The Constitutional Treaty as a Reflexive Constitution

By Jürgen Bast[*]

A. Introduction: Uneasiness over the Constitutional Treaty

The "Treaty establishing a Constitution for Europe" elicits divergent scholarly responses. An apologetic view holds that it is the best of all possible constitutions,[1] given the current constellations of political forces. Such a viewpoint is countered by a mixed choir of critics for whom the document is simply another treaty,[2] a "nostalgic project,"[3] or a merely "semantic constitution."[4] Some even believe that the recourse to constitutional rhetoric endangers the rational substance of the European status quo;[5] others fear that this very conceptuality could be damaged.[6] The present chapter endeavors to find a third approach. It offers a critical stance as regards the unfortunate, phraseological, sometimes even ideological language of

[*] Dr. iur., Dipl.-Soz., Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. For the translation, I would like to thank Joseph Windsor, Heidelberg. Among those who have helped with suggestions and criticism, I am especially grateful to Stephan Bitter, Dr. Philipp Dann, and Niels Petersen. E-Mail: jbast@mpil.de.

[1] Jürgen Schwarze, *Ein pragmatischer Verfassungsentwurf: Analyse und Bewertung des Entwurfs eines Vertrags über eine Verfassung für Europa*, EUROPARECHT 535, 569 (2003); Koen Lenaerts & Damien Gerard, *The Structure of the Union According to the Constitution for Europe: the Emperor is Getting Dressed*, 29 EUROPEAN LAW REVIEW 289 (2004).

[2] Juliane Kokott & Alexandra Rüth, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 COMMON MARKET LAW REVIEW 1315, 1320 (2003); Dieter Grimm, *Integration durch Verfassung: Absichten und Aussichten im europäischen Konstitutionalisierungsprozess*, 32 LEVIATHAN 448, 462 (2004).

[3] Nico Krisch, *Die Vielheit der europäischen Verfassung*, Contribution at the "45. Assistententagung Öffentliches Recht", Bielefeld, 9–12 March 2005.

[4] Christoph Möllers, *Pouvoir Constituant – Constitution – Constitutionalisation*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., 2005, forthcoming), connecting to the typology of KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 203 (1957).

[5] Joseph H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, 7 (Joseph H.H. Weiler & Marlene Wind eds., 2003); Joseph H.H. Weiler, *A Constitution for Europe? Some Hard Choices*, 40 JOURNAL OF COMMON MARKET STUDIES 563 (2002); Ulrich Haltern, *On Finality*, *in* PRINCIPLES, *supra* note 4.

[6] Paul Kirchhof, *The Legal Structure of the European Union as a Union of States*, *in* PRINCIPLES, *supra* note 4.

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the Constitutional Treaty. Simultaneously, the constitutional text is taken seriously in its normative statements. This approach aims to reconstruct the document from a point of view which depicts it, despite its contradictions, as a project with a rightful place in the tradition of Western constitutionalism.

The following thoughts focus on the relationship between the unity of and differentiation within the European constitution. Elements promoting unity are to be understood, here, as those normative structures that contribute to shaping a polity into a formally unified and substantively coherent order. The line of inquiry asks: which normative facts make it possible to speak of a unified constitutional order of the EU? In complement to the concept of unity, this article uses the concepts of differentiation (in the sense of variability) and incoherence (in the sense of fragmentation).[7] This topic should not be confused with that of "uniformity versus diversity", that is, in the given context, the federal balance between the Union and its Member States.[8] The relationship of the two sets of issues is beyond the scope of the present discourse.[9]

Section B. substantiates the assertion that the Constitutional Treaty's significance is to be seen in its nature as a motor for increased legal and political unity. In section C., the limits of the new unity are revealed. Section D. undertakes to define these findings more precisely in terms of constitutional theory. In doing so, policy-specific differentiation is depicted as a fundamental characteristic of Union constitutional law. Section E. introduces the category of constitutional standard case and reveals that the Constitutional Treaty defines the so-called "community method" as such a standard case. In section F., an attempt is made to reconcile the partially contradictory findings in a conception by which the relationship between unity and differentiation in the Constitutional Treaty can be understood. The notion of a reflexive constitution—so the author hopes—provides a theoretical place for uneasiness over the Constitutional Treaty by emphasizing its incompleteness. The final section adds some thoughts on the future of reflexive constitutionalism in view of a possible failure of the Constitutional Treaty.

