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Is constitutional finality feasible or desirable? On the cases for European constitutionalism and a European Constitution

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Abstract

This paper inquires into the nature of constitutionalism in the European Union and exposes its character as distinctly different from at least some of the descriptive and normative approaches to a “constitution for 2004” that currently proliferate. The paper portrays constitutionalism as a subtle and intrinsically ambiguous balancing process, using the evolution of the EC legal order as an illustration of the wider pattern according to which the exercise and perhaps the very nature of State power in Europe has been moderated without the need to superimpose a new but geographically larger State at European level. This leads to anxiety that the pursuit of “constitutional finality” is capable of imperilling the very foundations of the system, by robbing it of its adaptive character.

1. Introduction

This paper takes as its starting point the mood that favours “constitutional finality” as the leitmotif of the next round of EU Treaty revision. The paper is *not* designed as a commentary on the intricacies of the papers lately presented to the Convention, nor even as a blueprint for the Convention. Rather, it stands back from the particularities of the Convention process. The paper inquires into the nature of constitutionalism in the European Community and the wider Union and exposes its character as distinctly different from at least some of the descriptive and normative approaches to a “constitution for 2004” that currently proliferate, both inside and outside the Convention. The paper portrays constitutionalism as a subtle and intrinsically ambiguous balancing process, using the evolution of the EC legal order as an illustration of the wider pattern according to which the exercise and perhaps the very nature of State power in Europe has been moderated without the need to superimpose a new but geographically larger State at European level. This leads to anxiety that the pursuit of “constitutional finality” is capable of imperilling the very foundations of the system, by robbing it of its adaptive character.

The particular notion of devising a “hard list” of competences attributed to the Community or the wider Union, as part of a project to separate more precisely the role of the Community/Union from that of the Member State, is treated as an example of the way in which pursuit of constitutional finality may assign a dominant value to tidiness that underestimates the accompanying costs. The paper argues that the quest to deliver a “hard

list” of competences is vulnerable to attack for two reasons in particular - the “delayed reaction” problem and the “either/or” problem. The first issue, “delayed reaction”, refers to the point that some, perhaps most, of the anxieties that provoke scepticism about the reach of Community activity are already in the course of being addressed, in a web of imaginative and constructive re-shaping of *communautaire* endeavour. The second issue, “either/or”, concerns the risk that an antithetical over-emphasis on whether the Community/Union, on the one hand, or its Member States on the other can or should act tends to obscure the point that fundamentally both should be seen as complementing each other in the delivery of effective and legitimate governance for Europe. This brings the paper to the conclusion that hardening the demarcation of competence between the Community/Union and its Member States and, more generally, embracing constitutional finality in the Union may damage appreciation of the system as a multi-level, dynamic and relatively non-confrontational architecture designed to preserve the basic structure of the Member States while curing them of their congenital tendency to inflict political and economic damage on each other. The paper argues instead for an emphasis on improved transparency which is nevertheless surrounded by respect for the value and pragmatic good sense of much of the current trajectory of “constitutionalised” policy-formation and governance.

2. Constitutional finality

There has already been an investment of substantial political capital in preparing the intergovernmental conference that is to be convened in 2004 as a momentous episode for Europe. At one level the motivation is virtuous. The Declaration agreed at Nice in December 2000 that fixes “deadline 2004” calls for “a deeper and wider debate about the future development of the European Union”. One could hardly object to such a dignified goal. Moreover, the embrace at Nice of such thoughtful inclusiveness contrasts appealingly with television coverage of hollow-eyed politicians tottering exhausted from the marathon bargaining sessions that were required to hammer out a deal, insisting that never again would such fundamental decisions be taken in such desperate, frenzied and ill-planned circumstances. One might wryly reflect that that’s what they always say, but nonetheless it is plain that attempts are being made to endow the 2004 process with a more open and constructive flavour. The Convention is plainly part of this mood. And in some quarters the “2004 process” is being driven by a feeling that major, mould-making decisions will and should be taken.

This paper is, first of all, infused by mild scepticism about whether this is likely. At the very least, it assumes that, as is ever the way at IGCs, the “big decisions” will be reached only at the last moment, although it also follows that in so far as the political debate creates a momentum in which significant constitutional change is expected then this mood will combine with the political need to deliver an agreement as triumphant culmination of an IGC to generate something that is novel, or at least that can be presented as such. Moreover, the paper assumes that a significant part of the pressure to develop a radical constitutional agenda at the European level is dictated by the national political context in which credit may be gained from being seen to be a major player on the European stage (which might conversely mean that in other circumstances a desire to appease domestic constituencies may generate a calculatedly obstructive approach to deeper “Europeanisation”). That perception invites some further scepticism about whether the reality is likely to match the rhetoric. However, the

principal thesis of this paper is built around the proposition that if a grand architectural design for the future of the Union does not emerge in 2004, then there may be very good reason for treating that not as a failure but rather as a positive development. It will be argued that the presentation of 2004 as a potential end-destination, at which core constitutional questions will be “settled”, is at odds with the historical evolution of the Union, neglectful of a network of complex but largely inter-related devices for meeting in more sophisticated fashion the perceived weaknesses of the Union than would be achieved through the adoption of a formal constitution and, ultimately, fundamentally incompatible with how it *should* be seen, as a non-State actor which causes profound adaptation in the structure of the States that are members of it. In short, this paper will champion the cause of EU as process, not as static representation of a chosen destination. This will be explored with particular reference to the quest to devise a formula for dividing up State and Community competences, treating this as one example of a wider alluring but mistaken attempt to “find answers”. It will be contended that the patterns of constitutionalisation that have developed in the European Community and, to a lesser extent, in the broader Union have involved many deliberate but constructive ambiguities and a healthy dose of pragmatism from many players, and that the notion of elevating “constitutionalism” on to a (perceived) “higher” plane may imperil much of what has been achieved so far. Most of all it will be argued that the successes of the EU, at an economic and a political level, have been achieved largely because of the skilful manner in which games in which one party wins and so another is perceived to lose have been avoided. By contrast, the “constitution vision” is dangerous and divisive precisely because it threatens to insist on the triumph of one normative foundation over another. But why can’t we have it all?

The influential German Foreign Minister Joschka Fischer spoke explicitly of “constitutional finality” on 12 May 2000 in a speech delivered at the Humboldt University in Berlin under the title “From Confederacy to Federation? Thoughts on the Finality of European Integration”¹. Fischer’s contribution was, of course, nuanced and sophisticated and contains much to admire. He argues for a division of sovereignty between the Member States and the European institutions. I agree with his insistence on the vital role of both the States and the Union in the future shaping of Europe. I admire his efforts to avoid assuming that what is at stake is the “either/or” question - either a European State or nation-States. And I accept the pressing need for fresh thinking about the system of European governance in the shadow of impending enlargement. But neither the discourse of a “constitution” nor of “finality” are necessarily helpful additions to the debate.

On the former issue, the “constitution” for Europe, there is a real risk that the argument in favour of improved transparency for the Union, against which one would scarcely dare to take issue, may be conflated with an argument directed at alteration of the legal foundations in order to create a European constitution that would underpin a European State. One may desire both. But they do not necessarily go hand-in-hand. “Constitutions” come in many forms and possess varied functions². In fact there is a severe risk that in so far as the

¹. “Finalitaet” in the original German. For the speech plus accompanying discussion, see Jean Monnet Working Paper 7/00, available via <http://www.jeanmonnetprogram.org/papers/00/symp.html>.

². Cf J-C Piris, “Does the European Union have a Constitution? Does it need one?” 24 *ELRev* 557 (1999); Y Devuyst, “The European Union’s Constitutional Order? Between Community Method and *Ad Hoc* Compromise” 18 *Berkely Jnl Int’l Law* 1 (1999); also P Craig, “Democracy and Rule-making within the EC: an empirical and normative assessment” 3 *ELJ* 105 (1997); P Craig, “Constitutions,

objective of transparency is pursued under the label of Constitution-building it may provoke revolt against an idea that is capable of being regarded as quite different, that of further embellishing the State-like credentials of the European Union, with negative results for both causes. Symbols matter; symbols inflame³. And the suggestion that “finality” is or should be in sight is especially alarming in the light of its propensity to foreclose debates about a plurality of visions for “Europe”. Achieving finality suggests a process of picking winners and losers. This is unhealthy and destabilising. It should be pursued only if the current model is exposed as inferior. It is my core contention that the advantages of the way things are done today in the Union run the risk of being under-estimated on a wave of political (but perhaps not popular) support for constitutional finality. To make this point it is necessary to spend some time examining the nature of constitutionalism in the European Community (and, much less visibly, in the wider non-EC EU).

3. The background to constitutionalism

What is meant by “constitutionalism” (as distinct from a Constitution)? In the European Union - most prominently in the European Community segment of the Union - “constitutionalism” has come to represent a useful shorthand description of the transformation of a regime founded on an international Treaty into a complex organisation that does not - cannot - set aside its Treaty-based roots and yet has evolved into something that is significantly more constitutionally and institutionally sophisticated than an orthodox international organisation and in which the supervision of the relevant actors, at national and transnational level, is achieved according to methods and standards than reflect the deep impact of policy-makers and policy-executors on the life of all European citizens. Much of the constitutionalising force of EC law is directed at the control of public power by judicial institutions not only at European level but also, and much more directly and visibly, in proceedings initiated by private parties at national level. It also goes to the shaping of inter-State relations in the EC which has at least as much, and perhaps more, in common with the modes of internal distribution of power within a federal State as it does with the structuring of an international organisation established by a Treaty⁴. The principles of supremacy and direct effect are central to this claim that the EC legal regime operates in many respects *as if* it were organising the internal governance of a (federal) State.

This reveals that “constitutionalism” has equipped the EC with a working method that allows it to avoid choices about whether it is “really” international law or “really” State law. It is both; it is neither; it doesn’t matter (in practice). The system has a remarkably strong claim to operate as if it were a constitutional legal order divorced from an orthodox understanding of a

Constitutionalism, and the European Union” 7 *ELJ* 125 (2001); Special Issue: Can Europe have a Constitution? 12/1 *Kings College Law Journal* (2001); K Lenaerts and M Desomer, “Bricks for a Constitutional Treaty of the European Union: values, objectives and means” 27 *ELRev* 377 (2002). Cf, painting a broader picture of the role of law in European identity formation, T Mollers, “The Role of Law in European Integration” 48 *AJCL* 679 (2000). On the German debate in particular, see J Schwarze, “Germany” in J Schwarze (ed), *The Birth of a European Constitutional Order: the Interaction of National and European Constitutional Law* (Nomos, 2000), and, in comparative perspective, 554-568.

