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# What is Constitutional Democracy? A Comparative Analysis Between The United States and The European Union

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## Acknowledgements

Although the acknowledgements section should be the easiest part of this thesis since no research is required, it is difficult to name the many people (and yes, there are *many*) who have added to my effort to create and complete this work. I will try anyway.

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## Advice to Future Honors Students

I am not going to lie to you. This is the most difficult task I have accomplished in the 21 years of my life. It will be that way for you as well. I know you are shaking your head thinking this will be like any other research paper you have written for college, only longer, but it is so much more than that. It does not matter how smart, organized, task-efficient, academically oriented, passionate, etc., you are, it will be hard. That being said, “difficult” can mean whatever you make it mean. And it is up to you to decide whether accepting a little challenge will get in the way of achieving great success.

First, introspect for a moment and make sure you really are ready for this. Your relationship with your thesis will probably be the longest one you have had up until this point in your life. It is two years of fully-fledged commitment, late nights, long hours, roadblocks, opportunities, and a lot of heart and soul. I am not saying it isn't possible to cheat on your thesis with other activities. Just don't expect it to forgive and forget the night before you turn it in. Believe me; you will be happy to break up.

Do NOT write a thesis to add to your resume. DO write a thesis because you genuinely love to learn and are passionate about something. On that note, choose your topic wisely. Chances are, it will change in some ways over the course of your work, but pick something that interests you and something that will continue to interest you until you have completed it.

Secondly, take advantage of the resources you have. The faculty at Syracuse University is made up of some of the best intellectual minds in the world, and lucky for you, they are here to educate you on whatever you need. I promise that if you take the time to seek assistance, you will receive it tenfold. Furthermore, choose an advisor based on the fact that he or she is knowledgeable about your topic and interested in helping you pursue it; do not choose an advisor just because you like him or her as a person. The Honors Program has a great staff that knows absolutely everything to aid you in writing your thesis. And by aid, I mean financial as well. Apply for the scholarship opportunities that are presented to honors students. Your topic will undoubtedly present you with great opportunities to research your work outside the library and the Honors Department wants to help you make those options become real experiences.

Lastly, enjoy it. You will become a more intelligent person and a better student because of your thesis. It will help you land jobs and get internships and write personal statements. The most important thing it does is make you a more dynamic member of society—one who is learned in a specific topic and has something to show for it. You will recognize personal strengths and weaknesses that affect you both inside and outside an academic setting, skills valuable to living a successful life.

## **Introduction**

### **Constitutional Democracy**

*“Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it.”*

John Locke  
Second Treatise

Democracy, as a political concept, is highly supportive of a written constitution. Democracy is premised on the idea that the government is the agent of the people, and that for the people to exercise their participatory freedoms, they must enjoy a full range of human rights. The various mechanisms and procedures of democracy are designed to ensure that government is respectful of those rights while being responsive to the needs and wants of the people. Historically, those objectives have been accomplished without a written constitution, but most democracies have found it useful to instruct and limit their governments via a written constitution. A written constitution can be seen as a “precommitment” strategy that incorporates the citizens’ willingness to function within predetermined limits in order to protect fundamental rights.

Upon first glance, the concepts of constitutionalism and democracy can appear opposed to each other. Whereas the first term refers to “restrained and divided” power, the second implies its ultimately “unified and unconstrained” exercise. It is integral to correctly understanding this concept that one recognizes that constitutions are in fact responsible for codifying the rules of the democratic game, indicating who can vote, how, when and why, and what their participation means to their government.

A written constitution has proved to be the most expedient way to institutionalize a democracy and to regulate the government because it almost always addresses a number of perennial issues: How are the rulers to be selected? How are the rulers to utilize the organs of government to implement policies? How are the people in a country to inform their rulers about their interests and concerns? A constitution identifies the common objectives of the people and their rulers, the procedures that the government may use to enact and implement policies, and the human rights that the government must respect.

Democracy is a form of government under which the power to alter the laws and structures of government lies ultimately with the citizenry. Under such a system, legislative decisions are made by the people themselves or by representatives who act through the consent of the people, as enforced by elections and the rule of law.

In practical effect, this definition generally comes with qualifications and limitations. In most modern democratic nations, for example, the set of citizens who can exercise these powers through voting are restricted to those who are 18 years of age or older. A further qualification is that, realistically, in elections, decisions are not made by the whole of “the people,” but rather by *most* of the people who actually participate—a significantly smaller population.

There are many varieties of democracy, some hypothetical and some realized. In contemporary usage, *democracy* is often understood to be the same as *liberal democracy*. This contemporary understanding of democracy to a large degree differs from how the term was originally defined and used by the ancient Greeks in the Athenian democracy political regime.

The word *democracy* originates from the Greek δημοκρατία from δημοσ meaning “the people,” plus κρατειν meaning “to rule,” and the suffix ία; the term therefore means “rule by the people.” The term is also sometimes used as a measurement of how much influence a people has over their government, as in how much democracy exists (Head, 1995).

If democracy is to mean “people rule,” then the *Demos* should be free to redefine the rules whenever they want and should not be tied to any given definition. The need to keep open the possibility of democratic review seems particularly important when one remembers that the constitutions of many democracies have excluded significant categories of people from citizenship, notably women and those without property, and placed severe limits on the exercise of the popular will, such as the indirect election of representatives. Of course, some exclusions and limitations are inevitable and are intrinsic to any rule-governed activity. The fact that we are not presently hindered with the exclusions and limitations of the eighteenth century, though, is in large part due to successive social and democratic movements and reforms.

While democracy *per se* implies only a system of government defined and legitimized by elections, modern democracy can be characterized more fully by the following institutions:

- A constitution which limits the powers and controls the formal operation of government, whether written, unwritten or a combination of the two
- Election of public officials, conducted in a free and just manner
- The right to vote and to stand for election
- Freedom of expression (speech, assembly, etc.)

- Freedom of the press and access to alternative information sources
- Freedom of association
- Equality before the law and due process under the rule of law
- Educated citizens being informed of their rights and civic responsibilities  
(de Tocqueville, 1840)

Traditionally, the purpose of democracy is to prevent the accumulation of too much authority in the hands of one or a few. It rests on a balance of giving enough power for what Alexander Hamilton called “vigorous and energetic government” and avoiding giving out so much power that it becomes abused. Democracy is believed by some, such as Winston Churchill, to be the “least bad” form of government (Allen et al., 2004).

By creating a system where the public can remove administrations without changing the legal basis for government, democracy aims at reducing political uncertainty and instability, and assuring citizens that however much they may disagree with present policies, they will be given a legitimate chance to change those who are in power, or change policies with which they disagree.

Nonetheless, some people believe that there is no system that can ideally order society and that democracy is not morally ideal. These advocates say that at the heart of democracy is the belief that, if a majority is in agreement, it is legitimate to harm the minority. Opponents to this viewpoint say that in a liberal democracy, where particular minority groups are protected from being targeted, majorities and minorities actually take a markedly different shape on every issue; therefore, majorities will usually be careful to take into account the dissent of the

minority, lest they ultimately become part of a minority on a future democratic decision.

Generally, changes in a constitution require the agreement of a majority of the elected representatives, or require a judge and jury to agree that evidentiary and procedural standards have been fulfilled by the state, or, very rarely, require a referendum. This means a majority can still legitimately coerce a minority (which is still ethically questionable), but such a minority would be very small and, as a practical matter, it is harder to get a larger proportion of the people to agree to such actions. On the other hand, proponents of broader democracy wonder what gives a small minority of people, such as those who drafted the U.S. Constitution, or other constitutions/laws, the right to impose their will on the larger majority.

The late eighteenth century seems to be the moment when people on several continents began to speak of democracy as a form of political organization to be actively pursued or actively resisted. The word “democracy” had been known by educated Europeans (and Americans) for a long time before that, to be sure, as one of the basic types of political systems recognized by the thinkers of classical Greece (Head, 1995).

In their struggles against arbitrary acts of monarchical authority, eighteenth-century-opposition movements in Europe and North America often rallied around the notion of a constitution; constitutionalists, however, were themselves deeply divided between two conceptions of the constitutional idea. Some had in mind a combination of fundamental laws, customary practices, understandings of the divine plan, and common sense that could be invoked in



criticism of arbitrary monarchs and their tyrannical ministers: the restoration of proper respect for a polity's traditions was needed.

Setting these rules down in written form, through the attendant processes of debate, revision, adoption, and promulgation, became a powerful foundational act. By making the fundamental laws of the political order the outcome of deliberate actions by living people, the writing of a constitution became a powerful statement situating the fount of authority in human wishes. Such written statements, deliberately setting forth the organization of government and the powers of its principal components, also had the potential, if effectively followed, to provide barriers to arbitrary authority (Markoff, 1995).

That constitution-writing was in the air in the late eighteenth century is shown by such prototypes as the document issued by Sweden's Gustav III, which aimed for popular support against the nobility through a formal clarification of the powers of monarch and parliament; wartime constitutions in Britain's rebelling American colonies; and the text proposed by Utrecht's Patriots in 1784 (Roberts, 1986). But it was the new United States that was celebrated as the great pioneer in this regard when its Articles of Confederation were replaced by a more enduring constitution (ratified in 1789), whose clear provisions for amendment (immediately utilized to add on the Bill of Rights) further amplified the model of a fundamental document, written and correctable by human hands. This sense was all the more strengthened by the opening words "We the People," which made a very different claim than a royal declaration, just as a specifically empowered constitutional convention and a ratification procedure

further enhanced the element of human debate, reflection, and decision (Schama, 1977).

The first European state to follow suit was Poland, whose constitution of 1791, in announcing that the King ruled “by the grace of God and the will of the nation,” suggested a divine as well as a human source of authority. However, this document was soon rendered inoperative by the occupying armies of Russia, Prussia and Austria. The Polish document, moreover, presented itself as a royal enactment even as it embodied claims of popular sovereignty (Davies, 1982).

It may well be that the new United States and the old Polish Republic were the pioneers, successful and unsuccessful, because the notions of social contract so dear to those who urged a constitution had a particularly vivid reality in both places: the United States had well-developed representative mechanisms in its local meetings and colonial assemblies; the Polish nobility not only exercised considerable governing functions in the fifty-odd local parliaments, but literally drew up a new social contract (the *pacta conventa*) with each king they chose by election. It was not in the northwest European core that constitutions were first written, but on the western and eastern fringes (although the French soon pushed the notion of popular sovereignty further still by having a national plebiscite on their constitution of 1793) (Wood, 1993).

In Europe, revolutionary France assumed a major role in diffusing constitutionalism further afield, not only by marking its own changes of regime with new constitutions (in 1791, 1793, 1795, 1799, 1802 and 1804) but by inspiring and compelling similar documents to be adopted in the satellite states that its armies overran in the 1790s and beyond, sometimes thus reinforcing

already present constitution-writing propensities. Other states, trying to resist French dominance, followed suit. Haiti marked its independence from French rule by enacting its own constitution in 1805, becoming the second New World state to do so. Pressed by French forces, the besieged remnants of a Spanish government convened an assembly that issued a constitution in 1812, partly modeled on the French constitutions of 1793 and 1795 (Markoff, 1995).

By the time the conservative forces had triumphed in Europe, the model of constitution-making had been firmly implanted in two hemispheres. The French defeat sparked a wave of constitution-writing in the German states. Even the restored French monarchy itself issued a constitution in 1814, granted, so its royal preamble tells us, in recognition “of the wishes of our subjects” (Markoff, 1995).

The threat of coercive power is still the main cause for concern in writing a constitution today. A historical example would be Hitler in pre-Nazi Germany, who was “elected” in 1933 by the German people with the largest minority vote (Markoff, 1995). For this reason, some countries have created constitutions/laws that protect particular issues from majoritarian decision-making.

In addition to constitutional protections for citizens’ rights (such as the right to stay alive, express political opinions and form political organizations, independent and regardless of government approval), some electoral systems, such as the various forms of proportional representation, attempt to ensure that all political groups (including minority groups that vote for minor parties), are represented “fairly” in the nation’s legislative bodies, according to the proportion

of total votes they cast; rather than the proportion of electorates in which they can achieve a regional majority.

This proportional versus majoritarian dichotomy is a not just a theoretical problem, as both forms of electoral system are common around the world, and each creates a very different kind of government. One of the main points of contention is having someone who directly represents a small region in one country, versus having each vote count the same, regardless of where in the country one happens to live. Some countries such as Germany and New Zealand attempt to have both regional (majoritarian) representation, and proportional representation, in such a way that one does not encroach on the other.

### **Constitution Making for the 21st Century**

Alexander Hamilton's still-open question remains central to prospects for a peaceful and democratic world. In the 21st century, proof of our capacity for living together and sharing in good government is not only ever more urgently needed but also requires (and is generating) creative thinking about the making and content of present-day "political constitutions." Constitutional experimentation in many new and newly democratic nations challenges older constitutional democracies to rethink their own practice and to engage in a process of mutual learning about the contribution of constitution making to conflict transformation and sustainable peace (Allen et al., 2004).

A nation confident in a stable future of internal harmony and agreed purpose is not (if it ever was) the typical site of constitution making today. A changed world calls the utility of the traditional model of the constitution into question. Consider how high a bar that traditional model of an act of completion

sets to establishing and legitimating constitutions in situations of conflict. Yet making a traditional constitution is seen by many as essential to the establishment of post-conflict governance by providing a framework to manage diversity and ensure stability.

The late 20th century had seen nations, old and young, that were deeply divided, often to the point of violence. Nation-states, defined by established boundaries and the sole possession of sovereignty, had been challenged from within by claims for self-determination or secession, and from without by the proliferation of transnational political or economic treaties and powers with global reach. At the same time, successful economic and social development had been declared (as in the 1993 Vienna Declaration of the United Nations that now frames development and human rights policy) to go hand in hand with democratization. Meanwhile around the world many marginalized groups—indigenous peoples; the poor; racial, ethnic, and language identity groups; and, cutting across all social categories, women—have demanded inclusion, political participation, and power sharing (Wood, 1993).

Conflicts over the identities, powers, and rights of groups seem almost endemic, and, as such conflicts reproduce themselves in the form of new identities and claims, are likely to be a permanent feature of 21st century politics. The nature of many modern conflicts makes a final resolution hard to reach. In such circumstances, finding a way of living together within major disagreement is the more modest goal. Traditional constitution making as a conclusion of conflict and codification of a settlement that intends permanence and stability can seem to threaten rather than reassure. Citizens who actively reject a final act

of closure seek instead assurances that constitution making will not freeze the present distribution of power into place for the long term, nor exclude the possibility of new participants and different outcomes.

To imagine a constitutional settlement under which diverse and disagreeing groups can live, while continuing to engage in a freely accessible debate about that settlement itself, is a challenging proposition. The tension between the security and stability offered by the traditional ideal of constitutionalism and the flexibility called for by new circumstances is what places process at the heart of the new constitutionalism. A permanently open process must itself satisfy qualitative standards that were previously applied only to the outcome of constitution making. We used to think of a constitution as a contract, negotiated by appropriate representatives, concluded, signed, and observed. The constitution of new constitutionalism is, in contrast, a conversation, conducted by all concerned; open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable.

It is in such an environment of conversational constitutionalism that the issue (startling to some traditionalists) of a right to participate in making a constitution has arisen. The idea is hotly contested by those who argue that only elites in modern societies possess the moderation, technical expertise, negotiating skills, ability to maintain confidentiality, and above all rational incentives to compromise so as to maintain power that make for effective constitution making. However, this point is hard to argue against democracy. The elite-made constitution, according to the new paradigm, will lack the crucial cultural element

of legitimacy. It will do so because the process, not just the final text, is seen as flawed.

A democratic constitution is no longer simply one that establishes democratic governance. It is also a constitution that is made in a democratic process. There is thus a moral claim to participation, according to the norms of democracy. A claim of necessity for participation is based on the belief that without the general sense of “ownership” that comes from sharing authorship, today’s public will not understand, respect, support, and live within the constraints of constitutional government. Whether there is also a legal right to participate, for whom, and what all of this means in practical terms, are also key issues for modern constitutionalism, whose reputation and effectiveness depend upon democracy in its process as well as its outcome. Experiments with public participation in the process of making constitutions are a striking feature of “new constitutionalism.” It is with such issues of process that this thesis is concerned. The following chapters will explore the differences and similarities between the United States and European Union and will effectively measure the democratic nature of both political bodies and both constitutions.

***Chapter I***  
**The United States as a Democracy**

*“The federal and state governments are in fact but different agents and trustees of the people,  
constituted with different powers, and designed for different purposes.”*

James Madison  
The Federalist, No.46  
(Scigliano, 2000)

The 2000 presidential contest was one of the most closely divided and abnormal elections in American history. Not until a month after voters cast their ballots did it become certain that Republican candidate George W. Bush would claim the title of the nation’s 43rd president. In the interim, the world watched as the fight for votes in Florida repeatedly bounced from local to state to federal courts and back again, before a U.S. Supreme Court decision settled the matter. What many foreign observers found puzzling was how voting standards could vary so much from place to place or how local officials could play such an important role in a national election. American citizens were surprised by the different voting procedures from state to state; what should have not seemed unusual was the interplay of local, state, and national governments.

Few days pass when ordinary people in the United States do not encounter the laws or actions of all three levels of government. Zoning, traffic control, sanitation, educational administration, street repair, and a hundred other services are all managed primarily by local officials, acting under a grant of authority from the state. State government controls much educational policy, criminal justice, business and professional regulation, public health, among a variety of other important areas. And the acts of national government—from



defense and foreign affairs to economic and monetary policy to welfare reform—are staples of the daily news everywhere because of their wide impact (Allen et al., 2004).

Although few people recognized it at the time, both the drama of that presidential election and countless lesser dramas of everyday life are acted out on a stage erected by the framers of the U.S. Constitution over 200 years earlier. As colonists, the Founding Fathers had chafed under the authority imposed by the distant British imperial government and had come to view centralized power as a threat to their rights and liberties. As a result, the major problem facing the Constitutional Convention in Philadelphia in 1787 was how to restrict the power of the central government, yet provide it with sufficient power to protect the national interest. Dividing power between two levels of government, federal and state, was one of the solutions to this problem (Allen et al., 2004). This system of divided power, federalism, is widely acknowledged not only to be a unique American contribution to the theory of government, but part of the genius of the American constitutional system itself.

### **Defining Federalism**

Federalism is a system of shared power between two or more governments with authority over the same people and geographical area. Unitary systems of government, by far the most common form around the world, have only one source of power, the central or national government. Although democracy can flourish under either system, the differences between the two types of governments are real and significant. Great Britain, for example, has a unitary government. Its Parliament has ultimate authority over all things that

occur within the United Kingdom. Even if it delegates power over local matters, Parliament can require its towns or counties to do whatever it deems appropriate; it can even abolish them or change their boundaries if it chooses to do so (Elazar, 1987).

