Worth Doing Well- The Improvable European Union Constitution

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WORTH DOING WELL—THE IMPROVABLE EUROPEAN UNION CONSTITUTION

Stephen C. Sieberson*

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I. INTRODUCTION

The European Union Constitution (Constitution) was born of a desire to reorganize and simplify the existing EU Treaties in anticipation of the European Union’s (EU or Union) addition of ten new Member States in 2004. Its ratification is still in process at the time of publication of this Article, but the Constitution is intended to become the new foundational instrument for the EU.

The internal dynamics of the expanded Union and the external economic and geopolitical forces pressing against it will test the new Constitution, and it is premature to predict whether the instrument, if ratified, will serve the Union well. Nevertheless, one thing that can be done now is to evaluate the Constitution as a document. It can be analyzed in terms of its organization, its consistency, and its readability. Has it been well crafted? Is it more approachable than the Treaties? Is it a fitting product of the process that created it?

As background for this critique of the Constitution, Part II of this Article provides a brief overview of the existing EU Treaties, their shortcomings, and the political processes that culminated in the creation of the new Constitution. Of particular interest are certain goals articu-

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1. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, O.J. (C310) 1 (2004) [hereinafter Const.]. The European Union is the latest name for the organization that has been known as the European Coal and Steel Community, the European Atomic Energy Community, the European Economic Community and the European Community. Although it is currently appropriate to refer to the European Community in relation to much of the body’s activity, the name European Union is now in general use. Under the new Constitution, the European Union would legally succeed the European Community, and the term European Union would be used exclusively. Const. art. IV-438. (For convenience, this Article will simply refer to the entity as the European Union, the EU, or the Union).


3. The Constitution was approved by the Intergovernmental Conference on June 18, 2004 and signed on October 29, 2004. If ratification is not completed within two years of the date or signing, the European Council will take up the matter. Conference of the Representatives of the Governments of the Member States, IGC 2003—Meeting of Heads of State or Government, Brussels, 17/18 June 2004, CIG 81/04 at 88 (2004).
lated for the new document, such as the desire to replace the complex Treaties with a simpler, more approachable instrument. Part III is a summary of the Constitution's textual content, details that are necessary to illuminate the analysis that follows. Part IV offers a critical review of the awkward manner in which the Constitution is organized. In particular, it focuses on the confusion created by scattering related provisions throughout the various parts of the document. Part V proposes two possible solutions to this drafting problem. One would maintain most of the present text but with many of the overlapping parts merged together. The second would eliminate much of the Constitution's detail in favor of a more basic statement of critical principles. The conclusion is that the Constitution as written is not as effective as it could be, and that its quality as a document does not match its importance as an expression of political will.

II. THE GENESIS OF THE CONSTITUTION

A. The Existing EU Treaties

The Constitution is intended to replace the EU's primary constituent documents, the Treaty Establishing the European Economic Community (EC Treaty) and the Treaty on European Union (TEU). The treaties have been a work in progress, the subject of regular amendment, but in their evolution, they have grown to be increasingly complex.

The EC Treaty is the latest version of the Treaty of Rome. It establishes the European Community, and it contains most of the provisions defining the body's institutions and regulating the common market. The TEU creates the European Union, which essentially retains and shares the EC Treaty's institutional provisions. It also leaves in place the EC


6. EC Treaty pt. III.
The Treaty's economic provisions as the "first pillar" of a broader system. The TEU expands the scope of activity, however, by establishing a second pillar relating to common foreign and security policy and a third pillar governing police and judicial cooperation in criminal matters. Awkwardly, the operative entity for the first pillar is still the European Community, while the European Union acts under the second and third pillars. Nevertheless, despite this technical distinction, it is common to refer to the EU when describing any activity relating to any pillar.

Criticisms of the EU treaty structure are not new, but one of the most apt comments has come from British Foreign Secretary Jack Straw, writing even as the Constitutional Convention was underway:

While the practical achievements of the EU have been profound, the Union's treaties fail almost every test of clarity and brevity . . . For a start, there is not one constitution, but two. One "on European union," the other "establishing the European community." . . . Both have overlapping preambles with "objectives," "tasks," and "principles." As for the institutional arrangements, they are shared between the two treaties. These complex texts make the case for a single, coherent constitution for the EU . . . real reform is urgently needed.9

Other commentators have referred to the Treaties as a "hodgepodge"10 and an "ad hoc and often incoherent set of documents."11

B. Calls for Simplification of the Treaties

The drive for a new constitution was born of such frustrations. German Foreign Minister Joschka Fischer, in a seminal address on May 12, 2000, at Humboldt University in Berlin,12 expressed his concerns that the

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8. TEU arts. 11–28 (second pillar), 29–42 (third pillar).
Union was in danger of becoming "utterly intransparent." He asserted
that "productive steps" should be taken to complete the process of inte-
gration, and he proposed "the transition from a union of states to full
parliamentarization as a European Federation." He added: "This Fed-
eration will have to be based on a constituent treaty," and he urged
moving beyond the "fears and formulae of the 19th and 20th centuries" to
a Europe "established anew with a constitution ... centred around basic,
human and civil rights, an equal division of powers between the Euro-
pean institutions and a precise delineation between European and nation-
state level."

Fischer's call received a response in early 2001 from the Inter-
Governmental Conference (IGC) that approved the Treaty of Nice,
which is now the latest manifestation of the EC Treaty and TEU. The
Conference appended to the Treaty a declaration that called for a "deeper
and wider debate about the future of the European Union." Among the
basic issues to be addressed in this debate was "a simplification of the
Treaties with a view to making them clearer and better understood with-
out changing their meaning." The Nice Declaration indicated that a
further pronouncement from the European Council would be forthcom-
ing at its December 2001 meeting in Laeken, Belgium.

In July of 2001, the Commission entered the discussion by publish-
ing its White Paper on European Governance, which asserted: "Many
people are losing confidence in a poorly understood and complex system
to deliver the policies that they want." Among the "principles of good
governance" to which the EU should aspire, openness and coherence
were listed as critical to making EU policy "accessible" and "easily un-
derstood." The Commission, however, observed that these principles
were not being followed: "The European Union's policies and legislation
are getting increasingly complex." Therefore, a call was issued for
"a comprehensive programme of simplification of existing rules ...
regrouping legal texts, removing redundant or obsolete provisions, and shifting non-essential obligations to executive measures.”26 The Commission committed that it would “[s]implify further existing EU law”27 and propose appropriate “Treaty changes” or “constitutional reform” to the European Council at the upcoming IGC in Laeken.28

As anticipated, on December 14-15, 2001, the European Council issued its Declaration on the Future of the European Union (the Laeken Declaration).29 The document observed that EU citizens “are calling for a clear, open, effective, democratically controlled Community approach,”30 and it described the need for clearer division of competence between the Union and the Member States, simplification of EU legislation and more democracy, transparency and efficiency in Union institutions.31 The crux of the problem, according to the Declaration, was a need for simplification of the Union’s Treaties:

The European Union currently has four Treaties.32 The objectives, powers and policy instruments of the Union are currently spread across those Treaties. If we are to have greater transparency, simplification is essential.

Four sets of questions arise in this connection. The first concerns simplifying the existing Treaties without changing their content. Should the distinction between the Union and the Communities be reviewed? What of the division into three pillars?

