PROVIDING A CONSTITUTIONAL FRAMEWORK FOR WITHDRAWAL FROM THE EU: ARTICLE 59 OF THE DRAFT EUROPEAN CONSTITUTION

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I. INTRODUCTION

After almost 50 years in existence in a variety of different forms, the EU finally has an express proposal on the table dealing with the potential withdrawal of a Member State. Article 59 of the draft Constitution states that any Member State may now 'decide to withdraw from the European Union in accordance with its own constitutional requirements'.[1] The Member State would have to formally notify the European Council of this decision. The Council and the Member State would then enter into negotiations on a mutually agreeable basis for withdrawal, including a framework for the future relationship between the EU and the Member State. The results of this negotiation would require approval by a qualified majority of the Council after obtaining the consent of the European Parliament.[2] In any event, withdrawal would occur not later than two years following the notification unless extended by agreement between the Member State and the European Council.[3]

The inclusion of this draft Article impacts on the application of international law to the European Treaties.[4] The Vienna Convention on International Treaties does not permit a right to withdraw from any Treaty unless such a right is expressly stated in the Treaty itself.[5] However this presumption can be

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[1] See Art I-59 (1) of the Draft Convention: Conv 724/03 Annex 1 and see below for a fuller discussion.

[2] Ibid, Art I-59 (2). The State seeking to withdraw can take no part in the Council or European Council discussion or decisions concerning it.

[3] Ibid, Art I-59 (3).

[4] It should be noted that the EU represents a unique departure in international law and as such, the applicability or otherwise of the law of treaties may be moot, particularly given the view of the ECJ and the doctrine of supremacy discussed below, see in particular *Costa v ENEL*, ibid.

[5] Art 56 states: '1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw

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rebutted by evidence that the parties to the Treaty intended such a right to exist.[6] 'The problem [therefore] is essentially one of intention, but it is not an easy task to fix upon generally reliable signs of such intention.'[7] For example, the failure to replicate the limited duration of the ECSC Treaty in either the EEC or Euratom Treaties could be regarded as a sign that the parties did not intend for withdrawal to be possible; although no conclusion should be drawn of itself from the mere absence of a withdrawal clause.[8] As against this, one might argue that sovereign States would not have intended to abandon permanently and irrevocably their right to withdrawal without expressly so doing. This argument seems convincing, particularly with the passage of subsequent Treaties implementing closer and closer integration and centralized control between the Member States as the EEC has evolved into the current EU.[9] Equally this argument can be countered by another: Member States were aware of the ever increasing trend towards closer integration and the changing nature of the European project from simply a common market to a political union.[10] In the light of this, the failure to expressly confer a right of withdrawal demonstrates an intention that there should be no such right. The explicit statement of a right to withdrawal in Article 59 would at least remedy this uncertainty under international law, although only to the extent that the EU Treaties can be regarded as subject to international treaty conventions.

To date, no Member State has seriously entertained the issue of withdrawal,[11] although there is evidence of it receiving some attention from politicians, albeit not mainstream politics.[12] The convention on the future constitution of Europe now proposes an express right to withdraw from the EU in a manner which results in a number of ill-considered consequences. The primacy of the Member States' sovereign rights appear to be strengthened, but at what expense? Although the convention received a number of official proposals, none of the submissions resembles the current proposal. Indeed the current suggested provisions are a radical departure from the original draft provision in Article 46.

The issue of withdrawal, or secession, has been a constant issue in federations or unions[13] and it is surprising that with two obvious examples[14] and

from a treaty under para 1', Vienna Convention on International Treaties UN Doc A/Conf 39/28, UKTS 58 (1980) 8 ILM 679.

[6] Or the very nature of the Treaty implies such a right to withdraw: this does not seem relevant to the EU treaties.

[7] P Reuter *Introduction to the Law of Treaties* (London Pinter Pub 1990) 128, para 233.

[8] Waldock, YILC 1966, vol II, 250.

[9] In contrast, the relatively limited scope of the founding Treaties might lend itself more to the presumption that the parties did not intend for unilateral withdrawal rights.

[10] See, eg, *Crotty v An Taoiseach* [1987] ILRM 400.

[11] Although see the 1975 referendum in the United Kingdom on whether to remain within the EU. On a turnout of 64.5 per cent, there was a yes vote in the order of 67.5 per cent.

[12] See, eg, EU (Implications of Withdrawal) Bill [HL] 16 Dec 2000 in the United Kingdom.

[13] C Sunstein 'Constitutionalism and Secession' 58 U Chi Law Rev 633 (1991).

[14] The American Civil War arose over the attempted secession of southern states from the

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copious secondary legal resource material, the Convention opted for a provision that demonstrates few of the lessons a comparative survey of international jurisprudence should have produced. This article aims to examine the current position within the EU before summarizing the comparative lessons from North America and the former Soviet Union on the issue of secession or withdrawal. Finally, the article posits the true options open to the Convention and critically analyses the current proposal in the draft Constitution.

II. THE WITHDRAWAL OF GREENLAND

The Union of course has already had to deal with the issue of withdrawal, specifically the departure of Greenland.[15] Although there are undoubtedly parallels between the withdrawal of Greenland and any mooted withdrawal of a Member State, there are also sufficient differences that render the procedure utilized in the case of Greenland somewhat questionable, if not in theory, then at the very least in a practical sense. Nonetheless, it is proper to discuss in some detail the particular circumstances surrounding this event.

Greenland is loosely attached to Denmark through an historical process that binds States together in ways that are not readily apparent. Greenland was for a long time a colony of Denmark until, through constitutional amendment in 1953, it officially became part of Denmark, its citizens enjoying equivalent rights with those of their Danish counterparts and having two elected representatives in the Danish parliament. However, the experiment in direct rule was relatively short lived and in 1979 the Greenland Home Rule Parliament was created. Part of the pressure for Home Rule undoubtedly arose from the fact that although Greenland had voted in 1972 against joining the European Union, Denmark had voted to accede to the Union and consequently Greenland was obliged to follow suit.[16] Greenland has a population of around 55,000 of which less than 8,000 are Danes, the remainder being Inuit. The establishment of the Home Rule Parliament began the creation of a rolling evolutionary devolution where substantially more and more power was devolved to the people of Greenland,[17] with Denmark taking a radically reduced role in the governance of the island. By 1982, the Danish role in the governance of Greenland had been sufficiently diluted to enable a referendum to be put to the people whereby Greenland would withdraw from the European Union. Greenland voted in favour of such withdrawal and the European Union

Union and the issue of Quebec's potential departure from the Canadian federation has long been to the forefront. In addition, closer to home, the ending of the Soviet Union might also prove instructive.

