ARTICLES

THE CONSTITUTIONALIZATION OF THE EUROPEAN UNION: COMPARATIVE PERSPECTIVES

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In retrospect, the institutional development of the European Union (EU) during the last decade might be viewed as a missed opportunity for a constitutional moment.¹ In May 2000, Germany’s Foreign Minister Joschka Fischer revitalized a discussion that had long been set aside in the European public arena—the debate over a European Federation and a European Constitution. Seven years later, at a meeting of the European Heads of State and of Governments of the twenty-seven EU member states, chaired by German Chancellor Angela Merkel, the “constitutional concept” was officially “abandoned.”²

At the end of the decade, an assessment of the status of the EU’s constitutionalization appears worthwhile. This paper proceeds with such an assessment in a comparative perspective, i.e. confronting the European experience with the constitutional experience of the United States (U.S.)—as opposed to a comparison with recent developments in regional integration, like NAFTA or MERCOSUR.³ Indeed, the latter regional

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¹ The Lisbon Treaty has been ratified by all member states of the European Union, after a successful second referendum in Ireland on October 2, 2009, and after the Presidents of Poland and the Czech Republic eventually accepted to sign the act of ratification for their countries. The Treaty of Lisbon entered into force on December 1, 2009. This does not change by any means the analyses provided for in this Article, which were written before it was possible to know the outcome of the second Irish referendum.


³ See Jacques Ziller, The Challenge of Governance in Regional Integration - Key Experiences from Europe (Eur, U, Institute, Florence, Working Paper, No. 11, 2005. NAFTA is
groupings lack the political perspective that has been present in Europe since the early years of European integration after World War II.

There are considerable differences between the experience of the U.S. and that of Europe, which obviously need to be taken into account in a comparison. Times and conditions are different, with a time-span of about two centuries between the two processes. Legal and political conditions are also different. Take, for example, the political and legal contrast between the original thirteen Colonies that collectively had just won independence from the King of England, and six sovereign states in Europe. Two such sovereign states were centuries old (France and the Netherlands), the four others (Belgium, Germany, Italy, Luxemburg) existed for a century or less; all of them came with deep-seated, national identities, based on specific cultures and on different languages (four at the beginning of European integration, twenty-three currently). The American civil war was still ahead when the process of building the United States started; the European civil war—that is World Wars I and II—had just finished when the process leading to the European Union started.

However, there are also common features between the American and European experiences: both processes are continuous, with an increase of membership—from thirteen to fifty states in the American case and from six to twenty-seven (at present) in the European case. Furthermore, the legal instruments that are available for such an endeavor are essentially the same: treaties based upon international law—such as the Articles of Confederation of 1781 and the treaties of Paris (1951), Rome (1957), and Maastricht (1992), among others, that established the European Communities and the European Union—or a constitution, such as the Constitution of the United States of America of 1787 or the respective constitutions of EU member states.

an acronym for the North American Free Trade Agreement and created a trilateral, trading bloc between the U.S., Canada, and Mexico. MERCOSUR is a Spanish acronym that translated to English means the Southern Common Market. It comprises a trade agreement among Argentina, Brazil, Paraguay, and Uruguay. Id.


5. Id.

6. Amongst EU member states’ constitutions, special attention should be given to the Fundamental Law of the Federal Republic of Germany of 1949 which took over the institutions of federalism that were already enshrined in previous German constitutions, from 1849 (Frankfurt) to 1920 (Weimar); the German constitution was embedding the most fully fledged experience of constitutional federalism in Western Europe—together with the Constitution of Switzerland, and there are many common features between German federalism and what might be called European federalism. See generally Grundgesetz für die Bundesrepublik Deutschland (federal constitution).
This Article first analyzes, in section I, the different phases of a process that could have become Europe’s “constitutional moment” but appeared to come to an end with the withdrawal of the “constitutional concept” in June 2007. Section II explores the meaning of EU Constitutionalism as a political phenomenon, and section III analyzes the EU Constitutionalism as a scholarly phenomenon in order to compare EU Constitutionalism and the U.S. experience of constitutionalism. Finally, section IV reconstructs the content and significance of the “Constitutional Treaty” of October 2004, and the Treaty of Lisbon of December 2007 to compare the continuing incremental constitutionalization of the EU with the experience of the U.S. from the Articles of Confederation (1781) onward.

I. FORTUNE AND MISFORTUNE OF A CONSTITUTIONAL CONCEPT FOR EUROPE

A. THE UNITED STATES OF EUROPE, THE EUROPEAN FEDERATION AND A EUROPEAN CONSTITUTION: ORIGINS AND MEANINGS

The expression “United States of Europe” was coined by Great Britain’s former Prime Minister Winston Churchill, in a speech held on September 19, 1946, at the University of Zürich (Switzerland) where he concluded by proposing the establishment of what was to become the Council of Europe:

Our constant aim must be to build and fortify the strength of the United Nations organization. Under and within that world concept we must recreate the European family in a regional structure called—it may be—the United States of Europe and the first practical step will be to form a Council of Europe.

If at first all the States of Europe are not willing or able to join a union we must nevertheless proceed to assemble and combine those who will and those who can.

The salvation of the common people of every race and of every land from war and servitude must be established on solid foundations, and must be created by the readiness of all men and women to die


rather than to submit to tyranny.

In all this urgent work France and Germany must take the lead together. Great Britain, the British Commonwealth of Nations, mighty America, and, I trust, Soviet Russia—for then, indeed, all would be well—must be the friends and sponsors of the new Europe and must champion its right to live.9

Winston Churchill rightly pointed to the necessity of a joint initiative by France and Germany, two countries that had fought three wars against each other since 1870. Indeed, the next step leading to what is today the EU was a declaration by Robert Schuman—France’s foreign minister—issued on May 9, 1950, whereby France invited Germany and other Western European countries to pool their sovereign powers in the coal and steel production field into what would become the European Coal and Steel Community:

World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it.

The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations. In taking upon herself for more than 20 years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war.

Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.

With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point.10

The Schuman Declaration did not contain the words “United States of Europe,” or “Constitution”; it was based on functionalism, which is an approach that would lead to an ever closer union of the peoples of Europe in an incremental way. However, the creation of a European federation was undoubtedly an ultimate goal behind the Schuman Declaration, as has been explained with particular emphasis by Jean Monnet who drafted the

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declaration of the French foreign minister throughout his Memoirs. As a matter of fact, even the draft for a treaty establishing a European Political Community that was presented on March 10, 1953 did not bear the name "Constitution" but that of "Status": statut in the French language.

Fifty years after the Schuman Declaration, the words "European Constitution" were being used for the first time in a rather official context, albeit the author declared that he was speaking in a personal capacity. In a Speech at the Humboldt University on May 12, 2000, German Foreign Minister Joschka Fisher said:

The division of sovereignty between the Union and the nation-states requires a constituent treaty which enshrines the principle of subsidiarity. There should be a clear definition of the competences of the Union and the nation-states respectively in the treaty, with core sovereignties and matters which absolutely have to be regulated at European level being the domain of the Federation, whereas everything else would remain the responsibility of the nation-states. This would be a lean European Federation, but one capable of action, fully sovereign yet based on self-confident nation-states, and it would also be a Union which the citizens could understand. The nation-states will continue to exist and at the European level they will retain a much larger role than the Laender have in Germany.

These three reforms—the solution of the democracy problem and the need for fundamental reordering of competences both horizontally, i.e. among the European institutions, and vertically, i.e. between Europe, the nation-state and the regions—will only succeed if Europe is established anew through the realization of a European constitution centered around basic human and civil rights, an equal division of powers between the European institutions and a precise delineation between the Federation and the nation-state.