Questions then arise as to the possible reorganisation of the Treaties. Should a distinction be made between a basic treaty and the other treaty provisions? Should this distinction involve separating the texts? Could this lead to a distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions?

26. Id. at 23.
27. Id. at 5.
28. Id. at 34–35.
30. Id. at 4.
31. Id. at 4–6.
32. In addition to the EC Treaty and TEU, the other treaties in effect in 2001 were the Treaty establishing the European Atomic Energy Community (EURATOM), and the Treaty establishing the European Coal and Steel Community (ECSC). The ECSC lapsed as a separate treaty in 2002, and its assets, liabilities and programs were transferred to the European Community. Under the Constitution, EURATOM would remain in effect, amended by the Constitution.
Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.

The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?33

The Laeken Declaration called for a Convention on the Future of Europe to be convened in 2002, to produce a document that would provide a “starting point” for discussions at the next IGC.34

C. The Convention

In the inaugural session of the Convention, on February 26, 2002, Chairman Valery Giscard d’Estaing warned that “[t]he process of European union is showing signs of flagging. . . . The decision-making machinery has become more complex, to the point of being unintelligible to the general public.”35 He referred to a “tangled skein of powers [and] the complexity of procedures,”36 and commented: “We shall have to respond to the request for simplification of the Treaties, with the aim of achieving a single Treaty, readable by all, understandable by all.”37

On July 18, 2003, seventeen months after Giscard d’Estaing’s opening address, he and his fellow Convention representatives produced the Constitution under the title of “Draft Treaty Establishing a Constitution

33. Laeken Declaration, supra note 29, at 6–7.
34. Id. at 7–9.
36. Id. at 7. During the Convention Giscard d’Estaing observed that his study of the Mandarin language was easier than mastering the EU Treaties and agreements. Christopher Dickey & Michael Meyer, Is Europe Broken?, NEWSWEEK, Aug. 12, 2002, at 14.
37. Giscard d’Estaing, supra note 35, at 11. As the Convention proceeded, Jean-Luc Dehaene echoed Giscard d’Estaing’s sentiments as follows: “If, in the Convention, we succeed to make the EU, its Treaty and its texts, its procedures and its processes, more ‘understandable,’ we will have helped to remove a major obstacle that stand[s] in the way of achieving informed interest and involvement of citizens with EU affairs.” Jean-Luc Dehaene, Vice President of the European Convention, Understanding Europe: The EU Citizen’s Right to Know, Speech Before the Conference Organized by the Friends of Europe in Brussels 6 (Apr. 3, 2003), available at http://european-convention.eu.int/docs/speeches/8285.pdf.
for Europe."\textsuperscript{38} Although the assembly\textquotesingle s procedures were criticized,\textsuperscript{39} and although some commentators questioned whether there had been true accord among the delegates,\textsuperscript{40} the Convention\textquotesingle s Praesidium was able to claim that it had accomplished what the Laeken Declaration had mandated, and it referred the document to the European Council as the product of \textquotesingle broad consensus.\textsuperscript{34}\textsuperscript{1}

III. THE FRUITS OF THE CONVENTION

A. Organization of the Constitutional Text

The Constitution begins with a Preamble that describes the Union\textquotesingle s heritage and objectives. The body of the document is divided into four parts: Part I, which is untitled, broadly defines the Union, its competences and its institutions. Part II is captioned \textquotenote{The Charter of Fundamental Rights of the Union.\textquotenote{\textsuperscript{39}} Part III is entitled \textquotenote{The Policies and Functioning of the Union.\textquotenote{\textsuperscript{40}} Part IV contains \textquotenote{General and Final Provisions.\textquotenote{ Various protocols and declarations follow the Constitution\textquotesingle s text.

\textsuperscript{38} Peter Norman has written an invaluable on-the-scene account of the Convention from inception to adjournment. His book supplies great detail about the activities of Giscard d\textquotesingle Estaing\textquotesingle s Praesidium, the various working groups, and the plenary sessions, including the mechanics of drafting the Constitution and the politics of negotiating its more controversial provisions. \textit{See Peter Norman, The Accidental Constitution—The Story of the European Convention (2003).}

\textsuperscript{39} The Convention\textquotesingle s plenary sessions were held only once or twice per month, and generally for no more than two days per session. \textit{See the official website for the European Convention, at http://european-convention.eu.int/sessplan.asp?lang=EN.} Larry Siedentop has commented that the meetings were not \textquotenote{frequent enough for members to come up with new ideas. Intimacy is needed for such a group to develop a mind of its own.\textquotenote{ Larry Siedentop, \textit{We the People Do Not Understand, FIN. TIMES, June 5, 2003, at 21. Another commentator has referred to a \textquotenote{serious truncation and imbalance in the Convention\textquotesingle s debates.\textquotenote{ Kirsty Hughes, \textit{A Dynamic and Democratic EU or Muddling Through Again?, The Federal Trust Online Paper 3 (August 2003), available at http://www.fedtrust.co.uk/uploads/constitution/25_03.pdf.}


1. Part I: Untitled

Part I is apparently intended as an overview of the European Union. Such a feature was absent in the Treaties, and this introduction may reflect the desire for a “basic treaty” as referred to in the Laeken Declaration. Part I consists of sixty articles in nine titles:

Title I—Definition and Objectives of the Union. These eight provisions create the Union, grant it legal personality, affirm the primacy of EU law over Member State law, and identify the Union’s values and objectives, while acknowledging respect for the integrity of the Member States.

Title II—Fundamental Rights and Citizenship of the Union. This brief section of two articles describes the EU’s commitment to human rights and presages the Charter of Fundamental Rights in Part II of the Constitution. It also creates and defines EU citizenship.

Title III—Union Competences. Clearly responding to a demand in the Laeken Declaration, these eight articles define what the EU may do, both in terms of its exclusive competences and with regard to competences shared with the Member States. These are critical concepts, on the one hand confirming Union authority and on the other hand underscoring that powers not specifically conferred to the EU are reserved to the Member States.

Title IV—The Union’s Institutions. In straightforward terms, these fourteen provisions describe the institutions, their composition and their responsibilities. Correcting an omission in the Treaties, the European Council is for the first time formally identified as an EU institution. The new positions of a permanent European Council President and Union Minister for Foreign Affairs are established. Groups of three Member States will share presidencies of the Council for eighteen months, rather than rotating to a single State every six months, and the
Commission will be reduced in size to less than one commissioner per Member State. This title also includes the controversial new formula for qualified majority voting on the European Council and Council.

Title V—Exercise of Union Competence. Significantly simplifying the Treaties, these twelve articles reduce the number of EU legal instruments to six—European laws, European framework laws, European regulations, European decisions, recommendations and opinions. This title describes which institution may adopt these measures, and it describes the procedures for such activity. An important procedural development is that legislative co-decision by the European Parliament becomes the norm. Furthermore, several provisions provide specific guidelines for Union action in common foreign and security policy.

