WALTER HALLSTEIN-INSTITUT
FÜR EUROPÄISCHES VERFASSUNGSRECHT
HUMBOLDT-UNIVERSITÄT ZU BERLIN

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REQUIREMENTS FOR THE EMERGING EUROPEAN CONSTITUTION

Randi L. Goring
rg391@columbia.edu

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I. INTRODUCTION: CONSTITUTIONAL BEGINNINGS

Pennsylvania State House, May 25th, 1787. With guards stationed at the entrances of the building to keep out both press and public, the proceedings of the Constitutional Convention were opened. Although its stated purpose was to reform the current situation by giving the Continental Congress the power to regulate trade, many delegates understood the potential of the gathering: to give a new Constitution for the people of the thirteen sovereign and independent states of the Articles of Confederation. In the end, those who stayed did just that, and ratification by State conventions following the production of the document legitimized the gamble of those who wrote it.

But this is the story of a Constitution of the past, and the story of a Constitution for the European Union is one of the future. The Laeken Declaration acknowledges that the Union must be brought closer to its citizens, who call for a „clear, open, effective, democratically controlled Community approach" to responding to trouble spots in and around Europe and the rest of the world.[1] This challenge requires Europe to undergo reform, and presents the extraordinary opportunity for the debate on what, and how much, the Union should accomplish.

This paper identifies three major factors linked to the creation of a constitution: purpose, subject and acceptance, and using historical comparisons with other constitutions, in particular with the US Constitution, discusses these factors in relation to a Constitution for Europe.

Of course, it must be said at the beginning that the European Union is not trying to imitate the US model, but the founding of the US Constitution is instructive, in that its thirteen independent states voluntarily allocated certain sovereignties onto a newly-constructed higher level of governance. In contrast, the EU is not trying to build a „state" in the 19th century sense of the word, but rather to develop a means of legitimizing another level of governance, on the supra-national scale.

And legitimacy is the ultimate challenge of their task. The question is how an institution garners legitimacy, or in other words, acceptance. That is the main subject of this paper, which will try to illuminate the essential ingredients for the emerging European Constitution.

II. THE AIMS OF A CONSTITUTION

What is the purpose for writing a constitution? Is it a process in which rational, impartial framers try to contain the passions of future generations, for example, by slowing down the ordinary

[1] *Laeken Declaration* of 15 December 2001, cited on:
http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm.

legislative process with tools such as bicameralism and executive veto?[2] Traditionally, indeed, it is said that constitutions are to hinder their subjects from acting on whims: „Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy," said John Potter Stockton.[3] Others consider constitutions as for the protection of, for example, human liberties[4].[5]

There is another way to perceive a constitution: as a medium that creates a Nation. Carl Schmitt suggests that the French are not defined by their constitutions in the way that Americans are by the American Constitution. In other words, the French state was formed before the Revolution, in both institutional and non-governmental ways.[6] The „Americans," though, came into being only through their constitution. Hannah Arendt describes the Americans' view of their constitution as one of „reverent awe," that resembles „constitution worship," and attributes it to the remembrance of the act itself, i.e. of a people deliberately founding a new body politic.[7] This „beginning," and the myths that surround it, gives the public a point to which they can turn for a founding, and they thus fundamentally link the constitution with their nation.

Similarly, other scholars denote Americans' praise of their Constitution as expressions of „quasi-religious faith and patriotic sentiment," and argue „it is questionable whether such assertions even have the Constitution as their subject - they seem to use the Constitution as a symbol for the nation as a whole."[8] The Constitution can therefore function as the identity of a nation.[9]

What, then, would be the purpose of a Constitution for the EU? The reasons behind this undertaking are mainly practical. A European Constitution would reform the current structure of government in the EU and make it more transparent[10] to its citizens. It would also improve

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[2] John Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 380 (2000). [Hereinafter cited as *Arguing*.]

[3] John Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 382-3 (1995). [Hereinafter cited as *Forces*.]

[4] Jeffrey Seitzer, *Carl Schmitt's Internal Critique of Liberal Constitutionalism: Verfassungslehre as a Response to the Weimar State Crisis*, 10 CAN. J.L. & JURIS. 203, 222 (1997).