In the United States, the situation is quite different. Laws of the national government, located in Washington, D.C., apply to any individual who lives within the national boundaries, while laws in each of the 50 states apply to residents of those states alone. Under the U.S. Constitution, Congress does not have the power to abolish a state, nor can a state assume a power intended for the national government alone. Under American federalism, in fact, the U. S. Constitution is the source of authority for both national and state governments. This document, in turn, reflects the will of the American people, the ultimate power in a democracy (Elazar, 1987).

In a federal nation, the central government has defined powers, with full sovereignty over external affairs. The exercise of authority in domestic affairs is more complicated. Under the Constitution, the U. S. government has exclusive power to regulate interstate and foreign commerce, coin money, provide for the naturalization of immigrants, and maintain an army or navy, among other things. The United States guarantees to every state a republican form of government, thus ensuring that no state can create, say, a monarchy. These areas are ones in which national interests clearly supersede state interests and are properly reserved for the national government. The national government also has judicial authority to resolve controversies between two or more states and between the citizens of different states.

In other areas of domestic policy, however, the central and state governments may have parallel or overlapping interests or needs. Here, power may be exercised simultaneously by both state and national governments; chief among these concurrent powers is the power to tax. In areas where the Constitution is silent regarding national authority, states may act provided they do not conflict with powers the central government may legally exercise. On large and important subjects that affect citizens in their daily lives (education, crime and punishment, health and safety) the Constitution fails to assign direct responsibility. According to the republican principles that guided the founding generation, especially the theories of John Locke, the people reserve these powers, which they delegate to the states through the various state constitutions (Elazar, 1987).

The framers of the Constitution recognized the potential for conflict between and among the two levels of government, especially in the use of concurrent powers, and they adopted several strategies to avoid it. First, the U.S. Constitution was made supreme over state constitutions, a condition made enforceable through federal courts. It included a clause that declared the actions of the national government supreme whenever its constitutional use of power clashed with the legitimate actions of the states. The document also explicitly prohibited states from exercising certain powers that were granted to the central government. And as part of the campaign to win ratification of the Constitution, the framers agreed to support a Bill of Rights, the first ten amendments, to restrain the national government from interfering with individual liberties. The Constitution laid the ground rules for relationships among states by listing the

reciprocal obligations the states owed each other, and it made any newly admitted state equal with the original states. Finally, the states were represented in the national government itself by equal representation in the U.S. Senate, the upper house of Congress. In all of these ways, the Founding Fathers sought to mitigate conflict among the several governments in the United States (Les Benedict, 1996).

The American invention of federalism rested on a new conception of sovereignty, the ultimate power to rule. In English and European political theory, sovereignty was unitary and indivisible. Yet throughout the imperial crisis that preceded the American break with Great Britain in 1776, the colonists had argued that while the English Parliament controlled all matters relating to the empire as a whole, in practice the colonial legislatures made law for their respective colonies. Even so, the early American governments of the Revolutionary War era operated under an older theory of undivided sovereignty (Les Benedict, 1996).

Under the Articles of Confederation adopted in 1783, the nation's first constitution, each state or former colony was supreme; the states only cooperated in a "league of friendship" to address national issues. However, experience with the confederation form of government proved unsatisfactory and, to some minds, dangerous. Not only did states act to deny liberties to some of their own citizens, they too often pursued their self-interest, to the detriment of the nation at large. Widespread dissatisfaction with the Articles of Confederation led in 1787 to the convening of delegates to draw up a new constitution (Les Benedict, 1996).

The document that resulted begins with the famous words, “We the People of the United States . . . ,” thus indicating the source of sovereignty in the new nation. Created by the people, the Constitution denied sovereignty to both the national and state governments. What had once appeared illogical, a government within a government was now possible because both national and state power came from a grant of authority from the sovereign people. This grant of power was expressed through a written constitution that assigned different roles to the separate levels of government. State and national power could operate concurrently over the same territory and the same population because they focused on different things—the states on local matters, the national government on more general concerns (Elazar, 1984). The American experiment in government allowed both states and national governments to coexist as separate and independent units, each with a separate sphere of authority, because both exist to serve the people

### **A Study in Evolution**

How has federalism worked in the United States? Federalism has been a dynamic framework for government, a characteristic that fits the changing nature of American society itself. Over its 200-year history, the division of power under American federalism has shifted numerous times in law and practice. The U.S. Constitution is a flexible document, meant to allow the nation to respond to changing circumstances. At times, amendments to the Constitution have given a different role to the central and state governments than originally intended; at other times, courts have provided different interpretations of these roles. The proper balance between national and state powers is continually at issue in

American politics. It cannot be settled, President Woodrow Wilson (1913-20) observed, “by the opinion of any one generation.” Social and economic changes, shifts in political values, the role of the nation in the world—all these things have required each generation to treat federalism as “a new question” (Lienesch, 1988).

Even a casual reading of the Constitution leaves the impression that the central government has responsibility for only a small number of the functions that affect the conduct of everyday affairs. Certainly, this was true for the first century of nationhood. States make almost all of the governmental decisions that affected the lives of their citizens. They defined all crimes and punishments, established the laws of contract, regulated public health and safety, and set the legal standards for education, welfare, and morality.

Despite the importance of the states in daily life, the most pressing public policy questions prior to the American Civil War (1861-65) involved debates over the scope of national power, with most people believing it should remain limited. But a number of pressures kept pushing federalism to the center of political debates. The legacy of the Revolution, with its fears of centralized power, was a strong influence, as was the ambiguity that remained from the constitutional convention and the ratification debates. The language of the Constitution was general, and did not explicitly address whether or not states retained any residual sovereignty in the powers assigned to the national government. Complicating the problem was the fact that states, as a practical matter, were far more competent in performing governmental functions

satisfactorily than they would be in later eras when problems increasingly required multi-state solutions (Elazar, 1984).

The Civil War (fought over slavery which existed largely *because of* our divided and fragmented nation) settled the dispute about the nature of the union and the supremacy of the national government in it. It did not answer all the questions about the proper division of responsibility between central and state governments, even though the 14th Amendment ratified in 1868, contained language that permitted the legitimate expansion of national power. But the context for the debate had changed. During the last half of the 19th century, the United States became a manufacturing colossus, a development accompanied by a corresponding rise of a vast domestic market, large cities, great concentrations of wealth, and serious social problems. The rise of corporate monopolies of goods and services in the late 19th and early 20th century raised the specter of uncontrolled economic power, which to most Americans was as threatening as uncontrolled governmental power (Elazar, 1984).

No state or combination of states could effectively set the conditions both to spur and control this growth of commerce and its consequences. So the central government, now increasingly called the federal government, began to assume this responsibility, at first under the “interstate commerce” clause. Among the powers given to Congress in the Constitution is the power “to regulate Commerce with foreign Nations and among the several States. . .” By 1887, national legislation emerged to regulate monopolies under the interstate commerce power. Within two decades, Congress had passed a host of laws

governing everything from national lotteries to the liquor trade to the food and drug industry (Les Benedict, 1996).

Although the intent of much of this legislation was to prevent states from interfering with the growth of industry, the result was an extension of national power into an arena, the protection of health and welfare in an era of rapid industrialization, previously viewed as a state responsibility. Progressives at the turn of the century, led by President Theodore Roosevelt (1901-09), were unapologetic about this intrusion, arguing that the states need federal help to fulfill state goals. Although the Supreme Court, which by now was recognized as the final arbiter of constitutional interpretation, accepted and promoted this aim, it still attempted to keep federal power in check. Nonetheless, the general trend was clear: Federal authority grew in concert with national needs, and state power diminished correspondingly (Lienesch, 1988).

In the 1930s, President Franklin Roosevelt's New Deal economic programs further challenged this somewhat conservative balancing of state and federal interests by claiming a broad national authority to respond to the economic crisis of the Great Depression. Congressional measures paved the way for national management of welfare (creation of the Social Security system), agriculture, minimum wages, and labor relations, with other laws establishing federal regulation of such vital areas as transportation, communications, and banking and finance. Taken together with the relief programs and a variety of social experiments, the New Deal created a national administrative state that the emergencies of World War II and the Cold War only strengthened. It was a constitutional revolution of the first order: The U.S. government now exercised



powers (over labor law or banking regulation, for example) that previously the states had exercised almost exclusively (Lienesch, 1988).

The role of the central government within the federal system continued to expand during the last half of the 20th century. The Supreme Court reversed the prevailing interpretation of the 14th Amendment that narrowly defined the scope of national power, and extended federal oversight in areas of crime and punishment, social welfare, race relations, and equal protection of the laws (Lienesch, 1988). By the end of the century scarcely an area existed that national power did not reach. The effect was perhaps most apparent in the words most people chose when asked to identify their citizenship. Throughout most of the nation's history, a significant number of citizens identified their primary allegiance with a state; by the end of the 20th century, national citizenship was prized more often.

The revolution in federalism did not end debates about the proper distribution of power between the states and the national government. Disagreements about the proper role of national and state governments within the federal system continue to be an important part of American politics. Virtually no domestic issue is untouched by conflict over what level of government has authority to shape or implement policies relating to it. No longer is it easy to distinguish between the functions of state and national governments, because the current federal system tends to blend responsibilities and blur distinctions in response to complex social and economic issues.

### **The Virtues of Power Division**

Today, power and policy assignments are shared in what scholars label cooperative federalism. This feature of American life is so well established that it occurs even when the two levels of government are in conflict, as happened in the 1960s when Southern states cooperated on building the interstate highway system while resisting federally mandated racial integration. What makes cooperative federalism possible are several operating procedures, including shared costs, federal guidelines, and shared administration. Congress agrees to pay part of the costs for programs that are in the national interest but benefit primarily the inhabitants of a single state or region. Among these programs are highways, sewage treatment plants, airports, and other improvements to state or local infrastructure. The federal grant comes with a set of guidelines that states must adopt and enforce in order to receive the money. Concerned about drunken driving, for instance, Congress recently made the receipt of federal highway dollars contingent upon a state's enacting a lower blood alcohol limit as part of its traffic laws. Finally, state and local officials implement federal policies, but under programs of their own design and through their own bureaucracy. Job retraining is one such program, with each state developing and administering a program funded by federal dollars to meet the specific needs of its citizens (Elazar, 1987).

What lessons does the American experience with federalism offer to democratic governments elsewhere? Federal governments are not common (in fact, most nations adopt a unitary government in which power is centralized) nor is federalism essential to democracy, as the experience of parliamentary

governments demonstrates. But the principles of federalism are important for democratic government anywhere. Foremost among these principles are the division and separation of power and the decentralization of policies and politics. Americans have long believed that centralized power threatens liberty, and they traditionally have feared most the use of power by a distant national government (Elazar, 1987).

Vesting power in two levels of government, dividing it by making each level supreme in its separate sphere, was one solution to the problem of how to grant necessary authority to government without creating such concentrated power that liberty would suffer. The states, the level of government closest to the people, in effect serve to check the power of the national government. This innovation made sense to the founding generation; in fact, the American theory of representation requires a direct geographical connection between the representative and the represented. Localism continues to appeal to modern minds because, as one scholar has noted, it satisfies a natural “preference for the near and familiar and a suspicion of the remote and abstract.” “States’ rights,” as the powers assigned the states are often called, rest on an assumption that localism is important and that people are willing to trust government that they can control. State governments intuitively satisfy this requirement more than a national government does (Elazar, 1984). This belief explains why most Americans continue to want local control of the institutions that affect their everyday lives (police, schools, and hospitals, for example) while also insisting that the rights of citizens should be national and not vary from state to state. In

theory and practice, federalism addresses both local and national needs within a framework of limited power.

Federalism's ability to accommodate local issues also contributes to democracy by decentralizing policies and politics. The United States is a geographically large and complex nation. It is also a nation of immigrants, with each ethnic, national, and religious group bringing different cultural and moral values to social, economic, and political issues. Governing such a nation as a democracy would be much more difficult if these differences could not be expressed and accommodated easily. States can adopt widely varying policies on the same problem, thereby providing the means for citizens to live in a state where the policy suits their moral or cultural values. Consider an issue such as gambling. Some states permit it; others do not. Each state's policy suits the needs, experiences, and values of a majority of its citizens, as expressed through state law. In this example, the variation in state practice is beneficial because a national consensus does not exist to support a uniform policy on this issue.

Of course, a diversity of approaches to public policy is not an unalloyed virtue. It should never compromise the fundamental rights and privileges of citizens. The right to a trial by jury, for instance, should not depend upon a circumstance of geography. Diversity in practice can also lead to unequal treatment, such as when a poorer state is unable to fund a basic program, say, education, as well as a wealthy state can. But with the exception of basic rights, the ability to experiment with different solutions is a prized characteristic of a federal system.

Often the states are called laboratories of democracy, and for good reason. Innovative programs and policies from welfare and educational reform to health and safety regulation repeatedly have come first from state governments. Long before the national government acted, a number of states abolished slavery, extended the right to vote to women, African Americans, and 18-year-olds, and provided for the direct election of U.S. senators, among other reforms. These state actions expanded the promise of democracy at a time when none of these measures commanded a national consensus. In this sense, states serve as both political reformers and mediators, testing new ideas and helping to hammer out acceptable compromises among state and national majorities.

A federal system also expands participation in politics and government. The more levels of government, the greater the opportunity to vote and hold office. State and local governments elect thousands of office holders, compared to the two officials, president and vice president, elected by the nation at large. (Legally, neither national office is elected by the nation's voters but rather by the votes of designated electors chosen by voters in each state, though the election is truly national.) Many of these offices are training grounds for future national leadership. Among the nation's last five presidents, for example, only one, George Bush Sr. (1990-94), did not gain experience in a state office. Presidents Carter, Reagan, Clinton, and George W. Bush all first held elected state offices. Although most state or local office-holders do not move to national positions, they each learn valuable lessons about the role of government in a democratic society, lessons that ultimately strengthen the relationship between government

and citizens. Society also benefits because the pool of individuals qualified for higher office is larger than it would be otherwise (Rokkan, 1999).

Additional levels of government also increase access to decision-making in ways other than office holding. Interest groups blocked from influence at one level of government may find a better reception of their ideas at another level. During the 1950s and 1960s, civil rights advocates faced strong opposition from Southern states that opposed racial integration, but they found support in the national government for their efforts to achieve racial equality. Early in the 20th century, supporters of labor and environmental regulation often succeeded in passing state legislation, but were stymied at the national level. A federal system, therefore, has the potential to make government more responsive to the different, and at times competing, economic and social interests of the various states. In this fashion, it encourages and helps to manage a healthy democratic pluralism within a large republic. James Madison, among other framers of the Constitution, valued the multiplication of interest groups because it prevented the formation of a permanent majority with the potential to trample on minority rights (Allen et al., 2004).

Finally, federalism provided a platform for effective criticism and opposition to governmental policies and practices. A political party out of power nationally still may capture state and local offices that allow it to challenge national priorities or decisions. While some of this opposition may be strictly partisan, much of it undoubtedly expresses serious reservations about the wisdom of a particular policy or course of action. A federal system thus protects the freedom of citizens to oppose national policy they view as misguided, and by

this means it promotes the effective and necessary criticism of government that leads to the strengthening of democracy itself.

### **Creative Tension**

For more than 200 years, federalism has provided the framework for the development of American democracy. The claims of the federal government and the claims of state governments have always existed in tension with each other. They still do. Resolving this tension requires constant attention to the role of government and continual reassessment concerning the proper distribution of power between the two levels of government. This shifting balance, more often creative than not, rests on the principle of popular sovereignty, so the disputes surrounding federalism are about which government, state or national, best expresses the people's will. They are also about which values will prevail in the marketplace of political ideas. There will never be final answers to these questions, and the tension inherent in federalism will never disappear.

In the tension between governments, messy as it might be in practice, Americans have discovered perhaps their best guarantee of liberty, second only to their own vigilance and guardianship. Certainly, this was the hope of the founding generation. "Should this improvement on the theory of free government not be marred in the execution," James Madison wrote in 1792, "it may prove to be the best legacy ever left by the lawgivers to their country, and the best lesson ever given to the world by its benefactors" (Rakove, 1996). Among nations searching for a form of government that best promotes liberty, the federal legacy of the United States offers an example worth considering.

## **Chapter II** **Written From Scratch**

*“The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will.”*

Justice John Marshall, *Cohen’s v. Virginia* (Ackerman, 1991).

The Constitution of the United States is the central instrument of American government and the supreme law of the land. For over 200 years, it has guided the evolution of governmental institutions and has provided the basis for political stability, individual freedom, economic growth, and social progress.

The American Constitution is the world’s oldest written constitution in force, one that has served as the model for a number of other constitutions around the world. The Constitution owes its staying power to its simplicity and flexibility. Originally designed to provide a framework for governing four million people in 13 very different colonies along the Atlantic coast, its basic provisions were so soundly conceived that, with only 27 amendments, it now serves the needs of more than 240 million people in 50 even more diverse states that stretch from the Atlantic to the Pacific Ocean.

The U.S. Constitution is the central instrument of government and the “supreme law of the land.” It was written in 1787 in Philadelphia by the Continental Congress of the new American republic and was officially adopted in 1789. The objective of the writers was to outline the structure of a new, strong central government after the years of weakness and chaos resulting from the preexisting “Articles of Confederation and Perpetual Union” which had loosely bound the colonies together since 1778.



The U.S. Constitution outlines the structure and powers of the three branches of government (executive, legislative, judicial) and the three levels of government (federal, state, and local). The founding principles of the Constitution that are the basic values for most of the evolution in the United States are the same today as when it was written. First, the three branches of government are separate and each is checked and balanced by the power of the other two. Second, the U.S. Constitution is supreme over all other laws. Third, all persons are equal before the law, as are all states and each state must be democratic and respect the law of others; fourth, the people can change the U.S. Constitution by the methods outlined within it (Ackerman, 1991).

One method of promoting democracy that is accounted for within the Constitution is the ability for Congress to amend the laws if the need arises. Although the right is available, it is a difficult process. Amendment of the U.S. Constitution may be initiated by a 2/3 vote in each chamber of Congress, or 2/3 of the states calling for a national convention. In either case, a vote of 3/4 of the states is required to actually make an amendment and for it to be taken into action. The interpretation of the Constitution has changed over time without amendment by various pieces of legislation and judicial decisions. Understanding the success of the Constitution requires and understanding of the founding of the American government.