13. It should nevertheless be taken into account that the Constitution of the Kingdom of Italy, which had established the parliamentary monarchy of the Kingdom of Savoy on March 4, 1848 is known in Italy as "Statuto Albertino" (Statuto fondamentale della Monarchia di Savoia), a significant fact, as the 1953 draft status was based on a joint initiative of the French and Italian governments.

14. Joschka Fisher, German Foreign Minister, Address at Humboldt University (May 12,
In order to fully understand Fischer’s perspective it is worthwhile to quote the next part of his speech:

One could imagine Europe’s further development far beyond the coming decade in two or three stages:

First, the expansion of reinforced cooperation between those states which want to cooperate more closely than others, as is already the case with the Economic and Monetary Union and Schengen. We can make progress on the further development of Euro11 to a politico economic union, on environmental protection, the fight against crime, the development of common immigration and asylum policies and of course on foreign and security policy.

One possible interim step . . . a group of states would conclude a new European framework treaty, the nucleus of a constitution of the Federation. On the basis of this treaty, the Federation would develop its own institutions, establish a government which within the EU should speak with one voice on behalf of the members of the group on as many issues as possible, a strong parliament and a directly elected president. Such a center of gravity would have to be the avant garde, the driving force for the completion of political integration and should comprise all the elements of the future federation . . . this avant garde must . . . be open to all member states and candidate countries. . . . For those who wish to participate but don’t fulfill the requirements, there must be a possibility to be drawn closer in. Transparency and the opportunity for all EU member states to participate would be essential factors governing the acceptance and feasibility of the project. . . .

The last step will be completion of integration in a European Federation . . . . The steps towards a constituent treaty require a deliberate political act to reestablish Europe. This . . . is my personal vision for the future: from closer cooperation towards a European constituent treaty and the completion of Robert Schuman’s great idea of a European Federation.15

At the time of Minister Fischer’s speech, an intergovernmental conference (IGC) was negotiating amendments to the existing Treaties of Rome of 195716 and the Treaty of Maastricht of 1992.17 The Treaty of

16. The Treaty of Rome is the treaty that established the European Community (EC) and the European Community of Atomic Energy (EURATOM). Treaty Establishing the European
Nice, which resulted from these negotiations and was signed in early 2001, was the fourth major amending treaty after the Single European Act of 1986, the Treaty of Maastricht of 1992 and the Treaty of Amsterdam of 1997. In Berlin in 2000, Fischer was not referring to the then ongoing negotiations; he was instead looking ahead to the first decades of the twenty-first century.

The vision presented by Fischer in Berlin was later reflected in a "Declaration on the future of the Union" that was adopted by the intergovernmental conference of the year 2000 upon a proposal by the Belgian and Italian Prime ministers Guy Verhofstadt and Giuliano Amato, respectively, and it was annexed to the treaty of Nice. The Declaration scheduled a new IGC, to be held in 2004, in order to address a number of questions and thus, make corresponding changes to the Treaties. The words "Constitution" and "Federation" were being avoided, because a number of governments (under leadership of the United Kingdom) would never have subscribed to a declaration that used the vocabulary of "constitution-building" and of "federalism."

B. ABANDONING THE "CONSTITUTIONAL CONCEPT": THE EU SUMMIT OF JUNE 2007

The developments that followed from 2001 until the end of 2009 can best be understood by taking into account the competing visions about Europe's future as a political entity. The federalist perspective is illustrated by the German Foreign Minister's speech in 2000, and the opposing vision, the regional integrationist view, is based on a free trade area—a customs union and an internal market—which the British government has preferred since the early 1950s. Reading the mandate that the European Council approved after a long negotiation lasting until the

Community, 1957, available at http://eurlex.europa.eu/en/treaties/index.htm#founding. The original name of the EC was European Economic Community (EEC). The adjective 'Economic' has been cancelled by the Maastricht treaty of 1992 in order to signal the transformation of the EEC into Community with a political dimension, due to the creation of a European citizenship and of a Common Foreign and Security Policy (CSFP).


19. At the time of writing, the German Constitutional Court has given a green light to the ratification of the Treaty by Germany, pending an amendment to the accompanying German Law, and a new referendum was announced in Ireland for October 2, 2009, whilst polls were indicating that a majority of Irish voters would vote in favor of ratification. If the outcome of the referendum were positive, ratification by Ireland, Poland and the Czech Republic could follow during October, permitting an entry into force of the Treaty of Lisbon - by November 1, 2009, maybe.
early morning hours of June 23, 2007, one gets the impression that the federal vision has been defeated:

The IGC is asked to draw up a Treaty (hereinafter called “Reform Treaty”) amending the existing Treaties with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action. The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called “Constitution”, [sic] is abandoned. The Reform Treaty will introduce into the existing Treaties, which remain in force, the innovations resulting from the 2004 IGC, as set out below in a detailed fashion.\(^\text{20}\)

This detailed mandate was then strictly followed by the intergovernmental conference that was officially opened on July 23, 2007, and officially closed six months later on December 13 with the signing of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (EC), in Lisbon (Portugal).\(^\text{21}\)

By scrutinizing the cited extract of the mandate of the 2007 IGC, it was, however, already possible to see that the Reform Treaty was not the final word to the ongoing debate on Europe’s future. Indeed, the text says that the constitutional concept is abandoned, but it defines this as a concept which “consisted in repealing all existing Treaties and replacing them by a single text called ‘Constitution’.”\(^\text{22}\) It then says that “the innovations resulting from the 2004 IGC” would be introduced in the exiting treaties, that is, the Treaties of Rome and Maastricht as last amended by the Treaty of Nice, which had come into force on March 1, 2003.\(^\text{23}\) Essentially, while the endeavor to replace the existing Treaties of Rome and Maastricht by a single text bearing the word “Constitution” in its title had been abandoned, the reforms proposed by the European Convention of 2002-2003 and approved at the end of the subsequent IGC with the signing of the “constitutional treaty” in Rome on October 29, 2004, had not.\(^\text{24}\)

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23. Id.
24. For an analysis of these reforms, which cannot be synthesized in a nutshell see JACQUES ZILLER, THE EUROPEAN CONSTITUTION (2004) [hereinafter THE EUROPEAN CONSTITUTION]. The only reforms which have not been taken up by the Lisbon treaty were the formal aspects and symbols which could have given the impression that the EU had elements of statehood: the name “Constitution”, the anthem, flag, hymn, etc. the denomination of European “laws and framework laws” instead of regulations and directives, the name of the “Minister for foreign affairs” etc.
In comparing the constitutional experience of the EU with that of the U.S., the question immediately arises: comparing what period? A number of eminent European politicians have referred to the Philadelphia Convention in the framework of the EU constitution discussion.

The comparison first arose among a number of members of the so-called "body" that had been established by a decision of the European Council at its meeting in Cologne, Germany on June 3-4, 1999.\textsuperscript{25} The German members of this body, including in particular its president, Roman Herzog,\textsuperscript{26} could not help but think of the Verfassungskonvent (Constitutional Convention), which drafted the new German constitution in 1948 at Herrenchiemsee. The constitution was to become the fundamental law of the Federal Republic of Germany on May 23, 1949. In contrast, the French members of the body probably recalled the convention that proclaimed the French Republic during its first meeting on September 12, 1792. Undoubtedly, most members of this body also probably had the Convention of Philadelphia in the forefront of their minds when they decided by consensus to call their assembly "Convention."