[5] This is evident, for example, in Art.79(3) of the German Basic Law, which forbids amendments that affect its protection of human rights or its basic institutional principles.

[6] Seitzer 219.

[7] Hannah Arendt, *On Revolution* (NY: Penguin Books, 1981), 204.

[8] Stephen M. Griffen, „Constitutionalism in the United States: From Theory to Politics" in *Responding to Imperfection*, Sanford Levinson, ed. (Princeton University Press, 1995), 37-8. [Hereinafter cited as *Constitutionalism*.]

[9] But there is a downside to having a constitution on too high a pedestal. From the beginning, James Madison thought amendments would be appropriate only on „certain great and extraordinary occasions" [Stephen M. Griffen, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2137 (1996), quoting Madison in *Federalist* No. 49, hereinafter cited as Griffen], and indeed constitutional change in America has been almost episodic. (Griffin 2159.) Interestingly, Franklin D. Roosevelt was also reluctant to alter the Constitution during his presidency: he thought it too dangerous, and that the Constitution „was better regarded as a document to be revered than changed in response to changing conditions." (*Id.* 2147.) If this is the idea of a constitution, i.e. one that is practically unalterable and yet unresponsive to changing conditions, then perhaps the American understanding of constitution-making is more than a single, tangible instance, but rather a process, preserved in an enigmatic and unwritten form. *See, e.g.* works by Bruce Ackerman.

[10] This is important for acceptance, because people fear what they don't understand. A more transparent system would

efficiency. The members involved in the Common Foreign and Security Policy (CFSP) already recognize the power of having all the nations speak with one voice. Tighter coordination would better enable the Union to achieve its goals, whether they be within its borders or on a global scale.

More importantly, however, the drafting of a European constitution would open up the window of debate. Europe doesn't just need to define its goals and its responsibilities to its public, but the public needs to evaluate its expectations from Europe. If this unification of Europe is to succeed, then it requires stronger support from the people of Europe, which they are not likely to lend without a greater say in where the Union is heading. After all, integration is to them not a value in itself. Thus, efficiency is needed to convince the citizens of the advantages of such a union; transparency, on the other hand, will persuade them that their will is taken seriously. Since the legitimacy of the EU rests on the support of its citizens, both goals are indispensable, and the ensuing constitutional discussion will intensify both the public interest in and the legitimacy of further European integration.

III. The Subject of the Constitution

The French Revolution of 1789 began with the people declaring that *they* were the nation, the representatives of the third estate, and that they wouldn't disband until they had erected a constitution. In this moment of declaring themselves the representatives of the nation, they created the nation itself – they were simultaneously the „Subject and Object" of the pouvoir constitué.[11]

But who were these People that made up the nation? The French defined themselves as sharing a common territory and a common will for political unity. The point is not that they existed as a people prior to the constitution, since their nation became manifest in the very moment of taking the political action of giving the constitution. This ideology celebrated the will of the people as the source of the nation.[12]

Contrast this with the German constitutional debates of the 1880s, where there was a tendency to link nation with language, ethnicity, historical and spiritual unity. The French model eluded the Germans, whose history of being split into different principalities set the stage for a different version of sovereignty.[13] Thus, the start of an ideological debate of whether a *Volk* is or isn't necessary to have a nation was determined, a debate which overwhelms discussion of constitution-making to this day.

The question of *Volk*, however, was of no interest to the American forerunners of Abbé

alleviate the perception of some that the Union is threatening their identity.
[11] Hasso Hofmann, „Von der Staatssoziologie zu einer Soziologie der Verfassung?" *Juristen Zeitung*, 11.1999.
[12] *See, i.e.* Hofmann 1070.
[13] *Id.*

Siéyès, and they made no distinction between pouvoir constituant and pouvoir constitué.[14] This theme is picked up in a positive light by Arendt, who describes how the Founders played up their diversity, and how for them the word 'people' retained the meaning of manyness, „of the endless variety of a multitude whose majesty resided in its very plurality."[15] Indeed, although the American Anti-Federalists turned to Montesquieu's critique that an extensive territory composed of varying climates and people could never be a single republic state, Madison insisted that the vastness of the country would itself be a strong argument for a republic, since it would counterbalance various the political interest groups vying for power. He saw diversity as a given, acknowledging in *Federalist* 10, „as long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed."

