

TO BE A EUROPEAN CITIZEN: CONSTITUTIONAL PATRIOTISM AND THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

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The long term stability and efficiency of the European polity depends to some extent on European citizens developing a sufficiently strong commitment to and identification with it. If the European Union is to successfully master the tasks assigned to it and, using a non-consensual procedure, decide on policies significantly effecting the allocation of risks and

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resources between European citizens, then the development of a sufficiently robust European identity is widely believed to be necessary to ensure the legitimacy and the functioning of the polity in the long term (2). There is little doubt that such an identity is currently missing (3). The general question is what such an identity should be and what the conditions are under which such an identity is likely to develop (4).

The question to be pursued here is what the Constitutional Treaty (hereinafter: CT), signed by Member States on October 29 2004 and to be ratified within the next two years, has to contribute to the development of a European identity. There are two aspects to this question. First, what is the normative idea of the European Union that the CT embraces? What is the normative core of the identity it invites citizens to adopt? Second, what are the circumstances under which such an identity is likely to develop? And does the Constitutional Treaty help to establish the conditions that support the development of such an identity?

The first question focuses on the normative ideal embraced by the constitutional document itself. *What is the story that the CT in its textual self-*

(2) Empirical research suggests that there is a strong correlation between the development of a European identity and support for European institutions, see A. MAURITS VAN DER VEEN: «Determinants of European Identity: A Preliminary Investigation using Eurobarometer Data at www.Isanet.org/noarchive/vanderveen.html (analyzing Eurobarometer statistics to show that a sense of European identity is not simply a proxy for support for European integration, but that a sense of European identity has a far greater impact on support for integration than vice versa. Moreover, variables that are often argued to promote support for European integration are shown to do so primarily through their impact on a sense of European identity)». For an explanatory account why that may be so see J. HABERMAS: «Ist die Herausbildung einer europäischen Identität nötig, und ist sie möglich?», in *Der gespaltene Westen* (2004).

(3) According to a 2003 Eurobarometer survey 43% of European citizens feel they are nationals only and 47% feel they are firstly citizens of their own country and then citizens of Europe. Only 7% feel they are Europeans firstly and then citizens of their country while 3% feel European solely. See more generally A.-P. FROGNIER and S. DUCHESNE: «Is there a European Identity?», in: O. NIEDERMAYER and R. SINNOT (eds.): *Public Opinion and International Governance* (OUP 1995), 194-226.

(4) The debate on what European citizenship could mean could be was spurred on by the inclusion of a citizenship clause in the Maastricht Treaty. Helpful contributions include F. MAYER, J. PALMOWSKI: «European Identities and the EU – The Ties that bind the Peoples of Europe», 42 *Journal of Common Market Studies* (2004), pp. 573-578; J. WEILER: «To be a European citizen: Eros and Civilization», in: *A Constitution of Europe* (1999), 324. J. D'OLIVEIRA: «European Citizenship: Its Meaning, Its Potential», in: R. DEHOUSEE (ed.): *Europe After Maastricht: An Ever Closer Union?* (1994); E. MARIAS (ed.): «European Citizenship» (1994). J. SHAW: «Citizenship of the Union: Towards Post-National Membership» 6 *AEL* 237 (1995). See also G. SOLEDAD: *European Identity and the Search for Legitimacy* (London, 1993).

*presentation tells about the way the European Union fits into legal and political life in Europe? What kind of European identity does it invite European citizens to adopt? That question can be broken down into several more specific questions: What does the CT say the European Union stands for? What is its basic purpose? What is its authority in relationship to Member States? What makes it legitimate? In answering these questions the core part of the article provides a *reconstructive* account of the conception of supranational identity that the CT embraces and its text articulates. It does not seek to contribute to the immense literature discussing the normative questions what an adequate European identity should be, whether national courts ought to accept the ECJ's claim that EU Law is the supreme law of the land or whether the EU is in fact democratically legitimate or not. Its purpose is primarily reconstructive and its method analytical. It seeks to highlight the core features of the European Union as a supranational polity as it is presented in the CT. The core part of the paper focuses on these questions. The second part is more empirically focused and less developed. It tentatively explores whether the Constitutional Treaty and the political and legal practices it structures are likely to contribute to the development of such a European identity.*

Because the identity the CT invites citizens of Europe to adopt is a version of constitutional patriotism, the first part briefly presents the idea of constitutional patriotism (I). Its purpose is to provide some conceptual clarification and clear the ground for the more specific discussion of constitutional patriotism as a European identity embraced by the CT. The specific contours of Constitutional patriotism as a *European* identity will then be explored by an analysis of the Preamble (II). To further give contours to the idea of the specifically *supranational* identity that the CT embraces, the article will then discuss some core provisions pertinent to the authority (III) and legitimacy (IV) of EU Law and analyze the conception of authority and legitimacy they reflect. The CT's conception of authority and legitimacy serves to highlight the relationship between Member States and the European Union and gives more concrete contours to the idea of the EU as a supranational community. In a final part the article ventures to tentatively explore whether the Constitutional Treaty and the political and legal practices it structures are likely to contribute to the development of a European identity (V). It will argue that, whatever other factors may also influence the development of a European identity, the establishment of meaningful electoral politics on the European level is likely to be a necessary condition for such an identity to develop any time in the foreseeable future. The CT, however, does not allocate decision-making authority between European institutions in a way

that strengthens European electoral politics. Instead there is a danger that the CT will undermine rather than foster the development of a meaningful European identity. Instead of embracing constitutional patriotism European citizens are likely to continue to oscillate between disinterest in European political life and national recalcitrance. But there is a ray of hope: The article concludes that purposive interpretation of the CT in conjunction with strong parliamentary assertiveness vis à vis the Council could create conditions more favorable to the development of both a meaningful European electoral process and a European identity grounded in constitutional patriotism.

I. THE IDEA OF CONSTITUTIONAL PATRIOTISM

One well known answer to the question what a European identity could be is that Europeans should become constitutional patriots (5). The basic principles of the liberal democratic constitutional tradition should be understood as the focal point for the development of a common European identity. The constitutional commitment to human rights, democracy and the rule of law highlighted as the foundational values of the European Union in Art. I-2 of the Constitutional Treaty (6) is to be the bond that ensures cohesion among European citizens. But what does it mean for an identity to be shaped by these ideals? A good way to clarify the basic structure of constitutional patriotism as a collective identity is to discuss arguments claiming to discredit the very idea of constitutional patriotism.

As has been pointed out (7), there are at least three problems with such an idea. First, both as an ideal and as an actual political and legal practice there

(5) The best known contemporary proponent of constitutional patriotism as an identity for citizens in liberal constitutional democracies generally, as well as the EU, is J. HABERMAS: «Why Europe Needs a Constitution», in: ERIKSEN/FOSSUM/MENENDES (eds.): *Developing a Constitution for Europe* (2004), pp. 19-35. See also HABERMAS: «The European Nation-State: On the Past and Future of Sovereignty and Citizenship», in: *The Inclusion of the Other* (1998), pp. 105-127 and HABERMAS *supra*, note 1.

(6) Art I-2 CT states: The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights...

(7) A prominent sceptic of constitutional patriotism is RICHARD BELLAMY: *Which Constitution for What kind of Europe? Three Models of European Constitutionalism* (on file with author). See also R. BELLAMY and D. CASTIGLIONE: «Legitimizing the Euro-Polity and its Regime: The Normative Turn in EU Studies», *European Journal of Political Theory* (2003), pp. 7-34. See also M. EVERSON: «Strong Evaluations, Self-Interpretation and Constitutional Patriotism», in: ERIKSEN/FOSSUM/MENENDES: *Constitution Making and Democratic Legitimacy*, Arena Report No. 5 2002, pp. 177-183.

is *nothing specifically European* about these commitments. They are shared by liberal democracies as different as Canada, South Africa and India and, as universal principles, claim to be morally valid everywhere human beings politically organize their coexistence with one another. Second, rights, democracy and the rule of law can not serve as a focal point for a European identity, because there is no European consensus on what they mean. Rights, democracy and the rule of law are conceptually too thick to have the function ascribed to them. Human rights in Ireland are not the same as in the Netherlands. Democracy in France is not the same as democracy in Spain. And the British idea of the rule of law is different from the German Rechtsstaatsprinzip. But an identity focused on rights, democracy and the rule of law is not just too thick. A third problem with it is that it is also too thin. It is doubtful whether the political liberal tradition of human rights, democracy and the rule of law is *sufficiently thick* to effectively function as the cement of a supranational political community in light of conflicting loyalties connected to ethically thicker national identities. How can abstract principles—rather than collectively shed blood sweat and tears—be the kit for a political community?

The response to the first challenge is that the universality of an ideal does not make it formally inadequate as an ideal of a particular community. It certainly does not mean that the inclusiveness of the ideal makes it too weak to serve as a focal point of a common identity. The fact that Christianity or Islam claim to provide universal doctrines leading to salvation surely has not undermined their power to structure individual and collective identities. But there may be a different problem. The problem with universalist ideals as the ideals of *territorially exclusive* communities is merely that they do not establish decisive criteria who may belong to it or not. To illustrate the point: Christians and Muslims do not constitute *territorially exclusive* communities. Unlike communities who establish public authorities whose jurisdiction is territorially circumscribed, the community of Muslims (the Umma) or the community of Christians (the Church in Christ) is not. Everyone is welcome to convert to Christianity or Islam. Yet Europe is a territorially exclusive community. Not all liberal states may join the European Union. *Only European states may* (8). South Africa, Japan and India, for example, may not, no matter how perfect their institutionalization of rights, democracy and the rule of law. Does the insistence on boundaries suggest that universalist ideals

(8) Art. I-II CT states: «The European Union shall be open to all European states which respect its values and are committed to promoting them together».

are inadequate for formal reasons to serve as the focal point of collective identities? They do not. The requirement that a state be European is no reason to engage in soul-searching about the ontology of Europeanness. The requirement of Europeanness is best understood and has in fact been understood as a loose geographical criterion that underlines the idea that the European Union is a *regional* and not a global organization. The universal idea it embodies is an idea of world order in which states are regionally integrated as well as belonging to organizations with universal membership. As a loose geographical criterion its application should be governed political considerations of a very practical kind in cases such as the accession of Turkey, Bosnia or the Ukraine (9). There is no reason, then, why a European identity should not focus on the realization of ideals that are universal in Europe.

The response to the second challenge is simple: Disagreement over the meaning and implications of principles, does not rule them out as a focal point of a common identity. The consensus on principles need not extend to their full specification. All that is needed is some level of consensus on what they mean, supplemented by a consensus that when political and legal conflicts get

(9) There is no point in asking, for example, whether Turkey is really European, to resolve the issue of Turkish membership. Its largest city is, whereas most of its land mass is not. Yet most of its population centers are west of Cyprus, already an EU Member since May 2004. Instead different questions need to be asked: What is there to gain and what is there to lose for the progressive realization of European constitutional principles and practices that embody them? Could Turkey's membership, for example, help integrate Muslim communities more effectively in existing Member States such as the UK, France and Germany and enrich European political practice by deepening the understanding of what pluralism is all about in Europe? Does Turkish European membership help stabilize and spread the ideas of human rights, democracy and the rule of law into the Muslim world, where they are currently struggling to take hold? Given the European Union's stance in the past that has given rise to legitimate expectations, what would the effects be if the European Union simply turned down Turkey in the Muslim world? On the other hand: Is it true that such a step would effectively preclude the development of genuine European democracy, a European public sphere and strong social cohesion in Europe, because it would further alienate a majority of European citizens, strengthening Euroscepticism across Europe? It may well be desirable for serious efforts to be made by the political establishment in Member States in favor of Turkey's accession, but it is highly problematic politically to move forward with Turkish integration, if a clear and stable majority of European citizens continues to be against it. In this respect the decision by France to hold a referendum on Turkey's membership (as France had done in the case of the UK, Ireland and Denmark) need not be inappropriate. It is an attempt by the French government to shift responsibility to its citizens and wash its hands of charges of cultural xenophobia only, if the government makes no serious efforts to persuade the electorate of the stakes and raise the level of public discussion. Clearly then, the stakes are high and the answer may not be an easy one. But it is a mistake to assume that arguments from European identity provide good reasons to exclude Turkey.

serious, it is this vocabulary that is to be used to structure debates about what should be done. Such a consensus clearly exists in the European Union (10). There may be disagreement, for example, about what the role of the European Parliament has to be in Europe for the European legislative process to be democratically legitimate. But there is a consensus that legitimacy is a function of some conception of democracy that integrates the idea of the rule of law and individual rights. Legitimacy in Europe is not a function of Europe remaining true to its Christian heritage, for example, or a function of effectively maximizing the wealth of all citizens, or giving authentic expression to a particular stage of class struggle in the development in world history. Furthermore democratic legitimacy clearly requires more popular participation than Louis XIV deliberating with his personal advisors about what to do. It requires less than Athenian democracy or a New England town hall meeting. It is not necessary for all citizens to come together in a public space to deliberate and vote on every law. «Democracy» as the common term of reference to discuss issues of legitimacy focuses and constrains any disagreement that may exist. At any point in time there is likely to be a relatively thick shared understanding about what these concepts mean, likely to limit the range and depth of disagreements, while providing a common set of references that facilitate constructive debate and mutual engagement. Even if human rights, democracy and the rule of law are essentially contested concepts (11), they provide a meaningful common point of reference to structure legal and political debates. They also illustrate the nature of a liberal identity: It is focused on debates, contestation and justification and not a rich substantive consensus that establishes unquestioned truths.

