

ON “FEDERAL” GROUND: THE EUROPEAN UNION AS AN (INTER)NATIONAL PHENOMENON

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1. Introduction

Modern federal thought emerges in the wake of the Westphalian State system. In an attempt to make sense of the “Unions of States” that existed in the seventeenth century, classic international law originally conceived them in treaty terms. Federal unions are based on a *foedus* – an international treaty – that safeguards the sovereignty of its Member States. The emergence of the United States of America in the eighteenth century triggered a semantic revolution in the federal principle. Federalism became identified with a mixed structure situated “in between” international and national organization. Yet, when this second tradition crossed the Atlantic in the nineteenth century, Europe’s obsession with indivisible sovereignty pressed the federal idea into a national format. Within this third tradition, a federation becomes exclusively identified with a Federal State.¹

What kind of union is the European Union? Could it be described as a federal union? After a brief analysis of the history of European integration (section 2), this article analyses the European Union in light of the American and European “federal” tradition.² It will employ the inductive approach of American federal thought and examine the European Union along three

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1. For a detailed analysis of these three federal traditions, see Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, 2009, forthcoming), Ch. 1.

2. The following study will use the term “European Union” in its broadest sense, that is: as the all-embracing entity within which all European integration has taken place. Thus, even if much of the constitutional consolidation of Europe has taken place within the European *Community* – that is, the first of the three pillars – the article will refer to the constitutional evolution of the European Union *writ large*. This is a pure linguistic convention. It should not be taken to imply that the European Union and the European Communities *presently* form one legal entity, but simply acknowledges a semantic evolution in the last decade. This evolution would become official under the Lisbon Treaty as the latter would merge the “European Community” (First Pillar) and the “European Union” (Second and Third Pillar) into one entity: the (Lisbon) European Union, cf. Art. 47 TEU Lisbon and Art. 1(2) of the Treaty on the Functioning of the European Union (TFEU).

dimensions: a foundational, an institutional and a functional dimension. Each dimension is viewed in light of its “international” or “national” nature; and the Union will be found to occupy federal “middle ground” (section 3). This inductive approach will be contrasted with the deductive approach of European federal thought. Europe’s “statist” tradition has insisted on the indivisibility of sovereignty. The European Union is thereby pressed into a conceptual duality: the Union is either an *international* organization or a *national* federation. But since the legal and social reality of European integration would not fit this classificatory dichotomy, European constitutionalism escaped into the belief that the European Union was *sui generis*. Not only would the *sui generis* “theory” perpetuate the national format of the federal principle, it would collapse in moments of constitutional crisis. In these moments, the European tradition resumes its statist beliefs and leads to three constitutional denials: the European Union is said to have no people, no constitution, nor a constitutionalism (section 4). Today, Europe’s statist tradition is under siege as European constitutionalism has gradually come to acknowledge the idea of the European Union as a “federation of States” (section 5).

2. The “supranational” Europe: A (very) brief history

The various efforts at European cooperation after the Second World War formed part of the general transition from an international law of coexistence to an international law of cooperation.³ “Europe was beginning to get organized...”⁴ Four European organizations emerged in the years 1948 and 1949: the Western European Union, the Organization for European Economic Co-Operation, the North Atlantic Treaty Organization and the Council of Europe. However, a “new” approach to international cooperation in Europe occurred with a fifth international organization founded in 1951: the European Coal and Steel Community (ECSC). The Treaty of Paris had set up the first European Community.⁵ Its original members were six European States: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. The Community had been created to *integrate* an important industrial sector – coal and steel. The very concept of *integration* was to indicate the wish of the

3. Friedmann, *The Changing Structure of International Law* (Stevens, 1964).

4. Robertson, *European Institutions: Co-Operation, Integration, Unification* (Stevens, 1973), p. 17.

5. For a detailed discussion of the negotiations leading up to the signature of the ECSC Treaty, see Mosler, “Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl”, 14 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1951), 1.

contracting States to break with the ordinary forms of international treaties and organisations.⁶

In what ways was the European Coal and Steel Community a novel legal phenomenon? The coal and steel industry had been placed under the auspices of a “supranational” body – the High Authority.⁷ It could carry out its tasks through the adoption of “decisions”, which would be “binding in their entirety”.⁸ The directly effective nature of ECSC law led early commentators to presume an “inherent supremacy of Community law”.⁹ The new character of the European Coal and Steel Community – its “break” with the ordinary forms of international organizations – lay in the normative quality of its secondary law.¹⁰ Piercing the dualist veil of classic international law, Community law did not require a “validating” national transformation before it could become bind-

6. *Ibid.*, 24 (translation – RS): “The contracting parties sought to leave the ground of international relations. They aspired a closer community, which would burst the formal bonds of international treaties and institutions.”

7. On the birth of the term “supranational”, see in particular: Reuter, “Le Plan Schuman”, 81 *Recueil des Cours de l’Académie de la Haye* (1952), 519, at 543: “Au cours des négociations sur le Traité on vit apparaître spontanément comme une chose allant de soi le terme de “supranational”. Le succès de cette expression, plutôt nouvelle dans la langue française, fut considérable”. We find a reference to the “supranationality” of the Coal and Steel Community in Art. 9(5) ECSC: “The members of the High Authority shall, in the general interest of the Community, be completely independent in the performance of their duties. In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body. They shall refrain from any action incompatible with the *supranational character* of their duties.” Art. 9 ECSC was repealed by the Merger Treaty and replaced by the new Art. 10 ECSC. The latter made no reference to the “supranational” character of the Community. The Merger Treaty also replaced the name “High Authority” with the “European Commission”.

8. Art. 14(2) ECSC.

9. Cf. Bebr, “The Relation of the European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis”, 58 *Colum. L. Rev.* (1958), 767, at 788 (emphasis added): “The supremacy of the Community law is sometimes asserted on the traditional ground of the supremacy of international law. Undeniably the European Coal and Steel Community Treaty is an international Treaty concluded among the several Member States. However, any attempt to assimilate the Treaty with traditional international treaties beclouds the true nature of the Treaty. *The fact that Community law can be enforced directly demonstrates the inherent supremacy of the Community law better than any analogy to traditional international treaties which do not penetrate so deeply into national legal systems.*”

10. In addition to binding secondary law, the ECSC Treaty also envisaged directly effective Treaty articles. Art. 65 ECSC prohibited anticompetitive agreements, which where – unless authorized by the High Authority – “automatically void” (para 5). In Joined Cases 7 & 9/54, *Groupement des Industries Sidérurgiques Luxembourgeoises v. High Authority of the Coal and Steel Community*, [1956] ECR 175, the Court also found Art. 4 ECSC directly effective. Art. 4 ECSC “recognized as incompatible with the common market for coal and steel” and therefore as “abolished and prohibited within the Community, as provided in this Treaty”, *inter alia*, discriminatory measures. The Court ruled that “[t]he provisions of Article 4 are sufficient of themselves and are directly applicable when they are not restated in any part of the Treaty” (*ibid.*, 195).

ing on individuals. The Member States were thus deprived of a “normative veto” at the borders of their national legal orders. The transfer of decision-making powers to the Community represented a transfer of “sovereign” powers.¹¹ While the Community lacked *physical* powers,¹² it was the strong *normative* quality of its powers that would be identified with its “supranational” character.¹³

However, this was only one dimension of the Community’s “supranationalism”. Under the Treaty of Paris, the organ endowed with supranational powers was itself “supranational” – that is: independent of the will of the Member States. The High Authority was composed of independent “bureaucrats” and could act by a majority of its members.¹⁴ While the High Authority was not the only organ of the European Coal and Steel Community, it was its *central* decision-maker. It was, after all, the High Authority (subsequently renamed: the “Commission”) that was charged with ensuring that the objectives of the Treaty would be attained.¹⁵ To carry out this task, the *High Authority* would adopt decisions, recommendations and opinions.¹⁶ The ability of the Community to bind Member States against their will departed from the “international” idea of respecting their sovereign equality through unanimity voting. And indeed, it was *this* decisional dimension that had originally inspired the very

11. Reuter, *op. cit. supra* note 7, at 543.

12. According to Art. 86 ECSC, the Member States undertook “to take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations resulting from decisions or recommendations of the institutions of the Community and to facilitate the performance of the Community’s tasks”. For pecuniary decisions adopted by the High Authority, Art. 92(2) ECSC expressly stipulated as follows: “Enforcement in the territory of Member States shall be carried out by means of the legal procedure in force in each State, after the order for enforcement in the form in use in the State in whose territory the decision is to be enforced has been appended to the decision, without other formality than verification of the authenticity of the decision. This formality shall be carried out at the instance of a Minister designated for this purpose by each of the Governments.” The same was true for judgments of the Court of Justice, *cf.* Art. 44 ECSC.

13. *Cf.* Robertson, “Legal problems of European integration”, 91 *Recueil des Cours de l’Académie de la Haye* (1957), 105, at 143–145.

14. Art. 13 ECSC (repealed by the Merger Treaty and replaced by Art. 17 ESCS).

15. Art. 8 ECSC.

16. Art. 14 ECSC. Community acts were thus considered to be acts of the High Authority – even if other Community organs had been involved in the decision-making process. Under the Paris Treaty, the Council’s task was primarily that of “harmonizing the action of the High Authority and that of the governments, which are responsible for the general economic policy of their countries” (Art. 26 ECSC). The Council was seen as a “political safeguard” to coordinate activities that fell into the scope of the ECSC with those economic sectors that had not been brought into the Community sphere, *cf.* Mosler, *op. cit. supra* note 5, at 41. For an analysis of the powers of the Council under the ECSC, *cf.* Jaenicke, “Die Europäische Gemeinschaft für Kohle und Stahl (Montan-Union): Struktur und Funktionen ihrer Organe”, 14 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) (1951), 727, at 757–761.

notion of supranationalism.¹⁷ Early analysis consequently linked the concept of supranationality to the decision-making mode of the Community. Finer analytical minds even distinguished between “supranational powers”, “limited supranational powers” and “State powers preserved”, depending on the procedural balance between the High Authority and the Council.¹⁸

The legal formula behind the European Coal and Steel Community was thus dual: the absence of a normative veto in the national legal orders was complemented by the absence of a decisional veto in the Community legal order. It was this *dual* independence of the European Community from the will of its Member States that would eventually be associated with supranationalism.¹⁹

It was this legal formula that European federalists soon tried to export into wider fields. The European Coal and Steel Community had only been “a first step in the federation of Europe”,²⁰ and the six Member States soon tried to expand the supranational sphere to the area of defence. The Treaty instituting the European Defence Community (EDC) provided for a European army under the command of a supranational institution.²¹ Yet, this Community was still-born as the French rejected its ratification in 1954. The failure equally stopped the embryonic European Political Community (EPC).²² With the idea of *political* integration discredited, European integrationists now returned to the

17. On the composition of the High Authority, see *supra* note 7.

18. Bebr, “The European Coal and Steel Community: A political and legal innovation”, 63 *Yale L.J.* (1953–4), 1, at 20–4 defining “supranational powers” as those “exercised by the High Authority” alone, “limited supranational powers” as those acts for which “the Authority needs the concurrence of the Council of Ministers” – qualified or unanimous. Powers reserved to the States were identified with the Council’s exclusive competences, that is, where the Treaty required a unanimous decision of the Council without any involvement of the High Authority.

19. Cf. Mason, *The European Coal and Steel Community: Experiment in Supranationalism* (Martinus Nijhoff, 1955), pp. 34–5; as well as Jaenicke, “Der übernationale Charakter der Europäischen Wirtschaftsgemeinschaft”, 19 *ZaöRV* (1958), 153.

20. “Schuman Declaration” of 9 May 1950, available at europa.eu/abc/symbols/9-may/decl_en.htm.

21. On the history and structure of the European Defence Community, see Bebr, “The European Defence Community and the Western European Union: An agonizing dilemma”, 7 *Stan. L. Rev.* (1954–5), 169.

