Review Essay

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The European Constitutional Framework: Re-reading Eric Stein's *Thoughts from a Bridge* on the 50th Anniversary of the Treaty of Rome

Constitutionalizing the process of European integration has been a hot issue for decades. Attempts to endow the European institutions with a formal constitution using the political avenue, however, miserably failed. Also, the so-called "Constitution for Europe," drafted with many hopes in the recent years, met the same destiny as it was rejected in two referenda held in France and in the Netherlands. Paradoxically, it will be replaced by a new "Reform Treaty," which will maintain, indeed, many of the achievements enshrined in the constitutional text, but which is pervaded by the obsessive idea of removing any possible reference, also indirect, to a possible constitutional nature of the process of European integration.

This paper, inspired by the retrospective reading of the works of one of the founders of the European scholarship, Eric Stein, aims at analyzing the difference between the notion of constitution, *as developed in the modern, state-centered legal experience, and the notion of* constitutional framework, *a word coined by Eric Stein, which seems typically related to the peculiar experience of the European integration. In the author's view, the difference mainly relies in the opposition between the unity of the legal order governed by a constitution, and the pluralism inherent in the European legal order.*

I. European Constitution and European Constitutional Framework

A. *Introduction*

In 1957, at the time of its entry into force, only a few would have predicted a great future for the Treaty of Rome and for the creature it

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established: the European Community (EC). However, a retrospective look at 50 years of life of the European Institutions reveals an impressive pattern of events. The functionalist design, according to which political unity was implicitly promoted through economic integration, was crowned with success beyond the most optimistic predictions. Originally vested with a limited set of enumerated powers, mainly confined to the economic field, the EC has gradually developed the scope of its competence, both through expansive interpretative doctrines and through several revisions. In 1993, the treaty of Maastricht established a complex entity, the European Union (EU), which encompasses the competences of the Community in a more comprehensive integration design that also includes competences in politically more sensitive fields. The EU thus acquired its characteristic pillar structure, where the competences entrusted to the Community are exercised in accordance with a supranational method whereas activities of cooperation in the field of foreign and security policy and in criminal matters are governed by a more or less accentuated intergovernmental method.

As a result of this development, there are almost no fields nowadays in which the Member States are free to legislate sheltered from the influence of EU policies. The institutional system of the EC/EU also underwent significant changes, and it is now more akin to the political system of a sophisticated State-like entity than to the quite rudimentary institutional setting of an Intergovernmental Organization (IO). The enlargement of the scope of its competence, coupled with the development of a European political dynamic, has created a network of solidarity among the Member States which makes it virtually impossible for a single MS to determine its social, economic, and cultural model in isolation from its European ties. The international dimension of European integration grew considerably, sensibly eroding the plenitude of the foreign relations power of the Member States. The process of progressive enlargement led the EU to acquire a continental dimension. Alongside the process of integration, a sense of allegiance of Europeans to the EU institutions seems to have gradually grown, an allegiance that has not replaced but rather complements the more traditional allegiance to the State or local communities.

However, in spite of this momentous growth, the process of European integration appears far from complete, and indeed it has been shaken at its roots by grave uncertainties as to its nature and its possible future. It is well known that, precisely in relation to this state of affairs, the idea gradually took shape in political and academic circles that the time had come to endow the Union with a formal constitution. Contributing to this idea might have been the consideration that the EU has developed into an entity discharging certain functions normally entrusted to a State. Thus, being more

akin to a State than to an international organization, it needed to be governed by a constitution, rather than by a treaty.

The rest of the story is well known, and there is no need to dwell upon it. On the basis of a decision of the European Council in Laeken in 2001, a European Convention was called, composed of representatives of governments of the Member States, of the European Institutions, and of members of the parliaments of the Member States. It concluded its works in July of 2003 and presented the text of a treaty containing a constitution for Europe. With some changes, the text was subsequently adopted by the European Council on July 18, 2004, and signed in Rome on October 29 of the same year. However, the idea of a constitution for Europe was met with indifference and even hostility by public opinion, not only in those countries traditionally labelled as Euro-sceptical, but also in other traditionally Euro-enthusiastic ones. In spite of the large political consent in favor of the treaty on the part of European elites, the first two referendums held in 2005 in France and in the Netherlands, two of the founding members of the Union, produced negative results.[1]

Uncertain of the steps to be taken, the European Council decided first to suspend the procedure of ratification and called for a period of reflection.[2] Ultimately, at a time when I was finalizing the present contribution for publication, the European Council of June 21-22, 2007 decided, with unequivocal words, that "the constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution,' is abandoned."[3]

In the post scriptum I will return to this decision, which not only meant the abandonment of the constitutional project, but also envisages, in quite detailed terms, the drafting of a new Reform Treaty, with the task of replacing the Constitutional Treaty and reformulating, in a different, "un-constitutional" tone, some, but not all, of the achievements contained therein. In the new architecture envisaged by the European Council, which seems now to have materialized in a draft treaty prepared by the presidency of the Intergovernmental Council (ICG),[4] the Reform Treaty should include modifications to the Treaty of the European Union as well as to the Treaty of the Eu-

1. In France, 54.68% of the voters rejected the proposal to ratify the treaty; in The Netherlands, the proposal was rejected by a percentage of 61.6%. As a consequence of these results, the referendums scheduled in other Member States, namely in the United Kingdom, Portugal, Ireland, Denmark, the Czech Republic, and Sweden, were suspended or postponed.

2. See *Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe*, adopted at the meeting of the European Council of Brussels of June 16-17, 2005. More recently, *see Presidency Conclusions of the European Council* held in Brussels on June 15-16, 2006.

3. *See Presidency Conclusions of the European Council of Brussels* of June 21-22, 2007, annex I "Draft IGC Mandate," point I.1.

4. *See* doc. IGC 1/07 of July 23, 2007.

ropean Community, which, however, will be renamed. The first will be the Treaty establishing the European Union, whereas the second will be the Treaty on the functioning of the European Union. Although this new terminology aims to convey the idea that the first treaty includes the basic principles of the Union's legal order, whereas the second contains the rules of functioning of the system, reading the draft document creates a rather different impression, i.e., that the two treaties will continue to reflect the different paces, and consequently, the different institutional and normative settings, of the economic and of the political integration, respectively.

Be that as it may, it would make little sense, at this intermediate stage, to engage in a close analysis of the new text, which is, presently, far from completion. At this stage, however, one cannot but notice that, paradoxically, it has been the European Council—a body composed of the chiefs of state and government of the Member States—which has proclaimed the abandonment of the constitutional project, a project which, properly intended, would have entailed at least the partial emancipation of the European legal order from the legal orders of its Member States.

Thus, although at the time of this writing the future of Europe is far from being definitively determined, the events briefly narrated seem to justify a deep sense of distrust, not only vis-a-vis the voluminous and ambitious document drafted by the Convention, which is now doomed to oblivion, but also towards the noble, but perhaps not fully wise, endeavour to establish a constitutional order in Europe using the political avenue.

