

**Restraining Power from Below:
The European Constitution's Text and the
Effectiveness of Protection of Member State
Power within the EU Framework**

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Restraining Power From Below:

The European Constitution's Text and the Effectiveness of Protection of Member State Power Within the E.U. Framework

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Recently, I have heard it said here in Europe that, come Hell or high water, Europe will have a constitution. The details, even significant details, of that constitution are no longer as important as the realization of its adoption. Europe, as a commodity ever so carefully packaged for consumption by nations full of grateful citizens ready to vote as instructed by their respective governments, was in danger of disintegration as political elites bickered over the division of the power afforded them through the construction of this not new but improved entity.² Faced with what had been characterized as a crisis of confidence in the Europeanization project of the EU, forcefully demonstrated by the low voter turnout and the results of the European parliamentary elections of June 13, 2004,³ the impresarios of the European constitution had to act. To avert a total crisis, the political elite resolved to approve whatever was available – in this case the draft constitution – whatever its imperfections and lacunae.⁴ A gesture was required, and that gesture could be provided by the appearance of resolute action, if Europe was to progress along the lines outlined by its elites.⁵ For that purpose, even a flawed document would do. That view, at any rate, was embraced by the European popular press in the aftermath of the disappointing results of the European Parliamentary elections of June 13, 2004. And this view is not limited to the popular press. As the Member States marched toward approval of the draft Constitution on June 18, 2004 under the Irish presidency,⁶ Franco Frattini, the Italian Foreign Minister was quoted as saying: “We will be approving a compromise of minimums. It is a great paradox that though we are conscious of the fact that the Treaty will not be what we want, we must recognize that the best response to citizen indifference is its adoption.”⁷

Like most modern constitutions, the proposed European Constitution is rich and thick. For this paper, I will focus on a small but important aspect of the arrangements memorialized in that instrument – the issue of federalism in the improved but not new Europe. The European Constitution means to broaden and deepen Member State control over the mechanics of European governance. The draft constitution institutionalizes limitations on the ability of European institutions to legislate or to appropriate governance powers at the expense of the Member States. The Constitution memorializes the current state of federal-state allocation of authority as set forth in the Treaties and amplified in several generations of European Court of Justice Opinions and adds a number of rules to make it harder to impair the ‘deal’ struck by the constitution makers on the balance of power between the European federal authority and the Member States.⁸

Thus, as Europe takes another important step on the path to the creation of a formal state apparatus reflecting the reality of an increasingly integrated Europe,⁹ it has sought to implement binding norms meant to limit the general government’s ability to appropriate power for itself. This is an especially important concern for a Europe made up of Member States jealous of their respective sovereignty and state prerogatives, at least as a formal matter, yet ever eager to export difficult political issues to a collective entity held strictly to account.¹⁰

Having attempted to institutionalize a federal system in which the general or collective government governs but does not rule, can the structure survive its birth? Europe is not the first state in gestation that has walked down this path. Two of its great predecessors – the United States and Germany – share similar histories. Both are products of struggles to create multi-governmental systems of shared power, the framework for which was memorialized in an instrument binding on the people and their representatives. Moreover, European constitutionalism does not arise without a ‘domestic’ context of its own. In a sense, the constitutionalism that we now confront represents a culmination of developments indigenous to the project of self-creation undertaken by the institutions of the European Union since the days of the Communities in the 1950s.

This paper examines the apparatus of institutionalized upside-down federalism in the E.U. Constitutional entity in light of the American and German experiences in building federal, or at least multi-level governance systems, in which the power to govern is shared among many units. The paper first briefly reviews the notion of federalism as a concept of power sharing between or among multiple governments. Within this context, the power allocations made in the European Constitution can be examined most usefully. The paper examines the ways in which American and German courts have developed key concepts in defining the parameters of the federalism within their respective states. These constitutional experiences provide the context within which several key provisions of European federalism, provisions attempting to hard wire power allocations between and among the government participants in the federal entity, will be examined.

For very different reasons, both the American and German experiences are useful for evaluating the potential for long-term success of the attempt to hard wire the borders of federalism in the text of the European Constitution. In addition, the experience of the European Court of Justice as a great facilitator of the birth of Europe itself suggests parallels in jurisprudential behavior that should not be ignored.¹¹

Many, especially in Europe, question the value of American constitutionalism in understanding constitutional developments in Europe. American constitutionalism, after all, was imported with less than positive results in the period before the Second World War,¹² and anyway, some believe, Americans have always shared an unchanging view of federalism alien to European sensibilities.¹³ Yet, the American experience is indirectly relevant in important if ironic respects. As the first and most successful federal system, its structure and history cannot be ignored. The American system supplies one of the principal templates for measuring the success and authenticity of federal systems.¹⁴ Indeed, the shadow of the American Constitutional experience loomed large in the background of the crafting of the European Constitution. The participants in the European Constitutional Convention hoped to invoke a ‘Philadelphia Moment,’ an authenticating experience in which ‘civil society’ participates in an authenticating experience leading to the memorialization of a new and revolutionary institutionalization of political society.¹⁵ At the same time, Europe hopes to avoid the aftermath of the Philadelphia Moment as played out in the United States – civil war and centralization authenticated by national political and judicial institutions. Post-Philadelphia America is a model to avoid for Europe and, thus avoided, is irrelevant.¹⁶ But emulated or avoided, inevitable or exceptional, the American system has produced a large and sophisticated jurisprudence on matters of federalism. The lessons of that jurisprudence bear heavily on the potential for interpretive development of European Constitutional

text, even one built on 'anti-American' principles.

The American experience suggests the risks, at least for subordinate units of a federation, of memorializing unresolved conflicts over the nature of the structure of government within a constitutional text. It also suggests that text is indeed important in structuring inter-governmental allocations of power within a federation. In the absence of text indicating a particular resolution, the constitutional courts will tend to affirm the political settlement reached between the governmental participants. And that settlement usually favors the superior or general government at the expense of the inferior or subordinate governments of a federation. Or, at least it tends to favor the level of government in which the constitutional court is situated.

The German experience is perhaps even more directly relevant to the new European constitutional 'international' state. Germany is the most influential federal state within the new European construct. Its constitutional traditions arise from the union of more or less independent states that in its first manifestation after 1871 relied heavily on an inter-governmental model of governance.¹⁷ The constitutional traditions of Germany include a highly developed constitutional jurisprudence of federalism and a constitutional court whose work is well known outside of Germany.¹⁸ The parallels between German and European unification are stronger than that between American and European unification. Germany itself will likely continue to be a pivotal player within the European construct for the foreseeable future. Heavily invested in the creation of the European international state, the German judiciary, and its approach to matters of federalism, will likely be felt as the new European system fleshes itself out.

The German experience suggests three points. First, Germany serves as an example of the way in which text, and especially constitutional text, is important in outlining the parameters in which the federalism debate will take place within the political institutions and between the political and judicial institutions of government. The German constitutional text is generally far richer than its American counterpart, at least with respect to the federal relationship. It provides more clues respecting the manner in which political conflict between governments are to be resolved and the resulting government structured. It also serves as the basis for understanding the norms underlying the political settlement reflected in the text. Second, text, even richly detailed text, is not sufficient to guarantee the protection of the weaker or subordinate participants in a vertically integrated federation. The political process cannot guarantee the rights of states as against the federal government where the push to nationalize and centralize political conflict and power, remains strong. An independent institution is necessary, and constitutional courts have appeared up to the task since the middle of the 20th century. But text and interpretive institution are not enough either. The critical ingredient in the German success, such as it is, was the deployment of intra- and extra-constitutional principles which articulated the positive normative vision of the federal system as conceived in the Basic Law and provided a basis for more or less consistent application of the Basic Law to mediate disputes between the federal and Länder governments in a way that ensured that decisions would not invariably favor assertions of federal power.¹⁹

The European Court of Justice has itself emerged as a significant source of federalism jurisprudence. Its construction of a balance between Member State and European power through the development of the principles of direct effect, supremacy and autonomy have been critical for the development of a theory of the E.U. which now finds itself memorialized in the European Constitution.

The ECJ has invested the E.U. treaties with a vision of itself that would be hard to glean from the face of the text or from the any consensus of intention of the founding generation. The ECJ has not accomplished this without at least some connivance from the Member States themselves. As Marie-Pierre Granger has begun to uncover, the Member States themselves have been using the ECJ as a means for shaping the E.U.²⁰

But the ECJ is something of a paradox. Using the principles-driven language of the Bundesverfassungsgericht to interpret a text fairly rich in description of the boundaries between Member State and E.U. competences, one might expect the ECJ to have developed a jurisprudence of restraint. Instead, the ECJ has used the lacunae in the text to construct something akin to the American settlement of the unresolved conflict over the structure, nature, purpose and goals of the E.U. It has chosen to treat a text that memorialized ambiguity designed to satisfy the conflicting views of the Member States to develop a unique vision of the entity created by the Treaties. The ECJ's settlement, has embraced a nationalist vision to some extent, though for the moment to a lesser extent than that articulated by the American court. The reasons the ECJ has acted more like the American Supreme Court in a legal environment more like that in which the Bundesverfassungsgericht operates are complex but can, to some extent, be traced back to a constitutional text which has always suggested a progressive ideal – the closer union of the 'peoples' of Europe²¹ – even in the altered version of this phrase appearing in the European Constitution.²² This effect of this text, and its reconstruction by the ECJ, evidences that well-known limitation of comparative analysis, a limitation that must be kept firmly in mind for purposes of the analysis undertaken here.²³ The ECJ, steeped in this institutional history of a certain proclivity to make broad interpretive leaps from time to time, will preside over the construction of a European constitutionalism.

The ECJ experience thus suggests a caution, especially for those who find nothing of value in the history of American constitutional jurisprudence. Courts, especially constitutional courts, share approaches in ways that written constitutions can affect but not control.²⁴ For this court has combined the practices of the German Federal Constitutional Court to effect a federalism revolution of American proportions. The European constitutional set up provides the Member States with everything constitutional experience suggests is necessary for the protection of the weaker members of the federation – a more directed text, a strong court and principles based jurisprudence. Ironically, however, the history of the ECJ and its use of text and principle to advance a nationalist vision, suggests that the German experience is not inevitable.

How might the European Court of Justice, in its new incarnation as constitutional court of the European Union, approach the interpretation of the European Constitution? My prediction: The European Court will continue to be an active force in the consolidation of national power at the E.U. level. The European Constitution will provide the Court with a vehicle for a cautious and conservative nationalism. The constitutional text will provide the court with additional material for fashioning and solidifying its vision of a unique multi-level governance structure for Europe. The realities of this union, the skeleton of which is memorialized in the European Constitution, is based on power exercised through the center but controlled by power alignments at the bottom – at the level of the Member States. Individual Member States will lose the power to resist the center, but action from the center will reflect the will or at least the acquiescence of a collective of Member States. This consensus will be expressed institutionally through the requisite majority voting in Counsel and Parliament, or otherwise through

consensus.²⁵ The court will protect the power of Member State consensus as it strengthens the power of the institutions of the E.U., to develop and enforce this consensus.

The very different experiences of American, German and E.U. pre-constitutional experiences with federalism reveal that whatever ultimately emerges as the European constitutional text can only be considered a starting point for the construction of a European federal system. The implementation of European federalism, the application of the words so authoritatively memorialized in an increasingly large number of languages is neither self evident nor sure. It will be for the court, reviewing the actions of political actors, to give life and meaning to those words. The court may well play again a pivotal role in revealing the actual boundaries of Member State power and the willingness of the institutions of government to protect those boundaries. That revelation may follow the court's vision of the nature of the political creature created by the European Constitution, rather than the vision of the political actors who wrote the text.

The experience of the American and German federal republics suggest that caution is necessary for those who would rely on constitutional black letter to draw boundaries around the powers of a general government. Both the American and the German federal experiences, as well as that of the pre-constitutional E.U., suggest that any general or federal government will, when it is deemed necessary and the requisite level of popular support can be discerned with some confidence, generally find a way to assert power through its political and judicial institutions whatever the written limitations in constitutional text. This is essentially important in the context of a Constitution whose terms remain contested. As a consequence, the text will only be as useful as the judicial and political institutions will make it. The historical record suggests that in time of necessity, neither will stand in the way of federalization of authority. And experience suggests that sooner or later one crisis or another will inevitably make the assertion of an overbroad federal power likely.

The European Constitution starts down the interpretive path from a background in which the institutions charged with its oversight have clearly developed a coherent vision of centralization and federal authority. A look at the ways in which Constitutional courts have served the center at the expense of the Member States suggests that the borders of Member State power will be far more malleable than the European Constitutional text suggests. The experiences of the United States, Germany and the European Union to this point provide clues about the way the court may develop the meaning of the 'plain' text of the European Constitution in the years to come.