## **History**

The 13 British colonies, strung out along the eastern seaboard of what is now the United States, declared their independence from England in 1776. A year before, war had broken out between the colonies and Great Britain, a war

for independence that lasted for six bitter years. While still at war, the colonies (now calling themselves the United States of America) drafted a compact, which bound them together as a nation. The compact, designated the “Articles of Confederation and Perpetual Union,” was adopted by a Congress of the states in 1777, and formally signed in July 1778. The Articles became binding when they were ratified by the 13th state, Maryland, in March 1781.

The U.S. Constitution has 27 amendments. The Bill of Rights, the first 10 amendments to the Constitution, was adopted in 1791 in order to meet demands for the signature of Massachusetts and other states to the Constitution. The path to the Constitution was neither straight nor easy. A draft document emerged in 1787, but only after intense debate and six years of experience with an earlier federal union (Allen et al., 2004).

The Articles of Confederation devised a loose association among the states; and set up a federal government with very limited powers. In such critical matters as defense, public finance and trade, the federal government was at the mercy of the state legislatures. It was not an arrangement conducive to stability or strength. Within a short time (less than six years) the weakness of the Confederation was apparent to all. Politically and economically, the new nation was close to chaos.

The path to the Constitution was not easy. It was under these inauspicious circumstances that the Constitution of the United States was drawn up. In February 1787, the Continental Congress, the legislative body of the republic, issued a call for the states to send delegates to Philadelphia to revise the Articles. The Constitutional, or Federal, Convention convened on May 25, 1787,

in Independence Hall, where the Declaration of Independence had been adopted 11 years earlier on July 4, 1776. Although the delegates had been authorized only to amend the Articles of Confederation, they pushed the Articles aside and proceeded to construct a charter for a wholly new, more centralized form of government. The new document, the Constitution, was completed September 17, 1787, and was officially adopted March 4, 1789 (Allen et al., 2004).

The 55 delegates who drafted the Constitution included most of the outstanding leaders, or Founding Fathers, of the new nation. They represented a wide range of interests, backgrounds and stations in life. All agreed, however, on the central objectives expressed in the preamble to the Constitution:

*We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America* (Rakove, 1996).

The primary aim of the Constitution was to create a strong elected government, directly responsive to the will of the people. The concept of self-government did not originate in the United States; indeed, a measure of self-government existed in England at the time. But the degree to which the Constitution committed the United States to rule by the people was unique, and even revolutionary, in comparison with other governments around the world.

The Constitution departed sharply from the Articles of Confederation in that it established a strong central, or federal, government with broad powers to regulate relations between the states, and with sole responsibility in such areas as foreign affairs and defense.

Centralization proved difficult for many people to accept. America had been settled in large part by Europeans who had left their homelands to escape

religious or political oppression, as well as the rigid economic patterns of the Old World, which locked individuals into a particular station in life regardless of their skill or energy. Personal freedom was highly prized by these settlers and they were wary of any power (especially that of government) which might curtail individual liberties. The fear of a strong central authority ran so deep that Rhode Island refused to send delegates to Philadelphia in the belief that a strong national government might be a threat to the ability of its citizens to govern their own lives (Rakove, 1996).

The diversity of the nation was also a formidable obstacle to unity. The people who were empowered by the Constitution to elect and control their central government were of widely differing origins, beliefs and interests. Most had come from England, but Sweden, Norway, France, Holland, Prussia, and Poland, and many other countries also sent immigrants to the New World. Their religious beliefs were varied and, in most cases, strongly held. There were Anglicans, Roman Catholics, Calvinists, Huguenots, Lutherans, Quakers, Jews, agnostics and atheists. Economically and socially, the Americans ranged from the landed aristocracy to slaves from Africa and indentured servants working off debts. The major workforce of the country was the middle class—farmers, tradesmen, mechanics, sailors, shipwrights, weavers, carpenters and a host of others (Onuf, 1983).

Americans then, as now, had widely differing opinions on virtually all issues, up to and including the wisdom of breaking free of the British Crown. During the Revolution, a large number of British loyalists (known as Tories) fled the country, settling mostly in eastern Canada (Onuf, 1983). Those who stayed

behind formed a substantial opposition bloc, although they differed among themselves on the reasons for opposing the Revolution and on what accommodation should be made with the new American republic.

In the past two centuries, the diversity of the American people has increased, and arguably the unity of the nation has grown stronger. From the original 13 states along the Atlantic seaboard, America spread westward across the entire continent. Today it encompasses 50 states, the most recent additions being Alaska and Hawaii in 1959. Throughout the 19th century and on into the 20th, an endless stream of immigrants contributed their skills and their cultural heritages to the growing nation. Pioneers crossed the Appalachian Mountains in the east, settled the Mississippi Valley and the Great Plains in the center of the continent, then crossed the Rocky Mountains and reached the shores of the Pacific Ocean—4,500 kilometers west of the Atlantic coastal areas settled by the first colonists. And as the nation expanded, its vast storehouse of natural resources became apparent to all: great stands of virgin timber, huge deposits of coal, copper, iron and oil, abundant water power and fertile soil (Allen et al., 2004).

It was the continuing job of the Constitution and the government it had created to draw all these disparate interests together, to create a common ground and, at the same time, to protect the fundamental rights of all the people. The Founding Fathers had little precedent to guide them when they drafted the Constitution. The Articles of Confederation had also set up a federal government, but its powers were so limited that the states were united in name only. Although the people's experience with federalism was limited, their

expertise in the art of self-government was considerable. Long before independence was declared, the colonies were functioning governmental units, controlled by the people. And after the revolution had begun—between January 1, 1776, and April 20, 1777—10 of the 13 states had adopted their own constitutions. Most states had a governor elected by the state legislature. The legislature itself was elected by popular vote (Allen et al., 2004).

Now that most states were given the opportunity to become familiar with the text, the stage was set for the arduous process of ratification, that is, acceptance by at least nine states. Delaware was the first to act, followed swiftly by New Jersey and Georgia. Approval was given by comfortable majorities in Pennsylvania and Connecticut. A bitter debate was carried on in Massachusetts. That state finally conditioned its ratification on the addition of 10 amendments guaranteeing certain fundamental rights, including freedom of religion, speech, press and assembly; a militia instead of a standing army; the right to trial by jury; and the prohibition of unreasonable searches or arrests (Les Benedict, 1996).

By late June 1788, Maryland, South Carolina, and New Hampshire had given their assent, satisfying the requirement for ratification by nine states. Legally, the Constitution was in force. But two powerful and pivotal states, New York and Virginia, remained undecided, as did the two smaller states of North Carolina and Rhode Island. It was clear that without at least New York and Virginia's consent, the Constitution would stand on shaky ground because their lack of support for particular amendments would negatively affect the process of the Constitution (Les Benedict, 1996).

Under the text of the Constitution, each state legislature had the power to decide how presidential electors, as well as representatives and senators, would be chosen. Some states opted for direct elections by the people, others for election by the legislature, and a few for a combination of the two. Rivalries were intense; delays in setting up the first elections under the new Constitution were inevitable. New Jersey, for example, chose direct elections, but neglected to set a time for closing the polls, which stayed open for three weeks, allowing women to vote for a short amount of time.

The full and final implementation of the Constitution was set for March 4, 1789. But, by that time, only 13 of the 59 representatives and eight of the 22 senators had arrived in New York City. (Seats allotted to North Carolina and Rhode Island were not filled until those states ratified the Constitution.) A quorum was finally attained in the House on April 1 and in the Senate on April 6. The two houses then met jointly to count the electoral vote (Allen et al., 2004).

George Washington was unanimously elected the first president, and John Adams of Massachusetts, the first vice president. Adams arrived in New York on April 21 and in Washington on April 23. They were sworn into office on April 30, 1789. The business of setting up the new government was completed. The job of maintaining the world's first republic had just begun (Allen et al., 2004).

Virginia was sharply divided, but the influence of George Washington, arguing for ratification, carried the state legislature by a narrow margin on June 26, 1788. In New York, Alexander Hamilton, James Madison and John Jay combined to produce a remarkable series of written arguments for the

Constitution, *The Federalist Papers*, and won a narrow vote for approval on July 26. In November, North Carolina added its approval. Rhode Island held out until 1790, when its position as a small and weak state hedged in by a large and powerful republic became untenable (Allen et al., 2004).

The process of organizing the government began soon after ratification by Virginia and New York. On September 13, 1788, Congress fixed the city of New York as the seat of the new government. It set the first Wednesday in January 1789 as the day for choosing presidential electors, the first Wednesday of February for the meeting of the electors to select a president, and the first Wednesday of March for the opening session of the new Congress (Hutson, 1990).

It is of significance that a majority of the 27 amendments stem from continued efforts to expand individual civil or political liberties, while only a few are concerned with amplifying the basic governmental structure drafted in Philadelphia in 1787. Without such flexibility, it is inconceivable that a document drafted more than 200 years ago could effectively serve the needs of 280 million people and thousands upon thousands of governmental units at all levels in the United States today. Nor could it have applied with equal force and precision to the problems of small towns and great cities.

Although the Constitution has changed in many aspects since it was first adopted, its basic principles remain the same now as in 1789:

- The three main branches of government are separate and distinct from one another. The powers given to each are delicately balanced by the



powers of the other two. Each branch serves as a check on potential excesses of the others.

- The Constitution, together with laws passed according to its provisions, and treaties entered into by the president and approved by the Senate, stands above all other laws, executive acts and regulations.
- All persons are equal before the law and are equally entitled to its protection. All states are equal, and none can receive special treatment from the federal government. Within the limits of the Constitution, each state must recognize and respect the laws of the others. State governments, like the federal government, must be democratic in form, with final authority resting with the people.
- The people have the right to change their form of national government by legal means defined in the Constitution itself.

### **US Legislative History**

The legislative powers in the United States are separated between two assembling bodies—the Senate and the House of Representatives. The members of the two houses are subject to the same conditions of eligibility in almost every sense. The only difference between the two is the Senate resides in office four years longer than a representative. This division of the legislative power into two bodies is of great democratic necessity because it prevents from an imbalance of power and decision-making. Although the bodies have different responsibilities and methods for law-making, their accountability to the citizens and higher levels of government are equal (Tocqueville, 1840).

## The Senate

The framers of the Constitution created the United States Senate to protect the rights of individual states and safeguard minority opinion in a system of government designed to give greater power to the national government. They modeled the Senate on governors' councils of the colonial era and on the state senates that had evolved since independence. The framers intended the Senate to be an independent body of responsible citizens who would share power with the president and the House of Representatives. James Madison, paraphrasing Edmund Randolph, explained in his notes that the Senate's role was "first to protect the people against their rulers [and] secondly to protect the people against the transient impressions into which they themselves might be led" (Hutson, 1990).

To balance power between the large and small states, the Constitution's framers agreed that states would be represented equally in the Senate and in proportion to their populations in the House. Further preserving the authority of individual states, they provided that state legislatures would elect senators. To guarantee senators' independence from short-term political pressures, the framers designed a six-year Senate term, three times as long as that of popularly elected members of the House of Representatives. Madison reasoned that longer terms would provide stability. "If it not be a firm body," he concluded, "the other branch being more numerous, and coming immediately from the people, will overwhelm it." Responding to fears that a six-year Senate term would produce an unreachable aristocracy in the Senate, the framers specified that one-third of the members' terms would expire every two years, leaving two-thirds of

the members in office. This combined the principles of continuity and rotation in office (Hutson, 1990).

In the early weeks of the Constitutional Convention, the participants had tentatively decided to give the Senate sole power to make treaties and to appoint federal judges and ambassadors. As the convention drew to a close, however, they moved to divide these powers between the Senate and the president, following Governor Morris' reasoning that "As the president was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." Due to the concern of individual states that other states might create a coalition against them, by a simple majority vote, for commercial or economic gain, approval of a treaty would require a two-thirds vote. In dealing with nominations, the framers believed that senators (as statewide officials) would be uniquely qualified to identify suitable candidates for federal judicial posts and would confirm them along with cabinet secretaries and other key federal officials, by a simple majority vote (Hutson, 1990).

A major change in the Senate's institutional structure occurred in 1913 with the ratification of the Constitution's Seventeenth Amendment, providing for direct popular election of senators. Selection of senators by state legislatures had worked reasonably well for the Senate's first half-century. Eventually, however, deadlocks began to occur between the upper and lower houses of those bodies. This problem delayed state legislative business and deprived states of their full Senate representation. By the start of the twentieth century, direct popular election of senators had become a major objective for progressive reformers who sought to remove control of government from the influence of

special interests and corrupt state legislators. Although this amendment did not significantly affect the quality of persons subsequently elected to the Senate, its passage marked the only structural modification of the framers' original design of the institution (Allen et al., 2004).

During the nineteenth century, Senate leadership came mostly from committee chairs and other senior members, but in the early twentieth century the position of party leaders—majority and minority leader—developed. Today, leaders are elected by their fellow senators at the beginning of each Congress. Senate rules require that the presiding officer recognize the leaders before other senators present in the chamber, giving them first chance to propose legislation, offer amendments, and control the legislative agenda of the day.

The Senate has turned down fewer than two dozen, but it routinely influenced treaty negotiations with threats of modification through the addition of various amendments, reservations, or understandings.

The framers would find much in the Senate, as in modern America, that would surprise them. They would surely be amazed that the Senate has grown to one hundred members, with seven thousand staff members housed in three large office buildings, and that senators now view service in the body as a long-term career. They would also be surprised at the importance the Senate accords to its committee system.

Viewed over the broad sweep of its history, the Senate has balanced faithfulness to the Constitution's principles with requirements for measured change in response to the complex demands of a diverse society.

## **The House of Representatives**

The House of Representatives, created as the “popular” branch of government, was intended to counterbalance the more elitist Senate and presidency. Giving meaning to the principle “no taxation without representation,” the Framers of the Constitution provided that House members be elected directly by the people and enjoy exclusive authority to initiate tax and spending legislation. Members are elected for two-year terms and apportioned among the states according to population. In the First Congress only sixty-five members from thirteen states sat in the House. The size of the chamber is set by law, and it steadily increased throughout the nineteenth century. Apart from a brief interlude following the admission of Alaska and Hawaii to the Union, the number of members has held constant at 435 since 1913 (Hutson, 1990).

The history of the House of Representatives has been shaped by three developing institutions: the committee system, the legislative party, and the office of the Speaker. In the late eighteenth and early nineteenth centuries, most legislation was considered in the full House or in temporary committees appointed for the purpose of perfecting individual bills. During these early decades the pace of congressional deliberations was slow, and the small size of the chamber permitted leisurely consideration of legislation. The rapid rise of permanent standing committees began after the War of 1812, and the system was well established by 1848 when the Mexican-American War broke out. By this time each committee held exclusive jurisdiction over some area of government policy (Allen et al., 2004).

The rise of party organizations in the House roughly coincided with the development of the committee system. At first, party influence was felt most directly through control of nominations for Speaker, the policy positions hammered out in party caucuses, and the appointment of officials to patronage positions within the federal government. Aside from the Progressive Era and a brief period during the 1970s, the major parties have not attempted to bind the voting decisions of their members on major legislative issues. Periods of “party government” have, instead, been associated with increasing authority over committee assignments. When either the Speaker or party organizations have exercised wide discretionary power over committee memberships, as was the case until the end of World War I and since 1975 (for the Democrats), the major parties have been a powerful force in legislative deliberations. During the halcyon years of the seniority system from the middle twenties until 1975, on the other hand, most committee assignments were allocated according to the length of service of individual members, and parties largely became hollow shells that rarely caucused (Hutson, 1990).

Resting on influence over committee assignments and control of floor deliberations, the power of the Speaker’s office has evolved in tandem with the rise and fall of both the committee system and party government. From the emergence of the standing committee system until 1910, the Speaker exercised decisive influence over the composition of legislative panels, and candidates for the post often bartered away assignments in return for the support of powerful members. Growing authority over the recognition of members during House deliberations was consolidated with other procedural powers in the 1890

adoption of the “Reed Rules,” named for their author, Speaker Thomas B. Reed of Maine (Hutson, 1990). For the next twenty years, both assignment and procedural preeminence coincided and the Speaker of the House of Representatives was an almost imperial figure whose influence over national policy rivaled, if not exceeded, that of the president. During these years deviance from party positions was routinely punished by demotion within or outright removal from prestigious panels.

Viewed in the broadest historical perspective, the House of Representatives was never more powerful as a force in national government than when under one-man, authoritarian rule at the turn of the century. The chamber was never weaker than during the 1940s and 1950s when decentralization brought unparalleled influence to individual committee chieftains but left the House and the major parties without a coherent legislative agenda (Allen et al, 2004).

Major reforms adopted during the 1970s have moved the House of Representatives in two potentially contradictory directions. On the one hand, the legislative process has become even more decentralized as rule changes have enhanced the power of subcommittees at the expense of the standing committees of the House. As a result, subcommittee chairs often play a decisive role within an increasingly fragmented institution. On the other hand, changes in the Democratic Party rules and the formal powers of the office have greatly strengthened the speakership. In many respects the office has regained the authority (but not the stature) that it had at the turn of the century. But as long as the Speaker’s powers are exercised in a highly decentralized chamber, the House

will continue to play a distinctly secondary role to the Senate in national politics (Allen et al., 2004).

No product of human society is perfect. Despite its many amendments, the Constitution of the United States probably still contains flaws, which will become evident in future periods of stress. But two centuries of growth and unrivaled prosperity have proved the foresight of the 55 men who worked through the summer of 1787 to lay the foundation of American government.

Several characteristics of the U.S. Constitution have contributed to its relative success and survival as a body of foundation law. The preamble, for example, describes the objectives of the Constitution in only 52 words of forceful, declaratory, and quite general prose, which, by itself, provides no authority for any specific political decision. The main text, in only seven articles, describes the powers authorized to the several branches of government and the powers denied to the federal government or the states as few, brief, and well defined. All residual powers are reserved to the states. The Bill of Rights, with one exception, is a list of the rights of individuals against the state, not a list of claims by individuals on services to be provided by the state; the one exception is the right to a trial by jury. All residual rights are reserved to the people.

The genius of the Constitution in organizing the federal government has given the United States extraordinary stability over the course of two centuries. The Bill of Rights and subsequent constitutional amendments guarantee the American people the fullest possible opportunity to enjoy fundamental human rights.