It is possibly too simplistic to explain the difficulty of the Constitutional Treaty with nationalistic sentiments still lingering in Europe. Rather, the time may have come for a renewed reflection upon the roots of the failure of the constitutional project and upon the future of European integration. The 50th anniversary of the Treaty of Rome, which, in many respects can be considered as the first, imperfect but well-working, constitutional instrument of European integration, provides a welcome occasion to reflect upon the uneven destiny of these two instruments: why did the Treaty of Rome fulfil its tasks beyond any expectation, whilst the Constitutional Treaty, drafted with so many hopes, was speedily abandoned, first by the peoples and ultimately by the States of Europe?

This question has puzzled me while re-reading "Thoughts from a Bridge,"[5] a book which collects the writings of Eric Stein on legal issues related to European integration. Reading Eric Stein's writings on this process 50 years after the Treaty of Rome, and at a time of

5. ERIC STEIN, THOUGHTS FROM A BRIDGE. A RETROSPECTIVE OF WRITINGS ON NEW EUROPE AND AMERICAN FEDERALISM (2000) [hereinafter THOUGHTS FROM A BRIDGE].

considerable perplexity about its constitutional future, is more than a matter of intellectual excitement. Stein's writings span across the entire period of European integration, from its first concrete steps to its most recent developments, and they offer a constant source of inspiration. It is revealing, for example, to juxtapose the words used recently by the European Council to proclaim the end of the constitutional process[6] with those employed by Eric Stein, written a quarter century earlier to describe the process of a creeping constitutionalization of the European order in its earlier stages. In the famous opening lines of the celebrated article written in 1981,[7] Eric Stein wrote:

> Tucked away in the fairyland Duchy of Luxembourg and blessed until recently with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.

It is worth noting the terminology chosen by Stein. Instead of speaking of a constitution, he refers to a "constitutional framework"; and instead of a federal structure, he refers to a "federal-*type* structure." These two expressions concisely but clearly illustrate the delicate nature of the original process of constitutionalizing Europe. They point out that the notion of the European constitutional framework, as developed by the ECJ, is not necessarily the initial stage of a creeping process whose final outcome had to be the drafting of a formal constitution. To be sure, Stein has notoriously been among the most prominent supporters of the constitutional nature of the European construction; in a recent contribution, he did not hesitate to group himself among the constitutionalists, as opposed to the internationalists, in the scholarly struggle over the legal nature of the European Union.[8] Yet the entire corpus of his work clearly promotes the idea that the European constitutional framework possesses its own peculiar features which are markedly different from those of a full-fledged (state) constitution.

Thus, at the very outset, Eric Stein seems to admonish us that these two concepts, constitution and constitutional framework, in

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6. *Supra* note 3 and text.

7. *Lawyers, Judges and the Making of a Transnational Constitution, in* 75 AM. J. INT'L L. 1 (1981), *reprinted in* THOUGHTS FROM A BRIDGE, *supra* note 5, at 15.

8. *The Magic of the C-word*, Keynote address at the Ninth Biannual Conference of the European Union Studies Association, Apr. 2005, Austin, Tex., *in* 18 EUSA L. REV. 1, n.3, (2005). At p. 10 of the manuscript, he wrote:

> I readily confess my membership in the Constitutionalist club—but with an important caveat. I expect that the Union will become a premier player in the world arena but I have consistently disagreed with the idea of some "constitutionalists" that the Union will or should or could become ultimately a centralized federation, a "superstate."

spite of their terminological similarity, can have different natures and contents. These differences might be of relevance in explaining why the constitutional framework, developed behind the scenes on the fragile basis of the Treaty of Rome, proved (at a relatively early stage) to be successful not only for the audacity and the coherence of its legal construction, but also for its political wisdom, whereas the attempt to draft a constitution via the more visible political route raised much suspicion from the beginning and seems unlikely to lead to a successful outcome.

These preliminary thoughts prompt a more in-depth analysis of the relationship between the constitutional heritage of Europe, which is reflected in its constitutional framework, and the very idea of a constitution, as developed in modern, state-centered, legal and political philosophy. Using Eric Stein's works as my guide, I thus propose to explore some of the most important features which characterize the European constitutional framework and which make it so different from a full-fledged constitutional order. As a preliminary matter, I will briefly illustrate the structure and content of the book that prompted my musings. In the following sections I hope to be able to clarify what is, in my view, the meaning of the notion of a "constitutional framework" as opposed to that of a constitution. In particular, I will highlight the tensions between unity and pluralism, which strike me as the respective constituent elements of its design. In the final section, I will try to explain why the abandonment, more formal than substantial, of this perspective, and the embrace of a more *étatique* conception in the new Treaty, might account for the failure of the constitutional project. Along the way, I also wish to pay tribute to the one of the founders of the discipline of European law.

B. Thoughts from a Bridge: A Study of Divided Powers Systems

There is a passage in the introduction of Eric Stein's book which illustrates the book's methodological approach to the phenomenon of European integration and which attracted my attention:

> If I am pressed to encapsulate my central intellectual interest in a single phrase, I would say it has been the art of governance or the management of power in more or less complex divided power systems. These systems range from a highly centralized federation on the one end of the spectrum to a loose intergovernmental regime on the other.[9]

9. THOUGHTS FROM A BRIDGE, *supra* note 5, at 3. In a course given in 2005 at the Academy of European Law on the system of the European foreign relations power, I used, with unconscious awareness, an analogous expression and defined it as "the governance of international relations of a non-unitary entity." *See* Enzo Cannizzaro, *Unity and Pluralism in the EU's Foreign Relations Power*, *in* FUNDAMENTALS OF EU

Thus, in the conceptual itinerary of Stein, the study of European integration is not an object of analysis by itself, but is rather contextualised in a broader analysis of the governance of complex legal systems and of composite entities. This methodology is particularly suitable in order to catch the evolutionary trend of this process and its historical and theoretical importance.

Consistently with its inspiration, the book is divided into three parts. The first part, entitled "Constitutionalizing, Harmonizing," includes Stein's famous article on "Lawyers, Judges and the Making of a Transnational Constitution,"[10] devoted, as is well known, to the analysis of the institutional and normative setting of the EC, and a long excerpt from an article dealing with issues of substantive integration, entitled "Harmonization of European Company Laws."[11]

I have already explained why the first is to be grouped among the path-breaking contributions in European law scholarship. The second, focusing on technically complex aspects of company law, is of no less value. It helps us understand how the ECJ succeeded in promoting integration without affecting the existing diversity of Member State legislation, inspired by different legal traditions, using the principle of mutual recognition as a tool.[12] In spite of their apparent dissimilarities, these two writings, read consecutively, explain how the silent legal revolution of the ECJ not only developed on the institutional plane but also went hand in glove with a corresponding process in the field of substantive Community policies.

The second part of the book is devoted to a comparative legal analysis of the European integration project and the American federal experience. Here Stein expounds his conception of European integration as a federalist process with the help of a refined comparative methodology. The first section reproduces an excerpt from "Courts and Free Markets," a book co-authored with Terrance Sandalow, which appeared in 1982.[13] Providing a comparison of institutional and judicial systems, this book pioneered the further blos-

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LAW REVISITED. ASSESSING THE IMPACT OF THE CONSTITUTIONAL DEBATE, 193 (Catherine Barnard ed., 2007).