A. Structuring Federal Power Sharing Arrangement

Multi-level constitutional systems institutionalize power-sharing arrangements among governments asserting power over common sets of territory and people.²⁶ These arrangements produce a diffusion of sovereign authority among multiple partial sovereigns that is arranged either vertically or with greater horizontal elements. However arranged, these partial sovereigns together are meant to constitute the whole of a self-contained political community. Once purely a means of consolidating subordinate governments into more or less unified states, the multi-governmental 'federal' model increasingly provides a flexible and popular method for the construction of international or inter-governmental systems.

Multi-level constitutional systems can be arranged horizontally – a general government and its constituent parts existing as co-equal members of a union.²⁷ The last more or less rigorous experiment in horizontally arranged constitutional state systems

ended badly over a century ago. The Confederate States of America might have worked well in theory.²⁸ However, when faced with threats from the outside, that system tended to respond inefficiently. The tendency among modern scholars is to characterize horizontal systems as mere confederation or systems of inter-governmentalism. Not constituting 'proper' states, these constructs are not generally deemed worthy of serious study as state or federal systems appropriately constituted. On the other hand, horizontally arranged multi-level systems have proven effective in building stable systems of governance at the supra-national level. Regional trade associations, and the systems of supra-national human rights regimes are examples of the utility of this form of organization.

Most multi-level constitutional systems are usually structured as integrated vertical pyramidal systems. In such systems sovereign authority is divided between a general government, independent and supreme within the ambit of its specified powers, and its constituent parts, to which are reserved all residual governmental authority. The institutions of the general government are generally given authority to police the division of authority. The United States and Germany are usually considered two great models of federal organization. Other European States have crafted multi-layered governance systems, devolving some measure of governance rights to subordinate governments to accommodate ethnic, linguistic and nationalist divisions. Prominent among these are Spain, Belgium and the United Kingdom.

In the United States, structural protections of the residual powers of the states have been characterized as a mere truism: not a grant of positive power to the States, but merely a provision of descriptive and reassuring value.²⁹ Between 1789 and the present, the application of the principle by the federal courts has produced a flexible and efficient system of national governance in which the political accountability of federally elected officials serves as the primary source of the protection of federalism. It has served to reduce to insignificance,³⁰ or to mere formalism,³¹ the great residual powers of the constituent states of the American union in favor of the general government.

Germany has allocated power a little differently within the structure of its federal government. The Basic Law provides the Länder, represented in the Bundesrat,³² with a limited veto power over federal legislation³³ and allocates to the Länder virtually all power to implement federal law.³⁴ Since the adoption of the Grundgesetz, the resulting system of cooperative federalism, as interpreted by the German Federal Constitutional Court (the Bundesverfassungsgericht) invoking important extra constitutional principles has preserved Länder power to a greater extent than in the United States. But the power is not an independent power. Rather the power is based on a constitutionally necessary cooperation between the two levels of government. Thus, German federalism has produced a "tendency in German federalism to require consent from multiple actors for political action, resulting in the obstruction of clear and effective policymaking."³⁵

But vertically integrated multi-level systems of governance need not necessarily be constructed with vectors of power pointed up to the general government. Vertical federations can be structured upside-down. The best example of the most successful attempt to structure such a multi-governmental system is the E.U. As is well known, the European Union represents a hybrid of sorts – it is organized as a supra-national entity with multi-level federal characteristics.³⁶ It has evolved from a model of inter-governmental cooperation focused in the economic sphere to an international system of governance with many of the attributes of a federal state.³⁷

The structure of the E.U. evidences a strong adherence to certain characteristics of both vertical and horizontal federal states. These characteristics have caused more than one federal constitutional court to suggest that the hybrid cannot exist at all – and certainly not as a nice and well-behaved state. The German Maastricht decision provides an extreme example of this discomfort among the community of well-behaved states.³⁸

But, while it exhibits some key characteristics of a horizontal federalism,³⁹ the E.U. has sought to develop for itself certain important characteristics of a vertically integrated federal state. These key characteristics include EU autonomy, supremacy and direct effect. The E.U. exists separate from the Member States that constituted it, the E.U. is supreme within the areas of its competence, and E.U. acts can bind the citizens of the Member States directly, without the need for implementing legislation by the Member States. Most of these characteristics, no doubt reasonably to be inferred from the Treaties, were articulated and popularized by the European Court of Justice through two generations of a carefully and usually successfully developed jurisprudence.

But the EU also exhibits the traits of a vertical system built upside down. Europe may be a vertically integrated affair, yet the construction of the E.U.'s governing structures suggests a twisting of the flow of power back toward the bottom and the Member States. True to its origins as a complex system of policed inter-governmental cooperation and joint action in a variety of specific matters, the EU has evolved a structure of governance with the power to implement the will of the Member States, expressed as a consensus among a large majority of the Member States, but with no effective executive authority at the federal level. It is a model of an administrative state in which only the bureaucracy and the court exists at the federal level.⁴⁰ Indeed, the rise of so-called comitology and governance by committee, the object of much recent study, provides a natural vehicle for an administrative model of governance.⁴¹ The limited competence of the E.U., the parsing of the foreign relations power and the withholding of the power to tax and to wage war, substantially reduce the ability of the E.U. to act independent of the Member States. Moreover, the structure of the EU Council ensures that at some level decisions will be made by an E.U. institution with primary loyalty to the Member States rather than to the general government.⁴² All the same, the structural limits on the power of the institutions of the E.U., the methods for enacting regulations, and emerging principles of legislative restraint (among the most well known of which is the principle of subsidiarity), have produced a system with substantial formal respect for Member State authority, a certain amount of inefficiency, and a historic tendency to encourage the migration of state power to the federal or general government., while retaining a collective control of policy, at least at a macro level, in the Member States. While no Member State individually can claim superiority over the federal edifice, collectives of Member States have substantial power to affect the course of E.U. action.

For Member States, this provides the best of all worlds. Power has not flowed directly to the center. Instead, power flows to the collective of the bottom. Consensus among the Member States rather than fiat by independent actors at the center, provide an important source of E.U. power. A binding form of inter-governmentalism is attractive to Member States that understand the importance of collective action but that wish to resist ceding authority to an independent general government. More importantly, a 'headless' federation provides a convenient vehicle for avoiding political hard questions domestically. Consensus action implemented at the European level permits necessary action while minimizing the

likelihood that the electorate will blame domestic leaders. It is easier to implement hard choices by blaming 'Brussels' than to confront the issue as a matter of domestic politics. The fact that each Member State may have had a significant hand in shaping the consensus leading to E.U., action makes the process even more inviting. As one academic recently put it, European elites tend to blame Brussels for all that is negative.⁴³

B. The Limitations of Text.

In most democratic states, the principle is firmly established that constitutional courts must be allocated supreme authority to interpret constitutional text.⁴⁴ The principle may have very different bases. In the United States, for example, ultimate constitutional review by the federal Supreme Court follows from the division of authority built into the federal constitution and then current notions of the nature of law and the judicial power (in contradistinction to the legislative and administrative power) of government.⁴⁵ In other jurisdictions, constitutional review by some (usually quasi-judicial) entity follows from the requirements of the principles of democracy and the rule of law.⁴⁶

In the hands of constitutional courts, constitutional text has proven to be quite fluid.⁴⁷ Even the most self-evident provision of text has, in its time, been susceptible to interpretation, and re-interpretation. Moreover, constitutional courts have demonstrated a propensity for going outside of constitutional text in the service of that interpretive task. In the United States, judges have devoted a tremendous energy to the construction of principles of interpretation of the American constitution. Principles of construction have been derived from text, from the intention of the framers, from theory, from precedent, and from values inherent in the document itself or in the society from which the document springs. None of these interpretive tools can be controlled precisely through the text of the Constitution. Nor need these approaches be compatible, consistent, and internally coherent. Yet they have served, each in turn, and in the hands of their adherents, to build a substantial amount of flexibility into the American Constitution. Despite (or perhaps because) of their utility, interpretive tools remain tremendously contentious, as judges, academics and the political classes seek to mold a jurisprudence acceptable to them through the validation of some, and demonification of other, interpretive methods.⁴⁸

German constitutional jurists have been no less busy than their American counterparts in drawing together principles of interpretation through which to read and apply constitutional text. The traditional categories of analysis within German constitutional jurisprudence have been divided into four categories: textual, verbal or grammatical interpretation, systematic, structural or contextual interpretation, historical interpretation, and teleological or purposivist interpretation.⁴⁹ The approach has been different to some extent – but the difference may be more a function of emphasis than on the tools used.⁵⁰ Thus, for example, Bernhard Schlink has noted that, with respect to the importance of the intention of the framers, "original intent is only of relative significance. . . . [L]egal texts are introduced into a legal process where interpretations and reinterpretations, and constructions and deconstructions, alternate with one another. The outcome is open, constantly changing, and never more than temporary."⁵¹

Still, I am prepared to concede the importance of text, even in an environment in which text can serve only to cover over ambiguity and (more troubling) a lack of consensus. I am mindful of that ancient understanding from the American Supreme Court that a constitution is "intended to endure for ages to come, and, consequently, to be

adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code."⁵² The American constitution of 1789 is a model in this regard. But ambiguity will eventually have to be resolved, lacunae filled, and text applied. It is thus important to be mindful of what Jutta Limbach put so well in the context of German Constitutional jurisprudence:

Judicial self-restraint, the maxim often recommended to the Court, is, if taken literally, more misleading than persuasive. The call for judicial self-restraint serves neither to locate grey areas of law and politics, nor to clear them up. Moreover, judicial self-restraint cannot be a general strategy for a court whose primary duty is to check power and assert the protection of fundamental rights. The latter task may, as Konrad Hesse rightly stresses, call for resolute intervention rather than restraint, even at the risk of affronting some other constitutional organ. As for the formula of judicial self-restraint, Benda rightly calls it an attitude or a virtue: the Court cannot limit its own power and function, but has to carry out its tasks. . . . The slogan of judicial self-restraint is just as correct in practice as the contrary call on lawmakers to display more "political self-confidence." Neither maxim serves an informative function: they merely formulate a problem, but do not offer any criteria for solving it.⁵³

Where text produces conflict or inconsistency, where results turn on the clash of important principles inherent in the text of the constitution, no amount of judicial restraint, no amount of textual fine-tuning will provide the answer.⁵⁴ For the European Constitution, as for those that have preceded it, text provides merely a starting place for its construction and implementation.

Textual triumphalism is alluring, especially for those who worked hard to fashion a document which they believe provides protection against all sorts of evil. But the constitutional histories of other important states serves as a reminder that no amount of text is proof against interpretation – even interpretation at odds with thinking at the time of its adoption. These cautions apply with substantial force in the context of the development of a constitutional jurisprudence by the ECJ. The European Constitution, like a newborn child, will be shaped as much by its political and jurisprudential environment, as it has been shaped by its creators. An understanding of that environment, and its possibilities, is therefore important.

C. The American Experience

The American courts have taken a *laissez-faire* approach for the most part to the protection of state residual authority, effectively leaving battles over the division of power to the political process. It has coupled that that jurisprudential approach with a set of jurisprudential principles – effective government, democracy and accountability – that has produced long periods of very broad and flexible interpretations of the American constitution in favor of the assertion of federal power, which has virtually obliterated the independent powers of the States.