And were the pre-Constitution Americans already a *Volk*? Not really. They shared a common language and the majority hailed from England, but they also had a strong notion of state patriotism and a distrust of the other states (even without wars on the grand scale present in European history, this is not so surprising when one considers, for example, that Connecticut was founded when Massachusetts banned the religious heretic Roger Sherman). In fact, until 1787, Marylanders still called their state „the nation."[16]

A. A Special Type of Sovereignty

In their efforts to produce a new unity among the states, connected until that point only by what George Washington referred to as a „rope of sand," the Americans created a new interpretation of „sovereignty."

Using an analogy between constitutions and corporate charters, the American founding fathers redefined „sovereignty" to provide for a government that could be strictly bounded by its „charter" (i.e. fulfilling the „American conception of a constitution as a fence around, and not merely the frame of, government"), and for its boundary to be maintained by judges using agency law.[17] This was a sharp break from the British concept of complete sovereignty (i.e. parliamentary sovereignty) with „no gradations"[18], to one of a government of limited powers, where within the limitations of their charters, governments could be sovereign, but that this sovereignty was at the

[14] Schmitt comments on the American constitution-making with, „Das Volk gibt sich selbt eine Verfassung, ohne daß der allgemeine..."Covenant" von jedem anderen Akt der Konstituierung einer neuen politischen Einheit und von dem Akt der freien politischen Entscheidung über die eigene Existenzform unterschieden wurde." Carl Schmitt, *Verfassungslehre* (München: Duncker & Humblot, 1928), 78-9.
[15] Arendt 93.
[16] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, FN 100. [Hereinafter cited as *Sovereignty*.]
[17] *Id.* 1433-4.
[18] *Id.* 1431, quoting Samuel Johnson.

same time confined by the terms of its delegation itself.[19] Such a development took place with „considerable noise" in the great constitutional debates between 1763 and 1789.[20]

Thus the ultimate sovereignty resided in the People (long a Lockean concept), while at the same time relocating sovereignty from the Government, who became „servants" of the People, but were not the People themselves.[21]

But how could the People truly be sovereign without being able to run the day-to-day affairs of their government, how could the government command obedience, and would this not create a *imperium in imperio*? Once again, agency principles dictated that the People could act through agents, who could then compel obedience in the name of their principal, but who lacked authority to go beyond the scope of their agency.[22] And thus, the Americans established a government of limited powers, constituted by the People.

B. Federalism and Ultimate Power with the People

The people were the sovereign, then, but the federalists and the anti-federalists still had two different „Peoples" in mind: states rightists thought the People of each state were sovereign, and that the Constitution was not a sharp break with the Articles of Confederation, but that it simply clarified that sovereignty resided in state Peoples, not in state legislatures, as the Articles could have implied. Nationalists, though, thought the People of the US as a whole were sovereign.[23] Although this was a debate not finally settled until the Civil War[24], a closer look at the role of the States versus that of the nation, in a sense the centerpiece of American federalism, will illustrate that the very tension can be instrumental in retaining the ultimate power with the people.

Thus, was one „people" more sovereign than the other? Perhaps the most persuasive argument that the National *Volk* dominated the State *Volk* comes through an examination of Article V[25] of the US Constitution, which makes clear that a state people can be bound by a federal amendment even if that state people in a state convention explicitly rejects the amendment.[26]

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[19] *Id.* 1434-5.
[20] *Id.* 1436-7.
[21] *Id.* 1435.
[22] *Id.* 1436.
[23] *Id.* 1452.
[24] *See Id.* 1455-8 for a fuller discussion.
[25] „The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislature of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, *shall be valid to all Intents and Purposes, as Part of this Constitution*, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that….no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." (emphasis added) Article V.
[26] Akhil Reed Amar, *Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 485, 507 (1994). [Hereinafter cited as *Consent.*] The implications for this amendment are truly great: one can imagine that if the 38 least populous states ratified an amendment to the Constitution, the amendment would be valid, even if that's less than