The response to the third challenge —abstract principles are too thin to effectively serve as the cement for a political community— is that abstract principles may be thin, but identities focused on them are not. Constitutional patriotism is misunderstood as an attachment to universal moral principles contained in constitutional texts and nothing more. Such an account has certainly never been an adequate representation of the idea as it has been

(10) The CT presupposes such a consensus in Art. I-2. See also Art. I-59 that authorizes the suspension of certain rights in cases of a serious and persistent breach by a Member State of these principles.

(11) On the features and function of essentially contested concepts in the context of European integration, focusing in particular on sovereignty, see S. BESSON: «Post-souveraineté ou simple changement de paradigmes? Variations sur un concept essentiellement contestable», in T. BALMELLI/A. BORGHI/P.-A. HILDBRAND (eds.): *La souveraineté au xxième siècle* (Fribourg 2003).

presented by its best known contemporary proponent, Juergen Habermas (12). Instead, these principles are given a specific *interpretation* and take on a concrete institutional shape in the constitution. This concrete institutional shape is to some extent the response to the historical experiences of the community and the objectives it has set itself for the future. *Constitutional patriotism*, then, is a thick identity. It does not merely consist in abstract commitments to human rights, democracy and the rule of law. *It is an identity that connects an account of the past with a commitment to a concrete set of constitutional arrangements as a framework for the political realization of common aspirations for the future.* The reflections on the past are guided by the question how it exemplified or failed to live up to these ideals, present institutions are conceived as interpretations of these ideals, and the future is imagined as creating a more perfect union as defined by a greater realization and deeper understanding of these ideals. In this way universal values are meaningfully connected to concrete political and legal practices of specific communities.

It is neither necessary nor sufficient for such rich connections between the past, the present and the future to be established directly in the constitutional text. What matters is that it is anchored in the public culture of a political community and an integral part of the way that citizens understand themselves. But constitutions in their preambles, in their provisions on rights, in the way they structure institutions and describe their functioning to some extent invite citizens to make these connections. In the case of the CT, the Preamble provides an illustration of a shorthand account of some central themes around which a European identity *could* develop. The Preamble is an invitation to European citizens to think of themselves as participating in and giving further substance to the basic barebones structure of the story the Preamble tells. What kind of a story is it? What is the idea of a European identity that emerges on a close reading of the preamble?

II. THICK CONSTITUTIONAL PATRIOTISM AND THE PREAMBLE

The first textual paragraph of the preamble reaffirms that the rights of the human person, democracy and the rule of law are universal values. It mirrors the provision describing the Union's foundational values in Art. I-2: respect for

(12) «The political culture of a country crystallizes around its constitution. Each national culture develops a distinctive interpretation of those constitutional principles that are equally embodied in other republican constitutions ... in light of its own history.» J. HABERMAS: «The European Nation-State», *supra* note 4, at 118.

human dignity, freedom, equality, democracy and the rule of law. These values are the bedrock, the main protagonists of the story. This is the universalist core of any identity properly referred to as constitutional patriotism. But right away, even as they are introduced in the first paragraph, they are connected to the «cultural, religious and humanist inheritance» from which they have developed in Europe. The past here is cast as something that inspiration can be drawn from, and that, as a spiritual, intellectual and cultural «inheritance» remains a presence culturally sustaining the commitment to human dignity, human rights, democracy and the rule of law. Awareness for universal values has its source in the particular history of a community and is embedded in a particular culture.

But history is not just an inheritance to be appropriated or an inspiration to draw from. It also provides for a lesson to be learnt. The peoples of Europe «reunited after bitter experience» are cast as «determined to transcend ancient divisions». In the allusions to ancient divisions and bitter experiences the dark side of the past is invoked as something that needs to be transcended. Europe is to become a space where wars, persecutions, genocide, and ethnic cleansing are to be *confined* to the past by giving them *virtual presence* in the form of memory. Naturally the specifics of the negative lessons and the emphasis on what is to be learnt from them will be different for, say, Germans, Spaniards, Estonians, Poles or Czechs. But they converge on a commitment to human rights, democracy and the rule of law that embraces both appropriately reconceived national identities and *the commitment to «forge a common destiny» and to build a Europe «united in its diversity»*.

Thus the lessons to be learnt concern the concrete legal and political forms of organization that are desirable in Europe. A commitment to universal principles is connected with the establishment of a special kind of supranational community on the European level —neither a full-fledged federal state nor a mere international organization— that is a response to the lessons of the past. It emphasizes that *«the peoples of Europe» remain «proud of their own national identities and history»*. European integration, then, and a commitment to universal values is cast as compatible with celebrating national identity and the historical narratives that sustain it. The European Union is not to supplant national identities with a European identity. The Citizenship Clause, Art. I-10 in the CT, is illuminating in this respect. Every national and only nationals of Member States shall be a citizen of the Union. Not only does citizenship of the Union not replace national citizenship, it makes it a prerequisite (13). But national identity and history has to be

(13) The interdependence between national and European citizenship is also emphasized by J. WEILER: «To Be a European Citizen: Eros and Civilization», in: *A Constitution for Europe* (1999).

reconceived as open to transnational integration into a wider community. Nationality must no longer serve as a divisive force in Europe. European Nations are to coexist with and flourish within the constitutional framework established by the supranational community. This constitutional framework is to help «forge a common destiny».

What then are the contours of that «common destiny» to be forged and the «common future» to be built? How are the lessons in the past and the commitment to a particular supranational community in Europe connected to the future? The Preamble spells out some features of the «path of civilization, progress and prosperity» that Europe is to embark on. It is to be «for the good of all inhabitants, including the weakest and most deprived». Europe «wishes to remain a continent open to culture, learning and social progress». And it «strives for peace, justice and solidarity throughout the world», while being aware of the «responsibilities towards future generations and the earth». With regard to these aspirations continuity, rather than a break with the past is the theme. Europe «intends to *continue* along the path of civilization, progress and prosperity». It is «determined to *continue* the work within the framework of the Treaties establishing the European communities and the Treaty on European Union, by ensuring the continuity of the Community *acquis*».

At least in part the specific list in the Preamble reveals what it is that Europe defines itself in relation to. The Constitutional Convention that drew up this text under the Presidency of Giscard D'Estaing was working as the United States fought a war in Iraq. As the unprecedented mass demonstrations in London, Barcelona, Madrid, Rome, Paris and Berlin on February 15 2003 illustrated, many Europeans saw the United States not just as dangerously disrespectful of international law. What also found resonance in Europe, was a description of the U.S. as a country led by a less than articulate President, who is supported by a non-progressive religious base and aggressively engages in distributive politics in favor of the well to do, while refusing to engage seriously environmental concerns. This image is the inverse of the idea of a «culture of learning and social progress», for «the good of all inhabitants including the most deprived», «striving for peace and solidarity in the world» and recognizing «responsibilities towards future generations». The United States shares with Europe and has historically played a central role fostering in Europe the foundational commitments referred to in the Preamble. The U.S. Constitution is the earliest, the CT the latest constitution that is grounded in enlightenment political ideals. But the contemporary interpretation of these commitments embodied in the policies of the Bush administration at the time of drafting may well have provided a focal point for a widespread consensus on how these values are *not* to be understood in Europe. The Preamble

provides a competing interpretation of these commitments and articulates the core themes of an alternative vision of a transnational liberal civilization, the realization of which the Preamble describes as «the great venture». This alternative vision is not just something European citizens are encouraged to rally around to make their lives better. The Preamble describes Europe as «a special area of human hope». It echoes the «city on the hill» theme that is a staple element of American exceptionalism (14). Europe, too, aspires to be a model that others have reasons to emulate (15).

The Preamble, then, connects a commitment to universal principles with an account of the past, a commitment to a particularly constituted supranational community in the present and a set of distinct aspirations for the future. Europe as a political idea thus develops specific and distinct contours. It is grounded not just in universal principles, but in a religious and humanist culture, that is its inheritance. It embraces a supranational legal and political form that is neither a European nation state nor a mere international organization. And it subscribes to a particular political program and an ideal of a liberal civilization that is distinctively European. This then is the idea that the Preamble invites Europeans to make their own by engaging with it, giving substance to it and making it real.

III. THE AUTHORITY OF THE CONSTITUTIONAL TREATY: EUROPEANIZING THE EXERCISE OF RESIDUAL NATIONAL SOVEREIGNTY

But what kind of supranational community does the Constitutional Treaty establish? How exactly does the national element relate to the European in the supranational community established by the CT? At the heart of a

(14) The original draft drawn up by the Convention went further and described Europe as «a continent that has brought forth civilization», claimed that «freedom, equality and respect for reason» were humanist values (that is: not religious values) and introduced the Preamble with a Thucydides cite on the meaning of democracy (long before the Americans!), printed in ancient Greek (a language that less than 3% of European citizens can read). Furthermore the secularist triumphalism of the original Draft made no mention of «bitter experiences». After strong criticism the Intergovernmental Conference that finally agreed to the CT made the relevant changes in June 2004.

(15) See the illuminating discussion by A. VON BOGDANDY: «The European Constitution and European Identity: Potentials and Dangers of the IGC's Treaty Establishing a Constitution for Europe», in WEILER and EISGRUBER (eds.): *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, [<http://www.jeanmonnetprogram.org/papers/04/040501-07.html>].

supranational constitution and at the heart of a meaningful identity that relates to the constitution must be a more concrete idea of nature of the relationship between the supranational and the national. How then does the CT and the institutions it establishes flesh out and give meaning to the idea of a supranational community? What are the distinctive features of the account of authority and legitimacy that underlies it?

The Constitutional Treaty is distinguishable from the current Treaties in that it explicitly establishes a *comprehensive framework of legal authority*. The Primacy Clause of the CT explicitly establishes EU Law as the supreme law of the land. Yet, the CT makes no mention of a European people as its basis and is not ratified by a procedure that expresses an act of self-constitution by a European People. How then can the claim to authority be sustained? How can such a claim be squared with the supranational character of the EU?

The special nature of the EU is reflected in the way that the EU is committed to exercising its authority. It is to exercise its authority with due respects to residual sovereign rights. As will be argued below, *the claim to comprehensive authority, is flanked by substantive guarantees, even authorizations, for Member States to protect the inner sanctum of sovereignty*. Threats of resistance, always in the background of European practice from de Gaulle's Empty Chair Politics to resistance by national constitutional courts in the name of national constitutional commitments, are explicitly addressed in the CT. States are authorized to protect their essential sovereignty and they may unilaterally withdraw from the Union.

If this is so, a superficial assessment of the CT would suggest that it merely restates the status quo. The ECJ has long claimed that EU Law is to be accorded primacy in Europe. Equally well known is that the highest courts in many Member States have in fact claimed that they would set aside and not enforce EU Law if it violates certain fundamental national constitutional commitments. And states would have claimed a sovereign right to withdraw from the Union, even without such authorization by the current Treaties.

Yet, it would be a mistake to see the CT merely as a restatement of the status quo. The CT reframes the relationship between EU Law and national law in different terms. It explicitly establishes a *comprehensive framework of authority*. Whatever states may do they do within a legal framework that explicitly establishes the supreme law of the land. Furthermore the CT provides a *procedural framework* for the exercise of these residual sovereign rights. The CT changes the very nature of the relationship between the EU and its member States, by *Europeanizing and legalizing even the assertion of these residual sovereign rights* and thus strengthens the authority of the European

Union. The CT informs Member States that even moments of national recalcitrance, resistance, conflict, even withdrawal are moments in which they are to engage European procedures and European institutions. To illustrate the mechanisms by which the CT institutionalizes this complex dynamic, more context is necessary. The following will focus first on the EU's primacy clause as it relates to the guarantee of national identities and fundamental political and constitutional structures (a) and then the provisions governing the voluntary withdrawal from the Union (b).

a) *The Primacy of EU Law and the Guarantee of National Fundamental Constitutional Structures*

Unlike the Treaties that the CT replaces, the CT explicitly establishes the primacy of EU Law. Art. I-6 states: «The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of Member States.» In many respects there is little that is new in such a clause. It is the restatement of a doctrine that the ECJ has embraced for over forty years. Indeed, just to ensure that the specific formulations of Art.I-6 is not misunderstood as anything other than an endorsement of the ECJ's jurisprudence, the Member States annexed a formal declaration to the CT stating that «Art. I-6 reflects the existing case law of the Court of Justice of the European Communities and of the Court of First Instance» (16). Yet such a clause is likely to make a significant difference.

Nearly as well known as the ECJ's jurisprudence on the primacy of EU Law —Costa (17), Comet (18) and Simmenthal (19)— are the leading court decisions by various highest Courts of Member States resisting that claim (20). Originally some national courts have claimed that they will subject

(16) CIG 87/04 Add2, Declaration re Art. I-6.

(17) ECJ Case 6/44 Costa v. Enel, [1964] ECR 585.

(18) ECJ Case 43/76, Comet BV v. Produktschap voor Siergewassen. [1976] ECR 2043.

(19) Amministrazione delle Finanze dello Stato v. Simmenthal, [1978] ECR 629.

(20) For general overviews of note on the issue see A. M. SLAUGHTER, A. STONE and J. H. H. WEILER: *The European Courts and National Courts – Doctrine and Jurisprudence* (Oxford, Hart Publishing 1998); CONSTANCE GREWE and HELEN RUIZ FABRI: *Droits Constitutionnels Européens* (Paris, PUF 1995); FRANZ MAYER: *Kompetenzüberschreitung und Letztbegründung* (Muenchen, C. H. Beck 2000). For a collection of the leading cases across jurisdictions see A. OPPENHEIMER (ed.): *The Relationship between European Community Law and National Law: The Cases* (Cambridge, 1994 [vol. 1] & 2003 [vol. 2]).