10. THOUGHTS FROM A BRIDGE, *supra* note 5, at 15.

11. *Id.* at 50.

12. Notoriously, the doctrine of mutual recognition, based on the mutual trust that the Member States are bound to lend to each other, was first coined in the field of the free circulation of goods. Since that time it has also applied in a wide range of economic and non-economic contexts. In its original version, the doctrine prevents Member States from invoking differences in legislation as a ground for opposing the entry into a national market of products lawfully made under the legislation of another Member State (see the famous *Cassis de Dijon* case, Judgment of the ECJ of Feb. 20, 1979, Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, [1979] E.C.R. 649). It thus constituted a formidable thrust toward the establishment of a single market without engaging in the extenuating activity of harmonizing economic or non-economic legislation and regulation.

13. Eric Stein, *Courts and Free Markets, Perspectives from the United States and Europe, in* THOUGHTS FROM A BRIDGE, *supra* note 5, at 117.

soming of legal studies in this field. The central section is devoted to a comparison of the European and the U.S. foreign relations systems.[14] It is composed of a voluminous contribution merging excerpts from two seminal pieces published by Stein towards the end of the 1980s.[15] This section focuses mainly on an analysis of the problems raised by the current fragmentation of the EU foreign relations power. In another piece, a concise but impressive editorial published in 1992 in the *Common Market Law Review*,[16] Stein then presents some suggested solutions to these problems.

Using the comparative method here is even more useful. As is well known, federalist systems—although characterized by shared competences in many policy arenas—tend to conceive of the foreign relations power as essentially unitary. For centuries, splitting up the foreign relations power has been regarded as a sacrilege, and it evokes doctrines belonging to the first phase of federalism, such as that of divided sovereignty. The U.S. system is a classic example of centralization of the foreign relations power in a federal system. In this context, the European experience seems to travel along the opposite road. It constitutes an attempt—the most serious endeavoured thus far—to demonstrate that shared competence in the field of foreign relations is not only theoretically possible but also a living practice.

Towards the end of the second part of the book, some of Stein's later contributions are reproduced. In these writings, Stein further develops his conception of European democracy, inspired by two seemingly antithetical postulates: that decisions taken at the EU level must be legitimated from the "inside," i.e., through a democratic decision-making process developed within the EU system and that the democratic character of the EU decision-making system must be assessed by standards different from those developed at the Member State level. In particular, the dynamics of European democracy must necessarily involve the Member States as the primary institutional actors.[17] This idea is concisely expressed in Stein's panel statement

14. THOUGHTS FROM A BRIDGE, *supra* note 3, 191.

15. The first is his article *Toward a European Foreign Policy?—The European Foreign Affairs System from the Perspective of the United States Constitution*; the article was written with Louis Henkin and originally included in a collection of studies entitled *Integration through Law*, published in 1986. *See Integration through Law: Europe and the American Federal Experience*, 1 METHODS, TOOLS AND INSTITUTIONS, 3 (Mauro Cappelletti et al. eds., 1986). The second is his course given at the Academy of European Law which appeared in 1991 under the title *External Relations of the European Community: Structure and Process*, in 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, BOOK 1, KLI 111 (1991).

16. *Foreign Policy at Maastricht: "Non in Commotione Dominus," in* THOUGHTS FROM A BRIDGE, *supra* note 5, at 304.

17. Eric Stein, *Musing on Democracy in the Constitution for Europa, in* 30 YEARS OF EUROPEAN LEGAL STUDIES 68 (Paul Demaret et al. eds., 2005).

on *Democracy without a People*[18]: "the Union must develop an original version of representative democracy as it has already succeeded in designing its own original version of a rule of law."

The book also contains a third part, composed of three contributions devoted to Europe's "Burden of History,"[19] which at first glance appears to have less value for legal analysis. The patient and careful reader, however, will find some acute observations about the European historical legacy which could be very helpful in trying to grasp in full the historical and cultural roots of federalism *à la européenne*.

Eric Stein's book not only offers an account of the development of European integration; it also sketches the contours of a particular conception of European federalism, one which, to be sure, tends to compromise the quest for unity with respect for the unique heritage of the European Nation-State. The book thus seeks to reconcile the need for uniformity and consistency with the existence of different national sensitivities and values. From the reading of this book, the idea of European integration as a sort of a living laboratory emerges. It can hardly be captured by an existing legal formula but must be regarded as a social process that evolves in continuous interaction with the development of legal thought. Thus, at the turn of the last page, the reader is left with a sense of curiosity about the possible direction of that process: Is it destined to result in a classical federalist model, encompassing the legal order of its Member States in a comprehensive and unitary legal order? Or is it rather destined to develop into a new federalist model which remains cognizant of its international origins and of the manifold cultural heritages of Europe? In other words, can federalism *à la Stein* shape a new constitutional model for a legal order having its own features and its own nature, or is European integration destined, sooner or later, to take the shape of a classical federalist system?

In trying to answer this question, we need to analyse the legal implications of European federalism and to sketch some of the salient features of the pluralistic conception of the European constitutional framework against the background of the classical state constitution.

18. Included in THOUGHTS FROM A BRIDGE, *supra* note 5, at 335.

19. The first section, *History against Free Speech: German Law in European and American Perspective,* is an impressive piece that analyzes the relative importance accorded in each legal order to the freedom of opinion in regard to other competing values. Among these is what appears to be a leading example: criminal punishment for the crime of "denial" of the holocaust.

II. European Constitutional Framework and Legal Pluralism

A. *The European Constitutional Framework and its Normative Pluralism*

The European constitutional framework imagined by Eric Stein is basically a normative entity which, although exercising competence transferred by the Member States, attained a considerable degree of autonomy from their guardianship and ultimately endowed itself with the means necessary to achieve its objectives without—or even against—their will.[20] The two pillars on which this creation rests are the doctrines of the supremacy and direct effect of European law, developed in a famous line of cases decided by the ECJ.[21] The constitutional implications of these principles can hardly be overestimated. Indeed, they provide the foundation for a legal order which lacks almost all coercive means of enforcement but which nevertheless secures compliance with its norms essentially through the activity of the judicial and administrative authorities of the Member States. These two doctrines marked the transition of the Community from an international entity, which could only pursue its goals via the constant political intermediation of the Member States, to an entity acting in its own right, addressing natural and legal persons as subjects of its own legal order.[22]

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20. Interestingly, this was achieved even though the EU does not have coercive means at its disposal and must thus depend, in order to implement its rules, on the judicial and administrative machinery of the Member States. In order to overcome this hurdle, the ECJ has developed, in an impressive array of judgments, the idea that national judicial authorities and, to an extent, also the administrative organs of the Member States, act as organs of the EU and must deny the application of national law where it is inconsistent with Community law. Moreover, the judicial and administrative institutions of the EU tend to establish a direct connection with their national counterparts and to guide their action in implementing Community law, thus establishing a network of direct relationships in discharging judicial and administrative functions. This was well described by J.H.H. Weiler et al., *European Democracy and Its Critique*, *in* 18 West European Politics 4 (1995).