22. Art. 1 of the Draft Treaty establishing the European Political Community characterized the proposal in the following terms: “The present Treaty sets up a European Community of a supranational character. The Community is founded upon a union of peoples and States, upon respect for their personality and upon equal rights and duties for all. It shall be indissoluble.” The European Political Community had been designed to amalgamate the European Coal and Steel Community together with the European Defence Community into a new institutional structure (cf. Art. 5 EPC). This institutional design had been identified with the federal idea (cf. Art. 38(1) (c) EPC). The proposed European Parliament would have consisted of two Houses – the House of the Peoples and the Senate – and would have been the principal law-making organ of the European (Political) Community. For an analysis of the EPC, see Robertson, “The European Political Community”, 29 *British Yearbook of International Law* (1952), 383.

“functionalist” philosophy of economic integration.²³ The fruits of this strategy were the European Atomic Energy Community and the European (Economic) Community. The latter was the broadest attempt at European integration thus far. “[B]y establishing a common market and progressively approximating the economic policies of Member States”, the European Economic Community was to “lay the foundations of an ever closer union among the peoples of Europe”.²⁴

The new European Community (EC) carefully avoided all references to the concept of “supranationalism”.²⁵ Had it thus abandoned the dual formula behind the European Coal and Steel Community? Early doubts on its supranational nature were not confined to semantics. The enormously enlarged scope for European integration had required a high price: the return to a more international format of decision-making. While the European Community established similar institutions to those of the European Coal and Steel Community, the balance among them had significantly changed. Emblematically, the EC Treaty now charged the Council – and not the Commission – with the task “[t]o ensure that the objectives set out in this Treaty are attained”.²⁶ Instead of the “supranational” Commission, it was the “international” Council that operated as the central decision-maker.²⁷ The Council was composed of “a representative of each Member State”,²⁸ and, “[t]his traditional method of international representation is, of course, devoid of supranational characteristics.”²⁹

Decisional supranationalism could still be seen at work, when the Council acted by (qualified) majority. But what distinguished the unanimously acting Council from an “ordinary” international organization?³⁰ The Rome Treaty

23. In the words of Paul H. Spaak: “After the [EDC] venture it was not reasonable to repeat exactly the same experiment a few months later. A means must be found of reaching the same goal – that distant goal of an integrated Europe – by other methods and through other channels. We then considered that, having failed on the political plane, we should take up the question on the economic plane and use the so-called functional method, availing ourselves to some extent – although, of course, without drawing any strict parallels – of the admittedly successful experiment already made with the European Coal and Steel Community.” Cf. Address to the Assembly, 21 Oct. 1955, quoted in Robertson, *op. cit. supra* note 4, at p. 26.

24. Art. 2 EEC.

25. Efron and Nanes, “The Common Market and Euratom Treaties: Supranationality and the integration of Europe”, 6 *ICLQ* (1957), 670, at 682.

26. Art. 202 EC.

27. Cf. Robertson, *op. cit. supra* note 4, at pp. 159–60: “Indeed, it was the reluctance of governments in subsequent years to accept anything in the nature of the supranational which produced the result that powers of the Commission of the EEC were less extensive than those of the High Authority.”

28. Art. 203 EC.

29. Efron and Nanes, *op. cit. supra* note 25, at 675.

30. During the first two stages of a transitional period – stipulated in Art. 8 EEC – unanimous decisions would remain the rule; e.g. Art. 43(2) EEC: “The Council shall, on a proposal from the

answered this question by an institutional innovation: it tied the decision-making of the “international” Council to proposals by the “supranational” Commission. A “supranational” element in European law-making would thus be preserved in the prerogative of the Commission to initiate and formulate Community bills. This institutional novelty would henceforth be identified as the quintessence of the “Community method”.

While the decline of decisional supranationalism had cast a shadow over the supranational quality of the European Community, what about the normative dimension of supranationalism? Like its predecessor, the European Community would enjoy autonomous powers. The EC Treaty acknowledged two “supranational” instruments in Article 249 EC. The Community could act upon individuals through legislative “regulations” or executive “decisions” and these norms would be directly applicable within the national legal orders. Moreover, the supremacy of Community law was articulated as a constitutional principle of the European Community:

“By contrast with ordinary international treaties, the E[C] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

Commission and after consulting the Assembly, acting unanimously during the first two stages and by a qualified majority thereafter, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make.” However, the transition from unanimity to (qualified) majority voting was to take much longer. The (in)famous Luxembourg Compromise would allow States to insist on their veto power in the Council. Even after the demise of the Luxembourg Compromise (cf. Teasdale, “The life and death of the Luxembourg Compromise”, 31 *JCMS* (1993), 567), decision-making in the Community was still informed by “consensus” politics. In the 1990s the Council practice was thus described in the following terms: “Let me say it again: the wishes and concerns of delegations in the minority on a given issue will not be brutally overridden, as long as they are willing to negotiate constructively. There is no tyranny of the majority within the Council, because majorities are ephemeral: experienced ministers and officials know it will be their turn before long to rely on colleagues’ understanding. The ethos of the institution remains consensual.” Cf. Dashwood, “States in the European Union”, 23 *EL Rev.* (1998), 201, at 206. However, with qualified majority voting having – formally – become the constitutional norm, the decision-making context had, in the brilliant phrase by Weiler, moved from the “shadow of the veto” to the “shadow of the vote” (Weiler, “The transformation of Europe” in *id.* *The Constitution of Europe* (CUP, 1999), p. 72).

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty ... *It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.*³¹

But if the EC Treaty contrasted with “ordinary international treaties” because it had set up a government endowed with “real powers stemming from a limitation of sovereignty or a transfer of powers from the States”, what kind of legal object was the European Community? The question has troubled international and national lawyers ever since the early days of European integration.³² Its importance has increased with the evolution of the European project and its maturation in the form of the European Union. With the spread of majority voting in the Council, the rise of the European Parliament to become co-legislator, and the widening of the European Union’s powers, the question has become fundamental.

From the very beginning, the European Community was said to constitute “the highest form of international integration”.³³ But would it go *beyond* the frontiers of international law? While born with the genetic code of international law, the social reality of the European Community would soon pose serious conceptual problems. “Community law was established on the most advanced frontiers of the law of peaceful cooperation” and the principles of solidarity and integration had even taken it “to the boundaries of federalism”.³⁴ But was the Community inside those federal boundaries or outside them? Was it “in between” international and national law? Was the Community a federal union, or even a Federal State in the making?

The following two sections contrast two intellectual approaches to these questions. From the perspective of (early) American constitutional thought,

31. Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR 585, at pp. 593–4 (emphasis added).

32. For a critical evaluation of the early classificatory attempts, see Hay, *Federalism and Supranational Organisations* (University of Illinois Press, 1966), p. 74.

33. Schwarzenberger, *The Frontiers of International Law* (Stevens, 1962), p. 280.

34. Pescatore, “International law and Community Law – A Comparative Analysis”, 7 CML Rev. (1970), 167, at 182.

the European Union is a “federal” Union. The federal label is – ironically – denied by Europe’s own intellectual tradition. In identifying federation with Federal State, the European Union is – ultimately – classified as an international phenomenon.

3. The European Union in the light of the American federal tradition

The “American” federal tradition was established by *The Federalist*.³⁵ Defending the legitimacy of the 1787 Constitution, its thirty-ninth paper analysed the “international” or “national” character of the new legal order. The former referred to a structure recognizing the sovereign equality of States; the latter stood for the constitutional structure within a unitary State. Refusing to concentrate on the metaphysics of sovereignty, three analytical dimensions are singled out, which – for convenience – may be called: the foundational, the institutional and the substantive dimension. The first relates to the origin and character of the new constitution; the second concerns the composition of its government; while the third deals with the scope and nature of the federal government’s powers.

First, as regards the *foundational* dimension, the 1787 Constitution was an “international” act. What did this mean? It meant that the Constitution would be ratified “by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong”. The “*unanimous* assent of the several States” that decide to become parties to it was required. “Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act.”³⁶

Second, in relation to the *institutional* dimension, the legislature of the new Union was composed of two branches. The House of Representatives was elected by all the people of America as individuals and therefore was the “national” branch of the central government. The Senate, on the other hand, would represent the States as “political and coequal societies”; and in respecting their sovereign equality, the Senate was viewed as an “international” organ. Because every law required the concurrence of both houses, the overall structure of the central government thus had “a mixed character, presenting at least as many [international] as *national* features”.³⁷

35. Cf. Hamilton, Madison, and Jay, *The Federalist* (Cambridge University Press, 2003). In the following quotes from *The Federalist* I replace the term “federal” with “international” as this was the meaning of the term “federal” at the end of the 18th century. For an analysis of the “classic” tradition of the federal principle, see Schütze, op. cit. *supra* note 1.

36. *Ibid.*, pp. 184–5.

37. Hamilton, Madison, and Jay, op. cit. *supra* note 35, p. 185.

Finally, in terms of governmental functions, the following picture emerged. “[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects”. However, the nature of the powers of the central government was “national” in character, since they did not “operate on the political bodies composing the Confederacy, in their political capacities” but “on the individual citizens composing the nation, in their individual capacities”.³⁸

In the light of these three constitutional dimensions, the overall constitutional arrangement under the 1787 Constitution was found “in strictness, neither a national nor a[n] [international] Constitution, *but a composition of both*”.³⁹ The central government was a “mixed government”.⁴⁰ It stood on “middle ground”.⁴¹ The “more perfect Union” conceived in 1787 was found to lie “in between” an international and a national organizational structure. And it was this *mixed* character that would, in the future, be identified with the federal principle.⁴² Federalism was here defined as a hybrid: an (inter)national phenomenon.

What light will this tradition shed on the nature of the European Union? Within the classic period of European law, the European Community was described as a hybrid placed “between international and municipal law”.⁴³

38. Ibid. In *The Federalist* No. 15, Hamilton states (ibid., p. 67): “The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends.” And in the words of the same author in *The Federalist* No. 16 (ibid., p. 74): “It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the courts of justice.”

39. Ibid., p. 187.

40. *The Federalist* No. 40 – Title.

41. Letter of Madison to Washington of 16 April 1787, available at www.constitution.org/jm/jm.htm: “Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty; and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.”

42. On Alexis de Tocqueville’s discussion of the “middle ground” quality of the 1787 U.S. Constitution, see Schütze, op. cit. *supra* note 1; as well as Wheare, *Federal Government* (Oxford University Press, 1953), pp. 11–12: “since the United States is universally regarded as an example of federal government, it justifies us in describing the principle, which distinguishes it so markedly and so significantly, as the *federal principle*”.

43. Sasse, “The Common Market: Between international and municipal law”, 75 *Yale L.J.* 695. (1965–6). See also Hay, “The contribution of the European Communities to international law”, 59 *Proceedings of the American Society of International Law* (1965), 195, at 199: “The

“The Community is a new structure in the marches between internal and international law.”⁴⁴ It “is neither an international Confederation, nor a Federal State”. “It simultaneously combines characteristics from both types of State relations and thus forms a *mixtum compositum*.”⁴⁵ How would this mixed format express itself? What were the European Union’s “international” and “national” features?⁴⁶ Leaving the metaphysical question of sovereignty suspended, we shall investigate the nature and structure of the European Union along three dimensions: a foundational (3.1), an institutional (3.2.) and a functional (3.3.) dimension. Each dimension will be evaluated in terms of its international or national characteristics. This inductive approach will lead us to classify the European Union as a “federal” Union (3.4.).

3.1. *The foundational dimension: Europe’s “constitutional treaty”*

The European Community was conceived as an international organization. Its birth certificate is an international treaty. Its formation was “international” – just like the American Union. However, unlike the latter, the European treaties have been ratified by the national *legislatures* – not the national peoples – of its Member States. Genetically, they were legislative – not constitutional – treaties.⁴⁷

contribution of the Communities for legal science is the breaking-up of the rigid dichotomy of national and international law.”