More than a year later, on December 14-15, 2001, in Laeken (Belgium), the European Council decided to convene a "Convention on the Future of Europe." The European Council was referring to the experience of 2000, which was considered a major achievement, because this first Convention had succeeded in drafting the Charter of fundamental rights of the EU, albeit quite a number of members had diverging views regarding its content. There had been even more divergences between the fifteen governments of the EU member states about the legal status to give to that document, but they eventually reached a compromise that led to the proclamation of the Charter in Nice (France) on December 7, 2000, just before the meeting of the European Council that reached an agreement on the Nice Treaty.\textsuperscript{27}

In Laeken, the European Council decided to appoint former French President Valéry Giscard d'Estaing as Chair of the Convention on the future of Europe. Giscard d'Estaing, who claims to be a descendent of one of Lafayette's companions in the fight for American independence, was clearly fully aware of the events of May of 1787, when the representatives of the thirteen former British colonies in America—with the exception of

\textsuperscript{25} Presidency Conclusions, Cologne European Council (June 3, 1999), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm. The French version was using the word "enceinte", literally "precinct" that conveyed the idea of an assembly.

\textsuperscript{26} Herzog had previously been a President of Germany, a Judge of the Federal Constitutional Court of Karlsruhe and a professor of constitutional law.

\textsuperscript{27} See generally Treaty of Nice, supra note 18.
Rhode Island—gathered in Philadelphia in what is probably the most famous constitutional assembly in history. Giscard d’Estaing knew that according to the convention’s mandate, these representatives were to present and consider proposals for amendments to certain provisions of the treaties that united those thirteen states—the Articles of Confederation. He also knew that the assembly, proceeding under the Presidency of the delegate from the state of Virginia, George Washington, adopted an agenda that envisaged the institution of a national government, endowed with legislative, executive and judicial branches. Hence when Giscard d’Estaing proposed to name the Convention he was chairing “European Convention” (instead of “Convention on the future of Europe”), he was signaling his ambition to be remembered in history as a European figure equivalent to George Washington. A consensus of members at the Convention accepted his proposal on February 28, 2002. Clearly, however, the representatives appointed by the British Government and the British Parliament did not want to allow the same to happen in Brussels, as had happened in Philadelphia more than two centuries earlier.

American scholars are certainly better placed than I am to find out what the most salient commonalities and differences are between the Philadelphia Convention and the European Convention of 2002-2003. A major difference is that while the former group adopted a draft Constitution for a new state, the United States of America, the latter adopted a draft international treaty. The name of the treaty was “Treaty Establishing a Constitution for Europe,” but it was still a treaty. As a European scholar, I can contribute to a broader comparison between the U.S. and EU processes by trying to sketch out what EU Constitutionalism means in this context.

II. EU CONSTITUTIONALISM AS A POLITICAL PHENOMENON

What might be called “EU Constitutionalism” represents both a political phenomenon as old as the first attempts at unifying Europe on a free basis and a scholarly phenomenon that is far more recent and largely coincides with the decade that led from the Cologne meeting of June 1999 to the present days (2009).

Since the division of Charlemagne’s Empire between his three sons in 843, there have been numerous attempts at unifying Europe by military force. These attempts might be historically relevant to understand what happened in the second half of the twentieth century, but they cannot be considered as models, neither from a political point of view, nor in a legal

28. No citation is possible here because Giscard d’Estaing never formally published these comments; these propositions were asserted repeatedly in public speech.
sense. One may also leave aside the efforts of French Foreign Minister Aristide Briand between the two World Wars. His efforts were a success in establishing together with the U.S. secretary of state the principle of the prohibition of war with the Briand-Kellogg pact of August 27, 1928, but were a failure in his attempts to establish Franco-German friendship, due to the rise of authoritarian regimes in Europe.

The endeavor that led to establishing the Council of Europe in 1949 and of the European Communities and EU from 1951 to 1992 is, on the contrary, highly relevant in understanding what EU Constitutionalism means from a political point of view. During this period there always have been different and sometimes opposed views about what should be done on the European Continent in political terms. These differences are best illustrated by the composition of the European Convention of 2002-2003.

A. FOUR ORIENTATIONS ON THE FUTURE OF EUROPE

The European Convention held bi-monthly plenary meetings and an equal number of committee meetings from February 28, 2002, to July 10, 2003. It was composed of a total of 207 members (107 full members and 100 alternates) appointed by the governments and parliaments of the fifteen member states of the EU and of thirteen candidate countries (all of them full members of the EU since 2004-2007 [the latter date for Bulgaria and Romania], with the exception of Turkey), and admitted thirteen observers (and twelve alternates) to attend to its work. The composition of the Convention defies simplistic descriptions: there were at least four distinct perspectives, that is, four different orientations regarding what the Union should be and where it should be going. These four orientations represent four different visions of Europe: federalist, functionalist, intergovernmentalist and nationalist (or “souverainiste”, as the French say). These are four categories which, little by little, have been crystallizing within the context of the continuing debate on Europe since the early fifties.

1. THE FEDERALIST PROJECT

The federalist project for Europe is typically associated with Altiero Spinelli (1907-1986). This approach can be summarized—when it is not being caricaturized—in two points. First, the objective is to create a European federation endowed with external sovereignty, comparable to the

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29. For further details, see THE EUROPEAN CONSTITUTION, supra note 24.
30. The four visions of Europe were first described in this author's book. See THE EUROPEAN CONSTITUTION, supra note 24, at 75-79. They are reproduced here in largely the same form that they appear in the book cited.
United States of America. Second, the means consist of federal institutions, established by a constitution, including most importantly a Parliament that represents the peoples of Europe. A federal Europe would thus fundamentally be linked to democratic institutions.

Interest in the federalist vision, which was for a long time considered utopian and which in practice was eclipsed by the more pragmatic approach of Jean Monnet, re-emerged dramatically in 1992 in connection with the ratification of the Treaty of Maastricht. This re-emergence was due in large part to the fact that the prevailing, excessively technocratic approach to European integration was identified as the root cause of one, the “no” vote in Denmark in the referendum of June 2, 1992, two, the ratification of that Treaty, and, three, the hesitant acceptance by the French in the referendum on September 20 of that year.

2. The Functionalist Approach

The functionalist approach to European integration is forever linked to the name of Jean Monnet (1888-1979) and is found at the very heart of the Treaty of Paris of 1951, which established the “Community method.”

The Community method has been clearly defined ever since it was invented by Jean Monnet and his collaborators when the Schuman plan was conceived in 1950. This unique form of policy-making is based on two essential elements: the powers of the Commission and the so-called “functionalist” approach to European integration. The European Commission is an innovative institution that has no model or equivalent, either in national constitutions or in international organizations. It is, in principle, an independent organ charged with promoting the general European interest (as opposed to the interests of the Member States as such) through the exercise of three functions in particular that had traditionally been executed only by states: a decisive role in legislation, as it is entrusted with an exclusive “right of initiative”; an important executive role for the direct application of various common policies; and certain quasi-judicial powers, as it may bring proceedings before the European Court of Justice (ECJ) against a member.

Since the Schuman Declaration of May 9, 1950, the process of European integration has also been associated with what is sometimes called a “functionalist” approach. The terms “functionalist” and, more recently, “neo-functionalist”, which are primarily found in the works of political scientists,\(^3\) denote a theoretical construct used to apply the

\(^{31}\) See, e.g., Ernst B. Haas, THE UNITING OF EUROPE (1958); Ernst B. Hass, BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION (1964).
practical method devised by Jean Monnet. Monnet’s ideas were inspired on the one hand by his experience in sophisticated logistics operations linking France, Great Britain and the U.S. during World Wars I and II and, on the other hand, by his subsequent involvement in the development and application of the Marshall Plan for the reconstruction of Europe. From the already quoted Schuman Declaration, one may infer that European integration is a process of accretion whereby the interests of different states become, above all for pragmatic reasons, increasingly intertwined.