The Constitution and the federal government thus stand at the peak of a governmental pyramid, which includes local and state jurisdictions. In the U.S. system, each level of government has a large degree of autonomy with certain powers reserved to it. The courts resolve disputes between different jurisdictions. However, there are questions involving the national interest which require the cooperation of all levels of government simultaneously, and the Constitution makes provision for this as well. American public schools are largely administered by local jurisdictions, adhering to statewide standards. But the federal government also aids the schools, since literacy and educational attainment is a matter of vital national interest, and it enforces uniform standards designed to further equal educational opportunity. In other areas, such as housing, health and welfare, there is a similar partnership among the various levels of government.

Compared with the complexities of contemporary government, the problems of governing four million people in much less developed economic conditions seem small indeed, but the authors of the Constitution were building for the future as well as the present. They were keenly aware of the need for a structure of government that would work not only in their lifetime, but for generations to come. Hence, they included in the Constitution a provision for amending the document when social, economic, or political conditions demanded it.

Unlike the United States, the European Union has not been a stable cohesive political body for 200 years. Although the member states within the Union have existed for centuries longer, the cohesiveness necessary to form a

political union is lacking. Building a constitution for an instable polity is challenging to say the least. The method of measuring democracy becomes much more difficult and thus, implementing a democratic ideal for an arguably undemocratic body is nearly impossible. Understanding the functioning of the European Union will allow one to better recognize the challenges the Constitution for Europe faces.

### ***Chapter III*** **What is the European Union?**

*“The ongoing reconfiguration of Europe is driven by a growing nostalgia for an imagined “unified Europe” with shared values and traditions... to provide an ideological support for the success of European political union.”*

Nabil Echchaibi

Around twenty years after the First World War, the inability of the European nations to maintain peace in Europe on their own plunged Europe into a still more horrible conflict. Some 60 million people fell victim to the Second World War. Wide swathes of Europe suffered immense destruction. When the war ended, the two superpowers, the USA and USSR, representing totally different political and economic systems, confronted each other on European soil.

In those days, nobody knew exactly what was to become of this Europe, but there was a firm resolve to prevent the repetition of such a disaster, and a realization by the European states that independence and peace in Europe are always conditioned in part by their neighbor countries. There was also a clear realization that genuine reconciliation with strong ties embodied in treaties was necessary to overcome the ancient hostilities.

Until the completion of World War II, the European nations strongly opposed all attempts to infringe on their powers and were unwilling to yield control over their policies. Early collaborative ventures were international or *intergovernmental* organizations that depended on the voluntary cooperation of their members; consequently, they had no direct powers of coercion to enforce

their laws or regulations. *Supranational* organizations, on the other hand, require members to surrender at least a portion of their control over policy areas and can compel compliance with their mandates. After World War II, there developed a strong revulsion against national rivalries and parochial loyalties, and proposals for some kind of supranational organization in Europe became increasingly frequent (McCormick, 2002).

Against this background, the idea of European integration began to unfold. The countries of Western Europe (which unlike their counterparts in the East were not under the Soviet yoke) concerned themselves with the question of their economic development and cooperation and therefore also with the strengthening of their security. The idea of integration stems from the deep conviction that the sufferings caused by two world wars must never be repeated. If the individual countries work more and more closely together and pursue common goals (such was the conviction) no more armed conflicts will ever occur (McCormick, 2002).

While postwar recovery was stimulated by the Marshall Plan, the idea of a united Europe was held up as the basis for European strength and security and the best way of preventing another European war. Those who wanted a political community could not, however, agree on the approach and pace of progress. Should a united Europe be created as soon as possible by setting up federal institutions, or was progressive cooperation confined in the first instance to economic matters more appropriate and more promising? History shows that the second route won the day.

In May 1950, the French Foreign Minister, Robert Schumann, presented the plan for a European Coal and Steel Community (ECSC) drafted by his colleague, Jean Monnet, sometimes referred to as “Mr. Europe.” The key industries and resources for the war economy, coal and steel, of Germany and France were to be merged, removed from national authority and placed under supranational control, which was to be independent of the nation states. In April 1951, six countries, France, Belgium, the Netherlands, Luxembourg, Italy and the Federal Republic of Germany, signed the treaty establishing the ECSC. A supranational institution was created in the shape of the “High Authority,” which was able to make decisions without reference to the member states. The interests of the nation states were taken into account by a “Special Council of Ministers.” In addition, representatives of the national parliaments also met in a Common Assembly, while the Court of Justice was set up to hear appeals. The six ECSC countries remained the pillars of the European integration for the next twenty years (McCormick, 2002).

In March 1957, these six countries signed the treaties establishing a European Economic Community (EEC) and a European Atomic Energy Community (EAEC or Euratom) in Rome. The creation of a common market was to be the main focus of European unification for some considerable time. However, in view of the broader competencies of the EEC, the supranational components were downscaled. The preparation of legislation continued in the hands of the supranational authority, which is now called the Commission, but sole decision-making authority rested with the Council of Ministers. In the first

instance, this Council was able to make decisions by a qualified majority in many areas but in others, unanimity of all the member states was needed.

The concept of a “Europe of the Nation States” advocated by the French President, De Gaulle, which continued to give the member states the dominant role in the Community, and then came to the fore when the “Luxembourg compromise” was adopted. This meant that the Council of Ministers could in practice now only enforce unanimous decisions; in effect, that gave each Member state a right to veto every decision (Rokkan, 1999).

The EEC is a Customs Union: no duties are levied on trade in goods between the member states and a common external tariff applies to third countries. Almost simultaneously with the creation of the EEC, countries which preferred less far-reaching integration formed The European Free Trade Association (EFTA) in 1960. The EFTA also provides for exemption from customs duties for its member states but each such Member state retains its own external tariffs against third countries (Rokkan, 1999).

However, the EFTA countries (including Switzerland) also wished to avoid the risk of finding themselves disadvantaged on the important EEC market. Different routes were chosen: in 1961 Switzerland made an (unsuccessful) application for association with the EEC, while the United Kingdom applied for accession to the European Economic Community. These problems took nearly a decade to solve: in 1973, Switzerland with Portugal, Austria, Sweden and Finland signed a free trade agreement with the EEC, while the United Kingdom, Ireland and Denmark joined the Community in 1973 (McCormick, 2002).

The stagnation, created by the unanimity rule, of development of the EEC, EEAC and ECSC, which came to be known jointly as the European Community (EC) (due to the signing of the Brussels Treaty in 1965, which provided for the merger of the organizations into what came to be known as the EC and later the European Union), was not overcome until the mid-80s. Back in 1984, the idea of a European Economic Area which would combine the EC and EFTA countries had already been mooted. In the late 80s, as these bodies became more complex, the need for a comprehensive solution emerged. The basic question here was how the EFTA countries could take part in the European Single Market without at the same time jeopardizing the internal freedom of decision of the EC (Rokkan, 1999).

The most important step in that direction was the Single European Act (SEA), signed in 1986. Its main objectives were the progressive implementation of the European Single Market (free movement of persons, goods, services and capital) and an improvement in the workings of the EC institutions. The Single European Act led to qualified majority voting on all decisions necessary to implement the Single Market (Rokkan, 1999).

This progress towards the single market again placed the EFTA Member Countries under pressure, as had been the case in the early 60s. Within the EC, for example, goods could be shipped without customs inspections, every product could be placed on the market without any limitation or additional verifications in any other member state and workers could be seconded without any difficulty for employment missions in other member states.

The outcomes of these negotiations over a European Economic Area (EEA) and the political events which had occurred in the meantime—the end of the cold war, the fall of the Berlin Wall and the collapse of the Soviet Union—now gave this process a new direction. With the exception of Liechtenstein and Iceland, all the remaining EFTA countries (Austria, Sweden, Finland, Norway and Switzerland) applied to join the European Community following these new developments.

However, the EC itself was placed under additional pressure in the wake of the political transformation in Europe. Suddenly it transpired that Europe, which had up to then been protected and controlled by the great powers, would soon have to take responsibility for its own political role in a globalizing world. That being so, a relapse into the nationalism of the first half of the century could no longer be ruled out. German reunification became imminent to prevent a reversion from occurring. To begin with, this was a source of anxiety as well as celebration. Now that the Iron Curtain had been lifted, many ruined economies presented a substantial potential threat to Western Europe (Rokkan, 1999). The integration of the new Germany and the desire of Western Europe to stabilize the countries of Eastern Europe and support them in their process of democratization subsequently led to more far-reaching European integration. Clearly, however, this also created the need for a common external policy and cooperation on domestic policy matters accompanied by further strengthening of the European institutions.

In 1991, the Luxembourg Presidency of the EC proposed a model for what would come to be known as the “European Union” (EU). It was to be



based on three pillars: the existing European Community, a new common and external and security policy, and new cooperation in the areas of internal policy and justice. The first and strongest pillar, combining the EEC, EURATOM and the ECSC, was to be the only supranational arm, while the two other pillars would have an intergovernmental structure.

The Treaty of European Union, signed in Maastricht, the Netherlands, in 1992 and ratified in 1993, provided for a central banking system, a common currency to replace the national currencies, a legal definition of the EU, and a framework for expanding the EU's political role, particularly in the area of foreign and security policy. The member countries completed their move toward a single market in 1993 and agreed to participate in a larger common market, the European Economic Area (est. 1994), with most of the European Free Trade Association (EFTA) nations. In 1995, Austria, Finland, and Sweden, all former EFTA members, joined the EU, but Norway did not, having rejected membership for the second time in 1994 (McCormick, 2002).

As a function of the second pillar, monetary policy sovereignty was thereby transferred from the national central banks to the European Central Bank. For the time being, the United Kingdom, Denmark and Sweden are the only EU member states which do not belong to the European Monetary Union (EMU). The Monetary Union was completed in early 2002 when bank notes and coinage were issued. Eleven EU nations established the European Central Bank; the euro was introduced into circulation in 2002 by 12 EU nations (McCormick, 2002).

With the Amsterdam Treaty of 1999, the Union underwent further reforms. In Maastricht, some countries had hesitated to place cooperation in home affairs and justice on a common footing. The third pillar solution was therefore developed out of these historical steps. But the growth of cross border problems such as crime, asylum seekers etc. caused the EU countries to approach, through the Amsterdam Treaty, large sections of what had previously been the third pillar (border controls, immigration and asylum policy) through new community structures, i.e. as part of the first pillar. The common external and security policy remained organized on an intergovernmental basis, but in future the European Council was to be allowed to adopt common strategies, actions and positions. In addition the post of “High Representative for the Common External and Security Policy” was created. This was to give the policy a “public face” (McCormick, 2002).

It was soon after these steps that the European Union was becoming an efficient working body of nation-states, sharing a varied form of security policy and a growing unified market. The problem then became how they could unify these nation states into one larger, more influential political body. It was realized this could be done best through creating a community of European citizens (Reid, 2004).

### **Who Are The Europeans?**

The process of European integration has played a significant role in determining identity for citizens and the European Union as a whole; however, it is faced with contradictory trends. On the one hand, there is increasing economic interdependence, the advantages of a large-scale economy, the necessity of co-

operation to cope with environmental disasters or epidemics, etc. On the other, there are local movements clamoring for independence in the name of a particular local identity that is grounded in their geographic area (Venetians versus Sicilians, for example). In an era of globalization and fragmentation, the most logical step towards coping with the clash between identities is to develop and spread a broader concept of European identity (Habermas).

The European citizen was born in Maastricht, Holland on February 7, 1992, with the signing of the European Union treaty, but its conception has been many years running. European citizenship is conferred automatically on nationals of member countries, but seems to be short of content in the absence of a common language, a common history, or any strong constituent symbols. Only when the lessons of the past, memory, and the invention of traditions, have been brought to bear on the development of a new citizen's voluntary and political identity, will European citizenship be fully achieved. The Maastricht Treaty established a "multiple citizenship." It created a citizenship of the Union which provides for the right of EU citizens to vote and stand for election in local and European elections in other Member states of the Union and the entitlement to diplomatic and consular protection by the representations of every EU Member state in third countries.

In a similar way, we can refer to a European "multiple identity" by considering local, regional, and national identities as compatible without excluding the one from the other. Recent empirical results indicate that the majority of Europeans declare having both a national and a European identity, demonstrating that they consider them compatible. But when asked to make a

choice, the national attachment prevails. In reality, the citizens are not asked to choose to have either a national identity or a European one. Identity cannot be analyzed in terms of zero-sum games (Habermas).

In 2003 the EU and ten non-EU European nations (Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Cyprus, and Malta) signed treaties that resulted in the expansion of the EU the following year, increasing its population by 20% and its land area by 23%. This expansion of the EU, the largest in its short history, is particularly historic because eight of the new members are former Communist countries: they were part of the former Soviet bloc, behind what was then called the Iron Curtain. During the Cold War, these Eastern European countries had little contact with the rest of Europe, and they were also significantly poorer than most of their Western European neighbors. To gain entry in the EU, the countries had to undergo years of rigorous economic, legal, and democratic reform (Reid, 2004).

These last fifteen years of European integration have been marked by a series of Treaty revisions. Each revision was prepared by an intergovernmental conference (IGC) bringing together representatives of the governments of the Member states. The last two IGCs, which culminated in the signing of the Treaties of Amsterdam in 1997 and Nice in 2001, did not provide satisfactory answers to key institutional questions. Following the adoption of the Treaty of Nice, in particular, it became necessary to undertake more wide-ranging institutional reform than a mere adaptation of the institutions in the light of enlargement.

As the treaties have attempted to show, the European Union promotes political, economic, and social cooperation among its European members. Since Europe is made up of many relatively small countries, by banding together in a union, these countries reap the benefits of greater economic and political power. Integration has not solved many problems facing the EU; in fact it may have only deepened the need for institutional reforms. The method by which members of the European Union proposed to make these changes is through the adoption of a European Constitution.

The enlargement of the EU to include ten new members represents a historic step towards a definitive end to the division of Europe separated by the Cold War period. Thereby, the EU is making a central contribution to the promotion and safeguarding of peace, security, stability and prosperity throughout Europe. However, differences in prosperity between the old and new EU members remain substantial; catching up with the current EU members is a process which calls for a considerable effort and political sensitivity.

In addition, the enlargement of the EU represents an enormous institutional challenge. The question as to the future structures of the EU now arises, because the Union must safeguard its ability to function and make decisions effectively even with 25 Member states.

The European Union has been trying to sponsor a coming of age of European Identity awareness across national borders. In doing so, European Union administration intends to square the circle of European Union as the super nation-state of the nation states of Europe. In the light of a global context, the tide of Europeanization is but a particular case of the worldwide extended

tension between the two increasing and opposing processes of globalization and particularization.

Enlargement and deepening of the EU are two sides of the same coin. The question as to whether the Union will one day be a “Europe of nation states” or whether it will develop into a federal state, a “United States of Europe,” is more open than ever at the moment.

It is time for a new effort to be made to improve public understanding of the structure of the European Union. A good place to start improving the interaction of the system with its citizens is developing the European Union Constitution. The key to stabilizing the European Union as a political system is to create a document, which has consistent, applicable legislation, but is open to amending its contents when necessary. It is clear that some changes need to be made that are not relevant to the integration of other countries, but are fundamental to the European Union government as a whole such as democratic reforms, steps to greater efficiency, and accountability within citizens and their leaders.

**Chapter IV**  
**A Constitution for Europe. Finally.**

*“Our continent has seen successive attempts at unifying it: Caesar, Charlemagne and Napoleon, among others. The aim has been to unify it by force of arms, by the sword. We for our part seek to unify it by the pen. Will the pen succeed where the sword has finally failed?”*

Valery Giscard d’Estaing,  
 Former President of the EU Convention

The adoption of the European Union Constitution has been a 50-year process. Towards the end of the 20th century, it became clear for a large number of European leaders that the EU required a re-foundation and renovation. The European Union has long been involved in a protracted process of “constitutionalization.” One effect on this process is the multiple treaties beginning in 1951 and the cumulative effect of Treaty changes over the last 54 years. Another effect is that the European Union has become increasingly dynamic and powerful with a European system of rights, in conjunction with many sources such as the European Convention of Human Rights, each national constitution, and the European Court of Justice, and by has embraced of constitutional principles and practices of the member states. These developments have accumulated over time so as to amount to a veritable turning point in the history of European integration (Closa et al.).

The preamble calls on Europeans to “transcend their ancient divisions and, united ever more closely, to forge a common destiny.” It calls on the EU to draw its influence from Europe’s “cultural, religious and humanist inheritance,” though it makes no direct reference to Christianity. It also bestows dual citizenship on all members—both European citizenship and national

citizenship. It incorporates the Charter of Fundamental Rights of the Union, a bill of rights first approved at the December 2000 EU summit in Nice, France, that guarantees free speech, freedom of religion, the right to life and other fundamental freedoms; most of which are identical to the U.S Bill of Rights. It also calls for sustainable development in Europe that balances economic growth, a social market economy that is “highly competitive” and aimed at full employment and social progress while at the same time calling for a “high level of protection and improvement” of the environment.

In December 2000, in Nice, the European Council reached an agreement on the revision of the Treaties with a view to adapting the Institutions of the Union to enlargement, thereby expressing the need to initiate a wider and deeper debate on the future of the Union. The Laeken European Council, adopted on December 15, 2001 a “Declaration on the Future of the European Union,” thereby committing the Union to becoming more democratic, transparent, and efficient and preparing the way for a Constitution for the citizens of Europe. For this purpose, the Laeken Council decided to organize a Convention bringing together the main stakeholders to examine the vital questions regarding the future development of the Union and to seek the reactions and responses of those involved, which are presented in the Draft Treaty establishing a Constitution for Europe, a treaty which would outline what the Constitution would be should one be proposed. Clear and consensual answers had to be given to a number of fundamental questions, including how to organize the division of responsibilities between the Union and the member states, how to better define the respective tasks of the European institutions, how to ensure the coherence



and effectiveness of the Union's external action, and how to strengthen the Union's legitimacy (Monnet).

In accordance with the mandate given to it by the Laeken Declaration, the Convention was charged with the task of making proposals for institutional reform. As it turned out, its work went beyond this simple initial task and led to the drawing up of a draft constitution, i.e., a consolidated and simplified version of the various existing Treaties, or new founding text.

At that time, three phases were envisaged: a first phase of open debate, a second, more structured phase, the details of which would be determined by the Laeken European Council in December 2001, and, lastly, a new Intergovernmental Conference (IGC) that was to be convened in 2004 to decide on the necessary amendments to the Treaties (Monnet).

The Nice Declaration identified four main topics for consideration: (1) How to establish, and then maintain, a more precise division of responsibilities between the Union and the member states, in accordance with the principle of subsidiarity. (2) Whether the Charter of Fundamental Rights proclaimed in Nice should be included or remain a separate document. (3) How to simplify the Treaties in order to make them clearer and better understood without changing their meaning and (4) What role the national parliaments should have in the European construction (Monnet).