Compare Article VII, which requires nine states for the ratification of the constitution, with Article V, which provides that ratification by conventions of three-fourths of the states will amend the Constitution in a way that binds non-ratifying States. Thus, Article VII recognizes the pre-existing sovereign right of the non-constitution-ratifying States to secede, while Article V abolishes that sovereign right for those that join the Union, and hence become part of the larger common sovereignty.[27] One scholar argues that in fact the purpose of Article V was to prevent secession: „The specter of imminent secession haunted their every thought."[28]

And yet, the States continue to play a role in the identities of their citizens.[29] In addition, the Tenth Amendment preserves the independent lawmaking authority of state governments, whenever a law is not inconsistent with the Constitution or with federal laws. Thus, state governments maintain a law-making authority in a power derived from the sovereign People.[30] In fact, the 10th Amendment suggests that the very division of delegated sovereign powers to two different agents, i.e. to the federal government and to the states, promotes the ultimate sovereignty of the people.[31]

An interesting example of federalist principles protecting first and foremost the people can be illustrated by a look at the Eleventh Amendment. Adopted to overrule the Supreme Court's judgment in the 1792 *Chisholm v. Georgia* case, where the court allowed the executor of a South Carolina merchant to bring an assumpsit action in the Supreme Court against the State of Georgia for breach of a war supplies contract, its language reads: „The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Does this then give the states „sovereign" immunity over the American People? No. Firstly, it would not oust jurisdiction that was independently grounded, i.e. in federal question or admiralty cases[32], but just restricts the Article III jurisdictional grants, i.e. for diverse party jurisdiction.[33] Hence this amendment doesn't grant state sovereign immunity, it just doesn't make the governments suable for anything and everything, as the Court's *Chishold* decision threatened to do, and which would be dangerous.[34]

In other words, the 11th Amendment bolsters certain powers of the States. This reasoning harks back to that of Alexander Hamilton in *Federalist* no.28, „Power being almost always the rival of

50% of the population. Elai Katz, 29 COLUM. J.L. & SOC. PROBS. 251, FN 28 (1996).
[27] *Sovereignty* 1462.
[28] Examples given in *Sovereignty* FN 162.
[29] David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 60 (1990).
[30] *Sovereignty* 1466.
[31] *Id.* 1492 and following.
[32] *Id.* 1475.
[33] *Id.* 1481.
[34] *Id.* 1490.

power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress."[35] Thus, the people can ensure that their rights are best respected by actually using the states as a counterweight to federal power, and vice versa.

1. The States Play their Role

The importance of the States is also reflected in the fact that the delegates who drafted the US Constitution were representing their respective States. The States had diverse interests and concerns, and only the so-called „Great Compromise" could resolve differences between for example, large and small states and between slave-holding and non-slave-holding states.

At the same time, the delegates of a state voted as a single bloc, but that did not mean that the delegates of a single state were of a single politic; it has been calculated that almost three dozen political factions were represented at the Convention.[36] Additionally, researchers report that the votes cast correlated with both the economic interests of the Framers and with those of their constituents.[37] Therefore, the US delegates exemplify that diverse backgrounds and motivations can still come together to produce one unifying document.

Yet although the *Records of the Federal Convention* show that „We the People" would have been „We the Peoples" if only the ratifying states were known in advance, several of the founding fathers used the new phrase to highlight instead the unity of the nation and its mandate from the people. As Hamilton writes in *Federalist* 48 „WE THE PEOPLE of the United States... Here is a [clear] recognition of popular rights..."[38]

2. The Case of the EU

As the EU stands now, it already has a public authority beyond the nation state level, which in turn intensifies the need for a more democratic, transparent system of governance to correspond to this structure.[39] Of course, national parliaments are an important part of the legitimization process of this multi-level power system. That is, the democratic legitimacy comes up from the people through their respective nation into the greater institution of a European government, and