Draft Decision of the European Council on the Exercise of the Presidency of the Council of Ministers, Annex 8 art. 1, Meeting of Heads of State or Government, Brussels, 17/18 June 2004, CIG 81/04 (2004), available at http://ue.eu.int/cig/pdf/en/04/cig00/cig00081.en0f.pdf. Arguably, this is not significantly different from the current system, in which the immediate past-president and the upcoming president coordinate with the current president. The participation of the same three Member States for the full 18-month term may well offer a greater measure of consistency and coordination than is currently the case, but the complete replacement of the team every 18 months may also prove disruptive.

51. The first Commission appointed under the Constitution will consist of one commissioner per Member State. CONST. art. I-26(5). This appointment will not occur until 2009. Thereafter, beginning with the Commission appointed in 2014, the size of the body will be a number corresponding to two-thirds of the Member States, selected on the basis of equal rotation among the States. CONST. art. I-26(6).

52. The Constitution’s QMV formula represents a departure from the weighted voting formulas inserted into the EC Treaty through the Treaty of Nice. EC TREATY art. 205. The formula proposed by the Convention was a majority of Member States representing three-fifths of the EU population, but this had been blocked by Spain and Poland at the December 2003 meeting of the Intergovernmental Conference. Thomas Fuller, Split on Weighted Voting Sinks EU Charter Talks, INT’L HERALD TRIB., Dec. 15, 2003, at 1. The IGC meetings of June 2004 revised the formula to give greater voice to the smaller states. The final version requires the votes of 55% of Council Members, representing at least 15 Member States and comprising at least 65% of the EU population. CONST. art. I-25(1). In addition a “blocking minority” must include representatives of at least four Member States. Id. In certain instances the voting requirement is 72% of Council members representing at least 65% of the Union population. CONST. art. I-25(2).

53. CONST. arts. I-33–I-44.

54. Id. at art. I-33. The Constitution’s forms of legislation are similar to the five types currently provided under Article 249 of the EC Treaty, with the addition of “European regulations” as a new form of action. EC TREATY art. 249.

55. The Constitution expands the areas of co-decision from 37 to approximately 80 subjects. Valery Giscard d’Estaing, Oral Report Presented to the European Council in Thessaloniki, SN 173/03 at 11 (June 20, 2003) available at http://european-convention.eu.int/docs/speeches/9604.pdf. This increase is created through Article I-34(1), which provides that “European laws and European framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council under the ordinary legislative procedure as set out in Article III-396.” CONST. art. I-34(1). Thus the Draft expands co-decision by including it as part of the normal legislative process, as opposed to an article-by-article amendment of substantive treaty provisions.
common defense and cooperation in freedom, security and justice.\textsuperscript{56} A final article in this section contains procedures for enhanced cooperation among groups of Member States in circumstances in which the entire Union is unable to act.\textsuperscript{57}

Title VI—The Democratic Life of the Union.\textsuperscript{58} These eight provisions respond to demands for more trappings of democracy within the EU.\textsuperscript{59} They demand equality for all EU citizens and guarantee openness and transparency in the workings of the Union’s institutions. The varied articles include a right of citizen initiative, the work of a European Ombudsman, protection of personal data, and Union respect for the status of churches and other organizations under national law.

Title VII—The Union’s Finances.\textsuperscript{60} A concise summary of the EU’s budgetary system and processes is presented in four articles.

Title VIII—The Union and its Immediate Environment.\textsuperscript{61} This is a single provision that calls for the EU to establish close relationships with neighboring states.

Title IX—Union Membership.\textsuperscript{62} These three provisions deal with accession to the EU, suspension of the rights of a Member State that violates the Union’s core values and voluntary withdrawal of a State from the Union. The articles on accession and suspension have antecedents in the Treaties,\textsuperscript{63} while the provision on withdrawal is unprecedented.

2. Part II: The Charter of Fundamental Rights of the Union\textsuperscript{64}

This part of the Constitution incorporates the Charter that had previously been adopted as a “solemn proclamation” of the EU, but was not

\textsuperscript{56.} Const. arts. I-40-I-43. Activities relating to the common foreign and security policy (the TEU’s Second Pillar) and cooperation and justice in home affairs (Third Pillar) are currently subject to their own types of legislation, such as “common strategies,” “joint actions,” and “common positions” in the Second Pillar, and “common positions,” “framework decisions,” “decisions,” and “conventions” in the Third Pillar. TEU arts.13-15, 34. Under the Constitution, these types of legislative activity ostensibly will be carried out within the same six categories as all other forms of EU legislation. However, see comments in Part IV.D of this article.

\textsuperscript{57.} Const. art. I-44.

\textsuperscript{58.} Id. at arts. I-45-I-52.

\textsuperscript{59.} For an extended analysis of the European Union’s “democratic deficit” and how the Constitution will affect democratic rights and processes within the EU, see Stephen C. Sieberson, The Proposed European Union Constitution—Will it Eliminate the EU’s Democratic Deficit?, 10 Columbia J. Eur. L. 173 (2004).

\textsuperscript{60.} Const. arts. I-53-I-56.

\textsuperscript{61.} Id. at art. I-57.

\textsuperscript{62.} Id. at arts. I-58-I-60.

\textsuperscript{63.} TEU art. 49 (regarding accession); TEU art. 7, EC Treaty art. 309 (regarding suspension of rights).

\textsuperscript{64.} Const. arts. II-61-II-114.
included in the Treaties. Part II consists of its own Preamble and fifty-four concise articles that are divided into titles designated as Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. With the inclusion of the Charter in the text of the Constitution, the European Union will finally have a bill of rights at the core of its legal system.

3. Part III: The Policies and Functioning of the Union

The longest part of the Constitution with 322 articles, Part III incorporates much of the text of the EC Treaty and TEU. It contains considerable detail on the internal market, social, economic and monetary policy, external action and the competences of the EU institutions. The following is a summary of its seven titles:

Title I—Clauses of General Application. These eight provisions express general operating principles and objectives for the Union.

Title II—Non-Discrimination and Citizenship. This brief section of seven articles restates certain civil rights of EU citizens, such as the rights to move and reside freely within the Union. Concepts of equality and non-discrimination are also reiterated.

Title III—Internal Policies and Action. One of the most substantial sections in the Constitution, this title consists of 156 articles, divided as follows: Chapter I on the internal market, including competition law; Chapter II on economic and monetary policy; Chapter III on certain specific areas such as employment, social policy, agriculture, environment, consumer protection, transport and energy; Chapter IV on border policies, immigration, asylum and police and judicial cooperation; and Chapter V on areas in which the EU may take action complementary to that of the Member States, including public health, industry, culture, education and civil protection.

Title IV—Association of the Overseas Countries and Territories. This brief section of six articles contains special provisions governing the relationship between the Union and the overseas countries and territories of several Member States.

Title V—The Union's External Action. Various external matters have been consolidated into this section, whose thirty-eight articles are

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67. Id. at arts. III-115–III-122.

68. Id. at arts. III-123–III-129.

69. Id. at arts. III-130–III-285.

70. Id. at arts. III-286–III-291.

71. Id. at arts. III-292–III-329.
divided into eight chapters. Most notably, the chapters cover the TEU's second and third pillars, relating to a common foreign security policy (including defense) and police and judicial cooperation in criminal matters. Other subjects include a common trade policy, restrictive trade measures, humanitarian aid, the EU's conclusion of international agreements and joint responses to terrorist attacks or disasters.