[15] See generally, F Weiss 'Greenland's withdrawal from the European Communities' (1985) 10 EL Rev 173.

[16] See generally, Kramer 'Greenland's European Community referendum, background and consequences' 25 GYIL 273 (1982).

[17] See Act No 577, 29 Nov 1978.

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gave effect to the wishes of the people through unanimous agreement by the Council.

The mechanism used was relatively simple. First, Denmark entered a request to the Council to permit Greenland to withdraw from the EU and to move to OCT status through Treaty amendment.[18] This request was submitted to the Commission and then to the Parliament for consultation. The Commission duly reported favourably with regard to the proposal[19] and so did the Parliament, although there was a minority within the Parliament that objected to the relatively easy concession of withdrawal afforded Greenland.[20] The Council then sought practical proposals from the Commission with respect to fishery issues that the Commission duly supplied.[21] The Member States then unanimously passed the necessary amendments to the Treaty removing Greenland from the EU and conferring OCT status upon it, coupled with specific agreements with respect to fisheries.[22] The relevant Article empowering the withdrawal, or so called Greenland Treaty, was Article 236 EEC whereby Member States can consent to alteration or amendment of the existing Treaties. There are a number of key issues in this process. First, the power to amend the Treaty lies within the Member States. Second, the Member States consulted the other institutions of the EU before exercising their rights. Third the process was unanimously agreed to by all the Member States. Finally, the agreement to permit withdrawal was closely allied to the establishment of a new relationship with the EU so that withdrawal appears to automatically infer the need to agree the shape of the new relationship.

The European Union did not seek in any way to thwart Greenland's desire to withdraw[23]—quite the contrary, it yielded significant concessions to Greenland; in particular it conferred free trade rights on Greenland without any requirement that they be reciprocated on the part of Greenland. It did however execute separate agreements with respect to fishing rights, a significant interest for both Greenland and the EU.

OCT status has existed within the EU almost since its foundation.[24] Many Member States, through their colonial history, have acquired 'associated territories' that, while not part of the Member State proper, are their responsibility in terms of defence or foreign affairs or even currency. Classic examples can be seen in the Isle of Man and the Channel Islands in the United Kingdom. Their relationship to the Member State, and consequently their relationship to the EU are accordingly somewhat ambiguous. Specific protocols have been enacted to deal with these specific relationships and the whole system is now

[18] Bull EC Supp 1/83, 6.
[19] COM (83) 66 final.
[20] EP Doc 1-264/83, 17.
[21] COM (83) 593 final, para 3.
[22] OJ L 29 (1 Feb 1985).
[23] Although the parliamentary minority did raise objections, see ibid.
[24] Currently OCT status is to be found in Art 182–8.

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governed by the general rubric of Article 182–188 of the consolidated Treaty. Essentially this confers a special status on the associated territory, now known as an Overseas Country and Territory.

The experience with Greenland is unique and although the lessons to be drawn from the events provide some guidance to the secession of a Member State, there are sufficient differences to warrant the imposition of strong caveats for analogous use. First, special arrangements applied to Greenland from the accession of Denmark in 1973. Secondly, Greenland was not a Member State which seceded but essentially the re-definition of the State of Denmark through internal home rule. It required no alteration of the voting arrangements for Denmark, nor their representation at the EU institutions. The population 'loss' had no impact on the delicate balance of democratic representation within the EU either in Parliament or Council. Thirdly, geographically Greenland is disconnected with Europe, both spatially and by way of race. Finally, any attempt to prevent the departure of Greenland would have involved serious inferences with respect to past European colonialism which simply on the balance of interests would auger against any Member State attempting to derail the withdrawal.

However, some lessons can be learnt with respect to the procedural withdrawal of Greenland. First, it is clear that the unanimous agreement of the Member States facilitated the speedy and non-contentious withdrawal of Greenland from the EU. This approach reinforces the primacy of the Member States with respect to Treaty amendment. However, it also reinforced the notion that withdrawal would require the agreement of *all* the Member States. And this leads us onto the second element: Denmark chose not to attempt any unilateral withdrawal of Greenland but instead sought approval from its fellow members. If ever there was an argument for unilateral withdrawal rights, Greenland must have presented it. Far removed from Europe, with a predominantly non-European population, a consistent track record rejecting membership of the EU and the overtones of colonialism, Denmark could have easily justified simply acting on its own. Indeed there was a risk that the other Member States might have rejected the application. Opposition to Greenland's withdrawal existed within the Parliament. By Denmark subjecting itself to the wishes of the other Member States, it may be that they made an important concession generally with respect to withdrawal far beyond that of Greenland. Finally, Denmark appears to have retained its general role during the discussions, although presumably this reflects the limited nature of the withdrawal as distinct from precedent for any putative full Member State withdrawal.

III. THE CURRENT POSITION WITHIN THE EUROPEAN UNION

The current European treaty provisions are silent on withdrawal of a Member

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State, although the Treaties do provide for their perpetual existence. That EU law prevails in any conflict over State law, including State constitutional law, is well established.[25] The so-called doctrine of supremacy is entirely judicial and arises from the decision in *Costa v ENEL*.[26] In that case the European Court of Justice held that EU law would prevail over a subsequently enacted State law. Although there is no supremacy clause similar to that in the US constitution,[27] a doctrine of supremacy is required to ensure that the objectives of the Treaty are attained uniformly.