Although sharing common aspirations, the functionalist approach is more pragmatic than the federalist approach, and insists more on the method than on the objective. This method is linked closely to the institutions created to drive forward European integration, which were conceived above all as a means to overcome the national self-interest that biases the positions of the diplomatic services. Whereas a constitution is an essential feature to the federalist approach, which aims at establishing a European federation, the pragmatic nature of the functionalist approach allows it to see an international treaty as an appropriate legal tool for achieving European integration incrementally.

3. THE INTERGOVERNMENTALIST APPROACH

The intergovernmentalist approach to European integration was for a long time associated with Charles de Gaulle (1890-1970) and with his slogan of “l’Europe des patries” (“Europe of homelands”).

This approach is generally perceived as being hostile to European integration, as it represents the defiant preservation of national sovereignty. Its roots are as old as European intergovernmental cooperation itself, first manifest in the Vienna Congress of 1814-15. De Gaulle held in contempt everything Monnet stood for and opposed him at every turn. The intergovernmentalist approach is characterized by the objective of reinforcing interstate cooperation propelled by the most important countries.

The intergovernmentalist approach has always been advocated by the British governments. In 1950, they had refused Jean Monnet and Robert Schuman’s offer to join the proposed European Coal and Steel Community because of the supranational powers that were to be endowed to its High Authority. In 2003, the intergovernmental vision was best represented by British Prime Minister Tony Blair. Like de Gaulle, Blair’s vision of European integration blended a strong sense of pragmatism with the goal of a Europe guided by the leadership of the oldest and largest Member States. Although not as articulate as Blair’s position, the position of a number of governments of EU member states favor the intergovernmental approach,
either out of true conviction or because they do not know how to explain European integration to public opinion. Clearly, the appropriate instruments for intergovernmentalism are international treaties, especially if they set up institutions which are in the grip of the executives of participating countries.

4. THE NATIONALIST ATTITUDE

The nationalist, or souverainiste, attitude towards Europe started taking clear shape with the hostile reactions to the Maastricht Treaty in certain Member States. Such reactions occurred in Denmark and France where referendums were held in 1992, although it has always been present as an expression of fear towards the unknown future, best represented by the exaggerations of British press in the four last decades. Two characteristics distinguish this perspective from the intergovernmentalist approach. First, there is a genuine insistence on matters of principle, which may be contrasted with the relative pragmatism of both de Gaulle and Blair. Second, and more importantly, exponents of the nationalist view lack any kind of structured program for Europe.

Furthermore, the nationalist perspective may be distinguished in that the federalist, functionalist, and intergovernmentalist approaches to European integration are all in reality largely complementary, as long as the issue of transforming Europe in a federal state is not being debated. This harmonization can be seen from the fact that, since its inception the Union has made substantial albeit non-linear strides under the more or less contemporaneous influence of all three visions.

Compared with the other visions of European integration, the nationalist view might appear paradoxically more optimistic with respect to the problem-solving capacity of states, because it negates the fundamental risk of the divergent interests in Europe being pitted against each other.

The Convention of 2002-2003 differed radically from the ICGs that preceded it in that, for the first time, those espousing the nationalist vision had a forum to express their views openly. Since the enlargement of the EU to twenty-five Member States in 2004 (twenty-seven since 2007), this nationalist vision is also present at the highest level of the institutions of two Member States—with Presidents Václav Klaus, from the Czech Republic and Jarosław Kaczyński from Poland—and was dominant in Ireland during the campaign leading to the referendum of June, 12, 2008. The nationalist approach is not only hostile to any idea of a European constitution; it is also fundamentally opposed to the use of international treaties creating autonomous international organizations as a tool for European cooperation.
B. THE RESULTING CONFUSION IN THE DEBATE ON THE FUTURE OF THE EU

The growing difficulties of holding sound public debates on the future of the EU can be explained in the light of these four visions. Only the federalist project and the nationalist vision are easy to explain in a few slogans, as happens in electoral campaigns, especially when they lead to a referendum. In contrast, both the intergovernmentalist and the functionalist approach are far more complex, as they are in essence based upon compromises between diverging views about the future of Europe.

The campaign for the referendum on the ratification of the Constitutional Treaty in France on May 29, 2005, has been until now the clearest expression of these difficulties. The arguments against the Constitutional Treaty were basically of three kinds—to some extent antagonistic—which all resulted in the victory of negative votes: first, a sincere hostility against a further step towards European integration, expressed by nationalists of all kinds; second, a sincere disappointment with a treaty that did not create a European federation, expressed by European idealists; and third, an enormous amount of confusion about the real scope of specific clauses of the Constitutional Treaty, about the consequences of the presence of the word “constitution” in the official title of the treaty, and about the possibility of alternatives to the proposed treaty.

The confusion about possible alternatives to the Constitutional Treaty of 2004 is probably to be ascribed solely to the poor quality of political communication of those who were in favor of the Constitutional Treaty; they hardly tried to explain that the treaty was the best possible compromise at the time between twenty-five Member States of the EU. The confusion about specific clauses and the nature of the treaty is also to be attributed to fuzzy debates between specialists of constitutional law, legal theory and international law, whereas specialists of EU law did not come in early enough. Legal scholarship obviously has only a very limited direct impact on public opinion, but in a situation like that of 2005, the confusion in scholarly debate has to my view contributed to depriving politicians of simple and solid arguments in favor of the treaty.

C. EU CONSTITUTIONALISM AS A SCHOLARLY PHENOMENON

Confusion in the academic debate about the Constitutional Treaty was certainly not limited to France, although it had a specific impact in that country, due to the fact that such discussions focused indeed upon the text of the Constitutional Treaty of 2004. Everywhere in Europe, and to some extent outside of Europe, the growth of EU Constitutionalism as a scholarly phenomenon contributed to a very lively and rich debate, and as such, was
positive. It also contributed to the fuzziness of the debate about the Constitutional Treaty. There was a mix of highly theoretical discussion, some only to a certain extent grounded in the treaty of 2004 itself, and other detailed discussion of some clauses, biased by inappropriate use of typical methods of constitutional law in the field of EU law. In order to illustrate the confusion, three issues will be considered here, which have been chosen as being the most relevant ones to the issue of constitutionalization of the EU.

1. THE CONSTITUTION V. TREATY DISCUSSION

a. A treaty establishing a constitution?

A first type of discussion developed during the work of the European Convention, after its Praesidium had tabled a first draft outline including the title “Treaty establishing a Constitution for Europe,” on October 18, 2002. In his opening speech to the Convention on February 28, President Giscard d’Estaing restated the idea expressed two years earlier by Joschka Fischer: he proposed that the Convention would try to draft a treaty that would be the basis for the establishment of a future European Constitution, although in an undefined future. An apparently very small shift was accomplished when he proposed the outline seven months later: instead of a treaty that would consolidate or establish the institutions which would later prepare a European Constitution, this latter move would be accomplished by the proposed draft treaty itself. Apparently, most members of the European Convention did perceive such a shift as being merely a minor formal point, if ever they perceived the shift.

Many scholars, on the contrary, considered this a major issue: would the coming text be a constitution or a treaty? The discussion was mainly led by constitutional lawyers and legal theorists, and it is still not settled. On one side stood those who insisted that a constitution was by nature linked to statehood, concluding that it was improper to even use the word “constitution” in a treaty. Opposite, a number of scholars developed the idea that a political organization at a regional or worldwide level could likely be the basis for a constitution, and, as such, was a logical consequence of the transformations of the notion of sovereignty. A number of scholars opted for a more technical approach, noting that the word “constitution” had already been used for international treaties, e.g. the Constitution of the International Labor Organization, and that what mattered was the content, not the form of the legal instrument intended to establish a constitution.