For a general overview of the the situation in the Netherlands and Belgium see BRUNO DE

EU Law to national constitutional rights guarantees. Even though they generally won't do so anymore after the ECJ developed its own fundamental rights jurisprudence, national courts are still likely to insist on enforcing their constitution over EU Law, if EU Law is in clear violation of specific constitutional rules. Furthermore there is the issue of «Kompetenz-Kompetenz». National courts, invoking constitutional arguments, have threatened to set aside EU Law they deem to be clearly enacted *ultra vires*, even in cases where the ECJ has previously upheld such laws as falling within the competences of the EU. The relationship between EU Law and national constitutional law remains complex, with very few national courts having accepted outright that EU Law is the supreme law of the land (21).

As was argued extensively elsewhere (22), even if *content-wise* Art. I-6 is merely the codification of the *acquis communautaire*, such a codification is likely to make an important difference to the way national courts engage with EU Law. The ECJ can now simply cite the text of the CT. It no longer has to cite its own jurisprudence, which was the result of an interpretative exercise that involved complex conceptual, empirical and normative questions. Furthermore each Member State will have to explicitly endorse the primacy of EU Law during the ratification of the CT in line with national constitutional requirements. If such ratification will occur, there is no doubt that such an explicit approval will at the very least carry significant weight with national courts. In some cases it is likely that the constitution will be amended, explicitly for the purpose of enabling a state to ratify a Treaty that contains a supremacy clause (23). The explicit constitutional endorsement of the ECJ's

WITTE: «Do not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and the Netherlands», in: NEIL WALKER (ed.): *Sovereignty in Transition* (Hart 2003), 351-366.

(21) See *supra*, note 19.

(22) See M. KUMM and V. FERRERES COMELLA: «The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty», in WEILER and EISGRUBER (eds.): *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04 [<http://www.jeanmonnetprogramm.org/papers/04/040501-15.html>].

(23) In Spain, for example, the «Consejo de Estado» (a body that advises the government) has published a report (dated October 21, 2004) suggesting that the primacy clause of article I-6 may collide with the principle according to which the Spanish Constitution is the supreme norm of the legal system that is applied in Spain, a principle that is established in the Spanish Constitution itself. Therefore, the Consejo suggests that it may be necessary to amend the Spanish Constitution in order for Spain to be able to validly ratify a Constitutional Treaty that includes such a primacy clause. After the report was made public, the government decided to ask the Constitutional Court whether there is indeed such a contradiction between the Spanish Constitution and the Treaty. For an argument that the primacy clause of article I-6 does not make it necessary for Spain to change its Constitution, see VÍCTOR FERRERES COMELLA and ALEJANDRO

primacy jurisprudence, once it is duly ratified by Member States, strengthens the case for the supremacy of EU Law, even if it may not conclusively resolve all constitutional conflicts (24).

There are two main reasons why it is unlikely to conclusively resolve all conflicts. The first concerns the *text* of the supremacy clause. The clause establishes only that EU enacted by EU institutions «exercising competences conferred on it» shall have primacy. This still leaves open the question who gets to determine with ultimate authority whether particular legislation was enacted within «competences conferred» on the EU or not. The «Kompetenz-Kompetenz» questions remains unresolved. Furthermore the clause merely states that EU Law shall have primacy over «the law» of Member States. Unlike the supremacy clause in the US, the clause does not specifically determine whether «law» refers only to ordinary MS law or also includes state constitutions. Besides the ambiguity of the text the second concern is related primarily to the *ratification procedure*, but also to other features of the CT, such as its Preamble. The Preamble begins not with an invocation of «We the People». It begins with «His Majesty the King of the Belgians, her Majesty the Queen of Denmark, the President of the Federal Republic of Germany» etc...

SAIZ ARNAIZ: «¿Realmente hay que reformar la Constitución española para adecuarla a la cláusula de primacía de la Constitución europea?», *Actualidad Jurídica Aranzadi*, Año XIV, number 645, November 18, 2004.

In Portugal, a similar debate has already led to a constitutional amendment (introduced on July 24, 2004). Article 8 of the Portuguese Constitution now includes a clause (in paragraph 4) that explicitly declares that EU Law is applicable in the domestic legal system in the terms defined by EU law, with due respect to the fundamental principles of a democratic State under the rule of law.

In France, the Constitutional Council was asked by the President of the Republic to render an opinion on the constitutionality of the Treaty. In its decision (decision number 2004-505 DC, November 19, 2004), the Council established that, although the Constitution needs to be amended before France can ratify the Constitutional Treaty for other reasons, the primacy clause presents no specific constitutional problem. The Council emphasizes that the Treaty establishing a Constitution for Europe is still a Treaty, and that article I-5 entails that the Treaty respects the existence of the French Constitution and its place as the highest norm of the internal legal order. The Council notes that in earlier decisions (numbers 2004-496, 2004-497, 2004-498, 2004-499) it had already accepted that EU law has primacy, except when it contradicts specific provisions of the French Constitution, and it finds no reason to think that the primacy clause should now alter that conclusion.

(24) It won't be conclusively resolved because there will be arguments that the CT remains a document ultimately ratified according to national constitutional provisions of Member States. This grounds the CT in national constitutional practices. The CT will not have been enacted by European citizens acting collectively as «We the People» —as a European *pouvoir constituant*— in a European referendum or in specific ratifying conventions established on the national level.

and it ends with «have designated as their Plenipotentiaries who have exchanged their full powers etc... This has the smell of old world diplomacy about it. It does not express the passion and momentousness of an act of self-constitution by a European People. It is only fitting that such a document is ratified «in accordance with respective national constitutional requirements» (25). The CT does not require either a Europe-wide referendum of ratifying conventions in Member States. *Nothing in the ratification-procedure expresses the idea that a new ultimate legal and political authority is to be established by a European citizenry acting as «We the People».* Instead, the ratification procedure links the CT to the constitutional requirements as they happen to be in Member States. At least ten of the 25 Member States are going to use parliamentary procedures to ratify the CT. Some constitutions will either require or allow a referendum to be held (26). There are even attempts by the European Parliament to get Member States to coordinate national referenda to allow for greater cross-referencing in debates and the creation genuine Europe-wide momentum (27). But that may well be insufficient for some national courts to accept the primacy of EU Law, when EU legislation is in conflict with fundamental national constitutional commitments.

It is exactly to address these situations of constitutional conflict that another CT innovation comes into play. The current Art. 6 Sect. 3 EUT already states that «the Union shall respect the national identities of its Member States». But the new Art I-5 CT is considerably more elaborate: «The Union shall respect ... Member States... national identities, inherent in their fundamental structures, political and constitutional...It shall respect their essential state functions, including ensuring territorial integrity of the State, maintaining law and order and safeguarding national security».

Such a clause can be of significance in various ways. Governments, for example, may invoke it when, in cases of a national emergency, they don't respect certain provisions of EU Law in order to more effectively deal with the crisis. But beyond reading it as the EU's emergency clause, it may have a more

(25) See Art. IV-447 CT.

(26) As of November 18, 2004, nine Member States have committed themselves to do so: Czech Republic, Denmark, France, Ireland, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. Some other States are still undecided whether to hold a referendum. See <http://europa.eu.int/futurum/ratification>.

(27) The European Parliament has passed a resolution (October 14, 2004) calling on the Council to devise a coordinated approach to the timetabling of national ratification procedures, and suggesting that the period from 5 to 8 May 2005 might be chosen as a suitable period for holding the planned referenda on the Constitution or the parliamentary ratification in the Member States.

mundane significance. It could be of considerable significance for national constitutional courts adjudicating issues involving conflicts with national constitutional law. One way to understand the explicit guarantee of national constitutional identity is *as an authorization of national courts to set aside EU Law on national constitutional grounds, if and to the extent it is necessary to safeguard national constitutional identities.*

Such a reading of the CT is suggestive in a number of ways. For one, it would not be particularly harmful. Art. I-5 read in this way would only authorize something that Member States' highest courts are generally committed to do even without such authorization. Yet, something of great symbolic significance is gained. When national courts set aside EU Law invoking this clause in conjunction with their national constitutional provisions, they are no longer actors in a Schmittian drama, in which ultimate allegiances are affirmed and the European rule of law is suspended. Instead national courts act as duly authorized agents of the European Union never leaving the parameters defined by EU Constitutional Law. The status of EU Constitutional Law as the supreme law of the land would remain undisputed. Such a construction would give further expression to the idea that EU Law ultimately frames the terms on which European citizens relate to one another, even in extreme cases where fundamental national constitutional commitments are at stake.

Beyond the symbolic significance of reframing the role of a national constitutional court in this way, there is a further subtle advantage in the CT authorizing national courts to serve as guardians of fundamental national commitments. This CT provides a basis to further *procedurally circumscribe and engage national constitutional courts* even, even when they adjudicate questions of national constitutional law and even when they contemplate setting aside EU Law on national constitutional grounds. The new Art.I-5 Sect 2 states that «pursuant to the principle of sincere cooperation, the Union and its member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the constitution». The current Art. 10 ECT establishes only a good faith duty of Member States to ensure the fulfillment of their obligations. The new provision focuses on *mutual respect* and cooperation. In order to be able to operationalize that mutual respect, *the ECJ has good reasons to require national constitutional courts to engage the ECJ as it interprets national constitutional law* (28). The ECJ could insist that national courts—including national constitutional courts—are required to make a

(28) The following is drawn from M. KUMM & V. FERRERES COMELLA: *Supra*, note 21.

preliminary reference to the ECJ explaining the issue as it arises under national constitutional law. In this way the ECJ would have an opportunity not just to examine how best to interpret the EU provision in light of the possibility of conflict. The ECJ would also be able to contribute its views on the interpretation of the national constitutional principles at stake. Of course the ultimate authority on the interpretation of the national constitutional provision would remain with the national court. But just as the ECJ may profit from the views of national courts when it decides how to interpret EU Law in the ordinary practice of the preliminary reference procedure, so national courts may profit from the ECJ's views when it interprets national constitutional provisions in a context where the enforcement of EU Law is at stake. Such a procedural device may help expand the fruitful vertical and horizontal dialogue between national courts and the ECJ to include provisions of national constitutional law.

Another procedural barrier that the ECJ may want to establish as it fleshes out the implications of the new «mutual respect» clause is to require national courts to notify the Commission of its decision to set aside EU Law, when it does so. This way the Commission would know of the issue and be aware of the constitutional concerns described by the national court. As the political guardian of the European legal order the Commission could then assess whether it is necessary and helpful to address the issue on the political level in order to resolve it.

Seen as whole the CT's primacy clause as it relates to constitutional conflicts further strengthens the authority of EU Law in three ways. First, by expressly codifying what previously merely existed in the form of an ECJ doctrine it strengthens the claim that EU Law is in fact now the supreme law of the land. Second, by explicitly authorizing Member States courts in narrowly circumscribed circumstances to do as a matter of EU Law what they would have done as disobedient national actors anyway strengthens the plausibility of that claim to authority. And third, by authorizing Member States to act in ways incompatible with secondary EU Law when residual sovereign rights are at stake, it paves the way to procedurally circumscribe the use of this authority.

b) *Withdrawal from the Union*

A similar structure for dealing with residual sovereign rights can be found in the CT's provisions dealing with the withdrawal of a state from the Union. Before the CT the Treaties did not explicitly address under what circumstances

a state could withdraw from the Union. The Treaties were concluded for an unlimited time (Art. 51 EUT, Art. 312 ECT), as is the CT (Art. IV-446). There was some dispute what this meant, legally. Some suggested this meant that there was no right to withdrawal. Withdrawal would be the equivalent of illegal secession. Others suggested that international rules governing the termination of Treaties, in particular Art. 54 -56 of the Vienna Convention of the Law of Treaties, would be applicable. This would have required the consent of all parties. Most national constitutional lawyers insisted that nothing could ultimately prevent unilateral withdrawal, for so long as it occurred in accordance with national constitutional requirements. Ultimately there was agreement that in the real world no legal argument would ultimately carry much weight when a state was committed to withdrawal. In this sense the right to withdrawal remained a residual sovereign right, unencumbered by and prior to EU Law.

The CT provides for rules governing the voluntary withdrawal from the Union. Art. I-60 states that «Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.» The CT therefore provides an explicit legal authorization for states to do what they very likely would have done anyway, if they believed it to be in their interests. In some sense, the provision merely recognizes the residual sovereignty remaining with Member States. But if the CT establishes the primacy of EU Law and then authorizing States to withdraw unilaterally as they please, what is its point? If this is the assertion of authority, it is a conception of authority fittingly ridiculed by Saint-Exupery in the story of the Little Prince and the King on Asteroid 325.

The king was the sole inhabitant of asteroid 325. When the little prince arrived he was happy to see the little prince (Aha! A Subject!). «Clad in royal purple and ermine» and «seated on a throne at the same simple and majestic» he claimed to have absolute authority, though it was not clear what it was he ruled over or what the basis of his authority was. His air of authority sparked the curiosity of the little prince.

«Sire over what do you rule?»

«Over everything», said the king, with magnificent simplicity.

«Over everything?»

The king made a gesture that took in his planet, the other planet, and all the stars.

«And the stars obey you?»

«Certainly they do», the king said. «They obey instantly. I do not permit insubordination.»

The Little Prince then asks the king to order the sun to set, because he

desired to see a sunset. At this point, the king starts to provide deeper insights into the nature of his authority.

«If I ordered a general to fly from one flower to another like a butterfly, or to write a tragic drama, or to change himself into a sea bird, and if the general did not carry out the order that he had received, which one of us would be wrong?» «Accepted authority rests first of all on reason. If you ordered your people to go and throw themselves in the sea, they would rise up in revolution. I have the right to require obedience, because my orders are reasonable.»

«Then my sunset?» The little Prince reminded him...

«You shall have your sunset. I shall command it. But, according to my science of government, I shall have to wait until conditions are favorable.»

When asked when that would be the King consults a bulky almanac, before informing the Prince that this evening favorable conditions would pertain at twenty minutes to eight.