It is interesting to look at an extract from *Costa v ENEL*, to gain a clear insight into the courts approach:

> By contrast with ordinary international treaties, the EEC [EU] has created its own legal system which . . . became an integral part of the legal systems of the Member States and which their courts are bound to apply.
>
> By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.
>
> It follows that . . . the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be over-ridden by domestic legal provisions, however, framed, without being deprived of its character as Community [EU] law and without the legal basis of the Community itself being called into question.
>
> The transfer by the States from their domestic legal system to the Community [EU] legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[28]

By its very nature, a State that seeks to secede from the EU would undertake actions which conflict with EU law and since EU law is superior to State law, the State law is overturned. Legally speaking therefore secession is impossible, since the cumulative effect of the lack of an express process of

[25] See generally, K Alter *Establishing The Supremacy Of European Law* (Oxford OUP 2002).
[26] Case 6/64 [1964] ECR 585.
[27] Art VI, US Constitution: 'This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' It should be noted that Art 10 of the EC Treaty does impose an obligation on Member States to ensure the fulfilment of the Treaty objectives and to refrain from measures jeopardizing these objectives.
[28] Case 6/64 [1964] ECR 585, 590.

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secession, when coupled with the doctrine of supremacy, would negate any State act to withdraw from the EU.[29]

The doctrine of supremacy however asks the courts of each Member State for divided loyalties, and in the case of a conflict to see themselves as courts for the EU, in reality a federalization of the national courts. It would seem therefore that a federal jurisdiction has come into being with clear rules on supremacy and which appear on the surface to prevent any departure, or at least unilateral departure, by a Member State from the EU.

The reaction of the English courts to the Court of Justice doctrine of supremacy is interesting. The traditional doctrine of Parliamentary supremacy results in the lack of any substantive judicial review.[30] Joining the EU meant that United Kingdom courts had to accept the doctrine of supremacy. Although not required for the doctrine of EU supremacy, a doctrine founded exclusively within the EU and not dependant upon any State measure, the accession of the United Kingdom to the EU is legally enacted in the European Communities Act 1972 and subsequent legislation. The relevant section reads as follows:

> s. 2(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom, shall be recognized and available in law, and be enforced, allowed and followed accordingly . . .

All EU law and doctrines are thereby incorporated into domestic law within the United Kingdom, including supremacy. In the *Factortame*[31]case Lord Bridge of Harwich stated:

> If the supremacy of Community [EU] law over the national law of Member States was not always inherent in the EEC [now EC] Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community [EU]… Under the terms of the [European Communities] Act 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule national law found to be in conflict with any directly enforceable rule of Community [EU] law . . .[32]

[29] Although see the discussion of international law above, n 2.

[30] For a common law perspective outside of the United Kingdom, see Massey 'The Locus of sovereignty: Judicial review, legislative supremacy and Federalism in the constitutional traditions of Canada and the United States' [1990] Duke LJ 1229.

[31] *R v Secretary of State for Transport, ex parte Factortame Ltd* [1991] 1 All ER 70 (granting of interim relief—an injunction—against the operation of a State law which was in conflict with a Union law).

[32] Ibid, at 84.

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These comments appear to indicate, contrary to EU law, that this position is based on the statute and not EU jurisprudence. In *McCarthy's*,[33] Lord Denning supports this view:

> If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms, then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.

In the so-called *Metric Martyrs* case in the Court of Appeals, involving the penalizing of street trades for violating the metrication laws and selling their produce in imperial measurements (pounds and ounces) which they had been doing for many years, Laws J for the court, dismissed their appeal and stated:

> In my judgment (as will by now be clear) the correct analysis of that relationship involves and requires these following four propositions. (1) All the specific rights and obligations which EU law creates are by the ECA incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation. (2) The ECA is a constitutional statute: that is, it cannot be impliedly repealed. (3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes. (4) The fundamental legal basis of the United Kingdom's relationship with the EU rests with the domestic, not the European, legal powers. In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law. But that is very far from this case.

The die is therefore cast. The current situation consists on the one hand of the European Court of Justice with a doctrine of supremacy which would appear to make an act of secession unlawful and some State courts expressly abrogating to their States the right to determine their relationship with the EU, including the right to unilateral withdrawal.[34] It would seem highly appropri-

[33] *McCarthys Ltd v Smith* [1979] 3 All ER 325 (case concerning interpretation of equal pay legislation to be determined on traditional common law rules of interpretation—plain meaning—or on the basis of Union intent. Held: Union intent took priority over plain meaning).

[34] The approach of Member State courts is not limited to that of the United Kingdom, the UK has simply been significantly more honest and open around the discussion. Similar difficulties with secession are to be found in the jurisprudence of other Member States, in particular France; see *Administration des Douanes v Societe Cafes Jacques Vabre & J Weigel et Cie SARL* [1975] 2 CMLR 336; Union Democratic du Travail ADJA (1980) 40 (22 Oct 1979); Societe Bernard Carant (27 Apr 1988—noted in Sixth annual report OJ (1989) C 330/54); Cohn *The Conseil d'Etat: continuing convergence with the court of justice* 16 ELREV 144; Roseren *The application of Community Law by French courts from 1982 to 1993* 31 CMLREV 315; Boisdet [1991] 1 CMLR 3; Decision No 92-554 of 9 Apr 1992, JCP 1992. J 162 Rev gen Dr int'l pub 1992.507; [1993] 3 CMLR 345, paras 21852–4; and Art 88 of the Constitution.

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ate that in drafting a putative constitution for the future Europe the issue of secession should be dealt with directly and forcefully.

IV. A COMPARATIVE ANALYSIS

A. The North American Experience

1. The United States of America

'No government proper ever had a provision in its organic law for its own termination.'[35] So said Abraham Lincoln, albeit faced with the prospect of a potential secession from the United States by the southern States on the issue of slavery. 'Perpetuity is implied, if not expressed, in the fundamental law of all national governments . . .'[36]

Of course this view was not universally held within the America of the mid-1800s: the southern States felt that they retained sufficient national sovereignty to withdraw unilaterally from the Union. In essence, southern secession was based on principles similar to those that had underpinned the 'secession' of the thirteen colonies from the United Kingdom less than 100 years earlier. Specifically, the right to secede from the Union arose whenever the rights of the States were being egregiously trampled upon. The intervention by the national government in local matters, particularly the economic concept of slavery, was deeply resented by the southern States.[37]

The argument of the southern States was founded upon their existence as independent States, and the right to assert that independence when the Union was acting contrary to their interests. The former was based on the theory that the thirteen colonies were independent States at the time of the formation of the Union, or at the very least on securing independence from the United Kingdom. Although there is some argument, there was much authority that supported the southern view of their existence as independent States prior to

[35] First Inaugural Address (4 Mar 1861), reprinted in TH Williams (ed) *Selected Writings and Speeches of Abraham Lincoln* 117 (Chicago Packard 1943). For Lincoln's own views including his contradictory belief in the right of revolution, see Presley 'Bullets and ballots: Lincoln and the right of secession' (1962) 67 Am Hist Rev 647; Abbott 'The Lincoln Propositions and the Spirit of Secession' (1996) 10 Stud Am Pol Dev 103.

