every few generations, to prevent the body politic from falling into complacency and laziness. Jefferson wrote to Samuel Kercheval in July of 1816:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human... I knew that age well... It was very like the present, but without the experience of the present... Let us follow no such examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs.

The Florida Constitution today contains a provision requiring a special constitutional commission to consider possible amendments regularly, every twenty years. This is not a bad idea for the European Council to consider. Member States could actually benefit by building in a certain amount of flexibility. As the Union evolves, and as European society continues to mature while our world streams forward into more sophisticated times, flexibility can be an asset. It can permit Member States to keep the constitution fine-tuned via regular amendment, and it can also guard far into the future against excessive control by the most powerful members.

Thus, part IV, article 7 of the current draft constitution, which sets forth a “Procedure for revising the Treaty Establishing the Constitution,” might be given additional flexibility by providing for periodic review of the constitution, every two decades or so. Moreover, the language of article 7—which currently requires ratification of amendments by all Member States, or (after two years) ratification by four-fifths of the Member States and referral to the European Council for action—might be softened to permit ratification. In 1978, Congress extended the period for ratification until 1982. Nonetheless, the second deadline expired with only thirty-five of the requisite thirty-eight states approving it. STONE ET AL., supra note 122, at 637.

181. Id. at 73.
184. Draft Treaty, supra note 1, pt. IV, art. 7 (setting forth a four-step procedure for amending the EU Constitution).
185. Id. That provision states, inter alia:
amendment of certain provisions (excluding the Charter of Fundamental rights, basic structure of government, etc.) by a less-than-unanimous vote, perhaps based upon a weighted system. Requiring unanimity to amend an extraordinarily detailed constitutional document that is over 240 pages long may stifle growth and adaptability, particularly as the constitution grows to maturity. The lesson of the American experience is this: An overly rigid amendment process may lead to stagnation and eventual friction as other branches of government (particularly the judicial branch) become more active in interpreting constitutional provisions to compensate for the lack of flexibility in the written document.\footnote{186}

Seventh, the prospect of allowing an EU Constitution to come into existence can be made less threatening by taking stock of the areas of agreement, rather than becoming paralyzed by each area of uncertainty or disagreement. In reviewing the Charter of Fundamental Rights of the EU that was drafted at the first European Convention, circulated at Nice several years ago, and incorporated nearly verbatim into the Charter of Fundamental Rights contained in part II of the draft constitution, I was struck by the solid, non-controversial nature of most of its provisions.\footnote{187} Indeed, the draft charter looks much more like the early, influential state constitutions of Virginia\footnote{188} or Pennsylvania\footnote{189} or New York\footnote{190} – detailed and highly protective of individual rights and liberties – than the existing U.S. Constitution. When I first sat in my office in Pennsylvania and read a draft EU Constitution containing what may become the greatest charter of rights in the history of civilized society, I was both impressed and envious. There are many provisions in the Charter of Fundamental Rights contained in part

\footnote{The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements . . . . If, two years after the signature of the Treaty amending the Treaty establishing the Constitution, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.}

\footnote{Id.}

\footnote{186. \textit{Stone et al.}, supra note 122, at 72-75.}


\footnote{188. VA. CONST. of 1776; \textit{see also Adams, supra note 19, at 48} (discussing the creation of the Virginia Constitution).}

\footnote{189. PA. CONST. of 1776; \textit{see also Adams, supra note 19, at 50} (discussing the creation of the Pennsylvania Constitution).}

\footnote{190. N.Y. CONST. of 1777; \textit{see also Adams, supra note 19, at 53-54} (discussing the creation of the New York Constitution).}
II of the draft EU Constitution that are far more explicit and far more advanced than anything in the U.S. Constitution – a broad “Right to Life” in part II, article 2;\(^{191}\) a “Right to the integrity of the person” in part II, article 3 that includes a prohibition of eugenic practices and reproductive cloning of human beings;\(^{192}\) a “[p]rotection of personal data” in part II, article 8, which takes the American notion of a right to privacy into new frontiers;\(^{193}\) a “Freedom of thought, conscience and religion” in part II, article 10, that includes a right to conscientious objection;\(^{194}\) an incredible “[f]reedom of the arts and sciences” in part II, article 13 which explicitly protects artistic and scientific research, as well as academic freedom;\(^{195}\) a “non-discrimination” provision in part II, article 21 that extends to disability and sexual orientation;\(^{196}\) an express protection of “[t]he rights of the child”

\(^{191}\) This article of the Draft Treaty provides: (1) “Everyone has the right to life” and (2) “No one shall be condemned to the death penalty, or executed.” EU CHARTER, supra note 187, pt. II, art. 2.

\(^{192}\) EU CHARTER, supra note 187, at pt. II, art. 3 provides:
(1) Everyone has the right to respect for his or her physical and mental integrity; [and] (2) In the fields of medicine and biology, the following must be respected in particular: (a) the free and informed consent of the person concerned, according to the procedures laid down by law, (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons, (c) the prohibition on making the human body and its parts as such a source of financial gain, [and] (d) the prohibition of the reproductive cloning of human beings.