[35] Quoted in *Sovereignty* 1494.
[36] *Arguing* 363.
[37] *See, e.g. Id.* 388.
[38] P.119 of *Federalist* 48, quoted in *Consent* 481. *See also* James Wilson and others.
[39] Ingolf Pernice, Franz C. Mayer and Stephan Wernicke, „Renewing the European Social Contract: The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism." WHI-Paper, 11.2001, 2.

then returns down to the national level again in the manner of policies that effect the citizens through the workings of their national parliaments.[40] Thus, the importance of smaller states and sub-states should not be overlooked, as they provide the access point between the people and their government.[41]

On a more character-related note, the individual states of the EU have their respective personalities, but the average citizen is at a loss to identify the „Face of Europe." A survey revels that less than 10% of Europeans know Romano Prodi's name, and of those who correctly responded, most live in Italy.[42] Europe, in other words, has no George Washington figure. The changes to result from the Treaty of Nice, however, will significantly strengthen the role of the President of the European Commission, and could thus be the start of a Mr. or Ms. Europe, which would help the people better identify with the EU. This is one point, though, that should be recognized.

Despite the lessons to be learned from the federalist experiment in the early founding of the United States, Europe does not want to be a federation or a confederation. Europe already has a name: a Union. And it is a Union constituting States and Peoples. This Union, however, does need to better coordinate its role as a governing body that is involved with specific concerns on the proper level (for example, on matters of the environment and terrorism – problems that do not restrict themselves to borders). Europe needs neither another loosely unified international organization like the United Nations, nor does it need further intervention „in matters by their nature better left to Member States' and regions' elected representatives."[43] To achieve this balance, then, Europe needs to determine its purpose and its subject, and adjust itself accordingly, a task it can achieve with an appropriate constitution. After all, as Peter Häberle points out, „there is only that much State, as has been constituted."[44]

C. Summary

Maybe the question, „did the US Constitution create the *Volk*?" would be better phrased, „did the Constitution create a national *Volk in addition to* the State *Volk*?" One could look to Madison, who would accept that neither the people of the state nor the people of the nation were

(Http://www.whi-berlin.de/) [Hereinafter cited as *Multilevel*.]
[40] Ingolf Pernice, „The Role of National Parliaments in the European Union." WHI-Paper, 5.2001, 12. (Http://www.whi-berlin.de/) [Hereinafter cited as *Role*.]
[41] *Multilevel* 2.
[42] 24.6.2002 Speech by Alain Lamassoure, European Parliament Representative to the European Convention.
[43] Laeken Declaration.
[44] Ingolf Pernice, „Der Beitrag Walter Hallsteins zur Zukunft Europas: Begründung und Konsolidierung der Europäischen Gemeinschaft als Rechtsgemeinschaft," WHI-Paper, 9.2001. [*See* http://www.whi-berlin.de/]

wholly sovereign, but rather that Article V embodied the precise division.[45] John Austin also recognized „joint sovereignty"[46], as well did Alexander Hamilton in *Federalist* 85, who acknowledged residual sovereignty retained by the states, arguing it would make national government more responsible.[47] Thus, as one scholar proposes, the states were actually the „central components of the constitutional concept of sovereignty."[48]

If indeed the founders could simultaneously conceptualize both a national and a state *Volk*[49], this has wider implications for other States looking to create constitutions. As in the case of 18th Century America, European sovereignty is in the hands of the people scattered amongst various states, and therefore does not exist as one, united „*Volk*." This does not mean, however, that legitimacy would be weakened because it is exerted by „peoples," rather they just represent a more organized level of the „people." Indeed, the „constitution-making power" could legitimize itself by its very establishment, in whatever form it chooses, as in a „normative power of the factual," as described by Georg Jellinek.[50] Therefore the subject of a European Constitution could well be the People of the Member States, exerting their sovereignty as people to form a supranational entity, and in the process creating a new identity as a unified People.