Title VI—The Functioning of the Union. Another lengthy section, the ninety-four articles of this title are divided into three chapters. Chapter I contains detail on the EU institutions and advisory bodies, most of which was imported from the EC Treaty. Chapter II governs the Union's budget and multi-annual financial framework. Chapter III offers details about enhanced cooperation among groups of Member States.

Title VII—Common Provisions. A final section of thirteen articles deals with certain capacities of the Union and rights of the Member States, as well as several miscellaneous provisions.


The final part of the Constitutional text consists of twelve varied articles that deal with subjects such as the repeal of the EC Treaty and TEU, the continuity of the EU and its succession to the rights and obligations of the European Community. Procedures are described for the Constitution's ratification and entry into force, and there are provisions governing future amendments to the document.75

B. The Positive Results

As noted in the previous section, the Constitution offers a number of important institutional and procedural changes to the European Union, including a more permanent European Council Presidency, a new Union Minister for Foreign Affairs, a smaller Commission, a revised formula for qualified majority voting in the Council and European Council, and more co-decision for the European Parliament. Of more interest for this analysis, however, are those changes that make the Constitution a more coherent document than the existing Treaties.

Among the Constitution's innovations that reflect both substantive improvement and simplification are the following:

72. Id. at arts. III-330–III-423.
73. Id. at arts. III-424–III-436.
74. Id. at arts. IV-437–IV-448.
75. The standard amendment procedure would require a new convention or an intergovernmental conference, plus eventual ratification by all Member States. Id. at art. I-9. More streamlined procedures, not requiring a convention or IGC, are provided for changing unanimous voting requirements or special legislative procedures in Part III and revising internal Union policies in Part III. Id. at arts. IV-444, IV-445.
• The EC Treaty and the TEU are merged into a single text.\textsuperscript{76}

• The European Union replaces the European Community, and all references to the Community are excised.

• The three pillars of the TEU are scrapped, although their subjects of activity remain intact.

• In connection with elimination of the pillars, there is a reduction in the types of EU legal instruments.\textsuperscript{77}

• The Constitution provides a much clearer delineation of the relative competences of the Union and the Member States, even though the actual balance of power is generally unchanged.

Finally, it might be argued that Part I, which offers an unprecedented snapshot of the EU and its institutions, makes the Constitution more approachable to the average European citizen.\textsuperscript{78} This is a contestable point, however, and will be the subject of further discussion in Part IV.D of this Article.

C. So Much Text, So Little Style

Unfortunately, the Constitution’s length and style leave much to be desired. Brevity is entirely absent—the text alone, not including protocols, declarations and other addenda, consumes 202 pages in the Official Journal. The principal reason is that in addition to the newly crafted provisions in Part I and the new subject matter in Part II, Part III of the Constitution largely retains the substance and particulars of the existing Treaties. One commentator has asserted that the text’s provisions are “hardly less complex than the treaties they are meant to supplant.”\textsuperscript{79} The Centre for Applied Policy Research has criticized “the opaque structure of the text as a whole and the resulting fact that the citizens will find it difficult to read and comprehend the Constitution.”\textsuperscript{80} Another observer

\textsuperscript{76.} The EURATOM Treaty would remain in effect \textit{see supra} note 32, although it would be amended by the Constitution.

\textsuperscript{77.} \textit{CONST.} art. 1-33. \textit{See also supra} discussion at notes 53–57 and in Part IV.D of this Article.


\textsuperscript{79.} Siedentop, \textit{supra} note 39, at 21.

\textsuperscript{80.} Janis A. Emmanouilidis & Claus Giering, \textit{Light and Shade—An Evaluation of the Convention’s Proposals, in CENTRE FOR APPLIED POLICY RESEARCH, EU REFORM, CONVEN-
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has characterized the document as “depressingly long and wordy,” containing too much “EU jargon” and “far too much detail to be easily intelligible to ordinary citizens.” A commentary has asked: “Did anyone test-drive the turgid, legalistic text with a sample of citizens from different backgrounds and different countries? This would soon have shown that this text is heavy and rather impenetrable.” One writer has decried the document’s “lack of Jeffersonian democratic artistry,” while another has caustically suggested that it possesses “the literary charm of an unhelpful set of instructions accompanying flatpack furniture.”

Succinctness and artistry aside, a significant challenge in working with the Constitution’s text is the fact that related provisions are scattered throughout the document, rather than presented together. This compels the reader to jump back and forth through the text, searching for articles relevant to a particular subject. The following section will highlight the most pronounced examples of this phenomenon.

IV. A CONFUSING TEXTUAL DIASPORA

The general categories of material that comprise the Constitution may be broadly described as preambles and statements of objectives, operating principles, institutional provisions, articles on the forms of EU legislation, and substantive provisions on human rights, the internal market and other matters. Textual fragmentation is found in each of these categories.

A. Preambles and Statements of Objectives

An initial observation is that the Constitution contains two preambles, one relating to the entire document and another introducing Part II. Both contain appropriately lofty statements that provide context and express intent, but it is not clear why two preambles are necessary. Both speak of common values and shared heritage, while respecting the differences in national cultures. Both emphasize the central role of the individual in society, the necessity for protecting human rights, and

81. Quentin Peel, Europe’s constitution misses its moment, FIN. TIMES, June 17, 2003, at 23.
84. A draft EU constitution that is far from satisfactory, TIMES LONDON, May 27, 2003, at 17.
respect for law. Important as these principles are, it seems unnecessary to state them twice. In addition, the function of the Part II preamble is not obvious. It apparently relates to Part II only, but its ideals might well be useful to interpret the entire Constitution. On the other hand, the preamble for the entire document is evidently intended to serve the entire text, including Part II, but it could also be argued that the more specific Part II preamble should supersede its more general counterpart with regard to interpretation of Part II.

Parts I and III do not have preambles as such, but they contain statements of objectives that serve a similar function. Title I of Part I is captioned “Definition and Objectives of the Union,” and it contains three provisions that express values comparable to those included in the preambles—equality, human rights, non-discrimination, and the rule of law. Likewise, Title I of Part III broadly requires the Union to act with consistency, promote equality of the sexes and certain social rights, combat all forms of discrimination, protect the environment and promote sustainable development, protect the rights of consumers, respect the welfare of animals, and behave with fiscal responsibility. While most of these articles expressly relate to Union activity under Part III, curiously two of the provisions are not so limited. An additional statement of objectives is Article III-292, which identifies many of the same values as principles to guide the EU’s external action.

None of the referenced provisions in Parts I and III contain sufficient detail to be qualitatively distinguishable from the preambles, and thus their purpose might be questioned. Their placement as textual articles is not explained, nor is it clear whether their inclusion in the text gives them more authority than similar statements in the preambles. Quite obviously, they could be included in the preambles, but they are not. As the above description demonstrates, the drafters of the Constitution have chosen a decidedly random approach in expressing the ideals for the Union.

85. CONST. arts. 1-2-1-4.
86. Id. at art. III-115.
87. Id. at art. III-116.
88. Id. at art. III-117.
89. Id. at art. III-118.
90. Id. at art. III-119.
91. Id. at art. III-120.
92. Id. at art. III-121.
93. Id. at art. III-122.
94. Id. at arts. III-120, III-122.
95. Id. at art. III-292.
B. Competences and Operational Concepts

The Constitution contains critical information about the powers assigned to the EU, and how the Union and Member States may function within the EU system. Finding this information, however, requires searching through various parts of the document.