[36] Above, n 6.

[37] Almost all of the Declarations of Causes by the confederate States complained about federal breaches of constitutional obligations and limits. The national government was cited for 'dangerous infractions of the Constitution'. In the case of Texas they stated: 'By the disloyalty of the Northern States and their citizens and the imbecility of the Federal Government, infamous combinations of incendiaries and outlaws have been permitted in those States and the common territory of Kansas to trample upon the federal laws, to war upon the lives and property of Southern citizens in that territory, and finally, by violence and mob law, to usurp the possession of the same as exclusively the property of the Northern States.' At <http://members.aol.com/jfepperson/reasons.html> last visited 6 Nov 2002. See also <http://www.cwc.lsu.edu/> last visited 6 Nov 2002.

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their admission to the Union.[38] The latter issue was based upon the expression of the citizens of their States and in particular a list of grievances that accused the federal government of, inter alia, 'disloyalty and imbecility'![39] A large number of States accordingly purported to withdraw from the Union and establish their own confederacy.[40]

Neither the south nor the north sought prior resolution of the dispute through the judicial process. In retrospect the federal forces would presumably have had more to fear from a judicial decision from courts that, since *Marbury v Madison*,[41] had become quite activist. Moreover, the judiciary themselves were split on the issue of slavery and might, in the spirit of compromise to avert war and maintain some semblance to the Union, have been willing to imply rights into the Constitution that had not been expressly stated.[42]

In only one case does the issue appear to have been addressed and then it was addressed retrospectively when secession was no longer a practical option. In *Texas v White*[43] the court was required to deal with the impact of Texas' formal act of secession. The facts of the case are relatively simple. Texas sought an injunction in a federal court restraining the defendant from using Texas Indemnity Bonds issued after secession for the payment of Confederate supplies. The central question was whether the plaintiff (the State of Texas) had authority to bring suit against the defendant in a federal court. At issue was whether Texas was a State of the Union or not. On the argument of the defendants, Texas' act of secession had terminated its position as a State of the Union, and until Texas was in compliance with the provisions for reconstruction, it could take no legal action in the federal courts. Plaintiff disagreed, arguing that the Union was effectively indissoluble. On 15 April 1869 the court in a 5 : 3 decision offered judgment in favour of Texas. In the words of Justice SP Chase:

> By [the Articles of Confederation] the Union was solemnly declared to be perpetual. And when these Articles were found to be inadequate to the exigencies of

[38] Under the Treaty with Great Britain ending the War of Independence dated 3 Sept 1783, Her Majesty's Government in Art 1 recognizes the thirteen colonies as 'free sovereign and independent States', although this may have been a tactic by Great Britain to set up a divide and conquer scenario, which partially came true in the civil war as Great Britain sided, albeit in a limited way, with the confederacy. See generally Berger *Federalism, The Founders Design* (Norman, OK University of Oklahoma Press 1987) for a counter argument, that the original thirteen colonies were not States and therefore do not predate the United States.

[39] Above n 9.

[40] South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Texas, Virginia, Arkansas, North Carolina, Tennessee, Missouri, and Kentucky.

[41] 5 US (I Cranch) 137, 2 L Ed 60 (1803).

[42] See Amar 'Of sovereignty and federalism' (1987) 96 Yale LJ 1425.

[43] 74 US 700, 724–6 (1869) (the putative secession of Texas from the Union ruled unconstitutional based on an interpretation of the federal Constitution which constituted a waiver on the part of the states, including Texas, of the right to secede). See also A Reed Amar 'Some New World Lessons for the Old World' 58 U Chi L Rev 483, 501–2 and n 68 (1991) (discussing secession); D Currie *The Constitution in the Supreme Court: The First 100 Years 1789–1888* (Chicago, IL University of Chicago Press 1990).

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> the country, the Constitution was ordained 'to form a more perfect Union'. It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union made more perfect is not?[44]

The court did however go on to rule that while the Union was perpetual, the States were also guaranteed rights of perpetual existence and self-government, within the Union.[45] Thus there can be no question of States ceasing to exist within the Union, or within the confines of the constitution, not exercising their right to self-government. *Texas v White* therefore legally upholds the perpetual and irreversible nature of the Union although it throws a knowing glance at State rights. Although for most the issue is now resolved, secession movements are still in existence, both in Hawaii and California,[46] but from a legal and practical point of view, withdrawal from the United States is simply not an option.

2. Canada

The Anglo-Canadian analysis of the American civil war was that the national government was weak when compared to the rights and powers of the component States. This could be easily remedied in the British North America Act, since the establishment of autonomous provinces within a federation would be a conferral of power as distinct from the ceding of power of an existing State. The intent of the British North America Act was first, to provide for strong national government and second, to provide sufficient protection to the French minority to ensure stability in a region which might cause difficulties in the future, Quebec.[47] The British North America Act sought to achieve this through the conferral of extensive power on the national government in Ottawa,[48] while providing for the protection of the minority French culture in Quebec. Subsequent amendments over time modified the original constitutional provisions, treating the constitution as a laboratory experiment that needed altering as the circumstances required.

By the1960s however, there was a significant disparity of wealth between Quebec and other more prosperous elements of Canada. During the 1960s Quebec began to assume more and more local power in an effort to revitalize

[44] Ibid. This use of 'perpetual' in the precursor Articles of Confederation also provided a strong basis for an implicit concept of indissolubility referred to by Abraham Lincoln in his inaugural address, see n 35. Of course the phrase 'to form a more perfect Union' and the perpetual nature of the entity being created are concepts familiar to European lawyers.

[45] Ibid.