³. Cf B Laffan, “The European Union polity: a Union of regulative, normative and cognitive pillars” 8 *JEPP* 709 (2001).

⁴. Cf K Lenaerts, “Constitutionalism and the Many Faces of Federalism” (1990) 38 *AJCL* 205.

governing “Constitution”⁵. This is of the highest significance to understanding how the EC has developed, and therefore, in my submission, it is vital to informing the current debate about the future. The discourse of constitutionalism has tended to induce the suspicion that the Community/ Union is en route to becoming a State in its own right. This is not at all a necessary logical progression, however, and it is at best superficial and, worse, misleading, both in a descriptive and a normative sense. Better, it is submitted, to treat the Community/ Union as acquiring State-like functions. It has constitutional features that are closely analogous to those found in a State. It has competences that one would expect to find within the State’s arsenal and it adopts legislation that takes immediate effect throughout the Union’s territory. But that does not mean it is or should be a State at some time in the future. It lacks many features crucial to a normal understanding of the State. It has negligible rule-enforcing capacity - no army, no police force and, even in the wide range of areas where it is a rule-maker, it depends on national legal and administrative infrastructure to carry through and apply its policy choices. Its budget is relatively small (and a large proportion is spent on agriculture). And it possesses only the competences conferred on it by its Treaty⁶. So it is not a State but, more importantly, it is submitted that it should not be treated as aiming for that status, nor should it so aim. The Union is, in short, a response to the political and economic failings of States in Europe and it would sell its ambitions short, while simultaneously disregarding its history, if it were simply to attempt to re-establish the traditional State, albeit at pan-European level. This view would also look askance at suggestions that the EU suffers from a democratic deficit, in so far as such criticism means only that its institutional architecture is not the same as that of a traditional West European State. Of course it is not; that is the whole point. That is not simply to assert the EU’s difference, its uniqueness, as a sufficient defence of its current structure, but it is, at least, to insist that the EU be seen as part of dynamic process, itself changing over time and changing the nature of the States that are members of it, and accordingly its acquisition of and impacts on political power require assessment with reference to a more subtle benchmark than that of orthodox constitutional arrangements found in a State⁷.

Rightly have Joerges and Sand identified constitutionalism “as a metaphor for the challenges that the emerging transnational governance presents to the notion of democratic legitimacy”⁸. It is vital to escape imprisonment in thinking that assumes the rise of transfrontier markets generates a need for geographical bigger States. Economic structures migrate in ways that do not have to be followed and frequently cannot be followed by political institutions. The EU is part of the necessary leap of imagination which projects us towards an understanding of governance that transcends the State, either acting alone or in constructing inter-state

⁵. Cf J H H Weiler, *The Constitution of Europe: Do the new clothes have an emperor?* (Cambridge UP, 1999).

⁶. Article 5(1) EC; lately confirmed with vigour by the Court in Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, “Tobacco Advertising”.

⁷. See in this direction, with extensive bibliographic survey, C Lord, “Assessing Democracy in a Contested Polity” 39 *JCMS* 641 (2001); also C Lord and D Beetham, “Legitimizing the EU: is there a post-Parliamentary basis for its legitimation?” 39 *JCMS* 443 (2001); T Zweifel, “... Who is without sin cast the first stone: the EU’s democratic deficit in comparison” 9 *JEPP* 812 (2002); A Menon and S Weatherill, “Legitimacy, Accountability and Delegation in the European Union” in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP, forthcoming).

⁸. “Constitutionalism and transnational governance”, unpublished paper. See also F Snyder, “Governing Economic Globalisation: Global Legal Pluralism and European Law” 5 *ELJ* 334 (1999); B Rosamond, “Discourses of globalization and the social construction of European identities” 6 *JEPP* 652 (1999). Cf the Commission’s White Paper on Governance, COM (2001) 428.

bargains. So, from this perspective, criticism of the EU as lacking the democratic credentials that are characteristic of a State is not to take as given that which is contested. It is to take as given that which is denied. The EU is not a State nor is it to become one. This paper seeks to step beyond this perception and to make the case that, in fact, the very combination of European institutional and constitutional architecture alongside those of the Member States itself secures a broader sense of democratic legitimacy. This embrace of the virtues of multi-level constitutionalism, which by definition resists “finalising”, is shown already to provide some answers to the problems that are perceived to afflict the Union - the “delayed reaction” problem - and it supplies the core of the objection to the “either/or” model, which I pursue below.

4. The European Court and constitutionalism

In the EU much of the foundation for the advance of “constitutionalism” was dug by the Court. In particular we must attribute a great deal of credit (if that be the right word) to the Court for having wrenched thinking in and about the EC away from the model of the orthodox international organisation and towards a system that involves a much deeper and more complex relationship between two levels of mutually interdependent governance, that of the State and that of the transnational organisation, the Community/ Union. The Court achieved this through its audacious early rulings on the nature of EC law. More importantly still, enjoying “benign neglect” from potentially critical audiences,⁹ it achieved this because its activism was not confronted by opposition from political elites in the Member States and because its national courts absorbed the instructions handed out from Luxembourg and sustained and promoted the cause of European legal integration by treating EC law in the way they were instructed by the European Court¹⁰.

The Treaty of Rome did not stipulate that Community law should be applied in national courts at all. And it said nothing about which legal order should prevail in the event of conflict between Community law and national law. Both these points were addressed by the Court at an early stage in the evolution of EC law. First, the application of Community law in national courts. In 1963 the Court decided that Community law may be directly effective, which means it may create legally enforceable rights before national courts and tribunals. This was the famous decision in *Van Gend en Loos*¹¹ in which the Court stated that:

“The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage.”

⁹. E Stein, “Lawyers, Judges and the Making of a Transnational Constitution” 75 *AJIL* 1 (1981).

¹⁰. Why? See Part 5 below.

¹¹. Case 26/62 [1963] ECR 1.

Community law is capable of direct effect in national courts. The pre-condition is only that the relevant provision be sufficiently clear and precise. This, for the Court, flows from the spirit and purpose of the Treaty.¹²

The second key constitutional principle asserted by the Court at an early stage is that of supremacy or primacy - that Community law overrides national law in the event of conflict between them. Again, this is not made explicit in the Treaty. But in 1964 the Court asserted that a hierarchy places Community law above national law. In *Costa v ENEL*¹³ it explained:

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply....
... The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty... It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”

Again, the principle that Community law is supreme and must prevail in the event of conflict with national law is drawn from the structure of the Treaty, as necessary to give effect to its ambitions. The Court is not deterred by the absence of explicit textual support in the Treaty; and the novel and independent character of Community law, explicitly contrasted with “ordinary international treaties”, is asserted by the Court even as it constructs that new legal order.

So in *Simmenthal* the Court added that “... every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”¹⁴ And in *Factortame* the Court declared that “Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.”¹⁵

The Court has also added the doubtless logical but conspicuously bold confirmation that Community law overrides even national constitutionally protected rights. This was first clearly stated in *Internationale Handelsgesellschaft*.¹⁶ Supremacy has a profound impact on national legal orders.

In this way the EC legal order has been “constitutionalised”¹⁷ by its courts. The fundamental

¹². On direct effect as a policy choice, see eg P Pescatore, “The Doctrine of Direct Effect: an infant disease of Community Law” 8 *ELRev* 155 (1983); F Mancini “The Making of a Constitution for Europe” 26 *CMLRev* 595 (1989).

¹³. Case 6/64 [1964] ECR 585.

¹⁴. Case 106/77 [1978] ECR 629.

¹⁵. Case C-213/89 [1990] ECR I-2433.

¹⁶. Case 11/70 [1970] ECR 1125.

¹⁷. Eg J H H Weiler, *The Constitution of Europe* note 5 above, R Dehousse, *The European Court of*

constitutional characteristics of EC law have much in common with those which one would expect to discover in the constitution of a federal-type State. In particular, supremacy appears to dictate a hierarchical relationship between the two levels of law-making, placing the (quasi-) federal rules on top. And of course there is much more to the claim of “constitutionalisation”. The EC system has been developed, *inter alia*, to afford judicial protection to the individual who may be affected by the exercise of power by the Community institutions; general principles of Community law have been developed, in some instances without explicit textual support in the Treaty, which constrain the capacity to act of Community institutions and in some, albeit ill-defined, circumstances of national authorities too;¹⁸ and the Treaty establishes institutionally relatively sophisticated forms of lawmaking which reflect forms of representative democracy at both national and European level, in the shape of the Council and the Parliament respectively. So it functions as a constitution in the “thin” sense that it is constitutive of the system that is the EC legal order. But the Court is rhetorically bolder. In *Parti Ecologiste Les Verts v Parliament*¹⁹ the Court described the Community as “a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty...” What seems to be at stake here is a constitution that is characterised by an assumption of the subjection of the exercise of public power to judicial control even in circumstances where this is not explicitly foreseen in the governing texts. The legal control of the institutions of the Community itself, which is what was in dispute in *Parti Ecologiste Les Verts*, was deepened by the Court’s readiness to extend its powers of review beyond those explicitly conferred by the Treaty. This tends towards a stronger and thicker kind of constitution, of a type that might not be readily associated with an organisation existing beyond the State.

These are hugely sensitive issues. What is really here meant by a “constitution”?²⁰ And is the Court justified in drawing such conclusions from a text that offers relatively little explicit support?²¹ At this stage I merely raise the questions. The Court is insisting, by combining direct effect and supremacy, that national courts should apply Community law and that, moreover, they should apply it in preference to any conflicting norm found within their domestic legal order. They should, if necessary, protect the Community law rights of an individual against preferences of that State expressed through legislation duly passed according to established democratic processes. And - here is the big leap forward - national courts in the Member States have accepted and faithfully applied these principles. It is this that has come to make the EC legal order look different from that created by an “ordinary” Treaty and governed by public international law. Much of the stuff of EC law as seen from the vantage point of the European Court is, in fact, a good deal less distinct from orthodox public

Justice (Macmillan, 1998).