The Union's competences are conferred by the Member States. This is a key concept that is described at several points in the Constitution. Its first expression is found in Article I-1, which states that the Constitution establishes the Union, "on which the Member States confer competences." The same provision requires the EU to pursue Member State objectives by exercising the competences conferred by the States. Article I-11 then reiterates twice that conferral is granted by the Member States. Implying conferral by the States without specifically mentioning them, Article II-111(1) links activities under the Charter with the limits of Union power "as conferred on it in the other Parts of the Constitution." Similarly, Article III-115 emphasizes that the Union must act under Part III "in accordance with the principle of conferring of powers." These repeated reminders of the conferral principle may be seen as nothing more than appropriate emphasis of the doctrine. Their placement, however, lacks a clear pattern, and, moreover, there are other references to conferral that confuse the issue by describing Union competences as being conferred by the Constitution itself rather than by the Member States.

Union action is restricted by the principles of subsidiarity and proportionality, and Article I-11 provides useful definitions of the two terms. Subsidiarity requires that EU action in areas outside its exclusive competence may be taken only if the Member States cannot effectively accomplish the intended objective. Proportionality limits any Union action to what is "necessary to achieve the objectives of the Constitution." Much more detail on the application of these principles is found in a protocol attached to the Constitution, and Article I-11 helpfully refers to the supplemental document. Article I-11, however, fails to mention another relevant protocol, also attached to the Constitution. This
additional document contains procedural details regarding the role of Member State parliaments in reviewing proposed legislation against the subsidiarity and proportionality requirements. 105

"Enhanced cooperation" is a procedure that permits groups of Member States to engage in joint activity, using EU institutions, when action by the Union as a whole is not possible. 106 Article I-44 of the Constitution offers a useful overview of the procedure. 107 Critical details are found in Part III, 108 however, and in this instance the drafters of Article I-44 helpfully included cross references to the related provisions. 109 But the Constitution does contain additional cooperative procedures that are not mentioned in Article I-44 or its Part III counterparts. For example, in the area of common security and defense policy, there are mechanisms created for "permanent structured cooperation" among groups of Member States who might act on the Union's behalf, 110 or "commitments and cooperation" among States for mutual defense. 111 One further cooperative measure is found in Part IV, in which the Benelux "regional union" is specifically approved. 112 Like enhanced cooperation, the mechanisms for permanent structured cooperation are introduced in Part I of the Constitution and elaborated in Part III. 113 Regarding commitments and cooperation on defense, Article I-41(7) refers not to Part III but to the Member States' obligations under NATO and under the United Nations Charter. 114

Another operational concept that is covered in both Part I and Part III of the Constitution is the financial and budgetary scheme for the Union. The provisions in Part I comprise a separate title, "The Union's Finances," 115 and they offer general principles for EU revenue and expenditure, 116 along with descriptions of the Union's financial resources, 117 the multiannual financial framework 118 and the annual budget. 119 The real

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105. Id. at arts. 1-4.  
106. For a description of the Convention's negotiations over enhanced cooperation, see NORMAN supra note 38, at 99, 117, 186, 242-43.  
107. CONST. art. I-44.  
108. Id. at arts. III-416-III-423.  
109. Id. at arts. I-44(1), I-44(2).  
110. Id. at art. I-41(6).  
111. Id. at art. I-41(7).  
112. Id. at art. IV-441.  
113. Id. at art. III-312.  
114. Id. at art. I-41(7).  
115. Id. at arts. I-53-I-56.  
116. Id. at art. I-53.  
117. Id. at art. I-54.  
118. Id. at art. I-55.  
119. Id. at art. I-56.
worth doing well

nour steps, however, are to be found in Part II, whose provisions are partially cross-referenced in Part I.

The foregoing examples illustrate the Convention’s apparent intention to use Part I of the Constitution to lay out the basic principles of how the Union is to act and under what authority it may do so. Unfortunately, the drafters have failed to include all of the relevant material in Part I or have failed to provide adequate cross references to related provisions in Part III.

C. The Institutions and Their Activities

Among the innovative sections of Part I, its Title IV provides an overview of the Union’s institutions. Article I-19 identifies the primary institutions and states their objectives, while ensuing articles offer basic descriptions of each body. Additional provisions deal with key matters such as the presidencies of the European Council and Commission, the new Union Minister for Foreign Affairs, formations of the Council and the revised system of qualified majority voting on the European Council and Council.

As a summary, Title IV of Part I is useful, but as governing text it is grossly incomplete. All of the following institutions or bodies are introduced in Part I, but with important details reserved for Part III: the European Parliament, the European Council, the Council, the Commission, the Court of Justice, the European Central Bank, the Court of Auditors, the Committee of the Regions, and the Economic and Social Committee. In addition, Part III contains provisions, not reflected in Part I, relating to the European Ombudsman and the European Investment Bank. Part III also contains a number of procedural articles affecting all of the EU’s institutions and other bodies.

120. Id. at arts. III-402–III-415.
121. Id. at arts. I-19–I-32.
122. Id. at arts. I-20, III-330–III-340.
123. Id. at arts. I-21–I-22, I-25, III-341.
126. Id. at arts. I-29, III-353–III-381. In addition to the Constitutional text, there is an extensive Statute of the Court of Justice. See Const. Protocol on the Statute of the Court of Justice of the European Union.
129. Id. at arts. I-32, III-386–III-388.
130. Id. at arts. I-32, III-389–III-392.
131. Id. at art. 237.
132. Id. at arts. III-393–III-394.
133. Id. at arts. III-395–III-401.
Furthermore, several protocols to the Constitution describe the functioning of the institutions. 134

Voting rules for the institutions are found in Parts I, III, and IV of the Constitution. For the European Parliament, its standard rule of majority voting is found in Article III-338, 135 although other rules may apply. 136 For the European Council, the requirement of consensus voting as the norm is found in Article I-21(4), 137 but other provisions permit decisions to be taken by less than a unanimous vote. 138 Article I-23(3) provides that the standard procedure for the Council is to vote by qualified majority vote, 139 but other voting rules may be found elsewhere throughout the Constitution 140 and in a draft decision of the Council. 141

135. CONST. art. III-338.
136. Certain special procedures may require less than a majority or a super-majority. Id. at arts. III-333 (one quarter of EP members may set up a Committee of Inquiry), III-340 (two-thirds vote to censure the Commission).
137. Id. at art. I-21(4).
138. Article I-25 provides two different formulas for qualified majority voting on the European Council. See text of note 52, supra. For situations calling for QMV, see CONST. arts. I-22(1) (election of the European Council President), I-27(1) (selection of the Commission President), I-27(2) (appointment of Commission), I-28(1) (appointment or removal of the Union Minister for Foreign Affairs), III-382(2) (appointment of the Executive Board of the European Central Bank). Abstentions by a member of the European Council will not prevent unanimous decisions from being taken. Id. at art. III-341(1). The European Council may adopt its own procedural rules by simple majority vote. Id. at art. III-341(3). It may also decide by simple majority whether to examine proposed amendments to the Constitution and whether to convene a new constitutional convention. Id. at art. IV-443 (2).
139. CONST. art. I-23(3). The voting formulas are found in Article I-25. Id. at art. I-25. See discussion in note 52 supra.
141. See CONST., Declaration on Article I-25. The draft decision, which will be adopted by the Council on the day the Constitution takes effect, permits three-fourths of a blocking
Worth Doing Well

Because of the described arrangement of the text, anyone studying the Constitution's institutional provisions must set Part I against the other parts of the document, including its protocols, to see the whole picture. In the case of voting rules, the normal procedures are found in various places, but the exceptions to those rules far outnumber the standards, and a careful search of the full text is necessary to determine whether one of the many exceptions might apply.