The text submitted by the Convention served as the basis for the work of the Intergovernmental Conference, which brought together the representatives of the governments of the 25 current member states, the European Commission and the European Parliament. The three candidate countries (candidate meaning

applied for acceptance into the EU, but are pending approval) Bulgaria, Romania and Turkey, also took part in all the meetings of the IGC.

The Convention on the Future of Europe forwarded a draft Constitution to the Thessaloniki European Council on June 20, 2003, which incorporated the Charter on fundamental rights as its second part. The final draft Constitution was submitted to the Italian Presidency of the European Council in Rome on July 18, 2003. Despite high initial hopes, agreement was not reached in the end of 2003 due to differences over the size and composition of the Commission and the definition and scope of qualified majority voting (QMV).

From an initial agenda that included the distribution of competencies, simplification and the incorporation of the Charter of Fundamental Rights, the Convention on the Future of Europe produced a fully-fledged proposal for a Constitution for Europe. A new push, led by the Irish Presidency inaugurated in January, strove to complete the negotiation phase by June 2004. Official enlargement of the EU to 25 member states in May 2004 was another major EU milestone coinciding with this constitutional moment. The Heads of State or Government of the 25 member states and the three candidate countries signed the Treaty establishing a Constitution for Europe which would then need to be ratified by all 25 member states of the enlarged Union. (Closa et al.).

The Constitutional Treaty was approved at the European Council in Brussels in 2005 by the 25 member states of the European Union. The candidate countries Turkey, Bulgaria, Romania only signed the Final Act. Croatia participated as an observer nation because it had not participated in the works of the Convention. member states will now have to ratify the Constitution in

accordance with the modalities of their national legislations. The ratification of the European Constitution will involve a greater recourse to citizen opinion by open referendum than ever before. Eleven countries have already committed to holding a referendum over the EU Constitution and more may follow. The UK has been hesitant to propose a referendum, creating widespread concern over the possibility of the UK rejecting the Constitution, jeopardizing the ratification process or even leaving the United Kingdom outside of the Union.

### **What Does the Constitution do?**

To better understand the complexity of the EU constitution versus the U.S. constitution, it is necessary to compare the core of their documents; the EU constitution contains 50 articles, the U.S. contains seven. The EU articles describes the duties and responsibilities of the European Union. It also describes the European Institutions, including new ones, and defines their authority. It details how budgets and decision-making in the European Union should be done, also setting into stone the new double majority principle for most major legislation.

In an effort to streamline Brussels bureaucracy, the constitution also reduces the number of commissioners on the European Commission from 25 to 18 starting in 2014. The constitution also increases the powers of the democratically elected European Parliament, giving it equal power as the European Council to vote on budgets. Parliament will also have greater influence on the appointment of top EU offices, including the European Commission president. It will also have voting power in almost all policy areas. The

constitution also, for the first time, provides regulation for the voluntary secession of a member state.

With the creation of a president, foreign minister and new powers centralized in Brussels, the EU Constitution proposes the biggest reform in the history of the European Union.

The draft constitutional Treaty is divided into four major parts. Following a constitution-type Preamble recalling the history and heritage of Europe and its determination to transcend its divisions, Part I is devoted to the principles, objectives and institutional provisions governing the new European Union. Part II of the draft constitution comprises the European Charter of Fundamental Rights, a document similar in purpose to the U.S. Bill of Rights. Part III comprises the provisions governing the policies and functioning of the Union. The internal and external policies of the Union are laid down in this part, including the provisions on the internal market, on economic and monetary union, on the area of freedom, security and justice, on the common foreign and security policy (CFSP) and on the functioning of the institutions. Part IV groups together the general and final provisions of the draft constitution, including entry into the Union, the procedure for revising the Constitution and the repeal of earlier Treaties (Paris, 1999).

The extensiveness of the constitution implies a number of changes potentially affecting all areas of the European Union, whether it was reconstructing one aspect or creating a new law altogether. The document will change some ways that the EU operates and centralize additional power in Brussels. Nations will give up some rights regarding the internal market, foreign

trade, agriculture, fisheries and the environment. But the constitution will still allow member states their own say in such areas as defense, foreign policy and taxation.

### **EU Institutions**

The European Parliament, the European Council, the Council of Ministers, the European Commission and the European Court of Justice remain the central organs of the EU under the constitution. However, it also establishes a method of dual leadership: in addition to the President of the European Commission, it also creates the position of a European Council President. The president would be elected by the Council (the heads of state or government of the member states) for a 2.5 year term that can be extended by one additional term. The president's election would then have to be confirmed by the European Parliament. Under the constitution, the President of the European Commission would be elected by the European Parliament. The European Commission would also be streamlined under the constitution (Piris, 1999).

### **Parliamentary Power and Petitions for Referendum**

The constitution further strengthens the European Parliament by providing it with a "co-decision with the Council of Ministers," or vote, on most future laws important to the EU. Additionally, for the first time, the constitution requires the European Commission to take up a political issue if at least one million European Union citizens submit a petition. It does not, however, require the Commission to make a decision on the issue (McCormick, 2002).

## **The Founding Principles of the Union**

The values and objectives of the Union are consecrated, as are the rights of European citizens, by their incorporation into the Constitution of the European Charter of Fundamental Rights. The Union is accorded a single legal personality (merger of the former European Community with the European Union). The competences (exclusive, shared and supporting) and their distribution between the member states and the Union are defined clearly and permanently, thus giving citizens better access to their laws than previously. For the first time, with the introduction of a voluntary withdrawal clause, member states may withdraw from the Union. The instruments of action available to the Union are simplified, reducing their number from 15 to six, as is the terminology, with regulations and directives being replaced by European laws and European framework laws. For the first time, the democratic underpinnings of the Union, including participatory democracy, are defined and a genuine right of citizens' initiative is introduced.

## **EU Policies**

Economic coordination between the countries that have adopted the Euro is to be improved and the informal role of the Euro Group is to be recognized. The pillar structure is to be abolished: the second (common foreign and security policy) and third (justice and home affairs) pillars, which were hitherto subject to the intergovernmental method, are brought within the Community framework.

The common foreign and security policy is strengthened with the creation of a European Minister for Foreign Affairs and the progressive

definition of a common defense policy with the creation of a European Armaments Agency and the authorization to initiate enhanced cooperation.

A genuine area of freedom, security and justice is to be created through the planned implementation of common policies on asylum, immigration and external border control, the development of Europol and Eurojust actions and the creation of a European Public Prosecutor's Office (McCormick, 2002).

### **Powers of the EU**

The Union is said to be subsidiary to member states and can act only in those areas where “the objectives of the intended action cannot be sufficiently achieved by the member states but can rather... be better achieved at Union level.” The principle is established that the Union derives its powers from the member states. The idea is to stop the Union from encroaching on the rights of member states other than in areas where the members have given them away. The apportionment of power between member states and the EU in the Constitution is extremely similar to the U.S. Constitution's division of power between the States and the Federal governments. Critics say that the EU can act in so many areas that this clause does not mean much, but supporters say it will act as a brake and is an important constitutional principle (McCormick, 2002).

### **Division of Responsibilities**

The EU already has rights to legislate over external trade and customs policy, the internal market, the monetary policy of countries in the eurozone, agriculture and fisheries and many areas of domestic law including the environment and health and safety at work.

The constitution will extend its rights into some new areas, perhaps most importantly into justice policy, especially asylum and immigration. It does away with the old structure of pillars under which some policies came under the EU and some under “inter-governmental” arrangements. It means a greater role for the EU in more aspects of life. In some areas, the EU will have exclusive competence, in others a shared competence and in yet more, only supporting role (McCormick, 2002).

### **Decision Making**

The principle of voting by qualified majority will be generally applied. Requiring a unanimous agreement of all 25 members would be a recipe for inaction. There is a stipulation referred to as an “emergency brake” in which a country outvoted on an issue can take its case to the European Council; perhaps this is a veiled protection as it can still be outvoted there. The European Parliament will have an equal say on decisions requiring majority voting.

A qualified majority shall be defined as at least 55% of the members of the Council, comprising at least 15 of them and representing member states comprising at least 65% of the population of the Union. This system replaces the old one under which countries got specific numbers of votes (Piris, 1999). There were objections that Spain and Poland had too many votes and this method is felt to represent a fairer balance between large and small countries. The new standard will still lead to complicated permutations of voting but the final results of the “double majority” should command more general respect. An amendment does away with a proposed procedure under which the European Council could



have changed an area of policy to QMV. Now such a proposal will have to go before national parliaments and if one objects the measure fails.

A new qualified majority system is established, in which the majority of the member states (representing three-fifths of the population) will amount to a qualified majority. Qualified majority voting in the Council of Ministers has been extended to about 20 legal bases for Union internal policies and action. Several “*passerelle*” (switchover) clauses are created for facilitating subsequent extensions of qualified majority voting. The joint adoption of European laws and framework laws by the European Parliament and the Council is to become the norm (normal legislative procedure) (McCormick, 2002).

The number of EU policy areas requiring the double majority vote is vastly expanded in the constitution. However, it does not include a number of issues relating to internal security, foreign policy, budget, tax or economic policy, powers that many European member states wanted to retain in their national capitals. In many areas that can be determined by double majority votes, the constitution allows countries to impose a one-month veto in order to delay legislation. In many areas, long grace or transition periods have been built in so countries can adjust from the current requirement of unanimous votes to the new double majority system.

### **Presidency**

Significantly, the constitution replaces the current presidency of the European Council, which is held on a six-month rotating basis by each member state, with a president who serves a two-and-a-half year term at the helm of the council, stewarding its work and managing its agenda. The constitution also

establishes the office of an EU foreign minister, a position intended to increase the EU's status abroad as well as to coordinate foreign policy among the EU member states.

The European Council, that is the heads of state or government of the member states, "shall elect its President, by qualified majority, for a term of two and a half years, renewable once." The candidate will then have to be approved by the European Parliament. The President will "chair (the Council) and drive its work forward and ensure, at his level, the external representation of the Union."

This is a new step. At the moment, the Council presidency rotates through the member states every six months, so continuity is lost. The new President will therefore be a permanent figure with much greater influence and symbolism. But since he or she will be subject to the Council, the powers of the post are limited (McCormick, 2002).

### **Foreign Minister**

The European Council, deciding by qualified majority, with the agreement of the president of the Commission, shall appoint the Union Minister of Foreign Affairs who shall conduct the Union's common foreign and security policy. Although this position sounds powerful, the minister will only be able to speak on the EU's behalf when there is an agreed or common policy, for example over the Middle East roadmap which members have accepted. The post will combine the present roles of the external affairs member of the Commission with the High Representative on foreign policy so it will be more prominent, especially in negotiating trade and aid agreements. The EU is also to set up its diplomatic service which will strengthen the Minister's hand.

## Foreign and Defense Policy

“The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defense policy.” It does not mean that a common foreign or defense policy will be imposed on member states. Each one will retain a right of veto and can go its own way. There is nothing that could stop divisions over Iraq for example. The aim however is to agree on as much as possible. Defense is even more sensitive and has been ring-fenced by references to the primacy of NATO for relevant members.

The constitution re-commits the EU to a common foreign policy and says it should develop a common defense policy. It creates an EU foreign minister to co-ordinate diplomatic and foreign aid activities, and a diplomatic service. But states must agree foreign policy unanimously. If they disagree, as over Iraq, the minister is powerless. The constitution allows members to opt in or out of co-operation on defense. It also establishes an agency to co-ordinate arms procurement by EU states. The constitution also creates an office of the European Union Foreign Minister. The candidate would be selected by the European Council, but would also be subject to confirmation by the European Commission. The foreign minister would also serve as vice president of the Commission.

The constitution also calls for the Union to take over competency in matters of common foreign and security policy—including all areas of foreign policy and all questions relating to the Union’s security. The “progressive

framing of a common defense policy” could lead to a “common defense,” it stipulates. However, national vetoes still apply to foreign policy decision-making.

### **European Parliament**

The European Parliament is to have powers of “co-decision” with the Council of Ministers for those policies requiring a decision by qualified majority. The European Parliament has over the years acquired real power and the constitution confirms this. If the parliament does not agree to a piece of relevant legislation, it will not pass. This idea is to strengthen democracy because the parliament is the only EU institution in which voters have a direct say (Majone, 2002a).

### **Legal Supremacy**

The EU will for the first time have a “legal personality” and its laws will trump those of national parliaments: “The Constitution and law adopted by the Union institutions in exercising competence conferred upon it by the Constitution shall have primacy over the law of the member states.”

This confirms the status quo, which is that if the EU is allowed to legislate in an area of policy, its law will overtake any national laws. Equally in areas where it does not legislate, national law prevails. By having a “legal personality,” the EU will be able, as an organization, to enter into international agreements. The old European Community had this right but the EU as a whole did not, so its status in world diplomacy increases as a result of this change. In the future, parliaments of member states will be permitted to challenge EU decisions at the European Court of Justice in Luxembourg. The law would apply to all major national legislative bodies, including Germany’s Bundesrat, the upper

legislative chamber that represents the interests of the country's states at the national level.

### **Leaving the EU**

A new procedure describes how a member would leave the EU: "A member state which decides to withdraw shall notify the Council of its intention... The Union shall negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal." It was always the case that a member state could leave by simply repealing its own legislation. Now there is a formal procedure designed to show that the EU is a voluntary association. However a departing member would have to agree to the specific terms so there is an implied threat that it would not be that easy.

### **Charter of Fundamental Rights**

This sets out "rights, freedoms and principles," ranging from the right to life and the right to liberty to the right to strike. The Charter is wide-ranging but has to be tested in the courts before its exact status is established. The British government says that rules for interpreting the Charter mean, for example, that national laws on industrial relations will not be affected. It has been argued that Europe should be seen as a mature political community. This statement is based on the status of individual rights within the constitutional law of the Union. Although the original Treaties did not contain more than very specific references to individual fundamental rights, it has been shown that the ethos of European integration was grounded on assuring their effective protection.

The Charter of Fundamental Rights must be seen as a symbolic means of signalling that the legitimacy of the Union is to be unconditionally based on the

aspiration to effectively protect and promote individual fundamental rights. However, the Charter must also be seen as a constitutional beginning. On the one hand, there are good reasons to be highly critical of the actual contents of the Charter, even if merely referring to the previous state of play in fundamental rights in European law. Hardly two commentators would agree on which concrete things should be changed, but there could be an agreement that there needs a thorough constitutional debate to make improvements.

The task of drafting the Charter did not go to the usual committees of national civil servants answerable only to their Ministers. Instead, in a change from the EU's normal practice, it was given to a Convention made up of representatives of the European Parliament, national parliaments, member states' governments, and the Commission, together with observers from the European Court of Justice.

Reactions to the Charter project varied. Federalists feared that the European Council's true motive was to sidestep their demand for a constitution. Other doubters held it to be unnecessary EU rights being Treaty-based and therefore already justifiable. Some, with their eye on Article 17 of the European Community Treaty, thought it should emphasize that EU citizenship involves duties as well as rights, while many lawyers felt it posed a risk of overlap and confusion between the spheres of competence of the Court of Human Rights and the Court of Justice (Piris, 1999).

Supporters, on the other hand, pointed out that the public's ignorance of their rights under the Treaties and ensuing legislation was one cause of

skepticism about the European project. They saw the Charter as a way of promoting a “citizen’s Europe.”

Modern law, including constitutional law, is characterized by its reflexivity. Legitimate democratic law should not be considered as the final word, but as the best alternative resulting from the democratic procedure, given the justified constraints imposed upon the process of deliberation and decision-making. That does not preclude reopening the debate later on; it only requires that positive law should be seen as the starting point of the next debate. On the other hand, the maturity of the Union as a political community is far from complete. A polity that is increasingly influential in extent and depth cannot keep on drawing its legitimacy exclusively from substance. It is a well-established premise of the democratic theory of law that the main source of legitimacy is political participation, to the extent that only the latter can effectively bridge as far as possible the gap between the authors and the subjects of the law. In that respect, the drafting of the Charter signals a constitutional moment in Europe, which might lead to a thorough reconsideration of the constitutional principles and the goals of the polity.

The finished Charter is a remarkable and valuable document, though not without its weaknesses. One example is the way it handles political rights—the right to vote as a general principle is mysteriously absent. The articles dealing with freedom of thought, expression, assembly and association are clear and unambiguous. In both its Preamble and its 50 Articles, the Charter reiterates the values of the European Union listed in the European Union Treaty as being “liberty, democracy, respect for human rights and fundamental freedoms, and

the rule of law, principles which are common to the member states.” These values apply at both Union and member states levels. Respect for them is a condition of EU membership. Any member state found to be in breach of them might, according to the Treaties, be disciplined. As only democratic countries may be admitted to the Union, it could therefore be argued that the right to vote in one’s own country constitutes an existing right under the Treaties.

Of course, the Charter recognizes that any European Union citizen in an EU Member State of which he or she is not a national may nevertheless vote or stand as a candidate in European or municipal elections under the same conditions as nationals of that State. This is a limited rather than a fundamental right and mirrors the embryonic nature of EU citizenship. The EU regulations are a long way from the American arrangement whereby the citizen of any State in the federation automatically acquires full citizenship rights in any other such State on taking up residence there.

The Charter is limited in its application. Article 50 makes it clear that its provisions “are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the member states only when they are implementing Union law.” Nevertheless, several of its articles clearly apply at both national and European levels. The articles on entitlement to social security and health care are recognizably in this category and refer in the same breath to “Community law” and to “national laws and practices” (Piris, 1999).

A federal constitution would be expected to contain both a catalogue of citizen’s rights applicable throughout the federation and a clear statement of the divisions of competences between the federal and sub-federal levels of



government. The Charter, however, is not consistently clear about the relationship between member states and the EU where basic rights are concerned. An optimist might say that such tensions are normal in a federation, and a healthy sign. A pessimist might take the different view that the EU has not yet traveled far enough along the road towards a constitutional federation.

The importance of the Charter in the development of the European Union must be clearly recognized. It underlines the democratic and rights-based nature of the European Union. But it needs to be matched by an equally clear description of the competences of the Union and its institutions.

### **Referendums and Democracy**

It is easy to say that public participation in constitution making is desirable. This remains a matter of opinion and matters of opinion are hard to enforce. A right to public participation in constitution making creates a stronger ground on which to stand. The European Parliament has presented an important signal of unity by overwhelmingly endorsing the EU's proposed new constitution. Now, it is up to the bloc's 25 member states to ratify the historic treaty. The 25 EU member states must ratify the constitution by the end of October 2006—two years after they signed it. If any country rejects it in a referendum, the way forward is unclear. The country could hold a second vote, possibly after negotiating opt-outs. It could leave the EU. Or the constitution could be altered or abandoned. Referendums have given the EU problems in the past. Irish and Danish voters have both said “no” to key EU treaties, and then said “yes” in a re-vote (Siedentop, 2004).