¹⁸. For a full survey see T Tridimas, *The General Principles of EC Law* (OUP, 1999); also U Bernitz and J Nergelius, *General Principles of European Community Law* (Kluwer, 2000).

¹⁹. Case 294/83 [1986] ECR 1339.

²⁰. Cf literature cited at note 2 above.

²¹. Cf H Rasmussen’s mould-breaking (for good and ill!), *On Law and Policy in the European Court of Justice: a Comparative Study in Judicial Policymaking* (Martinus Nijhoff, 1986); also T Hartley, *Constitutional Problems of the EU* (Hart Publishing, 1999). It is submitted that criticism of the Court in this vein demands that attention be paid to devising a theory of legal reasoning and interpretation; cf J Bengoetxea, N MacCormick and L Moral Soriano, “Integration and Integrity in the Legal Reasoning of the European Court of Justice” Ch 3 in G de Burca and J H H Weiler, *The European Court of Justice* (OUP, 2001).

international law than the Court's calculated discourse of legal novelty in its early cases might lead one to suppose²², but its tariff-free importation into national legal orders is what has really given EC law its special character. This extraordinary episode is brilliantly captured by Bruno de Witte:

“The argument linking supremacy/ direct effect and the nature of EC law has gradually acquired an element of circularity. At first, supremacy and direct effect were to be recognized *because* the EC Treaty was unlike other international treaties ... But now that these principles have been accepted everywhere, at least for practical purposes, the direction of the argument is often reversed: EC law is now often being presented as being unique *because* it is endowed with direct effect and supremacy.”²³

5. National courts and constitutionalism

Of course there are circumstances in which one can point to threats to the European Court's mission statement. International treaties are mediated in different ways through the legal orders of States party to those Treaties. At one level the same is true of the EC Treaty. Different national constitutional arrangements condition the way in which a bridge is built between the EC system and the national legal order.²⁴ Some Member States have constitutions which expressly provide for the application of international Treaties by domestic courts. In other states, including the United Kingdom, a domestic act is required to provide the foundation for the application by national courts of legal rules deriving from an international source. One might question whether these national approaches conform or are capable of conforming with the European Court's own perception of the status of EC law as of itself “an integral part of the legal systems of the Member States ... which their courts are bound to apply.....”, asserted in *Costa v ENEL*. This might take us into a potentially unrewarding argument about whether EC law is an independent source of law or whether it depends for its force within the national systems on the existence of some bridge recognised by the national system. I would be provisionally content with the suggestion that both approaches are right - within the terms laid down by their own systems - and that it is unhelpful to seek a single framework within which to resolve such collisions.²⁵ For the truly remarkable thing about the constitutional architecture of the EC system is that its functioning largely follows the mapping project undertaken by the European Court in the early 1960s. National courts do accept by and large that EC law is capable of direct effect in national proceedings and by and large they do not contest that within the scope of its application EC law prevails over national law. It may be that different national legal orders reach these conclusions through different routes,²⁶ and it may that these routes do not coincide with the

²². Cf D Wyatt, “New Legal Order, or Old?” 7 *ELRev* 147 (1982); O Spiermann, “The other side of the story: an unpopular essay on the making of the EC legal order” 10 *EJIL* 763 (1999); F Berman, “Community Law and International law: How far does either belong to the other?” Ch 12 in B Markesinis (ed), *Bridging the channel: the Clifford Chance lectures* (OUP, 1996).

²³. B de Witte, “Direct Effect, Supremacy and the Nature of the Legal Order” Ch 5 in P Craig and G de Burca, *The Evolution of EU Law* (OUP, 1999).

²⁴. For a summary see S Weatherill and P Beaumont, *EU Law* (3rd ed., Penguin Books, 1999), Ch 12; T Hartley, *The Foundations of European Community Law* (OUP, 4th ed, 1998), Ch 8.

²⁵. Cf the splendid evasion of Article 53 found in the EU Charter of Fundamental Rights.

²⁶. Cf A-M Slaughter, A Stone Sweet and J H H Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart Publishing, 1998); J Schwarze (ed), *The Birth of a European Constitutional Order: the Interaction of National and European Constitutional Law* (Nomos, 2000).

purity of the constitutional vision expressed by the Court in the “heroic cases” of the 1960s. But, as an observable fact, EC law enjoys a depth of penetration into national legal and administrative culture which far transcends that of orthodox international treaties. This is the European Court’s great genius and this is what makes good the assertion that EC law is truly *sui generis*, occupying a space somewhere between the law of a (federal) State and the law of an international organisation and performing functions that are similar to those performed by legal rules in both those types of system. That is what makes EC lawyers a new breed, separated if not divorced from international lawyers but not (re-)married to national lawyers.²⁷

Quite *why* the European Court “got away” with this is an intriguing question. So too is the further question why this has only come to be a subject for polite debate relatively recently. I can only here summarise an increasingly rich field of research. The disinclination of political elites in the Member States to curb the Court’s determination to cause a dramatic escalation in the constitutional vigour of EC law is best understood within a framework that emphasises the consensual nature of decision-making in the EC.²⁸ For thirty years of practice, until the Single European Act came into force in 1987, the Council acted by unanimity. So judicial decisions might have surprised in so far as they deepened the practical impact of substantive rules, but the rules themselves were agreed only on the say-so of all (the governments of) the Member States. And bold interpretations of substantive law could be explained as operating in the collective interests of the Member States and therefore unlikely to provoke a backlash. This offers, for example, a plausible understanding of the Court’s ruling in *Cassis de Dijon*,²⁹ fundamental to the acceleration of building a more efficient, transfrontier market for Europe. So the Court has room to craft a deeper, stronger legal order than the Member States might originally have foreseen because it is acting as their partially autonomous agent in strengthening the credibility of the outcomes of inter-state bargaining.³⁰

This would not fully explain why national *courts* would be content to swallow the European Court’s view. There are a clutch of reasons which might help us to understand why supremacy and direct effect were largely absorbed by national courts. Karen Alter has recently published an important book which explores this matter.³¹ She finds that the formal

²⁷. Contrast the “international relations” vs. “comparative (national) politics” debate on the correct approach to studying the EU among political scientists; eg M Pollack, “International Relations Theory and European Integration” 39 *JCMS* 221 (2001).

²⁸. Cf ground-breaking work by J H H Weiler in “The Community System: the Dual Character of Supranationalism” 1 *YEL* 273 (1981); also K Alter, *Establishing the Supremacy of European Law* (OUP, 2001), Ch 5.

²⁹. Case 120/78 [1979] ECR 649.

³⁰. This nods (in alarmingly superficial manner!) towards a rich literature using and criticising a principal/agent model for understanding the relationship between Member States and EC institutions, particularly the Commission and the Court. See eg A Stone Sweet and J Caporaso, “From Free Trade to Supranational Polity: the European Court and Integration”, Ch 4 in W Sandholtz and A Stone Sweet (eds), *European Integration and Supranational Governance* (OUP, 1998); M Shapiro, “The European Court of Justice” in Craig and de Burca note 23 above; S Hix, *The Political System of the European Union* (Macmillan, 1999); D Wincott, “A Community of Law? European Law and Judicial Politics: the Court of Justice and Beyond” 35 *Government and Opposition* 3 (2000).

³¹. K Alter note 28 above. Again, early and influentially into the field, see J Weiler, “A Quiet Revolution: the European Court of Justice and its Interlocutors” 26 *Comparative Political Studies* 510 (1994). See also B de Witte, “Direct Effect, Supremacy and the Nature of the Legal Order” Ch 5 in P Craig and G de Burca note 23 above; W Mattli and A-M Slaughter, “The Role of National Court in the Process of European Integration: Accounting for Judicial Preferences and Constraints” Ch 9 in Slaughter, Stone

pull of legal reasoning plays a part; so too the attraction of empowerment promised to national judges by the chance to apply supreme Community rules. The picture is complex and needs to be broken down, *inter alia*, according to the substantive policy sectors involved and according to the incentives of different courts.

To revert to the purely descriptive plane, as a general proposition the judgments of the European Court dealing with the constitutional character of EC law were absorbed into the legal orders of the Member States and in practical effect they were there applied. But is this changing?

National courts that were responsible for the willing importation of the European Court's vision of the nature of EC law and its impact on domestic law are now, in the past decade, threatening to expel European constitutionalism (where it is perceived to have been stretched to illicit limits). Perhaps not surprisingly it is national constitutional courts - the judicial constituency that has *not* been empowered by the weapons of review according to the superior norms of European law to the degree that "ordinary" courts have newly found themselves able to scrutinise public acts - that have threatened to intervene. The German *Bundesverfassungsgericht*, in particular, could be regarded as having challenged the European Court's perceptions of the nature of EC law. The early "Solange" decision signalled the anxiety of the *Bundesverfassungsgericht* lest membership of the Community cause a depreciation in the standards of fundamental rights protection under German law³². The chosen tool, that was never in fact used, was the invalidation of Community acts by the German court for failure adequately to respect fundamental rights. Then, in the *Maastricht* ruling of 1993, anxiety about perceived improper extension of the reach of the Community law provoked a further threat to invalidate Community acts in Germany for want of competence in so far as the institutions of the Union should trespass beyond the limits of the competences transferred to them.³³ At one level this rejects the European Court's view that it and it alone may rule on the validity of Community legislation for, were it otherwise, the uniformity of application and indeed the very integrity of the system would be irrevocably compromised.³⁴ More fundamental still, it is a stance which seems inconsistent with the European Court's assertion that the source of validity of Community law within domestic legal orders is the Treaty itself and which threatens to give a practical edge to this theoretical lack of constitutional congruence. The *Bundesverfassungsgericht* and, according to different constitutional constructs, other leading courts in Europe seem instead to assume the source of validity of Community law within the national system to be located within, and therefore limited by, that national system. Specifically, an interpretation that leads to an extension in Community competence beyond the limits of the Treaty, into areas that could be occupied only consequent on an amendment to the Treaty, would be invalid in Germany even if the European Court is of the view that the extension is valid under Community law.

One may object (among a great many other objections³⁵) to an inherent selfishness on the part

Sweet and Weiler note 26 above..

³². [1974] 2 CMLR 549.

³³. [1994] 1 CMLR 57.

³⁴. Case 314/85 *Foto Frost v HZA Lubeck-Ost* [1987] ECR 4199.