44. Van Raalte, “The Treaty constituting the European Coal and Steel Community”, 1 ICLQ (1952), 73, at 74.

45. Constantinesco, *Das Recht der Europäischen Gemeinschaften* (Nomos, 1977), p. 332 (translation – RS).

46. The terms “international” and “national” will be used as analytical terms. The former refers to a voluntary and horizontal structure recognizing the sovereign equality of the States; the latter stands for the hierarchical and vertical structure within a unitary State. Even if the notion of “unitary” is less charged with symbolic connotations, this section will use the term “national” to facilitate a comparison with Madison’s discussion of the mixed structure of the American Union.

47. It is difficult – if not impossible – to accept that “the founding treaties as well as each amendment agreed upon by the governments appear as the *direct* expression of the common will of the [national] peoples of the Union”; *contra* Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, 36 CML Rev. (1999), 703, at 717 (emphasis added). National ratifications are – with the exception of Ireland – only *indirect* expressions of the common will of the national peoples of the Union. National consent is typically expressed through national legislatures. It is equally difficult to agree that these national ratifications should be regarded “as a *common* exercise of constitution-making power by the peoples of the participating State” (*ibid.*, 717) (emphasis added). This theory does not explain how each *unilateral* national act ultimately transforms itself into a collective act (*Gesamtakt*). On the German legal concept of “*Gesamtakt*”, see Köck, *Der Gesamtakt in der deutschen Integrationslehre* (Duncker & Humblot, 1978).

Would this (legislative) “treaty” origin categorically rule out the idea of a European “constitution”? This is not a matter of logical necessity.⁴⁸ And as soon as we accept that the status of a legal norm depends on the function a society gives it, it is hard to deny that the European treaties have been – socially – elevated to a constitutional status. They have evolved into a “Treaty-Constitution”.⁴⁹ The Court has insisted on the normative “autonomy” of the European legal order and this “originality hypothesis” severed the umbilical cord with the international legal order.⁵⁰

This emancipation manifested itself in the following legal facts. First, in contrast to the normative regime governing international treaties, the Court of Justice insisted on the “unilateral” nature of European law: a Member State could not invoke the breach of the EC Treaty by another Member State to justify a derogation from its own obligations under European law.⁵¹

Second, the Court insisted on the supremacy of Community law over all national law, including national constitutional law.⁵² This contrasts with classic international law doctrine of which the supremacy doctrine forms no part.⁵³

48. On this point, see Kelsen as analysed in Schütze, *op. cit. supra* note 1 at pp. 36–38.

49. Stein uses the compound “Treaty-Constitution”, cf. “Toward Supremacy of Treaty-Constitution by judicial Fiat: On the margin of the Costa case”, 63 *Mich. L. Rev.* (1964–5), 491.

50. The ECJ’s positions discussed in this section have gradually, albeit with some limits, been accepted by national judiciaries and national societies in general. For an overview of this “social” development, see Alter, *Establishing the Supremacy of European Law* (OUP, 2001).

51. Cf. Case 90-91/63, *Commission v. Luxembourg and Belgium*, [1964] ECR 625 and Case 52/75, *Commission v. Italy*, [1976] ECR 277.

52. Cf. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

53. Some legal scholars refer to the “supremacy” of international law *vis-à-vis* national law, cf. Morgenstern, “Judicial practice and the supremacy of international law”, 27 *British Yearbook of International Law* (1950), 42. However, the concept of supremacy is here used in an imprecise way. Legal supremacy stands for the priority of one norm over another. For this, two norms must form part of the same legal order. However, classic international law is based on the sovereignty of States and the latter implies a dualist relation with national law. The dualist veil protected national laws from being overridden by norms adopted by such “supranational” authorities as the Catholic Church or the Holy Roman Empire. (When a State opens up to international law, this “monistic” stance is a national choice. International law as such does not impose monism on States. On the contrary, in clearly distinguishing between international and national law, it is based on a dualist philosophy.) How, then, can one claim that one of the “foundational principles of international law” is “the general principle of supremacy of treaties over conflicting domestic law, even domestic constitutional law” (Weiler, “Federalism without Constitutionalism: Europe’s Sonderweg” in Nikolaidis and Howse (Eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, 2001), p. 54, at p. 55)? Reference to the international law doctrine *pacta sunt servanda* will hardly help. The fact that a State cannot invoke its internal law to justify a breach of international obligations is not supremacy. Behind the doctrine of *pacta sunt servanda* stands the concept of legal responsibility: a State cannot – without legal responsibility – escape its international obligations. The duality of internal

However, the absolute supremacy of European law has not been accepted by all Member States. In parallel with a *European* perspective, there co-exists a *national* perspective on the supremacy issue.⁵⁴ The national perspective insists on placing the fundamental structures and values of national constitutional orders beyond the reach of European supremacy.⁵⁵ Where European law trespasses on the very identity of a national constitutional order, the latter would oppose it. But will the existence of a national perspective on the supremacy of European law rule out the “constitutional” or “federal” character of the European Union? This is not the case. While the existence of a *dual* perspective on the supremacy issue may be interpreted in the light of a theory of “constitutional pluralism”,⁵⁶ the normative ambivalence surrounding supremacy and sovereignty can better be viewed as part and parcel of the European Union’s *federal* nature. The “suspension” of the supremacy question in the European Union is the very proof of the *political* co-existence of two political bodies and thus evidence of Europe’s living federalism. The theory of constitutional pluralism thus speaks federal prose, without – as Molière’s Monsieur Jourdain – being aware of it.

and international law is thereby maintained: the former cannot affect the latter (as the latter cannot affect the former).

54. For a brief overview of the jurisprudence of national Supreme Courts, see Craig and de Búrca, *EU Law: Text Cases and Materials* (OUP, 2008), pp. 353 et seq. – “The Second Dimension: Supremacy of Community Law from the Perspective of the Member States”. For a longer overview, see Oppenheimer, *The Relationship between European Community Law and National Law: The Cases* (CUP, 1994 and 2003).

55. Let us concentrate on the German legal order to illustrate this point. In 1974, the German Constitutional Court conceded the supremacy of Community law over some national constitutional provisions, but denied the legal effect of “any amendment of the Treaty which would destroy the identity of the valid constitutional structure of the Federal Republic of Germany by encroaching on the structures which go to make it up” (*Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel (Solange I)*, BVerfGE 37, 271, para 43). These judicially asserted constitutional limitations have been codified in Art. 23(1) Grundgesetz. The paragraph reads: “The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.” Art. 79(3) GG deals with the substantive constitutional limits on the amendment of the German Constitution and states: “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible”.

56. The “pluralist position” claims “that there is no objective basis – no Archimedean point – from which one claim can be viewed as more authentic than the other, or superior to the other within a single hierarchy of norms”. “Rather the claims of the Member States and the claims of the EU to ultimate authority within the European legal order are equally plausible in their own terms and in their own perspective.” Cf. Walker, “Sovereignty and differentiated integration in the European Union”, 4 *ELJ* (1998), 355, at 361–2.

Third, in establishing a direct link with individuals, Europe's constitutional order recognized from the very start an incipient form of European citizenship.⁵⁷ The latter was to be expressly acknowledged with the official introduction of a "citizenship of the Union" in the Maastricht Treaty. According to Article 17 EC "[e]very person holding the nationality of a Member State shall be a citizen of the Union". In accord with federal theory, every European will thus be a citizen of two political orders: the "[c]itizenship of the Union shall complement and not replace national citizenship". Equally in line with federal theory, Union citizenship has a horizontal and a vertical dimension: it forces Member States to horizontally extend *national* rights to citizens of other States; while it vertically grants *European* political and civil rights in relation to the European Union.⁵⁸

To conclude: in the eyes of the European Court and the majority of European scholars, the normative force of European law derives no longer from the normative foundations of international law. The ultimate normative base within the European Union – its "originality hypothesis" or "*Grundnorm*" – is the Rome Treaty as such. "[T]he EC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on a rule of law..."⁵⁹ While "international" in formation, the European treaties have *assumed* "national" characteristics.

This "national" semi-nature is not put into question by the "international" nature of the amendment process. In contrast to the American Union, the amendment of the European Union's constitution is *not* a mixed act. Treaty amendment requires the ratification of all the Member States according to their respective national constitutional requirements.⁶⁰ But whereas the Member States – in the collective plural – remain the "Masters of the Treaties";

57. For the opposite view, see Ipsen, *Europäisches Gemeinschaftsrecht* (J.C.B. Mohr, 1972), p. 251.

58. For a brilliant analysis of the two dimensions of "federal citizenship", see Schönberger, "European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism", 19 *European Review of Public Law* (2007), 61, at 79.

59. Opinion 1/91, [1991] ECR 6079, para 21. See also: Case 294/83, *Les Verts v. Parliament*, [1986] ECR 1339, para 23: "basic constitutional charter".

60. Cf. Art. 48 TEU: "The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded. If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements." On the scope and role of the provision in the European legal order, see Schütze, *op. cit. supra* note 1, Ch. 3 – Section I.

individual Member States have lost their “competence-competence”.⁶¹ Legally, Member States are no longer competent *unilaterally* to determine the limits of their own competences themselves.⁶² And: the European legal order has also blocked the avenues to *multilaterally* modifying the EC Treaty outside the official amendment procedure by successfully subordinating the legal regime for subsequently concluded agreements between Member States to the supremacy of European law.⁶³

3.2. *The institutional dimension: A European Union of States and people(s)*

How are we to analyse the institutional dimensions of the European Union? Its principal law-making organs are the Commission, the Council and the European Parliament. How should we characterize each of them along the international versus national spectrum; and what will this tell us about the nature of the European legislator?

In terms of its composition, the Commission is like a “national” organ: once appointed, the Commissioners are to act “in the general interest of the Community” and should be “completely independent in the performance of their duties”.⁶⁴ The Commission is chosen by the Member States and the European Parliament in a procedure that is partly international and partly “national”.⁶⁵ It acts by the majority of its members,⁶⁶ and this decision-making mode follows a “national” formula.

61. Ipsen, “Europäische Verfassung – Nationale Verfassung”, 22 *EuR* (1987), 195, at 202 (translation – RS): “By entering into the Community, the States themselves limited their competence-competence.”

62. Von Bogdandy and Bast, “The European Union’s vertical order of competences: The current law and proposals for its reform”, 39 *CML Rev.* (2002), 227, at 237: “[T]he individual Member State has forfeited its right to determine its own competences (*Kompetenz-Kompetenz*) insofar as it is not permitted to extend its powers *unilaterally* to the detriment of the Union. While the Member States acting jointly as the Contracting Parties may amend the Treaties, transferring powers back to the Member States, they are bound by the procedures provided for in Article 48 TEU.”

63. On this point, see Schütze, “EC Law and International Agreements of the Member States – An Ambivalent Relationship?”, 9 *Cambridge Yearbook of European Legal Studies* (2006–7), 387.

64. Art. 213(2) EC.

65. The Council, meeting in the composition of Heads of State or Government and acting by a qualified majority will nominate a President of the Commission. The nomination has to be approved by the European Parliament. A list of Commissioners will then be proposed “in accordance with the proposals by each Member State”. But “the Commission thus nominated shall be subject as a body to a vote of approval by the European Parliament”. Only after this approval by the European Parliament, the Commission “shall be appointed by the Council, acting by a qualified majority” (Art. 214 EC).