21. In his *Reminiscences of the Embryonic EEC*, in Thoughts from a Bridge, *supra* note 5, at 471, Eric Stein likens the celebrated *Van Gend en Loos* case (Judgment of the ECJ of Feb. 5, 1963, case 26/62, N.V. Algemene Transport – en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] E.C.R. 1) to *Marbury v. Madison*. Beyond formal dissimilarities between the two judgments, the analogy is striking. *Van Gend en Loos* is indeed the case that paved the way for a constitutionalist conception of European integration.

22. By way of example, note the following passage:

> bei Widerspruch zwischen dem von der Centralgewalt gesetzten Recht jeden Grades und dem von den Einzelstaaten gesetzten geht das erstere unbedingt vor. Die Centralgewalt steht sowohl den Einzelstaaten als den sämtlichen Staatsangehörigen herrschend gegenüber: sie bedarf für ihre Rechtssätze keiner Vermittlung der Einzelstaaten, kann jedoch mit Durchführung derselben die letzeren jederzeit und in jedem Umfang betrauen.

Although such an excerpt could just as well have been written today, it is drawn from a book written in 1886 by Philip Zorn, Das Staatsrecht des deutschen Reiches (the quotation is drawn from the second edition, Berlin, Guttentag Verlagsbuchhandlung, 1895, at 86). In *Courts and Free Market, Perspectives from the United States and Eu-*

From their initial enunciations, these doctrines were further developed to their more extreme forms in which the ECJ explicitly tends to present the Community legal order as a self-contained and fully autonomous constitutional regime. Indeed, the ECJ's construction explicitly claims the exclusive authority of this new entity to settle conflicts between EU law and the laws of the Member States and, by so doing, to determine the boundaries of its own competence.[23] If this claim were actually substantiated, one could unhesitatingly mark the passage from a constitutional framework to a full-fledged constitutional order, and one might regard the European Union as a truly supreme federal authority in the sense of a modern state.

Although the Community's struggle for autonomy has fashioned a "constitutional framework," it seems to me much more doubtful that the Community was vested with the exclusive authority to settle conflicts of competence with its Member States, and, therefore, that the European order has really developed into a full-fledged constitutional regime. Re-reading Eric Stein's work reinforces my reluctance to draw such a conclusion and my inclination to highlight the difference between these two notions. It is true that the process of integration has made an international law approach to the (internal) functioning of the EU obsolete. The Member States are certainly no longer the "Masters of the Treaties," because they have lost the power to determine, within the particular order set up by the founding Treaties, the scope of EU competence and the legal effects of its acts. However, one can hardly conclude that this process has transformed the EU into a *self-contained* legal order whose authority rests solely on its constitutive act.

In order to explain this difference, I will use a theoretical argument based on the classical positivist conceptions about the relationship between a given legal order and its constitutive instrument. It is commonly accepted that, among the crucial elements of an *étatique* concept of a "constitution," there is the capability of establishing conflict-settlement rules designed to transform political conflicts into legal conflicts. In general terms, the application of these rules should make it possible to resolve each conflict in an unequivocal and final fashion. In other words, there should be no co-existence of a plurality of equally valid solutions for one and the same legal conflict within a constitutional order. It is common experience that, in state legal or-

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rope, *in* THOUGHTS FROM A BRIDGE, *supra* note 5, at 127, Stein recalls the crucial importance of the 1787 decision of the Constitutional Convention at Philadelphia to "establish a federal government with power to act directly on individuals. The existence of direct relations between individuals and central institutions is, indeed, generally taken as a defining characteristic of a federal system."

23. See the famous *Simmenthal* case (Judgment of the Court of Mar. 9, 1978, case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, [1978] ECR 1129).

ders, no contradictory legal propositions can coexist on a long-term basis because conflicts are univocally settled on the basis of procedures set up by the constitutive legal instrument.[24] Pluralism in conflict settlement is inconsistent with the very *raison d'être* of a legal order and with the quest for coherence which represents its basic premise.

Of course, absolute coherence is an ideal situation rarely found in practice given the complexity of modern legal orders. Nevertheless, with a certain degree of approximation, states' legal orders do at least *tend* toward unity, in the sense that they establish procedures *designed to produce* it. At least theoretically, a plurality of contradictory solutions for one and the same legal conflict, if it persists in the long run, is at odds with the very notion of a legal order.

Yet this kind of plurality is precisely what may occur in the relationship between EU law and the laws of the Member States. Telltale evidence of that state of affairs is the endless and inconclusive scholarly and jurisprudential debate concerning the identification of the organ having the ultimate authority to settle legal conflicts arising from inconsistencies between EU law and national law. While the EU judicial institutions have explicitly claimed the exclusive authority to determine the validity of Community acts, and therefore also indirectly to determine the outcome of a conflict between Community law and national law, a number of Member States' supreme courts have accepted this claim only within certain limits. Starting from premises that differ fundamentally from those of the EU courts, they have tended to regard the application of Community law as a result of the *self-limitation* of the national legal order vis-à-vis the Community. In other words, according to these national courts, the supremacy of Community law within the domestic legal order is not unqualified; rather, it results from a positive grant of power from national constitutions, a grant that is logically and necessarily circumscribed by the limits set in those constitutions. It is on the basis of this legal construction that a number of national supreme courts have claimed that they retain the power to verify whether Community law has been enacted within the scope of the competence assigned to the

24. The recognition that a conflict between international and municipal law admits different solutions, each valid for its own legal order, paved the way for the recognition of the autonomy of international law, at a time in which it was largely conceived as a branch of state public law. There is probably no better example of this *étatique* conception of the conflict between international and municipal law than this emphatic passage written by Philip Zorn in 1880: "Ein Widerspruch zwischen Recht und Rechtgedanken, zwischen Recht und Rechtsprinzipien, zwischen recht und Rechtsidee, zwischen recht und Rechtsprätension ist möglich: niemals aber zwischen Recht und Recht" (*Die Deutschen Staatsverträge*, *in* 36 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 1880, 9, at 20).

Community, and in compliance with the fundamental values and principles of the domestic constitution.[25]

In legal terms, both of these claims—the unqualified supremacy of Community law asserted by the ECJ on the one hand, and its limited supremacy under the control of the national courts on the other—have equal legitimacy. To put it differently, neither has a clearly superior authority.