³⁵. For a flavour of the debate see Eg M Herdegen, "Maastricht and the German Constitutional Court" 31 *CMLRev* 235 (1994); H-P Ipsen, "Zehn Glossen zum Maastricht-Urteil" 29 *Europarecht* 1 (1994); J Wieland, "Germany in the European Union: the Maastricht Decision of the *Bundesverfassungsgericht*" 5 *EJIL* 259 (1994); M Zuleeg, "The European Constitution under Constitutional Constraints: the

of the *Bundesverfassungsgericht* in its willingness to impose costs on other Member States. The virtuous claim that invalidation would apply only to German territory has a formal propriety that would rapidly be overtaken in practice, as the integrity of the Community legal order would likely unravel under the pressure of anxiety among other constitutional courts not to be seen to hold less scrupulous sensitivity than their German counterparts.³⁶ In this sense this offers a strong example of the point that national decision-making may in a European context be insufficiently representative of the full constituency of affected interests, and it makes a normative case for locating the decision on legal validity at European level.

But, of course, the *Bundesverfassungsgericht*'s stance is at one level very serious indeed. It throws up the possibility of a national court and the European Court disagreeing on the validity of an adopted act. Who would be "correct"? And who would win?

There is a huge attraction in limiting discussion of such questions to the abstract. A concrete case of division of opinion on such a matter would be a major crisis. But there has been no such concrete case. And it is crucial to the thesis of this paper that it is not merely good fortune that no such actual disagreement has occurred. Rather, all relevant actors possess incentives to avoid a direct collision. Threats can be productive in so far as they may generate concessions or, more constructively, a re-balancing of a relationship. Once a threat is executed things may never be the same again, both as between the (judicial) parties to the dispute and, by a process of spillover, in application to other interested parties as well. The parties know this. They want to avoid "deciding" big questions which probably cannot be decided to the satisfaction of both parties. By declining to answer the question, no one overtly wins but no one loses either, and both parties maintain their own position to mutual advantage. In this sense, in fact, both win.

So one might be naïf to expect a *national* court *not* to be tempted to express the sort of sentiments about the virtue of *national* democracy expressed in the *Maastricht* decision by the *Bundesverfassungsgericht*. And it is by no means a specifically German perspective that there is a core of national constitutional principles that cannot be transferred³⁷. But once these anxieties are placed in a context of an evolving European constitutionalism the hard edges of political and legal nationalism can be smoothed away, and the wider implications of decisions on the transnational environment can be indirectly mixed in. It is an extraordinary balancing act.

So the *Bundesverfassungsgericht* has not done what it said can - it has not invalidated EC acts for the purposes of their application on German territory. Better to threaten rather than to execute. And to expect a response from the European Court. In this way mutually satisfying indirect constitutional conversations develop. It is not difficult to identify a linking chain between the first "Solange" decision³⁸ and the development of fundamental rights protection by the European Court. In maintaining the logical purity of the principle of supremacy, the

German Scenario" 22 *ELRev* 19 (1997); Papers by Weiler, MacCormick, Preuss, Grimm and Habermas in *Special Issue on Sovereignty, Citizenship and the European Constitution* 1/3 *ELJ* 219-307 (1995).

³⁶. Cf in particular the comparable approach subsequently taken by the Supreme Court of Denmark, summarised in Weatherill and Beaumont note 24 above p451. See H Rasmussen, "Confrontation or Peaceful Co-Existence?" Ch 24 in D O'Keefe (ed), *Judicial Review in European Union Law: Liber Amicorum Gordon Slynn* (Kluwer, 2000).

³⁷. Schwarze note 2 above 496-501.

³⁸. [1974] 2 *CMLR* 549.

Court decided that Community law overrides even national constitutionally protected rights, which prompts the genuine anxiety, expressed in “Solange” by the *Bundesverfassungsgericht*, that a decrease in individual legal protection could occur. But the Court also insisted that Community law respects fundamental rights standards, and that these are inspired by the European Convention and by national constitutional tradition and that Community acts dipping below such standards will be annulled.³⁹ Whether or not the European Court is serious about the protection of fundamental rights or whether instead this was a device to sweeten national courts into accepting the full implications of the supremacy doctrine is a matter that has caused controversy.⁴⁰ But the German courts accepted that so long as protection of fundamental rights was sufficiently assured at Community level, they would not intervene to review Community acts against domestic standards.⁴¹

A positive reading of this episode would be that “supremacy” is not all that it may initially appear. It succeeds only if national courts are persuaded by the Court’s case in favour of it. So the quality of the Court’s reasoning and, in particular, its commitment to ideals that limit the exercise of public power, affect the practical vitality of Community law in national legal orders. And national courts are actively able to shape the Community legal order, by this (indirect) transmission of anxieties about the direction taken or to be taken by the European Court. They participate precisely because without them, Community law is fatally weakened, and therefore supremacy is, because of the dependence of the Court on its national judges for the practical application of the law, a process that involves a greater degree of inter-court dialogue than one might expect. And so the sceptical “Solange I” was followed by the more receptive “Solange II”⁴² after an intervening period in which the European Court attended to the elaboration of the protection of fundamental rights as part of the general principles of the Community legal order. And, I submit, there is a comparable perceptible cause-and-effect between the *Maastricht* decision’s anxiety about the need vigorously to police the outer limits of Community competence and, for example, the European Court’s recent annulment of the Tobacco Advertising Directive as lying beyond the Treaty-defined limits of Community competence,⁴³ a decision that is one of several in recent years in which the Court has carefully shown itself conscious of the need to pay explicit heed to the distinction between Treaty interpretation (which it is allowed to perform) and Treaty amendment (which it is not).⁴⁴ It may initially appear a paradox of supremacy in that the European Court is consistently restricted in asserting its power by the need to play the art of the possible, but it presents an appealing system of interaction between the leading courts of Europe, albeit that it is plainly dependent also on national judges paying due heed to the wider implications of their own rulings on Community law. And here too the dynamic nature of the relationship is

³⁹. Cf P Alston (ed), *The EU and Human Rights* (Oxford, 1999); Tridimas n 18 above Ch 6; K Lenaerts, “Respect for Fundamental Rights as a Constitutional Principle of the European Union” 6 *Columbia Jnl Euro Law* 1 (2000).

⁴⁰. Cf J Weiler and N Lockhart’s famously fiery “Taking rights seriously: the European Court and its fundamental rights jurisprudence” 32 *CMLRev* 51 (1995).

⁴¹. Compare “Solange I” [1974] 2 CMLR 549 with “Solange II” [1987] 2 CMLR 225. Cf J Kokott, “Report on Germany” in Slaughter, Stone Sweet and Weiler note 26 above; Dehousse note 17 above 62-66.

⁴². Note 41 above.

⁴³. Case C-376/98 note 6 above, and further Part 7.2 below.

⁴⁴. Eg Opinion 2/94 on accession to the European Convention on Human Rights [1996] ECR I-1759; Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325. Cf Rasmussen *et al* note 21 above on the problem of locating this distinction; also S Weatherill, “Activism and Restraint in the European Court of Justice”, forthcoming.

visible. The *Bananas* decision of the *Bundesverfassungsgericht* delivered in 2000⁴⁵ is consciously presented as conforming to the *Maastricht* ruling, and in form it does indeed so conform. But the tone is different. *Maastricht* carries a heavy emphasis on what could go wrong at European level and how the German court would respond. *Bananas* is more overtly concerned to emphasise the need to keep such intrusion to extreme circumstances. The signs of supportive, respectful interaction between courts in Europe are evident, underpinned by an anxiety on both sides, national and Europe, to avoid direct confrontation in which there must be winners and losers.

That would mean that the reality of dialogue between courts has *already* escaped the “either/or” assumption of constitutional hierarchy found in the doctrine of supremacy. There is a complex, layered reality of dialogue and persuasion. And there is a “practical concordance” between the attitudes to the status of EC law held at national level and in the European Court⁴⁶ which reflects the inter-dependence of legal orders in Europe which itself reflects (and promotes) economic and political interdependence.

This exultation could readily be criticised as bold but complacent and susceptible to falsification any day by a cantankerous national court. But how better to resolve this constitutional collision? A “final” resolution could be achieved only by insisting that one legal order has supreme authority over another. But which, among the Member States, would agree to a Treaty provision asserting the primacy of EC law? Which, aware of the need to secure credibility in the enforcement of the rules of the EC game, would see the value in agreeing to a provision placing national law at the apex? Better, in my view, to avoid formalising the situation. If the European Court’s view of the nature of EC law cannot be reconciled with that of the national courts, let us accept that we have seen constructed over the last forty years a quite spectacular success story, according to which both Community and State systems successfully co-exist. This is the ambiguity and pragmatism to which I refer; supremacy and direct effect operate successfully precisely because they are outwith the formal text of the Treaty and they are instead subject to elaboration and application in an institutional system that cherishes dialogue. The key point is that the legal approach to the exercise of State power in areas covered by the EC Treaty has been profoundly changed without an overt constitutional moment⁴⁷ or least without anything perceived as such.

So “constitutionalism” depends on ambiguity and on creating arenas for problem-solving (which might involve problem-avoiding) within an overall system which emphasises the necessary interconnection of national and European constitutional legal orders. In so far as it is an attempt to provide an arena within which law and politics can co-exist it is inevitably characterised in Europe by a certain imprecision for, after all, what is at stake is nothing less than a challenge to the hegemony of national constitutional law and the development of a legal order that involves a re-distribution of power. In fact the system works precisely because each participants can rest its consent to involvement on different bases which may be

⁴⁵. 2 BvL 1/97, 7 June 2000. For discussion see C Schmid, “All Bark and no Bite: Notes on the Federal Constitutional Court’s Banana Decision” (2001) 7 *ELJ* 95; G Nicolaysen and C Nowak, “Teilrueckzug des BVerfG aus der Kontrolle der Rechtmassigkeit gemeinschaftlicher Rechtsakte” 54 *NJW* 1233 (17/2001).

⁴⁶. Schwarze note 2, 545.

⁴⁷. Cf B Ackerman, *We the people* (Harvard University Press, 1991). See also in this vein Schwarze note 2 above.

constitutionally irreconcilable in a purely formal sense but which do not cause any practical need to choose. It would be problematic only if there was some attempt to find the “correct” answer - that is, to adjudicate who is the winner and who the loser - the either/ or question.⁴⁸ That is what is to be avoided; and that is where “constitutional finality” is perilous.⁴⁹ Both sources of authority, national and European level, have complementary roles to play.⁵⁰ The current constitutionally pluralist pattern permits this.