D. Legal Instruments

The Constitution's reduction in the number of permissible legal instruments, as outlined in Article I-33, appears on the surface to be a significant step toward simplifying EU law. A closer look, however, reveals that there are many other legal acts available to the Union. Herwig Hofmann offers a useful analysis, demonstrating that Article I-33 is by no means exclusive. He notes that the EU will continue to use delegated regulations, inter-institutional arrangements, and "soft law tools" such as "guidelines, vademecums, codexes, notices or circulars to Member State administrations." Furthermore, Article I-37(3) calls for "rules and general principles" for Member States to control the Commission's exercise of its delegated implementing powers, and the implementing acts of the States will themselves take many forms and be part of the system of Union law.

The Constitution also provides various types of direct EU action outside the normal scope and procedures of Article I-33, including: agreements between the EU and IGOs or third countries, budgetary and financial framework decisions, certain acts of the European Parliament, various forms of "coordinating, complementary or supporting minority (based on population or numbers of States in such a minority) to force the Council to reconsider a measure that has received a qualified majority vote. One commentator has noted that this is "an additional complicating factor" that may interfere with efficient Council operations. Giovanni Grevi, Light and Shade of a Quasi-Constitution—An Assessment 8 (EPC Issue Paper No. 14, 2004), available at http://www.theepc.net.

142. See supra notes 53–57 and accompanying text.
144. Id. at 3, 7.
145. Id. at 9–14; see also Const., at art. I-36.
146. Hoffman, supra note 143, at 17–18.
147. Id. at 7.
149. Id. at art. I-37(1).
150. Id. at art. III-317(2).
151. Id. at arts. I-54(3) (requiring Member State ratification), I-55(4) (permitting the European Council to change the specified voting procedures).
152. Id. at arts. III-330(2), III-333.
action,” and actions relating to the common foreign and security policy, common security and defense policy, and the area of freedom, security, and justice. Finally, amendment of the Constitution itself is subject to special procedures.

The European Union is a complex system, internally and with regard to its relationship with the Member States. The need for variety and fluidity in the forms of EU action is understandable, and the Constitution provides ample flexibility. The concern here is that Article I-33 suggests a simple approach that does not withstand closer scrutiny.

E. Fundamental Rights and EU Citizenship

Part II is the Constitution’s Bill of Rights, its great statement of fundamental human rights that must be guaranteed by and within the Union. But there are additional provisions on the subject. Part I has a title named “Fundamental Rights and Citizenship of the Union.” In it, Article I-9 requires the EU to recognize the rights expressed in Part II, and it calls for the Union to accede to the European Convention for the Protection of Human Rights (ECHR). It also incorporates as “general principles of the Union’s law” the fundamental rights arising from the “constitutional traditions common to the Member States.” The preamble to Part II then refers to these same sources of law and actually expands on them. It “reaffirms” the rights arising from the “constitutional traditions and international obligations common to the Member States,” the ECHR, “the Social Charters adopted by the Union and by the Council of Europe,” the case law of the ECJ and the case law of the European Court of Human Rights. It further states that Part II will be interpreted by the ECJ and Member State courts “with due regard” to certain “explanations” prepared by the Charter Convention, as later updated by the European Convention.

153. Id. at arts. III-278–III-285.
154. Id. at art. I-40.
155. Id. at art. I-41.
156. Id. at art. I-42.
157. Id. at arts. IV-443, IV-444, IV-445.
158. Id. at arts. I-9–I-10.
159. Id. at arts. I-9(1), I-9(2).
160. Id. at art. I-9(3).
161. Id. at pt. II Preamble (emphasis added).
162. Id. A logical question is whether these explanations should be treated as part of the Constitution itself, subject to amendment only through the elaborate process required to amend the Constitution. A difficulty presented in this analysis is the fact that the explanations themselves are prefaced with the statement that “they do not as such have the status of law.” Praesidium, Updated Explanations relating to the text of the Charter of Fundamental Rights, July 18, 2003, CONV 828/1/03 REV 1 at 2. For an analysis of this point, see Hofmann, supra note 143, at 20.
Closely related to "fundamental rights" are EU citizenship rights and principles of democracy within the Union. Article I-10 guarantees Union citizens the right to "move and reside freely" in any Member State, the right as a resident to vote and stand as a candidate in municipal and European Parliament elections, certain rights to diplomatic and consular assistance from any Member State and the right to deal with EU institutions in any official EU language.\(^{163}\) Part II repeats the grant of rights relating to voting and standing for election,\(^{164}\) and Part III, in its own title on "Non-Discrimination and Citizenship,"\(^ {165}\) contemplates additional Union legislation relating to citizens' rights.\(^ {166}\) An additional set of principles in Part I is entitled "The Democratic Life of the Union."\(^ {167}\) Once again, equality is demanded,\(^ {168}\) and citizens are offered access to the EU institutions,\(^ {169}\) transparency in institutional activities,\(^ {170}\) personal data privacy\(^ {171}\) and the assistance of an ombudsman to address grievances about the institutions.\(^ {172}\)

While the Constitution's guarantee of human rights is a positive development, its approach is highly complicated. Substantive provisions on individual rights are scattered throughout Parts I, II, and III, and there is considerable repetition among them, a situation characterized by one commentator as "pointless duplications."\(^ {173}\) Furthermore, the incorporation of the ECHR, constitutional traditions and international obligations common to the Member States, Social Charters of the EU, and Council of Europe, case law of two courts, and official explanations of the original Charter means that the text of the Constitution, however presented, is not the last word on the subject. Interestingly, Articles II-111–113 recognize the interplay among the various systems of rights, and they attempt to offer guidance in applying the different schemes.\(^ {174}\) Unfortunately,
these provisions are themselves complex, and it is likely that the European Court of Justice will eventually be called upon to determine the hierarchy of these various sets of principles and to sort out any inconsistencies in how they are worded.

F. The Internal Market and Other Subjects of EU Law

Consistent with the pattern established for other provisions, the drafters of the Constitution have utilized Part I to debut most of the substantive areas of EU action, while reserving the essential detail for Part III. These fields include: the internal market; monetary policy for the Eurozone Member States; economic and social policy; external action; common foreign and security policy; common security and defense policy; and "the area of freedom, security and justice." The elaboration in Part III largely mirrors the text of the Treaties on these subjects, and, as noted, the introductory references in Part I are unprecedented.