At this point, the little Prince was beginning to lose interest and wanted to leave. The king, however, refused to let him go, because he was proud to have a subject. The little prince turns to the king and says:

«If Your Majesty wishes to be promptly obeyed he should be able to give me a reasonable order. He should be able, for example, to order me to be gone by the end of one minute. It seems to me conditions are favorable...» He then leaves, not without noticing the king's «magnificent air of authority».

Does the authority of the CT structurally resemble the authority of Saint Exupery's king on asteroid 325? What is the significance of having the withdrawal provision in the CT?

First, unlike the king on asteroid 325 the EU's authority in its core domain of operation is significant and undisputed. The question is merely how that authority is to be construed. According to the currently still dominant view, EU Law ultimately derives its authority from Member States whose constitutions also circumscribe the limits of EU Law's authority. Under these circumstances, the claim to establish a *comprehensive* framework of authority in conjunction with an authorization to withdraw is not just of symbolic significance. *It invites citizens to reconceive what it means to exercise residual sovereign rights. The CT suggests that EU Law now legally grounds the exercise even of the right to withdraw.* It is no longer a residual sovereign right of Member States that exists independent of and prior to anything EU Law prescribes. The CT thus suggests that a shift in ultimate authority has occurred. This shift does not entail Member States losing their residual sovereign right to withdraw. But it does mean that the right is now Europeanized. Member States, even when they exercise residual sovereign rights, are admonished to understand themselves as agents acting under the authority of EU Law.

Second, this conceptual revolution in constructing EU authority, has practical implications. Voluntary withdrawal is now *procedurally circumscribed*. These procedural hurdles are not cumbersome in any formal way. According to Sect. 2 of Art. I-60 a Member State «shall notify the Commission of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union» following the procedures generally applicable for the negotiation of international agreements between the Union and third parties (29). Note that the CT does *not* stipulate a requirement that a consensus needs to be reached. The text merely states that «*the Union* shall negotiate and conclude an agreement with that State». This procedural hurdle does not establish formal barriers of any significance. Yet, the legal establishment of such a procedure is significant in at least two ways. First, as far as the withdrawing state is concerned, it is drawn into a complex legal process of negotiations, which involves the future status of that State. The negotiations have the function to require the withdrawing state to *engage* the EU on a high level, no doubt triggering extended crisis management and jaw-boning, perhaps conducive to a state reconsidering its position (30). Second, as far as the other Member States are concerned, they find themselves negotiating together within the institutional framework and familiar procedures of the EU. Such an arrangement is likely to help *normalize*, tone-down and manage a situation that has the potential to spiral into a major constitutional crisis. From the perspective of the EU the authorization and proceduralization of a state's withdrawal ensures sustained engagement among all parties and normalizes such an event (the withdrawing state is just exercising its right under the CT and we've got a procedure for dealing with this...). Withdrawal threats of a Member State no longer raise the specter of high politics and the talk of emergency threatening the framework of the CT. This may help to contain the danger of spillover and prevent the authority and legitimacy of the whole edifice from being undermined.

Finally, a further significance of this provision lies in its exploitability for assuring acceptance among national citizens in the ratification process. Governments, many of which are facing a skeptical audience, can claim that ultimate sovereignty continues to lie with the nation state. The CT has many features of a constitution and does explicitly establish that EU law is the

(29) These are laid out in Art. III-325.

(30) For the significance of institutional structures that perpetuate «jaw-boning» as a means of shaping state behavior see CHAYES & CHAYES: *The New Sovereignty* (1995).

supreme law of the land. That is likely to provoke serious resistance in the name of sovereignty. Governments can now point to the CT and explain that it provides an exit option that can be used should it become necessary and it is in the national interest to do so. Signing on to the CT is not an irreversible act. It is not comparable to joining a federal state. There will be no civil war, should a nation wish to re-establish its independence. Assuming that it is understood that states have such a residual right anyway, the clause is a placebo for a Eurosceptic populace attuned to the language of sovereignty. But this placebo comes with a dialectical twist. By allowing national actors to point to the CT as the source of a right to withdrawal, it strengthens the CT's claim to authority: States don't just have such a right in virtue of being a nation organized as a sovereign state. *The CT establishes* that they have such a right. The CT brings to public expression that even moments of deep national recalcitrance, resistance and conflict are moments where the connection to Europe and the comprehensive framework of authority established by the CT remains intact.

The CT, then, establishes EU Law as the supreme law of the land without relying on a European «We the People» as a constituent power. Under these circumstances, a claim to ultimate authority is only tenable, if the CT also serves as a guardian of Member States sovereign rights and by and large leaves the exercise of these rights in the discretion of Member States. In the process, however, these residual sovereign rights are Europeanized. Their ultimate legal base has become the CT that establishes the right and lays down the procedures for exercising it. There is no residual sovereign space in which national actors are exclusively national actors. Even in the domain of residual sovereignty, national actors act on authorization of the EU and they remain embedded in European institutional practices. *The CT seeks to organize a highly interdependent and pluralist institutional structure within a jurisprudentially monist framework of legal authority.* This, in a nutshell, is the CT's conception of supranational authority.

IV. THE LEGITIMACY OF THE CONSTITUTIONAL TREATY AND LINKAGES TO NATIONAL CONSTITUTIONAL LEGITIMACY: NEGATIVE INFERENCE, CO-OPTION AND BORROWING

But is the authority the CT establishes legitimate authority? A very conventional understanding of democratic legitimacy in a constitutional democracy suggests that a constitution is legitimate in virtue of it having been endorsed by «We the People». The CT, on the other hand is to be ratified by

Member States according to their respective national constitutional requirements. The ongoing political process under a constitution is generally believed to be legitimate first, because it takes place under a duly adopted constitutional framework and second, because of electoral politics and the role of directly representative institutions at the heart of the political process established by the constitution. In Europe, on the other hand, no European agenda-setter is directly and meaningfully accountable to a European electorate. Furthermore, given the significant legislative powers of the EU, that allow for legislation to be enacted without requiring the consent of each state to be bound, the legitimacy of EU Law can not convincingly be linked to state consent. Clearly, the practices of the European Union can be justified neither in terms of the conventional constitutional model or the international law model. There are libraries filled about the question how legitimacy and democracy can appropriately be conceived within the supranational polity of the European Union. Here the much more narrow question is what, in the self-presentation of the CT grounds the CT's claim to legitimacy.

The complex account of legitimacy to be found in the CT finds its condensed expression in title six, addressing the «Democratic Life in the Union». The heading arouses suspicion. Does the invocation of «democratic life» in the European Union serve as a detractor for the lack of European democratic *institutions*? Or does it merely signal that a deeper more integrative account of democratic legitimacy, that includes European democratic institutions, will be provided? The account provided has three main prongs, focusing on outcomes (the principle of democratic equality), the political process (representative democracy) and competences (decisions to be made as close to the citizen as possible, in order to enhance participation) respectively. Correspondingly this section will give an account of the CT's basic rules on competences (1.), the structure of its political process (2.) and its substantive commitments, and its human rights provisions specifically (3.). The main purpose of this analysis is to illustrate how the CT's claim to legitimacy is closely linked to national legitimacy. This link to national legitimacy is established by the techniques of *negative implication* with regard to the EU's competences, the *co-option* of national institution to enhance the legitimacy of European legislation and *borrowing* of national human rights standards to assure legitimate outcomes. National institutional actors, standards and practices are at the heart of the EU's claim to legitimacy. *The legitimacy of the supranational community is defined not on independent terms, but by persistent reference to national practices. Yet this reference to national practices serves to ultimately define a distinct supranational standard of legitimacy.*

1. *Competences: Constitutionalizing Subsidiarity*

Art. I-46 establishes that decisions shall be taken as closely to the citizen as possible. This formula connects questions of democratic participation with the jurisdictional or competence related idea of subsidiarity. The basic idea is this: If there are no good reasons for a political issue to be shifted up to the European level, there is a good reason to leave it to be decided by Member States. Something is lost, democracy-wise, when jurisdiction is shifted upwards. The significance of the vote goes down as the number of the electorate goes up. Organizing a demonstration in your municipality is comparatively less costly time and energy-wise than it would be organizing a demonstration in Brussels. Getting access to your local representative is likely to be easier than getting access to a European representative. Getting your letter published in a paper of local circulation is likely to be easier than getting it published if it has wider circulation. These differences between levels of government are magnified in the European Union by the comparative underdevelopment of a European civil society, a European public sphere and a European identity. A central theme of the Constitutional Convention was therefore to enhance the legitimacy of the EU by establishing a European polity, which reflected a serious commitment to the principle of subsidiarity and more effectively established jurisdictional limits to European legislation (31).

The CT institutionalizes this commitment to subsidiarity not just by specifically enumerating competencies, distinguishing between different categories of competencies (32) and different legal acts (33) of the Union. It also establishes that the *exercise* of the Union's competences is governed by the principles of subsidiarity and proportionality. Except for the very limited domain in which the CT preempts Member States' action by establishing exclusive competences for the European Union, *any exercise of competences must meet the requirements of subsidiarity and proportionality*. Even when

(31) In the words of the Laeken Declaration: «Citizens often hold expectations of the European Union that are not always fulfilled. And vice-versa-they sometimes have the impression that the Union takes on too much in areas where its involvement is not always essential. Thus the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union».

(32) Art. I-12 CT.

(33) Art. I-33 CT. A European law that is binding in its entirety effect MS autonomy more than a European framework law. A European framework law as a law binding as to the results achieved but leaving to the MS the choice of form or method is more intrusive than non-binding recommendations and opinions in particular affect the autonomy of MS.

EU action falls under a jurisdictional heading in the CT, it is not enough that EU policies further some generally desirable policy. The EU can act only if it can show that «the objectives of the proposed action cannot be sufficiently achieved by MS ... but rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level» (34). In other words the EU must show that it is acting to solve a specific collective action problem – a problem relating to externalities, race to the bottom concerns etc.... This is the core meaning of the commitment to subsidiarity. The proportionality requirement additionally establishes that even when the EU acts to address such a problem, the EU's action must be the least intrusive to MS autonomy of all equally effective means to address the collective action problem, and it must not be disproportionately intrusive when compared to the benefits it brings.

This way of thinking about constitutionalizing the allocation of decision-making authority between two levels of governance is radical. Instead of a conventional jurisdictional approach that consists of a one-step analysis, there are two steps. The question is not merely: Does an action fall under the jurisdictional heading that confers competences to the European level. That is just the first part of a richer inquiry. An affirmative answer to that inquiry does not resolve the issue whether the EU acted within its competences. Even when the EU is clearly acting under one of its competences, *whether and the extent to which it may be exercised is subject to the subsidiarity and proportionality test*. This test requires a highly contextual analysis of the effects of such action and the reasons that justify the use of EU Law rather than Member States action to address the issue.

The connection between the subsidiarity and proportionality test and the EU's legitimacy can now be specified: *The subsidiarity test links the exercise of EU competences to the existence of inherent structural problems with procedures on the level of Member States*. Only if and to the extent the exercise of MS jurisdiction is likely to be *tainted* by such a problem, may the EU exercise its competences. The legitimacy of EU legislative action is thus linked to *structural defects* of any MS action that EU Law may preempt. In this sense, the legitimacy of the exercise of the EU's competences is tied to the existence of defects of MS actions. *It is the potentially tainted nature of Member States action that prima facie legitimates the EU's action*. The

(34) The language in the CT and the Protocol on the application of subsidiarity and proportionality is convoluted and obfuscating rather than illuminating. Restating the current law Art I-11 CT states: «Under the principle of subsidiarity ... the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by MS ... but rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level.

legitimacy of the EU's action in these circumstances derives in part from its *comparative advantage* over a national process, which is tainted due to the existence of collective action problems. Call this *legitimacy by negative implication*.

In endorsing this basic understanding of competences, the CT provides nothing that is new. There are numerous changes with regard to specific provisions, and the CT distinguishes more clearly between different kind of competencies and different forms of EU action. But with regard to basic principles, the CT mostly restates the current law. But there is a problem with the current law that the CT suggests an innovative solution to: Under the current arrangement there is a wide spread skepticism about the extent to which the EU's political institutions take the commitment to subsidiarity and proportionality seriously. The perception is that the EU does what it can get the relevant majorities for, with no-one taking a keen interest in subsidiarity/proportionality concerns as a distinct set of considerations. There is no political culture focused on subsidiarity concerns in Europe. Furthermore, there is a widespread belief that the assessment of the relevant normative and empirical questions that the application of the subsidiarity and proportionality test requires is best left to political actors. The ECJ as a judicial guardian of the EU's constitutional order is believed to be institutionally ill-equipped to play a significant role in policing the jurisdictional boundaries between the EU and MS. That should not be obvious. The proportionality structure, triggering a highly open-ended empirical and normative assessment of acts of public authorities is central to the Court's fundamental rights jurisprudence. The ECJ would not be engaging in a qualitatively different inquiry when assessing subsidiarity and proportionality concerns. Furthermore the ECJ could require the Commission, Parliament and Council to provide a more substantial record that reflects their engagement with subsidiarity/proportionality concerns. It could then assess whether that record plausibly validates the conclusion that a piece of EU legislation fulfills subsidiarity/proportionality requirements. There were some early signs that the ECJ would go that way (35). Yet, on the whole, the ECJ's jurisprudence does not reflect serious engagements with these requirements and subsidiarity is addressed by the Court only in a cavalier fashion (36). Given the traditional

(35) The ECJ has held that failure to give adequate subsidiarity related reasons may constitute a violation of an essential procedural requirement, but then interpreted that requirement so laxly as to render it a weak tool for the enforcement of jurisdictional constraints.