6. The case for “constitutional finality” re-assessed

What, then, is the case for “constitutional finality”, if the system of constitutionalism is working so well? We have a supple constitution already, based on pragmatism.⁵¹

One response to this inquiry is to retort that, in fact, the “2004 debate” has much of the ambiguous merit I have identified above as worthwhile in underpinning the evolution of the EU. That is to say, the notion of a “constitution” in the EU is being employed in different ways and for different reasons. That may be so. There is, however, potential damage to be done in the presentation of 2004 as a final destination. My primary concern is with the question of dividing up the respective competences of the Community and of the Member States, although I take the view that this issue raises questions and problems that are of more general relevance. The argument in favour of addressing the question of competence division appears to run roughly as follows. That the Community has over-stepped the mark; that this is damaging to its legitimacy and (not unconnected) to its capacity to deliver efficient and responsive governance; that therefore a much clearer control must be imposed over the scope of Community activity. I do not take serious issue with this agenda as a basis for debate but I object to the failure adequately to appreciate how much has already been achieved in addressing these perceived problems of over-ambition at Community level and I oppose in particular the notion that we would be served by a hard list of Community competences as a means to clean up and clarify the issue of who does what in governing Europe.

In tackling the question why there may be an impetus towards a “Constitution”, or at least towards a firmer constitutional basis for separating out Community from State competences, I believe that it is necessary to begin with a diversion, but one that seems to me to be vital in understanding the current trajectory of the EU project. My contention is that the defining moment for the EC as we currently view it was the entry into force of the Single European Act in 1987 and the injection of the qualified majority voting in Council (“QMV” hereafter) as the norm in many areas of Community legislative activity. Here, surely, was where State

⁴⁸. So the Court’s hint in Opinion 1/91 on the draft EEA Agreement [1991] ECR I-6084 that some parts of the EC system are of such importance that they could not be modified by the Member States (esp paras 71-2) has subsequently been wisely ignored. On what the Court might have meant other than a fundamental shift away from the assumptions of Treaty-making see F Berman note 22 above esp at p271; Tridimas note 18 above 37-38.

⁴⁹. Cf C Richmond, “Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law” 16 *Law and Philosophy* 377 (1997); also M Kumm, “Who is the Final Arbiter of Constitutionality in Europe?” 36 *CMLRev* 351 (1999), eg arguing at p384 to “stop asking” the question posed in the article’s title.

⁵⁰. See further below Part 9.

⁵¹. Cf Eijsbouts, Review Article, 37 *CMLRev* 213, 219 (2000), comparing the virtues of the British and the EC “constitutions”.

power mediated through the EC was transformed into something radically different, and less crude, than the simple power of veto. Qualified majority voting has been extended into new areas of legislative activity of the EC by the subsequent Treaties of Maastricht, Amsterdam and Nice and even into the non-EC EU; the functional competence of the Community itself has been steadily enhanced on periodic Treaty revision while enlargement has added new participants. Geographical and functional expansion might seem to demand Qualified Majority Voting in place of a limiting rule of unanimity in order to make the process viable but it brings severe tensions as States realise they can be outvoted in ever wider areas of activities. Moreover, the adopted rules are supreme and they are capable of direct effect - which is to say the Court's long-established judgments on the constitutional relationship between Community and national law suddenly assumed a different hue in a world of Qualified Majority Voting. Community law plays a vital role in holding States to the bargains agreed at European level and its contribution to making credible those commitments serves as a persuasive explanation for the acquiescence of national political elites in the Court's groundbreaking decision-making in the early years of the EC. But the rise of "QMV" in the legislative procedure ruptures the direct link between Community law as a system susceptible to vigorous enforcement and the ability of the Member States to use veto power as a means of guarding the gate through which rules must pass before becoming invested with that legal force.⁵² To be clear: even in a world of QMV it is *not* the case that States are outvoted day in day out,⁵³ nor even that the preferences of an "outvotable" state are ignored.⁵⁴ But a regime of QMV, in place of unanimity, generates a quite distinct and sharper appreciation of the importance of defining the limits of Community competence from that which prevailed in times when an anxious State knew the Council acted only if every State was in agreement and that therefore ultimately it could refuse to budge.

This would lead one to suppose that the Single European Act ought to have been political dynamite, but in fact there was a delayed reaction before sceptical national politicians, academics and national courts cottoned on to what had happened. A major element in the lack of sharp attention to widespread potential use of "QMV" lay in the association of the switch in voting rules under the Single European Act with the "simple" fact of market building. The project to complete the internal market by the end of 1992, underpinned by the Single European Act's injection of a new base for legislative harmonisation (Article 100a, now Article 95) to which the "QMV" rule applied, was skilfully depicted as politically neutral but economically beneficial. The Commission, under the politically astute direction of Jacques Delors, presented "1992" as a simple rationalisation of the well-established objective of market integration, built around the accepted principle of (non-absolute) mutual recognition of technical standards set out by the Court in *Cassis de Dijon*⁵⁵ and supported by wonderfully positive data on the economic gains prepared the team headed by Paolo Cecchini. It was brilliant packaging; to oppose the "Cecchini Report" that was to argue for the unarguable, for "non-Europe".⁵⁶

⁵². The linkage of normative supranationalism to decisional intergovernmentalism famously explored by Weiler note 28 above.

⁵³. Wessels puts the decisions taken by QMV in Council in recent years at about 10% of the total number of adopted acts; "Nice Results: The Millennium IGC in the EU's Evolution" 39 *JCMS* 197 (2001).

⁵⁴. See eg F Von Prondzynski's explanation of the concessions made to the UK in the negotiation of the Working Time Directive (93/104), even though the UK held no veto; 23 *ILJ* 92 (1994).

⁵⁵. Case 120/78 note 00 above.

⁵⁶. The data is summarised in P Cecchini, *The European Challenge: 1992, the Benefits of a Single Market* (Wildwood House, 1988).

The idea of neutrality in the process was never realistic. Some astute commentators noticed this at the time.⁵⁷ Subsequent research has emphasised the extraordinary depth and breadth of “re-regulatory” activity that has necessarily accompanied the agenda of European market-building, involving (among other consequences) significant empowerment of European-level actors displacing national actors.⁵⁸ But at the time this change, deceptively advertised as a politically non-committal exercise in improving economic performance, slipped through under the radar of those who would be alert to fundamental constitutional change. Many of the protests that made ratification of the Maastricht Treaty, agreed in 1991 but entering into force only in 1993, such a rocky road should really have been unleashed some years earlier. They were, in fact, not specific to that Treaty at all but rather related to judicial and legislative practice extending back over several decades, but placed in a different context by the rise of “QMV”. The *Bundesverfassungsgericht*’s judgment in *Maastricht* fits that description. So too some academic criticism of judicial “activism” published in the 1990s but largely dealing with cases from much earlier.⁵⁹

In fact, the tendency for critical reaction to EU choices to be delayed is still prominent. I make the case that a significant element of the argument for a final constitutional settlement of the relationship between Community and State competences is driven by a gross under-appreciation of how much has *already* been achieved in finding a delicate way of balancing the relationship between the powers of the Community and the Member States. “Constitutional Finality” is at one level a solution to a problem that has already attracted some (overlooked) solutions as the Community and the Member States have established a *savoir-vivre* with the practice of qualified majority voting. This now requires exploration.

7. Questions of legitimacy

What has happened, initially unnoticed, is that “QMV”, above all, generated an anxiety among States willingly stripped of their veto to find other and typically more subtle ways of “controlling” the process of EC policymaking. Put another way, functions exercised at Community level, which were anyway increasingly wide-ranging, could no longer be legitimated simply by the fact that they represented the unanimous choice of the Member States to act jointly at European level, thereby better to perform tasks that would potentially elude the capabilities of States acting alone, bilaterally or in a less sophisticated multilateral framework. The responses to this alleged legitimacy crisis are varied.⁶⁰ But they can helpfully be grouped around two distinct types.⁶¹ One insists on the depth and breadth of the political

⁵⁷. See in particular R Bieber et al (eds), 1992: *One European Market* (Nomos, 1988).

⁵⁸. Cf M Egan, *Constructing a European Market* (OUP, 2001); K Armstrong and S Bulmer, *The Governance of the Single European Market* (MUP, 1998); K Armstrong, *Regulation, Deregulation, Re-regulation* (Kogan Page, 2000); Hix note 30 above Ch 8. Also central to this picture is “comitology”; eg C Joerges and E Vos, *EU Committees: Social Regulation, Law and Politics* (Hart, 1999).

⁵⁹. See eg the (important and interesting) critique of T Hartley, *Constitutional Problems of the European Union* (Hart Publishing, 1999) which in Ch 2 is largely concerned with cases from, in EC terms, ancient history.

⁶⁰. On detecting strains in the documentation prepared for the 1996 IGC, see G De Burca, “The Quest for Legitimacy in the European Union” 59 *MLR* 349 (1996)

⁶¹. Cf the assessment of the Amsterdam Treaty provided by R Dehousse, “European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?” 35 *CMLRev* 595 (1998).

and moral responsibility to which the EU is and should be subject (Part 7.1) while the other seeks to pay attention to the setting of limits on the powers that the EU exercises, thereby to preserve national control (Part 7.2).

7.1. Legitimacy sited at European level

I offer here no more than a brief overview of features that demonstrate the enhancement of the political and moral responsibility assumed by the EU in the light of the widening of its activities beyond the economic coupled with the (correct) assumption that legitimation/supervision according to national-level control is inadequate and in fact is defeated by the very fact that the transnational level has become the key site for policymaking and action.

The Parliament has been the big winner in successive Treaty revision (albeit much less strikingly so at Nice, admittedly). One might take this a tacit admission by the Member States that the “democratic credentials” of the organisation are thereby enhanced and, under the influence of broadening of competence and extension of majority voting in Council, that they should be enhanced. It represents an assumption that European-level democracy needs to be improved and that the system cannot rely for its legitimacy on its foundations in the (democratic) Member States coupled with its functionally limited capacity.