The American constitution itself contains very little by way of references to federalism or to the allocation of powers between the federal government and the states. The word federalism is never used as a sign post of constitutional or interpretive direction. Instead, the principle of federalism may be derived from the constitution considered as a whole. The federal government, and particularly its legislative branch, is vested with specified and limited fields of legislative competence.⁵⁵ Limitations on the residuary powers of states are also specified.⁵⁶ Powers not granted the general

government are specifically reserved to the states,⁵⁷ or to the people.⁵⁸ The text also sets forth certain specific limitations on the part of the federal government, as well as the states, with respect to assertions of power against the people.⁵⁹

In a sense, the text of the federal Constitution provides more than enough basis to protect state power from federal encroachment. Reading the grants of authority to the federal government narrowly, and the protection of state powers broadly, could have served to restrain aggrandizement of federal competence at the expense of state residuary power. That was the argument made by the state of Maryland in *McCulloch v. Maryland*.⁶⁰ But arguments based on both a restrictive reading of the sovereign authority passed to the federal government, and the propriety of reading positive grants of authority narrowly, were rejected by the American Court.⁶¹ Though Europeans may suggest that the principle of subsidiarity might overcome the expansiveness of this doctrine were it to be embraced by the ECJ, there is no guarantee that the ECJ would not, in embracing subsidiarity within a broad nationalist reading of the European Constitution, treat the doctrine as a truism: ends and means clearly adapted to the attainment of legitimate and constitutionally required goals might then, by definition, fall outside the category of acts which subsidiarity might relegate to the local sphere.⁶²

Even in the absence of favorable interpretation by the courts, the structure of the federal government, at least until the 20th century, would have facilitated a political process of federal self-restraint of at least encourage substantial federal consultation or cooperation with state governments in order to arrive at acceptable political solutions to assertions of federal authority. In some respect, the American Senate served a function similar to that of the modern German Bundesrat and in much more attenuated form to the E.U. Council. Senators were appointed by their States and served their interests. But the system in the United States did not work as expected.⁶³ And in any case was abandoned on the eve of the great expansion of federal power in the 20th century. Party politics rather than issues of federalism tended to dominate the Senate, echoing a concern expressed about the effectiveness of the modern Bundesrat in serving the needs of the Länder in contemporary Germany.⁶⁴

In the absence of strict textual limitations on concentration of power at the federal level and the failure of political control of the legislature by the states, American courts, over the course of the last two centuries, have constructed a jurisprudence the results of which has been to confer a broad deference of the federal government in the construction and exercise of its authority, and to strictly construe provisions purporting to restrict the authority of the federal government to act. First, and especially since the so-called judicial revolution of 1937, the federal judiciary has indulged a broad reading of grants of legislative power to the federal government. The means to effectuate federal power has been broadly read since the early 19th century, applying a principle of efficient government to broadly expand the means used by the federal government to effectuate its ends.⁶⁵ The Tenth Amendment's protection of state residuary power has been treated as a truism,⁶⁶ requiring the federal Supreme Court to grope for extra-constitutional principles on which to base even modest federalism protections of state authority.⁶⁷ The 9th Amendment's reservation of power has been substantially ignored.⁶⁸ And, most ironically of all, principles of judicial restraint have been most successfully applied over a two hundred year period to reduce judicial oversight of federal incursions into state power.⁶⁹

The American experience suggests that constitutional structure does matter. Loosely written documents, documents that rely overmuch on the common understandings of the generation that negotiated its terms, documents punctuated by long silences and completed by common knowledge are likely to be dynamic whatever the intention of the founding generation. The American constitution has itself proven to be inadequate as a vehicle for constraining or policing the federal relationship. It has offered very little by way of structural protection for the weaker members of the federation.

The inadequacy of the text on this score might well have been deliberate in the American context. There was intense disagreement among the founding generation about the nature and meaning of the federal structure they were creating. The nationalists, headed by Alexander Hamilton, favored a reading of federalism heavily tilted toward central government dominance.⁷⁰ The unionists, headed by Thomas Jefferson and James Madison, favored a vision of a federal state built on state power.⁷¹ The document they produced contained language that each thought would further their view of the emerging federation.⁷² Each faction was confident that the language adopted would serve as a cloak to further their own views – a furthering that would occur in the political and judicial fields.⁷³ Deadlock thus produced compromise in the form of a deferral of a resolution. This is a risky strategy – one that ultimately almost destroyed, and eventually profoundly transformed, the American federation in the 19th century. That raises another lesson – the dangers of leaving significant questions unresolved in the constitutional text. The rush to get agreement – to show something for the effort produced a document that at least with respect to the allocation of authority between governments, left the basic disagreements of the parties on the character of the republic unresolved. The American experience has taught us that generally such unresolved fundamental questions leads potentially to severe conflict, potential rupture of the union, and ultimately, for a successful union, consolidation at the federal level. To the extent the E.U. constitution moves conflict, unresolved, into the body of the constitution, it faces the same risks as the young American republic.

In the absence of clear textual commands, the constitutional court has declined to step in. Instead, it has served largely to give its imprimatur to the status quo. Indeed, those few times that the constitutional court has sought to thwart the political realities of creeping federalization of has produced crisis and threatened the authority of the court itself.⁷⁴ Even the recent attempts by the federal Supreme Court to read structural limitations into the power of the federal government have produced only modest protections for state power.⁷⁵ While it is true enough that the American Constitutional text could have been read far more narrowly from its inception, it is also clear that the text itself permitted a broad reading, and nothing in the Constitution as a whole precluded a reading in favor of the broad assertion of federal power at the expense of the states.

Unchecked by a deliberately ambiguous and inadequate constitutional text, the American experience also evidences the power of centralizing forces within a federation. Political power, in the absence of textual protections, has proven wholly inadequate to the task of preserving state power. The member states of the American union have been unable to exert the political will necessary to preserve their interests in the face of social, political, economic and technological forces all pushing toward centralization. Even representation within the federal government served to provide a federal forum for state interests and the use of the federal government by coalitions of states to impose their will on their adversaries through use of the federal power.⁷⁶

To a large extent, then, the American experience with federalism provides a cautionary tale for European constitution drafters.⁷⁷ But the caution ought to extend beyond the obvious. Avoiding the failures of American federalism does not necessarily start and end with the structuring of an appropriate institutional architecture in the black letter of constitutional text. The foundational lesson from the United States is that a constitution is unlikely to be detailed enough to provide all the answers for all time for those who choose to be governed by its provisions. Moreover, constitutions, even constitutions bound by the original intention of its drafters, the American jurisprudential interpretive limitation of choice, will change its character and meaning in the hands of the generations that follow the founding generation. Whatever lessons the American experience offers for construction of systems, it offers a greater lesson and caution as a reminder that even ossifying constitutional structures are inherently dynamic. The German experience evidences this insight well enough.

D. The German Experience.

The German form of federalism, as written into its Basic Law and as fleshed out by its Constitutional Court, presents something of a contrast to the American system both as written and as developed through the jurisprudence of the American Supreme Court. Both start with the premise of federal supremacy, and of limited federal and residuary state power. Both provide protection against federal encroachment within the Constitutional document itself. But the German Federal Constitutional Court (the Bundesverfassungsgericht) has adopted a vision for the construction of a federal state significantly different in important respects from its American counterpart.⁷⁸

The German system can be best characterized as creating complexity, mutual dependence, and diffusion of power of a sort that requires cooperation between the federal and Lander governments. This structure has produced deeply engrained habits of negotiation and political solutions to conflicts between the Lander and federal governments in cases of potential conflict. Halberstam and Hills have nicely reduced the greatest differences between the American and German federal models into three broad categories: first, the German Länder are directly represented in the upper house of the German Parliament, the Bundesrat, but may act only to veto federal legislation that affects the administrative duties of the Länder; second, the Länder have a virtual monopoly on the implementation of federal law; and third, the Länder have a more limited power to raise revenue than do their American counterparts.⁷⁹

“Despite the tendency, in a climate of cooperative federalism, for major developments in the federal system to pass the Court by, rulings of the Bundesverfassungsgericht have been sought and given over a wide range of federal issues and have affected in detail the relations between the Bund and Länder.”⁸⁰ The Federal Constitutional Court has played an important role in this process through its development of critical principles of constitutionalism.⁸¹ Among the most important of these has been the development of the principle of constitutional fidelity or comity (Bundestreue).⁸² The result has produced a system in which the Federal Constitutional Court has effectively split the proverbial baby in articulating its vision of the federal political order created by the Basic Law:

Although firmly upholding the principle of federal supremacy in those areas of public policy expressly committed to the federal government, this vision also includes a critical and autonomous role for the individual Länder. For one thing, the court has tended to construe strictly the long list of concurrent powers granted to the

federal government under Article 74, probably because a broad constriction of these powers would virtually obliterate the Länder as effective units of the federal system. For another, the court has invoked the principle of comity to impose a variety of obligations on both federal and Länd governments in their relations with each other.⁸³

The differences between the German and American approaches might best be understood in differences in the Constitutional documents of each state, as well as in the approach of the court to its role in arbitrating disputes among the political branches. While the American courts have coupled a policy of passivity in the face of federal encroachment on state authority with jurisprudential principles of broad construction of federal power, the German Bundesverfassungsgericht has adopted almost the reverse position. It has shown an inclination to actively protect Länder authority and a disinclination to broadly construe the Basic Law's grants of power to the federal government.

Despite these differences in form, there are those who suggest that German federalism in its own way has become as illusory as American federalism. Professor Kommers himself notes the mutability and fragility of the federal ideal within Germany, though he still argues that the Länder remain viable and important components of a functioning federal system.⁸⁴ I look first at the textual basis for federalism in the Basic Law and then at the manner in which the Bundesverfassungsgericht has interpreted and derived principles from them in articulating its more specific vision of German federalism.

The Basic Law sets forth a complex system of provisions regulating the allocation of authority between the federal and Lander governments. The specificity stands in contrast to the American constitutional framework. As a general matter and like the similar provision in the American constitution, the Basic Law provides a supremacy clause in favor of federal legislation.⁸⁵ Like the 10th Amendment to the American Constitution, the Basic Law also includes a residuary clause in favor of the Lander.⁸⁶ That provision is supplemented by another reserving to the Länder "the right to legislate as this Basic Law does not confer legislative power on the Federation."⁸⁷ The legislative power is divided between legislation exclusively vested in the federal government and legislation with respect to which the federal government and the Lander have concurrent legislative authority. In addition, the federal government is given authority to enact 'framework' legislation, statutes requiring implementation by legislation enacted at the Lander level.⁸⁸ With respect to areas of exclusive jurisdiction, Lander legislation is permitted only where the power to legislate is delegated back by the federal government.

The Federal Constitutional Court has tended to read the grant of power to the federal government narrowly, giving substantial effect to Article 30's federalism principle.⁸⁹ But the Federal Constitutional Court has not applied the principle articulated through Article 30 consistently this way.⁹⁰ More often than not, however, the Constitutional Court has read the Basic Law in a way that does not shut the Länder out.⁹¹ Indeed, in a sense, the German Court's jurisprudence is almost the mirror reverse of its American counterpart, in which the Court has had to struggle to preserve even a small area of state competence.

In addition, the Basic Law builds federalism into the lawmaking process itself in two significant respects, both of which have echoes in the structure of the E.U. The first is the institutionalization of intergovernmentalism. Intergovernmentalism works as a formal matter – for example at the federal level through the Bundesrat. The second

is in the provision for the crafting of framework laws under article 75.⁹²

Coordination also works through the implementation of a system of enforced cooperation and bureaucratic intermingling, effectively requiring interagency and multi-level cooperation for the implementation of policy.⁹³ For example, cooperation is built into the structure of governance through the provision for Joint Tasks and intergovernmental cooperation under Articles 91a and 91b of the Basic Law.⁹⁴ "In addition to the forms of cooperation between the states and federation dictated by practical necessity, the Basic Law itself sets up an intricate web of intergovernmental relations, particularly in the area of fiscal policy. Articles 104a to 115 fix the distribution of revenue to be shared between federal, state and local governments. Carrying out the terms of these provisions requires extensive coordination between levels of government."⁹⁵ But this coordination is just the tip of the iceberg. The German federal system is laced with constitutional and extra-constitutional networks of cooperation and coordination between all levels of government.⁹⁶

Despite the profusion of provisions regulating federalism, the Basic Law provides as opportunity for abuse as it does answers to questions of scope of authority. Like the American Constitution, it is generally understood as essentially indefinite – a general roadmap that must be interpreted and applied by the institution given competence over such matters – the Federal Constitutional Court. The President of the German Federal Constitutional Court nicely articulated this understanding in a recent paper. "For the articles of the Basic Law are marked by a low degree of definiteness. They are norms with great openness, and margins of interpretation that are hard to delimit. The Basic Law essentially contains—apart from the law on the organization of the State – principles that must first be spelled out before they can be applied. . . . [T]erms are used whose content can be made definite only by using interpretation or even evaluation, sometimes through recourse to extra-legal notions and historical experience."⁹⁷ The German Federal Constitutional Court has been explicit in articulating the extent of its authority with respect to finding meaning in the Basic Law: "The judge's task is not confined to ascertaining and implementing legislative decisions. He may have to make a value judgment (an act which necessarily has volitional elements); that is, bring to light and implement in his decisions those value concepts which are inherent in the constitutional legal order, but which are not, or not adequately expressed in the language of the written laws."⁹⁸

The foundational principle of federal organization is written into the Basic Law itself. Article 20(1) provides that the German state shall be a federal state.⁹⁹ This federalism principle is broader than the notion of multi-states. It includes the division of the federation into Lander and the participation of the Lander in the legislative process. All of these aspects of federalism in the Basic Law are made 'eternal,' that is, not subject to amendment.¹⁰⁰

A key principle of interpretation developed and deployed by the Constitutional Court from out of the Basic Law in this context was the principle of federal comity or fidelity – *Bundestreue*. "The *Bundestreue* principle requires not only that one government refrain from infringing the interest of another but also that it render affirmative assistance when the occasion demands. Whether the duty has been violated is subject to judicial determination in an appropriate case."¹⁰¹

The doctrine of comity, which the court invoked for the first time in the Housing Funding case (1952), does not appear in the text of the Basic Law. It is, rather, an unwritten principle inferred by the court from the various structures and relationships created by the

Constitution. German federalism, said the court, is essentially a relationship of trust between state and national governments. Each government has a constitutional duty to keep 'faith' (Treue) with the other and to respect the rightful prerogatives of the other.¹⁰²

The principle of *Bundestreue* has been construed to supply the underlying character and animating spirit of German federalism through which federalism provisions of the Basic Law must be interpreted. It has also been extended to the obligation of the federal government when it acts within the E.U.¹⁰³

In addition, the principle of subsidiarity appears to have leaked back from E.U. law to assume a status as a principle of German constitutional law. Though there is no mention of subsidiarity except in the Basic Law's E.U. provisions,¹⁰⁴ academics "have distilled this principle from the Basic Law's general structure, particularly its provisions on federalism and democracy, and from various fundamental rights."¹⁰⁵ In the hands of the German Federal Constitutional Court, subsidiarity appears to be evolving into a principle of jurisprudence extending the power of the German Court to review any transfer of power from the Bundestag to the European Union.¹⁰⁶

Further, as already mentioned, the Federal Constitutional Court has adopted a jurisprudence of strict construction of Article 30 and the related provisions of the Basic Law allocating power between the federal government and the Länder. It thus serves as a principal protector of the powers of the Länder in the face of federal encroachment.¹⁰⁷ A jurisprudence of principles, tied to multiple provisions of the Basic Law designed to describe and preserve a distinct form of federal relationship, have combined to permit the Bundesverfassungsgericht a large degree of authority to police the borders of the federal relationship in a way that permit the Länder some, sometimes considerable, function within the federation.