Still, the practical impact of this *réserve de souveraineté* in relation to the Member States is relatively modest. As far as I know, no Community act was ever declared inapplicable in the territory of a Member State on the ground of its inconsistency with national law—at least not until very recently.[26] In practice, the supreme courts of both the Community and the Member States have exercised their powers with a sense of mutual understanding and political wisdom. While each has sought to exert an influence on the jurisprudential direction of the other, judicial discretion has been exercised so as to avoid direct conflict. This is easily understood, as the mere existence of a certain power can have a persuasive impact that is in fact more effective than its exercise. In practice, through the capacity of the ECJ to interact with national judges, EU law enjoys "supremacy without a supremacy clause."[27] This expression properly conveys the idea that the supremacy of Community law over national law is based not so much on a legal rule accepted by all actors involved but rather on the capacity of the ECJ to persuade its national counter-

25. The most recent conflict is probably prompted by the application of the Framework decision 2002/584/JHA on the European Arrest Warrant. See the Judgment of the ECJ (Grand Chamber) of May 3, 2007, case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad (not yet reported), which tends to reassert that the validity of EU law must be assessed uniquely against the background of EU law principles. A reference to decisions of a number of national High Courts which, in a variety of ways, disregarded national laws implementing the decision on the ground of their inconsistency with national Constitutions, is contained in the opinion of Ruiz-Jarabo Colomer AG, delivered on Sept. 12, 2006, n.y.r. *See, in particular,* the decisions of the German Constitutional Court of July 18, 2005, 2 BvR 2236/, 4.

26. Such a conflict is possible, however, and this has become evident as consequence of the judgment of the ECJ in the *European Arrest Warrant* case, see *supra* note 25. Indeed, a conflict may arise between the finding of the ECJ that framework decision 2002/584/jha is consistent with individual fundamental rights protected at the European level and the findings of certain national courts according to which the framework decision *infringe* fundamental rights as guaranteed at the national level, and, therefore, are inapplicable in the territory of that state. Ironically, the most difficult situation could be that of the national court which referred the case to the ECJ, *i.e.,* the Belgian *cour d'arbitrage,* because according to a well-established interpretation of the EC Treaty (the leading case in this matter is *International Chemical Corporation*, judgment of the ECJ of May 13, 1981, case 66/80, SPA International Chemical Corporation v. Amministrazione delle finanze dello stato, [1981] ECR 1191), the *cour d'arbitrage* is under a direct obligation to give effect to the judgment of the ECJ. Thus, a further review of the framework decision under the Belgian Constitution would seriously undermine the binding effect of the ECJ's judgment and also, in broader terms, the authority of the court.

27. THOUGHTS FROM A BRIDGE, *supra* note 5, at 24.

parts that the exercise of the powers conferred to the Community is not unfettered and that fundamental values and principles that correspond (at least by and large) to those of the national orders, are adequately guaranteed through the Community's constitutional process (for example, in the form of an adequate fundamental rights jurisprudence).

The inclination of the national courts to accept the supremacy of Community law in practice, while reserving their ultimate power to intervene if the Community clearly oversteps the limits of the powers bestowed upon it by the respective national constitution, has thus created an unusual situation. The competence of the central entity to settle low-intensity conflicts between EU law and national law is assigned to the ECJ, whereas the courts of the Member States maintain their ultimate competence to settle conflicts involving sensitive issues of sovereignty. In a sense, then, the European order is unitary at its base (i.e., with regard to the large majority of conflicts that are settled in an unequivocal fashion through the EU judicial organs), but it is pluralist at its top because it lacks a generally recognized supreme authority for settling issues of a fundamental character. To put it differently, the European order can be described as constitutional up to a certain level; but from that point upwards, it is still wedded to its internationalist origins.

B. The European Constitutional Framework and Institutional Pluralism

As an institutional matter, the constitutional framework created by the foundational Treaties presumes the autonomy of the European political process. It is primarily this autonomy that allows us to regard the EU as capable of developing its own policies, rather than regarding it as a mere agent expressing the common will of the Member States. However, the political system of the Community and (to an even greater degree) the political system of the Union in non-Community matters still hinge on the Member States, which are not only the main political actors but which also act as "collectors" of the representation and legitimacy of the system itself.

These observations provide a conceptual frame for the discussion of the democratic discourse within the EU. They are based on the implicit premise that the EU is an autonomous order that exercises political power, and that it is not an agent acting merely on behalf of its members. Yet the complexity of the Union's political system, and its considerable dependence on the actions of the Member States, make it illusory to conceive of democracy and legitimacy in the terms applicable to national legal orders. Empirical analyses demonstrate the great extent to which the institutional system of the EU is still dependent on the political and institutional systems of the Member

States, conceived as politically organized entities.[28] The Member States absorb much of the social and political actors' activity and of the representation of interests which, within modern liberal States, are commonly exercised by political parties. As a result, the political discourse continues to develop mainly at the Member State level and is then transmitted onward to the European level. One can thus distinguish two different phases: the first occurs at each Member State level, and concerns the establishment of the national stance vis-à-vis other Member States. In this phase, States tend to behave as unitary actors, along the traditional lines of foreign relations. It is in the subsequent phase that the various national stances interact not only among themselves but also with the position expressed by supranational actors, such as the Commission and the European Parliament. In this phase, the Member States have, generally speaking, traditionally been engaged in the defence of their national agendas while the supranational institutions tend to mainstream transnational and collective interests into the decision-making process.

The Community decision-making process thus has idiosyncratic features markedly different from those of modern liberal states. It is not based on stable political majorities, determining and imposing their own political direction. Decisions often result from shifting majorities in these institutions, and it is not uncommon for such decisions to be made on the basis of very broad majorities or even, within the Council of Ministers, on a unanimous vote. Moreover, national preferences tend to cut across political allegiances, such as party lines. Although there is a growing tendency to take decisions on the basis of majority voting, the predominant role reserved to interstate negotiation makes it unlikely for a State to be outnumbered and forced to accept decisions which momentously affect its interest without reckoning on some sort of counterbalancing compensation (often called "side payments"), in relation to seemingly unrelated decisions.

A further element that makes it very difficult to evaluate democracy and legitimacy within the EU political system is the fact that there is no unitary legislative procedure. Depending on the particular area of Union's competence, so-called "secondary law" is made according to a variety of procedures characterized by varying degrees of influence by the respective institutions. In some areas, decisions are arrived at purely through an intergovernmental method, i.e., on the basis of the unanimous consent of the Member States; in others, the

28. For this and other conclusions contained in the current section, I refer to the results of the research project: *Supranational Democracy. An Empirical Research on Legitimacy and Representation of Interests in the Practice of the EU Institutional System,* sponsored by the Italian Ministry of Education and carried out by a research unit established at the Institute of International and European Union Law of the University of Macerata (Italy). The (still tentative) results are available on the Institute's website at www.unimc.it/symposium.

procedure resembles a bicameral parliamentary system because it involves both the European Parliament, i.e., a body of directly elected representatives, and the Council, a body representing the Member State governments.

These diverse decision-making procedures are commonly classified according to the greater or smaller role assigned to the supranational vis-à-vis the intergovernmental dimension. This not only reflects the preponderant role of this dualism in the political system of the EU; it also tells us that there are fields in which the Member States are inclined to accept the possibility of being bound by decisions taken without their consent, whereas they tend to maintain strict control over others. In turn, the degree of propensity toward supranationalism depends on a variety of factors: the importance of the national interests at stake, the advantages of decision-making at the European level, the existence of constraints provided for in the treaties, and so on. This observation seems to lead toward the conclusion that, unlike classical states, the European political system is not based on a single legitimizing factor, such as the will of the people, but rather on a plurality of elements capable of bestowing legitimacy upon political decisions, each appropriate in its particular context ranging from unanimity among the Member States to the classical forms of parliamentary majorities.