In February 2005, Spain was the first of ten of the EU's 25 member

countries to put the constitution up to a referendum. The populations of Denmark, Poland, the Netherlands, Portugal, Ireland, Luxembourg, the Czech Republic and, perhaps most importantly, France and Great Britain will follow in 2005 and 2006 (Associated Press).

Should one or more countries vote no on the constitution, one of three things can happen. Depending on the size and stature of the country in the Union, the government will either put the constitution back to vote at a later date, send the document back to the drawing board or agree to back out of the constitution and re-negotiate its EU membership. The latter is unlikely if, say, France were to say “no” but not necessarily for newer states. Government leaders are working hard to keep something like that from happening by emphasizing the progress membership has brought to their countries (Associated Press).

One thing the referendums do is give European citizens an unusual amount of direct involvement in a major EU decision. Observers believe more referendums might be a good way to increase awareness and involvement by Europeans in the EU in the future, allowing for democratic participation.

Following so many referenda on the constitutional treaty, it will be difficult for governments not to put other kinds of EU issues to a public vote. Some believe that in the future, it will become harder for critics to claim that the EU is inherently undemocratic if countries are allowed to vote on the Constitution itself.

## The Constitution Now

Politicians, European and abroad, sharply disagree about the constitution—about how much it changes, what it changes, and whether it is good or bad. Some see it as an opportunity to build a United States of Europe, while others complain it does precisely that. Much depends on how it is implemented. For example, the European Council president could become a new force for EU integration or just a figurehead. Equally, the impact of the Charter of Fundamental Rights may hinge on rulings by the European Court of Justice.

The first European Constitution is not a constitution in the obvious sense. It marks neither the founding of a new European super-state, nor does it iron out the many differences between the bloc's 25 nations. The “constitution” label basically describes a new treaty based on international law between sovereign states, which joins together the various treaties in EU history, ranging from Rome and Maastricht to Amsterdam and Nice. It foresees streamlining European law and allowing for a more transparent relationship between the institutions, although the EU Commission, currently a major sticking point, still occupies an uneasy position between the European Council and the parliament (McCormick, 2002).

Supporters of the new constitution hope it will give the people of Europe greater scope to identify with their ambiguously defined “Union.” Its detractors, meanwhile, believe that the highly complex constitution is packed with impenetrable legalese that leaves Brussels with even more of a bureaucratic headache than ever.

It has obvious weaknesses. The dense layers of European decision-making, the lack of transparency as to how such decisions come about and the absence of opportunity for European citizens to get involved in the decision-making processes cause mistrust among the people, and perhaps that its contained in an enormous 473 page document. Euro-skeptics reject a transfer of a basis of authority from international agreements to a European constitution on the grounds “that there is no European people,” as a former constitutional judge, Ernst-Wolfgang Böckenförde wrote, “What is lacking, apparently, is the subject necessary to all constitutionally-based processes; the collective singular known as ‘people’ which could then set itself up as a nation with its own citizens” (Habermas).

However, the challenge in this argument lies in the fact that the Constitution would identify the citizens in the European Union as having a “European identity,” therefore making them into a common people who will share an authoritative government. Furthermore, a nation of citizens should not be confused with a community bound together by a common fate unconnected with politics and characterized by shared origins, language, and history. For this would deny the voluntary character of a nation state whose collective identity did not exist before the democratic process which, although not vital to such states, nevertheless gave birth to them. As mentioned previously, the national democratic state’s greatest achievement is reflected in the contrast between a nation state and a people’s nation through the status conferred by national citizenship, which created a completely new and indeed abstract sense of legal

solidarity. If the people lack a common citizenship, they potentially lack the common value-base to have a democratic voice (Habermas).

There are three theoretical reasons why the Constitution will be beneficial. First, it will provide the way for the necessity of a European civic society. Second, it will build-up of a politically oriented public throughout Europe and third, it initiates the creation of a political culture. These three functional requirements of a democratically organized EU can be regarded as points of reference for complex yet converging developments. Such processes can be guided by Constitution acting in a certain sense as a catalyst in order to accelerate and steer everything to converge at a given point. Initially, there would be a constitutional referendum, which would unleash a great debate in the whole of Europe since the constitutionally based process is, in itself, a singularly effective means of cross-border communication. A European constitution would not only expose the shift in power, which has been quietly taking place; it would also encourage new constellations of power (Habermas).

A problem arises when questioning if the small or medium-sized nation states capable of acting independently when left to their own devices in order to resist being drawn into becoming assimilated to a social model which today's dominant world economic force is proffering to them. Just as the Europeans want to play a significant role in the world economy, they should also be interested in the negotiating power which a European Union that is politically capable of action would have as one of the world's global players. The European Union has put itself under pressure to reform since expanding the Union with economically and socially relatively heterogeneous countries will increase the

complexity of regulation and voting requirements, which cannot be overcome without further integration or “absorption.” Attempts to use the current problems involving expansion as a means of tackling more deep-seeded structural problems have been unsuccessful (Habermas).

Looking ahead, admitting a country with Turkey’s size and population will require immediate overhauling of the Constitution’s decision-making processes as well as its economic stipulations. The accession treaty to be signed by up to 28 states (including current members as well as the next round of candidates Romania, Bulgaria and Croatia) will necessitate new international law and also require an altered constitution. The problem arises that as the text currently reads, there is no process for amending the constitution in the future. The constitution lays out a number of exclusive competencies for the European Union including trade issues and currency policy for euro zone members. But it also includes areas of split competency, like environment and energy policy, where decisions made at the EU level can also affect member states; but the majority of such legislation is made at the national level. Any competency not expressed in the constitution will remain at the national level.

With the dense history of the European Union, the multiple challenges facing the full adoption of the constitution, is it likely that the European Union will ever serve as a democratic force?

***Chapter V***  
**A “United States” of Europe?**

*“Some day, following the example of the United States of America, there will be a United States of Europe.”*

George Washington, 1797

At the beginning of the twenty-first century, it seems that nearly all countries have embraced democracy (in word, if not in deed); the end of the Cold War seemingly removed the last obstacle to its spread across the globe. However, of course, things are never so simple. In Europe, the birthplace of popular government, a debate has begun over the future of democracy. How should Europe address the desire for democracy within the European Union?

Politicians and scholars have struggled with the form that the EU should take since the European Communities were founded. In the past two decades, as the Union grew closer and gained more areas of competence, the demand for democratic processes became more insistent. Indeed, it was a member of the European Parliament who coined the phrase “democratic deficit” to describe the lack of popular input into EU decision-making (Newton). Many have sought a solution to this problem, but even the gradual increases in the powers of the European Parliament (the only directly-elected body within the Union) have not significantly alleviated the democratic deficit.

What, then, is the solution? Institutional reforms within the EU have been introduced to permit greater public participation and to create a federalist structure. Such reforms would be embodied in a European Constitution, which he believes would “bring to the surface and formalize the...[EU’s] role in

creating a society of individuals, drawing attention to the way the state fosters a value in all who are subject to it, the value of a fundamental or ‘moral’ equality,” since all citizens share rights and responsibilities, and thus a common identity (Siedentop, 2001). Such an approach to the question of democracy divides the problem into two parts: the emotional (the need to garner popular support behind the EU institutions) and the institutional (the desire to define the institution’s role, and the peoples’ part in it). The recognition that they are two distinct matters may shed light on the debate over popular participation in the European Union. In some ways, the relationship between the two interests seems clear: institutional arrangements often affect popular approval, and societal attitudes bear on the creation or reform of political bodies. However, in some cases, the desires of institutional actors seemingly differ from those of the people.

One major concern confronting Europe at this critical time in its democratic development deals with the question of identity, examining the problems which the current lack of a European consciousness may engender, yet noting that the seeds may already have been sown. The absence of either a popular internationalist leadership or a threat sufficient to impel European unity compounds the difficulties already inherent in building a common identity among the peoples of over a dozen nations. Consequently, most scholars look to structural reforms within the EU as an avenue to increase popular participation in the European project, with the belief that democratic governance will strengthen people’s interest in, and respect for, EU decision-making, creating a “culture of consent” to follow Brussels. There are a number of options for EU



institutional reform; it can adopt the statist French model (toward which it already tends), the unstructured British model, or the federalist German and American models (which differ in their balance between the center and the periphery).

### **The Problems of European Identity**

European scholars have long predicted that a new consciousness would emerge across the continent as political and economic forces drew the nations closer together. In 1882, Ernest Renan asserted that “[n]ations are not eternal. They had a beginning and they will have an end. And they will probably be replaced by a European confederation” (Thiesse, 1999). Today, however, even as European nation-states cede part of their sovereignty to the EU, there is little evidence that the nations themselves are fading away. Moreover, there are few signs of the emergence of any European identity coexistent with individuals’ national or regional identities. In the eyes of many, the absence of a sense of “European-ness” demonstrates the gulf between the average citizen and the EU institutions, which have provided little basis around which to build a common consciousness, which is deemed as a necessary attribute for a democratic citizenship.

Despite these obstacles, Europeans *could* develop some type of common identity. Three factors were fundamental to the creation of a medieval clerical community which spanned the continent: a common language, creed and cosmopolitanism (Siedentop, 2001). This dynamic allowed the churchmen of the Middle Ages to share ideas, for though they came from many countries; they all spoke Latin and followed the Church. Accordingly, the clergy shared a European

identity which coexisted with their national and familial identities—the identity of a European Church. The difficulty today is that the modern national elites do not have the common tongue, beliefs and internationalism of their medieval religious counterparts. Nevertheless, there are indications that Europe may be developing the elements of a common identity, as many in the European elite speak English, believe, at least theoretically, in democracy and market economics, and participate in international exchanges. However, the isolation of the EU elites and the lack of an exterior threat to spur European unity have impeded the creation of a European consciousness. At present, then, it is difficult to determine if or when a European identity might emerge.

### **Democracy: The European Creed**

In looking for a belief to unite Europe, religion no longer presents the common creed that it did in the Middle Ages. Today, the Church is splintered into many sects, and many Europeans are merely nominal adherents, while large numbers of immigrant laborers have made Islam a significant minority religion in several European countries. Furthermore, the secularization of politics would not permit such a religion-based political understanding. Clearly, then, religion can no longer play the part of shared belief system that it once did.

The post-Cold War consensus in the West that liberal democracy and market economics will lead to prosperity and peace, not simply in the United States and Europe, but throughout the world, given that there are other factors which could bind together citizens of a large European state. This belief is enshrined in the Treaty on European Union, which declares that the Union is built on an “attachment to the principles of liberty, democracy and respect for

human rights and fundamental freedoms and of the rule of law,” as well as a commitment to “strengthening and the convergence of their economies and to establish an economic and monetary union” (Treaty on European Union, C340). Also, before they may accede to the EU, candidate countries must meet the Copenhagen criteria, which center around “democracy, the rule of law...[and] the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.” Over the past half-century, the EU has promoted popular governance and free trade across Europe (both inside and outside its borders). Europeans have demonstrated a commitment to democracy and free trade; these principles are at the heart of Europe, and may constitute the new creed.

### **Are Europeans Provincial?**

Although Europeans share a belief in democracy and trade, it has been asserted that despite the new rhetoric of Europeanism, Europe has perhaps never been more divided by national cultures than at present. The partial fusion of political elites in Europe resulting from the necessities of the early post-war period has largely disappeared, and the media and tourist authorities are not strong enough to support internationalism alone (Siedentop, 2001). Under this view, the recent popularity of xenophobic parties such as the *Front National* in France and the *Freiheitspartei* in Austria demonstrates that the nations of Europe are withdrawing into themselves. In such circumstances, it is hard to imagine that a European identity could flourish.

While nationalism indisputably remains a potent force in Europe, its appeal should not be overstated. The mass demonstrations across France,

protesting the second-place finish of *Front National* candidate Jean-Marie Le Pen in the first round of presidential elections in April 2002, show that even nationalism has its limits. Hundreds of thousands took to the streets, carrying banners proclaiming, “We Are All From the Same World” and “No to Fascism, to Exclusion, to the National Front” (Associated Press). While Le Pen’s stunning performance in the first round of elections might seem to indicate that France had become more xenophobic and isolationist, it appears that immigration and European integration were only minor issues in an election dominated by questions of crime and unemployment (Astier). Although nationalism retains a significant role in European politics, its influence is limited by the people’s belief in democracy, pluralism and the benefits of international engagement.

The EU has done much to advance internationalism in Europe. While contacts between national elites remain largely intergovernmental, the EU has instituted a number of policies and programs which promote international cooperation at the local level, such as programs to foster cultural and education exchanges between cities in different member states. Additionally, as a result of the free movement of labor guaranteed by the EU, approximately 5 million European citizens work in another member state (Directorate-General). Thus, it would be premature to declare cosmopolitanism dead in Europe; the EU has increased the possibility of cooperation across the continent, and many citizens have taken advantage of the opportunity provided.

### **Are Eurocrats the Harbingers of European Identity?**

Although Europeans may, to some extent, share a creed, an international perspective and a language, these factors have not crystallized into a common

identity. One explanation for this stagnation may be the lack of a European leadership capable of sparking a sentiment of “Europeanness.” However, the EU officials and administrators, “Eurocrats,” seem perfectly placed to lead the process of identity formation: they work together in English (and sometimes French), they believe in the benefits of regional integration, and they have an internationalist outlook. Given that they seem to fit the model of the medieval clergy, the dismissal of Eurocrats as a force for internationalism indicates that the lack of a European identity is not predicated merely on the parochialism of national elites, but also on the isolation of Eurocrats. National administrators have little incentive to advocate for Europeanization, with the consequent transfer of their powers to Brussels; Eurocrats, who have a strong motive for advancing the EU, have little public voice to do so. Hence, a significant obstacle to the growth of a European consciousness is the lack of coherent international elite with a strong social voice and ties to the citizenry, and thus the power to create a belief in Europe as a political entity that responds to the people.

### **Identity: Us versus Them**

Also contributing to the weakness of European identity is the lack of an outside force against which to define Europeanness. Most national identities were forged in wars or other crises, as a people (“us”) distinguished itself from some outside power (“them”). The American colonies did not perceive themselves as an entity because of geographic proximity, or even common language and heritage, but rather because they fought together against British rule. During the Cold War, the EU stood in contrast to the Warsaw Pact. Since the fall of the Berlin Wall, the EU has appeared relatively secure, although some

argue there is still an identity crisis in Europe. It is a delayed crisis resulting from German reunification and the consequent acceleration of EU integration (Reid, 2004). Even if the rapid deepening of EU ties was accomplished rashly enough to constitute a crisis, it is not clear that this type of crisis creates a “them” in contrast to which Europe can create its own identity.

The French efforts “to defend a European identity against facile Americanization” seem to imply that France views the United States as a possible force against which to define a European identity (Reid, 2004). But given the percolation of American popular culture into European (and especially French) society, it seems unlikely that the average Spaniard or Dane sees America as an alien force against which he must draw together with the Belgians and Portuguese. As the EU and the U.S. share a commitment to the ideals of democracy and free trade, they cannot be rivals in the sense necessary to create an “us” versus “them” identity. While the world does not lack ideological divisions, stateless threats like terrorism and economic destabilization do not provide a strong rationale for regional integration.

Thus, one of the biggest challenges to building a concrete polity presently facing the EU is the absence of a European identity, which stems (at least in part) from the paucity of the Europeanist political class and the absence of a pressure for unification. Additionally, the lack of popular participation in European institutions also impedes the creation of a European identity; for the people to develop a sense of belonging to the EU, they must feel that they have some stake in the decision-making process. Consequently, what may be the most

important step to create popular support behind the EU is to implement institutional changes, rather than a European leadership (Habermas).

### **What Form of Democracy for Europe**

Before beginning institutional reforms to increase the opportunity for popular participation within the EU, Europe must decide what type of democracy is best suited for modern Europe. There are two vital schools of thought on democratic governance, one led by Montesquieu, the other by Madison. The vision promulgated by Montesquieu is that of an elite-led democracy, based on a sociopolitical hierarchy which creates leisure time that the aristocracy may spend on governance. Conversely, the Madisonian view is that of a populist democracy, where the people create a political class from amongst themselves, based on ability (Siedentop, 2001). Modern democracy leans toward the Madisonian approach, although the prevalence of the wealthy in political life demonstrates that Montesquieu was not wholly wrong in his approach. In determining how to structure its democracy, the EU must decide what roles the elites and the people will each play.

There are four possible models for European democracy—French, German, American, and British—patterned on the respective national political system of the largest political systems, including three of the largest EU members states. The French model privileges centralization and efficiency, and consequently gives significant authority to the national elite. The British model is an informal division of power between the national and local elites, based on a “common sense.” The German model is strongly federalist, with the local and national elites sharing government power. There is also the implicit American

federalist model, which differs from the German in that it divides governmental powers between national and local elites. Each model presents attractive features which the EU would like to incorporate in its own structures, but each also presents certain drawbacks that would have to be overcome (Siedentop, 2001).

### **The French Model**

At present, the EU seems to be following the French model, which allows most of the decision-making power concentrated in the Council and the Commission (and, to a lesser extent, the European Parliament). In some ways, the French model may benefit the EU, since it provides clear decision-making structures. Given that it is currently comprised of fifteen member states and envisions enlarging to twenty-five or more in the coming years (or decades), the EU cannot afford fragmentary decision-making. The French system provides clarity, as most government functions are centralized and can be coordinated with relative ease.

Nonetheless, though the French model suits France, there are indications that it may not work well on the European scale. One drawback of the French model is that it privileges political elites over ordinary citizens, because centralization gives bureaucrats in Paris power that citizens in the provinces find difficult to combat. Furthermore, it may not protect the diverse cultures and interests of all Europeans. The French have long struggled with minority rights, with perhaps fewer positive results than other European nations. The strong centralizing impulse of the French system has impeded efforts to create meaningful regional governments. Despite recent efforts at decentralization, Corsicans, Basques and other groups still fight for the right to teach their



languages in schools and govern their own regional affairs (Ford). Given the difficult relationship between France and its minorities, there is reason to doubt that French federalism would ease the diversity concerns already present in the EU.