The German experience suggests that constitutional text matters – and it may matter a great deal. With sufficient specificity, the contours of the federal Land relationship can be better appreciated and harder to obscure or obfuscate. The text of the Grundgesetz provides both political and juridical bodies with a clearer understanding of the nature and effect of federalism, and of its importance to the structure of the federal state as a whole. None of this had to be deduced, and deduced imperfectly from a generational understanding inadequately memorialized. . It also serves as the basis for understanding the norms underlying the political settlement reflected in the text.

The German experience also suggests that text, standing alone, is insufficient to preserve the federal relationship where the relationship involves vertical power relationships. The superior government will inevitably seek to exercise its power to its greatest extent – and the possibility for abuse exists. The pull of centralization – the temptations of nationalization of political conflict, does not disappear because of the inclusion of provisions in a text – even a constitutional text. Something more is needed – the institutional will to see the text faithfully observed. That task has fallen on the Bundesverfassungsgericht. In this respect, at least, Hand Kelson was right.¹⁰⁸

But the creation of an independent institution, standing alone, is not enough. The American experience amply demonstrates that as well. Even the German experience suggests that the combination of text and institution may be inadequate. The missing ingredient in the German experience is the investment power to invoke intra- and extra-constitutional principles as the means for disciplining constitutional interpretation. The German court's elevation of such

principles – *Bundestreue*, subsidiarity and solidarity – for example, serve to flesh out and direct interpretation of the eternal principle of federalism built into the Basic Law.¹⁰⁹ Together, text, constitutional court, and general interpretive principles, appear to provide a greater likelihood of protection for the weaker members of the federation.

The German experience in the sense of protecting the inferior members of a federation is a success of sorts, especially when compared to the American experience. But, the differences in the treatment of the American states and the German Länder under their respective constitutions and by their respective courts may serve to highlight an important part of the analysis that needs emphasis: that whatever the form or character of the division of authority between member state and federal government, it is the subordinate government that tends to need protection. In the German case, the courts have risen to the challenge more successfully, from the Länder's perspective, than have the American courts in the defense of the prerogatives of the American states. Yet both systems also depend both on political constraints – in the American context, political constraints on federal power tend to be weak, unaided by structural devices in the Constitution. In the German case, structural devices requiring cooperation make consultation and deal making more likely.

The differences between American and German federalism jurisprudence should not obscure the fact that in both cases, protection of the residuary power of the subordinate governmental unit is dependent on more than mere constitutional text. To a great extent, protection of the federal principle is dependent on the construction of a jurisprudential vision of the meaning of the federal constitution and the governance structure it creates as articulated by the constitutional courts. In both cases, that vision is derived from the articulation of powerful principles of interpretation. Ironically, in both cases, that vision is also dependent on the willingness of the national institutions to exercise restraint. For both principles and authority flow from the center and not from the bottom. Whatever else they may be, both the American Supreme Court and the Bundesverfassungsgericht remain creatures of the central government and ultimately loyal to a vision which preserves enough of the power and prerogatives of that level of governance to ensure the preeminence of the courts in their respective fields of competence.¹¹⁰

E. European Post-Constitutional Nationalist Power Sharing

In several important respects, the European Constitution resembles more the German than the American model of constitutionalism. The resemblance is not skin deep— quite the opposite. Both the German and American systems invest the federal government with supreme, if limited independent authority. Under the E.U. Constitution, that supreme authority remains vested in the Member States to a far greater degree. However, like the German Basic Law, the E.U. Constitution is crafted to force a far greater degree of cooperation and bargaining among all of the actors at all of the levels of governance than is contemplated in the American Constitution.

Like the German Basic Law, the European Constitution goes to great lengths to memorialize and describe the division of authority between Europe and its Member States. Both Union and Member State are now formally vested with legal personality within the political system contemplated by the European Constitution.¹¹¹ Within its authority, the actions of the Union are supreme.¹¹² But, consistent with the federal principle, the Union is given only specific and limited authority over a specified set of areas.¹¹³ The European

Constitution memorializes the transfer of competences from the Member States to the Union in three broad categories. In certain areas, principally including competition in the internal market and third nation trade, the authority of the Union is exclusive.¹¹⁴ In a larger second category of areas, including the internal market, the common agricultural policy, transport, environment, immigration and judicial/police cooperation, the Union and the Member States share power to act.¹¹⁵ And in a third broad category, including culture, education, sports and civil protection, the Union may act only in support of Member State action.¹¹⁶ With respect to another set of specified areas, principally economy and employment, the Union must coordinate the national policies of the Member States.¹¹⁷ Moreover, the Union may pursue a common foreign and security policy.¹¹⁸

The European Constitution does not constrain the ability of Union power to grow only through a specification of competences. The Constitutional also carries forward the well known and much described institutional checks on Union independence through the implementation of a governance structure in which the Member States may assert direct and indirect control. The idea, of course, is that the Member States can best protect their interests, and limit assertions of Union power at their expense, if Member States have a direct and autonomous voice within the Union. The reality, of course, is more ambiguous. Participation in Union governance does not necessarily result in devolution. More often, it provides the institutional space in which Member States may push national problems up to a 'supra-national' level and through systems of formal and informal multi-state consensus, use the union to solve difficult domestic issues. The result has been a consensus centralization, where governance is guided from the bottom but implemented from the top of the federal pyramid. The Constitution does not alter this dynamic.

Moreover, even the formal division of competences is both incomplete and open-ended. The Council has been given authority to plug any gaps in the powers conferred on the Union. Such gap filling is limited to actions required to attain one of the objectives of the Constitution.¹¹⁹ The possibilities for centralization under this provision might be interesting. Certainly, the Constitution contains a wide variety of objectives. On the other hand, the Council will undertake gap filling – the institution of the Union most closely connected to the Member States.¹²⁰ Moreover, this stretching of Union competences has another fail-safe built in: the obligation to notify National Parliaments when the Union intends to invoke Article 17 powers.¹²¹ Indeed, at the heart of the European Constitution's 'principle of participatory democracy' is the ideal of consultation.¹²²

These specific formulations of division of competences is buttressed within the text of the European Constitution by a number of other provisions which are meant to generalize the character of those divisions. Some of these take the form of declarations or cautions to the Union. Thus, for example, the Constitution reminds the Union of its obligation to respect the essential functions of the Member States.¹²³ The European Constitution also contains its version of the American Constitution's 10th Amendment: "Competences not conferred upon the Union in the Constitution remain with the Member States."¹²⁴ Other principles – subsidiarity, proportionality, loyal cooperation, conferral – are meant to give this perhaps descriptive provision more teeth than that conferred on its American counterpart. And indeed, the ideal of consultation and cooperation is folded into the operation of the principle of federalism – the Union's Institutions are required to funnel information to the Member States with respect to any activity that might be deemed to be Member State prerogative threatening – from the

compliance with the principles of subsidiarity and proportionality in lawmaking,¹²⁵ to the extension of Union powers by resort to the flexibility Clause of Art. I-17.¹²⁶

The complexities of the principles driven system of division of competences as well as its deployment will require an authoritative body to interpret the bargain memorialized in the Constitution, and to apply its terms to the evolving social and political situation within Europe. The European constitution preserves the role of the ECJ as the supreme authoritative interpreter of the emerging European constitutional text. Article IV-3 of the European Constitution memorializes the current reality under which "The case-law of the Court of Justice of the European Communities shall be maintained as a source of interpretation of Union law."¹²⁷ European commentators have suggested that the

*"draft Constitution enhances the position of the ECJ as the supreme court of the Union. . . . The Constitution provides for a clearer hierarchy of norms. . . . It formally incorporates the principle of primacy and contains a number of provisions which given the division of competence between the Union and the Member States. . . . It is ultimately for the Court to interpret these provisions and determine their meaning. It brings the Court closer to the political game by encouraging judicial control of subsidiarity. The incorporation of the Charter of Fundamental Rights further increases the set of constitutional norms vis-à-vis which the Court may test the legality of Community action. Finally, the Constitution is imbued by a number of principles, such as democracy, transparency, subsidiarity and equality, which can be expected to feature more prominently in judicial reasoning. . . ."*¹²⁸

American commentators have suggested that "the Draft contains no provision that would address complaints about the court's activism and its bias toward the EU."¹²⁹ This conclusion follows from the retention in the European Constitution of the broad language conferring jurisdiction on the ECJ and the addition of Art. I-25(1) explicitly granting the ECJ supervisory control over Commission responsibility to oversee the application of Union law.¹³⁰

Like the Bundesverfassungsgericht, the European Court of Justice has grounded its jurisprudence on the construction of a normative edifice of general principles of interpretation through which the Treaties have been read and implemented. Indeed, European judicial constitutionalism has never been wholly dependent on a blind adherence to a textual object uniformly interpreted by a political community built on a singular vision of the institutions, powers or purposes of the E.U. The ECJ has been able to authoritatively articulate its vision of the European Community based on the judicially elaborated principles of E.U. autonomy, supremacy and direct effect. Equally important to the development and implementation of the judiciary's vision has been the articulation and application of a number of jurisprudential devices, not the least of which have been the development of a jurisprudence of general principles of law through which to interpret the treaties.¹³¹

The new constitution will not alter the habits of the ECJ in the use of these jurisprudential tools as it continues its role as supreme arbiter of scope and nature of community law and, necessarily, of whatever residuary authority is left to the Member States through the application of general principles of (constitutional) law. Indeed, the European Parliament, to some extent, anticipates this when, in its Report on the draft Treaty establishing a Constitution for Europe, it argues for an evaluation of the constitutional text on the basis of adherence to principles and criteria, "all of which can never be deemed to have been achieved but must always be subject to a review of their meanings and be fought for anew through historical

developments and over generations.”¹³² Indeed, the European constitution provides a fairly large nod in this direction – the articulation of general principles of interpretation to be applied by the institutions of Europe.

The European Constitution sets forth a number of principles to be used to mediate federal state relations. To that end, the European Constitution also attempts to constrain the courts in their interpretive task by providing a series of interpretive principles to be used to flesh out the meaning of the Constitution. For the most part, none of these principles breaks new ground. They are either drawn from the existing structure of the E.U. or from the jurisprudence of the ECJ.¹³³ Some are well known – the principle of subsidiarity and proportionality are well developed in the jurisprudence of the ECJ. However, their character under the new instrument, and in the context of additional principles, might undergo some change. In particular, that character may be shaped by the power given to National Parliaments to “ensure compliance with that principle in accordance with the procedure set out.”¹³⁴

Among the more interesting is the principle of loyalty.¹³⁵ With echoes of German *Bundestreue*, this provision has the potential to create a positive obligation on the part of the Union to respect the limits of its power, but may also create a positive obligation on the part of the Member States to cede that authority necessary for the Union to operate to attain its objectives in accordance with the powers ceded to the Union. It may also serve as a vehicle for the requirement of cooperation – a mandatory cooperation for the attainment of common goals that runs through the European Constitution. Neither the Member States nor the Union may be able to assert an authority to fail to act or to fail to cooperate in defense of its rights.¹³⁶ Moreover, the Constitution itself reminds the Member States of their positive obligation to “take all appropriate measures, general or particular, to ensure fulfillment of the obligations flowing from the Constitution or resulting from the Union Institutions’ acts.”¹³⁷ The principle of loyal cooperation may add unexpectedly sharp teeth to this obligation and further the possibilities for centralization possible but not inevitable from out of a reading of the language of the Constitution.