Recognizing the complexity of the European decision-making process is a pre-condition for any serious debate about democracy in the European Union. Such an acknowledgment also fights the temptation to oversimplify the nature of the problem—unfortunately a very common tendency in the current debate—and to propose simplistic panaceas, such as enhancing the role of the European Parliament or, alternatively, that of the national parliaments. Either of these suggestions may well be appropriate in particular contexts, but it makes little sense to propose one or the other as a general remedy. All this shows that we need to avoid speaking of legitimacy and democracy in general terms and that we must address these issues in the concrete context of the various subject matter areas and procedures.[29]

The lack of a unitary decision-making procedure, due in part to the persistence of different stages of integration and in part to the varying roles of the Member States and of the EU institutions, is the source of another peculiarity of the European constitutional framework: the compartmentalization of secondary laws and the lack of in-

29. For a thorough discussion of the issue, see Stein, *International Integration and Democracy: No Love at First Sight,* 95 AM. J. INT'L L. 489, 530 (2001). *See also* THOUGHTS FROM A BRIDGE, *Democracy Without a People*, *supra* note 18, at 344: "One wonders whether this is the time to seek more democracy through radical proposals such as the adoption of a formal Union Constitution or the scheme for taking the procedure for further integration out of the hands of the national government."

terrelation among rules which have the same formal status. This is quite a novelty for lawyers accustomed to working with rules within national systems. Whereas in those systems it is commonly accepted that, for example, a statute containing environmental standards or regulations can repeal or amend a previous statute establishing standards or regulations concerning industrial processes, this is an infrequent, and even exceptional, occurrence in the context of the European law. In the European system, a rule adopted under a certain procedure, say, under the environmental competence, cannot as a rule be repealed or amended by a subsequent norm enacted under another competence and on the basis of a different decision-making procedure. The existence of a plurality of decision-making procedures, each assigned to a particular sphere of competence of the EU, thus tends to compartmentalize EU law into a potentially infinite range of normative sub-systems, each self-contained and thus (at least theoretically) separate from the rest.

C. *The Pluralism of the European Constitutional Framework and the Foreign Affairs Power*

Among the most complex and fascinating aspects of European integration is the EU's competence-sharing in the field of foreign relations. As noted above, this system is almost unique among contemporary federal systems. Unlike classical federalism models, attributing a foreign affairs power to the EU did not result in the Member States losing their international legal personalities, although they did lose many powers traditionally associated with such personalities, e.g., the competence to regulate trade with third states. Thus, the transfer of foreign affairs powers to the EU has, again, created a situation of power-sharing among a plurality of entities whose activities continuously interact. The resulting network of relationships is too complex and too *sui generis* to be easily explained in terms of our traditional conceptual frameworks.

As recalled above, it is to this set of issues that Eric Stein devoted what are perhaps his most valuable and original set of studies. They have become a staple, if not the starting point, for the scholarly debate of this topic. Among the many merits of Stein's analysis, his comprehensive approach to the foreign affairs power seems the most important. To my knowledge, his studies were the first ever to attempt to link the issue of the external relations of the European Community to that of the foreign policy of the European Union as part of a systematic study on the European foreign relations system. Even now, such an approach is rare because it has far-reaching implications and presents nearly intractable technical difficulties. These difficulties derive not only from the fact that a system of competence-sharing is highly exceptional in the field of foreign relations. They are

also exacerbated by the idiosyncrasy that, in the European context, the foreign affairs power is shared in a *dual* fashion. It is shared horizontally between the EU and the EC, the former having competence in the field of foreign policy and the latter in the area of economic integration; and it is shared vertically between the EU/EC (as a single unit) and the Member States, with the former enjoying the competence expressly or implicitly transferred by the Member States, and with the latter retaining a residual, and increasingly slender, share. Thus, in European federalism we can hardly speak of a unitary foreign relations power. Rather, the external sovereignty appears deeply fragmented and distributed according to powers and prerogatives possessed by various entities.

This "unnatural and inherently unstable separation of foreign economic policy and political policy," as Stein puts it,[30] creates a permanent state of imbalance. Yet, while it appears far from logical, it is not at all *random*. Rather, it is a consequence of the particular (and perhaps paradoxical) nature of European federalism, which tends to harmonize norms in politically less sensitive fields while reserving a leading role for the Member States—acting either individually or collectively under the Common Foreign and Security Policy (CFSP)—in areas of greater political sensitivity. The differences among the institutional and normative legal settings which govern, respectively, foreign economic and foreign political policy, thus reflect both the asymmetry in the development of European integration and the will of the Member States to maintain control over politically charged issues.

The existence of a plurality of units acting in the international arena under different legal regimes, principles, and values sharply contrasts with the unitary and orderly organization of the foreign affairs power in federal systems.[31] Still, even in Europe, the action of the various entities can be coordinated through informal arrangements. It seems that the Community enjoys a broad discretion, and the supranational institutions feel free to use the Community competence in order to pursue political goals, where there is a clearly discernible consensus among the Member States about foreign policy directions, for instance, in matters of human rights. Conversely, the supranational Community institutions seem to accept that the Member States will take the lead and act through the (more intergovernmental) EU foreign policy mechanisms in highly sensitive areas, where they perceive that the search for political consensus requires a

30. *Id.* at 306.
31. Stein & Henkin, *Toward a European Foreign Policy?, supra* note 15, at 197.

more or less intense process of bargaining among the Member States.[32]

Thus, the European foreign relations system relies not so much on hard rules, aimed at securing coherence through law, but rather on a flexible and multidimensional political approach, based primarily on a case-by-case search for compromise and the mutual consent of the various actors. This must seem unsatisfactory to those who maintain that European integration must entail the creation of a full-fledged sovereign entity which is capable of speaking with one voice and which enjoys full foreign relations powers vis-à-vis other sovereign nations. However, the unique nature of the European project leads to a more nuanced construction in which formerly fully sovereign entities, jealously attached to their international prerogatives, are now forced to cooperate (albeit to different degrees) in virtually every field of foreign relations.

III. LEGAL PLURALISM AND CONSTITUTION: TWO ANTITHETICAL CONCEPTS?

A. *Is it Possible to Harden the European Constitution? And is it Desirable?*

The European order, as it presently stands, is not the product of a theoretical mind. It is rather the practical consequence of the historical balance of power in the European arena and of its dynamic evolution. On one level, there is the central entity, i.e., the EU/EC, which tends to assert the autonomy of its political and normative system from those of its Member States; on the other level, there are the Member States, which constantly tend to downplay the consequences of having transferred power to the center and which seek to assert themselves as true sovereign players, although they act through the European institutional and normative processes.