(36) In ECJ Case C-376/98 (Tobacco Advertising) ECJ Case C-84/94 (Working Time) the court invalidates or partially invalidates EU directives. But one striking feature of these decisions

role of the ECJ as the «motor» of European integration that may not be surprising.

It is at this point that a CT innovation comes into play. The CT establishes that *national Parliaments* «shall ensure compliance with that principle» (37). The CT incorporates a Protocol (38) that lays out a special procedure to enable national Parliaments to play that role. The Protocol establishes that the Commission should forward all documents of legislative planning and all legislative proposals to national parliaments at the same time as it forwards them to the European Parliament and the Council. All European legislative acts have to be justified with regard to the principles of subsidiarity and proportionality. Art. 4 of the Protocol on the application of these principles establishes qualitative standards that these justifications must meet: They have to «contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality». It should «contain some assessment of the proposal's financial impact» (these costs are generally incurred by MS, not the European Union as the legislating institution). Furthermore «the reasons for concluding that a Union objective can be better achieved on the Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators».

A more fully informed Parliament serves two functions. First, it can more effectively control the executive branch of its government as it participates in legislation on the European level. Second, the Protocol establishes a specific role for Parliament to help police jurisdictional boundaries on the European level. If a national Parliament concludes that it holds a proposed legislative act to be incompatible with a commitment to subsidiarity, it can send a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission stating why it considers that the draft in question does not comply with the principles of subsidiarity. That reasoned opinion will «shall be taken into account». If at least one third of all national parliaments have sent such a reasoned opinion, the draft *must be reviewed* (39). The draft can then be maintained, amended or withdrawn and *reasons must be given* for this

is that the ECJ avoids subsidiarity and proportionality analysis along the lines suggested above and prefers to adopt a more categorical mode of analysis.

(37) Protocol on the Application of Subsidiarity and Proportionality.

(38) *Id.*

(39) See Art. 6 of the Protocol on the application of subsidiarity and proportionality. To be more precise, a third of all votes allotted to parliaments is necessary. Each national Parliament has two votes, leaving one for each Chamber in bicameral legislatures. Furthermore, the threshold is a quarter rather than a third in cases where the EU relies on Art. III-165 of the CT concerning the establishment of an area of freedom, security and justice.

decision. Given the substantial record created by the reasoned opinions that will have been formulated by a wide range of actors by the time litigation is likely to occur, the ECJ will more plausibly be in a position to play a role in assessing subsidiarity and proportionality concerns, if asked to do so in the context of annulment proceedings. Finally, MS are encouraged to provide for the possibility within their own national law for national parliaments or even chambers of parliament to initiate annulment actions before the ECJ—technically on behalf of the MS as laid down in Art. III-365 CT (40). Parliaments then, as independent actors of a disaggregated state, potentially acting against their respective executive branch, are drafted in the service to help police the jurisdictional boundaries of the EU. By making national parliaments participants in the European legislative process, national parliaments under the CT help legitimize EU legislation.

The rules concerning competences, then, connect the legitimacy of European practices to MS legitimacy in two distinct ways. First, the principle of subsidiarity links the jurisdiction of the EU to the existence of structural deficits of national solutions. Second, for the enforcement of these jurisdictional boundaries the EU co-opts and empowers national parliaments to get involved in the European legal process, thus helping to legitimate it.

2. *Representative Democracy: National and European Accountability*

Another prong of the CT's account of «the democratic life in the Union» focuses on «the principle of representative democracy» (41). «The functioning of the Union shall be founded on representative democracy» (42). This principle is embodied in European institutions in two ways. First, citizens are directly represented in the European Parliament (43). Second, Member States are represented in the European Council and Council of Ministers by their respective representatives of the executive branches, which are themselves

(40) The language of Art. 7 of the Protocol on the application of the principles of subsidiarity and proportionality reads: The ECJ has jurisdiction to hear actions on grounds of infringements of the principle of subsidiarity, brought in accordance with the rules laid down in Art. III-365 of the CT by MS, or notified by them in accordance with their legal order on behalf of their national parliament or chamber of it.

(41) Art. I-46 CT.

(42) I-46 Sect. 1 CT.

(43) Citizens are represented in a degressively proportional form with a minimum and maximum threshold, see Art. I-20 Sect. 2 CT.

democratically accountable either to their national parliaments or to their citizens. The EU insists on the importance of governments being democratically accountable as a matter of national constitutional law for good reasons. As the executive branch of national governments are co-opted as European institutions, *the constitutional features of Member States become an integral feature of what makes the European Union legitimate*. In this sense the European Union draws on the «legitimacy capital» of national governments. Under these circumstances it makes sense that the CT has strengthened the provisions allowing for the suspension of rights, including voting rights, if a Member State is in serious and persistent violation of the EU's basic commitments to human rights, democracy and the rule of law. If the legitimacy of MS constitutional regimes is a prerequisite for the legitimacy of European legislation, then some degree of European constitutional oversight of domestic constitutional practices is a plausible consequence.

Furthermore the role of national governments in the European legislative process is more significant than the CT's «two pillar» model of representative democracy suggests. It is misleading to think of the European Parliament on an equal footing with the organized executive branches of national governments in the European Council and the Council of Ministers. Under the CT the collective executive branches of Member States under the CT have more firmly entrenched their dominant role. Of course, both the European Parliament and the Council of Ministers are important players in the legislative process. But the collectivity of national executive branches in the European Council and the Council of Ministers will be the agenda-setters. Parliament has been and will continue to be at best a junior-partner in this enterprise.

There are three reasons for this asymmetry of power between the Parliament and the collective national executives. *First*, the European Council, consisting of the Heads of State and generally operating under a unanimity requirement, has the task to «provide the impetus for the general political direction and priorities» for the Union. Compared to the current practice of quarterly Intergovernmental Conferences (hereinafter: IGC's) the role of the European Council is strengthened by the newly introduced European Council President. The European Council by a qualified majority elects the President for two and a half years, renewable for one term (44). The European Council President gives the Council more of an institutional structure, continuity and symbolic presence. The European Council does not

(44) Art. 1-22 CT.

legislate itself. But the Council of Ministers does. The voting rules in the Council of Ministers, operating under the guidelines drawn up by the European Council, provide the *second* reason for the dominance of the national executive branches. The Council of Minister decides by qualified majority, defined by 55% of the members representing at least 65% of the population (45). It is typically considerably more difficult to get the necessary majority in the Council of Ministers, acting under general guidelines of the European Council, than it is to get a necessary simple majority in the European Parliament. *Third*, the Council has the central role to play in determining the make-up of the Commission. With the monopoly to propose legislation generally (46) left in tact, the Commission remains a central player in the legislative process, by being able to set the agenda and determine the baseline for political bargaining. But the text of the CT is misleading when it states that «Parliament shall elect the Commission President», to the extent it suggests that Parliament chooses freely. The Parliament, by a simple majority has the task to *confirm* the candidate agreed upon by the European Council. The European Council in choosing the President is merely required to «take into account the elections to European Parliament» (47). If the Council's candidate is rejected by Parliament, the European Council will suggest another candidate who «shall be elected» by the Parliament. The Council then selects the individual Commissioners together with the President. The Commission as a whole is then subjected to a vote of consent by parliament (48). During the Commission's five year term parliament may vote to censure the Commission who will then resign (49). The Parliament's role in all of this, then, is secondary to the role of the Council. Parliament does not take any initiatives, it reacts. It is the junior partner of the collective executive branches of Member States. Its role more closely resembles the role of the editor, not the author of European laws.

The rules concerning the appointment of the Commission allow for some space of maneuver for the Parliament to flex its muscle, as recent events have illustrated. It is not entirely unimaginable that over time Parliament would simply reject any President of the Commission that it has not agreed upon in advance, rather than leaving that choice to Member States. The same can be imagined for determining the Commissioners: Parliament could refuse

(45) Art. I-25 CT.

(46) In a few areas the CT has undercut that monopoly.

(47) Art. I-27 CT.

(48) Art. I-27.

(49) See Art. I-26 Sect.8.

consent if the Commissioners are not in line with parliamentary preferences. Rather than react to specific deficiencies of candidates, as Parliament has done in the Buttiglioni affair, it could develop a more proactive role and simply send its own list to the Council as the basis for negotiations, with the threat not to consent to any Council proposal not sufficiently aligned to parliament's preferences. The rules concerning the appointment of the Commission, then, could ultimately allow Parliament to effectively exercise a much higher degree of political control over the Commission. But whether or not that is desirable or likely, it would stretch the provisions of the CT.

Seen as a whole, the rules of the CT clearly entrench Member States executive branch as the political agenda-setter in the European Union. And their legitimacy finds its basis in the national constitutional provisions ensuring accountability to national parliaments and citizens.

3. *Outcomes: Rights of the Market Citizen and Fundamental Rights*

Perhaps it is revealing that the first prong of the CTs account of the Union's «democratic life» is *outcome oriented*: The title on democracy begins by spelling out a «*principle of democratic equality*» (50). It establishes that «the Union shall observe the equality of all its citizens, who shall receive equal attention» from the EU. This provision is probably best understood as a somewhat cumbersome formulation of what Dworkin has called the duty of public institutions to treat its citizens with equal respect and concern (51). This is a foundational substantive principle that guides the exercise of public authority generally.

First it must be clarified what equal respect and concern does not mean. Equal respect and concern in the European Union does *not* translate into an equal right to vote in Europe. Even though every citizen in Europe has a right to vote for European Parliament (52), there is no requirement for each representative in the European Parliament to represent an equal number of European citizens. In that sense not every vote in Europe will have equal weight. Instead Art. I-20 establishes that «representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member shall be allocated more than ninety-six seats». To take the extreme case, this means that Europeans citizens that are Germans

(50) Art. I-45.

(51) R. DWORKIN: *Freedom's Laws* (1996).

(52) See Art. I-10 Sect. 2 b.

will be represented in the European Parliament by approximately one representative for every 850.000 citizens (53), while European citizens from Luxembourg will be represented by one representative for every 70.000 citizens (54). There is a comparative overrepresentation of Luxembourg citizens or underrepresentation of German citizens by the factor 12. The fact that a citizen is a member of one or another state, then, is significant for the weight attributed to his vote for European Parliament.

Furthermore equal respect and concern does *not* translate into or authorize the establishment of a European welfare state. The EU's competencies to engage in redistributive welfare politics are limited. On the one hand its power to tax as an instrument for redistributive politics is limited to narrowly circumscribed areas (55). And it remains for the Member States to determine the scope of health benefits, social security, pension benefits etc... Many of these concerns are addressed within the informal Open Method of Coordination (56). Art. III-210 provides a limited authorization to legislate on social security of workers, but it is telling that in key areas the unanimity requirement has not been given up (57). The commitment to welfare politics as a European legislative concern lives on in the policies of the European Union in the *residual form of consumer protection* (58) and in the *protection of workers for so long as they work* (59). The EU provides protection of its citizens in their role as producers and consumers. This points to the heart of the EU's agenda.

a) *Rights as Empowerment: The Rights of the Market citizen*

At the heart of the Union's policies and achievements lies the establishment of an internal market. The EU's commitment to equal respect

(53) Germany has 82 Mio. Citizens and will be represented by the maximum number of 96 representatives.

(54) Luxembourg has 420.000 Citizens and will be represented by the minimum number of 6 representatives.

(55) For a discussion of Europe's power to tax see A. MENENDES: «Taxing Europe: Two Cases for a European Power to Tax», 10 *Columbia Journal of European law*, 297-338 (2004).

(56) See G. DE BURCA: *The Open Method of Coordination* (on file with author).

(57) See Art. III-210 Sect. 3.

(58) This includes in particular workers health and safety as well as working conditions. In these areas European legislation can be enacted following the usual qualified majority co-decision-procedure. See Art. III-210 Sect. 2b and Sect. 3.

(59) See Art. III-235 ECT.

and concern finds its most concrete expression in the task of the creation and management of a free and undistorted internal market, to which all citizens have unfettered access as producers and consumers. The rights of European citizens are first and foremost the rights of market participants. The Union's is committed to treat European citizens with equal respect and concern as market participants. The internal market «shall comprise an area without internal frontiers in which the free movement of persons, services, goods, and capital is ensured in accordance with the Constitution» (60). The first and practically most important of the rights listed under the citizenship provisions of Art. I-10 is «the right to move and reside freely within the territory of the Member States», a right central to the idea of a mobile market citizen. Within the scope of the CT public authorities in Member States may not discriminate between nationals and non-national European citizens. At European airports any EU citizen can make use of the generally faster lines at immigration check points traditionally reserved for nationals. Furthermore the mobile citizen producer /consumer, traveling with his European passport pays everywhere within the Euro-zone using one currency. Fittingly, among the symbols of the Union listed in Art. I-8 is the *Euro* as the Union's currency, right beside Beethoven's «Ode to Joy» as Europe's anthem and the European flag. Furthermore a great many of the other competences of the European Union, from the economic and monetary policy to the establishment of trans-European networks are in effect market building policies. Beyond guaranteeing peace, then, the creation of a genuine internal market and the guarantee of rights for citizens as market participants is the core substantive accomplishment of the European Union from the perspective of European citizens. Freedoms of citizens as market participants in Europe can only effectively be guaranteed by the EU as an institution and EU Law as an instrument. At the heart of the EU's claim to legitimacy, both under the CT and the current Treaties, are the rights and benefits connected to the establishment of an internal market.

b) *Rights as Constraints: The Charter of Fundamental Rights*

But what about fundamental rights? Isn't the inclusion in the CT of the Charter of Fundamental Rights a major factor in legitimizing the EU as an institution? Here it is important to distinguish between two ways in which the Charter could enhance the EU's legitimacy. On the one hand European

(60) Art. III-130.

fundamental rights could provide a common minimum standard that all actions by public authorities in Europe would be held to. European citizens everywhere in Europe could invoke European fundamental rights against actions taken even by Member States. The EU would be the ultimate constitutional repository of core European constitutional commitments. This is *not* how the Charter generally operates. With regard to human rights the Charter bears some resemblance to the US Constitution before the Civil War, providing guarantees primarily against actions by the federal government, but not state governments. Of course the EU establishes a principle of non-discrimination on grounds of nationality that binds Member States' actions that fall under the scope of EU Law. And in case of a clear risk of a serious breach of respect for human dignity, freedom, equality and democracy the EU may suspend certain Member States' rights under Art. I-59. But generally the Charter applies only to acts of the European Union. It applies to acts of Member States only, to the extent they are implementing EU Law (61) or there actions otherwise fall under the scope of EU Law (62).