Still, the cover of a constitution may provide the European constitutional court with a greater, rather than a more constrained array of interpretive tools with which to impose its vision of Europe from its reading of text. In this context, how might the European court approach the interpretation of the European Constitution? How might it give depth or new meaning to the words so carefully crafted by the Constitutional Convention? The constitutional text is certainly richer than the U.S. text, especially with respect to the division of competences and checks and balances between levels of government. In this respect, the European Constitution more resembles the German Basic Law.¹³⁸ One might expect, then, that the similarity could incline the ECJ to more closely follow the jurisprudential patterns of the *Bundesverfassungsgericht*. In that case, one might expect the European Constitution, by its terms, to do precisely what its framers intended – to make it hard for the European Court to interpret away the prerogatives of the Member States built into the black letter of the European Constitution.

But, the text, though ample, is not free from ambiguity. The draft is enormous. The draft constitution consists of a preamble and five articles. Yet, the emerging European constitutional text does not so much resolve as provide a cover for a multitude of contentious issues, which remain unresolved. From the extent of the supremacy of the Constitution over the Constitution of the Member States, to the effect of consultation and cooperation on the assertion of power within

the Union, to the meaning of the nature of the Union itself as an autonomous government, none of these core issues have been addressed – or rather, none of them have been resolved. The European institutions, and particularly the European Commission, have conceded the extent to which they are uncomfortable with the ambiguities in the draft,¹³⁹ even in the explanatory documents prepared for the general public and distributed on its website.¹⁴⁰

Nor does the European Constitutional text represent a clear expression of an uncontested vision for Europe.¹⁴¹ Like the American constitution, the European Constitution builds conflict into its black letter. The European constitution memorializes, even institutionalizes, a lack of consensus over the nature of the union it furthers.¹⁴² Member State governments understand this well but appear resigned – perhaps confident that their peculiar views will prevail over that of their antagonists.¹⁴³ Resolution will come in the courts and through implementation of the Constitution in the political bodies of the E.U. And indeed, transferring the resolution of ambiguity to the ECJ continues an increasingly important practice of Member State governments seeking to influence the nature and extent of their participation in the Union.¹⁴⁴

The character of that ambiguity may well have been altered in an important way. Though the new entity created is still grounded in international law, the governing document is now identified as a Constitution and not a Treaty. The ECJ will be called upon to determine whether, or to what extent, the change from the word “Treaties” to the word “Constitution” alters the vision of the organization created. The symbolic and rhetorical power of the word “Constitution” is well understood, especially by those involved in the Constitutional Convention.¹⁴⁵ The ECJ may well give this symbolic and rhetorical change substantive effect in drawing and applying principles of construction and interpretation of the new “constitutional” instrument. The grounding in international rather than domestic law may well, as a result, come to mean far less than it does today.¹⁴⁶

Indeed, the principles so carefully built into the European Constitution to protect Member State prerogatives can cut in several directions. Thus, for example, the European Constitution does build in a requirement of loyalty to the constitutional order, like its German counterpart.¹⁴⁷ However, the European Constitution fails to supply a singular description of its essential character.¹⁴⁸ There are, though, constitutional values aplenty: pluralism, tolerance, justice, solidarity, non-discrimination, human dignity, freedom, democracy, equality and the rule of law.¹⁴⁹ There are significant Constitutional objectives as well: the promotion of peace, the values and well-being of its people, sustainable development, the promotion of scientific and technical progress, justice and social protection, gender equality, inter-governmental solidarity, and children’s’ rights, and the economic, social and territorial cohesion and solidarity of the Member States.¹⁵⁰ The faithful application of European Constitutional values to its overall Constitutional objectives in the context of a division of competences which itself is bounded by other Constitutional principles, will be filled in by a court notable for its path-breaking decisions in a host of cases establishing the autonomy, supremacy and direct effect of the institutions of the European Communities/Union over the course of fifty or so years.¹⁵¹ Clearly, a hierarchy of values, and the principles underlying them will have to be established, and then faithfully applied. In that process, subsidiarity may well find itself subordinate to the values of democracy, freedom, equality, the rule of law and non-discrimination. Moreover, the relationship between the need to protect fundamental individual rights at the European level, and respect for the Member States, and their prerogatives, has yet to be fully developed. That

development will occur at the European rather than at the Member State level.

The loyalty principle is not the only, or perhaps even the most significant point of conflict built into a text meant to be all things to all parties. Consider two other examples. The principles of subsidiarity and proportionality, built into the text of the European Constitution, are meant to provide unalterable restraints on European institutions in the exercise of their competences.¹⁵² Each, perhaps, is also meant to restrain the expansion of those competences beyond a common understanding of their breadth at the time of the adoption of the Constitution. But these restraining principles cannot be read in isolation. The constitution requires loyalty to the constitutional order taken as whole. The principle of supremacy,¹⁵³ applied to actions undertaken in fulfillment of the objectives articulated in the first portion of Part III,¹⁵⁴ when read with fidelity to the European Constitution in accordance with the aims of Union articulated in the broad language of the Constitution's preamble,¹⁵⁵ or the principle of democratic equality central to the vision of the Union itself,¹⁵⁶ may reduce the utility of subsidiarity and effectively constrain proportionality as a force for limiting the breadth (rather than the manner) of state power at the European level. The notion of supremacy, itself, may have a significantly broader reach under the European Constitution.¹⁵⁷ The principle of supremacy is also textually ambiguous. The European Constitution clearly provides that its law "shall have primacy over the law of the Member States."¹⁵⁸ It leaves unanswered whether the Constitution, and the laws adopted there under, and the decisions of the ECJ, have primacy over the constitutions of the Member States. For Member States like Germany and Spain, the answer might be different than for other Member States. And, the jurisprudence of the ECJ already suggests an answer inconsistent with that taken by the German Constitutional Court to date. Although conflict on this point has a long history, the issue has not before produced crisis. The Constitutional framework of this lacuna may provide just the context necessary to bring this issue to the fore.

It is also true that national parliaments may now deliver reasoned opinions to the Commission if they considers that the principle of subsidiarity has not been respected, and that if one third of the national parliaments of the Member States hold the same opinion, the Commission must review its proposal.¹⁵⁹ Even the vectors of control built into the national parliamentary 'early warning system' contain substantial ambiguity.¹⁶⁰ It is true enough that under the European Constitution, the Commission must explain the way it has taken the principles of subsidiarity and proportionality into account in drafting its proposal, and that this reasoned opinion must be delivered to national parliaments for their review.¹⁶¹ It is also true that national parliaments may review the proposals, now explained, and deliver reasoned opinions if they believe that the principle of subsidiarity has not been respected.¹⁶² Moreover, if one third or more of the national parliaments share this view, the Commission must review its proposal, though it need not withdraw it.¹⁶³ But control of the process, and of subsidiarity and proportionality remains firmly within the institutions of the central government all the same. First, the Commission retains its monopoly for making proposals and the power to make the initial assessment of the applicability of the limiting principles of subsidiarity and proportionality. Second, the Commission is free to reject the positions of the national parliaments on this score. Third, and most important, the ECJ retains the ultimate authority to determine disputes between Commission and national parliaments.¹⁶⁴ Additionally, to the extent political influence will be effective, it will more likely come from the EU Council (and thus reflect Member State consensus on the matter) rather than from a

minority of national parliaments. In all of this, the institutions of the central government, rather than those of the Member States, retain control over the manner in which the principles are applied as well as their interpretation, as a matter of binding E.U. law. Thus understood, there is great irony built into the European Constitution. Subsidiarity and proportionality will serve to further consolidate national power rather than protect the residuary power of the Member States.

On the other hand, the European Constitutional text does provide limitations on broad nationalist readings that were unavailable to restrain the American Supreme Court. Perhaps one of the most important is the explicit declaration that power in the Union proceeds from both the people directly and the Member States. That may have a profound effect on the ability of the Supreme Court to read the Member States out of the Constitution. In the United States, the Supreme Court, early in its history, was able to construe the American Constitution as emanating directly from the people of the union as a whole. As a consequence, Constitutional loyalty in the United States required a nationalist perspective.¹⁶⁵ The same leap would be considerably more difficult under the European Constitution. Moreover, the principles of subsidiarity and proportionality may have a limiting effect on the proclivity of the central government organs to assert power in the absence of a strong call for 'union' action. Yet as history has demonstrated, political problems increasingly have acquired a cross-border dimension requiring action at the highest level of governance. The impetus for the internal market itself reflects this fundamental understanding. Criminality, environmental, family issues and others have increasingly taken on a cross border dimension. Thus, realities on the ground rather than theoretical purity may drive centralization. The Constitutional text, appropriately interpreted, need not stand in the way of these emerging realities.

My prediction: the European Court will continue to be an active force in the consolidation of national power at the E.U. level, for a cautious and conservative nationalist vision. The new Constitutional text provides a basis for this continued evolution. The constitutional text will provide the court with additional material for fashioning and solidifying its vision of a unique multi-level governance structure for Europe. The realities of this union, the skeleton of which is memorialized in the European Constitution, is based on power exercised through the center but controlled by power alignments at the bottom – at the level of the Member States. Individual Member States will lose the power to resist the center, but action from the center will reflect the will or at least the acquiescence of a collective of Member States. This consensus will be expressed institutionally through the requisite majority voting in Counsel and Parliament, or otherwise through consensus.¹⁶⁶ The court will protect the power of Member State consensus as it strengthens the power of the institutions of the E.U., to develop and enforce this consensus.

F. Conclusion

At the opening of the European Constitutional Convention on June 28, 2002, Romano Prodi, the President of the European Commission expressed the view that the "European Union is unique in that it is a union of peoples and states. The real aim is not to build a superstate . . . The real aim . . . is to continue developing this unique structure towards an increasingly advanced supranational democracy: A European democracy based on the peoples and the states of Europe."¹⁶⁷ Is it possible to build an upside-down federation? Is it possible to develop multi-tiered governance structures in which the general government implements but does not control the authority of the state on behalf of which it acts but does not govern? Even if

it is possible to build such a structure, can it survive? Those questions have been the focus of this article.

The European Constitution represents another step – but not the culmination by any means – toward a process of integration, the end of which is difficult to predict. Like the characters in certain Genet plays,¹⁶⁸ the EU has been able to evolve successfully by presenting itself as the embodiment of whatever set of desires is expressed by the elites that it must service. For some, the EU plays the federal role; for others the international. The attention to detail in this regard assumes the character of absurdity, but is instructive all the same.¹⁶⁹ Federal state, system of inter-governmentalism, sui generis international organization – these and other descriptions have served the EU well as its institutions, and especially its Court of Justice, have appropriated the language of nation-states to mark the outer boundaries of its power.

The proposed E.U. Constitution attempts to build a more formalized and institutionalized federalism on the foundation of the current system of European power sharing, but with more direct protections for Member State power. It is not clear that any amount of writing in a Constitutional document memorializing vertical power sharing arrangements can fully protect subordinate units of government against a sifting of power towards the center. The experience of other federal entities suggests that centralization will continue under this European Constitution as it had under its predecessor Treaties. The ECJ may be working from modified material, but on a stage that permits greater centralization and the consolidation of its vision of an autonomous and supreme government responsible to its two constituencies – the Member States and the people of the E.U. The federal entity created will be unique,¹⁷⁰ but it will, in the end, be a unified federal entity all the same.