V. SUGGESTIONS FOR IMPROVEMENT

In broad terms, the Convention has taken the EC Treaty and TEU and combined them as Part III of the new Constitution. They have added

175. For example, the Charter usually refers to rights, but occasionally to principles, and the two can be combined. "[E]xamples for principles recognised in the Charter include e.g. Articles 25, 26, and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g., Articles 22, 33, and 34." Updated Explanations relating to the text of the Charter of Fundamental Rights, supra note 162, at 51. Article II-111(1) states that rights must be "respected," while principles must be "observed." CONST. art. II-111(1). Article II-112(5) then sets out to clarify the proper implementation of principles. Id. at art. II-112(5). One commentator has described the attempted clarification as "problematic" and "ambiguous." DOUGAN, supra note 173, at 3.


Part I as an overview of the Union and its competences and institutions, Part II as a bill of rights, and Part IV as a housekeeping section. Despite the real improvements mentioned earlier in this Article, is it really legitimate to describe this overall construct as a simplification?

From a drafting point of view, Part I is arguably the most problematic section of the Constitution. Ironically, it is offered as an easy-to-digest, inspirational introduction to the European Union, a succinct rendition of the EU’s components and characteristics. But in this attempt to make the Constitution more approachable and understandable, the drafters of the document have actually created a deception. Just as a movie’s promotional trailer may fail to reflect the true quality of the entire film, Part I’s sneak preview fails to reveal the full plot of the Constitution. Virtually every one of the provisions of Part I is amplified, clarified or limited by articles elsewhere in the document. Thus, the Convention has presented the European citizen with a set of basic statements, none of which can be relied upon without an exegetical foray into Parts II, III and IV.\textsuperscript{183} The unhappy conclusion is that this arrangement actually increases the complexity of the Constitution under the guise of simplification.

For years to come the Constitution will be scrutinized by experts in every field of Union activity. Concerns over institutional power and the intricate subtleties of substantive law will supply ample motivation for ever deeper analysis of the new document, coupled with suggestions for its amendment. It is beyond the scope of this Article—or any other single commentary, for that matter—to adequately describe the substantive successes or failures of the Constitution.\textsuperscript{184} However, given the pre-Convention demands for a clearer, simpler successor to the Treaties, and in light of the textual analysis in Part IV of this Article, two straightforward means of improving the Constitution’s text are offered.

\textit{A. Reeling in the Related Provisions}

The first suggestion is to eliminate as much of the textual fragmentation as possible. Related and overlapping provisions should be presented together, so the reader can have confidence that the presentation of a particular subject is relatively complete. Where competing considerations

\textsuperscript{183} Janis A. Emmanouilidis and Claus Giering have noted that Part I “is not enough to provide EU citizens with a clear-cut picture of the EU as a constitutional community,” and that “the rights, obligations, aims and limits of the European Union become apparent only after one has read more than 460 articles.” Emmanouilidis, supra note 80, at 3.

\textsuperscript{184} For a wide-ranging set of substantive improvements proposed by a group of academics for the July 18, 2003 draft of the Constitution, see The Federal Trust, \textit{Making it our Own—A trans-European proposal on amending the draft Constitutional Treaty for the European Union}, (May 2004), available at http://www.fedtrust.co.uk. For an overall evaluation of the final version of the Constitution, see GREVI, supra note 141.
necessitate that significant, related material be presented elsewhere, cross references should be used if possible.\textsuperscript{185} This process of regrouping related articles will create a felicitous side benefit, namely, the opportunity to eliminate redundancies and clear up inconsistencies.

Looking back to Part IV of this Article, the following are examples of how the Constitution might be rearranged to bring an end to the textual diasporas:

- The preambles and statements of objectives should be combined into a single preamble for the entire document.
- References to the conferral principle should be consolidated into a single article in Part I and thereafter reiterated only where necessary.
- The protocol on subsidiarity should be incorporated into Article I-11, and the protocol on the role of Member State parliaments should be brought forward into the text of the Constitution.
- The textual material on enhanced cooperation should be combined, preferably in Part I.
- The budgetary and financial provisions should be brought together, again preferably in Part I.
- All of the institutional provisions in Part III and the relevant protocols should be incorporated into the introductory articles in Part I.
- Exceptions to the standard institutional voting rules should be identified in a single article in Part I for each institution. For clarity, these references to special voting requirements may be repeated in the relevant articles in Part III, but a single initial list of these exceptions will present a more complete portrayal of how each institution operates.
- To account for the additional types of legal instruments beyond the new Basic Six, Article I-33 should be expanded to describe other means of action available to the EU institutions.
- Because of the symbolic importance of describing fundamental rights in a separate part of the Constitution, Part II should be retained, but the related provisions in Parts I and III should be incorporated into the Charter. Additionally, and more con-
troversially, the Charter should be given its full due, and references to the other sources of rights should be deleted. Critical principles from those other sources, if not currently found in the Charter, should be expressed as provisions of the Charter.

- The allocation of competences between the EU and the Member States should be retained in Part I, and this must of necessity include certain references to substantive areas of action. All other references to substantive matters, such as Articles I-40 to 42, should be moved to their related sections in Part III.

What emerges from the foregoing is a substantially expanded Part I of the Constitution, covering most of the institutional detail currently divided between Parts I and III. At the same time, the function of Part III is clarified—it becomes the substantive law section of the document. Parts II and IV remain relatively intact. The benefit of this approach is that the different parts of the Constitution will no longer overlap, but will have different purposes. Part I will describe in full detail the Union and its institutions. Part II will be a stand-alone Bill of Rights. Part III will cover all of the subjects of EU activity. Part IV will continue as a brief set of technical provisions.

The chief victim of this approach would be the putative stylistic elegance of Part I in its current form. This is a sacrifice well worth making. The sense of order resulting from this restructuring would bring the Constitution much closer to the people than do the streamlined but misleading introductory provisions of the current document.

B. A Streamlined Constitution—a “Basic Treaty”

The bolder approach would be to essentially retain Parts I, II and IV (amended as described in the preceding section) as the “basic treaty” contemplated in the Laeken Declaration, relegating most of Part III to the realm of legislation. Such an instrument would have the look and feel of the rearranged document described in the preceding section, but without many of the substantive provisions of Part III.

Critical features of the shortened Constitution would include the following:

- A single preamble or statement of objectives.
- Clear statements on conferral, subsidiarity, and primacy of EU law.

186. See supra text accompanying note 33.
• Delineation of competences granted to the EU and reserved to the Member States.
• Essential detail on the institutions, the EU legislative process, legal instruments, and the Union budget.
• A comprehensive list of exceptions to the standard institutional voting rules.
• The Charter of Fundamental Rights of the Union.

The obvious practical benefit of pruning most of Part III from the Constitution is that in matters where unanimity is not politically required it will not be necessary to suffer through the constitutional amendment process to change the law.\textsuperscript{187} Given the vast detail in Part III, its provisions will undoubtedly require constant fine-tuning as the Union continues to evolve,\textsuperscript{188} and the EU would be well-served to facilitate the necessary textual changes.\textsuperscript{189} A related benefit is that when the ECJ interprets Part III, the other EU institutions will more easily be able to override the Court by changing the law.\textsuperscript{190} As long as Part III is constitu-

\textsuperscript{187} The ordinary amendment procedure requires a constitutional convention or IGC, plus ratification by all of the Member States. \textit{Const.} art. IV-443. Even the streamlined procedures relating to Part III require either acquiescence by the Member State parliaments (objection by even one parliament will block the amendment) or affirmative ratification by all States. \textit{Id.} at arts. IV-444, IV-445.