[46] See websites such as <http://www.freehawaii.org and www.calrepublic.tripod.com>.

[47] In more recent times, this view has been contested, see R Vipond *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany, NY State University of New York Press 1991); J Smith 'Canadian Confederation and the Influence of American Federalism' (1988) 21 Can J Pol Sci 443; GB Baker 'The province of post confederation rights' 45 University of Toronto LJ 77 (1995).

[48] Although not necessarily creating a strong national identity.

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its francophone economy. In fact, at the request of Quebec, the Canadian government had changed the British North America Act to reduce substantially the role of the national government and to strengthen the power of the provinces.[49] With this emerging economic success, deep-seated nationalist leanings for Quebec independence came to the fore and acquired a political legitimacy.[50]

In 1995 a referendum which sought to establish a separate Quebec outside of Canada but with a continuing economic and political partnership secured a vote of 49.5 per cent in favour, perilously close to the 50 per cent required under the Quebec rules. The close result stunned the federal government who sought to bring legal clarity to the issue of Quebec. The Canadian Supreme Court has the power to consider hypothetical questions on the constitutionality and interpretation of federal or provincial law. Although not legally binding, these references have considerable moral authority in that they carry the substantial legal weight of the court. The issue of unilateral secession was certified to have sufficient potential to disrupt public order that it required a ruling from the Canadian Supreme Court.[51]

There were three questions which the Court was asked to resolve. First, did Quebec have the right to unilateral secession under the Canadian constitution? Secondly, did Quebec have an international right to unilateral secession based in international law rights of self-determination? Finally, if there were a conflict between the Canadian Constitution and international law, which should prevail?

The Canadian Constitution is silent on the issue of provincial secession.[52] The Court however reasoned that if the majority of people in any province sought to secede from the federation, then as a democratic nation, the expression of the will of the people could not be ignored.[53] Both Canada and the province would have to enter into negotiations to give effect to the democratically expressed wishes of the people. There is therefore an inherent right to secede from the federation based on the democratic nature of Canada. However, this right was subject to two conditions. First, there had to be a clear majority in favour of a clear question on secession. Secondly, that secession could only take place following negotiations involving all of Canada.

[49] Changes included the withdrawal, or restriction, of national government from, inter alia, provincial control, foreign relations, equalization payments and fiscal control. The British North America Act has been repatriated to Canada as its constitution under the Canada Act 1982 Eliz c 11 (UK). Quebec failed to ratify this newly repatriated constitution.

[50] See generally, D Latouche *Canada and Quebec, Past and Future: An Essay* (Toronto University of Toronto Press 1986); E Mcwhinney *Quebec and the Constitution 1960–1978* (Toronto University of Toronto Press 1979).

[51] Reference re Secession of Quebec from Canada (1998) 161 DLR (4th) 385.

[52] See P Hogg *Constitutional Law of Canada* (4th edn Toronto Carswell 1997) at 5-30–5-37.

[53] See generally Rayfuse 'Reference re secession of Quebec from Canada: Breaking up is hard to do' 21 UNSW LJ 834 (1998); D Mullan 'Quebec Unilateral Secession Reference: A ruling that will stand the test of time' (1998) 9 Pub L Rev 231.

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Unfortunately the meaning of the term 'clear' is of course itself not clear! Depending on who is arguing, a clear majority could be anything beyond 50 per cent. Or it could require something significantly more, say 66.6 per cent. The better view is that the phrase 'clear majority' must mean something more than simply 50 per cent but exactly how much beyond this remains unknown. However, such a requirement for a higher majority rather than a simple majority is not unusual in constitutional questions, but the vagueness now inherent in Canada is unsettling.

What constituted a 'clear question' was more squarely dealt with by the Court. The Court rejected any claim that the 1995 referendum provided a 'clear' question to the people of Quebec. The referendum did not ask for secession. Instead it offered something that Quebec was in fact not able to offer: an alternative relationship with Canada. If the question is to be clear, it must be put to the people straight: remain in Canada or leave. Only if the people vote by a clear majority to leave would the issue then fall to be negotiated.

The Court ruled that unilateral secession was not possible. Secession would require negotiations with all of Canada. Secession of any one province would impact not merely on the withdrawing province but on all the provinces left behind and the Canadian nation as a whole. The interdependence of the provinces would require a new accommodation. A democratic wish to secede would bestow only a multilateral right to secession. The democratic wish to secede therefore is merely a point of departure, not an ending.

Finally, the Court held that a province did not have a unilateral right to secede based on the international right to self-determination. Under international law, all peoples have the right to self-determination and States are bound to respect that right. However, since the provinces are democratically represented both at provincial and national level, they did not constitute a 'people' endowed with the right of unilateral self-determination under the principals of international law. The Canadian ruling therefore was not in conflict with any right under international law of self-determination that might have given the people of Quebec the right to unilateral secession.

Both sides could take comfort from the ruling. For Quebec, a legal right to secede had been established for the first time, albeit the subject of restrictions. For Ottowa, the right to secede could only be exercised with the approval of the remaining provinces: Canada can only change composition if all of Canada agrees. In contrast to the results of their neighbour's actions, the Court produced a very Canadian result, with victory for all in some measure.

3. A Critique of North America as a Comparator

The use of the North American models as comparators is, like the issue of Greenland, also subject to considerable caution. In neither the US nor Canada was there the amalgamation of independent States similar to that of the EU.

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Secondly, for both the US and Canada the goal in drafting their constitutional constructs was to establish a single nation, albeit divided up among component elements. The EU had no such initial objective but emerges as a mechanism to provide for economic free trade. Only later, incrementally, does the issue of closer political integration emerge. Finally, by the time the issue of secession arises in both the US and Canada, they are already fully functioning federal States, having long ago made that choice. Thus putative withdrawals have to be seen in that light. The EU may currently stand on the brink of federal statehood, but it is by no means certain that it will take that fateful step and even if it chooses to do so, it may be some time before one can truly draw an analogy between such a federal union and that of either the US or Canada. Nonetheless, there are benefits to be earned from studying the North American experience, particularly in deciding whether or not the EU should move towards federal statehood. The strict limits on withdrawal, an absolute prohibition in the US and federal control in Canada, indicate a possible way forward if the EU is to achieve deeper integration.