European Citizenship, the Maastricht innovation, took the rhetoric, if not necessarily the substance, on to a new plane. Citizenship does not have to be associated with States. A European Citizenship does not at all imply a transfer of status from State to European level. Indeed Article 17(1) EC provides that “Citizenship of the Union shall complement and not replace national citizenship.” But the very language of “Citizenship” suggests an attempt to convey something of the shifting sands of allegiance and legitimacy that flow from the deepening role of the European Union, and to add a (supplementary) European level of democratic legitimacy. It has not done very well on this score. But it could. In so far as it involves the construction of a sense of European identity which is, first, in supplement to and not in replacement for national loyalties and, second, built around social values not ethnicity or nationhood, then European Citizenship has some potential for developing an appealingly inclusive notion of political belonging.⁶² Such dynamic notions of Citizenship have the potential to generate a richer process than that which appears to be assumed and preferred by the *Bundesverfassungsgericht* in its *Maastricht* ruling.⁶³ There, the court identified obstacles to the transfer of essential State functions to supra-State level that could be overcome only once democratic legitimacy nourishes the European level - which, the Court seemed to consider, was far away if ever achievable, and, it seems, not even desirable. It may be true that the loyalty of the peoples of Europe to European-level governance is, as a general proposition, weaker than the bond linking them to State-level decision-making, not least

⁶². See eg J Shaw, “The Many Pasts and Futures of Citizenship in the European Union” 22 *ELRev* 554 (1997); J Weiler, “To be a European Citizen: Eros and Civilization” Ch 10 in Weiler note 5 above; H Staples, *The Legal Status of Third Country Residents in the European Union* (Kluwer, 1999), esp Ch 9.4. For useful recent surveys, see T Faist, “Social Citizenship in the European Union” 39 *JCMS* 37 (2001); N Prentoulis, “On the technology of collective identity: normative reconstructions of the concept of EU Citizenship” 7 *ELJ* 196 (2001); N Reich, “Union Citizenship - Metaphor or Source of Rights” 7 *ELJ* 4 (2001).

⁶³. Note 33 above.

because of the absence of true European political parties and a European media.⁶⁴ But this does not mean that a deep cleavage between the two levels is necessarily desirable or enduring. One may express considerable discomfort with the static presentation of the *Bundesverfassungsgericht* which appears to use the assumption of a connection between shared identity and a consequently legitimate representative unit as a basis for excluding mutation and in particular extension of the shared vision, with the exclusionary and restricting result that any impetus towards changing identity can itself be regarded as normatively unacceptable.⁶⁵ One may therefore argue for a distinct form of European identity-formation built around shared constitutional values.⁶⁶ This would not be static but would be susceptible to development and, in particular, to widening. This could begin to help to underpin multiple sites of political authority with a degree of social legitimacy and begin to challenge approaches based on membership of a single political community as descriptively and normatively orthodox. But notwithstanding the Commission's oft-stated claim that the insertion of the Citizenship provisions into the Treaty has elevated the status of the people to a new constitutional plane in the Community legal order,⁶⁷ relatively little that has happened subsequently on either the legislative or the judicial plane to the Union Citizen born on 1 November 1993 has put flesh on these bones. The Court's declaration in *Grzelczyk*⁶⁸ that Union Citizenship is "destined to be the fundamental status of nationals of the Member States" may provide a new propulsion.

Fundamental rights protection in the EU is central to the elaboration of a richer political discourse.⁶⁹ Article 6 EU, a Maastricht innovation, commits the Union to observe fundamental rights, although the Court's jurisdiction to apply that provision is confined to the circumstances envisaged by Article 46 EU. The Amsterdam Treaty introduced new provisions in this area, although, perhaps surprisingly, they were directed at exercising control over recalcitrant Member States rather than the institutions of the Union. This is Article 7 EU. The latest boost to fundamental rights protection in the Union is supplied by the Charter on Fundamental Rights. This was agreed as a non-binding legal document by the Parliament, Council and Commission at Nice in December 2000.⁷⁰ The Charter is a strong candidate for inclusion in any more formal, "constitution-type" document drafted under the auspices of the intergovernmental conference that will begin in 2004. It will be intriguing to see how the elaboration of rights-based protection develops. How far into the economic, social and political sphere will "rights" be taken? The Charter is a peculiar mix of the more

⁶⁴. Cf J Schild, "National v European Identities" 39 *JCMS* 331 (2001) for survey data from France and Germany. The article may be read as an invitation to understand the immense nature of the task of tracking past, present and future "identities" across the European continent.

⁶⁵. Cf H Lindahl, "The Purposiveness of Law: Two Concepts of Representation in the European Union" 17 *Law and Philosophy* 481 (1998).

⁶⁶. Cf J Habermas, *The Inclusion of the Other: Studies in Political Theory* (Polity Press, 1999); also J H H Weiler note 5 above; N MacCormick, "Democracy, Subsidiarity and Citizenship in the European Commonwealth" 16 *Law and Philosophy* 331 (1997).

⁶⁷. E.g. COM (93) 702, COM (97) 230. For up-to-date information on developments: <http://europa.eu.int/comm/dg15/en/people/index.htm>.

⁶⁸. Case C-184/99 [2001] ECR I-6193. See similarly Case C-224/98 *D'Hoop* judgment of 11 July 2002; Case C-413/99 *Baumbast* judgment of 17 September 2002.

⁶⁹. Cf Alston *et al* note 39 above

⁷⁰. C Engel, "The European Charter of Fundamental Rights: a Changed Political Opportunity structure and its Normative Consequences" 7 *ELJ* 151 (2001); C Calliess, "Die Charta der Grundrechte der EU" *EuZW* 261 (9/2001); Special Issue on *The EU Charter of Fundamental Rights* 8/1 *MJ* (2001); A Menendez, "Chartering Europe" 40 *JCMS* 471 (2002).

familiarly *communautaire* economic rights and broader social and political rights that have been more peripheral to the EC's activities, though the assembly of these rights in a single document may itself secure its transformative impact. What relationship with the Strasbourg system of human rights protection will be evolved? And will, as Reich has argued should follow, there be a readiness to extend Article 230 to provide for a special constitutional complaint by a citizen aggrieved by a Community act that bears on that person's fundamental rights?⁷¹ More generally still, one may consider whether the relatively open, participatory nature of the Charter's drafting process will come to challenge the more closed intergovernmental conference as the paradigm for reform of the EU. This, of course, is germane to the ambitions of the current Convention. Human rights as such represent a powerful rallying call in any polity and the Charter is capable of serving the EU well as a basis for generating or, in some States, re-generating popular support⁷² but, moreover, it is submitted that the very debate itself is constructive and capable of replenishing interest in and enthusiasm for the sense of a European dimension to political culture.⁷³ It has rather more appeal than the sight of haggard political elites stumbling blinking into the cold light of dawn after they have finally struck a deal to conclude an intergovernmental conference, leaving their officials to work out as best they can what actually was decided as the night dragged on. So in both content and process the Charter could assist in the generation of something to which one could point as a concretisation of shared supra-State values uncontaminated by nationalistic edge.

These are trends that I would treat as indicative of an impetus towards recognising the enormous political and legal clout of the Community. It has been felt accordingly that *European* democratic credentials should be attached to the process and that *European* notions of citizenship and fundamental rights protection should be available. This stands for the growth of rule-making power and accompanying legal political responsibility at European level. But, apparently moving in the opposite direction, are signals of anxiety even scepticism about the accretion of power at European level.

7.2. Legitimacy sited at State level

"Subsidiarity" is the slogan most prominently associated with the perception that the Community has become too ambitious and that the intensity of its policy-making should be curtailed in favour of a greater respect for the autonomy of the Member States' regulatory preferences. This, in fact, is not what the version of subsidiarity found in the Treaty states. It provides a more balanced formulation of the need to assess without preconception where lies the most efficient level of governance in Europe. According to Article 5(2) EC the Community shall take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." So only if all things are equal (which they never are) is there a built-in preference for State action.

Subsidiarity is properly taken as part of a mood of devoting closer attention to the merit of

⁷¹. N Reich, Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde, *ZRP* 2000 Heft 9 375.

⁷². In this vein Von Bogdandy, "The EU as a human rights organisation? Human Rights and the core of the EU" 37 *CMLRev* 1307 (2000).

⁷³. See in particular G de Búrca, "The drafting of the European Union Charter of fundamental rights" 26 *ELRev* 126 (2001).

Community intervention. The evolution of EC law has been characterised by its outward spread. The EC Treaty confers defined competences on the Community, but it does not make explicit the residual areas of exclusive national competence. “Protecting” such areas of exclusive national competence is accordingly awkward, at least once the naked political fact of veto power in Council as a means of halting unwelcome legislative ambition has been surrendered. Under the influence of both the political and the judicial institutions of the European Community, national systems have become gradually subject to EC incursion “in ever wider fields”.⁷⁴ There is no STOP! sign; more fully, “there simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community”.⁷⁵ Subsidiarity may be treated as a PAUSE! sign - pause and consider whether the Community should act. But there is no sector-specific suppression of Community competence under the subsidiarity principle.

Subsidiarity, a chameleon concept, possesses the initially unsettling yet in fact rather creative “capacity to mean all things to all interested parties - simultaneously”.⁷⁶ It is, to my mind, of value if it sets up a context for debate. Subsidiarity has the potential to serve as a basis for applying in specific cases the general notion of a complementary relationship that prevails between State and European level and, in addition, for capturing the essential point that both actors are involved in the governance of Europe, albeit that their contributions will vary sector by sector. In fact much of the story of subsidiarity through the 1990s has been tied to attempts to convert it from vague aspiration of good governance into operationally useful instrument, politically and perhaps also legally. Most notable in this vein is the Amsterdam Protocol which provides *inter alia* that “For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators”. So, for example, Directive 2000/31 on electronic commerce⁷⁷ asserts in its Preamble that “... by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity”. Mere lip-service perhaps, one may ruefully suspect, but in so far as subsidiarity opens up the debate about how and why the Community chooses to act, it is capable of playing a fruitful role in the construction of a rational agenda for devising the proper relationship between the EC and the Member States.