### **The British Model**

Would the British model be a better alternative for Europe? This is a complicated question. Although Britain was the birthplace of modern representative government, British democracy was traditionally based on its aristocracy and powerful local lords kept the national government at bay. The recent breakdown of the British aristocracy has led to increasing centralization, and (because there are no clearly defined rules to prevent London's usurpation of power, only traditions and informal arrangements) the United Kingdom's unwritten constitution has been unable to halt the trend. Additionally, Britain has "lost its voice," that is to say, it no longer advocates for liberalism in the ways that it formerly did (Dingle). The unspoken premise of Siedentop is that the EU may face the same fate without a written constitution: increasing centralization (with the resulting threat to diversity) without any real plan or purpose.

In spite of its weaknesses, the British political system has certain strengths to which the EU aspires. The first is the "culture of consent which British political institutions had created" (Dingle). This is the very feature out to build the European Union. A "political culture of consent...[is] an almost familial relationship with the law, a relationship which stands in contrast with the view of law as a remote and alien thing, something imposed by 'others' at one's own expense," and which involves both a desire to participate in political life and

a willingness to accept the resulting laws and rules. Siedentop argues that the British culture of consent was founded on social hierarchy, with the aristocracy peopling the House of Lords and otherwise dominating national politics. Yet the British government also includes a House of Commons, from whose ranks the Prime Minister and Cabinet are drawn. Therefore, the ordinary British citizen has a direct connection to government, someone to petition for change and censure if results are not forthcoming. And, what is perhaps most important, the members hold real power, because Parliament is the central organ of the British government (Dingle).

Although Britain's unwritten constitution may be seen as a weakness, it may also be conceived of as strength, for it permits flexibility. Since the relationship between the national and local governments is not entirely fixed (although years of practice have created traditions), they can adjust their interactions as needed to meet changes in the political environment. One example is Britain's recent devolution, which has given the Scottish and the Welsh significant autonomy vis-à-vis the central government, and the Deputy Prime Minister has hinted that greater devolution may occur (Siedentop, 2001). Beyond flexibility, devolution demonstrates the British system's ability to support diversity, giving each of its constituent groups their own assembly to address local problems and administer regional affairs. Indeed, the existence of parliaments at Westminster, Cardiff and Edinburgh gives the British citizenry significant control over its political elites, something that would benefit the EU.

While it is true that Britain is seen (not least by its European partners) as lacking enthusiasm for larger causes or ideas, it does not necessarily follow that

this is due to an inability to participate in the ideological debate (Siedentop, 2001). There are other plausible explanations for the United Kingdom's lack of zeal for the European project, such as skepticism and national pride. Britain's aloofness toward Europe does not necessarily mean that the British are unable to lead Europe; perhaps they are simply unwilling. Nevertheless, the increasing calls for a written constitution (by republicans and monarchists alike) suggest that the British political system is in need of clarification, if not structural change (Jacobs, 2002). The British people's discontent with their unwritten constitutional system should give the EU pause, even as it seeks to develop many of the strengths of the British political system.

### **The German Model**

The other alternative to the French and British models is the German political system, which is strongly federalist, with the *Länder* (states) retaining significant power in national decision-making. In many respects, the German model seems to embody desirable characteristics for the EU: it takes enormous trouble to create different spheres of authority and to protect each from the others, minimizing the risk of encroachments from the federal government, and the strong regional governments create a relatively direct link between the people and the political elites (Siedentop, 2001). This system might also be more politically expedient, given the strength of nationalism in Europe, in that it would guarantee national governments a role in EU affairs (unlike the French model, in which the national governments—particularly national legislatures—could become increasingly marginalized). Whereas today decisions are made either by national governments or by Brussels, the German model would create a third

option, which might be especially valuable for sensitive policy areas: certain decisions could be made jointly, with the assent of both EU institutions and a majority of national governments required for EU action.

While this joint decision-making will be time-consuming (particularly if the assent of both the executive and the legislature were required at each level), special procedures could be created to reduce delay. Properly implemented, joint decision-making could increase policy coordination among EU member states, and give the EU a stronger influence in areas now largely reserved for intergovernmental cooperation.

Yet the German model has not been very popular in Europe because decentralization is perceived to be inefficient (Siedentop, 2001). The German federal structure does sometimes lead to delays in political decision-making, largely because the central and regional governments maintain separate budgets, and often the federal government gives the *Länder* under-funded mandates. This is a structural problem that could be remedied, for example, by requiring transfers of funds to accompany transfers of authority. Therefore, the German model does not seem structurally unsound or unsuited to the EU. One might surmise that the German example has not been better received in Europe largely because the French fear that accepting federalism would be tantamount to permitting German leadership of the EU, and the Germans are too wary of seeming aggressive to push it. However, for Europe to adopt a federalist structure, Germany must become its champion, for it is the only federal member state with the clout to steer the EU down that path (German Constitution

### **The (Implicit) American Model**

Despite its similarities to German federalism, the American political system has certain distinctive characteristics which could benefit Europe. The American system is referred to here as “implicit” because the French would be likely to reject the allusion to a “United States of Europe” out of hand, given their distrust of any American influence in EU affairs (Reid, 2004) Nevertheless, the American model creates a division of sovereignty that could be beneficial for Europe, because it creates separate spheres for each level of government, allowing each to fulfill its duties efficiently. This is unlike the German political system, which, as previously described, requires the *Länder* and the federal government to reach a consensus in many areas.

Even if the EU were inclined to adopt the American model, it could not be implemented in Europe without modification. There are certain features of the U.S. system which do not comport with the present situation in Europe. For example, American politics does not explicitly recognize the existence of regions, whereas “[I]n Europe there are regions which retain memories of a political existence earlier than those of nation-states... [and which] see an unrivalled opportunity to weaken the states to which they are currently subordinated” (Siedentop, 2001).

In determining what will be the constitutive units of the EU under the American model, then, it seems necessary to choose between nation-states and regions. Although this may appear to be a false choice, and the two are not mutually exclusive. A “United States of Europe” could conceivably have three

levels of government—regional, national, and European (similar to the levels of government in the U.S.—local, state, and federal)—each with its own powers and responsibilities. Such a system would have the benefit of creating a sphere of autonomy from groups such as the Corsicans and the Basques, which national governments may be unable to grant for political reasons (but which they might otherwise willingly accept, in exchange for peace with the armed rebel movements) (Reid, 2004).

Indeed, several European nations (particularly Spain, but also others, like France and Britain) have begun to recognize the political legitimacy of their internal regions, giving them autonomous powers for local decision-making (Siedentop, 2001). Hence, the beginnings of a regional-national-European structure exist already, at least in a few member states. The erection of a three-tiered system would create additional complexities and demands for coordination; however, it would also permit closer ties between the elites and the people, thereby opening the door to greater democratic participation (depending, of course, on the selection of representatives and other avenues of popular input selected).

Conversely, because the American political system has many opportunities for popular participation, there is also the potential for populism to erupt and disrupt the political process. This has not occurred in the U.S because American politics is dominated by a legal system which is set on following the legal procedures inherent in political decision-making. In effect, then, the assertion is that there is a bit of Montesquieu in the Madisonian system, a constraining elitist force. While there is likely truth in this view, the existence of a

strong, legally-trained elite alone cannot explain the resilience of American democracy. By their very nature, democratic systems are vulnerable to populism if the political ruling class does not heed the needs of the citizenry. In the United States, then, one might hypothesize that the voting public itself believes in the rule of law, largely due to the great respect Americans have for their Constitution (Nagle, 1964).

Given the recent resurgence of populism (especially popular nationalism) in Europe, a fear is that, without a Constitution, the EU will have no weapons to keep such movements at bay. Ideally, a European Constitution would have the same effect as the U.S. Constitution, cementing the rule of law and guaranteeing minority rights. Europe finds itself at a crossroads, seeking a path which will permit efficiency without sacrificing diversity. Federalism presents one possible mechanism for the EU to achieve its goals democratically.

### **A Federalist Union**

In its current debate over institutional reforms, Europe is not simply considering where the decision-making power should lie, but also what the EU should become. The EU has the potential to develop as a global political actor (with a statute equivalent to its considerable economic power), if it succeeds in creating centralized governance structures. However, few are willing to attain such goals at a cost of losing their regional distinctions in language and culture, concern well noted. Thus, the need to create a feeling of belonging on the part of the populace requires that the tendency toward centralization be limited, to permit the survival of cultural distinctions. The European Constitution is a prime example of the federalist ideal of the Union polity.

A federalist system is the only sensible way for Europe to arrange EU-national government relations. The main advantage of federalism is that it is a political system which makes it possible to combine the advantages of small states and large states, without at least some of the disadvantages attaching to each. The anti-majoritarian bias of the EU, familiar to Americans knowledgeable about their own Senate and Electoral College, combined with the role of supranational institutions, provide small states with an opportunity to protect their own vital national interests (Moravcsik, 2002). A federal Europe could blend the political coherence of a small state with the open-mindedness of a large state, lessening the risk of both political and moral oppression. Moreover, a federation would create clearly delineated spheres of authority for both the EU administration and national governments, thereby combating the tendency toward centralization to Brussels, which could reduce the space for diversity and thus, for democracy.

While the possibility that the EU should be a confederation has been debated, it appears that the EU has already gone beyond the confines of confederation in many areas, itself assuming sovereign powers, so it is no longer possible to create a mere confederation in Europe. Additionally, “the weakness of earlier confederations such as the Holy Roman Empire and Switzerland (which depending on the member states to execute orders, had either come to be dominated by the strongest member or had become impotent) as a potential reason for those creating governments to beware of such a model. Nonetheless, it seems that a confederation would also permit strong international cooperation in Europe, while creating even greater possibilities of national diversity.



Accordingly, a confederation may not be the solution to the problems of democracy in Europe (Moravcsik, 2002).

For federalism to have the benefits that are possible in the EU, European leaders would have to undertake significant structural changes in the Union's institutions. This poses inherent difficulties, for the Union finds itself in the unenviable position of seeking to build public enthusiasm for, and participation in, a body which already has weaknesses and failures, rather than creating popular support behind a new idea, an advantage United States Founding Fathers' enjoyed. Only a deliberate and far-reaching overhaul of the EU institutions, and a realignment of Brussels's relations with the national capitals, could convince Europeans that the EU was an actor in their interests, in which participation was beneficial and could yield real results.

A written constitution that proposes several modifications to the current European institutional structures would be the first and arguably most significant step to foster the growth of democracy within the EU. Such a constitution must be more than a delineation and separation of powers between the various levels and organs of government; it must also include a declaration of rights, along the lines of the American Bill of Rights. A European Constitution is hypothesized to "bring to the surface and formalize the state's role in creating a society of individuals," while its federal structures would "minimize the need for coercive power and...maximize a willing obedience to laws, which are perceived as protecting local and regional as well as national interests" (Siedentop, 2001). A constitution could lift the veil surrounding the internal workings of the EU,

giving ordinary citizens a better understanding of how the Union functions, and of what place they have in the process.

While many scholars, politicians, and citizens alike have advocated the drafting of a European constitution, the disagreements about the Constitution lie in the form such a constitution should take. The European Convention suggested that the draft constitution should take the form of a treaty, yet some influential European politicians (including the Vice President of the Convention) have suggested that, to gain public support, a constitution would need to be ratified by the European public through a referendum (G. Amato, public presentation, 22 February 2002). Such a popular vote would, it is asserted, involve the public in the process and make the European Constitution feel more like a contract among citizens, rather than an agreement among states.

Although this argument is appealing, the experience that most countries have had in instituting their national constitutions demonstrates that popular ratification is neither a prerequisite nor a guarantee of success. In the United States, for instance, the Constitution was enacted by a small group of male landowners, yet most Americans today identify strongly with the U.S. Constitution and count themselves among “We the People.” Conversely, upon the dissolution of the USSR, Russia and the other newly-independent states adopted constitutions by referendum, yet they have not been overwhelmingly successful in ensuring democracy and the rule of law. The final decision was to allow for a referendum by each country in the European Union, a process that has not been easy going thus far.

As previously discussed, since Europeans do not yet share a common identity, the creation of a European Constitution would seem to be premature. In this regard, it is significant to note that the U.S. Constitution was not written until over a decade after the Revolutionary War drew the colonies (and thus, multiple identities) together. Additionally, it is difficult to determine what sort of document will be appropriate, given that the EU combines supranational and intergovernmental elements. This unique character has led some scholars to assert that: “[t]he EU does not have and does not need a ‘Constitution like a State’s,’ simply because it is not a State” (Piris, 1999). As the European structures are still in flux, and the balance of powers is still being determined, a document which purported to specify the institutional arrangements would probably not be definitive, and could impede future reforms. There are two main avenues for reforming the Union into a more democratic polity. First, by enlarging the Parliament to represent more citizenry, and secondly, by subtracting some powers from the Commission and allocating it to other bodies (Piris, 1999).

### **An American Senate for Europe?**

One of the main criticisms of the EU’s present institutional structure is that it presents very few opportunities for popular participation. Some politicians in Europe have proposed to remedy the problem of public participation by expanding the Parliament—the only directly-elected body within the EU. The United States Senate, arguably the most powerful legislative body in the Western world, began as an indirectly elected chamber. Not surprisingly, that helped to make Senators zealous in the protection of states-rights (Siedentop, 2001). Since 1913, U.S. Senators have been directly elected, because differences of opinion

and ideology within the states made it increasingly difficult for state legislators to reach consensus on their senatorial nominees. To solve the deadlock within the state legislatures, states began selecting their senators by referenda, a practice which became so widespread that the Seventeenth Amendment was easily ratified (Hutson, 1990). The push from the European Perspective is to enlarge the Parliament to act as a body similar to the United States Senate where a majority of the citizens are represented.

It is easy to imagine a similar phenomenon in the European member states, particularly those with strong regional identities (like France, Spain, Britain, Italy and Belgium, among others), where the allocation of senators could become highly politicized. If every ethnic group in Europe were given a seat in the European Senate, the body would be too bloated to function effectively; on the other hand, there would be no simple way to determine which regions were represented and which were not. Hence, the indirect election of European Senators could create more divisions than unanimity, a result in direct contradiction to the aims of the European project.

As a possible solution to the difficulties that a dual-chambered Parliament might pose, some European politicians (including Prime Minister Guterres of Portugal) have suggested that the so-called “European Senate” be merely a consultative organ, lending its wisdom and experience to the EU, but without fierce battles being waged over membership, and without adding another layer to the bureaucracy in Brussels. This would create a European legislature along the model of the British Parliament, wherein the House of Lords has the power to comment on bills and delay their enactment for further consideration,

but does not have the authority to block their passage altogether. While such a body might produce better-crafted legislation than the EU currently enacts, given the limited powers of the Parliament at present, a consultative body might not reduce the democratic deficit significantly.

Furthermore, there are several concerns which neither an authoritative nor a consultative Senate could address. The first is that placing all the democratic accountability in one body is dangerous; “giving the European Parliament too much power could actually have disruptive effects and aggravate the legitimacy problem of the EU even further” (Piris, 1999). It is important to recall that the legislature represents the peoples of Europe, but most of the negotiation and cooperation in Europe occurs between the national governments and the Commission and Council. If the European Parliament were given the predominant role in EU legislation, this would create a divide between those who make the decisions and those who enforce them. Such discontinuity could impede the flow of communication between Brussels and the national capitals, making EU decisions seem even further removed from the concerns of the citizenry.

The second issue that a Senate could not resolve is the feeling of distance between the peoples of Europe and their representatives in the Parliament (which would remain one chamber of a bicameral legislature). In a 1999 interview, British Prime Minister Tony Blair noted the irony that “[t]he European Parliament is more directly democratic but it is more remote from people than their National Parliaments.” While the isolation of European legislators is a difficult problem, the solutions lie in the area of greater accountability and public

engagement, rather than in the creation of a second chamber. Although a Senate would not impede the opening of the current Parliament to greater public involvement, it would be a mistake to believe that the formation of a new chamber would obviate the need for changes in the current one. In sum, the consequences of a European Senate are unclear; while it would permit a greater role for national legislatures, arguably promoting democracy; it is not evident that the creation of a bigger Parliament is the most effective means to reduce the democratic deficit within the EU.

### **The EU Commission vs. The U.S. Presidency**

A major area of contention when comparing the United States and the European Union in terms of their voting power lies within the U.S. President and the president of the Commission. To clarify, in the U.S., the people do not *technically* directly elect their president—although citizens place a vote for the president, it is the Electoral College which actually makes the final decision (for example, Al Gore won the popular vote in 2000, but George W. Bush won the election). The U.S. President is the most powerful member of the executive branch and the rest of the executive branch is led by a cabinet, yet the US cabinet is solely appointed by the president—none of them are elected officials (unlike the UK where, as the executive is part of the legislature, the majority of members of the cabinet are democratically elected MPs). The president's choice of cabinet then has to be ratified by Congress.

How is this different then the EU system? The Commission has a strong case for being the closest the EU has to an executive branch. Its president is agreed to by representatives of the semi-democratically elected governments of

the member states. These representatives are, arguably, equivalent to the United States' Electoral College voters. The Commission president-elect is then confirmed into office by the European Parliament.

Then, of course, the president of the Commission appoints the commissioners, just as the US president appoints his cabinet. Only the Commission president has no say in who his commissioners are. Instead, the individual (again, democratically-elected) governments of the member states nominate their own commissioners. The Commission president then gives them their various positions. These then have to be ratified by the European Parliament, therefore very similar to the U.S. process (McCormick, 2002).

Despite these similarities to the U.S. system, the Commission holds too much power that prevents them from being accountable to the people, unlike in the U.S. system where citizens can choose not to re-elect a President. Reforms to the other European institutions, particularly the Commission, could also contribute to remedying the democratic deficit in Europe. Indeed, it is difficult to understand how democracy in Europe can readily be promoted when “most of the power resides with the Commission and the Council of Ministers—neither of which is directly elected, and neither of which has much public accountability” (McCormick, 2002). Because Commissioners are appointed, they are accountable only to the national executives that nominate them. Furthermore, because most Commission proceedings are closed to the public, neither the citizenry nor the national legislatures are well placed to judge the efficacy of their representation (McCormick, 2002). Given such institutional arrangements, it is quite unremarkable that most citizens feel shut out of EU decision-making.

To address this problem, the Commission must somehow open itself to the public. One possibility is by direct election of its members. While they are meant to represent all of Europe, Commissioners are currently nominated by the national governments of the member states, as mentioned above; such a system could be altered to replace national nominations with national elections. Once elected, the Commissioner would be expected to act independently, just as appointed Commissioners do. This could create a dilemma for Commissioners, as the public pressure to represent national interests could make it difficult for them to act independently. This would be particularly true if the Commission were to open its proceedings to the public, either by allowing visitors or by distributing transcripts of the discussions, as would be necessary to allow the public to cast informed votes (McCormick, 2002).