End Notes

- 1 Many thanks to Dr. Franz Michael Hohensinn (Vienna Ph.D. and Penn State LL.M. 2004) and Evan Atwood (Penn State Law 2005) for their excellent research assistance.
- 2 Explaining the indifference and hostility of European populations to the E.U., as evidenced by the poor voter turnout in the June Parliamentary elections, a Polish academic closely connected with elites in Brussels and France suggested that “La construcción de la UE aparece como un asunto que solo concierne a las elites que se aprovechen del proceso, que son las únicas que conocen sus arcanos y tienen capacidad de influencia.” Martí, 2004 at 5 (quoting Krzysztof Pomian).
- 3 The European popular press focused on this aspect of the elections. See, e.g., Cañas and de Rituerto, 2004 at 2.
- 4 The exigencies of time, a restless citizenry, and a willingness to adopt a document leaving unresolved the key issues of its character, nature and scope is not unique to Europe. In some respects, the process of European constitutionalism mirrors that of its American forbearer. Both processes have been carefully managed affairs. Both have covered over the great struggles for power among elites under a veneer of openness and paeans to democratic values. The struggles of elites over power, the desire of important players to keep their unique systems in place, and protected, also marked the creation of the American system. But where the issues in the 1780s revolved around the preservation of slavery and navigation, the issues in the early 2000s revolved around the preservation of language, cultural and political dominance. For a discussion of the deployment of rhetoric in the context of American constitution-writing, see, Riker, 1996.
- 5 See García 2004 at 3. On the other hand, the gesture might also have been required because of the other implication of the European Parliamentary elections - voter dissatisfaction with their national governments. John McCormick has suggested that “most voters still feel European elections are a poll on their national governments rather than an opportunity to influence EU policies, about which many voters are still confused and uncertain.” McCormick, 1999.
- 6 “After two days of last-minute negotiations, the heads of government or state from the 25 member states agreed on the final text of the Constitution at 11pm, Friday, June 18.” Government of Malta, Press Release: The EU Has a New Constitution, (June 21, 2004) available at <http://www.gov.mt/>
- 7 See Fernando García, 2004 at 4. As a noted military historian has noted in another context, with significant relevance here: “The means by which this miracle [the end of conflict in Europe] has been achieved have understandably acquired something of a sacred mystique for Europeans, especially since the end of the Cold War. Diplomacy, negotiations, patience, the forging of economic ties, political engagement, the use of inducements rather than sanctions, the taking of small steps and tempering ambitions for success - these were the tools of Franco-German rapprochement and hence the tools that made European integration possible.” (Kagan, 2002)
- 8 See The European Convention, Final Report of Working Group V, CONV 375/1/02 REV 1, at P 10, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00375-r1en2.pdf> (Nov. 4, 2002). QUOTE AT 10-12.
- 9 I acknowledge the lengths to which the document avoids the issue of statehood for Europe. The draft authors took pains to ground the constitution in international rather than national law, so that the constitution somehow failed to constitute a national constitution because it is said not to be grounded in domestic law. While the hyper technicality of this distinction gives great comfort to those who believe that hypertechnicality makes all the difference in the world - that form trumps substance - it is hard to draw any practical distinction between states founded on domestic or international legal systems. For a discussion of this point, see Backer, 1998. European statehood, like the ‘love that dare not speak its name,’ exists best only when unacknowledged. Lord Alfred Douglas, Two Loves (1896) quoted in The Oxford Dictionary of Quotations 255 (Angela Partington ed., 4th ed. 1992). This is especially true in places like the United Kingdom. “Some Community specialists believe that these are questions that ought not to be discussed: they feel that by drawing attention to them one could sow the seeds of suspicion and distrust towards the Union in the minds of ordinary citizens.” (Hartley, 1999) Yet there is irony here as well. The Member States have shown little desire to cease acting like a state when it suits them, as long as what they do is called something else - usually something with an international flavor. And the institutions of the European Union are glad to oblige. The web site of the European Union is full of explanations of its personality suggesting both its intergovernmental character and the importance of Member State governments and citizens. The fact of union remains a convenient thing for significant portions of the population. The fact of that convenience can be lauded, the structure built to facilitate that convenience must, of necessity, remain unmentioned.
- 10 See discussion, text at note 41, below.
- 11 And indeed, there is a growing body of comparative work focusing on the European Court of Justice in the context of constitutional courts of other states. See, e.g., Slaughter et al, 1998, (especially the essays pp. 227-393).
- 12 See Favoreu, 1990.
- 13 “Europeans dismiss the American experience as irrelevant because of a mistaken belief that the American Constitutional founders, and those who came after, shared a common view of the nature of a federal state and the nature of federalism in the United States has remained substantially unchanged since 1789.” Backer, 2001, citing Stuart, 1987. Of course, American constitutionalists share the same disability with respect to the value of European lessons in constitutional governance. See, e.g., Kenned, 1994.
- 14 See, e.g., Wheare, 1964. But this is not to suggest that all federal systems are alike. See, e.g., King, 1982: 133-141.
- 15 Disputing Prime Minister Blair’s description of the Constitutional process as a mere tidying up exercise, the Daily Telegraph opined that the expression ‘tidying-up exercise’ sits uncomfortably with the words of the Constitution’s architect, Valéry Giscard d’Estaing, who has described its creation as Europe’s “Philadelphia Moment”. Much as we disagree with the former French president’s ideology, it is he rather than Mr Blair whose description closer matches the truth. Far from tying up a few loose ends, ratification of the Constitution would create a single European polity. The Real Conference, The Daily Telegraph (London, England), May 10, 2003, available at <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2003/10/05/dl0501.xml&Sheet=/opinion/2003/10/05/ixopinion.html>
- 16 Indeed, for some Europeans, the American experience serves as a global anti-model of judicial constitutionalism. See, e.g., Klug, 2000.
- 17 A good English language summary of the creation of the 19th century German Reich can be found at Currie, 1994: 1-15.
- 18 The jurisprudence of the German Federal Constitutional Court, the Bundesverfassungsgericht, has been controversial at times, especially in

- connection with the interpretation of the effect of European Law on the German Basic Law. See, e.g., *Brunner Brunner v. European Union Treaty*, Cases 2 BvR 2134 and 2159, [1994] 1 C.M.L.R. 57 (German Federal Constitutional Court, second chamber, Oct. 12, 1993). Especially for European integrationists, this court's work has been the object of some critical analysis. See, e.g., Curtin, 1997, (criticizing the German court's reliance on traditional indicia of statehood in its understanding of the European Union).
- 19 But there is irony here as well as a caution. "Although the Constitutional Court has tended to construe these generous grants of federal power somewhat strictly, they have been extensively exercised, and as a result there is much less room for state legislation in Germany than in the United States." Currie, 1994: 34.
- 20 See Granger, 2004. She notes:
- "A series of reasons have been put forward by governments' agents to justify such a burst of activity. First, there has been a greater acknowledgment of the Court's interactive role and law making powers, together with a better understanding of the nature of judicial decision-making. . . . Secondly there has been an increased awareness of Article 234 EC being used as a means of challenging national laws, policies, and practices, thereby calling for governments' participation to defend them. Thirdly, governments may well have realized that by submitting observations, they could obtain the invalidity of an EU act, the adoption of which a government unsuccessfully opposed. . . . Fourthly, it is likely that governments have realized . . . they could use participation in judicial proceedings to try to obtain favorable decisions in the first place, thereby avoiding the need for later disobedience in order to protect national interests. Finally, . . . the diminution of governments' influence over EU treaty-making and legislation . . . may incite governments to expand their activities to the alternative judicial arena." (Granger, 2004: 9)
- 21 As Professor Andreu Olesti has noted: "el Tratado constituye una etapa en el proceso creador de una union más estrecha entre los pueblos de Europa. Constituye por consiguiente una fase hacia una finalidad que no se encuentre específicamente determinada." Olesti Rayo, 1998: 127. In a pamphlet produced by the E.U. for distribution to the general population, the European Constitution is described as "an important step in the construction of Europe." *European Communities, A Constitution for Europe* (Luxembourg, 2004) at 3.
- 22 The European Constitution no longer refers to the 'ever closer union' of the peoples of Europe but instead describes the peoples of Europe as "determined to transcend their ancient divisions and, united in ever more closely, to forge a common destiny." *European Constitution*, Preamble. Though meant to appease those who feared two blatant a statement of eventual political union, it is not clear that the revised provision substantially alters the progressive vision of the E.U. Moreover, the progressivism remains enshrined in the enabling provision of the Constitution that refers to the establishment of the Constitution as an act "reflecting the will of the citizens and States of Europe to build a common future." *European Constitution* at Art. I-1(1).
- 23 The "federalism provisions of constitutions are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests." (Jackson, 2001: 173) ("Each federal 'bargain' is in important respects unique to the parties' situations." *Id.*).
- 24 For a consideration of commonalities of patterns of judicial approaches to constitutional text, see Backer, 2000.
- 25 On the latter point especially, see generally, Armstrong, 2000; Pedler and Schaefer, 1996. For an early but popular critique, see Bradley, 1992.
- 26 The literature on 'federalism' is enormous and growing. The concept is both deceptively simple to understand at a very general level. See, e.g., Ackerman, 1997. ("The hallmark of the federalism scenarios is the existence of multiple centers of power in an ongoing project of intensive coordination that is (a) far more engaging than those envisioned by the traditional treaty, but (b) less than that envisioned by the classical unitary state." *Id.*, at 778). The concept, however, quickly becomes complex as applied to particular systems. Systems that appear to be federal in nature may not be - the European Union is a case in point. See Weiler, 1999: 264-285. At the same time systems that appear to be very different from each other in character and nature of operation all operate under the rubric of federalism. See, e.g., Lenaerts, 1990.
- 27 John C. Calhoun was the great theorist of horizontal systems. His ideas that a general government could be controlled by its member states, within which ultimate sovereignty would be vested, spurred his opposition to the growing centralization of power in the United States in the first half of the 19th century and were key foundations for the construction of the Confederate States of America (1861-1865).
- 28 For evaluations of the organizational form of the CSA, see, e.g., Rable, 1994: 39 et seq.
- 29 *U.S. v. Darby*, 312 U.S. 100 (1941).
- 30 The jurisprudence of the Commerce Clause provides the most telling case in point. See, e.g., *Katzbach v. McClung*, 379 U.S. 294, 302-05 (1964); *Perez v. U.S.*, 402 U.S. 146, 154-155 (1971). These cases suggested that the federal power over 'commerce' could extend to virtually any activity subject to legislative regulation. Though the breadth of these decisions was limited in *U.S. Lopez*, 514 U.S. 549 (1995) and *U.S. v. Morrison*, 529 U.S. 598 (2000), even after those cases, the power of the federal government to regulate activity which is characterized as 'economic activity' by the Court, is essentially limited only by the exercise of political restraint by the federal Congress.
- 31 The jurisprudence of the Taxing and Spending Clauses provides an excellent example of the case in which the States retain formal power but are also given the authority to their rights in exchange for the receipt of money or other favors from the federal government. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987).
- 32 Article 50 of the Basic Law provides that the "Länder shall participate in the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union."
- 33 See Articles 76 and 77 of the Basic Law (suspensive veto). The Bundesrat has greater veto rights over certain matters of state finance (Arts. 104a(4); 105(3); 106(3); 107(2)), and amendments to the Basic Law (Art. 79(2)).
- 34 Article 83 of the Basic Law provides: "The Länder shall execute federal laws as matters of their own concern insofar as the Basic Law does not otherwise provide or permit." *BL Art. 83 in Basic Law for the Federal Republic of Germany* prepared in English by the German Bundestag, Berlin 2001 and available on line at <http://>
- 35 Halberstam & Hills, 2001: 180-181.
- 36 The process of integration producing the E.U. has been characterized usefully "as a hybrid composed of international and domestic variables; a process driven by mixed motives in several directions and at variable speeds." O'Neil, 1996: 81-82.
- 37 See Backer, 2001.
- 38 *Brunner v. European Union Treaty*, Cases 2 BvR 2134 and 2159, [1994] 1 C.M.L.R. 57 (German Federal Constitutional Court, second chamber, Oct. 12, 1993). For a critique see Zuleeg, 1997.
- 39 Among the most important of these is the reservation of state power over war to the States, and the sharing of competence over foreign affairs between the E.U. and the Member States. See, e.g., Weiler, 1999. ("The external legal relations of non-unitary actors: mixity and the federal principle").
- 40 Peter Lindseth has argued convincingly about the administrative character of the institutions of the European Union. See Lindseth, 1999.
- 41 "Committees were born of a strong national desire to retain control over the setting and consequences of European regulatory norms/standards, and they thus embody the functional and structural tensions that characterize internal market regulation." Joerges 2002: 18. See, also, Dehousse, 2002; 1999.
- 42 As is well known the E.U. Commission, rather than the Counsel, is required to serve the interest of the center. "The Commission is expected to rise above competing national interests and to represent and promote the general interest of the EU (however that is defined). . . . It represents EU interests at meetings of the Council of Ministers and the European Council and reminds other segments of the EU system about the basic goals of European integration." McCormick, 1996: 120.
- 43 Martí, 2004, at 5 quoting Krzysztof Pomian. ("Acabo de pasar tres meses en Polonia y sus dirigentes, como los franceses, no hacen trabajo de pedagogía política europea sino lo contrario; culpan de todo lo negativo a Bruselas).
- 44 See, e.g., Favoreu, 1990: 40-59.
- 45 See *Marbury v. Madison*, 5 U.S. 137 (1803) (The supreme will of the people "organizes the government and assigns to different departments their respective powers. . . . It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").
- 46 *United Mizrahi Bank, Ltd. V. Migdal Village*, C.A. 6821/93, 49(4) P.D. 221 (1995) ("The doctrine of judicial review of constitutionality is based upon the 'rule of law', or, more correctly, the rule of the constitution. . . . The central role of the court in a democratic society is to protect the rule of law."). A germinal figure in the development of notions of the need for a constitutional court as an independent institutional check on government was Hans Kelsen. See Kelsen, 1961; 1942.
- 47 For examples of this sort of fluidity, see, e.g., *United Mizrahi Bank Ltd v. Migdal Village*, Supreme Court (Israel) C.A. 6821/93, 49(4) P.D. 221 (1995)