66. Art. 219 EC.

In terms of its composition, the Council is an “international” organ: “The Council shall consist of a representative of each Member State at ministerial level, authorized to commit the government of that Member State.”⁶⁷ Each national minister thus represents “its” State government; and where decision-making is by unanimity, the sovereign equality of the Member States is respected. Yet, the EC Treaty also envisaged procedures that would break with the international idea of sovereign equality. The EC Treaty permitted the Community to act by a (qualified) majority of States; and where a qualified majority suffices, the Member States have weighed votes depending – roughly – on the size of their populations.⁶⁸ Strictly speaking, the Council will thus not represent the Member *States* – a notion that implies their sovereign *equality* – but the national *peoples*.⁶⁹ To act by qualified majority, the Council needs a “triple majority”: a majority of the *States* must obtain a majority of votes from the *national peoples*; and the votes must represent a majority of the *European people*.⁷⁰ Formally, then, decision-making within the Council is neither completely international nor completely national, but a combination of both. It stands on federal middle ground.

The composition of the European Parliament has changed over time. Originally, it was an assembly of “representatives of the *peoples of the States* brought together in the Community”.⁷¹ This designation was adequate as long as the Parliament consisted of “delegates who shall be designated by the respective Parliaments from among their members in accordance with the procedure laid down by each Member State”.⁷² However, the structure of the Parliament

67. Art. 203 EC.

68. Art. 205 EC.

69. For a similar conclusion albeit from a different perspective: Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot, 2001), pp. 563 and 566.

70. Art. 205 EC stipulates that for a qualified majority the Council must have “at least 255 votes in favour cast by a majority of the members” (para 1). In addition, any member of the Council is allowed to request verification “that the Member States constituting the qualified majority represent at least 62% of the total population of the Union” (para 3). “If that condition is shown not to have been met, the decision in question shall not be adopted.” The Lisbon Treaty would replace the triple majority system with a double majority system. Art. 16(4) (reformed) TEU stipulates that “a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union”. The Lisbon Treaty would thus get rid of weighed votes (after a transitional period).

71. Art. 137 EEC (emphasis added). France preferred this symbolic formulation. And to safeguard the indivisibility of the French Republic guaranteed under Art. 1 of the 1958 French Constitution, the idea of a “representative mandate” was also rejected by the Constitutional Council in its 1977 decision on the 1976 European Parliament Election Act. On this point, see Jacqué, “La Souveraineté française et l’élection du Parlement Européen au suffrage universel direct” in Bleckmann and Ress (Eds.), *Souveränitätsverständnis in den Europäischen Gemeinschaften* (Nomos, 1980), p. 71, at pp. 76–7.

72. Art. 138 EEC.

dramatically changed with the introduction of direct elections.⁷³ While there remain “international” elements, its composition steadily evolved towards the “national” pole. Today, the European Parliament *directly* represents – even if in a distorted way – a European people.⁷⁴ The anachronistic characterization in Article 189 EC of Parliamentarians as “representatives of the peoples of the States brought together in the Community” is thus misleading.⁷⁵ The European Parliament no longer represents the national *peoples* in their collective capacities, but a – constitutionally posited – European people. Its legal existence precedes its political essence.⁷⁶ Socially, the European *demos* will “constitute

73. Direct elections were introduced by Decision 76/787, O.J. 1976, L 278/1 relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage. The “decision” represented an international agreement between all the Member States and required “adoption in accordance with their respective constitutional requirements”. The Act stated that “[t]he representatives in the Assembly of the peoples of the States brought together in the Community shall be elected by direct universal suffrage” (Art. 1). Representatives would be elected for a term of five years (Art. 3). Art. 4(1) would require independence: “Representatives shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.” For an overview and a commentary of the provisions of the Act, cf. Paulin and Forman, “L’élection du Parlement Européen au suffrage universel direct”, 12 CDE (2006–7), 506.

74. To this day, the EC Treaty allocates a – neither equal nor proportional – number of parliamentary mandates to the Member States and there is still no uniform European electoral procedure. The aim of establishing a uniform electoral procedure has been as old as the Community itself. Pending such a uniform European election law, Decision 76/787 provided in its Art. 7(2) that “the electoral procedure shall be governed in each Member State by its national provisions”. However, Arts. 9 and 11–12 of the Act had already established a minimum core. Moreover, since 1976 a number of developments have taken place. First, the EC Treaty now provides under Art. 19(2) EC that “every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State”. Second, since 2004, European Parliamentarians must not be a Member of a national Parliament (the application of this rule is delayed for certain Member States). Most importantly, in 2005, the European Parliament was given a single statute for its Members (cf. Decision 2005/684, O.J. 2005, L 262/1). This will enter into force in 2009. According to its Art. 2, European Parliamentarians “shall be free and independent”. Art. 3 insists that “Members shall vote on an individual and personal basis” and “shall not be bound by any instructions and shall not receive a binding mandate.” Parliamentarians will be paid out of the Community budget (Art. 23).

75. The ambiguous formulation in Art. 189 EC would change under the Lisbon Treaty. Art. 10 TEU Lisbon states in its second para (emphasis added): “Citizens are *directly* represented at Union level in the European Parliament.” See also: Art. 14(2): “The European Parliament shall be composed of representatives of the Union’s citizens.”

76. In the words of Habermas: “The ethical-political self-understanding of citizens in a democratic community must not be taken as a historical-cultural *a priori* that makes democratic will-formation possible, but rather as flowing contents of a circulatory progress that is generated through the legal institutionalization of citizens’ communication. This is precisely how national identities were formed in modern Europe. Therefore it is to be expected that the political institutions to be created by a European constitution would have an inducing effect.” Cf. Habermas, “Remarks on Dieter Grimm’s ‘Does Europe need a Constitution?’”, 1 ELJ (1995), 303, at 306.

itself as a political unit through the very process of representation”.⁷⁷ And the Parliament’s “national” composition is also reflected in its decision-making mode, which is majority voting.⁷⁸

Having analysed the composition and operating mode of each institution, what is the nature of the European legislature? Depending on the legislative procedure applicable, there are a number of European legislators.⁷⁹ The Commission will generally be charged with the formulation of a legislative proposal. However, where the Council operates on the basis of unanimity, the legislative procedure will still be predominantly of an “international” nature: after all each State guards its sovereign equality in the form of a decisional veto. According to the now dominant co-decision procedure, on the other hand, the Council decides by a qualified majority and the European Parliament acts as “co-legislator”.⁸⁰ The European legislature is here “bicameral” and this constitutional structure “reflects a subtle federal balance”: “Legislation comes into being through majority voting in the two houses of the legislature and only after the approval by both of them. One house represents the people in their capacity as citizens of the Union, the other house represents the component entities of the federation, the Member States, and – through them the people in their capacity as citizens of the Member States.”⁸¹ The European Union’s prevailing legislature is consequently a combination of “international” and “national” elements. While the Parliament represents a – constitutionally posited – European people, the Council represents the Member States. This institutional arrangement reflects the *dual* basis of democratic legitimacy in the European Union.⁸²

77. Grabitz, “Der Verfassungsstaat in der Gemeinschaft”, (1977) DVBL, 786, at 793. And referring to the French intellectual tradition, Peters finds that “we can already discern a European ‘demos’, at least *in statu nascendi*”, cf. Peters, “European Democracy after the 2003 Convention”, 41 CML Rev. (2004), 37, at 72.

78. Art. 198 EC: “Save as otherwise provided in this Treaty, the European Parliament shall act by an absolute majority of the votes cast.”

79. On this point, see Schütze, “The European Community’s Federal Order of Competences: A Retrospective Analysis” in Dougan and Currie (Eds.), *Fifty Years of the European Treaties: Looking back and Thinking Forward* (Hart, 2009), p. 63, at p. 70.

80. Cf. Dashwood, “Community legislative procedures in the era of the Treaty on European Union”, 19 EL Rev. (1994), 343, at 362–3: “The “product” of the procedure is an act adopted jointly by the European Parliament and the Council – in contrast to that of the consultation or co-operation procedures, which is simply an act of the Council. ... [T]he acts in question shall be signed by both the President of the European Parliament and the President of the Council, symbolising in the most concrete way possible the joint character of such acts.”

81. Lenaerts, “Federalism: Essential concepts in evolution – the Case of the European Union”, 21 Fordham Int’l L.J. (1998), 746, at 763.

82. For a discussion of this dual legitimacy in the context of democratic theory, see section 4.3. *infra*.

3.3. *The functional dimension: The division of powers in Europe*

What about the allocation of the functions of government? What kind of powers does the European Union enjoy? Within the internal sphere, the European Union clearly enjoys significant economic and political powers. This is equally the case in the external sphere.⁸³ However, the European Union's powers remain enumerated powers. Its scope of government is "incomplete". The reach of its powers is *not* national – that is: sovereign – in scope.

But what is the nature of the European Union's powers? When it was born, the Treaty of Rome envisaged two instruments with direct effect on individuals. Regulations were to have direct and general application in all Member States.⁸⁴ Decisions allowed the Community to adopt directly effective measures addressed to particular persons.⁸⁵ In making regulations and decisions directly applicable in domestic legal orders, the EC Treaty thus recognized two "national" instruments – one legislative, the other executive. The European Community also possessed an "international" instrument: the directive. In order to operate on individuals, the European command would need to be incorporated by the States. However, through a series of courageous rulings, the European Court of Justice partly transformed the directive's morphology by injecting "national" elements.⁸⁶ Today, directives can have vertical direct effects within national legal orders. However, in refusing to grant them horizontal direct effect, the Court has insisted on an "international" remnant. Directives thus combine "international" and "national" features. They are a form of "incomplete legislation" and thus symbolically represent "federal" middle ground.

What about the European Union's *executive* powers? While the European Community has established its own enforcement machinery in some sectors,⁸⁷ the direct administration of European legislation has remained an exception – even if the Community has enlarged its executive presence in recent years.⁸⁸ Indirect Community administration still characterizes a European federation that continues to largely rely on its Member States to apply and implement

83. On the scope of the European Community's internal and external powers, see Schütze, *op. cit. supra* note 1, Chs. 3 and 6.

84. Art. 249(2) EC.

85. Art. 249(4) EC.

86. On the instrumental format of directives, see Schütze, "The morphology of legislative power in the European Community: Legal instruments and the federal division of power", 25 *YEL* (2006), 91, at 118–129.

87. For EC competition law, see Regulation 17/62, O.J. 1962, L 13/204, Spec. Ed 87 and Regulation 1/2003, O.J. 2003, L 1/1.

88. For the increasing role of European agencies in the direct implementation of European law, cf. Chiti, "The emergence of a Community administration", 37 *CML Rev.* (2000), 309.

Community law.⁸⁹ The decentralized application of European law is effected through the supremacy principle: all organs of a Member State's administration – executive *and* judicial – must disapply conflicting national law in every individual case before them. Supremacy and pre-emption thus primarily concern the executive application of European law.⁹⁰ Unlike contemporary American federal doctrine,⁹¹ European federalism imposes an obligation on national administrations to implement European law. Thus, although national administrations are – from an institutional perspective – not integrated into the European administrative machinery; national administrations operate – from a functional perspective – as a decentralized European administration. However, there is an important caveat. The obligation to execute European law is on the Member States as “corporate” entities. Where a national administration refuses to give effect to European law, the only road open for the European Union to enforce its laws is to bring an action before the European Court of Justice. In the execution of its legislative choices, European law thus still “largely follows the logic of State responsibility in public international law”.⁹²

3.4. Overall classification: *The European Union on federal middle ground*

In the light of these three dimensions, how should we classify the European Union? Its formation was clearly international and its amendment still is. However, its international birth should not prejudice against the “federal” or “constitutional” status of the EC Treaty. Was not the 1787 American *Federation* the result of an international act?⁹³ And had not the 1949 German *Constitution* been ratified by the State legislatures?⁹⁴ The fact remains that the European legal order has adopted the “originality hypothesis” and cut the umbilical cord with the international legal order. The Treaty *as such* – not international law – is posited at the origin of European law. Functionally, then, the European

89. Cf. Lenaerts, “Regulating the Regulatory Process: ‘Delegation of Powers’ in the European Community”, 18 *EL Rev.* (1993), 23, at 27.