This limitation ought not to be considered a defect. Citizens are generally adequately protected against acts of nation states by their national constitutions, as well as by the European Convention of Human Rights and whatever redress the domestic political, administrative and judicial process may provide. The costs of providing additional legal remedies by establishing avenues for further judicial redress involving the ECJ may well outweigh any potential benefits, as litigation takes longer and longer to come to a conclusion. Furthermore there is a danger that the institutional dynamics between national constitutional courts, the ECHR and the ECJ may provide incentives for the competing courts to further juridify political life in the European Union. Once it is understood that in Europe a very wide range of political questions and a wide range of plausible political positions can be translated into a plausible constitutional rights claim (63), one would have to be naïf to believe that a «race to the top» between courts is likely to further justice rather than juristocracy in Europe (64). So it may not be a bad thing

(61) Art. II-111 Sect. 1.

(62) ECJ C-260/89 (ERT) [1991] ECR I-2925, ECJ C-368/95 (Familiapress).

(63) See M. KUMM: «Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice», 2 *Journal of International Constitutional Law* 2004, pp. 574.

(64) Instead of excessive reliance on judicial remedies, a coherent human rights policy within existing competencies may be a more promising approach for the EU. For the details of such an approach see PH. ALLSTON and J. WEILER, «An “Ever Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights», in PH. ALLSTON (ed.): *The EU and Human Rights* (OUP 1999), pp. 3-66.

that the function of the Charter is functionally more *limited*: To guide and constrain the exercise of public authority on the level of the European Union and provide for the protection of European citizens against acts and decisions made by the European Union. It legitimates the European Union primarily in that it provides a normative standard that guides and constrains European Union actions.

So the *function* of the fundamental rights catalogue is to guide and constrain primarily EU actors. But what can be said about the *content* of fundamental rights in Europe? Here the purpose is not to provide a general overview of the provisions, but to focus on some distinctive structural features of European fundamental rights adjudication. Structurally European fundamental rights openly authorize European courts to engage in reasoned policy-assessment, while at the same time requiring them to connect their reasoning to the practice of both the ECHR and Member States constitutional traditions. The following will focus on the connection between human rights as they are conceived on the European level and standards derived from domestic constitutional practices.

Art. I-9 CT cites two different sources of fundamental rights in the EU. The first states the standard traditional formula first used by the ECJ and later incorporated in the Treaties and still good law today. Fundamental rights are *general principles of EU Law* and are derived from the rights guaranteed by the ECHR and *as they result from the constitutional traditions common to the Member States*. Here the core idea is the idea of a constitutional tradition common to Member States. The ECHR, which the ECJ in practice has tended to use as a starting point for its inquiries, is in many respects a focal point of that common tradition. *But the ECJ tends to focus its analysis in particular cases on the constitutional concerns that arise in the jurisdiction that it receives the reference from*. In effect it interprets that national provision in light of a common constitutional tradition as it is reflected in the ECHR in particular (65).

This basic and strong connection between the ECJ's rights jurisprudence and national constitutional practice is not severed by the Charter of Fundamental rights. The Charter of Fundamental rights claims not to change the law in the European Union. The task of the Convention drawing up the Charter and the purpose of the Charter according to its Preamble is to «make more visible» the fundamental rights already guaranteed in the form of general

(65) The paradigm case illustrating this practice remains ECJ C-44/79 (Hauer) [1979] ECR 3727.

principles of European law. The basic idea was to translate, among other things, the basic principles of equality, and non-trivial liberty interests that the ECJ already claimed to be protecting, into a list of more specific protected interests. Such a list would highlight, create more awareness for and make more visible the particularly significant and vulnerable interests, many of which are linked to technological development. *The bottom line is that under the Charter practically any non-trivial interest enjoys prima facie protection as a constitutional right in Europe.* That is its first distinctive feature.

Since practically any piece of legislation infringes someone's liberty interests and makes distinctions between persons (giving rise to equality concerns) and such infringements and comparative disadvantages constitute a *prima facie* violation of a Charter right, you can't have much in virtue of having a right. Not surprising an infringement of an interest protected as a right generally merely triggers a reasoned assessment whether the *infringement is justified*. The infringement is justified if it conforms to requirements laid down in a formal and a substantive test. The formal test requires that the EU Law limiting a right is enacted and applied according to proper procedure (66). If the proper procedure was followed, the substantive test assessing whether the infringement is justified consists of a *proportionality test* (67). The proportionality test requires a measure to further a legitimate policy, be the least intrusive of all equally effective measures and not impose burdens that are disproportionate to the benefits it provides. This test provides little more than a structure that establishes the individually necessary and collectively sufficient conditions under which the reasons that public authorities have for infringing a protected interests qualify as good reasons, all things considered (68). *Within such a framework rights merely provide a structure for assessing the reasons that can be invoked to justify infringements of protected interests.* Practically any liberty interest is protected as a right, but an infringement of a right merely triggers proportionality analysis. Right reasoning structurally resembles rational policy assessment in cases where sufficiently significant individual interests are in play. European courts in turn are cast as *guardians of political*

(66) Art. II-112.

(67) Art. II-112 Sect. 1 2nd sentence states «Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others».

(68) For the claim that there is an analytical connection between the concept of a constitutional rights and the principle of proportionality see R. ALEXY: *A Theory of Constitutional Rights* (OUP 2002).

rationality or at least of reasonableness. Their task is to ascertain whether there are good reasons, under the circumstances, that justify an individual being burdened in a non-trivial way.

The highly open-ended policy inquiry required by proportionality analysis is constrained in part by the Court exercising deference vis-avis the political branches. This discretion is exercised in a highly contextual way on a case-by-case basis. The Court does not generally provide a structure for the discretion it accords using «levels of scrutiny» that characterizes much of U.S. rights jurisprudence.

But beyond this general deference the ECJ is now required to be guided in its proportionality analysis by both the ECHR and national constitutional traditions: *If the respected interest reflects rights that correspond to those guaranteed by the ECHR or constitutional traditions common to Member States, rights shall be interpreted in harmony with those traditions* (69).

Both with regard to the sources of rights and with regard to their interpretation, the common practice of Member States remains an authoritative standard for the ECJ adjudicating fundamental rights. European rights jurisprudence remains, to an important extent, the interpretation of rights as they reflect a common understanding of Member States.

4. *Conclusions: Supranational Legitimacy under the CT*

The legitimacy of EU Law under the CT is connected to the legitimacy of MS institutions and practices in three distinct ways. The *first* focuses on *jurisdiction* and was referred to as *legitimacy by negative implication*. The principle of subsidiarity assures that the EU acts only in circumstances where potentially preempted *MS actions are tainted by collective actions problems*. In that sense, the *prima facie* claim in favor of the legitimacy of the EU's action lies in it addressing concerns that MS are *structurally incapable* of addressing legitimately or effectively. The second is *procedural* and involves the *co-option* of national institutions. National executive branches are the political agenda-setters in the European legislative process. These are legitimated either by being directly elected by the citizenry or, more likely, subjected to national parliamentary control. The CT enhances this control by providing the parliament with all the relevant documents, assuring that there is no information asymmetry. Furthermore national parliaments are also

(69) See Art. II-112 Sect. 3 and 4 respectively.

drafted into service to help police the jurisdictional boundaries of the EU. The *third* way the legitimacy of EU Law is connected to the legitimacy of MS practices is *substantive*. To some extent EU Law *borrow*s national human rights standards as standards used to assess EU actions. The substantive limits of the EU's actions, defined by European human rights, draw from and are applied in light of national constitutional practices. By way of negative implication, co-option and borrowing the EU's legitimacy is, to a significant extent, constructed with reference to the legitimacy of national institutions and practices. Conversely the legitimacy of national domestic practices are enhanced, as European institutions provide safeguards against Member States following policies that unduly burden their neighbours.

But the CT's conception of legitimacy remains distinctively *supranational*, notwithstanding these references to national institutions and practices. Reference to national legitimacy should not be confused with the replication of a national paradigm of legitimacy on the European level. First, the jurisdictional argument from subsidiarity and its negative implication for national legitimacy *undermines* the conventional national paradigms of legitimacy («We the People» as a collective subject governing itself within a national constitutional framework). In this sense the claim to supranational legitimacy involves a criticism and qualification of conventional national accounts of legitimacy (70). Second, when national institutions are co-opted to play a role in the European legislative process they tend to change their character. They become distinctively European institutional actors, subject to distinctly European institutional dynamics. In this sense national institutions are just as much Europeanized as European practices are nationalized. Third, borrowing in the domain of human rights protection, too, does not simply involve reference to a specific national standard. It involves the construction of a *European* standard in light of *shared* national commitments. Only fundamental rights as they result from the constitutional traditions *common* to the MS are binding EU Law. This involves complex exercises of construction by the ECJ, as it interprets that common tradition to establish what European principles, properly understood, protect. Constructing European legitimacy by negative implication, co-option and borrowing gives rise to a distinctly European practice that is supported by a distinctly supranational conception of

(70) This is a point Miguel Maduro has rightly emphasized, see M. MADURO: Where to Look for Legitimacy?», in: ERIKSEN/FOSSUM/MENENDEZ (eds.): *Constitution Making and Democratic Legitimacy*, Arena Report No. 5 2002, pp. 81-110. See also M. MADURO: «Europe and the Constitution: What if this is as good as it gets?», in WEILER/WIND: *European Constitutionalism Beyond the State* (2003), pp. 74-102.

legitimacy. These linkages to national constitutional legitimacy, then, are at the core of the CT's conception of supranational legitimacy.

V. THE CAPTURE OF EUROPE BY ITS MEMBER STATES AND THE LOST
EUROPEAN CITIZEN: EUROPEAN IDENTITY BETWEEN «BREAD AND CIRCUS»
AND RECALCITRANT NATIONALISM

The picture of a European identity as it has emerged in the discussion of the CT's Preamble and its conception of authority and legitimacy, then, is the following. On its most abstract level the identity of citizens, as imagined by the CT, is a commitment to the enlightenment ideas of human dignity and autonomy giving rise to human rights, democracy and the rule of law. More concretely European citizens are invited to identify with a particular idea of a transnational liberal civilization, in which the European supranational polity has the task to address the issues that Member States are structurally unable to address fairly or effectively themselves. Besides questions concerning peace and security the establishment of a common market and securing the rights of producers and consumers in such a market takes center stage. On all levels the European and the national are inextricably linked and both cooperatively instantiate and serve the same ideals. The establishment of European comprehensive authority is linked to a European authorization of Member States to protect their residual sovereign rights, while the exercise of those rights is procedurally circumscribed by European Union Law. The legitimacy of European practices, through the mechanisms of negative inference, co-option and borrowing, is inextricably linked to the legitimacy of national institutions and practices. Conversely the legitimacy of national practices is enhanced, by the provision of European safeguards that preclude Member States from imposing undue burdens on their neighbors. To be a European citizen means to be a citizen also of a Member State. And being a citizen of a Member State means being a European citizen. More importantly, however, to be a European citizen means interpreting *both* European and national citizenship as informed and suffused by a commitment to human rights, democracy and the rule of law, the implications of which are worked out in mutually engaging, referential and deferential legal and political practices.

When there is a conflict about the authority or the legitimacy of EU Law the question is not: Is this compatible with national self-government or state sovereignty? Nor is it adequate to ask whether one or another resolution of the conflict is more useful to help bring about a strong federal Europe. The foundational values of Europe are *neither* the idea of a European nation *nor*

the idea of national communities organized as states. It is the idea of institutionalizing political and legal life to help citizens flourish in the variety of communities they are part of (local, regional, national and transnational) within a framework defined by human rights, democracy and the rule of law. In contemporary Europe Member States and the European Union provide the concrete institutional embodiment of this idea. The key point of constitutional patriotism as a supranational identity, then, is that it focuses not so much on the relationship between Member States and the European Union, but *emphasizes their common purpose and the mutual engagement to achieve that purpose*. Both European and national institutions serve to more perfectly realize a political and legal order in Europe in which the political and legal conditions for human dignity and human flourishing are assured by institutionalizing the best understanding of rights, democracy and the rule of law that emerges as a result of contestation, deliberation and negotiations between Member States and European citizens. The characteristic aspiration of supranational constitutional patriotism in Europe, then, is the replacement of any kind of nationalism with constitutional principles as the fundamental ethos that animates legal and political practice in Europe.

So much for the reconstructive interpretation of the CT and the identity it invites European citizens to adopt. But is the CT likely to contribute to the development of a European identity that embraces the commitments reflected in its Preamble and its conception of authority and legitimacy? Do European citizens have good reasons to embrace it? The first is an empirical, the second a normative question. In an ideal world, where citizens *actually* embrace what, on reflection, they have *good reasons* to embrace, the answer to these questions would necessarily be identical. But it would by no means be clear what that answer would be. This is not the place to address the whole range of reasons that support or undermine the CT or even the general conception of the EU that it reflects. Here it must suffice to point to one serious concern about current European practice that the CT does nothing to remedy and that is likely to preclude the development of anything like the kind of identity the CT purports to embrace.