In spite of its theoretical deficit, the "living Constitution" of Europe has proved to be a robust construction. Paradoxically, its uncertain legal nature allowed it to draw force from many pre-existing legal schemes, even though it has never fully matched them. Thus, the pluralism of the European framework is not a theoretically perfect model but rather the historical compromise of many competing visions of integration. The passage from a constitutional framework to a full-fledged *constitution* is, or can be perceived as, a dramatic abandonment of this heritage. After all, it is one of the historical functions of a constitution to secure the *unity* of the legal order that it

32. I tried fully to develop this conclusion in my study *Unity and Pluralism in the EU's Foreign Relations Power, in* FUNDAMENTALS OF EU LAW REVISITED: ASSESSING THE IMPACT OF THE CONSTITUTIONAL DEBATE, *supra* note 9.

establishes, at least conceivably at the expense of its pluralist features.

A superficial look at the Constitutional Treaty suggests that this was indeed the idea that inspired its drafters. Not only did the Constitutional Treaty include some symbols belonging more properly to state-like entities than to forms of international integration, such as the flag and the anthem. More importantly, it envisaged a newly designated "European Law" as an expression of the general will (Article I-33), and introduced a distinction (though not a very clear one) between "legislative" and "non-legislative" acts (Article I-35). It further established an "ordinary legislative procedure" based on the consent of the two "houses," i.e., the Council of Ministers representing the Member States, and the directly elected Parliament representing the people (Articles I-34 and III-396) and even a Minister for foreign affairs, whose precise role and powers, however, remained unclear. Moreover, the Treaty sought to establish a unitary set of fundamental values and principles through the incorporation of the Charter of Fundamental Rights (Part II of the text). It tended to present the EU as a unitary legal person (Article I-7) and to consolidate the various provisions which establish the currently fragmented European foreign power in order to vest the Union with a power of external action (title V of Part III). Finally, it incorporated a supremacy clause (Article I-6) granting—in somewhat ambiguous terms—to the "constitution and to the laws adopted by the institutions of the Union in exercising competences conferred on it [. . .] primacy over the law of the Member States."[33]

A thorough analysis of the "labyrinthal" text of the Constitutional Treaty, which incidentally includes a number of provisions "ill suited for primary law status,"[34] is beyond the scope of the present essay, and it is, indeed, not worthwhile at all. To be sure, a technical analysis of its provisions may well have revealed that many apparent changes were more formal than substantive, and that the entry into force of the Constitutional Treaty would in fact not have changed the pluralistic nature of the European order very significantly. A few ex-

33. The wording of the provision could suggest that the supremacy of EU law depends upon it being enacted within the scope of the competence assigned to it. However, this would make little sense and could have major practical drawbacks. European law enacted outside the sphere of EU/EC competence is not *inferior* law; it is simply law enacted *ultra vires*. One cannot properly assume that law enacted outside the scope of the competence assigned to the EU loses its priority over national law; *ultra vires* law is rather invalid for lack of a proper legal basis in the founding Treaty. To mix together these two distinct features of European law could engender the mistaken idea that every judge entitled to apply EU law over conflicting national law (as national judges must do) is equally entitled to ascertain whether it was enacted within the sphere of its competence. This would seriously undermine the principle of priority of EU law which art. I-6 was expressly designed to affirm.

34. Stein used both expressions in *Musing on Democracy in the Constitution for Europe, supra* note 17, at 73.

amples abundantly support this conclusion. The establishment of an ordinary legislative procedure would not have abolished the plethora of decision-making procedures, just as the distinction between legislative and non-legislative acts would not have entailed the establishment of a unitary system of legislative sources. The grouping in one single title ("the EU's external action") of the plethora of provisions concerning the foreign relations power, presently dispersed throughout the three founding Treaties, would not, alas, have brought about the invoked de-pillarisation of the Union's action and would certainly not have recast the unity of the foreign relations power. A superficial look at the provisions of the new treaty confirms that foreign policy and substantive policies would have been exercised on the basis of different procedures, with different acts and on the basis of a different set of judicial remedies.

Thus, the effect of the new treaty would not have entailed a revolutionary change of the legal balance on which the recent European model rests. However, it would have rewritten the present "living Constitution," based as it is on pluralism, in a different, unitary tone.[35] This is, in my view, the original sin of the Constitutional Treaty: the abandonment of the European constitutional tradition of Europe in favour of a different, more traditionally state-centered constitutionalism. The use of notions generally associated with the idea of a unitary legal order might have triggered the fear of a European super-state heralded by terms and symbols of a constitutional legal tradition. If the intent of the drafters was to use terminology in order ultimately to obtain a result that could not be reached politically, i.e., to set in motion a process of transformation of the European legal order toward a more unitary constitutional order, the defeat of the constitution, and the transposition of its main achievements in a

35. Constitutional symbols and terminology must have become a true obsession. Note that the European Council, in June 2007, made it clear that every expression which can even remotely suggest a process of constitutionalization of Europe must be eliminated, while maintaining many, albeit not all, of the substantive changes entailed by the constitutional treaty. See, *expressis verbis,* Annex I to the Presidency conclusions, point I.3, which reads:

> The *TEU* and the *Treaty on the Functioning of the Union* will not have a constitutional character. The terminology used throughout the Treaties will reflect this change: the term "Constitution" will not be used, the "Union Minister for Foreign Affairs" will be called High Representative of the Union for Foreign Affairs and Security Policy and the denominations "law" and "framework law" will be abandoned, the existing denominations "regulations," "directives" and "decisions" being retained. Likewise, there will be no article in the amended Treaties mentioning the symbols of the EU such as the flag, the anthem or the motto. Concerning the primacy of EU law, the IGC will adopt a Declaration recalling the existing case law of the EU Court of Justice.

(Emphasis in original.)

treaty deprived of constitutional character, is a striking example of Dante Alighieri's "law of *contrappasso.*"[36]

B. Post Scriptum. Constitutionalizing without Unifying? Some Overall Recommendations for the Reform Treaty

But is the idea of a constitution, tantalizing as it is, really inconsistent with the political and legal heritage of the EU? Is there no way to reach a compromise between the noble ideals underlying the essence of a constitutional text with the day-to-day practice of government of that complex and multifaceted entity? An attempt to answer this question falls well beyond the scope of the present contribution, *inter alia,* because it requires skills which exceed those of a legal scholar. The aim here is, rather, to reflect upon the uniqueness of the constitutional heritage of Europe and upon the inadvisability of giving it up in favor of a more traditional, *étatique* constitutional perspective which appears, in the present state of affairs, politically unwise and legally troublesome. The result of the analysis here is clear: the European constitutional framework *à la Stein,* which tends to represent a compromise between the basic requirement of constitutionalism and the institutional and political reality of Europe, is not merely an earlier stage of a more mature European federal constitution. Instead, we are dealing with two different processes, which in terms of their nature and results, are marked more by dissimilarities than by analogies. The idea that the European constitutional framework heralds the European federal State turns out to be unfounded.