- ("Judicial review expresses the values of the constitution. By means of judicial review the judge makes, manifest the ideals of the society in which he lives. He expresses the fundamental conceptions of society as it moves through the shifting sands of history."); Princess Soraya Case, 34 BverfGE 269 (1973) Federal Constitutional Court (Germany), reproduced and translated in Kommers, 1997: 124-128. ("Under certain circumstances law can exist beyond the positive norms which the state enacts - law which has its source in the constitutional legal order as a meaningful all embracing system, and which functions as a corrective of the written norms. The courts have the task of finding this law and making it a reality in binding cases.")
- 48 Contrast Bork (1990), arguing that originalism is the only authentic and legitimizing form of constitutional interpretive jurisprudence, with Brest, (1980) originalism rejected as a legitimizing jurisprudence, and Grey (1975), arguing in favor of evolutive theories of interpretation. See generally Eskridge, Jr., et al. 2000.
- 49 For an English language discussion, see, e.g., Brugger, 1994.
- 50 See, e.g., Zeidler, 1987.
- 51 Schlink, 1994: 197, 121.
- 52 McColluch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
- 53 Limbach, 2000 (citing among others, Konrad Hesse, Funktionelle Grenzen der Verfassungsgerichtsbarkeit, in Recht als Proze_ und Gefüge, Festschrift für Hans Huber 261, 264 (1981); Benda, 1981; and Landfried, 1984.
- 54 Both the American and German courts have devised interpretive techniques for balancing, especially where the application of appropriate but multiple text provisions or constitutional principles produce inconsistencies. For an American example, see, e.g., Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) (O'Connor, J., concurring) (O'Connor noted that the case, involving the application of the Religion Clauses, represented a collision of two important constitutional principles that required judicial balancing). But for a critique of the interpretive technique of balancing as unprincipled, see Aleinikoff (1987), and contrast Coffin (1989). For the German courts, the principle of proportionality has sometimes been used as a balancing technique. For a discussion, see, e.g., Baer 1999 (scope of proportionality rule in equality context).
- 55 U.S. Const. art. 1, Sec. 8 (enumeration of specific fields of federal legislative power).
- 56 Id., at art. 1 sec. 10 (states prohibited from among other things entering into treaties, and coining money)
- 57 Id., at Amend. 10 ("The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.")
- 58 Id., at Amend. 9 ("The enumeration in the Constitution, of certain rights, shall not be construed to deny o disparage others retained by the people.")
- 59 See, e.g., U.S. Const. art. 1, sec. 9(2) (limitation on power to suspend writ of habeus corpus); art. IV, sec. 2 (protection of state citizens' privileges and immunities); Amends. 1-8..
- 60 17 U.S. (4 Wheat.) 316 (1819).
- 61 In the words of the court: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional." Id.
- 62 See discussion below, text at Part E: European Post-Constitutional Nationalist Power Sharing.
- 63 But see Bybee, 1997.
- 64 See, e.g., Sturm, 1999 (critically assessing the academic theory that party politics would displace federalism as the underlying basis of federal-Länder relation and suggesting that political party confrontations at the federal level have not completely eviscerated the articulation of Länder interests in the Bundesrat).
- 65 "Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?" McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
- 66 U.S. v. Darby, 312 U.S. 100 (1941) (the 10th Amendment "states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment. . . .").
- 67 Consider the efforts of Justice O'Connor to find structural limitations on the power of the federal government within the constitution but outside the scope of the 10th amendment: "The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the states.." New York v. U.S., 505 U.S. 144 (1992). Such non-textual limitations were found to exist with respect to federal efforts to control the legislative discretion of states. See also Printz v. U.S., 512 U.S. 898 (1997).
- 68 But see Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J., concurring). At least one academic has suggested that historical evidence suggests that the 9th Amendment was intended to gain protection for natural rights otherwise unreferenceed in the text of the federal constitution. See Sherry, 1987.
- 69 Because States are well represented in the Federal government, and because States at one time were directly represented in the Senate, the federal Supreme Court suggested that broad assertions of federal in a sense represented a consensus of the States, and thus required less oversight and protection by the courts.
- "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. . . . The effectiveness of the federal political process in preserving the States' interests is apparent even today. . . ."*
- Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). For the academic gloss on this position, see Wechsler, 1961: 49-enforcement of federalism based limitations best left to the political process). This principal, of course, has been limited by the discovery of extra-constitutional structural limitations on the power of the federal government to invade certain function of the states. See New York v. U.S., 505 U.S. 144 (1992).
- 70 See, e.g., Stourzh, 1970; McGowan, 2001.
- 71 See Ellis 2000.
- 72 For an excellent account, see Rakove (1996).
- 73 See, e.g., Horowitz, 1977.
- 74 There are a number of examples. The anti-labor jurisprudence of 'liberty of contract' of the so-called Lochner era of the late 19th century is one. See Paul, 1960. Better known was the refusal of the Supreme Court to validate all federal legislation at the commencement of the Great Depression leading to the 'court packing' crisis are two more recent example. For a discussion see, e.g., Cushman, 1998; Friedman, 1994. By and large, the Court stands at the apex of its authority when it confirms the political settlement effected by the ruling elites. For a discussion of the necessary limits of judicial action, see Larry Catá Backer, 2000.
- 75 See Printz v. U.S., 521 U.S. 898 (1997) (federal law requiring state officers to process national background checks for gun purchasers violates principles of federalism by invading the state's governmental authority over its own officers); and contrast Reno v. Condon, 528 U.S. 141 (2000) (enactment of federal law preventing state motor vehicle departments from disclosing driver personal information to third parties did not violate principles of federalism because regulation touched on market rather than governmental activities of state, that is, the manner in which the state regulated third parties).
- 76 American politics before the Civil War was marked by the playing out of state rivalries and contests for power and influence on the national stage by supra-state coalitions of local political classes. For a discussion and analysis, see, e.g., Bailyn et al., 1992. ("Ironically, the post-Revolutionary generation finally found a way of containing the many factions that had arisen by institutionalizing division in the form of political parties. . . . The Democrats and their National Republican or Whig opponents were national coalitions of sectional, class, economic, ethnic, and religious interests, held together by compromise and cooperation." Id., at 487).
- 77 See to that effect Young, 2002.
- 78 For nice English language summaries of the jurisdiction of the German Federal Constitutional Court, see Limbach, 2000; Zeidler, 1987.

- 79 Halberstam and Hills, Jr., 2001: 175-178.
- 80 Blair, 1981.
- 81 Following the common practice, Nigel Foster and Satish Sule describe the five general principles derived from the Basic Law as the principles of (1) republicanism, (2) democracy (Demokratieprinzip), (3) rule of law (Rechtsstaatsprinzip), (4) the social state (Sozialstaatsprinzip), and (5) the federal state (Bundesstaatsprinzip). See Foster and Sule, 2002: 153-181. Several other important principles of constitutional jurisprudence, including the principle of proportionality and subsidiarity are derived from these more general principles. See, id., at 170-172.
- 82 For a good summary of norms underlying the German conception of fidelity or comity, see Halberstam, 2004: 739-762.
- 83 Kommers, 1997: 113-114. See also Blair and Cullen, 1999.
- 84 Professor Kommers notes that:
- By the 1960s, the Federal Republic was being described as a unitary (unitarische) federal state, i.e., one with strong centralizing features. By the early 1970s, it was also characterized as a system of cooperative federalism and, by the late 1970s, as a system of Politikverflechtung, a complex form of joint decision making among many centers of power and influence. Many commentators came to believe that federalism, despite the eternity clause, had become a façade for an increasingly centralized state, especially in regard to public finances, and that states had lost much of their relevance as legislative bodies. (Kommers, 1999: 1, 17 & n. 35)*
- See also Finn, 1990.
- 85 Article 31 provides that "Federal law shall take precedence over Land law." Art. 31 GG.
- 86 Article 30 provides "Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder." Art. 30 GG.
- 87 GG Article 70(1). The provision also provides for the "division of authority between the Federation and the Länder . . . be governed by the provisions of this Basic Law respecting exclusive and concurrent legislative powers." GG Art. 70(2).
- 88 For a nice summary of the differences between these types of legislation, see, e.g., Currie, 1994: 35-60; Foster and Sule, 2002: 175-177; Michalowski and Woods, 1999:31-34.
- 89 Recall that Article 30 represents a concrete expression of the division of competence found elsewhere in the GG. "The general rule of Article 30 GG can be found in more concrete provisions dealing with the legislative and executive tasks." Foster and Sule, 2002: 176.
- 90 In particular, the exercise of federal power under Article 72 has been a source of centralization. See, e.g., Jeffery, 1999: 333-334.
- 91 But because of the extensive use of its exclusive and concurrent powers to legislate and occupy fields of legislation, the practical effect of the protection is not very significant. In effect, the court does effectively protect the Länder but only at the margins of legislative power. See, Currie 1994: 34. ("Although the Constitutional Court has tended to construe these generous grants of federal power somewhat strictly, they have been extensively exercised; and as a result there is much less room for state legislation in Germany than in the United States"). Yet, the Bundesverfassungsgericht has also protected the other prerogatives of the Länder well enough. See, id., at 100 ("Unlike our Supreme Court, the Constitutional Court - with the important exception of the Article 72(2) provision requiring a showing of need for the enactment of legislation within the concurrent authority of the Bund - has faithfully defended the prerogatives of the states.").
- 92 Article 75 identifies a number of areas of law in which the federal government may propose framework legislation. The federal government's power to craft detailed framework legislation, that is to make it difficult for the Länder to assert their discretion in the crafting of directly applicable statutes, is limited ("Only in exceptional circumstances may framework legislation contain detailed or directly applicable provisions. GG Art. 75(2)). Once framework legislation is adopted, "the Länder shall be obligated to adopt the necessary Land laws within a reasonable period prescribed by law." GG Art. 75(3)).
- 93 Here we come to the well known German understanding of 'cooperative federalism.' (Kommers, 1997: 90-96)
- 94 Art. 91a provides for federal participation in Länder efforts in the fields of higher education, improvement of regional economic structures, and improvement of agriculture and coastal preservation. Article 91b provides for federal Länder cooperation in the promotion of research institutions.
- 95 Kommers, 1997: 90.
- 96 These networks exist at three levels. The first is the level of the 'whole state' that is where the entire power of the state - allocated between all levels of government, is coordinated on a horizontal basis. For a discussion of the notion, see Kommers, 1997: 68-69. "All decisions in this sphere must consequently be arrived at by accommodation and compromise, or must be limited by 'agreement to disagree.' In addition, decisions taken in this sphere may also require approval at the federal or the Länder legislatures." Leonardy, 1999:7. The second level is that of the federal state, with its inter-governmental structures arising from the Basic Law. The third level is that of horizontal coordination between the Länder excluding the federal government. Like the first level, this one is built on informal but powerful networks. See id., at 9-10.
- 97 Limbach, 1999. Winifried Brugger nicely summarized the German approach:
- The prevailing view holds that the Constitution differs from statutes in that it is more political, more open-ended, and less complete. From that it follows, according to this view, that vague constitutional provisions cannot be 'construed' (ausgelegt) but must be 'actualized' (aktualisiert) or 'concretized' (konkretisiert); the difference being that a strict 'construction' reveals a solution inherent in the text, whereas an 'actualization' or 'concretization' entails a dialectic process of creatively determining results in conformity with, but not determinable by, the Constitution. (Brugger, 1994: 396)*
- 98 Princess Soraya Case, 34 BVerfGE 269 (1973) Federal Constitutional Court (Germany), reproduced and translated in Kommers, 1997: 124-128.
- 99 The article provides: "The Federal Republic of Germany is a democratic and social federal state." GG Art. 20(1) translated in German Bundestag, Basic Law for the Federal Republic of Germany.
- 100 Article 79(3) GG provides: "Amendments to this Basic Law affecting their division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."
- 101 Currie, 1994: 77-80.
- 102 Kommers, 1997: 69.
- 103 Foster and Sule, 2002: 179. 104 GG Art. 23.
- 105 Kommers, 1997.
- 106 Kommers, 1997: 113.
- 107 Thus, the writers of a recent assessment of the Bundesverfassungsgericht effect on the shape of modern German federalism concluded that:
- Given the balance of forces in the German federal system, and the centralizing pressures to which it has been subject, it is natural that the Länder have felt the need to resort judicial decision more often than the federal government. For the same reason, it is to be expected that any propensity of the Court to insist on strict observance of the wording and the spirit of the constitution will benefit the weaker element in the federal relationship. And indeed, we have seen that on the whole - though not at all times and not on all questions - the resolution of federal issues has tended to protect the position of the Länder. (Blair and Cullen, 1999: 123-124). (Blair and Cullen, 1999: 123-124.*
- 108 Kelsen, 1961: 268. (need for an independent constitutional court to act as a quasi-legislator using the mechanisms and vocabulary of courts as a counterweight and a check on institutional and political excess).
- 109 See Leonardy, 1999: 19-20.
- 110 For a discussion of the internal dynamic of courts in the context of their jurisprudential functions, see Backer, 2003.
- 111 European Constitution, Art. 6. With respect to the E.U., this provision memorializes case law of the ECJ, a case law that within some Member States was only begrudgingly admitted.
- 112 European Constitution at Art. I-10(1) ("The Constitution, and law adopted by the Union's institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.").
- 113 The European Constitution describes this as a principle of conferral. "The limits of the Union's competences are governed by the principle of conferral." European Constitution at Art., I-9(1).
- 114 European Constitution, Art. I-12.
- 115 Id., at Art. I-13.