90. Cf. Ipsen, *op. cit. supra* note 57, at 288 (translation – RS): “The supremacy principle operates exclusively at the *executive* stage (through the judge or other executive organs like the administration), and *not* already at the legislative stage in the Member State.”

91. On the “no-commandeering rule” in US federalism, cf. Halberstam, “Comparative federalism and the issue of commandeering” in Nikolaidis and Howse, *op. cit. supra* note 53, at p. 213.

92. Kadelbach, “European administrative law and the law of a Europeanized administration” in Joerges and Dehousse (Eds.), *Good Governance in Europe's integrated Market* (OUP, 2002), p. 167, at p. 176.

93. Cf. Madison, *The Federalist* No. 39, *op. cit. supra* note 35, at pp. 184–5.

94. Art. 144(1) GG reads (emphasis added): “This Basic Law shall require ratification by the *Parliaments* of two thirds of the German *Länder* in which it is initially to apply.”

Union is based on a “constitutional treaty” that assumes and stands on federal middle ground. The same conclusion was reached when analysing the European institutions. The Community’s dominant legislative procedure strikes a federal balance between “international” and “national” elements. And while the scope of its powers is limited, the nature of these powers is predominately “national”. Overall then, the legal structure of the European Union is – in analogy to the American Union before the Civil War – “in strictness, neither a national nor a[n] [international] Constitution, *but a composition of both*”.⁹⁵

4. The European Union in the light of the European federal tradition

Historically, European constitutionalism has insisted on the indivisibility of sovereignty.⁹⁶ The European federal tradition therefore focuses on the locus of sovereignty. Where States form a union but retain their sovereignty, the object thereby created is an international organization (confederation) regulated by international law. By contrast, where States transfer sovereignty to the centre, a new State emerges. Within this State – a Federal State if powers are territorially divided – all legal relationships are now regulated by national law. (Con)federalism is here conceived in “statist” terms. The *absolute* idea of sovereignty operates as a prism that blinds out all *relative* nuances within a mixed or compound legal structure. The result is a conceptual polarization into two idealized categories: *either* a Union of States was a “Confederation of States” or it was a “Federal State”.

How did European federal thought define an (international) “confederation”? A (confederal) union was said to have been formed on the basis of an ordinary international treaty. Because it was an international treaty, the States had retained sovereignty and, therewith, the right to nullification and secession. “Nullification and secession, absolutely prohibited within a unitary or Federal State, follow logically from the nature of the Confederation as a

95. Madison, *The Federalist* No. 39, op. cit. *supra* note 35, at p. 187.

96. One British, one French and one German “representative” will suffice to support this point; cf. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982), p. 3: “Parliament is, under the British Constitution, an absolutely sovereign legislature”; Carré de Malberg, *Contribution à la Théorie Générale de l’État* (Dalloz, 2003 – originally published: 1920), pp. 139–40: “La souveraineté est entière ou elle cesse de se concevoir. Parler de souveraineté restreinte, relative ou divisée, c’est commettre une contradiction in adjecto ... Il n’est donc pas possible d’admettre dans l’État fédéral un partage de la souveraineté...”; and Laband, *Das Staatsrecht des Deutschen Reiches* (Scientia, 1964 – originally published: 1911), p. 73: “die Souveränität eine Eigenschaft absoluten Charakters ist, die keine Steigerung und keine Verminderung zuläßt”.

treaty creature. A sovereign State cannot be bound unconditionally and permanently.”⁹⁷

The Federal State was regarded as a *State*; and, as such, it was sovereign – even if national unification had remained “incomplete”. Because the Federal State was as sovereign as a unitary State, constitutional differences between the two States needed to be downplayed to superficial “marks” of sovereignty. For example: if in a Federal State powers are divided between the Federal State and its Member States, how could the Federal State be said to be sovereign? The European answer to this question was that all powers were ultimately derived from the Federal State, since it enjoyed “competence-competence” (*Kompetenz-Kompetenz*).⁹⁸ This idea translated the unitary concept of sovereignty into a federal context: “Whatever the actual distribution of competences, the Federal State retains its character as a sovereign State; and, as such, it potentially contains within itself all sovereign powers, even those whose autonomous exercise has been delegated to the Member States.”⁹⁹ In the final analysis, the national tradition of the federal principle thus equated the Federal State with a decentralized unitary State.¹⁰⁰ Federalism was a purely “national” phenomenon.

Thus, while American federalism accepted gradations on the spectrum between an international union and a unitary State,¹⁰¹ semantic fluidity was unacceptable to European conceptual legal science (*Begriffsjurisprudenz*).¹⁰² European federal thought adopted a deductive approach, in which conceptual definition would precede and prevail over empirical legal analysis. Mixed features were aberrations, if not imaginations, and had to be “interpreted away”.

European federal thought would apply this conceptual apparatus to an analysis of European integration. But since these categories could not explain the

97. Jellinek, *Die Lehre von den Staatenverbindungen* (Keip, 1996 – originally published: 1882), p. 175 (translation – RS).

98. One of the best discussions of the concept of *Kompetenz-Kompetenz* can be found in Hänel, *Deutsches Staatsrecht* (Duncker & Humblot, 1892), pp. 771–806.

99. Jellinek, op. cit. *supra* note 97, at pp. 290–1 (translation – RS).

100. Triepel, *Unitarismus und Föderalismus im Deutschen Reiche* (Mohr, 1907), p. 81.

101. The 1777 and the 1787 American constitutional structures entailed a mixture of “international” and “national” elements. Madison readily admitted this in *The Federalist* No. 40, op. cit. *supra* note 35, at p. 191: “The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation. The misfortune under the latter system has been, that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it, and to require a degree of enlargement which gives to the new system the aspect of an entire transformation of the old.”

102. The instance on “sharp” categories would allow no gradations between “Confederation” and “Federal State”; and once sovereignty was the selected criterion, all conceptual nuances and semantic fluidity could be eliminated from the discussion on federal Union. Cf. Jellinek, op. cit. *supra* note 97, at p. 173.

social and legal reality of European law, Europe's quest to describe the middle ground between "international" and "national" law would soon be answered by a novel concept – supranationalism. The European Community was said to be a *sui generis* legal phenomenon.¹⁰³ It was incomparable for "it cannot be fitted into traditional categories of international or constitutional law".¹⁰⁴

Was the European Union really a species without a genus? There are serious problems with the *sui generis* argument. First of all, it lacks explanatory value for it is based on a conceptual tautology.¹⁰⁵ Worse, the *sui generis* theory "not only fails to analyse but in fact asserts that no analysis is possible or worthwhile, it is in fact an 'unsatisfying shrug'".¹⁰⁶ Secondly, it only views the Union in *negative* terms – it is *neither* international organization *nor* Federal State – and thus indirectly perpetuates the conceptual foundations of the European tradition.¹⁰⁷ Thirdly, in not providing any external standard, the *sui generis* formula cannot detect, let alone measure, the European Union's evolution. Thus, even where the European Community lost some of its "supranational" features – as occurred in the transition from the ECSC to the EEC – *both* would be described as *sui generis*. But worst of all, the *sui generis* "theory" is historically unfounded. All previously existing Unions of States lay between international and national law.¹⁰⁸ More concretely: the power to adopt legislative norms binding on individuals – this acclaimed *sui generis* feature of the European Union – cannot be the basis of its claim to specificity.¹⁰⁹ The same lack of "uniqueness" holds true for other normative or institutional features of the European Union.¹¹⁰ And even if one sees Europe's *Sonderweg* – yet another way of celebrating the *sui generis* idea – in "the combination of a

103. Hallstein would use the term, but then add that "this would not contradict it being the seed of an incipient federation" and "[e]very federation is *sui generis*"; cf. Hallstein, *Die Europäische Gemeinschaft* (Econ, 1973), p. 365 (translation- RS).

104. Mason, *op. cit. supra* note 19, at p. 126.

105. Hay, *op. cit. supra* note 32, p. at 37: "It should be clear, however, that the term has neither analytic value of its own nor does it add in analysis: the characterization of the Communities as supranational and of their law as 'supranational law' still says nothing about the nature of that law in relation either to national legal systems or to international law."

106. *Ibid.*, p. 44.

107. For this brilliant point, see Schönberger, "Die Europäische Union als Bund: Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas", 129 AÖR (2004), 81, at 83.

108. Westerkamp, *Staatenbund und Bundesstaat: Untersuchungen über die Praxis und das Recht der modernen Bünde* (Brockhaus, 1892).

109. Schönberger, *op. cit. supra* note 107, at 93.

110. To give one more illustration: Europe's supremacy principle is, in its structure, not unique. The Canadian doctrine of "federal paramountcy" also requires only the "disapplication" and not the "invalidation" of conflicting provincial laws; cf. *Smith v. The Queen*, [1960] S.C.R. 776.

‘confederal’ institutional arrangement and a ‘federal’ legal arrangement”,¹¹¹ this may not be too special after all.¹¹²

In any event, the *sui generis* “theory” only provides a tranquilizing *non liquet* in times of constitutional peace. It will not prevent classificatory wars in times of constitutional conflict. Whenever the “sovereignty question” is posed, Europe’s “statist” tradition returns from the depths of a subconscious past. This section will analyse the classificatory war in the wake of the signing of the Treaty on European Union (4.1). The Maastricht battle has structured the European legal debate for more than a decade.¹¹³ In such times of constitutional conflict, Europe’s federal tradition offers only a polarized and idealized alternative: the European Union is either an international organization (confederation) or a Federal State. And because the Union is not a State, it must be an international organization.¹¹⁴ This would, in turn, lead to three constitutional denials: the European Union could have no people, no constitution, and no constitutionalism (4.2.).

4.1. *Posing the sovereignty question: The “Maastricht Decision”*

The ratification of the Maastricht Treaty was *the* constitutional moment when the symbolic weight of European integration entered into the collective consciousness of European society. The ensuing legal debate crystallized into national constitutional reviews on the nature of European integration. The most controversial and celebrated review was the “Maastricht Decision” of the German Constitutional Court.¹¹⁵ The German Supreme Court posed the sovereignty question. Its central contestation was this: Europe’s present *social* structure sets limits to the *constitutional* structure of the European Union. As long as there was no European equivalent to national peoples, there would be an absolute legal limit to European integration. In this moment of constitutional conflict, European federal thought was forced to reveal its deeper intellectual structure.

111. Weiler, *op. cit. supra* note 53, at p. 58.

112. Cf. Pescatore, *The Law of Integration: Emergence of a new Phenomenon in International Relations, based on the Experience of the European Communities* (Sijthoff, 1974), p. 58.

113. Baquero-Cruz, “The legacy of the Maastricht-Urteil and the pluralist movement”, 14 *ELJ* (2008), 389.

114. For this thesis, see only Wyatt, “New legal order, or old”, 7 *EL Rev.* (1982), 147; Schilling, “The autonomy of the Community legal order”, 37 *Harv. Int’l L. J.* (1996), 389; as well as Pellet, “Les Fondements Juridiques Internationaux du Droit Communautaire”, 5 *Collected Courses of the Academy of European Law* (1994), 211.

115. *Brunner et al. v. The European Union Treaty (Maastricht Decision)*, BVerfGE 89, 155 (1993), translated in [1994] 1 *CMLR* 57.