IV. LEGITIMACY

Political legitimacy has been described as the belief amongst the people themselves that they have a moral obligation to follow the rules and regulations of their regime.[51] Schmitt locates the legitimacy of this democratic model as when the power is that of the people[52], whereas Arendt emphasizes the importance of form: the authority of the US Constitution arose from the way and manner in which the delegates of power organized the process at the drafting and ratifying conventions. That is, this principle of „mutual promise and common deliberation" is for Arendt the foundation of later legal authority.[53]

In another analysis, the „American and French Revolutions [are said to] form the epicenter of what we today consider modern liberal constitutionalism," in that they both contain a core liberal commitment to limited government in service of individual liberty, although the definition of

[45] *Consent* 507.
[46] Dow 57.
[47] *Id.* 59.
[48] *Id.* 57.
[49] And the conclusion is mixed, *see Consent* 507.
[50] Hans Heinrich Rupp, „Europäische „Verfassung" und demokratische Legitimation," *Archiv des öffentlichen Rechts*. 120 Band, 1995, 269-275, 272-3.
[51] Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (NY: Foundation Press, 1999) 253.
[52] „[D]ie demokratsche Legitimität...beruht auf dem Gedanken, daß der Staat die politische Einheit eines *Volk*es ist." (Schmitt 90)
[53] *See* Arendt 204 and following; Andrew Arato, *International Conference on Comparative Constitutional Law: Contribution: Forms*

individual liberty changes over time[54] [55]. This is thus the argument that legitimacy is tightly connected with the protection of basic rights, or an „effect" that attributes legitimacy.[56]

Legitimacy also relates to the relevance of the text, to how it reflects the understanding of the people. When congratulated after the Philadelphia convention on the production of a constitutional text largely attributed to his drafting skills, Gouverneur Morris replied its worth „depends on how it is interpreted."[57]

Bruce Ackerman, though, sees the legitimacy of the US Constitution as related to time and endurance. He writes, „rather than the product of a magic moment at the ballot box, the Constitution gained its legitimacy from a complex dialogue between citizens and their representatives -in both established and transformative institutions- extending over months and years. It is only by sustaining public support in their long march through a broad variety of institutions, defeating their opponents time and again, that the Federalists earned their higher lawmaking authority."[58]

Finally, Hans Heinrich Rupp points out that the legitimacy of a constitution always comes back to its relation to „the people," for „…how can one esteem a constitution as democratic, if it does not stem from the *Volk*?"[59]

Thus, legitimacy is the product of numerous factors: organization, protection of human rights, relevance, the test of time, and political principles. How, then, can the European Constitution best earn its legitimacy? This paper takes for granted that its drafters will try to meet all of the above-mentioned aspects for an enduring constitution, and rather focuses on the actual public acceptance of the to-be-proposed document. Clearly in regard to this issue, ratification must be the leading actor.

A. Ratification

The view that the legitimacy of a constitution requires popular ratification[60] survived as part of the revolutionary tradition of the French Revolution, rather than Siéyès' view that only an assembly exercising „general will" is necessary.[61]

Across the ocean in America as well, Madison believed the Constitution and the

of Constitution Making and Theories of Democracy, 17 CARDOZO L. REV. 191, 209-10 (1995).
[54] Seitzer 222.
[55] The German Basic Law reflects this influence as well, with its core commitment to human dignity. *See* Supra Note 5.
[56] Seitzer 222.
[57] Murphy in Jackson, 254.
[58] Bruce Ackerman and Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 566-7 (1995). [Hereinafter cited as *Unconventional*.]
[59] Rupp 271.
[60] Adopted by, among others, Carl Schmitt. (*Schmitt* 90)

Constitutional Convention had no authority without ratification. He wrote in *Federalist* 40: „[The proposed Constitution] is to be submitted to the people themselves, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities."[62]

But why is ratification important? For one thing, constitutions seem to require second scrutiny, because they regulate the most basic aspects of political life, and because they are deliberately constructed to be difficult to change, i.e. requiring supermajorities for Amendments.[63] Ratification also holds the drafters in check (not wanting to be overruled, they might anticipate and feel constrained by possible censure).[64] This shadow of censure was apparent at the Federal Convention: before laying down a ratification process, the delegates assumed their work would be ratified by state legislatures, and so some tried to tailor it to be acceptable to the state legislatures.[65] Finally, this represents an act of good faith, and the chance for public discourse after viewing it in its entirety (particularly when there is still the option to change the proposal).[66]