There are other more specific, more operationally useful devices for fixing the limits of Community competence. It is frequently and correctly observed that periodic Treaty revision has expanded Community competence, but one should also be aware how carefully defined the new competences have tended to be. For example, the Community has lately been allowed competence to act in the fields of public health, consumer protection and culture. But it is not a broad competence. It is a competence defined as supplementary to that of the Member States. The Community may, for example, adopt incentive measures, but

⁷⁴ . In Opinion 1/91 on the draft EEA Agreement [1991] ECR I-6084 the Court found that “the States have limited their sovereign rights, in ever wider fields”, thereby updating its earlier assertion that “the Member States have limited their sovereign rights, albeit within limited fields” (Case 6/64 *Costa v ENEL* note 13 above, Case 26/62 *Van Gend en Loos* note 11 above).

⁷⁵ . Lenaerts note 4 above 220.

⁷⁶ . M Robinson, “Constitutional Shifts in Europe and the United States: Learning from Each Other” 32 *Stanford Jnl Intl L* 1, 10 (1996).

⁷⁷ . OJ 2000 L178/1.

harmonisation of public health laws is explicitly excluded by Article 152(4). The same is true of cultural policy under Article 151(5). Harmonisation in such areas is excluded under the new Treaty provisions. This proviso was a major reason for the legislature's unsuccessful attempt to fit harmonisation of tobacco advertising rules under Article 95 (ex 100a). In the "Tobacco Advertising" judgment the Court itself joined the cause of insisting on the seriousness with which the limits of the Community's attributed competence must be taken when it annulled Directive 98/34 on application by Germany, which had been outvoted in Council.⁷⁸ The Court insisted that the Treaty confers on the EC no "general power to regulate the internal market"⁷⁹ and found that the Directive, which imposed a wide-ranging ban on the advertising of tobacco products in the Member States, did not contribute to market-building to the extent required to cross the threshold for valid reliance on the legal base governing the harmonisation of laws in (what is now) Article 95 of the Treaty. Put another way, the Court - by implication - treated this as an invalid attempt to develop a harmonised public health policy at Community level, a matter which is not within Community competence. It is submitted that in a regime of "QMV" it is especially⁸⁰ appropriate that the Court should police the constitutional bounds of valid Community action, and refuse to accept that a political majority can, in effect, assume responsibility for fixing the reach of the Treaty. There is much in the "Tobacco Advertising" judgment that resembles the types of anxiety found in the *Bundesverfassungsgericht's* ruling in *Maastricht* and if the European Court has been in part motivated to take a stand on the need to assert a practical constitutional dimension to fixing the reach of Community competence by unease that if were not so vigilant then it may find its position usurped by militant national constitutional courts, then so much the better for the development of a vibrant inter-court constitutional dialogue in Europe.

One might imagine subsidiarity would be a key element in the judicial control of legislative ambition. An interesting question is why subsidiarity was not discussed by the Court in its "Tobacco Advertising" judgment.⁸¹ A formal answer would be that the Court was concerned only with Article 5(1) EC and once it had concluded, in line with that paragraph, that the matter fell outside the Community's attributed competence, then subsidiarity under Article 5(2), dealing with the exercise of competence, simply did not come into play.⁸² It is therefore odd to discover in the July 2001 Green Paper on European Contract Law⁸³ that the Commission is actively seeking to uncover areas in which the market is malfunctioning because of deficiencies in the existing package of harmonised contract law; and that these are (likely to be) the areas in which future harmonisation will be focused. The Green Paper's presentation is in terms of the need to comply with the principle of subsidiarity; but might this not truly be more a question of whether there is even a competence to harmonise national

⁷⁸ . Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419.

⁷⁹ . Para 83 of the judgment.

⁸⁰ . Though not exclusively: a unanimity rule ensures the conferral of the authorisation of all the Member States on Community acts but, in so far as a unanimous Council plays fast and loose with the limits of Community competence, this cedes unwarranted power to national executives acting through the Council and tends to subvert recognised national constitutional controls.

⁸¹ . Contrast the Opinion of AG Fennelly. On judicial review, see D Wyatt, "Subsidiarity and Judicial Review", Ch. 32 in O'Keefe (ed) note 36 above.

⁸² . AG Fennelly considered that Art 95 is a matter of exclusive competence so Art 5(2) is in any event irrelevant. The Court did not address the point in the case but has done subsequently; see Case C-491/01 *ex parte BAT and Imperial Tobacco* judgment of 12 December 2002, paras 178-185.

⁸³ . COM (2001) 398.

contract law? That is, the Commission has rushed to Article 5(2) without first addressing the dictates of Article 5(1). However, it may be that the distinction matters little in practice, if at all. The application of the principle of conferred powers (Article 5(1) EC) and the application of the principle of subsidiarity (Article 5(2)) involve closely similar inquiry. Functionally, subsidiarity and attributed competence have much in common, of course, and both have come to the fore, the one earlier than the other, precisely because of the need to fix on methods for setting limits to Community action in the context of a relaxation of political grip that might tend to generate (qualified) majority-driven centralisation.

The broader point is the function of the Court in a climate of “competence sensitivity”. It is not to argue complacently that the relationship between the competence of the EC and that of the Member States is unproblematic. It is instead to argue that such problems are currently under interrogation.

It is also significant to an appreciation that the transfer of power under the Treaty is not all one-way that the competences that the Community has gradually added to its list beyond the arena of market building typically involve the establishment of minimum standards only. Articles 176, 137 and 153 EC, governing competence to legislate in the fields of environmental protection, social policy and consumer protection respectively, stipulate that national measures that are stricter than the agreed Community standard are permitted, provided they are compatible with the Treaty. Such a measure establishes a common EC-wide rule, but as a minimum only, as a floor above which Member States may introduce stricter rules up to the ceiling set by the Treaty itself, in particular by the rules of free movement. This may be taken to represent confirmation that integration and uniformity are inapt as paramount guiding values in such realms and that space should be preserved for diverse local preference and for regulatory experimentation.⁸⁴

It can therefore be seen that at times of Treaty revision States have embraced a formal expansion of competence and agreed the exercise of powers to be subjected ever more frequently to qualified majority voting; but this has been accompanied by the insertion from 1993 of the subsidiarity principle, a general provision addressing the question of when the Community should exercise its competence to act, alongside other more specific textual limitations on the reach of Community action. This is part of the bargain struck and still being struck on what shall be the impact on the scope of permitted Community action of the rise of potential dissentient minorities unable to rely on voting power in Council to apply a brake.⁸⁵ In the context of this paper, the key argument is that *already* the perception that the Community may be over-reaching itself is being addressed; and that a drive to use the 2004 IGC to harden the division of competence between States and Community risks overlooking

⁸⁴. Cf S Weatherill, “Flexibility or Fragmentation: Trends in European Integration” in J Usher (ed), *The State of the European Union* (Longman, 2000); M Dougan, “Minimum Harmonisation and the Internal Market” 37 *CMLRev* 853 (2000). More broadly, B Rosamond, *Theories of European Integration* (Macmillan, 2000). On associated maturation of the academic discipline, see J Shaw, “European Union Legal Studies in Crisis? Towards a New Dynamic” 16 *OxJLS* 231 (1996); J Hunt and J Shaw, “European Legal Studies: Then and Now” in D Hayton (ed), *Law’s Future(s)* (Hart, 2000).

⁸⁵. Cf A Dashwood, “States in the European Union” 23 *ELRev* 201 (1998), examining “conservatory” vs “constitutionalising” elements; also N Bernard, “The Future of European Economic Law in the light of the principle of subsidiarity” 33 *CMLRev* 633 (1996); S Breyer, “Does Federalism make a difference?” [1999] *Public Law* 651; C Timmermans, “Subsidiarity and Transparency” 22 *Fordham Intl LJ* S106 (1999).

or undervaluing existing methods of re-balancing.

Much more general manifestations of anxiety to control the expansion of the Community's influence can be grouped under the general heading of flexibility. This is a many-headed beast⁸⁶ but loosely what is at stake is the development of collaborative inter-State endeavour which does not necessarily involve orthodox communautaire method nor the participation of all the Member States. Room is left for the expression of local preference; the Community does not simply swallow up the sector. Scope for opting out, the provisions on enhanced co-operation invented at Amsterdam and the open method of co-ordination⁸⁷ all fit on this agenda. The Commission's White Paper on Governance⁸⁸ is also receptive to new methods for doing the Union's business - although not receptive enough for some commentators.⁸⁹

The provisions on closer co-operation introduced by the Treaty of Amsterdam have particular appeal because they attempt to establish a framework within which new endeavours falling within the scope of Community competence may be pursued by some, but not all, Member States. The procedure seems to promote managed and non-exclusionary deepening of collaborative endeavour by most, but not all, Member States. Variation occurs sector-by-sector, diminishing the risk of a generally applicable deep rift between hard core States and an outer rim. The opportunity for advance other than at the pace of the slowest members of the convoy seems especially vital in the light of the next load to be placed on the EC/EU system, enlargement to the East. In this sense, these new provisions on closer co-operation could be regarded as the key to resolving the "widening or deepening" debate - they promise both, albeit at the (now inevitable) price of abandoning the uniformity of application of the law. In fact, the threshold criteria are rather demanding and the provisions have not yet been used. At Nice they were lightly tweaked to loosen the restrictions. Closer co-operation has a particularly positive constructive potential, for (unlike subsidiarity) it breaks the simplistic State *or* Community confrontation and suggests layered alternatives in between. Of particular salience to this paper, flexibility, which has become a landmark feature of the EU's constitutional terrain, shows the dynamic nature of the process and challenges limiting assumptions that constitutionalism has a necessary anchorage in *fixed* reference points.⁹⁰ And again it raises anxieties that the drive towards harder competence division in 2004 may neglect what has already been achieved in pursuit of a reconfiguration of the relationship between the Union and its Member States.

8. The appeal of multi-level constitutionalism

The juxtaposition of devices and symbols that insist on the depth and breadth of the political and moral responsibility to which the EU is subject alongside other instruments that pay more sceptical attention to the setting of limits on the powers that the EU exercises may seem to

⁸⁶. The literature is, of course, vast! See G De Burca and J Scott (eds), *Constitutional Change in the EU: from uniformity to flexibility?* (Hart, 2000) for a collection of essays and copious bibliographic references.

⁸⁷. See D Hodson and I Maher, "The Open Method as a new mode of governance" 39 *JCMS* (2001) 719.

⁸⁸. COM (2001) 428, 25 July 2001.

⁸⁹. See comments at <http://www.jeanmonnetprogram.org/papers/01/010601>; also C Scott, "The Governance of the European Union: the Potential for Multi-Level Control" 8 *ELJ* 59 (2002).