How did the German Supreme Court derive national limits to European integration? The Court based its reasoning on the democratic principle – the cornerstone of modern constitutional thought. How could European laws be legitimized from a democratic point of view? Two options existed. First, European laws could be regarded as legitimized – directly or indirectly – through national democracy. Second, they could be legitimized by the existence of a European democracy. As regards the first option, national democracy could only be *directly* safeguarded through unanimity voting in the Council. However, the rise of majority voting in the Council increasingly allowed the European Union to adopt legislation against the will of the German people.¹¹⁶ European integration thus imposed formidable limits on the effectiveness of *national* democracy. Yet, majority voting was necessary for European integration;¹¹⁷ and this had been recognized by Germany's choice to transfer sovereign powers to the European level. The situation in which a Member State was outvoted in the Council could thus still be *indirectly* legitimized by reference to the national decision to open up to European integration. (That argument works only where the national decision is of a constitutional nature – as in the case of Art. 23 of the German Basic Law.) But even this decision was subject to the fundamental boundaries set by the national Constitution.¹¹⁸

How did the Court assess the second option – legitimation through a European democratic structure? The Court readily admitted that “with the building-up of the functions and powers of the Community, it becomes increasingly necessary to allow the democratic legitimation and influence provided by way of national parliaments *to be accompanied* by a representation of the peoples of the Member States through a European Parliament as the source of a *supplementary* democratic support for the policies of the European Union”. Formal progress in this direction was made by the establishment of European citizenship. The latter created a legal bond between the European Union and its subjects, which “although it does not have a tightness comparable to the common nationality of a single State, provides a legally binding expression of the degree of *de facto* community already in existence”.¹¹⁹ But would this *constitutional* structure correspond to Europe's *social* structure? The existing democratic structure of the European Community would only work under certain social or

116. *Ibid.*, 78

117. *Ibid.*, 86: “Unanimity as a *universal* requirement would inevitably set the wills of the particular States above that of the Community of States itself and would put the very structure of such a community in doubt.”

118. Art. 79(3) GG states: “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”

119. *Maastricht Decision*, cited *supra* note 115, at 86.

“pre-legal” conditions. And these social pre-conditions for constitutional democracy did not (yet) exist in Europe.¹²⁰

The very purpose behind the European Union was to realize a “Union of States” as “an ever closer union of the peoples of Europe (organized as States) and not a State based on the people of one European nation”.¹²¹ The European Union was never to become a (Federal) State. And from this negation, the German Court drew its dramatic and (in)famous conclusions. First, the Union would need to recognize that the primary source of democratic legitimacy for European laws had remained the *national peoples*. Second, all legal authority of the European Union derived thus from the Member States. Third, European laws could consequently “only have effects within the German sovereign sphere by virtue of the German instruction that its law is applied”. European norms required a national “bridge” over which to enter into the domestic legal order.¹²² Fourth, where a European law went beyond this national scope, it

120. Let us quote the contested para 41 (id., at 87) in full: “Democracy, if it is not to remain a merely formal principle of accountability, is dependent on the presence of certain pre-legal conditions, such as a continuous free debate between opposing social forces, interests and ideas, in which political goals also become clarified and change course and out of which comes a public opinion which forms the beginnings of political intentions. That also entails that the decision-making processes of the organs exercising sovereign powers and the various political objectives pursued can be generally perceived and understood, and therefore that the citizen entitled to vote can communicate in his own language with the sovereign authority to which he is subject. Such factual conditions, in so far as they do not yet exist, can develop in the course of time within the institutional framework of the European Union. ... Parties, associations, the press and broadcasting organs are both a medium as well as a factor of this process, out of which a European public opinion may come into being...”

The idea that no political system can operate without a broad consensus on the purposes of government by members of the polity is generally accepted. Only in passing did the German Constitutional Court seemingly define the substantive preconditions of democracy by a relative “spiritual ..., social ... and political” homogeneity of a people (id., at 88). The reference to Heller was designed to express – opposing Schmitt – the Court’s belief in the necessity of a common set of civic values (!) as the basis of parliamentarianism, cf. Ipsen, “Zehn Glossen zum Maastricht Urteil”, 29 EuR (1994), 1, at 6. There is no trace in the judgment of an insistence on racial or ethnic homogeneity. Suggestions to the contrary, describing the German Court’s position as one of “organic ethno-culturalism” and as a “worldview which ultimately informs ethnic cleansing”, cf. Weiler, “Does Europe need a Constitution: Demos, Telos and the German Maastricht Decision”, 1 ELJ (1995), 219, at 251–2 are uninformed and unfair. Ironically, much of what Weiler pronounces to be “his” civic theory of social and political commitment to shared values (ibid., 253) is what we read in the German Constitutional Court’s judgment.

121. *Maastricht Decision*, cited *supra* note 115, at 89 (emphasis added). The Court continues the theme a little later (ibid.): “In any event the establishment of a ‘United States of Europe’, in a way comparable to that in which the United States of America became a state, is not at present intended.” Incidentally, the German Supreme Court did – superficially – acknowledge the *sui generis* characteristics of the EU by inventing a new term for the EU – the *Staatenverbund*.

122. On the bridge metaphor, cf. Schmid, “From Pont d’Avignon to Ponte Vecchio: The resolution of constitutional conflicts between the European Union and the Member States through principles of public international law”, 18 YEL (1998), 415.

could have no effects in the national legal order. Fifth, the ultimate arbiter of that question would be national Supreme Courts.

In conclusion, each Member State had remained a master of the treaties. Each of them had preserved “the quality as a sovereign State in its own right and the status of sovereign equality with other States within the meaning of Article 2(1) of the United Nations Charter”.¹²³ European law was international law.¹²⁴

4.2. *Europe’s statist tradition unearthed: Three constitutional denials*

The constitutional conflict over the Treaty on European Union had awoken old spirits: Europe’s statist tradition. The reactions to the Maastricht challenge were manifold and ranged from the placid and guided to the aggressive and misguided.¹²⁵ But underneath superficial differences, much of the ensuing constitutional debate would not escape the conceptual heritage of Europe’s federal tradition. The latent presence of the latter manifested itself in a series of three “constitutional denials”: the European Union was said to have *no* people, *no* constitution, and *no* constitutionalism. These denials derived from a deep-seated belief in the indivisibility of sovereignty. Because sovereignty could not be divided, it had to be in the possession of *either* the Union *or* the Member States; that is, *either* a European people *or* the national peoples. Depending on the locus of sovereignty, the Union would be based *either* on a (national) constitution *or* an (international) treaty. And even if the Union was based on a constitutional treaty, the lack of a “constitutional *demos*” denied it a constitutionalism of its own.

Let us look at the underlying philosophical rationale for each of these denials, before subjecting each to constructive criticism.

Will a people – the “constituency” for constitutional politics – precede its polity, or be a product of it? This question has received different philosophical and constitutional answers. To some, the “people” will emerge only through subjection to a common sovereign.¹²⁶ To others, the “people” will precede the

123. *Maastricht Decision*, cited *supra* note 115, at 91.

124. Cf. Pernice, *op. cit. supra* note 47, at 711 referring to the “internationalist” view of the Court that “treats Community law as any other rule of international law”.

125. For a moderate and informed analysis in English, see Everling, “The Maastricht Judgment of the German Federal Constitutional Court and its significance for the development of the European Union”, 14 YEL (1994), 1. For the opposite, see Weiler, *op. cit. supra* note 120.

126. Cf. Hobbes, *Leviathan* (CUP, 1996), pp. 114 and 120: “A Multitude of men, are made *One* Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that Maketh the Person *One*. . . . This done, the Multitude so united in one Person, is called a Common-wealth, or in latine Civitas. This is the generation of that great

State for it is they who invest the government with its powers.¹²⁷ Most early modern European States were “supra-national” in character in that they housed multiple “nations” under one governmental roof.¹²⁸ However, with the rise of nationalism in the nineteenth century States would come to be identified by their nation.¹²⁹ Multiple nations within one State came to be seen as an anomaly. This anomalous status was equally attached to the idea of “dual citizenship”: an individual should only be part of one political body.¹³⁰ (National) peoples thus came to be seen as mutually exclusive. Transposed to the context of the European Union, this meant that a European people could not exist alongside national peoples. (And European citizenship could not exist alongside national citizenship.) Both peoples would exclude – not complement – each other; and as long as national peoples exist, as they do, a European people could not.

This brings us to the second denial: the absence of a European constitution. Under the doctrine of popular sovereignty, only a “people” can formally “constitute” itself into a legal sovereign. A constitution is regarded as a unilateral act of the “*pouvoir constituant*”.¹³¹ Thus, “it is inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people, in which they attribute political capacity to themselves”.¹³² This normative – or better: democratic – notion of constitutionalism is said to have emerged with the American and French Revolution and to have, since then, become the *exclusive* meaning of the concept.¹³³ “There is no such source for

Leviathan, or rather (to speak more reverently) of that *Mortall God*, to which we owe under the *Immortal God*, our peace and defence.” I am grateful to Quentin Skinner for shedding much light on this passage.

127. The theory of popular sovereignty will typically distinguish between a “people” (nation), on the one hand, and a “subject” (citizen) on the other. The former refers to a *community* characterized by an emotion of solidarity that gives the group consciousness and identity. The latter refers to an *individual’s* legal relation to its State. On these issues, cf. Salmond, “Citizenship and allegiance”, 17 L.Q. Rev. (1901), 270.

128. Before the 1789 French Revolution, French kings would refer to the “peoples” of France, cf. Vuyenne, *Histoire de l’Idée Fédéraliste: Les Sources* (Presses d’Europe, 1973), p. 165. The UK continues to be a multi-*demos* State that comprises the English, Scottish, Welsh and a part of the Irish Nation, cf. Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (OUP, 2001), p. 123: “one of the most explicitly plurinational states in the world”.

129. On these issues, cf. Gellner, *Nations and Nationalism* (Wiley Blackwell, 2006); and Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (CUP, 1992).

130. Cf. Beaud, “The question of nationality within a federation: a neglected Issue in nationality law” in Hansen and Weil (Eds.), *Dual Nationality, Social Rights, and Federal Citizenship in the U.S. and Europe* (Berghahn Books, 2002), p. 314.

131. On the theory, cf. Zweig, *Die Lehre vom Pouvoir Constituant* (Mohr, 1904).

132. Grimm, “Does Europe need a Constitution?”, 1 ELJ (1995), 282, at 290.

133. Grimm acknowledges the past existence of a descriptive concept of “constitution” that preceded the “normative” idea of “constitution”. However, according to him, only the latter is

primary Community law. It goes back not to a European people but to the individual Member States, and remains dependent on them even after its entry into force. While nations give themselves a constitution, the European Union is given a constitution by third parties.”¹³⁴ And assuming, hypothetically, that a European people would in the future give the Union a constitution? Then, “the Union would acquire competence to decide about competences (*Kompetenz-Kompetenz*)”. It would have the power to unilaterally change its constitution and would thus have turned itself from a Confederation of States into a Federal State.¹³⁵ However, for the time being, the Union is no State.¹³⁶ And failing that, the European Union has no constitution.

Let us finally look at a third – milder – denial: “The condition of Europe is not, as is often implied, that of constitutionalism without a constitution, but of a constitution without constitutionalism.”¹³⁷ (Paradoxically, this very same denial has been made in relation to the American Union(s) of the eighteenth-century.¹³⁸) “In federations, whether American or Australian, German or Canadian, the institutions of a federal state are situated in a constitutional framework which presupposes the existence of a ‘constitutional demos’, a single *pouvoir constituant* made of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted.” “In Europe, that precondition does not exist. Simply put, Europe’s constitutional architecture has never been validated by a process of constitutional adaptation by a European constitutional *demos*[.]”¹³⁹ And in

today accepted since it refers to State power and to the democratic idea of a *pouvoir constituant*. What is perplexing in this context is his reference to the U.S. American Constitutions, especially the Articles of Confederation – none of which was adopted by “the” American people. Cf. Grimm, “Die Verfassung im Prozess der Entstaatlichung” in Brenner (Ed.), *Der Staat des Grundgesetzes – Kontinuität und Wandel: Festschrift für Peter Badura* (Mohr Siebeck, 2004), p. 145, at p. 146 (translation – RS): “The normative Constitution emerged in 1776 at the periphery of the then western world, in North America.” In a different publication, Grimm even acknowledges the existence – in the nineteenth (!) century of treaty-constitutions: “But in the nineteenth century treaty-based constitutions could be found, both through state mergers or out of revolutionary pressure on kings, who did not necessarily fully abandon their pre-constitutional legitimacy while partially recognizing popular sovereignty.” Cf. Grimm, “Treaty or Constitution: The legal basis of the European Union after Maastricht” in Eriksen, Fossum and Menéndez (Eds.), *Developing a Constitution for Europe* (Routledge, 2004), p. 69, at p. 74.