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[7] On coherence in the context of European integration, *see* Stefano Bertea, *Looking for Coherence within the European Community*, 11 EUROPEAN LAW JOURNAL 154, 170 (2005).

[8] On this issue see, *e.g.*, Stefan Oeter, *Federalism and Democracy*, *in* PRINCIPLES, *supra* note 4.

[9] The relationship is more complex than generally assumed. Normatively, little speaks for the assumption that diversity is best protected by incoherence. For an opposing tendency, *see* Krisch, *supra* note 3.

B. The Constitutional Treaty as a Motor for Legal and Political Unity

The Constitutional Treaty brings about a caesura in the process of European constitutionalization—a caesura symbolized by the invocation of the notion of a constitution[10] and the extraordinariness of its origin (that is, the Convention process and the elaborate and highly politicized ratification procedures).[11] The new constitutional text, however, also has considerable innovative potential stemming from its normative content. This potential consists in the strengthening of—partly already long existent—tendencies to promote unity.

I. Stabilization of the Unity: Institutional Framework and Membership

To begin with, the Constitutional Treaty stabilizes two elements that have sustained the—fragile and legally contested[12]—organizational unity of the Union: the identity of the institutions operating under the various founding treaties and the identity of the Member States that bear up the Union.

Organizational unity currently rests upon the "single institutional framework," of which Article 3 EU speaks: regardless of the legal personality involved, any action by a Union institution constitutes the exercise of European sovereign power.[13] The Constitutional Treaty notably drops the adjective "single," since the issue of organizational unity is clarified elsewhere (this will be treated shortly). Nonetheless, the Constitutional Treaty still entrusts its main institutions with the task of preserving the coherence of the Union's policies (Art. I-19(1) CT).

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[10] Armin von Bogdandy, *Konstitutionalisierung des europäischen öffentlichen Rechts in der europäischen Republik*, 60 JURISTENZEITUNG 529, 530 (2005); Armin von Bogdandy, *Europäische Verfassung und europäische Identität*, 59 JURISTENZEITUNG 53, 56 (2004).

[11] Anneli Albi & Peter Van Elsuwege, *The EU Constitution, National Constitutions and Sovereignty: An Assessment of a "European Constitutional Order"*, 29 EUROPEAN LAW REVIEW 741, 750 (2004); Clemens Ladenburger, *Die Erarbeitung eines Verfassungsentwurfs durch den Konvent*, *in* DER VERFASSUNGSENTWURF DES EUROPÄISCHEN KONVENTS 397 (Jürgen Schwarze ed., 2004); Andreas Maurer, *Die Methode des Konvents – ein Modell deliberativer Demokratie?*, INTEGRATION 440 (2003).

[12] For one side of the controversy, *see* Armin von Bogdandy, *The Legal Case for Unity*, 36 COMMON MARKET LAW REVIEW 887 (1999); Manfred Zuleeg, *Die Organisationsstruktur der Europäischen Union*, EUROPARECHT (BEIHEFT 2) 151 (1998); Bruno de Witte, *The Pillar Structure and the Nature of the European Union*, *in* THE EUROPEAN UNION AFTER AMSTERDAM 51 (Ton Heukels *et al.* eds., 1998). For the other side, *see* MATTHIAS PECHSTEIN & CHRISTIAN KOENIG, DIE EUROPÄISCHE UNION, paras. 56 *et seq.* (3rd edition 2000). For an intermediate position, see, *e.g.*, Werner Schroeder, *European Union and European Communities*, *in* EUROPEAN INTEGRATION: THE NEW GERMAN SCHOLARSHIP, Jean Monnet Working Papers No. 9/03 (Joseph H.H. Weiler & Armin von Bogdandy eds., 2003).

[13] ECJ, Case 22/70, Commission v. Council, 1971 E.C.R. 263, paras. 3/4; Case C-170/96, Commission v. Council, 1998 E.C.R. I-2763, para. 16.

Henceforth, the European Council has the status of an institution and accordingly becomes, for the first time, legally responsible (Arts. III-365(1), III-369(b) CT).