\textsuperscript{188} For example, Roger Goebel has argued that the inclusion of complex and detailed provisions on economic and monetary union in the existing treaties is troublesome simply because even minor changes will be subject to the "time-consuming and cumbersome" treaty amendment process. Roger J. Goebel, \textit{European Economic and Monetary Union: Will the EMU Ever Fly?}, \textit{4 COLUM. J. EUR. L.} 249, 287 (1998). \textit{See TEU art. 48} for the existing treaty amendment requirements. Essentially all of the EMU provisions referenced by Goebel are retained in the Constitution.

\textsuperscript{189} Commentators Emmanouilidis and Giering have noted that removing the "non-constitutional" provisions from the document would "provide the EU with the ability to amend the latter on the basis of a less complex procedure." Emmanouilidis, \textit{supra} note 80, at 7. In a similar vein, columnist George Will has aptly observed that "[a] proper constitution does not give canonical status, as rights elevated beyond debate, to the policy preferences of the moment." George Will, \textit{EU should really study America's Constitution}, \textit{REGISTER GUARD} (Eugene, OR), Jul. 29, 2003, at A11. He adds: "The more detailed a constitution is in presenting particular political outcomes as elevated beyond the reach of changeable majorities, the more quickly it is sure to seem dated." \textit{Id.}

\textsuperscript{190} U.S. Supreme Court Associate Justice Stephen Breyer has commented that the EU's legislative processes, which should enable the EU institutions to override ECJ rulings, significantly restrict the ability of the institutions to respond. This is because ECJ decisions involving treaty interpretation can be set aside only by amending the relevant treaty. The problem, according to Breyer, is that "in light of the length and the detailed nature of the ECJ's 'constitution' (namely, the basic treaties), many more ECJ decisions will likely rest upon 'constitutional' grounds." Stephen Breyer, \textit{Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts}, \textit{21 CARDOZO L. REV.} 1045, 1053 (2000). The result is that "it is difficult for member states or other EC institutions to revise ECJ decisions with which they disagree." \textit{Id.} at 1052. Breyer compares this situation
tional, a simple legislative response to a judicial ruling on Part III will be impossible. Thus, whether to enable legislation to reflect changing times or to deal with an unwelcome court decision, a simpler amendment process seems imperative to permit the political will to be exercised efficiently at the EU level.

By including in the more abbreviated Constitution a full recitation of voting rules and exceptions, especially detailing those instances in which the Council must act unanimously, the delicate balance of power between the EU and its Member States would not be altered. This balance would also be preserved by continuing to require unanimity to amend the Constitution. Granted, any requirement of consensus either in legislation or in the constitutional amendment process may be a recipe for stagnation, but the point of this analysis is to suggest that the Constitution could be streamlined without upsetting the existing political applecart.

VI. CONCLUSION

To conclude this analysis, it is useful to recall the challenges posed in the Laeken Declaration and to gauge how the Convention and IGC have responded:

1. The challenge: “[S]implifying the existing Treaties without changing their content. Should a distinction between the Union and the Communities be reviewed? What of the division into three pillars?” The result: The two main Treaties have been melded, the substantive content has generally been preserved, and the balance of power between the

with the United States, where constitutional decisions of the Supreme Court are “very difficult to overturn” but where decisions on statutory or administrative grounds can be set aside by “only a new statute or reconsideration by the relevant agency.” Id.

191. See supra note 187.

192. Prior to the Convention, Commission President Prodi had warned that in an enlarged EU, a treaty that can be amended only by consensus might well become “fossilized.” Youri Devuyst, The European Union’s Constitutional Order? Between Community Method and Ad Hoc Compromise, 18 BERKELEY J. INT’L L. 1, 33 (2000).

193. It should be noted that there was discussion at the Convention regarding the drafting of a basic treaty. NORMAN, supra note 38, at 22, 63, 85. There were also proposals to relegate much of the Part III detail to a body of “organic law” falling somewhere between the Constitution and ordinary EU legislation. Id. at 66, 105. The Federal Trust group has commented on the benefits of a set of organic laws. The Federal Trust, supra note 184, at 26. Likewise, Herwig Hofmann comments that creation of organic laws would permit a shorter Constitution, but he also cautions that the new category might also “increase the overall complexity of the legal system.” HOFMANN, supra note 143, at 21. He also argues that removing the full detail of the Treaties from the Constitution would have weakened Member State influence over “a large range of matters.” Id. at 22. Neither approach was accepted, and the Constitution actually expands rather than contracts the text of the Treaties.

194. See supra note 33 and accompanying text.
Union and its Member States has largely been maintained. The Communities are replaced by the Union in all respects. The three pillars are also officially eliminated, although they have survived in spirit.

2. The challenge: "[T]he possible reorganisation of the Treaties. Should a distinction be made between a basic treaty and the other treaty provisions? Should this distinction involve separating the texts? Could this lead to a distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions?" The result: Although it may look like a basic treaty, Part I of the Constitution is part of, not separate from, the document. This Article contends that the extra text in Part I, as currently presented, actually creates more confusion than clarity. The new, somewhat simpler amendment procedures for certain provisions in Part III¹⁹⁵ are an exceedingly modest step.

3. The challenge: "Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights." The result: Both of these have been accomplished, but the overall treatment of human rights and their sources is unduly complicated.

4. The challenge: "The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?" The result: A constitution has been crafted, and it both preserves the Union’s values and maintains the sensitive political balance between the EU and its Member States.

Overall, it is incontestable that the Constitution is an improvement over the existing Treaties and that it has met many of the goals set at Laeken. Nevertheless, what of the broader goals of simplification and making EU law more accessible and easily understood? It is perhaps wishful thinking to expect that the average EU citizen could ever readily grasp any constitutional document, but can it not at least be more transparent? Can it not be more approachable to the person willing to make the effort?

Perhaps the blame for the ponderous nature of this document should be placed on the Convention process, which relied on separate working groups but lacked an influential style committee. Or it might have been a manifestation of the old adage: "If I’d had more time I would have written you a shorter letter." Most likely, however, it was the political necessity of finding acceptability among the greatest number of deci-

¹⁹⁵. See supra note 187.
sion-makers. Despite the innovative spirit that led to the drafting of Part I of the Constitution, the Convention displayed an inherent conservatism, a sense of caution that produced Part III with the look and feel of the existing Treaties. The competing spirits led to inclusion of both parts, and the result is not felicitous.

Given the difficulty of accomplishing dramatic change in the diverse and complex EU, it is only fair in the end to credit the Convention and the IGC for agreeing on any version of a constitution, regardless of its literary shortcomings. Nevertheless, despite the obvious successes of the venture, this Article has suggested that the Constitution is amenable to significant improvement without a major political shift. Although a shorter, basic document is appealing, even a mere rearranging of the current text would afford a meaningful gain. Perhaps all that is needed is more time. Whether in three years, or five, or ten, it will soon enough be necessary to amend the Constitution for reasons of substance and policy. In the meantime, interested scholars and politicians can quietly work together to create a stylistic makeover that can be widely tested for its political acceptability prior to the time for amendment. The people of Europe deserve a constitution that is well crafted. Creating such a document is a task worth doing.