134. Grimm, op. cit. *supra* note 132, at 290.

135. *Ibid.*, 299.

136. This is universally accepted; see *EWG Verordnungen*, BVerfGE 22, 293 (296) (1967) (translation – RS): “The Community itself is no State, not even a Federal State.”

137. Weiler, op. cit. *supra* note 120, at 220.

138. Schmitt, *Verfassungslehre* (Duncker & Humblot, 2003 – originally published: 1928), p. 78 (translation – RS): “The American Constitutions of the eighteenth century emerge without their proper constitutionalism.”

139. Weiler, op. cit. *supra* note 53, at pp. 56–7.

the absence of a unitary constitutional *demos*, the European Union could have no constitutionalism.

What is common to these three denials? Each is rooted in Europe's statist tradition and based on the idea of indivisible sovereignty: a *unitary* people forms a *unitary* State on the basis of a *unitary* constitution. The inability to accept shared or divided sovereignty thus blinds the European tradition to the possibility of *federal* arrangements or a *duplex regimen* between peoples, States and constitutions. It is unable to envisage *two* peoples living in the same territory – yet, this is generally the case in federal unions.¹⁴⁰ It is unable to envisage *two* constitutional orders existing within the same territory – yet, this is generally the case in federal unions.¹⁴¹ It is unable to envisage *two* governments operating in the same territory – yet, this is generally the case in federal unions. Finally, it is unable to envisage a compound *pouvoir constituant* of multiple *demos* – yet this is generally the case in federal Unions.¹⁴² The

140. Cf. Beaud, *op. cit. supra* note 130, at pp. 317–320: “Citizenship in a federation is by definition *dual citizenship* – the federal as well as subnational – as the inhabitants of this federation are simultaneously those of the member state to which they belong. Consequently, if dual citizenship is conceived of as an anomaly in the case of the state, it becomes, on the contrary, a prerequisite of the federation. ... Dual citizenship, essential to federations, is then nothing but the duplication of the fundamental law of duality of political entities constituting them. In contrast to the state, the federation here is characterized by a ‘political dualism’....”

141. American and German constitutionalism accept the idea “State Constitutions”. However, in both cases, the federal Constitution establishes a normative frame around the State Constitutions. Art. IV, Section 4 of the US Constitution states: “The United States shall guarantee to every State in this Union a Republican Form of Government...” And Art. 28(1) GG states: “The constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county, and municipality the people shall be represented by a body chosen in general, direct, free, equal, and secret elections.”

142. When Professor Weiler confesses that “I am unaware of any federal state, old or new, which does not presuppose the supreme authority and sovereignty of its federal *demos*” (cf. Weiler, *op. cit. supra* note 53, at p. 57), we may draw his attention to the United States of America. Neither of the two Constitutions of the United States was ratified by a “constitutional *demos*” in the form of “the” American people. The Articles of Confederation were ratified by the State legislatures, while the 1787 Constitution was ratified by the State peoples. And as regards constitutional amendment, Art. V of the U.S. Constitution requires the concurrence of the federal *demos* – acting indirectly through its representatives – and three fourths of the State *demos* – acting either through their representatives or in conventions. The structure of the amendment power led Dicey to conclude that “the legal sovereignty of the United States resides in the States’ governments as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union”; Dicey, *op. cit. supra* note 96, at p. 81. More generally, in all (democratic) federal unions the *pouvoir constituant* should be a compound of the federal and the State *demos*, see Schneider, “Alternativen der Verfassungsfinalität: Föderation, Konföderation – oder was sonst?“, 23 *Integration* (2000), 171, at 174. Where the “constitutional *demos*” is conceived in unitary terms, the federal Union loses its federal base, see Schmitt, *op. cit. supra* note 138, at p. 389 (translation – RS): “The democratic idea of the *pouvoir constituant* of the *whole* people

black-or-white logic of unitary constitutionalism is simply unable to capture the federal “blue” on the international versus national spectrum.

The European Union’s constitutionalism must, in the future, be (re)constructed in federal terms. It is half-hearted to – enigmatically – claim that the European Union has a constitution, but no constitutionalism. For once we admit that Europe has a constitution, who tells us so? National legal theory? International legal theory? Since none affirms the statement that “Europe has a constitution”, the latter presupposes a system of thought that allows us to “recognize” or “verify” that statement as true. Logically, the affirmation of a “constitution” presumes the existence of a “constitutionalism” – that is: a constitutional *theory*.¹⁴³ But more importantly: the misguided insistence on a “constitutional *demos*” shows that “constitutionalism” is still identified with the legitimizing theory underlying a – *unitary* – Nation State.¹⁴⁴ But the European Union’s mixed constitutional system cannot be conceived in purely unitary – or “national” – terms. Only a *federal* constitutionalism can explain and give meaning to normative problems that arise in compound systems like the European Union.¹⁴⁵ And once we apply a *federal* constitutionalism to the European Union, the above “denials” are shown for what they are – *false problems*. They are created through the application of a wrong constitutional theory. National constitutionalism simply cannot explain the “dual nature” of federations as classical physics was unable to explain the dual nature of light.¹⁴⁶ By insisting that the European Union is *either* international *or* national, it denies its dual nature as an (inter)national phenomenon.

4.3. *Excursus: Europe’s democratic “deficit” as a “false problem”?*

Applying a *federal* constitutional theory to the European Union may also place the European Union’s “deficits” into a new light.¹⁴⁷ The classic illustration of

rescinds the federal basis and, consequently, the federal character of the polity.” “In the federal State without federal basis only one people exists. The State-character of the ‘States’ is thus eliminated.”

143. On the relationship between “theories” and “facts”, see Popper, *The Logic of Scientific Discovery* (Routledge, 2002); and: Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1996).

144. For the same point, see Beaud, “Europa als Föderation? Relevanz und Bedeutung einer Bundeslehre für die Europäische Union”, 5/2008 *Forum Constitutionis Europae*, 18.

145. For a remarkable step towards such a theory of federal constitutionalism, cf. Beaud, *Théorie de la Fédération* (Presses Universitaires de France, 2007).

146. Classical physics insisted that a phenomenon must be *either* a particle *or* a wave; it could not be both. Following the work of Einstein, modern physics now accepts the dual nature of light. On Einstein’s discovery in “lay” terms, see Isaacson, *Einstein: His Life and Universe* (Pocket Books, 2007), Ch. 5.

147. The following discussion focuses on the structural aspect of the democratic deficit. It does not claim that there is no democratic deficit at the *social* level, such as the low degree of

a distorted constitutional discourse is the debate about the European Union's "democratic deficit". It is not difficult to find such a deficit if one measures decision-making in the Union against the unitary standard of a Nation State. There, all legislative decisions are theoretically legitimized by one source – "the" people as represented in the national parliament. But is this – unitary – standard the appropriate yardstick for a *compound* body politic?

In a federal structure there are *two* arenas of democracy: the "State *demos*" and the "federal *demos*". Both offer independent sources of democratic legitimacy; and a *federal* constitutionalism will need to take account of this *dual* legitimacy. One functional expression of this dualism is the division of legislative powers between the State *demos* and the federal *demos*. One *institutional* expression of this dual legitimacy is the compound nature of the central legislature. It is typically made up of *two* chambers;¹⁴⁸ and thus, every federal law is – ideally – legitimized by reference to *two* sources: the consent of the State peoples and the consent of the federal people. It is thus mistaken to argue that "[t]rue federalism is fundamentally a non-majoritarian, or even anti-majoritarian, form of government since the component units often owe their autonomous existence to institutional arrangements that prevent the domination of minorities by majorities".¹⁴⁹ While federal systems may have "a somewhat ambiguous standing in democratic ideas",¹⁵⁰ federalism is not inherently *non-democratic*.¹⁵¹ It is – if based on the idea of government by the governed

electoral participation or the quality of the public debate on Europe. Nor will it claim that the current constitutional structures could not be improved so as to increase democratic governance in the European Union. For the various dimensions of the question of democratic legitimacy in the EU, see Chalmers et al., *European Union Law: Text and Materials* (CUP, 2006), pp. 167–178. For the argument that the EU does not suffer from any democratic deficit, see Moravcsik, "In defence of the 'Democratic Deficit': Reassessing legitimacy in the European Union", 40 *JCMS* (2002), 603.

148. Cf. Gerber, *Les Notions de Représentation et de Participation des Régions dans les Etats Fédéraux* (EUI LLM Thesis, 1993).

149. Majone, "Europe's 'Democratic Deficit': The question of standards", 4 *ELJ* (1998), 5, at 11.

150. Dahl, "Federalism and the democratic process" in Pennock and Chapman (Eds.), *Nomos XXV: Liberal Democracy* (New York University Press, 1983), p. 95, at p. 96. Dahl continues (*ibid.*, pp. 96 and 101): "If one requirement of a fully democratic process of that the demos exercises final control over the agenda, and if in federal systems no *single* body of citizens can exercise final control, is it then the case that in federal systems the processes by which people govern themselves cannot even in principle ever be fully democratic?". "Some critics have so contended. But if this is so, then a transnational federal system like the European Community is necessarily undemocratic. Are we to conclude that however desirable it might be on other grounds, when a people who govern themselves under a unitary constitution ever into a larger federal order they must necessarily suffer some loss of democracy?"

151. In this sense also: Dahl, *op. cit. supra* note 150, at p. 107: "[A]lthough in federal systems no single body of citizens can exercise control over the agenda, federalism is not for this reason less capable than a unitary system of meeting the criteria of the democratic process..."

– inherently *demoi*-cratic. And “[t]o really celebrate the EU as a *demoi*cracy, one must depart from mainstream constitutional thinking.”¹⁵²

Finally, one fundamental expression of the dual legitimacy is the – typically – compound nature of the federation’s constituent power. The point has been well made in relation to the United States of America:

“Half a century ago J. Allen Smith wrote a book in which he bitterly criticized the undemocratic spirit of the American Scheme of government. In it he argued that a true democracy had to embrace the principle of majority rule. ... His criticism was justified, but only within his own frame of reference. It was phrased in the wrong terms. He was in fact criticizing a federal system for serving the ends it was intended to serve. ... What he ignored was that even in 1907 the United States was still composed of States. The amending clause was an excellent spot for his attack and the criticism he made of it would have been equally applicable to any federation. Nearly all governments that are called federal employ some device in the amending process to *prevent* a mere majority from changing the constitution. ... Does this prove federalism i[s] undemocratic? Certainly it does, if democracy be defined in terms of majority rule. ... They argue that the will of the majority is being thwarted and suggest by implication at least that this is ethically wrong; the term ‘will of the majority’ carries with it certain moral overtones in these days of enlightened democracy. But what the *ad hoc* majoritarians forget is that a federal state is a different thing, that it is not intended to operate according to a majority principle. We cannot apply the standard of unitary government to a federal state. If the opinion of a