Also reaffirmed is the uniformity of membership in the Union, which also indirectly defines its subject of democratic legitimacy, the Union citizens (Art. I-10 CT).[14] The legal concept of enhanced cooperation is not expanded into partial memberships (Art. I-44 CT);[15] on the contrary, the Constitutional Treaty expressly affirms the equality of Member States before the constitution (Art. I-5(1) CT). Membership in the Union is qualified by fundamental constitutional values (Arts. I-2, I-58 CT) and is innovatively converted into a voluntary system (Art. I-60 CT).[16] The latter increases—contrary to skeptical voices[17]—the unity of the Union, as displayed by a recent opinion of the Spanish Constitutional Court. It upheld the Spanish approval of unconditional primacy of Union law, particularly in view of the ultimate possibility of withdrawal.[18]

II. Promoting New Unity: the Founding of the New European Union

Whereas the abovementioned elements focus on continuity, the Constitutional Treaty elsewhere introduces significant novelty for the promotion of unity. These innovations include (1.) the merging of current primary law from the EU and EC Treaties into a single constitutional document, (2.) the formal abandonment of the pillar structure in favor of a reestablishment under a single legal personality, and (3.) the formulation of overarching legal standards and the standardization of types of competence, legal instruments, and law-making procedures.

1. A Codified Constitutional Text: One Union, One Treaty

By presenting its constitutional law in a single document, the Union seeks to connect politically and aesthetically to a postulate as old as the modern concept of

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[14] Ingolf Pernice, in GRUNDGESETZ KOMMENTAR, para. 20 on Art. 23 of the German Basic Law (HORST DREIER ED., 1998).

[15] On the compatibility of enhanced cooperation with the constitutional premises of legal unity, *see* DANIEL THYM, UNGLEICHZEITIGKEIT UND EUROPÄISCHES VERFASSUNGSRECHT 374 (2003).

[16] Henri de Waele, *The European Union on the Road to a New Legal Order – the Changing Legality of Member State Withdrawal*, 12 TILBURG FOREIGN LAW REVIEW 169, 178 (2005).

[17] Thomas Bruha & Carsten Nowak, *Recht auf Austritt aus der Europäischen Union?*, 42 ARCHIV DES VÖLKERRECHTS 1, 21 (2004); Schwarze *supra* note 1, at 558.

[18] Declaración del Pleno del Tribunal Constitucional, DTC 1/2004, 13 December 2004, *available at* http://www.tribunalconstitucional.es/JC.htm; English translation in: 1 COMMON MARKET LAW REPORTS 39 (2005); see, in particular, paras. 47 and 58.

constitution itself.[19] Amalgamating constitutional law into a single, written document not only strengthens its normativity and stability,[20] but also allows the constitutional order to be described and perceived as a unity. The existence of a constitutional document advances the abstract idea of a legal order, within which all norms are subject to one paramount body of law.[21] From this point of view, one can appreciate the degree of progress envisioned by the Constitutional Treaty. It would bring a Europe of "bits and pieces"[22]—that is, the loose union of "the Treaties on which the Union is founded" (Arts. 48, 49 EU) and the unmanageable mass of "subsequent Treaties and Acts modifying or supplementing them"—into a formally unified constitutional order. Such an act, as anticipated by the early liberal call for a written constitution, is more than mere compilation of the *leges fundamentales* currently in force.[23]

2. *A Single Organization: One Union, One Personality*

Accordingly, the new Union emerges as a single organization, *vis-à-vis* its citizens as well as in the international community (Arts. I-1, I-7 CT).[24] The re-foundation as a legal successor to the EC and EU puts an end to the absurd situation in which the Union appeared to have a split personality. Indeed, this represents for citizens a significant windfall, in terms of transparency; it bridges a problematic gap between political communication and legal construction. The debate over the old EU as an independent subject of international law becomes obsolete; internally, a rationalization of the procedures for entering into treaties is made possible.

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[19] Dieter Grimm, *Verfassung II.*, *in* GESCHICHTLICHE GRUNDBEGRIFFE VOL. 6, 863, 866 (Otto Brunner *et al.* eds., 1990); Hermann Heller, *Staatslehre*, *in* GESAMMELTE SCHRIFTEN VOL. 3, 385 (1971).