As far as I am concerned, I belong to the latter category, and opted for applying the concept expressed in Article 16 of the French Declaration of
the Rights of Man and of the Citizen of August 24, 1789, which states: “Any society in which the guarantee of rights is not secured, and in which the separation of powers is not determined, has no constitution at all.”\textsuperscript{32} I thus considered, as the proposed treaty was securing fundamental rights and was consolidating the separation of powers in the EU, it could be considered a constitution. As a matter of fact the institutional setting and major legal principles of the EC had already been denominated a “constitutional charter” by the ECJ in a decision of 1986, \textit{Les Verts v. European Parliament}.$^{33}$

What neither I nor other scholars I have read until now have done, was to look at the other side of the coin and examine what were the consequences of the contractual nature of the international treaty into which the EU constitution was enshrined—as opposed to the question whether a treaty could contain a constitution. I would like to emphasize something that has been to a large extent forgotten in the continuing debate about the European Constitution:\textsuperscript{34} an international treaty—such as the treaties establishing the EC and EU—being a contract between states, it must be analyzed first as a set of reciprocal obligations between its signatory states, even if in the specific case of the EC treaties it goes beyond and contains rights for the benefit of private persons.

\textbf{b. The Van Gend en Loos case}

In its famous decision \textit{Van Gend en Loos}\textsuperscript{35} of February 8, 1963, the ECJ, answering a question from the \textit{Tariefcommissie}, a tax court from the Netherlands, stated:

The first question of the Tariefcommissie is whether article 12 of the treaty has direct application in national law in the sense that nationals of member states may on the basis of this article lay claim to rights which the national court must protect.

To ascertain \textit{whether the provisions of an international treaty extend so far in their effects} it is necessary to consider the spirit, the general scheme and the wording of those provisions. The objective of the EEC

\begin{itemize}
  \item[32.] \textsc{Declaration of the Rights of Man and of the Citizen}, art. 16 (1789), \textit{available at} http://www.hrcr.org/docs/frenchdec.html.
  \item[34.] For an example of the content of this ongoing debate, even after the adoption of the Lisbon Treaty, see the first chapters in \textsc{The Lisbon Treaty – EU Constitutionalism Without a Constitutional Treaty?} (Stefan Griller & Jacques Ziller eds., 2008).
\end{itemize}
treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects member states and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this community through the intermediary of the European parliament and the economic and social committee.\textsuperscript{36}

The \textit{Van Gend en Loos} case is well known to EC and EU lawyers, who usually insist on the paragraph that follows, where the ECJ says:

In addition the task assigned to the court of justice under article 177, the object of which is to secure uniform interpretation of the treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.\textsuperscript{37}

Currently in Europe, constitutional lawyers and legal theorists also know and often recall the \textit{Van Gend en Loos} case. Maybe due to the fact that we Community lawyers do not insist enough upon this obvious international feature and prefer to concentrate upon the notion of direct applicability of EC law, provided that the relevant clauses are sufficiently clear, precise and unconditional. Most constitutional lawyers and legal theorists tend to forget not only that the ECJ spoke of a new legal order “of international law,” but they also forget the sentence that follows where the ECJ again says:

These rights arise not only where they are expressly granted by the

\begin{footnotesize}
\textsuperscript{37} Id.
\end{footnotesize}
treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.\textsuperscript{38}

In a nutshell, this decision, which is almost half a century old, defined the legal issue at stake: the EC/EU constitution, if any, is enshrined in an agreement which creates mutual obligations between the contracting states, as well as rights and obligations for individuals and for the institutions it is setting up. This agreement is and will remain different from a constitution, which creates rights and duties for the individuals and for the institutions of the Union as well as for constituent part of the Union—e.g. states—but is not based upon mutual obligations of the states.

c. A 10\textsuperscript{th} Amendment for the EU

The constitution versus treaty discussion may seem highly abstract, but it has precise legal consequences which have probably not yet been thoroughly explored by EC and EU lawyers.

As far as EU Constitutionalism is concerned, this is well illustrated by a clause which had been inserted into the Constitutional Treaty of 2004 (article I-11)\textsuperscript{39} and which will be inserted into the EU Treaty by the Lisbon Treaty, where it will appear twice. The future articles 4 § 1 and 5 § 2 of the Treaty on the European Union (TEU) will read:

Article 4

1. In accordance with Article 5, competences\textsuperscript{40} not conferred upon the Union in the Treaties remain with the Member States.

Article 5 (ex Article 5 TEC)

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.

2. 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. Competences not conferred upon the Union in the Treaties remain with the Member States.\textsuperscript{41}


\textsuperscript{40} Notably, in European legal vocabulary, the word “competence” (not “competency”) stands for the US constitutional law concept of “power.”

\textsuperscript{41} See Treaty of Lisbon, supra note 21 (emphasis added).
Furthermore, Declaration number 18—"in relation to the delimitation of competences"—has been added by the 2007 IGC, the first indent of which states:

The Conference underlines that, in accordance with the system of division of competences between the Union and the Member States as provided for in the Treaty on European Union and the Treaty on the Functioning of the European Union, competences not conferred upon the Union in the Treaties remain with the Member States.

The redundant wording of the Lisbon Treaty and the cited declaration is due to the fact that this clause originates from requests of all those—be they of nationalist or mere intergovernmentalist orientation—who fear or criticize the expansion of powers conferred to the European Communities and Union in the last decades. Such expansion of powers came mainly through means of treaty revisions to which all member states agreed. This clause cannot but recall the Tenth Amendment to the Constitution of the United States, the adoption of which had been presented by Hamilton as a major argument in order to obtain the ratification of the 1787 Constitution by the New York State Legislature.

As a European scholar, I am not best placed to judge whether the Tenth Amendment was only restating a principle which was obvious for any well intentioned interpretation of the U.S. Constitution. As far as the EU and EC treaties are concerned, it is beyond any doubt that the clause is a necessary consequence of the principle of conferral, as understood in international law. It is therefore twice redundant: because it is repeated with exactly the same wording in two subsequent articles, and because it is stating something obvious.

What has not been underlined by constitutional lawyers in Europe—to my knowledge—is the fact that, whereas a clause like the aforementioned is not necessary in an international treaty, it gets specific significance in the framework of a constitution. In an international treaty the clause serves only the purpose of recalling to the institutions that the treaty is setting up—as well as the broader public—that holders of the relevant power are initially the states, who only delegate its exercise (or transfer it) to common institutions. The treaty has no influence on state powers that are not delegated (or transferred) to common institutions. Such a clause in the

42. Id.
43. Id.
44. For an analysis of the consequences of the principle of conferral in the constitutional treaty, see Paul Craig, Competence: Clarity, Conferral, Containment and Consideration, 29 EUR. L. REV. 323 (2004).
framework of a constitution is different: such a clause indicates that it is Union law that establishes that the "remaining powers" are state powers and not Union powers.

The paradox is that a clause that makes sense in constitutional law but is not even necessary in international law will be inserted in the treaties upon the very insistent request of those who are most hostile to the establishment of an European Federation, thus contributing to the "constitutionalization" of the treaties, even though the so-called "constitutional concept" was abandoned in June 2007.