B. The Former Union of Soviet Socialist Republics

1. History

The Union of Soviet Socialist Republics came into being in 1922.[54] Pursuant to the 1977 Constitution, the USSR was 'an integral, federal, multinational [S]tate formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics'.[55] The USSR was conferred specific jurisdictional powers under Article 73 but the Union republics retained control over all other issues[56] and also had the power to enter into treaties with other States and organizations and to establish diplomatic relations internationally.[57]

An express power to withdraw from the USSR was conferred by Article 72, which stated: 'Each Union republic shall retain the right to freely secede from the Union' thereby re-adopting Article 17 from the former 1936 Constitution of the USSR. However, no process was outlined as to how such a withdrawal might take place. Indeed it is unlikely that this Article was ever intended to be anything other than window dressing designed to maintain a charade of voluntary association to the USSR. However, by the mid 1980s, attempts by the then President Gorbachev to reform the communist bloc unleashed a wave of popular revolt within the union republics.

[54] Originally there were four Union republics: Russia, Ukraine, Belorusa, and the Transcaucasian Federation. This would later rise to a total of fifteen Union republics.
[55] 1977 Constitution of the USSR, Art 70.
[56] Ibid, Art 76.
[57] Ibid, Art 80.

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The three Baltic States of Latvia, Lithuania, and Estonia in particular wanted full independence from the USSR, and similar sentiments quickly emerged in the other Union republics. On 11 March 1990 Lithuania declared independence from the USSR giving rise to Soviet military intervention. As the communist party lost power to the nationalist parties in democratic elections throughout the Union republics, it became clear that the USSR as then constituted could not survive. However, an all-USSR referendum indicated significant support for the continuation of the USSR, albeit in a different form. A revised arrangement was proposed that would strengthen the powers of the republics but retain a common foreign and defence policy under a common President. However, a failed coup by the communists in August 1991 effectively ended the ability of the USSR to control the pace of events. Latvia and Estonia declared unilateral independence from the USSR. The USSR recognized the independence of the Baltic States in September of 1991. On 1 December 1991 the Ukraine voted overwhelmingly in favour of independence from the USSR.

On 8 December 1991, Russian President Boris Yeltsin signed the BelaVezha Agreement[58] stating that 'the Soviet Union as a geopolitical reality [and] a subject of international law has ceased to exist'. It is clear that the BelaVezha Agreement was of dubious legal standing. While all three States had the power to secede, they did not have the power by themselves to determine the future of the USSR. However, subsequent events were to render this a moot point. The Agreement further announced the creation of a new entity—the Commonwealth of Independent States (CIS). On 21 December, eleven of the remaining twelve Union republics signed a Treaty joining the CIS.[59] This agreement was more carefully worded, stating that the creation of the CIS meant that the USSR effectively ceased to exist. President Gorbachev resigned on 25 December but was not replaced. On 26 December the Supreme Soviet Court officially dissolved the USSR with effect from 31 December 1991.

2. An Analysis of the USSR as a Comparator

The de facto position in 1977 on the adoption of the last USSR Constitution was that no Union republic would ever be permitted to withdraw. Although such a power existed in a de jure sense, it was thought to be of little value. As the monopoly of power enjoyed by the communists eroded, claims for independence became more realistic. It should be noted however that not all were willing to use the de jure power to withdraw from the USSR. The Baltic States believed that their accession to the USSR had been an illegal act and consequently their independence is not really based upon Article 72

[58] Meeting between the Presidents of Russia, Belarus and the Ukraine. See text in (1992) 31 ILM 138.

[59] The so called Alma–Ata Summit, see above, n 57 for text. See also, SA Voitovich 'The Commonwealth of Independent States: An emerging institutional model' (1993) 4 EJIL 403.

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but on a unilateral act of the rights of free people.[60] Moreover, there is little evidence that the dissolution of the USSR was much affected by the presence of Article 72, nor that it would have been different in the absence of Article 72. It was clear that the USSR, even towards the end, sought to continue its existence through military means,[61] despite the de jure right of withdrawal. However it no longer had effective military power to achieve this. In reality the USSR dissolved because all the Union republics, including the core Russian Federation, wanted it so. The dissolution of the USSR therefore represents an interesting example when all the parts of a federation wish to see its dissolution; but it has little to offer in procedural or substantive terms when a single State seeks to withdraw from such a federation. It would provide however an interesting comparison for the dissolution of the entire EU and the re-establishment of fully autonomous States, although even here the process was somewhat hasty and the lesson may be what to avoid rather than what to emulate.

V. THE CONVENTION SUBMISSIONS

A. Introduction

The European Council at its meeting in Lacken established a European Convention to investigate the future development of the EU, including drafting a new European Constitution.[62] While most attention was focused on institutional and jurisdictional reform, the issue of withdrawal had not been entirely overlooked, although it has not been given the sort of attention that logically it deserves. Withdrawal mechanisms fall into three principal categories: State primacy, federal primacy, and federal control.

State primacy confers an absolute, immediate, and unilateral right for a Member State to withdraw from the federation. Although such models do exist, they are rare. State primacy generally indicates a significant lack of commitment between the parties. Thus the existence of such a federation normally ceases after a relatively short period of time or the federation becomes so disconnected as to cease as a de facto, albeit perhaps not as a de jure, entity.

Federal primacy would prohibit absolutely any Member State withdrawal, effectively making membership a one-way valve. Federal primacy is the American model, although one which emerged through force of arms in that context.

[60] The Declaration of European Community Foreign Ministers 27 Aug 1991 (Brussels) refers to the 'restoration of sovereignty and independence of the Baltic States'.

[61] See the situation in Lithuania, referred to above.

[62] The so called Lacken Declaration, accessible at <http://european-convention.eu.int/pdf/LKNEN.pdf > last visited on 8 Apr 2003.

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Federal control on the other hand recognizes the Member State's sovereign right to withdrawal but makes it dependent upon negotiation among the other elements of the federation and establishes withdrawal as a mutually negotiated activity, requiring the approval not merely of the Member State seeking to withdraw but also the approval of those Member States left behind. This is the Canadian model.