1. *Democratic Life in the European Union and its Discontents*

To approach this concern, it may be helpful to start with three snapshots focusing on three distinct aspects of European constitutionalism. Then I will put forward some conjectures about what connects them.

The first concerns the recent European Parliamentary elections. In the Parliamentary elections in June the voter turnout was 45,7%, the lowest it has ever been (71). These bad results would not look considerably better, even if one were to discount for the particularly low participation rate of citizens of the new Member States (72). Since the introduction of European Parliamentary election in 1979 voter turnout has been consistently falling in every election from 65.9% in 1979 to the previous low of 53% in 1999. Even in the nine countries that participated in the first direct elections to the European Parliament turnout in 2004 was on average 9 percentage points lower than in 1979. Turnout for European elections was on average 25% below voter turnout in domestic elections (73). Besides the low turnout the one striking feature of these elections has been the success of a diverse group of anti-European movements and parties, now well represented in the European Parliament. Polls reveal that European citizens are not aware who won the elections or even what it would mean to win an election on the European level. Presumably they'd be at a loss to say why it is important for them to know who won the elections. And it would not be easy to convince them that their time is well spent worrying about that. The elections provided a vivid illustration of just how peripheral European electoral politics are and they undermine simple progress narratives suggesting that things are improving.

The second snapshot concerns the Preamble of the CT. In remarkable candor the structure of the Preamble expresses a feature of European constitutionalism that the rest of the CT wants to gloss over. The preamble begins with «His Majesty the King of the Belgians her Majesty the Queen of Denmark, the President of the Federal Republic of Germany» etc. and it ends with «have designated as their plenipotentiaries». What I have failed to highlight in the discussion of the Preamble is that it is the 17 Presidents, six Majesties and Royal Highnesses, one government and one Parliament that «draw inspiration from», «believe», and are «convinced» of all the things the Preamble refers to. The invitation to identify with the particular conception of

(71) See http://www.elections2004.eu.int/ep-election/sites/en/results1306/turnout_ep/index.html.

(72) In the new Member States Slovakia and Poland, for example, voter turnout was below 20%. Less than one third bothered to vote in the Czech republic, Estonia and Slovenia. On the other hand voter turnout in Malta was above 80%. In Belgium and Luxemburg it was over 90%. *Id.*

(73) For a helpful analysis of the elections see R. ROSE: *Europe Expands, Turnout falls: The Significance of the 2004 European Parliament Election*, at <http://www.idea.int/elections>.

constitutional patriotism that the substance of the Preamble reflects is issued by the Heads of States and Governments (and in the case of Hungary, the national Parliament). The Heads of States and Governments appear unconcealed as the alpha and omega of European constitutionalism.

The third snapshot concerns the ratification debates. These have only just begun and to some extent the dynamic of the ratification process are unpredictable. Furthermore the themes and intensity of debates are likely to vary across jurisdictions. Europe means a great many things in different nations. But here is an educated guess about some themes that are likely to play a central role across jurisdictions. On one level the debates will be extremely abstract. First, National sovereignty will be invoked as a reflex against the very idea of a European constitution. As a defense governments will say that golf clubs, too, have constitutions, that the constitution does not really change much and that sovereignty of States will be as or even more effectively respected and protected under the CT than under the current Treaties. Second, European institutions will be lambasted as undemocratic – a bureaucratic machine run by those «out there» in Brussels. Here the response will be to point to the subsidiarity, the role of national parliaments and the role of national executives in the EU's legislative process, perhaps with a timid nod to the role of the European Parliament. On a second level the debates will be more specific and focused on the preoccupations each specific jurisdiction: Did the British government effectively protect the red lines it drew? Did the Polish government effectively secure the influence Poland deserves? On a third level the debates will be about the costs and benefits of participating in Europe in the first place. What is lost, what is gained in each jurisdiction? Here a standard fallback for governments is that all in all the CT is better than the Treaties it seeks to replace. These themes are clearly not exhaustive of what debates will be about. But they are likely to be central to most of them.

What connects these three snapshots? On the one hand the comparative lack of interest in European elections and the nature of the ratification debates suggest the absence of a common identity in Europe that has anything at all to do with the conception of thick constitutional patriotism of the kind that the CT embraces. On the other hand they point to an explanation about why it is that things are the way they are and why they are not likely to change under the CT. The structure of the political process inhibits the development of a European identity. At this point the explanation is little more than a hypothesis. Its plausibility would have to be assessed in light of a richer account of the dynamics of European institutional practices and a deeper investigation into the social psychology of the development of collective identities than can be provided here. Its core point is this: The CT leaves in

tact European institutional arrangements that hinder rather than foster the development of meaningful electoral politics on the European level. Without meaningful electoral politics on the European level a European identity along the lines outlined here is unlikely to develop. Instead European responses to the European Union are likely to continue to oscillate between vague and fickle support, coupled with disinterest in European political life on the one hand, and shrill national recalcitrance on the other. There are two empirical claims here. The first is that the degree of participation in European electoral politics depends to a significant extent on questions of institutional design and the role of the European Parliament in particular. The second is that the existence or absence of robust European electoral politics is a significant factor for the development of a European identity focused on constitutional patriotism. Here it must suffice to provide rich descriptive account to bolster these claims.

a) *European Parliamentarianism and its Discontents*

What accounts for the fact that a European Parliament, that since its inception as a consultative assembly in the original Treaties of Rome has gained significant powers, remains as insignificant in the public eye as it does? What accounts for the fact that, even as the Parliament's role is strengthened in the Single European Act, the Treaty of Amsterdam and Niece, voter turnout goes down? Many reasons have been put forward to explain the phenomenon. First, the Parliaments legitimacy may be in doubt given the way that seats are apportioned in Parliament. Yet it would be surprising if many European citizens even knew how seats are apportioned (74). Second, citizens disinterest in European parliamentary elections is not an expression of a general hostility towards the very idea of a European Parliament. On the contrary, a large majority approves of a European executive responsible to a European Parliament (75). Third, European legislative decision, it has been suggested, are of low public salience (76) and tend to be of a pareto-

(74) For a discussion of this issue see M. MADURO: «Where to Look for Legitimacy?», in: ERIKSEN/FOSSUM/MENÉNDEZ (eds.): *Constitution Making and Democratic Legitimacy*, Arena Report No. 5 2002, pp. 81-110.

(75) A standard Eurobarometer survey consistently shows that a great majority of European would prefer a Parliament with a strong supervisory function over a European government.

(76) A. MORAVCSIK: «In Defense of the “Democratic Deficit”: Reassessing Legitimacy in the European Union», 40 *Journal of Common Market Studies*, pp. 603-624 (2002).

optimizing coordinative nature (77). But as the BSE crisis in the late nineties and the responses following September 11 have illustrated, citizens are well aware that the EU does and should play a role of the EU in the allocation and management of risks in areas of high political salience. Furthermore the rules that are generated by the EU effect domestic priorities and require significant domestic allocation of resources. The Euro-sceptics in particular do not doubt that Europe matters. They just don't think it should. Furthermore the lack of interest in European Parliamentary elections is probably not just caused by the absence of a common European language or the existence of an appropriately structured public sphere that allows citizens to understand what goes on in Parliament, though clearly these factors are relevant (78). Even in a world where everyone spoke all European languages and was bombarded by coverage of European affairs, citizens would have scant reasons to focus on what goes on in the European Parliament. Why?

To put it bluntly: *The European Parliament is not a place where competing visions of Europe's future are translated into competing programs by competing parties in a way that is likely to significantly shape the outcomes of the European political process.* In part that has something to do with the internal structure of Parliament. The Party structure remains underdeveloped, even though changes are taking place. But more importantly the European Parliament, as it is conceived under the current Treaties and the CT is not the central agenda-setter in Europe. It is an editor and not the author of European laws. It has a veto over most acts of legislation, but it does not have the power to set and aggressively pursue a legislative agenda. Given the role of Member States in the European Council as agenda-setters and the Council of Ministers as the core venue of decision-making, as well as the relative independence of the Commission as the institution generally responsible for drafting and proposing legislation, the role of Parliament is not significant in a way that European citizens have a reason to care much about. As was explained above, this does not mean that Parliament is marginal or unimportant. *It merely means that if citizens are alienated by outcomes of the political process, they can't with a reasonable hope for a legislative remedy, vote for change or even express their dissent by voting for a clearly defined alternative set of programs*

(77) See SCHARPF: «Negative and Positive Integration in the Political Economy of European Welfare States», in: MARKS/SCHARPF/SCHMITTER/STREECK: *Governance in the European Union* (1996), pp. 15-39.

(78) See D. GRIMM: «Does Europe need a Constitution», 1 *European law Journal*, pp. 282-302 (1995); F. SCHARPF: «Democratic Policy in Europe», 2 *European law Journal*, pp. 136-155 (1996).

and persons. Yet that is the standard Parliaments are generally held to. That is how Parliaments, since the early 19th century have functioned, even when there are other domestic veto-players with the power to curtail the will of parliamentary majorities. And that is what citizens are made to believe Parliament functions, were they to read the CT: The European Parliament is mentioned as the first institution in the CT (79), before the European Council and the Council of Ministers, the CT emphasizes the importance of representative democracy and the role of the European Parliament as the first institution reflecting that principle (80), and the Treaty states that the Parliament elects the Commission President (81). All this reads as if the Parliament was the primary agenda-setter in the Union, *flanked* by strong Member States representation in the European Council and Council of Ministers, no doubt, but the primary agenda-setter non-the-less.

When Europeans originally voted for a Parliament, they may well believed to have voted for an institution that plays a comparable role to Parliaments in their respective domestic settings. But in Europe, such expectations will be disappointed. It has puzzled public choice theorists why a great number of citizens actually turn out to vote for elections, knowing that their vote is practically certain not to change anything. It should not be puzzling that citizens are considerably more apathetic about an institution that does not even function to create and bring to public representation alternative political programs embodied in competing personnel and is not linked to political power in a way that one or another side winning the elections makes a significant difference. Additionally, the frustrations with the European Parliament - and future frustrations under the CT may be linked to the discrepancy between the adoption of the language and traditional institutional forms of democracy as a matter of public rhetoric and constitutional presentation, and the reality of indirect rule more reminiscent of pre-revolutionary forms of governance. It is a contested question whether or not a European Parliament as a central European agenda setter is desirable, all

(79) Art. I-19 CT lists the European Parliament as the first element of the EU's institutional framework. Art. I-20 the provides details about the Parliament. Art. I-21 to 25 CT address the European Council, Council President and Council of Ministers and Art. I-26 CT addresses the Commission.

(80) Art. I-46 CT establishes that the functioning of the Union «shall be founded on representative democracy» and immediately goes on to state that «citizens are directly represented at Union level in the European Parliament», before going on to mention the European Council and Council of Ministers as institutions representing Member States accountable to national Parliaments or citizens.

(81) Art. I-20 Sect.1 states that the EP «shall elect the President of the Commission».

things considered. But the compromise of rhetorically appeasing those who think it should be and the reality of leaving Member States governments in the driving seat is likely to lead to resentment and suspicion from both sides.

b) *National Government Accountability and its Discontents*

But the problem is not just that citizens can't focus on Parliament as an institution to bring about legislative change and hold accountable a person or a party for their failed politics. There are no alternative actors in the European Union that citizens can hold accountable *as European citizens*. The President of the Commission and the Commission itself is generally determined by the European Council, even if Parliament then goes on to formally elect him and gives its consent to the Commission. The only hope of electoral accountability, then, seems to be the national governments. As the framing of the Preamble nicely illustrates, governments are in the driving seat. Of course the governments can't be held accountable as European actors by citizens acting collectively as European citizens. But can they not be held accountable nationally in national elections? Isn't that the very point of co-opting national institutions to serve as European actors: to ensure the legitimacy of the European process by linking it to national accountability mechanisms?

The answer is that national accountability mechanism, where they do not serve as a complement to other stronger accountability mechanisms, are likely to function badly. They are responsible for creating exactly the kind of combination of disinterest and national recalcitrance that characterizes European citizen's approach to political life in Europe. There are two reasons for this.

First, when governments are held accountable for their role in Europe, debates take place in the national context and address the actions of national governments. It is not surprising that when these actors are held accountable by national citizens the debates are structured primarily along the national/European divide. They produce exactly the kind of debates that they have in the past and that will unfold again in the ratification process. They will be about being pro or against Europe. The sovereigntists will battle the Europeanists. They will be about cost-benefit analysis along national lines: What do we, as a national community gain, what do we, as a national community lose? How much do we pay in, how much do we get back? There is a structural bias to these debates that tend to preclude the discussion of *what kind* of Europe is desirable for European citizens, a debate that emphasizes what it is that Europeans have in common and provide competing visions and

political programs that guide what Europe should become. When Senators in the U.S. are held accountable by their States for what they've done in Washington, these debates tend to exhibit a similar structure. The questions tend to focus on what was done *for the state*. In federal or quasi-federal systems there are good reasons for the existence of such accountability structures. But, unlike in the United States, where there are presidential elections that produce a debate of a very different kind, in Europe there are *no other* elections of significance to complement elections that have this structure. The peculiar and impoverished nature of debates on the future of Europe may not primarily be due to the fact that there is no strong independent European identity. There is no strong European identity because existing accountability structures perpetuate debates that have the effect of reinforcing the national/European divide and preclude the development of a European identity.