152. Nicolaïdis, “We the Peoples of Europe...”, 83 *Foreign Affairs* (2004), 97, at 102. An example of such mainstream constitutional thinking is the idea that “the most legitimating element (from a ‘social’ point of view) of the Community was the Luxembourg Accord and the veto power” as “this device enabled the Community to legitimate its program and its legislation” (Weiler, “The Transformation of Europe”, 100 *Yale Law Journal* (1990–1), 2403, at 2473). This is mistaken in two ways. First, how can a unanimous decision of national ministers legitimate directly effective European laws? If European legislation affects European citizens *directly*, how can an *indirect* legitimization through national *executives* be sufficient? To solve this dilemma, Weiler refers to the underlying formal legitimacy of the founding Treaties, which received national parliamentary consent, and to the claim that national parliaments control their government’s minister in the Council. However, the former argument cannot explain how an earlier parliament can bind its successors. (This normative problem may only be solved through the insertion of a clause into the national *constitution* that would legitimize European integration.) And even if we were to assume absolute control of national ministers by their national parliaments, *social* legitimacy is in any event co-dependent on “system capacity”. Dahl explains this point as follows (op. cit. *supra* note 150, at p. 105 – emphasis added): “As Rousseau suggested long ago, it is necessarily the case that the greater the number of citizens, the smaller the weight of each citizen in determining the outcome... On the other hand if a system is more democratic to the extent that it permits citizens to govern themselves on matters that are important to them, then in many circumstances a *larger system would be more democratic than a smaller one, since its capacity to cope with certain matters – defence and pollution, for example – would be greater.*”

majority is a sufficient guide for public policy in a community then it is unlikely that a federal system will have been established in that community.”¹⁵³

How enlightening *comparative* constitutionalism can be! The discussion of the European Union’s “democratic deficit” indeed reveals a deficit in democratic theory.¹⁵⁴ The description of crisis reflects a crisis of description.¹⁵⁵ Indeed, “[t]he question about which standards should be employed to assess the democratic credentials of the EU crucially hinges on how the EU is conceptualized[.]”¹⁵⁶ The search for normative criteria to describe and evaluate the European Union will – eventually – lead to a *federal* constitutional theory. The European Union is “based on a *dual* structure of legitimacy: the totality of the Union’s citizens, and the peoples of the European Union”. “Elections provide *two* lines of democratic legitimacy for the Union’s organizational structure. The European Parliament, which is based on elections by the totality of the Union’s citizens, and the European Council as well as the Council, whose legitimacy is based on the Member States’ democratically organized peoples....”¹⁵⁷ Duplex regimen, dual democracy.

5. Conclusion: The European Union as a “federation of States”

What is the relation between the federal idea and the European Union? We saw above that the American tradition easily classifies the European Union as a federal union. The Union has a mixed or compound structure; and in combining international and national elements, it stands on federal “middle ground”.

The federal label is – ironically – denied by Europe’s own intellectual tradition. In pressing the federal principle into a national (State) format, the concept of federation is reduced to that of a Federal State. And while the creation of a Federal State may have been a long-term inspiration in the early years of

153. Livingston, *Federalism and Constitutional Change* (Clarendon Press, 1956), pp. 311–4.

154. Beaud, “Déficit politique ou déficit de la pensée politique?”, 87 *Le Debat* (1995), 44.

155. Winckler, “Description d’une crise ou crise d’une description?”, 87 *Le Debat* (1995), 59.

156. Kohler-Koch and Rittberger, “Charting crowded territory: Debating the democratic legitimacy of the European Union” in Kohler-Koch and Rittberger (Eds.), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield, 2007), p. 1, at p. 4.

157. Von Bogdandy, “A disputed idea becomes law: Remarks on European Democracy as a legal principle” in Kohler-Koch and Rittberger (Eds.), *op. cit. supra* note 156, p. 33, at pp. 36–7 (emphasis added).

European integration, the failure of the European Political Community in the 1950s caused the demise of federal ideology.¹⁵⁸ The fall of federalism gave rise to (neo-)functionalism.¹⁵⁹ The latter remained agnostic on what kind of object the Union was. The Union was celebrated as a *process* – a “journey to an unknown destination”.¹⁶⁰ But this agnosticism could not forever postpone the fundamental question: “What is the European Union?” “*Les contraintes de l’existence publique ne permettent plus de s’accommoder du flou[!]*”¹⁶¹

Early commentators were aware that the new European construct had moved on the “middle ground” between international and national law. Yet, Europe’s conceptual tradition blocked the identification of that middle ground with the federal idea. The quest for a new word was thus answered by a neologism: the idea of supranationalism. The European Union was celebrated as *sui generis*. But how common exceptionalisms are!¹⁶² The *sui generis* “theory” was, in any event, but a veneer. In times of constitutional conflict, Europe’s old federal tradition returned from the depths and imposed its two polarized ideal-types: the European Union was either an international organization or a Federal State. And since it was not the latter, it must be the former.

But what is the explanatory power of the international law thesis? Can it satisfactorily explain the legal and social reality within the European Union? In the last fifty years, “Little Europe” has emancipated herself from her humble birth and has grown into a mature woman: the European Union. The interna-

158. Forsyth, “The political theory of federalism: The relevance of classical approaches” in Hesse and Wright (Eds.), *Federalizing Europe?: The Costs, Benefits, and Preconditions of Federal Political Systems* (OUP, 1996), p. 25, at p. 26.

159. The functionalist classic is Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (National Peace Council, 1946). Neo-functionalism discards the belief in the automaticity of the integration process and emphasizes the need to build new loyalties with strategic elites. The classics here are Haas, *The Uniting of Europe: Political, Social and Economic Forces, 1950–1957* (Stanford University Press, 1968) and Lindberg, *The Political Dynamics of European Economic Integration* (OUP, 1963).

160. Shonfield, *Journey to an Unknown Destination* (Penguin, 1973). Ironically, the process metaphor itself has been identified with federalism, see Friedrich, *Trends of Federalism in Theory and Practice* (Pall Mall, 1969), Ch. 1: “The Theory of Federalism as Process”.

161. Editorial: “Nation, federation: Quelle Europe ?”, *87 Le Debat* (1995), 25 (emphasis added).

162. Calhoun described the 1787 legal order as “new, peculiar, and unprecedented” (Calhoun, “A Discourse on the Constitution and Government of the United States” in Lence (Ed.), *Union and Liberty: The Political Philosophy of John C. Calhoun* (Liberty Fund, 1992), p. 117). The legal structure of the British Commonwealth has equally been described as *sui generis*, see Balfour Report (1926), available at www.foundingdocs.gov.au/resources/transcripts/cth11_doc_1926.pdf: “The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution; while, considered as a whole, it defies classification and bears no real resemblance to any other political organization which now exists or has ever yet been tried.”

tional law thesis thus runs into a great many explanatory difficulties. *Unlike* international doctrine predicts, the obligations imposed on the Member States are not interpreted restrictively.¹⁶³ *Unlike* international doctrine predicts, the Member States are not allowed a free hand in how to execute their obligations. *Unlike* international doctrine predicts, the Member States cannot modify their obligations *inter se* through the conclusion of subsequent international treaties. In order to defend the international law hypothesis, its adherents must denounce these legal characteristics as non-essential “marks” of sovereignty. And in relegating the social reality of European law to a false appearance, European thought refuses comparing the *ideal* with the *real*. *Was nicht sein darf, das nicht sein kann*. But facts are stubborn things!

The *sui generis* thesis and the international law thesis had – both – caused the Community to disappear from the federal map. How did the federal idea return? Its revival in discussion of the structure of the European Union was slow. In a first step, it was accepted that the Community had borrowed the federal principle from the public law of Federal States.¹⁶⁴ The European Union was said to be the “classic case of federalism without federation”.¹⁶⁵ It had “federal” features, but it was no “federation”. Federation thus still meant Federal State.¹⁶⁶ The word “federal”, by contrast, attached to a *function* and not to

163. Everling, “Sind die Mitgliedstaaten noch Herren der Verträge” in Bernhardt (Ed.), *Völkerrecht als Rechtsordnung, international Gerichtsbarkeit, Menschenrechte* (Springer, 1993), p. 173, at p. 178.

164. Haas separated the idea of “federation” from the notion of “State” (op. cit. *supra* note 159, at p. 37) and could, consequently, speak of the “federal attributes” (id., at p. 42) of the ECSC. The ECSC was, overall, described as a “hybrid form, short of federation” (id., at p. 51), for it did not satisfy all the federal attributes believed by the author to be necessary for a federation to exist (id., at p. 59): “While almost all the criteria point positively to federation, the remaining limits on the ability to implement decisions and to expand the scope of the system independently still suggest the characteristics of international organisation.”

165. Burgess, *Federalism and the European Union: The Building of Europe 1950–2000* (Routledge, 2000), pp. 28–29: “[I]t is not necessarily the case that every ‘federalism’ will always lead to ‘federation’ in the sense that Europe will simply be like Germany or Switzerland writ large – a new putative national state. Not will it replicate the United States of America, although it does already exhibit many of the traits of the American Confederation during 1781–89. The EU of course is not a federation; it does not fit the established criteria by which we conventionally define such a state. Logically, then, we have a classic case of federalism without federation... Whatever the EU is, it is not yet a state. But it has to be acknowledged that it does have several institutional features and policy-making characteristics of an established federation.”

166. Cf. Friedmann, *The Changing Structure of International Law* (Stevens, 1964), p. 98: “The Community Treaties stop short of the establishment of a federation. They do not transfer to a federal sphere the general powers usually associated with a federal state...” Pentland, *International Theory and European Integration* (Faber and Faber, 1973) also identified federalism with the “State model”. In fact, his chapter on federalist theory is entitled: “Power and the Supranational State: Varieties of Federalist Theory” and therein we read “federalists are concerned to direct the integrative process toward a definitive, well-articulated ideal – a supranational state

the *essence* of the organization. The adjective was allowed – adjectives refer to *attributes*, not to *essences* – the noun was not. In order for European constitutionalism to accept the idea of a “Federation of States” a second step was required. European constitutionalism needed to abandon its obsession with the idea of undivided sovereignty. It needed to accept that “[t]he law of integration rests on a premise quite unknown to so-called “classical” international law: that is the divisibility of sovereignty.”¹⁶⁷ The Community enjoys “real powers stemming from a *limitation of sovereignty* or a transfer of powers from the States to the Community” through which, in turn, “the Member States have *limited their sovereign rights*, albeit within limited fields”.¹⁶⁸ The European Union is indeed based on a conception of divided sovereignty and in strictness neither international nor national, “but a composition of both”. It represents an (inter)national phenomenon that stands on – federal – middle ground.

In conclusion, the European Union is a federation of States.¹⁶⁹ It even represents the best manifestation of “true” federalism in positive law.¹⁷⁰ Once this idea is accepted, it is possible – in a third step – to ask what type of federation the European Union is.

But that is another story.¹⁷¹

with specific characteristics” (id., at p. 148). See also: Schmitter, “Imagining the Future of the Euro-Polity with the Help of New Concepts” in Marks, Scharpf, Schmitter and Streek (Eds.), *Governance in the European Union* (Sage, 1996), p. 121, at p. 133: “[federation] implies the existence of an orthodox sovereign state”.

167. Pescatore, op. cit. *supra* note 112, at p. 30. This corresponds to Fischer’s vision: “The completion of European integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation-state. Precisely this is the idea underlying the concept of ‘subsidiarity,’ a subject that is currently being discussed by everyone and understood by virtually no one.” Cf. “From Confederacy to Federation: Thoughts on the finality of European Integration”, Speech at the Humboldt University in Berlin (12 May, 2000).

168. *Costa v. ENEL*, cited *supra* note 31, 593 (emphasis added).

169. Cf. Dashwood, “The relationship between the Member states and the European Union/Community”, 41 CML Rev. (2004), 355, at 356: “a federation of sovereign States”; Börzel and Risse, “Who is afraid of a European Federation?”, *Jean Monnet Working Paper No. 7/00*; Delors, “Where is the European Union heading?”, Speech at the U.S. Conference Series (March 2001), available at www.ena.lu/: “federation of nation states”.

170. Beaud, op. cit. *supra* 144, 14 (translation – RS).

171. Schütze, op. cit. *supra* note 1.