2. THE DISCUSSION ON PRIMACY OR SUPREMACY

One of the most debated clauses of the document that was drafted in the framework European Convention, during the work in 2002-2003 and amended in a minor way during the IGC that followed in 2003-2004 was the clause on "primacy." This clause has been heavily discussed, particularly during the referendum campaigns in France and in the Netherlands in 2004 and 2005, and during the reflection period that followed and up until the IGC of 2007.

The text that was drafted in 2002 said: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States." For lawyers who had been educated in EC or EU law, or both, this term did not seem particularly significant, as the ECJ established the principle of primacy—or "precedence" or "supremacy"—as it is often denominated in English language literature—as early as 1964 in the famous case Costa v. ENEL.

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, 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.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15, 93 (3), 223, 224 and 225). Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure (for example Articles 8 (4), 17 (4), 25, 26, 73, the third subparagraph of Article 93 (2), and 226) which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

The precedence of Community law is confirmed by Article 189, whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States’. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.47

Importantly, this case was well known to the negotiators of the treaty signed in 1972, by which the original six Member State’s community was extended to Denmark, to Ireland, and to the United Kingdom.48 It was also

48. Norway, which had signed the treaty of accession to the European Communities, did not
perfectly known to the British government and Parliament who enacted the European Communities Act 1972, in order to enable United Kingdom courts to directly apply the provisions of the European Community treaties and the laws established on the basis of these treaties. Although a number of politicians in some member states—as well as some scholars—had criticized the ECJ for the boldness it showed in the *Costa v. ENEL* case and subsequent case law, no government had officially attempted to try and have the principle of primacy reverted or even modified. Yet the representative of the British government in the European Convention—followed only by a very small number of *souverainistes* of the Convention, and by a big number of constitutional lawyers from Member States—did everything they could in order to have the relevant clause suppressed. Thus, they succeeded with the treaty of Lisbon.

The Convention's draft Constitutional Treaty contained the above cited clause in article 10 of its First part, which was included in Title III on the EU's competences. Strangely enough, while the British government's representative in the European Convention had constantly asked for the withdrawal of the relevant clause from the draft, the British government did not oppose it being moved forward in the treaty that was eventually agreed to by the IGC. It became article I-6 of the Constitutional Treaty, immediately following article I-5 on the “Relations between the Union and the Member States.” This change of place could have made it less clear that the principle of primacy only applied in the sphere of competence of the Union. What the British government did instead was to demand that a Declaration (non binding law) be annexed to the Constitutional Treaty, stating that “The [intergovernmental] Conference notes that Article 1-6 reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance.”

The debates that took place in member states during the ratification procedures for the Constitutional Treaty—especially the referendum campaign in France—and the subsequent requests by a number of member state governments during the preparatory phase of what became the Lisbon treaty, led to abandoning the primacy clause.

As the clause was not supposed to change existing EC or EU law, this might have been insignificant, but there was a danger that a number of national courts would interpret this step back as a wish of the Member States to abandon the principle set up in the *Costa v. ENEL* case law.

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Therefore, the 2007 IGC, which agreed upon the text of the Lisbon treaty, added Declaration number 17 on Primacy, stating:

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, 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 the said case law.\textsuperscript{50}

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

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 judgment 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.\textsuperscript{51}

I will not comment here on the very strange wording (from a legal point of view) of this declaration, which quotes an opinion of the Council Legal Service rather than directly endorsing the relevant Court decision. A footnote to the declaration cites the last paragraph of the case, as cited above. It is one of the clearest expressions of the confusion of the debate on primacy.

The wording of Article I-6 of the Constitutional Treaty had been carefully chosen. It is illuminating because it steers clear of the word "supremacy"—which is predominantly used in the English language literature—and instead uses the word "primacy", which corresponds more exactly to the nouns "primauté" and "primato" (in French and Italian), which have been used notably by the French literature on the subject. These latter terms have been used in reference to the precedence which appears in the English language translation of the Costa judgment (adopted ten years before English became an official EC language) and which corresponds to the words "prééminence" and "preminenza" in the

\textsuperscript{50} See Treaty of Lisbon, supra note 21.

The German version uses the word "Vorrang" (priority), which underlines the notion of priority embedded in "precedence", "prééminence", and "preminenza", and which is typically used in the German doctrine.

Using the word "primacy" facilitated a distinction between the characteristics of EC and EU law and those of federal constitutions, which has always been familiar to the most astute EC law doctrine and which was developed in detail by the Spanish Constitutional Court in its binding opinion on the ratification of the Constitutional Treaty. According to this distinction, EC law takes precedence over national law in case of conflict with provisions which are embedded in the treaties or in laws adopted by EC institutions, whereas the Constitution of a State is the "supreme law of the land," in the Words of Article VI, section 2 of the U.S. Constitution. In other words, primacy can only have effects in the sphere of application of EC law, whereas supremacy is a general feature of the constitutional system of a country.

Two corollaries must be reminded here, which shed light on the difference between "primacy" in the EU law sense, and "supremacy" in U.S. constitutional law.

First, albeit there have been until now discussions amongst scholars about this, EU and EC law do not have an extended concept of preemption that follows from the exercise of EU or EC competences. The Lisbon treaty reproduces the wording of the Constitutional Treaty which confirms my understanding of preemption which logically derives from the principle of conferral. Two additions have been made, compared with the Constitutional Treaty, which do not change existing law, but clarify it to non-specialists. In addition to what was to be article I-12 § 2 of the Constitutional treaty, the second indent of the above cited Declaration, number 18—"in relation to the delimitation of competences"—says:

When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has

52. In EC/EU law, all language versions of the treaties and of the legislation adopted by the institutions are equal from a legal point of view. As far as Court judgments are concerned, the situation is different: the authentic language of an ECJ decision is the language of the case, i.e. usually the language of the plaintiff, but it has to be born in mind that the Court’s members decide on the basis of a draft submitted to them by the entrusted judge (juge rapporteur) in the French language. Hence the particular importance of the French wording of the ECJ case law.


decided to cease exercising, its competence. The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality. The Council may, at the initiative of one or several of its members (representatives of Member States) and in accordance with Article 241 of the Treaty on the Functioning of the European Union, request the Commission to submit proposals for repealing a legislative act. The Conference welcomes the Commission's declaration that it will devote particular attention to these requests.\(^5\)

The first sentence corresponds to established law, and is the consequence of the notion of shared competences embedded in EC/EU law—a notion also well known to German constitutional law.

Second, contrary to U.S. constitutional law—following the Civil War—EU law admits the possibility of withdrawal. A number of scholars, as well as European Federalists, have for a long time insisted upon the fact that the treaties of Rome and Maastricht did not contain any provision relating to withdrawal. However, it was easy enough to reply that under the international law of treaties, this was always possible, either by a unanimous decision of the member states, allowing withdrawal of one or more of them, or on the basis of the *rebus sic stantibus* principle. The European Convention of 2002-2003 soon agreed that it would be better to embed the possibility of withdrawal in the constitutional treaty.

As a consequence, EU law primacy remains contingent as opposed to U.S. law supremacy—as has been argued by the Polish Constitutional Court in a Judgment of May 2005 on Poland's Membership in the EU, which addressed the hypothesis of collision between a provision of EU law and the Constitution of Poland:

13. Such a collision would occur in the event that an irreconcilable inconsistency appeared between a constitutional norm and a Community norm, such as could not be eliminated by means of applying an interpretation which respects the mutual autonomy of European law and national law. *Such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm.* Furthermore, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. *In such an event the Nation as the sovereign, or a*

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State authority organ authorized by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland’s withdrawal from the European Union.\textsuperscript{56}

When the Polish constitutional court adopted this decision, the constitutional treaty of 2004 had already been signed, which contained an article I-60 on the “Voluntary withdrawal from the Union”; the provision has been taken over by the treaty of Lisbon, and will become article 50 of the Treaty on the European Union:

Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.\textsuperscript{57}

\textsuperscript{56} Polish Constitutional Court, May 11, 2005 (No. K 18/04), \textit{available at} http://www.trybunal.gov.pl (emphasis added).