⁹⁰. See J Shaw, "Constitutionalism and Flexibility in the EU: developing a Relational Approach" Ch 15 in De Burca and Scott note 86 above; also G de Burca, "Differentiation within the Core? The Case of the Internal Market" Ch 7 in De Burca and Scott esp at p141.

carry a paradoxical whiff. In the former instance, the EU appears to be treated as if it were a State or at least something closely akin to one, in the latter the EU's credentials as a functionally limited international organisation are on display. But it is not a paradox precisely because the State/non-State dichotomy is misleading as to the true nature of the EU, which deserves to be intellectually liberated from such binary thinking in favour of embrace of the virtues of multi-level constitutionalism as a model for governance.

What is actually at stake is an acceptance that the increasingly dense involvement of the EU, and in particular the EC, in regulatory activity increases anxieties about the accountability to which it is subject. The two trends identified above involve two different choices as to the proper site of that accountability; first, European level, achieved by, for example, a deeper role for the European Parliament and a firmer stance on fundamental rights protection at European level and, second, national level, which is secured indirectly by placing closer limits on what the Community is permitted to achieve.⁹¹ But in fact this is not a choice. Both elements combine to generate a credible level of legitimation for the activities pursued in the Union.

This is the “either/or” problem. Much of what has been articulated above relates to a fruitful and constructive interrelation of State power and power exercised by European institutions. Beyond the descriptive I make the claim that this is very strongly supported by the normative claim that Europe must not be built on an either/ or model. I have argued above that the Union is not a state, is not on the road to becoming one and that it should not take that road. Instead it sets up a system of governance in which it and its Member States have distinct but complementary roles to play. “Multi-level governance” acts as a rather neat shorthand for describing the way in which Europe (and not only Europe) is the subject of many layers of intersecting legal and political authority, some territorially defined, others sectorally defined, not necessarily capable of subjection to a single, internally consistent rule of authority, yet working more or less successfully because of adaptation along the way and the vested interest of participants in avoiding conflict. I have described the European legal order, involving national courts and the European Court in this vein, but the phenomenon is much broader. It stands for multi-level constitutionalism, within which national and European level systems of governance interconnect. In this vein pioneering work by Pernice treats the European Union as a divided power system, and sees “a progressive constitution of legitimate institutions and powers at the European level, which are complementary to the national constitutions and designed to meet the challenges of an evolving global society”.⁹² This points towards the growth of a coherent constitutional and institutional architecture for Europe, albeit that different sources of legal authority must be drawn on to make real this vision - the key being not to suppose that one source has any necessary superiority (measured in any sense) over another. I find this a hugely appealing vision especially, as explained by Pernice, in so far as

⁹¹. There are, of course, other proposed institutional reforms that tend to promote State-level accountability, eg a greater right of participation in EU policy-making granted to national Parliaments or Parliamentarians.

⁹². I Pernice “Multi-level constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited” 36 *CMLRev* 703 (1999) (a rich source of bibliographic references); I Pernice, “Multi-level constitutionalism in the European Union” 27 *ELRev* 511 (2002). See also J Wouters, “Institutional and Constitutional Challenges for the European Union - some reflections in the light of the Treaty of Nice” 26 *ELRev* 342 (2001); M Horeth, “No way out for the beast? The unsolved legitimacy problem of European governance” 6 *JEPP* 249 (1999); J Shaw, “Postnational constitutionalism in the European Union” 6 *JEPP* 579 (1999).

it corrects historically mistaken attitudes to the “State” as necessary organising starting-point.

In so far as markets outstrip States and generate patterns of regulation beyond the State, there then arises the need to shape institutions that will perform these transfrontier regulatory tasks and to fashion methods for supervision of their conduct. Multi-level constitutionalism possesses the singular attraction that it frees us from the trap that treats the increase in private economic power in supra-State domains as a basis for shifting extra public power to that same level, which would in turn draw demands for greater institutional accountability to be transplanted to that level, a process which is then seen to impoverish the domestic political sphere. This is a self-defeating prognosis. Instead a multi-level approach argues for the importance of different levels of governance in dealing with the growth of transnational economic activity. It builds a case that, in fact, the very combination of European institutional and constitutional architecture alongside those of the Member States itself secures a broader sense of democracy - a democracy which ensures the reflection and representation of interests outside a context which is dependent on and limited by State systems.⁹³ In this sense the argument is that European integration is itself democratic and can be legitimated by its capacity to inject into national political processes a legally enforceable duty to respect interests that are affected by decisions taken yet which are not capable or are inadequately capable of shaping those decisions through voting power *as well as* its capacity to improve the effective problem-solving capacity of States by providing a reliable framework for the taking of collective action.

This requires judgements about European “democracy” to comprehend the full range of direct and indirect impacts of European norms.⁹⁴ In short, national-level decision-making assumes what does not exist - a stable set of consumers of those decisions, whose preferences will be fully satisfied by the national polity and who are not joined by other “external” affected parties. European law needs to correct these malfunctions, but without eliminating the State itself which plainly retains an indispensable but not unique role in sustaining the loyalty of citizens to adopted political decisions. This suggests a wider context which insists that the function of the European Union is to “tame” the nationalistic urges of its States by using legal rules to strip them of their capacity for harmful excesses.⁹⁵

⁹³. See in particular, on a “constitutional” reading of EC trade law, the groundbreaking work of M Poiares Maduro, *We, the Court* (Hart, 1998); also A Somek, “Equality and Constitutional Indeterminacy: An interpretative perspective on the European Economic Constitution” 7 *ELJ* 171 (2001); S Weatherill, “Pre-emption, harmonisation and the distribution of competence to regulate the internal market” in C Barnard and J Scott, *The Legal Foundations of the Single Market* (Hart Publishing, 2002).

⁹⁴. Cf insisting on the democratic potential of supranationalism C Joerges, “Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration” 2 *ELJ* 105 (1996); and in the particular context of private law, “European challenges to private law: on false dichotomies, true conflicts and the need for a constitutional perspective” 18 *Legal Studies* 146 (1998). See also C Joerges and J Neyer, “From intergovernmental bargaining to Deliberative Political Processes: the Constitutionalisation of Comitology” 3 *ELJ* 273 (1997); M Poiares Maduro, “Europe and the Constitution: What if this as good as it gets?” in J Weiler and M Wind (eds), *Rethinking European Constitutionalism* (CUP, forthcoming; also available via <http://les1.man.ac.uk/conweb>); P Craig, “The Nature of the Community: Integration, Democracy and Legitimacy” in Craig and de Burca note 23 above; Lord, Lord and Beetham, Zweifel, Menon and Weatherill note 7 above; Reich note 62 above; Shaw note 92 above.

⁹⁵. Plainly I here compress a vast debate into a tiny space! See much more fully eg N MacCormick, *Questioning Sovereignty* (OUP, 1999); Weiler, *The Constitution of Europe* note 5 above; D Curtin, “Postnational Democracy: the European Union in search of a Political Philosophy” (Inaugural Lecture, Universiteit Utrecht, 1997).

9. Conclusion

There is a need to develop an institutionally and constitutionally inter-connected system of layers for achieving efficient and representative governance in Europe. This, therefore, asserts a formal legitimacy for the EU rooted in its Treaty but supplements this with a claim to legitimacy founded on its capacity to renovate and, fundamentally, to improve the responsiveness of (national) decision-makers to interests who are affected thereby and not simply to be satisfied with existing national assumptions. That is, European market-building is reflected not in European State-building but in making national systems more European. The core argument of this paper is that discussion of “constitutional finality” needs to be conducted in this light, but that there is a risk of neglecting the nuances. Particularly, the quest to construct a “hard list” of competences is symptomatic of the lurking “either/or” problem, which underplays the extent to which both Member States and the European Union depend on each other for the effective discharge of the full range of their political, economic and social tasks. And the problem is accentuated by the “delayed reaction” phenomenon, according to which insufficient account is taken of how the inherent dynamism of the EU institutional and constitutional system is *already* making strides to tackle the perceived problem of over-ambitious centralisation of power in Europe.

It is correct to diagnose a certain confusion about what to “do” with the EU, now that it has clearly broken its bonds as a mere machine for the delivery of economic integration and has gradually accumulated state-like constitutional and institutional features, while performing ever wider functions. Fundamental questions about the nature, purpose and location of democratic legitimacy are attracting different types of response designed to cope with seepage of power to European level. On the one hand one observes care to impose limits on what the Community can do in part out of anxiety that it lacks sufficient legitimacy, on the other it drives towards increasing legitimacy at the European level by adding to the Community and/ or to the wider Union factors that reflect the State-like reach of its activities. My claim is that these are complementary approaches, that emphasise the proper roles of both States and the European institutions. Admittedly portrayal of the dynamic relationship that has been developed within the Union framework between the Member States and the institutions of the Community/ Union may, even if accepted as basically accurate, be criticised for its intransparency. Who can understand this labyrinth, other than the expert? And so, the complaint continues, the system loses legitimacy because of its obscurity. This is an important perception, and it argues for making more transparent the system of governance in Europe while appreciating that in so far as its virtues lie in its inter-connections and cross-checks it cannot be subjected to a simple explanation. Gratifyingly, this appreciation is present in the Laeken Declaration and has played a role in at least some of the deliberations of the Convention. But, in the approach to 2004 and the rising tide of opinion which asserts that “something must be done!”, it is fundamentally important to avoid conflating the search for transparency and clarity in the EU with the case for a “Constitution”, especially in the context of a search for a “finality” that would involve the triumph of one vision over another. Both projects are served by a product that will look similar or even the same - a short, comprehensible document which will capture in words the essential features of the system. But the former, which I favour, would treat such a document (and indeed, as in the case of the Charter of Fundamental Rights, its very preparation) as an element in a process encouraging

informed public debate about what the Union is seeking to achieve and how it should go about doing so,⁹⁶ while the latter would alarm me deeply in so far as it would be designed to “solve” questions about the true site of political and legal authority in Europe. Any process that is built around the quest for a winner and that will consequently also involve a loser is pernicious.

⁹⁶Cf P Craig, “Constitutions, Constitutionalism, and the European Union” 7 *ELJ* 125 (2001), drawing on the EUI’s simplification project; also the White Paper on Governance note 88 above.