Surprisingly, few submissions were made to the Convention on this important area. However, the submissions made to the Convention reflect all three of the potential models outlined above. In the draft Constitution from Professor Dashwood of the United Kingdom, and submitted by the Right Honorable Mr Peter Hain, Minister for Europe of the United Kingdom,[63] Article 27 would confer an absolute right of withdrawal on every State following notification to the Council.[64] Withdrawal would therefore be exclusively a matter for the Member State. No State requires permission to withdraw since this is one of the retained sovereign rights of the Member States.[65] Of course withdrawal would necessitate internal institutional re-adjustments including modification of the Constitution through unanimous action of the remaining Member States acting in consultation with Parliament.[66]

On the other hand, in advocating potential models,[67] M Lamassoure indicates that in a federal re-organization of the EU, the rule should really be: once a member always a member.[68] However, this federal approach, not merely in the sphere of secession but more globally, is rejected,[69] as is the confederal model[70] and instead reliance is placed on a hybrid version. Ultimately, M Lamassoure settles on a 'community' model, which would be one where each Member State has the right to withdraw but subject to strict and deterrent conditions.[71]

[63] Although it should be noted that the submission does not carry either the support or agreement of Her Majesty's government.

[64] Submission by Peter Hain (UK) of draft Dashwood treaty on Union by Professor Alan Dashwood: at <http://register.consilium.eu.int/pdf/en/02/cv00/00345en2.pdf> last visited 28 Oct 2002.

[65] Ibid, at 49.

[66] Although Dashwood indicates in the commentary that the exact role of the Parliament might be enhanced, for example requiring its assent to any such modifications, see ibid, at 49.

[67] Conv 235/02.

[68] Ibid, at 6—although it is not strictly true to say that a federal form of government automatically has to prohibit secession. K Wheare *Federal Government* (Oxford OUP 1963) 85–7 (a right to secede is consistent with a federal system of government). Of course permitting secession must be seen as a last resort if the political will to work through problems is to be sufficiently focused.

[69] Ibid, at 8. The federal model is rejected as being one unlikely to be acceptable to the people of Europe. Essentially the argument is that while the people of Europe are supportive of the component parts of the Union, they may balk at a model that would present these component parts as a whole.

[70] Ibid, at 6. The confederal model is rejected as being unworkable as the Union enlarges. The argument is that the confederal model would greatly exacerbate the current difficulties of the Union as the number of States increased, in particular it would enlarge the democratic deficit, reduce accountability, heighten conflict between States and so forth.

[71] Ibid, at 12, this would be much closer to the Badinter formulation, see n 45.

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In the submission of M Robert Badinter, the issue of secession is dealt with in Article 80 of his draft proposal.[72] While Member States would retain ultimate secession powers, these could be exercised only with the agreement of the EU. No withdrawal could take effect until the European Council had agreed to an effective date. That agreement would presumably be dependent upon satisfactory negotiations to accommodate the withdrawal. Withdrawal therefore is not merely a matter of internal reorganization, but a matter of substance for the EU, dealt with by either agreement or court imposed rulings. Compensation would have to be paid for any loss arising to the EU, although it is unclear what this loss would cover or how it would be calculated. The Badinter formulation leaves a host of issues to be resolved and would probably indicate a powerful role for the Court of Justice in any putative withdrawal but it comes closest to that of Article 59.

VI. THE DRAFT CONSTITUTIONAL PROVISION ON WITHDRAWAL

As we have seen above, the Convention settled on draft Article 59. The specific wording of the provision is as follows:

> *Art 59.1*: Any Member State may decide to withdraw from the European Union in accordance with its own constitutional provisions.
>
> *Art 59.2*: A Member State which decides to withdraw shall notify the European Council of its intentions; the European Council shall examine that notification. In light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State setting out the arrangements of withdrawal taking account of the framework of its future relationship with the Union. That agreement shall be concluded on behalf of the Union by the Council of Ministers, acting by a qualified majority, after obtaining the consent of the European Parliament.
>
> The representative of the withdrawing State shall not participate in Council of Ministers or European Council discussions or decisions concerning it.
>
> *Art 59.3*: The Constitution shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement, or failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, decides to extend this period.
>
> *Art 59.4*: If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 57.

Into what category of withdrawal therefore can we place this proposal: State primacy, union primacy or union control? A surface reading indicates that it is somewhat of a hybrid. Arguably it most closely resembles that of

[72] Submission by M Robert Badinter at <http://register.consilium.eu.int/pdf/en/02/cv00/00235en2.pdf> last visited on 28 Oct 2002.

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State primacy. It is modified however because although the Member State has a *unilateral* right to withdraw, it does not have an *immediate* right to withdraw. A Member State that wishes to withdraw must spend two years attempting to negotiate the terms of that withdrawal. Only after this period has passed will the provisions of the European Constitution cease to apply to the withdrawing State.

With respect, it is submitted that the proposal has been ill-thought out and would result in significant difficulties. The issue needs to be addressed first at the general level of principle and then, having selected which principle applies, the provisions should establish a clear mechanism that would facilitate the general principle. The convention appears to have undertaken neither analysis.

Any proposal for withdrawal must deal with a number of issues, both substantive and procedural. Substantively, the proposal should give effect to the underlying basis on which withdrawal is to occur. In particular it should leave no doubt as to the locus of authority for withdrawal, either the Member State or the EU. Procedurally, the mechanism should be clear and unambiguous, creating an architectural framework upon which the stakeholders can reorganise their affairs in the event of a withdrawal. Resolving the substantive issue requires a significant policy choice but relatively simple terminology. On the other hand, the procedural issues present relatively straightforward policy choices but require complex provisions to ensure that questions as to the exact parameters of the withdrawal procedure do not arise during any putative withdrawal. Uncertainty as to process is the last thing one would need during what would obviously be a tense time for the EU. How then does the current proposal measure up against these criteria?