\textsuperscript{57} Treaty of Lisbon, \textit{supra} note 21.
Strikingly, there has been very little discussion of the withdrawal clause in scholarship, and even less in the political debate. Only some European Federalists have explained that they considered the withdrawal clause as contrary to the goal of establishing United States of Europe.

3. THE DISCUSSION ON LENGTH AND CONTENT OF THE CONSTITUTIONAL DOCUMENT

A third topic for discussion that gained prominence in the scholarly and political debate about the constitutional treaty was the discussion about its length and content.

When President Giscard d'Estaing presented the work of the European Convention to the Heads of state and governments of the EU at the European Council of Thessaloniki (Greece) on June 20, 2003, it was a quite lean text, in two parts: a preamble and sixty articles on institutions and their powers, followed by the preamble and fifty-four articles of the Charter of Fundamental Rights that had been proclaimed in Nice in December 2000 and only very slightly amended. Giscard d'Estaing, however, announced that another dozen of final and transitional clauses would be added (as part IV), and that the Convention had still to agree on the text of Part III.

In its final form, the text adopted by Convention on July 10, 2003 was divided into four parts that contained respectively sixty, fifty-four, three hundred forty-two, and ten articles. A big number of scholars and politicians started saying that a text of a total of four hundred sixty-six articles could not be a Constitution. The four hundred sixty-six articles were reduced to four hundred forty-eight in the treaty agreed by the IGC in 2004 and signed in October of the same year.

The debate on length has not been considered as a serious legal discussion by many scholars who recalled a number of precedents of constitutions that had the same length or even more, since the Constitution of Cadiz of 1812. More important than the debate on length was the debate on the content of the Constitutional Treaty.

A number of critics converged from all sides, saying that the clauses of part III—which took up more than 90% of the existing wording of the Rome and Maastricht treaties—should not have been inserted in the constitutional treaty.

As far as I know, I have been the only scholar—or at least one of the few—who tried to explain why the content of Part III of the Constitutional

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58. This was only due to the fact that the Secretariat of the IGC grouped some clauses in a single article instead of leaving them in several ones.
Treaty was indispensable. My reasoning was based on the idea that tabula rasa was not an option in the process of repealing the existing treaties and replacing them with a new text.

The principle of conferral implies that, once the Treaties are repealed, the legal bases contained in them must be maintained to avoid a "re-nationalization" of a whole series of competences with which the Community and the Union have already been entrusted. Indeed, if these legal bases were not preserved, then the Union's institutions would lose not only their power to legislate but also their ability to apply the legislation and regulatory rules of the Community and the Union that are already in place. Moreover, the legal bases prescribed in the Treaties constitute a significant part of Union law because the Court of Justice considers them, under certain conditions, to be directly applicable, i.e., that they are binding and may be directly relied on in court proceedings. Such legal bases may thus be relied on, in particular, in legal actions challenging national legislation on the ground that it fails to respect such provisions.

The European Convention therefore faced a dilemma: the goals of simplification and reorganization of the Treaties, as set forth in the Laeken Declaration, seemed to call for the adoption of a text as short and simple as possible; it appeared to call for a text unburdened by the more complicated provisions contained in the existing Treaties setting down legal bases. In contrast, a text limited to short, simple statements risked being little more than a declaratory document without any real "teeth." Furthermore, if the Constitution had failed to carry over those legal bases from the Treaties, this would have been truly revolutionary because it would have reallocated to the Member States a host of powers that they had already conferred, in some cases as far back as 1958, upon the Community and the Union.

In any event, the Convention was given neither the mandate nor the political authority necessary to conduct a complete re-examination of the division of the various fields of action between the European and the national levels. The most it could do was to propose marginal adjustments, in particular by inserting certain new legal bases in Part III.

As a matter of fact, during the work of the European Convention, there had been proposals to separate the future text into two treaties: one constitutional treaty, which would include parts I, II and IV of the

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60. THE EUROPEAN CONSTITUTION, supra note 24, at 45.
Convention's project, and one implementing treaty, which would have the content of part III. This seemed logical, as most of the important restatement and innovations proposed by the European Convention were embedded in parts I and IV, part II being the Nice Charter of 2000. Part III was only the result of drawing the consequences of the innovations of parts I and IV—starting with the merger between the EC and EU—to the contents of the EC and EU treaties. Its content was therefore almost identical to the EU Treaty. This is also why the content of part III was not discussed in the Convention, but was drafted by legal experts on the basis of two detailed mandates given to them by the Praesidium of the Convention.

The proposal to split the text into two parts was, however, rejected by a number of governments. Some said that it would imply too complex a ratification procedure; the events of 2005 and 2008 showed how insincere this argument was. The British government was the most hostile to this division and clearly made the point that the splitting would entail the risk of establishing a hierarchy between the constitutional treaty and the implementing treaty, which would someday lead courts to disregard the precise legal bases included in what was part III, and to accept the development of EU law and policies on the basis of the far more vaguely framed clauses of part I.

Clearly, both the lawyers of the British government and the members of the Convention who favored the splitting solution were aware of the development of Supreme Court case law on the basis of Article I, Section 8 of the US Constitution, and especially on the General Welfare and Commerce Clauses. The first group feared such a development in Europe, the second was hoping for it.

What remains unknown is whether some members of the European Convention were aware of the fate of the Articles of Confederation, which have never been formally abolished. If so, those who were in favor of the proposed Constitution for Europe might have hoped that keeping the EC and EU treaties, while adding a constitution containing only parts I and II, might lead to the same lapsing of the existing treaties as has happened to the US. This in turn would have implied a strategy in the long run, hoping that someday the Institutions of the EU, and especially the ECJ, would have applied the European Constitution without considering the treaties anymore.

61. In 2005 during the referendum campaign in France, the argument made was that a single treaty was too complicated for the electorate which should have only called to vote on parts I and II; in 2008 during the referendum campaign in Ireland the argument was that a single treaty containing all amendments to the existing treaties was too complicated.

The Treaty establishing a Constitution for Europe was signed in Rome during a very solemn ceremony on October 24, 2004. Procedures for ratification began immediately, and at the end of May 2005, nine member States out of twenty-five had concluded the procedure for ratification. In the meantime, a referendum had been held in Spain on February 20, 2005, with a positive result. The referendums organized in France on May 29 and in the Netherlands on June 1, had on the contrary a negative result. On June 6, the British government decided to suspend the procedure that was going on in the House of Commons in view of ratification, and pushed for stopping the process all over Europe, in order to have a "pause for reflection." Some governments were rather in favor of such a pause; others were contrary and said the procedures should go on in order to have a clear view of the positions of member states on the constitutional treaty. The French and Dutch governments said nothing, and in those two countries the debate came to a total standstill that lasted until the autumn of the following year.

Ratification procedures continued with other Member States, so that in December 2006, eighteen out of twenty-five Member States had finished the procedure for the authorization of ratification. On January 1, 2007, Bulgaria and Romania became the twenty-sixth and twenty-seventh Member States to ratify the Constitutional Treaty. A series of negotiations opened, which culminated in the meeting of twenty-seven heads of state and governments on June 21-22, 2007, where they decided to give a mandate to a new IGC in order to transform the innovations that had been agreed to in 2004 in amendments to the existing treaties. As mentioned above, they agreed that "[t]he constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution," is abandoned."62 On this basis, the Treaty of Lisbon was drafted in the following months, and signed on December 13, 2007. Whether repealing all existing treaties and replacing them by another treaty was corresponding to the constitutional concept that had been developed from Fischer's speech until the signature of the constitutional treaty remains to be demonstrated. As far as the content is concerned, the reforms which should be introduced into the existing treaties of Rome and Maastricht by the Lisbon treaty are exactly the same, with a few additions and a few minor amendments.