- 116 Id., at Art. I-14 (the coordination of Member State social policy is discretionary, in apparent deference to the sensibilities of Member States such as the U.K.).
- 117 Id., at Art. I-16.
- 118 Id. at Art. I-15.
- 119 Id., at Art. I-17.
- 120 Id.
- 121 "Using the procedure for monitoring the subsidiarity principle referred to in Article 9(3), the Commission shall draw Member States' national Parliaments' attention to proposals based on" Article 17 (flexibility Clause). Id., at Art. I-17(2).
- 122 "The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent." European Constitution at Art. I-46(3). See, e.g., Wallace and Wallace, 1996: 30, 32. (for discussion of models of European cooperation, regulatory and multi-level). See Protocol on the Application of the Principles of Subsidiarity and Proportionality, at Para. 2, European Constitution, CONV 850/03 at 229 ("Before proposing legislative acts, the Commission shall consult widely.").
- 123 Id., at Art. I-5(1).
- 124 Id., at Art. I-9(2).
- 125 "The Commission shall submit each year to the European Council, the European Parliament, the Council of Ministers and the national Parliaments of the Member States a report on the application of Article I-9 of the Constitution." See Protocol on the Application of the Principles of Subsidiarity and Proportionality, Para. 8, European Constitution, CONV 850/03 at 229.
- 126 European Constitution Art. I-17(2).
- 127 See Draft Treaty Establishing a Constitution for Europe, July 18, 2003, O.J. C 169/1 (2003) (as amended) (not yet ratified), art. IV-2, O.J. C 169/1, at 57 (2003).
- 128 Tridimas, 2004.
- 129 Sieberson, 2004: 230.
- 130 Thus, the Commission now explicitly (one could argue that this relationship had been implicit under the Treaty regime) "shall oversee the application of Union law under the control of the Court of Justice." European Constitution Art. I-25(1). Professor Sieberson explains that two phrases in the Constitution actually affirm the role of the ECJ as guardian of EU law. Article I-28(1) mirrors existing language in the EC Treaty and requires the Court to 'ensure respect for the law in the interpretation and application of the Constitution.' Article I-25(1), which describes the Commission and its responsibilities, states that the Commission 'shall oversee the application of Union law under the control of the Court of Justice.' This is a statement not found in the current Treaties. These two phrases may not constitute a ringing endorsement of the ECJ's activist approach, but they certainly do not support any curtailment of the Court's role. (Sieberson, 2004: 230-231)
- 131 For an assessment of the ECJ in this respect at a time of great growth in its jurisprudence, still good reading, see Rasmussen, 1986.
- 132 European Parliament, Report on the Draft Treaty Establishing a Constitution for Europe, FINAL A5-0299/2003, 10 Sept. 2003, RR\506813EN.doc (PE 323.600) at 6-7. These criteria and principles include: "respect for the preservation of peace, democracy, freedom, equality, the rule of law, social justice, solidarity, and cohesion." Id.
- 133 For an excellent discussion of the nature and development of the most important of these principles, see Tridimas, 2000.
- 134 European Constitution at Art. I-9(3). This refers, of course, to the so-called early warning system built into the constitutional framework. The process for involvement by National Parliaments is set out in a Protocol to the Constitution.
- 135 See European Constitution, Art. I-5(2) ("Following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Constitution.").
- 136 "The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure that could jeopardize the attainment of the objectives set out in the Constitution." European Constitution at Art. I-5(2).
- 137 Id., at Art. I-10(2).
- 138 Of course, similarity does not mean identity. Both constitutions share a greater degree of detail in the memorialization of the way that competences are distributed among governments. The German Basic Law, however, creates a federal state. The European Constitution stops short of state creation. Thus compare the text of the German Basic Law: QUOTE, with that of the European Constitution: Article 1 of the Constitution declares the establishment of "a union of European States which, while retaining their national identities, closely co-ordinate their policies at the European level, and administer certain common competences on a federal basis." Art. 1. The difference has consequences. The ambiguity inherent in the nature of the polity created by the European constitution may permit greater ambit of interpretive movement for the court.
- 139 See Commission of the European Communities, Communication From the Commission, A Constitution for the Union, Opinion of the Commission, COM(2003) 548 FINAL (Sept. 17, 2003). The draft Constitution also contains some imprecise and ambiguous wording. There must be no misunderstandings about the constitutional text that Member States are gearing themselves to sign. During the ratification period, and afterwards, we must be able to give explanations which are agreed by all as to the significance of whatever provisions are adopted.
- 140 See European Commission Secretariat General, Draft Constitution: Citizens' Guide, Presentation to Citizens, [n.d.] available at /guidecitoyen_en.pdf" http://www.europa.eu.int/futurum/comm/documents/guidecitoyen_en.pdf last visited January 16, 2004).
- 141 Jo Shaw has nicely summarized the articulations of the Babel of EU constitutionalist thinking that itself reflects the conflicts articulated more formally in the political sphere. See Shaw, 2002: 3-7.
- 142 For a taste of the conflict as manifested in the academic literature prior to the development of the European Constitution, compare the more statist position in Lenaerts, 1998 with the more skeptical analysis in Zuleeg, 1997.
- 143 The position of the U.K. government well reflects this view when it stated that: "Like most other Member States, the UK does not support every proposal put forward in the Convention." British Secretary of State for Foreign and Commonwealth Affairs, A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference 2003, at 27 (¶ 43) (Cm5934, Sept. 2003). The Prime Minister emphasized this position in his forward to the report. "Let me be clear: the Convention's end product - a draft Constitutional Treaty for the European Union - is good news for Britain. . . . But the text is not perfect. Like many other Member States, there are some points in the Convention text which we will want to examine in more detail." Tony Blair, Forward, in Id., at 3. The Italian position was made no less clear. See, e.g., note 7, above.
- 144 See Granger, 2004: 29-30.
- 145 See Ana Palacio, The IGC: Reflections on a Protected Endgame, Address at a Conference, Towards a European Constitution, organized by the Federal Trust for Education and Research, London, England (July 1, 2004).
- 146 See Backer, 1998.
- 147 The analogue is to the German constitutional notion of *Bundestreue*. Ironically, in this case, the German concept is judicially constructed from out of the meaning of the Basic Law. The European version is written into the constitution itself.
- 148 Yes, yes, the supporters of the European Constitution, endlessly suggest otherwise. How could they not? But a close reading of the document suggests that the old tension is carried over from the Treaties. The Constitution is, but is not, a federal, international domestic legal order. It is described as a further step toward greater integration by some and no more than a tidying up of the current state of affairs but others. All are reading the same document. Consider the ambiguity of the U.K. prime minister's defense of the constitution in minimalist terms.
- "The Convention text spells out that the EU is a Union of nation States and that it only has those powers which Governments have chosen to confer upon it. It is not and will not be a federal super state. The text reinforces the role of national Parliaments in the Union. And it proposes a new position of full-time President of the European Council, which will mean greater accountability to national governments as well as greater efficiency."*
- Tony Blair, Forward, in British Secretary of State for Foreign and Commonwealth Affairs, A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference 2003, at 3 (Cm5934, Sept. 2003). Yet he could have been describing literally the American constitutional situation.
- Some entity will have to decide which vision is closer to the truth to be constructed from out of the document. Here one is faced squarely with the American dilemma arising in full force the day after the proverbial 'Philadelphia Moment.' Article 1 of the European Constitution sums it up nicely: a union of European States which, while retaining their national identities, closely co-ordinate their policies at the European level, and administer certain common competences on a federal basis. The articulation of the nature and character of this beast will take a bit of time.

149 These are set forth in Part I of the European Constitution at Art. I-2.

150 See *id.*, at Art. I-3.

151 As Miguel Maduro so well articulated in another context: "much of this discussion of values hides certain conceptions about the institutions related to those values. Many discussions about substantive decisions are, in reality, institutional discussions." (Maduro, 1998: 154) (noting also that "non-discrimination tests, in turn, entail a distrust in national political processes." *Id.*, at 157).

152 For a nice discussion of the principles in the context of the construction of a political "Europe" see Olesti Rayo, 1998. See also The European Convention, Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, at part II, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00286en2.pdf> (Sept. 23, 2002).

153 The European Constitution makes clear that within the ambit of its competences, the institutions of the European Union shall be supreme. Article I-10(1) of the Draft Treaty provides: "[t]he Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States." Draft Treaty Establishing a Constitution for Europe, July 18, 2003, O.J. C 169/1 (2003) (as amended) (not yet ratified) art. I-10(1), O.J. C 169/1, at 10 (2003).

154 See European Constitution at Arts. Part III 1-6..

155 The preamble provides broad language of a vision of Europe with respect to which the Constitution that follows represents merely an incomplete attainment. Thus, the Constitution looks towards a "reunited Europe" intending to "continue along the path of civilization, progress and prosperity" and "determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny."

156 "In all its activities, the Union shall observe the principle of the equality of citizens. All shall receive equal attention from the Union's Institutions." European Constitution at Art. I-44.

157 As Anthony Arnull recently noted:

More importantly, the existing doctrine of primacy does not extend to Titles V and VI of the TEU, the so-called second and third pillars, which deal respectively with the Common Foreign and Security Policy ("CFSP") and with Police and Judicial Cooperation in Criminal Matters. Because the Draft Treaty would abolish the Union's pillar structure, the effect of Article I-10(1) would be to make the doctrine of primacy applicable across the entire range of the Union's activities. (Arnull, 2004: 508-509.

158 European Constitution at Art. I-10(1) (emphasis supplied).

159 See Protocol on the Application of the Principles of Subsidiarity and Proportionality, European Constitution, CONV 850/03 at 229. For an excellent analysis see Anna Verges, The Governance of EU Powers and the Role of the National Parliaments, (conference Paper) (June 30, 2004) available at <http://www.fedtrust.co.uk>.

160 See The European Convention, Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, at part II, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00286en2.pdf> (Sept. 23, 2002).

161 See Protocol on the Application of the Principles of Subsidiarity and Proportionality, European Constitution, CONV 850/03 at 229 at Para. 4.

162 *Id.*, at para. 5.

163 *Id.*, at para. 6 ("Where reasoned opinions on a Commission proposal's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the Member States' national Parliaments and their chambers, the Commission shall review the proposal.").

164 *Id.*, at para. 7 ("The Court of Justice shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought . . . by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.").

165 In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall declared that the "government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *Id.*, at -.

166 See, e.g., European Constitution, Art. I-43 (Enhanced Cooperation).

167 Romano Prodi, Speech at the Opening of the Constitutional Convention on the Future of Europe (Feb. 28, 2002), in The Federal Trust, for Education and Research, The Constitutional Convention on the Future of Europe: Speeches by Valery Giscard D'Estaing, Pat Cox, Romano Prodi and Jose M. Aznar 22 (European Essay No. 21, 2002) at 24.

168 See, e.g., Genet, 1966.

169 Consider, for example, the designation or self-identification of the E.U. on the Internet. Its home page address is europa.int.eu.

170 For a discussion of this point see Backer, 1998.

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