[20] ULRICH K. PREUß, REVOLUTION, FORTSCHRITT UND VERFASSUNG 21 (1994); Möllers, *supra* note 4; Grimm, *supra* note 19, at 880.

[21] Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 RECHTSHISTORISCHES JOURNAL 176, 184 (1990).

[22] Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MARKET LAW REVIEW 17, 22 (1999); SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 111 (2002).

[23] *See* Heinz Mohnhaupt, *Verfassung I.*, *in* GESCHICHTLICHE GRUNDBEGRIFFE VOL. 6, 832, 840 (Otto Brunner *et al.* eds., 1990).

[24] Theo Öhlinger, *Europa auf dem Weg zu einer Verfassung*, *in* EUROPARECHT IM ZEITALTER DER GLOBALISIERUNG 379, 385 (Heribert F. Köck *et al.* eds., 2004); Bardo Fassbender, *Die Völkerrechtssubjektivität der Europäischen Union nach dem Entwurf des Verfassungsvertrages*, 42 ARCHIV DES VÖLKERRECHTS 26 (2004).

Presumably, the consolidation into one legal personality will symbolically reaffirm the Union as a player on the international stage.[25]

3. A Unified Legal Regime: One Union, One Method

Amalgamation and consolidation offer the opportunity to formulate fundamental rules and principles which apply—at least as a general rule—across all of the Union's policies.[26] This is precisely the project the Constitutional Treaty pursues, specifically in its Parts I and II. The unity of substantive constitutional law is realized—again: as a general rule—at the level of Community law, which leads to numerous innovations for the policies formerly of the second and third pillars. For example, the primacy of Union law (Art. I-6 CT) was neither judicially guaranteed nor explicit in the EU Treaty.[27] Furthermore, the prohibition of discrimination in Article I-4(2) CT could previously, under Article 12 EC, only be applied to Community law.[28]

C. The Incomplete Promotion of Unity

As important as this progress is to the development of a coherent constitutional order, the unity envisioned by the Constitutional Treaty is incomplete and remains precarious. Further analysis shows that the European constitution would continue to exhibit significant incoherence, both formally and substantively.

I. Formal Incoherence

Wading through the complete text—some 474 pages of reading material in the Official Journal—one experiences how far away the Constitutional Treaty is from the ideal of a concise, expressive constitutional document. This is not, or at least not primarily, an editorial deficiency. The structure and length of the constitutional text reflect the unsolved problems involved with fostering unity. Even the comprehensive codification of primary law failed, because the Atomic Energy Community continues to exist as a legal entity with its own treaty basis alongside

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[25] Gráinne de Búrca, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, 61 WASHINGTON & LEE LAW REVIEW 555, 568 (2004).

[26] Patrick Birkinshaw, *Constitutions, Constitutionalism and the State*, 11 EUROPEAN PUBLIC LAW 31, 42 (2005).

[27] Albi & Van Elsuwege, *supra* note 11, at 751; sceptical, however, *Editorial Comments: The CFSP under the EU Constitutional Treaty – Issues of Depillarization*, 42 COMMON MARKET LAW REVIEW 325 (2005).

[28] On the horizontal delimiting function of this concept, *see* Cases C-465/00, C-138/01 and C-139/01, Österreichischer Rundfunk et al., 2003 ECR I-4989.

the new Union—with much unclarity about the legal consequences.[29] Weaknesses in codification and poor systematization find their most obvious expression in the fragmentation into four independent, partially redundant parts.[30] Several provisions are formulated repeatedly, and others have no clear logic of allocation.[31] In terminology superficially adapted to the new context, Part III takes on many of the provisions of the EC and EU Treaties without significantly progressing beyond the consolidating efforts of the Amsterdam Treaty. The Constitutional Treaty's length is due, in part, to the appending of thirty-six Protocols, two Annexes, and fifty Declarations. This epilogue delivers an immense supplementary constitutional law with specialized provisions regarding individual Member States and with a plethora of hidden legal bases. To some extent, this incoherence can be explained by the Constitutional Treaty's multiphase history.[32] The Convention discussed the formulation of a constitutional document, without prior clarification of its relation to the so-called technical provisions of existing primary law. The Commission and numerous Convention members favored the project of a basic treaty; it would have primacy over other provisions, which were to have a simplified procedure for amendment.[33] Ultimately, the idea of a basic treaty proved unable to garner political consensus, for reasons discussed below.