\(^{193}\) EU CHARTER, supra note 187, at pt. II, art. 8 provides:
(1) Everyone has the right to the protection of personal data concerning him or her; (2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data, which has been collected concerning him or her, and the right to have it rectified; [and] (3) Compliance with these rules shall be subject to control by an independent authority.

\(^{194}\) EU CHARTER, supra note 187, at pt. II, art. 10 provides:
(1) Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance; [and] (2) The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

\(^{195}\) EU CHARTER, supra note 187, at pt. II, art. 13 provides: “The arts and scientific research shall be free of constraint. Academic freedom shall be respected.” Id.

\(^{196}\) EU CHARTER, supra note 187, at pt. II, art. 21 provides:
(part II, article 24)\textsuperscript{197} and "[t]he rights of the elderly" (part II, article 25),\textsuperscript{198} topics that are just now awakening keen interest in American law; an unparalleled safeguard of "[f]amily and professional life" in part II, article 33,\textsuperscript{199} which captures what most democratic societies profess to stand for, but often fail to carry out. This is an impressive, highly enlightened, unparalleled piece of constitutional craftsmanship. It is born of a group of nations that, following the trauma of World War II, have written some of the most beautiful, eloquent laws and constitutional provisions dealing with respect for human dignity and fundamental freedoms, and have now taken these to a higher level. Upon finalization and ratification, it will become an exemplar for all future democratic enterprises.

A constitution is meant to establish a common base line, a starting point upon which all participants agree, but beyond which participants are free to move in protecting the rights of their own citizens. Member States have accomplished remarkable unanimity, already, in the process leading up to the creation of a draft constitution.\textsuperscript{200} For instance, there is a general

\begin{quotation}
(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a rational minority, property, birth, disability, age or sexual orientation shall be prohibited; [and] (2) Within the scope of application of the [Constitution] and without prejudice to [any of its specific] provisions . . . any discrimination on grounds of nationality shall be prohibited.
\end{quotation}

Id.

197. EU CHARTER, supra note 187, at pt. II, art. 24 provides:
(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity; (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration; [and] (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Id.

198. EU CHARTER, supra note 187, at pt. II, art. 25 provides: "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life." Id.

199. EU CHARTER, supra note 187, at pt. II, art. 33 provides: "(1) The family shall enjoy legal, economic and social protection [and] (2) To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child." Id.

consensus that capital punishment is inconsistent with a basic respect for human life in the union.\textsuperscript{201} As well, the doctrine of proportionality that flows through EU law is an important, shared principle, that sits at the heart of the draft constitution,\textsuperscript{202} and will inevitably serve as a keystone that brings order to every other guarantee in Member States’ laws and constitutional jurisprudence, much like the Fourteenth Amendment Due Process Clause has assumed a place of priority in the American Bill of Rights in the hundred years since its ratification following the Civil War. There may be disagreement on fine points; it may be frustrating and maddening at times, as the European Council and each Member State wrestles with capturing a constitution on paper. But recognizing the large amount of shared ground (which was fostered by transparency,\textsuperscript{203} and the consistent push for citizen participation,\textsuperscript{204} from the very start of this constitutional process) should give comfort to each Member State as the necessarily difficult process of constitution-making reaches a point of culmination in 2004.\textsuperscript{205}

Although my own politics might be described as centrist, the European constitutional model I have described above – accomplished by incorporating modest revisions to the current draft document – would be considered quite “conservative” (in some ways) in the United States. It turns our system upside down, gives a maximum amount of power to the Member States,\textsuperscript{206} and requires strict adherence to the text and history of the constitution to further safeguard the individual nations’ autonomy.\textsuperscript{207} Each proposal set forth above, to a certain extent, would restrict the power of the central government. But modern Europe is not the United States of America in 1776. It consists of a collection of independent nations that have joined together for the common good, but have elected a partnership rather than an unconditional marriage. In many ways, these concerns mirror those of the Anti-Federalists in post-Revolutionary America, who vigorously opposed

\begin{thebibliography}{99}
\bibitem{201} See EU CHARTER, supra note 187, at 9 (prohibiting the death penalty and executions entirely).
\bibitem{202} See Draft Treaty, supra note 1, pt. I, art. 9.
\bibitem{203} See Presidency Report, supra note 200.
\bibitem{205} See supra note 2 and accompanying text (regarding vote on draft constitution in summer of 2004).
\bibitem{206} See discussion supra notes 100-04, 158-60, 165-70.
\bibitem{207} See discussion supra notes 169-81.
\end{thebibliography}
adoption of the U.S. Constitution as the new nation took shape.\textsuperscript{208} Robert Yates, who wrote under the pen name "Brutus" in the \textit{New York Journal}, the most outspoken opponent of the proposed Constitution, saw great peril looming in the shadows of this experiment called the American Constitution.\textsuperscript{209} It threatened to open the door to unending expansion of national power; it threatened to render the states inconsequential; it posed an insidious danger to the preservation of individual rights over which blood had been spilled in the Revolutionary War.\textsuperscript{210} As one Anti-Federalist pamphlet proclaimed:

\begin{quote}
You, gentlemen, the preachers of the new Constitution, will not surely contest a fact proved by the records of all ages and of all nations... that the liberties and rights of the people have been always encroached on, and finally destroyed by those, whom they had entrusted with the power of government.\textsuperscript{211}
\end{quote}