Second, given the governments interest in defending its record, when it is held accountable, it will have an incentive to make its own everything that is good that happened on its watch, while blaming on Europe and the need to compromise everything that goes badly. The problem of blame-shifting is not just a problem for the EU gaining acceptance among European citizens and does not just effect the legitimacy of the European Union. It also raises questions about effective domestic accountability. If governments can effectively blame the European Union for what in fact are the deficiencies of domestic policies, then the lack of transparency has the effect to undermine the effective democratic control of national institutions as domestic actors. The dual role of governments does little to enhance the legitimacy of European institutions and undermines effective accountability of governments as domestic actors. The idea that national parliaments can be an effective check on blame-shifting practices is questionable. Even though some countries have done better job than others to strengthen mechanisms of control of parliament with regard to the executive branch (82), at the very best the problem can only be mitigated, but not resolved. It is simply too easy for the executive branch to claim that complicated negotiations and bargains struck between Member States made this or that compromise necessary. Furthermore a perverse effect of a stronger and more effective involvement of national parliaments is that it exacerbates the problems of structural bias, discussed

(82) Germany, for example, has amended its constitution (Art. 23 of its Basic Law) to enable domestic actors to better control the actions of the executive. Denmark, too, has established effective procedures to better control the actions of the executive branch on the European level.

above. It tends to intensify the need of the executive branch to justify its actions in terms of realizing a narrowly defined national interest.

c) *Between the «Cold Putsch» and «Spaceship Brussels»*

According to the CT the participation of the European Parliament in the co-decision-procedure and the role of national governments in the European Council and Council of Ministers complement one another to ensure that European political practice adequately embodies the principle of representative democracy. Unfortunately in the European Union the two prongs of representative democracy tend to undermine rather than complement one another. On the one hand the European parliament is at best a junior-partner of the Council in the legislative process, whose influence is further diminished by the relatively independent status of the Commission. European citizens have few reasons to take great interest in such a Parliament. On the other hand, even if the Council collectively may be in the driving seat of the legislative process, each government is only one actor among many others – other governments, the Commission and the European parliament to name only the most prominent actors. A neo-Madisonian idea of dispersion of power through inter-institutional checks and balances, complemented by requirements of reason-giving and cooperative mutual engagement has many attractive features. But in the concrete form that it takes in the European Union it has two highly unattractive side-effects, both presenting potent obstacles to the development of a European identity.

First it amounts to a massive empowerment of the collective executive branches of Member States at the cost of national Parliaments. Though no doubt hyperbolic, a leading German newspaper captured something of importance when it described the European Union as it was established in the Treaty of Maastricht the result of a «cold Putsch» by the executive branches, that legislatures and citizens then reluctantly ratified in the name of peace and prosperity in Europe for fear that failure to do so would undermine the very idea of European integration. In the fundamental analysis nothing much has changed since then. The extension of the co-decision procedure from the Treaty of Maastricht to the Treaty of Nice and the CT effectively expanded the role of the European Parliament as a veto-player and has given it some additional clout. But neither this, nor the cooption of national Parliaments by the CT, granting them a weak role in the European legislative process, changes the political dynamics significantly.

Second the requirement that national institutions, the executive branch

and, according to the CT now also national parliaments engage with and mutually deliberate with other European actors undermines their accountability to citizens. All actors are somehow involved in and participate and deliberate in the European legislative process. Yet no-one specifically can reasonably be held accountable for the outcomes of the legislative process. From the perspective of citizens, the European political process becomes a «spaceship» (83), a complex self-referential process largely immunized from the influence of electoral politics. Everyone part of the relevant inter-institutional deliberative network talks to everyone else and a consensus is eventually formed, perhaps a consensus accompanied by protest by this or that Member State. But these deliberative interactions do not produce *competing* visions of what the European Union should become, leading to *competing* programs and embodied in competing personnel. Since there is no electoral *competition* between European elites connected to competing policies, elections don't function as a mechanism to express support for one or another vision, program or personnel. They don't serve as a meaningful way to effect political change. Citizens can no longer identify with one side against the other and express their dissent by favoring an alternative political personnel, program and vision of Europe's future. If everyone is somehow involved, but no electorally accountable actor can meaningfully be held responsible for a set of outcomes, and no alternative political programs are presented to make a choice from, then one would predict electoral debates to have two features, both of which are prominent in Europe. First, instead of a debate on alternative visions, programs and personnel it would be a debate for or against Europe. You're either going to support the package of rules supplied by the European political process or reject the very idea that there should be a European package of rules at all. You're either a Europhile or a Eurosceptic. You either want more Europe or less Europe. But since Europe appears as a monolithic whole that produces a set of outcomes without institutionally producing a menu of alternative outcomes, you can either be for the product or against it. There is no visible institutional embodiment of an alternative Europe. There is little opportunity to use the vote to express your support for an alternative European political program, because such an alternative is unlikely to have been developed and presented by European actors. Second, besides expressing your support for or protest against Europe European elections tend to be determined by domestic politics. Most regard it as too radical and blunt a choice to be against Europe and «the whole European system». After all

(83) A. OLDAG/H. M. TILLAG: *Raumschiff Brüssel* (2003).

everyone signed on to it and the cost of exit and the general benefits of membership are high. Not surprisingly the protest vote, though significant, in the end remains relatively ineffectual. Instead European parliamentary elections are not primarily about Europe and nor are national elections. Instead European citizens vote for the party or candidate they trust for his stance on domestic issues. Not surprisingly European parliamentary elections are often treated as a barometer for the popularity of the domestic government and the popularity of its domestic policies.

2. *European Identity and Representative Democracy in Europe under the CT: Interpretative Possibilities and Political dynamics*

The structure of the political process, then, is one central reason why it is unlikely that European citizens will develop a European identity along the lines envisioned by the CT. Citizen's identities are not shaped by constitutional preambles or constitutional texts more generally, unless these constitutional texts are the focal point of political and legal contestation and deliberation meaningfully connected to citizens' collective political action. It is difficult to know what the necessary and sufficient conditions for the development for such an identity are. The availability of appropriate historical narratives, public education, perhaps outside threats all have a potentially important role to play (84). But the above analysis suggests that for the development of an identity of constitutional patriotism in Europe today one *necessary* condition for the development is the establishment of a meaningful electoral process on the European level (85). Such a process would allow European citizens to vote for and against competing visions of what Europe ought to become and participate in debates about what that implies for political programs and competing parties and leaders. Of course the barriers that remain for the development of a robust European identity would still remain considerable. The absence of a well-developed public sphere in Europe and a common language in particular presents a considerable obstacle for such

(84) For a conception of European history that supports the development of a European identity and the role of public education see M. KUMM: «The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History», 6 *German Law Journal* No. 2 (2005).

(85) For an argument that the development of national identities was linked to the emergence of representative institutions on the national level, replacing more indirect forms of rule see Micheal Hechter, *Containing Nationalism* (OUP 1999).

an identity to develop (86). But such an obstacle will only be overcome, if institutions are established that provide a sufficiently strong incentive for such obstacles to be overcome. *Current institutional structures perpetuate the very obstacles that are invoked as a reason not to establish meaningful electoral politics at the heart of the European political process.* They perpetuate the very condition of apathy and national recalcitrance that provides the sociological and political background to the academic cottage industry writing on the «democratic deficit» in Europe. Additionally the argument for a more central role of a European Parliament does not depend on either an idealized description of parliamentarianism (87), nor does it suggest that it is necessary or desirable to institutionalize Westminster type Parliamentarianism in Europe. The argument is not that everything should be decided by Parliament and that the complex administrative type procedures characteristic of the Comitology process needs to be replaced. On the national level, too, the parliamentary procedure is just one among many jurisgenerative procedures. But whatever the role of other administrative type processes there are, at the very least the formal legislative process and a strong European Parliament in particular would serve as a «mechanism for the public control of the cumulative unintended consequences of scattered forms of decision-making» (88). Parliament deserves to emerge at least as an equal to Member States as an independent and strong agenda setter as a legislator within the co-decision-procedure.

European constitutional theorists may have been too quick to think of defenders of Parliamentarianism as intellectually complacent or naïf statistes, who refuse to take seriously the task of translating (89) the basic commitments underlying the democratic constitutional tradition to a setting beyond the state. What may well be infatuation the «sui generis» character of the European Union —Europe’s constitutional Sonderweg as Joseph Weiler aptly calls it (90)— has led to the stigmatization of the idea of a robust European

(86) D. GRIMM: «Does Europe Need a Constitution», *supra* note 77.

(87) This is a charge made, for example, by A. MORAVCIK: «In Defense of the “Democratic Deficit”: Reassessing Legitimacy in the European Union», 40 *Journal of Common Market Studies*, pp. 603-624 (2002), and R. DEHOUSSE: «Beyond Representative Democracy», in: WEILER/WIND (eds.): *European Constitutionalism Beyond the State* (2003).

(88) Chr. Lord., D. BEETHAM: «Legitimizing the EU: Is there a “Postparliamentary Basis” for its Legitimation?», 39 *Journal of Common Market Studies*, pp. 443-462 (454).

(89) See N. WALKER: «Postnational Constitutionalism and the problem of translation», in: WEILER/WIND: *European Constitutionalism Beyond the State* (2003), pp. 27-54.

(90) J. WEILER: «In Defense of the Status Quo: Europe’s constitutional Sonderweg», *id.*, pp. 7-26.

parliamentarianism as a symptom of intellectual inertia among the more sophisticated echelons of European academia. Yet the case against parliamentarianism – indeed against representative democracy in Europe – may not be as strong as it seems (91) and the costs of making do without it may be very high. The above does not claim to be a conclusive argument for a robust Parliamentarianism in Europe. It merely serves to deepen the understanding of what is lost when meaningful electoral politics in Europe is absent. Furthermore establishing electoral politics at the heart of the European political process *does not mean the establishment of a federal state*. It does not suggest that the European Union should be doing more than it is currently doing or that the particular supranational structure of its authority should be changed or the structure and role of the Comitology process radically altered. *But it does suggest that an important dividing line between citizens debating the future of Europe is the dividing line between Democrats and Republicans*. Democrats would insist on establishing some form of a meaningful electoral politics on the European level, whereas Republicans would argue that division of powers, rights protection and the formal framework of a constitution and administrative-type oversight for the exercise of public authority is sufficient. If the argument presented in this last section is plausible, it suggests that those who find a European identity focused on constitutional patriotism attractive, need to side with Democrats.

Democrats, though critical of the CT, may still have reasons to accept it for strategic reasons as the best option realizable under the circumstances. From a democrat's perspective the CT's hypocrisy may turn out to be an advantage. If it is true that the CT provides an account of its own legitimacy that is undermined by a literal reading of some of its operative provisions, clearly this provides an argument for these provisions to be read narrowly. These provisions should not interfere with the progressive development of political practices under the CT that are able to realize its purposes to a greater extent and thus produce a constitutional *effect utile*. Practically this ought to encourage the European Parliament to play a more assertive role in relationship to the Council and fight politically for a more central role.

The CT opens promising avenues for an assertive and self-conscious

(91) A recent version of an attack against Parliamentarianism as «orthodoxy» «deeply anchored in western political culture» (136) and «resting on a mechanical, transmission belt vision of public policy» that loses their plausibility once «a complex constellation of preferences and interests» are revealed to be behind «convenient abstractions» (155) is by R. DEHOUSSE: «Beyond Representative Democracy: Constitutionalism in a Polycentric Polity», ID.: pp. 135-156.

Parliament to enhance the significance of electoral politics in Europe. One such avenue concerns the appointment of the Commission President and the Commissioners. The parliament can argue that the provision stating that «Parliament shall elect the Commission President» (92) actually means that *Parliament* will *elect* the President rather than just approve the choice made by the Council. Elect comes from the latin «electio» and means careful choice. Such a choice is absent when Parliament's role is just to approve or disapprove of a candidate chosen by the Council. Of course Art. I-27 states that the Parliament «shall elect» the candidate proposed by the European Council. But the Council in turn is required to engage in «appropriate consultations» and «take into account the elections to the European parliament». The Parliament should interpret the requirement to «take into account the elections to European parliament» as a requirement to generally give deference to the candidate chosen by the European Parliament. The same is true for the selection of Commissioners. Rather than reacting to specific deficiencies of candidates put forward by Member States, as parliament has done in the Buttiglioni affair, Parliament should present its own list of Commissioners as a basis for negotiations with Member States and refuse any substitutions made without specific reasons relating to legitimate political concerns. If the analysis put forward here is plausible, this interpretation makes better sense of the CT as a whole than an interpretation that suggests a more limited Parliamentary role in the determination of the President and the Commission.

More strongly aligned with the Parliamentary majority, the Commission is likely to interpret its impartiality and draft its proposals with a greater sensibility to parliament's preferences rather than to Member States. The role of Parliament as a political agenda-setter would be significantly strengthened. The Council would resemble more strongly a second legislative chamber, though still incomparably more powerful than the second chamber in any western federal system. As a whole such a development would strengthen the role of Parliament to such a degree that European citizens might find that they have good reasons to take European elections more seriously. Such a development would be further supported if the competing party blocks in the European Union became more cohesive and presented their own candidates for the presidency and the Commission before the elections, thereby personalizing competing programs. In important respects such a development would reflect the ideals of the CT to a greater extent, than a practice in which the Council remains the overbearing political agenda-setter in the EU. It

(92) Art. I-20 Sect.1 CT.

would strengthen representative democracy in Europe along the lines suggested by the CT's Chapter on the «democratic life» in the Union. Such an interpretation of the relationship between the Parliament and the Council would also provide the minimal institutional prerequisites for the development of a genuine European identity grounded in constitutional patriotism. Whether this would be enough is by no means clear. The development of a European identity depends on more than the adequate institutionalization of electoral politics on the European level (93). But without some such a development the idea of a European identity will remain constrained to the ivory tower, complementing the topic of the EU's democratic legitimacy as a favorite theme of EU financed conferences.

(93) For a discussion of the role of European history and public education see M. KUMM: «The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History», 6 *German Law Journal* No. 2 2005 (forthcoming).