The main changes brought by the Lisbon Treaty of 2007 as compared to the constitutional treaty of 2004 are of a symbolic nature: instead of having at “treaty establishing a Constitution for Europe,” there would be a “Treaty on the European Union” (TEU) and a “Treaty on the Functioning of the European Union” (TFEU). Article I-8 of the constitutional treaty on the symbols of the Union, setting its flag, anthem, motto, name of currency, and “Europe day” disappeared, but the symbols continue to be used anyway by the EU institutions and Member States. The institutional figure, known in the Constitutional Treaty as “Minister of Foreign Affairs,” will be called a “High Representative.” Instead of replacing the present denomination of EU legislation by “European laws,” “European framework laws,” and “European regulations,” the denominations of EC law instruments, i.e. “regulations” and “directives” remain in use, with the addition of precisions when they are “delegated” or “executive” nature. The Charter of fundamental rights was not inserted in one of the treaties, but it has “the same value” as the TEU and the TFEU.

The debate about the importance or lack of importance of these constitutional symbols and what has been perceived by many as a vocabulary of statehood is probably far from being closed. One of the most interesting statements in regard is contained in the advisory opinion given by the Council of State of the Netherlands in July 2003, just after the adoption of the draft constitutional treaty by the European Convention, and in February 2007, during the negotiations which led to the adoption of the Lisbon Treaty. In the Council of State’s opinion of 2007 on the “Request for advice on the mandate of the Intergovernmental Conference to revise the Treaty on the European Union and the Treaty establishing the European Community,” the State Council held that:

In its advisory opinion on the proposal by MPs Karimi, Dubbelboer and Van der Ham on the holding of a consultative referendum on the constitutional treaty for the European Union, the Council of State gave its views on the nature of the Treaty establishing a Constitution for Europe with respect to its approval. The Council did not comment on the desirability of holding a referendum, but made its remarks in the light of the proposers’ wish to enable a consultative referendum on the Treaty to be held. It gave its views on the reasons that the proposers

put forward for their proposal. In making this assessment of the possibility and desirability of holding a referendum, the Council of State concluded that approval of the Treaty establishing a Constitution for Europe, in which the fundamental rights were enshrined and the pillar structure was abandoned, was to some extent comparable to approval of a national constitutional amendment. However, its opinion also expressly pointed out the differences between a national constitution and the Treaty establishing a Constitution for Europe. The latter, it said, could not be equated with a national constitution, for the EU could not be considered a state. This is also apparent from the proposed Reform Treaty, which merely amends the existing treaties and is thus in line with the constitutional development of the Union as described above.\footnote{To my knowledge, there has been no enquiry in the Netherlands about the “questions raised by the referendum of 2005.” This Opinion of 2007 was taking up an idea that was already present in the Opinion of 2003 of the Council of State: though it did not have, as such, a constitutional nature, the so-called constitutional treaty was different from the usual variety of Treaty amendments. In the 2007 Opinion this argument is further developed by a subsection on “Symbols,” which is worth quoting in its entirety:}

The name of the Treaty establishing a Constitution for Europe reflected a particular vision of European co-operation. The existing treaties were to be repealed and replaced by a treaty which, as a single, binding constitutional document embracing the entire constitutional order, was unprecedented in the Union’s political history. The new document no longer pursues such a goal. It does not repeal the existing treaties. The state symbols of European unification that were included in the Constitution for Europe, such as the flag, the anthem and the motto, and the renaming of items of European legislation as ‘laws’ and ‘framework laws’, are no longer to be found in the proposed Reform Treaty. Furthermore, it no longer explicitly codifies the supremacy of EU law.

The significance of these changes should not be underestimated. EU terminology and symbols are apt to create expectations among citizens, \footnote{2007 Advisory Opinion, supra note 63 (emphasis added).}

\footnote{Available only in the Dutch language on the database of the Dutch State Council (the Raad van State), \url{http://www.raadvanstate.nl}. The Opinion was examining the issues related to a possible referendum in the Netherlands on the base of the draft adopted by the European Convention, nevertheless it is applicable to the constitutional treaty of 2004, as the differences between the Convention’s draft and the final text of the treaty had no relevance for these issues.}
and form potential points of reference for the further development of both EU policy, whose dynamics are inherent in the integration process, and EU case law, with its characteristic emphasis on teleological interpretation. In the past, treaty terminology and symbolism have played an important part in the development of the EU. There is no reason to assume that things will be any different in the future.

In this respect, the proposed Reform Treaty is perfectly clear. Unlike the Treaty establishing a Constitution for Europe, it provides no arguments for a gradual expansion of the EU towards a more explicit state or federation. 66

This opinion was delivered before the signature of the Treaty of Lisbon, but it is fully applicable to said treaty. It was issued more than a year before the referendum that was held in Ireland on June 12, 2008, again raising doubts about the capacity of the EU to go forward with institutional reform.

All the efforts of the treaty drafters notwithstanding, the Irish electorate opposed ratification of a treaty it did not understand, following declared souverainistes populists, rather than the leaders of the major political parties of the Republic of Ireland. But the discussion was not closed; it was only put between brackets for a yet undefined time.

One may assume that the discussion on EU Constitutionalism will probably resume rather soon. If eventually the Lisbon treaty were not to be ratified, the hypothesis of an interim initiative to deepen integration between a more limited of member states would again become relevant, in the form presented by Joschka Fischer in his speech of the year 2000 or in some related form. If, on the contrary, the Lisbon treaty were to enter into force, it is worthwhile noting that the new procedure for treaty amendments enshrined in article 48 EU treaty will introduces a formal right of initiative for the European Parliament. It is more than probable that this right will be taken seriously as soon as an opportunity arises.

Furthermore, in order to secure the position of the Irish government in the planned new referendum on the Treaty of Lisbon, the heads of state or governments of the EU member states promised during the European Council meeting of June 18-19, 2009, that "they will, at the time of the conclusion of the next accession Treaty, set out the provisions of the annexed Decision [on the concern of the Irish people on the Treaty of Lisbon] in a Protocol to be attached, in accordance with their respective

66. 2007 ADVISORY OPINION, supra note 63.
constitutional requirements, to the Treaty on European Union and the Treaty of the Functioning of the European Union.” Subsequent to the European Council meeting, a second referendum was held on October 2, 2009, where Ireland ratified the Treaty of Lisbon. Nevertheless, as enlargement to include new Member States requires the consent of the European Parliament, the latter might have an instrument to ensure that its requests for treaty amendment be accepted by Member States’ governments. Even if no majority existed amongst the members of the European Parliament to get such a strategy to its ultimate conclusions, a new discussion would certainly be opened on the nature of the pouvoir constituant dérivé\(^6\) in the EU. Such a debate started during the work of the European Convention, without however, coming to a conclusion.

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67. According to French constitutional doctrine, in a reasoning which is endorsed by a majority of European Academia, a distinction has to be made between the “originate” power to establish a constitution (pouvoir constituant originaire), which in a democracy lies necessarily with the people, and the power to amend the constitution, derived from the latter (pouvoir constituant dérivé) which may be delegated by the constitution to the institutions which it establishes.