In one sense, the Anti-Federalists have proven correct in their prediction that the evolving U.S. Constitution would foster enormous federal power.\textsuperscript{212} However, as Stanford historian Jack Rakove has correctly observed, it was not the Constitution itself that created the present American system of government.\textsuperscript{213} It was the evolution of the federal judicial power in cases like \textit{Marbury v. Madison},\textsuperscript{214} and the trauma of Civil War, and the adoption of the Fourteenth Amendment during Reconstruction, and President Franklin Roosevelt's New Deal, and the evolution of a national economy, that caused the United States to transform itself — quite consciously — from a confederation into a modern nation-state with a powerful central government.\textsuperscript{215}

Europe need not make the same choices that the United States made. It need not embrace the same extensive notion of judicial review for its courts,\textsuperscript{216} the same sweeping concept of "necessary and proper" powers for

\begin{center}
\textsuperscript{208} CATHERINE DRINKER BOWEN, \textbf{MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO DECEMBER 1787}, at 269-72 (1986).
\textsuperscript{209} \textit{Id.} at 246.
\textsuperscript{210} RAKOVE, \textit{supra} note 5, at 150-52.
\textsuperscript{211} \textit{Id.} at 152 (emphasis omitted).
\textsuperscript{212} See \textit{id.} at 269-72.
\textsuperscript{213} \textit{Id.} at 150-52.
\textsuperscript{214} 5 U.S. 137 (1803) (Marshall, C.J.).
\textsuperscript{215} RAKOVE, \textit{supra} note 5, at 201-02.
\textsuperscript{216} See \textit{U.S. CONST. art. III, \S} 2; \textit{Marbury}, 5 U.S. 137 (1803).
\end{center}
its legislature, its the same brand of federal supremacy vis-à-vis component states, or other specific constitutional elements which have caused our American Constitution to vest enormous power in Washington, D.C. At the same time, the American experience does provide invaluable lessons when it comes to constructing a forward-thinking and enduring European Constitution. Part of that lesson is that this wonderfully rich assortment of European nations that has guided the development of Western civilization for centuries, would wither and die if it did not insist upon its own custom-made constitutional template.

Those who are witness to this historic process are extremely fortunate. In the United States, many of us watch with awe and envy as Europeans confront the opportunity to create the most sophisticated, up-to-date, enlightened constitution of modern time. Unlike the Framers of the U.S. Constitution who met in a stifling hot convention hall in Philadelphia in 1787, leaders in the EU have the benefit of observing and learning from a period of political and societal history unmatched by any that has preceded it. Europeans’ parents and grandparents have observed destructive wars waged by good governments and bad; atomic bombs that have threatened safety in the name of protecting security; the invention of automobiles and jet airplanes that have revolutionized travel; the development of technological devices like cell phones and Internet devices that encroach upon our privacy in ways that the Framers of the U.S. Constitution could have never imagined; and the rapid advancement of science and medicine that present us with daunting ethical challenges dealing with in-vitro fertilization and the cloning of live human cells. If we, in the United States, had the opportunity to draft a new constitution at the dawn of the twenty-first century, how fortunate we would consider ourselves. We would build upon our extensive experiences, borrow from the experiences of other nations new and ancient, and produce a political-legal document that was unprecedented in the history of mankind.

A new European Constitution, if it is finalized and ratified, will become a model for every nation in the world, including the United States. It will turn into a beacon for our evolving notion of world democracy, and become

---

217. See U.S. Const. art. I, § 18, cl. 18; McCulloch v. Maryland, 17 U.S. 316 (1819).
218. See U.S. Const. art. VI, § 2.
220. Bowen, supra note 208, at 1 (Bowen's description of the Constitution Convention remains the standard).
even more widely-quoted and influential than the American Constitution of
the past two centuries.

But first, as with any monumental document, it must be completed. As
John Adams communicated to his friend George Wythe after the American
Constitution had been framed and a wondrous new experiment in
government was embarked upon: “You and I, dear friend, have been sent
into life at a time when the greatest lawgivers of antiquity would have
wished to live.”

Leaders and citizens of the EU live in such a time, even though they may
be too close to the historical windowpane to fully appreciate the view. If
they are successful, however they ultimately tinker with and sharpen the
details of the draft document, this will constitute the greatest
accomplishment in the history of modern democracy, shining a light on
sparkling new paths that will reach around the globe.

Ich moechte mich herzlich bedanken fuer die Gelegenheit, an der Diskussion
ueber ein Thema von so historischer Bedeutung, wie es die Schaffung einer
Europaeischen Verfassung darstellt, mitwirken zu koennen.

221. John Adams, Thoughts on Government IV, at 200 (1850), cited in State v.
Jewett, 500 A.2d 233, 235 n.6 (Vt. 1985).

222. English Translation: I wish to heartily thank you for the opportunity to take part
in the discussion of such a theme of historical importance as the creation of a European
constitution.