With respect to the substantive policy choice proposed by the Convention, a surface reading would indicate that it has elected for State primacy. However, there are a number of issues that may give pause for thought. First, the State right to withdraw is subject to the requirement that it be in accordance with its own constitutional provisions. Since the draft European provision would be justiciable by the ECJ, this insertion has catapulted that court into the role of final arbiter of a significant issue of national constitutional law, something not previously attempted within Treaty provisions. If a dispute arose as to the validity of the national decision to leave the EU, the question as to whether or not the decision was constitutionally made would fall ultimately to the ECJ. It is also unclear as to whether the withdrawing Member State appointee to the European Court of Justice would participate in any judgment surrounding the withdrawal itself? The difficulties raised in *Gore v Bush*[73] would pale in comparison to the potential difficulties that could arise under this surprising drafting.

[73] 531 US 2000.

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Secondly, not only does the wording give State primacy, it actually appears to give de facto *State control* over the process of withdrawal. Admittedly this occurs as much as a result of deficiencies in the procedural aspects of the provisions as from any substantive policy choice, as we shall see below. Nonetheless, there is an important policy choice that follows from such a proposal. Not only does the Member State have the right to unilaterally withdraw from the EU, but by simply refusing to negotiate the terms of withdrawal, it can hold the threat of withdrawal over the EU, knowing that whatever happens, after 2 years withdrawal will take effect in any event. This would certainly enable the larger Member States to control the process of withdrawal to their own benefit, perhaps even using the threat of withdrawal to force concessions from the other Member States knowing that any putative withdrawal could itself be withdrawn before the two years have expired.[74] Smaller Member States would be unlikely to be so indulged. Thus at a policy level, there appears to be a move towards State control for certain States, although not for others.

Procedurally the provisions are incomplete and unclear. During the difficult period that would surround any putative withdrawal, one would expect a constitution that would provide clear and unambiguous answers in as many situations as possible.[75] Yet these provisions leave many questions unanswered. Can the notification of withdrawal itself be withdrawn during this 2-year period? Although the representatives of the withdrawing Member State on the Council are expressly prohibited from taking part in the vote or discussions regarding the putative withdrawal, it seems as if they continue to participate and engage fully in all other decisions of the Council, including those which would be of significance in the soon to be altered relationship between the EU and the Member State. The provisions prevent Council members from the withdrawing Member State from taking part in the discussions or decisions surrounding the withdrawal, but it remains silent with respect to the role of parliamentarians from that Member State in securing the consent of Parliament. Can these members vote? Or be heard in the discussions? Should a judge of the ECJ or CFI continue to hear cases, particularly de novo, between the notification and effective date for withdrawal?

Moreover, the departure of any Member State would significantly alter the operation of the institutions of the EU. Swift and rapid constitutional amendment would be required to accommodate these changes. Any Article on withdrawal should contain such expedited provisions to enable the EU to accommodate to the profound changes that it would be facing. The current proposal is silent and presumably relies therefore upon the ordinary constitutional amendment provision which, it is submitted, is ill-suited to the specific

[74] See the procedural analysis below.

[75] The Opinion of the Commission on the Draft Constitution in its entirety states that there are 'some imprecise and ambiguous wording', see COM (2003) 548, at 4.

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needs which arise on withdrawal.[76] As currently constructed, the withdrawal of one Member State would have a destabilizing effect on the remainder of the EU and set off what could constitute a whole new round of renegotiation of the terms of the EU constitution.

Any putative constitution should methodically and rigorously provide for a procedural framework for withdrawal, yet Article 59 is conspicuously deficient in this regard.

VII. CONCLUSION

The proposed system of delayed withdrawal threatens both the withdrawing State and the stability of the very EU itself. If State primacy is the objective, then it needs to be immediate, with express consequences for the withdrawing State. State primacy automatically requires that one is either entirely in the federation or entirely outside. One cannot have a half-way house. Where is the incentive for negotiation when withdrawal will occur in any event? The Dashwood proposal was logically consistent: withdrawal happens instantly, there is no forced negotiation as to its terms. Although that proposal failed to deal with a number of other issues, it was theoretically sound. The current proposal does not appear to be.

Perhaps more damning of all is the Convention's failure to deal with the larger principle involved. State primacy, no matter how you organize it, favours larger States in a variety of ways. First, the mere threat of withdrawal from a large State carries more weight than that of a smaller State. Thus State primacy provides extra leverage for the larger States when compared to the currently uncertain position, yet it provides little for the smaller States. Secondly, larger States are more likely to realistically withdraw from the EU with only a modest impact on their economies, yet with profound impact on those smaller States left behind. Thirdly, larger countries will be able to negotiate relatively advantageous terms of withdrawal as a practical matter. Their economies will carry more significance to the EU as a substantial trading partner. Finally, the larger States have more significant representation at most levels of the institutions of the EU, their loss will be more keenly felt, the culture more sympathetic in dealing with withdrawal when compared to smaller States who will have had a proportionately smaller impact on the institutions.

In reality, State primacy is only feasible where a federation is loosely connected and the departure of a participant will not be disruptive in a significant manner. The current levels of integration in the EU, from the common currency, to common trade, fiscal and international commercial policies, indi-

[76] Note that the Commission Opinion on the Draft Constitution criticizes the unanimity requirement for constitutional amendment, see COM (2003) 548.

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cate that as a practical matter, no Member State could withdraw from the EU without detailed and complex negotiations with its former partners.

The interconnected nature of the modern EU with a common currency, a system of central banks, convergent fiscal policies, convergent taxation policies, a free internal market, common areas of consumer and environmental protection, competition policy and State aid regulations clearly indicates that the withdrawal of any Member State would require new mechanisms and adjustments for the conversion of an internal member of the EU to a third party. Although this might vary considerably depending on the identity of the withdrawing Member State, it should be clear that some sort of compensatory fund might have to be established for those internal States affected by the withdrawal. Moreover, some sort of monitoring and oversight committee would be desirable to ensure compliance with any transition measures following the negotiated agreement. Although the composition and duration of such entities could only be addressed following the negotiations, certainly their structure, general competencies and legal status could all be dealt with in the relevant provision.

What was needed therefore was a provision that would spell out in detail the mechanism for such negotiations and the status of the withdrawing Member State and its representatives and employees in all EU institutions during the negotiation period and an expedited mechanism to allow for alteration of the Treaty provisions for those left behind. In adopting a European constitution, more thought needs to be expended on the framework for withdrawal from the EU. In that regard, draft Article 59 provides the departure point for discussion, but is nowhere near a destination for an actual framework.

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