Another question involves the relevant „ratify-er" of the Consitution: is it the „national People" or the „State People"? Some scholars argue that the US Constitution derived the sovereignty of one American People through its ratification clause.[67] Before ratification, the People of each state were sovereign, and thus could not be bound by the Constitution. Therefore, Article VII confirmed the pre-existing sovereignty of the People of each state by proclaiming that the Constitution would go into effect only between the nine or more states ratifying.[68]

In the case of post-war Germany, however, the Basic Law was ratified by the *Länderparlaments* in 1949, not directly through the public or through their representative conventions, but does this mean that the *Volk* were not included? That the Basic Law was solely an act of government? Not necessarily, since one could argue that when a constitution is made through a

[61] Arato 203.
[62] *See Consent* FN 157; Arato FN 43.
[63] *Arguing* 369.
[64] *Id.*
[65] The Constitution was eventually ratified after the Confederation Congress passed the proposed Constitution on to the States, and the States elected delegates to ratifying conventions, who approved the Constitution in more than nine states. This process could have broken down at any stage if enough citizens were convinced that the process was illegal. *Arguing* 370.
[66] Arato 227.
[67] *Sovereignty* 1459.
[68] *Id.* 1460. Here is where we should also note Arendt's argument that the founders wanted to preserve the States' power, since the people had already been organized into self-governing states that already established the People as the *pouvoir constituant*, and that the national constitution only „repeated...on a national scale what had been done by the colonies themselves when they constituted their state governments." Had the Federal Convention chosen to abolish state power, she argues, they would have lost their *pouvoir constituant*, and be thrown into a „state of nature" like the French. (Arendt 165) Therefore, the ratifying people of the US Constitution is twofold: they are the national people that has been instantaneously created by their ratification of the Constitution, and they are also another expression of People that already existed at the State level, just elevated onto a new level.

parliament, which is democratically elected and more open to democratic scrutiny than, say, the executive branch, it *is* an act of the public[69].[70] This means of ratification is probably not as satisfying for the People, however. A closer examination of the US example will illustrate why that could be the case.

The Federalist ratifying convention in America has been called an exercise in „quasi-direct democracy". „Direct", because it was focused on a particular, concrete proposal, but „quasi-direct" because the people did not cast ballots on the proposal, but for delegates who would deliberate on it further.[71] Yet the convention delegates still apparently had a clear sense of a „mandate" to go in a particular direction.[72]

Some say the ratification procedures in the US have a mixed record: Property requirements did not disqualify a substantial percentage of white male votes from casting a ballot, and a few states even suspended all property requirements for this special election. On the other hand, participation rates were „unspectacular": in only three states did voter turnout seem higher than the norm, and in four lower! Also, some elections were held in the dead of winter, so lacked the best turnout, and of course, women and slaves were denied voting.[73]

The public did, however, play a strong role in the ongoing debates, in town halls, pamphlets, and papers. They were passionate, evidenced by when the Federalist-dominated Pennsylvania Assembly lacked a quorum on Sept. 29 1787 to call a state ratifying convention, a Philadelphia mob, in order to provide the necessary numbers, dragged two anti-Federalist members from their lodgings through the streets to the State House, where the bedraggled representatives were forced to stay while the assembly voted.

And it is this very debate that is important: the citizens should be excited about their future and the future of the institutions that govern them. The ratification of the European Constitution, particularly by referendum, would thus offer the opportunity for discussion that the Union and the people need.

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[69] Arato 197.

[70] This issue of legitimacy arose again during reunification, questioning whether the Basic Law should be ratified in a popular election, and thus gaining it a popular legitimacy it supposedly lacked. However, a parliamentary commission on constitutional revision rejected this idea of a popular referendum, accepting the prevailing view among constitutional scholars that the 12 national elections in 40 years represented overwhelming popular support for the existing constitutional order and established the Basic Law's legitimacy. The GDR's voluntary joining of the Federal Republic under the Basic Law, i.e. giving its consent, and the subsequent confirmation in a March 18, 1990 election, was acknowledged as evidence of its acceptance among East Germans as well. Donald P. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke
University Press, 1997) 30-1.