If Commissioners were directly elected, the only apparent means to ensure their independence would be to limit them to a single term. Term limits have their own drawbacks, particularly as they create turnover, thereby reducing efficiency and reducing the public's choice of representation. While the direct election of Commissioners remains a possible amelioration of the democratic deficit, it has significant limitations which would need to be addressed carefully before such a system was implemented.

Another option would be to revamp the nomination procedure, so Commissioners would be selected not by the national executives (who are already represented in the Council), but by the national legislatures. In effect, this would create a system of indirect election, making the Commission more publicly accountable without exposing it directly to popular pressures. Moreover, it could



give national assemblies a voice in the EU similar to that of the proposed European Senate, without adding to the bureaucracy in Brussels. Still, the election of Commissioners could be plagued by some of the same problems as the election of Senators, based on cultural and regional divisions. However such divisions would likely be less relevant, since Commissioners are explicitly expected to be independent—unlike Senators, who are meant to represent their constituents—so the selection of a Basque Commissioner would have less relevance to the promotion of regional interests than would the election of a Basque parliamentarian.

The least revolutionary reform, in some ways, would be simply to open the Commission's proceedings to the public eye, either by admitting observers or by distributing transcripts of the deliberations. This would allow European citizens to petition their governments to re-nominate (or not) a particular member. On the other hand, a reform could reduce the effectiveness and independence of the Commission, since its members would be mindful of their public role and perhaps censor their discussions. As long as their work remains, for the most part, shrouded in secrecy, the Commissioners will be viewed with a certain degree of distrust or skepticism. Therefore, it seems that the Commission must discover ways to open at least some of its proceedings to public view and to internalize the popular suggestions and criticisms that result from such scrutiny.

So who is accountable for what in the EU's bureaucratic maze? The EU does not have separate legislative and executive branches to speak of. The European Commission comprises nationals from every member state, but it is

unelected and holds more power than any national administration. Ministers on the council must answer to their national constituencies, but they can easily claim to have been outvoted in Brussels. And the parliament, which is directly elected, can neither initiate laws nor control significant resources (Nicolaidis, 2004).

### **Political Competition as a Form of Democracy**

The debate over the so-called “democratic deficit” in the European Union has mainly focused on how the EU can produce more efficient, effective, transparent and accountable policies. However, democracy is more than simply policy outputs in the interests of citizens.

Democracy is also about the ability of voters to choose between rival groups of elites, with rival candidates for political leadership and rival programs for public policy. This competition not only allows voters to reward or punish leaders for their actions, but also promotes policy debate, deliberation, innovation and change. Without such democratic contestation, voters are not only disenfranchised, public policies also stagnate.

The problem for Europe is that the EU polity, as currently designed, presents severe constraints on the process of political competition. Policy outputs from the EU are relatively centrist: a moderately-regulated market, with a moderately-monetarist macro-economic policy regime. And, because there are multiple veto-players in the EU decision-making process, these EU policies are hard to change. The result is a set of constraints on political competition. Parties on the left cannot promise high social protection or expansionary spending policies, and parties on the right cannot promise labor market deregulation or tax

cuts. The choice, then, is either to accept the constraints of the EU polity or to advocate radical reform of, or withdrawal from, the EU.

If European democracy is to be saved, a new democratic contest over the direction of EU policies is vital. Political competition is central to the modern liberal-democratic conception of democracy. Weber observed that mass democracy means the inevitable “professionalization” of politics through the machines of competitive political parties. In a similar vein, Schumpeter argued that mass elections work because they produce competition between rival groups of elites for control of the political agenda. On one hand, competition provides incentives for elites to develop rival policy ideas and propose rival candidates for political office. On the other hand, competition provides voters with a mechanism to punish politicians who fail to implement their electoral promises or who are dishonest or corrupt (Fearon, 1999). Like a perfect economic market, perfect political competition leads to optimal outcomes: with a choice for voters between political products, which forces politicians to respond to changes in voters’ preferences and to engage in policy product innovation.

Also like markets, however, elections by themselves do not guarantee perfect competition. At one extreme, political markets can be oligopolistic. For example, in the 1940s, political scientist E.E Schattschneider, among others, criticized American elections for producing “unresponsive” parties, who neither advocated different policy positions nor behaved in an accountable way once elected. The problem, as he saw it, was too few incentives for parties to articulate rival voters’ interests (what he called to “mobilize bias”), which meant that the Democrats and Republicans pursued identical policy positions. One result of

these criticisms was the introduction of the primary system, which created new incentives for intra-party competition, and which reinvigorated American democracy (Schattschneider, 1960).

Enlightened despots can also produce policies close to the preferences of the median citizen. Democratic competition produces two main public goods. First, political competition guarantees that outputs cannot stray too far from voters' preferences. Second, in a more Habermasian sense, political competition is a vehicle for promoting political debate and deliberation, which in turn promotes the formation of "public opinion" around specific policy positions. Without this second element, there would be no way for voters to form their preferences on complex policy issues.

Perhaps even more grandly, without this "formative" aspect of political competition, democratic identities, *demoi*, would not develop and evolve. For example, in the history of both American and European democracies, the replacement of local identities by national identities occurred through the process and operation of mass elections and party competition (Key, 1964). In the EU context, rather than assuming that a European *demos* is a prerequisite for genuine EU democracy, a European democratic identity could only form through the praxis of democratic competition for control of the EU policy agenda where citizens accept being on the losing side in one particular contest in the expectation that they will be on the winning side in the not too distant future.

Surprisingly, however, the academic debate about the so-called "democratic deficit" in the EU has not paid much attention to the issue of competition for control of the EU policy agenda. The focus has been almost

exclusively on the output side of the EU polity. In the “standard version” of the democratic deficit, the basic problem of the EU is that control over political outputs has shifted from the parliamentary systems of government at the domestic level to the executive-centered system of government at the European level (Weiler et al., 1995). In the EU system, the executive branches of government, in the EU Council and the European Commission, are the main decision-makers. These bodies are secretive, and beyond the control of national parliaments.

A standard solution, as advocated by numerous scholars and commentators, is to increase the power of the European Parliament over the selection and scrutiny of the Commission, and in the legislative process vis-à-vis the Council (Lodge, 1989). Increasing the power of the European Parliament, from this perspective, is a direct compensation for the loss of control of national parliaments over policy outcomes.

Giandomenico Majone also focuses on the output side of the EU polity, but from a different angle (Dehousse, 1995). Majone argues that the EU is essentially a “regulatory state,” and so does not engage in redistributive or value-allocative policies. He also argues that, because regulatory policies are, by definition, pareto-efficient rather than redistributive, the making of these policies should be isolated from the standard processes of democratic politics—in the same way that courts should be independent of legislatures and executives, and central banks should be independent from the vagaries of the “political business cycle” (Majone, 2002a).

What Majone believes the EU system might lack, however, is political accountability. By this he means transparent decision-making, *ex post* review by courts and ombudsmen, greater professionalism and technical expertise, procedures that protect the rights of minority interests, and better public scrutiny by private actors, the media, and parliamentarians at both the EU and national levels. From this perspective, the problem for the EU is less of a “democratic deficit,” but rather a “credibility” or “legitimacy” deficit (Majone, 2002b).

Andrew Moravcsik presents the most extensive critique to date of these output-oriented versions of the democratic deficit. Against the argument that power has been centralized in the “executives” at the EU level, Moravcsik points out that from the point of view of the voters, national government leaders are the most directly accountable politicians in Europe. So the fact that national governments run the EU should be seen as a democratic feature of the EU. Against the critique that the executives are beyond the control of representative institutions, Moravcsik points out that the most significant institutional development in the EU in the past two decades has been the increased powers of the European Parliament against the Council and the Commission (Moravcsik, 2002).

Against Majone’s argument that the problem is the legitimacy and credibility of EU regulators, Moravcsik points out that EU policy-making is more transparent than most domestic policy-making processes: the technocrats are forced to listen to multiple societal interests: there is extensive judicial review of EU actions by both the European Court of Justice and national courts: and the European Parliament and national parliaments have increasing scrutiny powers,

which they are not afraid to use (as was shown in the European Parliament censure of the Santer Commission in May 1999). Moravcsik argues that the EU's elaborate system of checks-and-balances ensures that an overwhelming consensus is required for any policies to be agreed upon, and, in any case, radical neo-liberals are just as unhappy with the centrist EU policy regime as socialists. Moravcsik consequently contends that the empirical evidence clearly refutes the theoretical and normative claims of the democratic-deficit advocates. The EU polity works well, in that it produces centrist policy outcomes in the interests of the overwhelming majority of Europe's citizens.

Democracy means more than simply consensual policy outcomes, made by an open and accountable political process. Enlightened despotisms can produce consensual policies, but this does not make them democratic. The problem for the EU is that the input side of democracy is completely absent. Representatives at the EU level are elected, and so can formally be "thrown out." However, the processes of electing national politicians and even the Members of the European Parliament are not contests about the content or direction of EU policy. National elections are about domestic political issues, where the policies of different parties on issues on the EU agenda are rarely debated.

Similarly, European Parliament elections are not in fact about Europe, but are "second-order national contests" fought by national parties on the performance of national governments, with lower turnout than national elections, and hence won by opposition and protest parties (Van der Eijk et al., 1996). At no point do voters have the opportunity to choose between rival candidates for executive office at the European level, or to choose between rival

policy agendas for EU action, or to throw out elected representatives for their policy positions or actions at the EU level.

One could argue that if the EU continues to produce good policies, and the process of political competition in domestic democracies ultimately filters through to the EU level, then there is little for EU citizens to worry about. However, the EU policy regime has a powerful indirect impact on the process of domestic political competition. The single market rules governing the production, distribution and exchange of goods, services, capital and labor restrict micro-economic policy options. Similarly, the Economic and Monetary Union (EMU), the Growth and Stability Pact, and the multilateral macro-economic surveillance restrict national budgetary and fiscal policy options. As a result, parties on the left (who accept the EU regime as legitimate) cannot promise high levels of social protection or expansionary budgetary policies. Equally, parties on the right cannot promise further deregulation of labor, product or capital markets or major cuts in public expenditure.

Again, one could contend that restricting policy choices to the center-ground of politics is in the interests of the median voter, and so is inevitably supported by either a center-left or a center-right majority in most member states. In contrast, more radical policies to the left or right of the center do not, by definition, command the support of a political majority.

But, this argument ignores two important aspects of political competition. First, if parties advocate identical policies, voters will be indifferent about which group of elites is elected to power. This gives incumbents a huge advantage, as they have the added advantage of a track record of implementation



of these policies. The only choice voters have, if the incumbents are not incompetent or corrupt, is to judge the personalities of the rival party leaders. As a result, policy debate is replaced by a political beauty contest.

Second, and more significantly for the future of the European society and economy, restrictions on policy competition undermine policy innovation. Without the possibility of debating rival or new policy promises, outside the short-term boundaries of the EU policy regime, solutions to the long-term structural problems of the European economy are unlikely to be found.

Moravcsik contends that issues on the EU agenda are simply not salient enough for voters to be interested in EU policy questions—what Schattschneider would have called “biases to be mobilized.” Hence, Moravcsik invokes Schmitter’s argument that genuine European “cleavages” would only develop if the EU were given significant redistributive powers, such as a guaranteed minimum-income for the poorest third of European citizens. And since these powers are undesirable, Moravcsik concludes that the institutional status quo is preferable to full-blown democracy (Moravcsik, 2002).

The theoretical argument can be summarized as follows. The EU policy regime is indeed centrist, as Moravcsik claims. However, this regime also constrains domestic policy choices to only minor variations from this regime. This is a problem for EU citizens because there is no political competition over the direction of the EU policy agenda, which would promote policy innovation in the EU regime or enable optimal policy package alternatives to develop. As a result, Europe is locked in to existing policy status quos, and there is no incentive for political elites at the domestic or EU levels to change this situation. The

result is declining party competition at the domestic level, increased voter apathy, growing distrust of governments and political elites, and soaring antipathy towards European integration. If this theory is correct, the long-term consequences could be disastrous for the EU polity.

**Conclusion**  
**Where to Go from Here?**

*“We agree that it is more vital than ever that Europe and the US - two longstanding allies sharing in essence the same values and foreign policy objectives - work together to promote democracy, freedom, stability and prosperity throughout the world. The opportunities for making progress are before us.”*

European Commission President Barroso,  
February 9, 2005

The essence of democracy is political choice. If the political marketplace does not provide this choice, the connection between voters’ preferences and policy outcomes relies on the intentions of the elites and institutions. So far, the EU has been lucky. Because of the independence and design of the agenda-setter (the Commission), EU policies tend to be centrist, and because of multiple veto-players, policy change is difficult. However, as the EU faces some fundamental question (about how to reform the European economy, what role Europe should play in the world, and how to deal with Europe’s new multiethnic society) the EU’s luck may run out.

Issues in on the EU agenda are already highly salient: such as whether regulation of the single market should be based on a neo-liberal or a social democratic model; whether the European Central Bank and the EU Finance Ministers should pursue a monetarist or a neo-Keynesian macro-economic strategy; how Europe’s labor markets should be reformed to reduce structural unemployment; whether Europe should promote “free trade” or “fair trade”; whether Europe should have a liberal or conservative immigration policy; and

what Europe's global role should be in relation to the United Nations and the United States. These are the key issues of modern politics in Europe.

However, because the policy competences for tackling these issues are now at the European level, these issues have been removed from domestic political competition. The empirical evidence suggests that, not only has domestic party competition on the main dimensions of politics declined since the 1970s, but a major factor in this decline has been the constraints imposed by the EU single market and the Economic and Monetary Union. As a result, in the domestic arena, voters are simply no longer able to make democratic choices about which policies they prefer to the EU status quo. And, because representation in the EU institutions is highly indirect, voters cannot make choices about what should happen at the EU level either.

Consequently, the "enlightened despotism" that is the current EU may produce relatively moderate and benign policies, but whenever Europe is faced with a need to reform the basic policy status quo, Europe's elites are trapped. Acting collectively through EU institutions, they are not able to move either to the left or to the right of the policy status quo without alienating large sections of their electorates, and have no incentive to undertake policy innovations and to sell these innovations to their publics. In a fully democratic polity, by contrast, tough policy decisions are resolved through the process of competitive elections. In this sense, even the American electoral system appears to be less than democratic at times.

This process has a powerful inducing effect. On complex issues, voters' preferences are endogenous to the electoral processes; as new preferences form

in response to new information, new arguments and new considerations about the long-term sustainability of existing equilibrium. A new majority is then formed in favor of policy change in one direction or another and this majority is given a chance to see if this policy strategy works.

The only solution for the EU, then, is a genuine contest for political leadership at the European level—for example, through some form of majoritarian election of the Commission President and/or new Council President. Because there are a high number of veto-players in the EU policy process, such a contest would have only a limited impact on current policy status quos.

However, as the EU starts to tackle the more fundamental problems, a contest for political leadership at the European level would provide the necessary safety-valve for a debate to be aired, new preferences to be formed, competing positions to be taken, a democratic choice to be made, and a new policy to be developed with full democratic authority. Only through such a genuine contest could European democracy be reinvigorated at both the national and European levels. Without such a contest, the democratic future of Europe could be severely lacking.

The preceding overview of European politics depicts a continent that lacks a common identity, searching for a political structure which can create unity without sacrificing diversity. No national model promises the optimum balance between stability and flexibility. The path of institutional reform is fraught with difficulties, as politicians do not want to favor democracy in Brussels at the expense of efficiency and practicality.

Where, then, does Europe find itself in the debate over its democratic future? There are many steps that the European Union may take to reduce the democratic deficit and increase popular participation. The difficulty European and national officials will face is in selecting those which will best suit the EU and satisfy the demands of the populace. The EU may draw on inspiration for the national governments of its member states (the French, German, British, and the United States) in reshaping its political structure. The EU's best chance to satisfy each of its constituencies is to combine elements of each model, as well as features of other political systems which may be helpful in the European context (such as Spanish regionalism).

It is still the early days for the European Union, and it is not clear that a "United States of Europe" is either possible or desirable. The Union is still in its adolescence, with many institutional and political changes to come. In such a situation, it is not surprising that few in Europe are prepared to support Brussels wholeheartedly, for it is not readily apparent what it may become. A constitution is a set of legal arrangements creating a political structure; it may enshrine the principles of democracy, but unless the people believe in it, it cannot itself produce a democratic Europe. In the end, the institutions in Brussels cannot create a "culture of consent," they can only provide a space for democracy and popular participation to flourish.

The United States is the oldest and largest surviving constitutional republic—a nation that has experienced a larger increase in area, population, and income; absorbing people of more diverse racial, ethnic, and language backgrounds, than any other contemporary nation. Europeans are well advised to

understand and consider those characteristics of the U.S. Constitution that provided the political and legal framework for the American success story.

The framers attacked tyrannical government and advanced the following ideas: that government comes from below, not from above, and that it derives its powers from the consent of the governed; that men have certain natural, inalienable rights; that it is wise and feasible to distribute and balance powers within government, giving local powers to local governments, and general powers to the national government; that men are born equal and should be treated as equal before the law. The framers of the U. S. Constitution sought to make these ideas the governing principles of a nation. And although at times there have been struggles putting these ideals into practice, it is not due to weaknesses within the constitution, but disputes between the republic's people.

Constitution makers today still confront the problem posed by Alexander Hamilton in 1787, of whether “societies . . . are really capable or not of establishing good government from reflection or choice, or whether they are forever destined to depend for their political constitutions on accident and force” (Scigliano, 2000). The makers of “new” constitutions do not seek to throw the entire tradition onto the scrap heap. Constitutions remain higher law, specify the institutions of governance, define the rights, duties, and relationships of state and citizens, and set the tone or establish the identity of the nation-state. Onto this traditional foundation, however, today's framers seek to build new practices.

Recent constitution-making processes have been accompanied by massive efforts to involve the public before, during, and after the text is finalized.

These efforts include proposals to require prior agreement on broad principles as a first phase of constitution making; an interim constitution to create space for longer term democratic deliberation; civic education and media campaigns; the creation and guarantee of channels of communication, right down to local discussion forums; elections for constitution-making assemblies; open drafting committees aspiring to transparency of decision making; and approval by various combinations of representative legislatures, courts, and referendums.

There is no simple transition to a new constitutionalism. Control of the process and of the ultimate distribution of power is at stake and participatory constitution making remains highly controversial. Constitution making has not been made easier, and by no means have all of these innovations, nor all of the constitutions that resulted, been successful. However, the process does move incrementally closer to the needs of the present day.



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