I have also stressed that, from a legal viewpoint, the difference between the models of a constitutional framework on the one hand and a full-fledged constitution on the other, is neither one of degree nor one of terminology but rather of substance: pluralism versus unity. In other words, it seems to me that the very idea of a constitution is not inconsistent with the non-exclusive pluralistic experience of the European Union, conceived as an entity sharing power with its Member States and exerting on its own behalf some but not all of the prerogatives of a state-like entity. This consideration can provide the guiding principle for the worthwhile attempt to reconcile the unique features of European federalism with those features of democracy, re-

36. In his poem *La Divina Commedia*, written between 1307 and 1321, Dante made abundant use of *contrappasso*: Dante Alighieri's hell is, essentially, based on the law of *contrappasso*, a sort of reversed retributive proportionality by which the penalty in hell for the worldly sins of an individual is symbolically constituted by an amplification of the sinful conduct itself. *"Perch'io parti' così giunte persone, / partito porto il mio cerebro, lasso!, / dal suo principio ch'è in questo troncone. / Così s'osserva in me lo contrapasso."* ("Because I severed persons bound so closely, / I carry my brain separate (what grief!) / From its life-source which is within this trunk. / So see in me the counterstroke of justice.") (Inf. XXVIII, 139-42).

spect for the rule of law, transparency and efficiency, which must remain the cornerstones for every politically active legal structure. In other words, any attempt at reducing the inherent complexity of the European constitutionalism, or, put differently, any attempt to create a European Leviathan, seems both theoretically unsound and practically impossible. Still, there is much to be done in order to reconcile the process of European integration with a constitutional project. This seems to me the most important legacy of Eric Stein's model, which did not conceive of the constitutionalization of Europe as a revolutionary event, merging the political life of the Member States' legal orders into one, but rather as the patient search for the most viable solutions to practical problems. In that regard, it provides a vivid example of how one can create a sophisticated legal and political theory if one approaches the matter free from theoretical preconceptions.

In this perspective, it is to be hoped that these last tumultuous yet confused years have not wasted the opportunity to reform the process of integration. Indeed, the recent events leave one with the impression that the obsession with the formal constitutionalization of the European system obscured the need for a serious reform that the European order must undergo in order to live up to the challenges of integration, coming in particular from the enlargement to the Eastern European countries. If one gets rid of the many myths engendered by the constitutional project, one can turn now to such a reform.

Thus, much remains to be done. However, the present contribution is certainly not the place to proffer concrete recommendations to the Intergovernmental Conference, which has just received its mandate from the European Council. I will therefore limit myself to pointing to recent developments of judicial and institutional practice which suggest solutions to some of the present difficulties of integration—difficulties which were left unaddressed, or only partially addressed, by the Constitutional Treaty. One of the most characteristic and astonishing features of the process of European integration is its ability to find, through an empirical approach, solutions to the most intractable questions—where a theoretical approach would almost certainly have been doomed to failure.

The coordination among activities of the Union, which are presently dispersed among different institutional and normative frameworks (the three pillars of the Union), is a striking case in point. We have already seen in one of the previous sections how practice has attenuated the theoretically strict distinction between Community policies (first pillar) and foreign policy (second pillar). Looking at what has been achieved in practice can thus offer solutions which, when properly addressed through the political process,

can lead towards an acceptable compromise between the supranational inspiration of the Community's economic policies and the mainly intergovernmental regime that applies to foreign policy (which the Member States are certainly not ready to abandon).

A second example of how practice can illuminate the reform process comes from the recent case law of the ECJ, which tends to extend certain solutions already tried in the field of Community law (first pillar) to activities in the field of police and judicial cooperation in criminal matters (third pillar).[37] While respecting some of the characteristic features of this Union subsystem, and in particular the intergovernmental character still partly residing in the institutional system of the third pillar, the ECJ seems to be pursuing a path similar to the one which had led to the constitutionalization of Community law decades earlier. In this fashion, the court seems to bring a certain institutional homogeneity and unity to the divided system of the Union.[38]

The unreasonable fragmentation of the system of sources of law represents another striking example. We have seen how exceedingly rigid such a system can be. This is due to the combination of two elements: the strict application of the principle of conferral, which requires the Community to use enumerated powers for the pursuit of specified aims, and the fragmentation of the decision-making system, which assigns a specific decision-making procedure to each field of EC activity. This combination has produced the perverse effect of compartmentalizing community law into a potentially infinite array of normative sub-systems. It comes as no surprise, then, that this fragmentation has been the subject of countless scholarly contributions. However, as seen above, the solution finally adopted in the Constitutional Treaty (which was meant to operate only at the level of terminology) left the illness untreated. It is interesting to note, therefore, that the recent case law of the ECJ confronted with this compartmentalization, has in fact responded to the problem. It has moderated the perverse effects of this compartmentalization by permitting a (limited) interaction between rules enacted on different legal bases.

The lead taken here by the Court might well inspire a more comprehensive solution, which should take two directions simultaneously: the recognition of the Community as an entity empowered to

37. *See, in particular,* the judgment of the ECJ of June 16, 2005, Case C-105/03, *Criminal Proceedings against Maria Pupino,* [2005] ECR I-5285, and the two recent judgments of Feb. 27, 2007, Case C-355/04 P, *Segi et al. v. Council of the European Union,* and of May 3, 2007, Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad,* (not yet reported).

38. But see now the provision of arts. 64 & 65 of the draft reform treaty which aims at including the judicial and police cooperation in criminal matters in the treaty on the functioning of the union, thus envisaging a sort of communitarization of the third pillars.

use its competences interchangeably to achieve the aims assigned to it; and the establishment of a *unitary* decision-making system for the full range of the competences assigned to the Community. The combined effect of these measures should thus lead towards the establishment of a more or less unitary system of Community sources of law under which rules adopted according to different competences can inter-relate. Moreover, since particular acts would no longer be tied to particular competences under the Treaty, the efficiency and comprehensiveness of Community actions would be significantly enhanced.[39]

This is a typical example of the far-reaching constitutional implication of ECJ case law. At the same time, however, it is also a good example of the limits of such an approach. Indeed, as seen above, the establishment of a unitary system of sources, and the acknowledgement of the Community as an actor which can use freely its powers for achieving its aims, requires, as a pre-condition, a radical reform of the decision-making system and, therefore, a formal process of revision of the founding treaties.

* * *

These are only some of the areas in which the IGC's treaty reform efforts can be informed by actual practice in order to improve the constitutional efficiency of the Union legal order without unnecessarily sacrificing its pluralistic nature. While the focus on formal unity has prevented the Constitutional Treaty from curing some of the structural weaknesses of the European order, a more balanced approach is to be expected in relation to the Reform Treaty, along the lines proffered by the theorists who first noted the relevance of the silent judiciary revolution of the ECJ. Behind the scenes, judges and lawyers have never ceased to weave the web of a constitutional framework for the new Europe.

39. For further reference, see Enzo Cannizzaro, *Gerarchia e competenza nel sistema delle fonti dell'Unione europea*, *in* 10 IL DIRITTO DELL'UNIONE EUROPEA 651 (2005).