[71] *Unconventional* 562-3.

[72] *Id.* 563.

[73] *Id.* 563-6.

1. Ratification must be Binding

> If individuals *enter into* [i.e. form through social compact] a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of [pre-existing] political societies *enter into* a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme *over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government...*[74]

It is important that the future European Constitution be ratified by its populace, even if some states were to reject it, which is highly possible. The Union should still go forward, however. In the US, for example, eleven of the original thirteen states agreed to go along with the new constitution by the summer of 1788, and North Carolina, who initially voted against the constitution, and Rhode Island had to come later. If further European integration is successful, the others will join, but the main point is that it cannot remain forever in its status quo situation, with gaps in its systems of transparency and efficiency, and even, in some cases, legitimacy.

The EU needs to „keep the motor running," so to speak, to challenge its citizens to accept a supranational identity and to convince them to support its goals. Ratification, especially referendums, functions as a catalyst for *Bewußtsein* and motivates the people. Thus, the debate will be the most important: in the case of the Philadelphia Convention, both the Virginia and the New Jersey proposals for a constitution were rejected (one was too centralized and one was too decentralized), and the delegates eventually decided on the „right" constitution for their land. Without such discussion, however, it would be questionable whether the public would have supported the ratification as an expression of a conscientious people, and the US Constitution might have lost the impetus of an interested public. Therefore, the debate itself is of great significance for the emerging European Constitution.

V. Conclusion

The current powers of the EU resemble those of the Articles of Confederation. These were, among others, the authority to act to resolve disputes between states, and the power to regulate the value of the money. In fact, EU is in an even more advanced position, since it speaks with one voice on foreign concerns, coins its money, sets tariffs, and it already allows freedom of movement and the reciprocal recognition of civil rights in each member state (the US Constitution had to specifically state this in Article IV). Additionally, around 80% of economic and social legislation in the Member States of the EU, and probably even greater percentage of environmental legislation, are already determined by the directives of the European institutions.[75]

[74] *Sovereignty* 1461, quoting Alexander Hamilton in the *Federalist* No.33.
[75] *Role* 5.

And like the Articles, some would argue that the member states of the EU are no longer able to meet certain challenges independently. This includes, for example, issues of security, climate change, international markets and terrorism. At the same time, national policies have an immediate impact on other states.[76]

Although European sovereignty exists currently in the Peoples of its member states and does not function as one, united „*Volk*," this does not mean that the People could not exert their sovereignty on a supranational level. Firstly, an examination of the US Constitution helps to disbunk the myths that a *Volk* is a necessary precursor of a constitution.

In addition, the „divided loyalties" (or maybe it's time to call them „multiple identities") of the newly minted US Citizens after the Constitution was ratified are an interesting approach to the concept of sovereignty. Not only did some of the founders recognize their dual identity as State- and Federal citizens, but some even thought such multiple identities would work to protect the people themselves, who could get the best of both worlds while playing each identity off against the other in an effort to procure their full rights.[77] Ingolf Pernice argues that Europeans already have created multiple identities to correlate to different levels of government[78] - they now need to formally correlate the government to their identities.

Europe already acknowledges that it must make its next move, and the prospect of the thirteen candidate countries waiting to join its Union should only hasten its efforts to better integrate and coordinate its current members. But Europe cannot go forward without the support of its People, who themselves have to evaluate their expectations for a supranational entity. The people want more efficiency, but they also want assurances that they can maintain their national personalities. These are problems, however, that can be addressed by a constitution that involves the public in a discussion over their needs and their identity and how to realize a balance between conflicts in sovereignty. When the debate is over, the immediate supporters will ratify and legitimize the new constitution, and the other nations will have to follow later, if at all. The public, though, has to determine the right shade of integration and the right equilibrium between nation-state and supra-nation. And only then can Europe realize its unity, as a unity of peoples and states, and as a unity without conformity.

[76] *Id.* 9.
[77] *See Federalist* No. 85.
[78] *Role* 10.