II. Prolongation of the Pillar Structure

Formal incoherence corresponds to a substantive incompleteness in terms of promoting unity. The old pillar structure can be recognized in the form of specialized regimes of constitutional law, albeit behind the façade of unity. This is true, to a moderate degree, for the third pillar.[34] There exists a competing right of initiative for a minority of Member States (Arts. I-42(3), III-264 CT), the European Council is involved in the law-making process (Art. III-270, III-271 CT), and certain areas are beyond the reach of legislative acts (*e.g.*, Art. III-263 CT). The prolongation of the pillars is even more pronounced in the Common Foreign and Security Policy,

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[29] Christiane Trüe, *EU-Kompetenzen für Energierecht, Gesundheitsschutz und Umweltschutz nach dem Verfassungsentwurf*, 59 JURISTENZEITUNG 779, 783 (2004).

[30] Öhlinger, *supra* note 24, at 389.

[31] For examples, see Jan Wouters, *The European Constitution, Parts I and III: Some Critical Reflections*, 12 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 3 (2005).

[32] Franz C. Mayer, *Verfassungsstruktur und Verfassungskohärenz: Merkmale europäischen Verfassungsrechts?*, INTEGRATION 398, 399 (2003).

[33] *See* Commission Communication: A Basic Treaty for the European Union, COM(2000) 434 final.

[34] *See* Jörg Monar, *Justice and Home Affairs in the EU Constitutional Treaty: What Added Value for the ‚Area of Freedom, Security and Justice'?*, 1 EUROPEAN CONSTITUTIONAL LAW REVIEW 226 (2005).

which continues to lead a constitutional life of its own.[35] Unanimity in the Council is the general rule (Art. I-40(6) CT), the Commission's role is largely taken over by the Minister for Foreign Affairs (Art. I-40(4) CT), and the Parliament has only a general right to be consulted (Art. I-40(8) CT). With a few narrow exceptions, legal review by the Court of Justice is excluded (Art. III-376 CT).[36] Further deviations concern the legal instruments (Art. I-40(6) CT), the conclusion of international agreements (Art. III-325 CT), and the system of competences (Arts. I-12(4), I-16 CT).[37]

A critical evaluation of these specialized regimes can be based on general principles formulated in Parts I and II of the Constitutional Treaty. The exclusion of legal review in core areas of foreign policy blatantly contradicts a fundamental value, the rule of law (Art. I-2 CT). Further, it seems questionable whether the limited jurisdiction for individual complaints can be reconciled with the right to an effective remedy (Art. II-107 CT). Similar tension exists regarding the principle of democracy (Art. I-2 CT) and the general rules on the "democratic life of the Union" (Arts. I-45 *et seq*. CT).[38] The preclusion of legislative instruments—completely in the CFSP and partially in the Area of Freedom, Security and Justice—prevents the Parliament's effective participation and, thus, representation of Union citizens. This also indirectly renders transparency rules inapplicable where they are exclusively for legislative acts in the technical sense. In particular, the Council deliberates and votes in public only when performing legislative functions (Arts. I-24(6), I-50(2) CT). Likewise, the involvement of national parliaments in a system which is to increase compliance with the principle of subsidiarity only obtains in a "draft European legislative act" (Art. 3 of Protocol No. 2).[39] Especially precarious in this setting is Article I-21(1) CT, which reads in relevant part: "The European Council … shall not exercise legislative functions." In the face of its powers under the Constitution, one

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[35] An overview in Daniel Thym, *Die neue institutionelle Architektur europäischer Außen- und Sicherheitspolitik*, 42 ARCHIV DES VÖLKERRECHTS 44 (2004).

[36] On the delimitation problems, *see* Tim Corthaut, *An Effective Remedy for All? Paradoxes and Controversies in Respect of Judicial Protection in the Field of the CFSP under the European Constitution*, 12 TILBURG FOREIGN LAW REVIEW 110 (2005).

[37] As to the latter, *see* Christiane Trüe, *Das System der EU-Kompetenzen vor und nach dem Entwurf eines europäischen Verfassungsvertrags*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 391, 409 (2004); Armin von Bogdandy & Jürgen Bast & Dietrich Westphal, *Die vertikale Kompetenzordnung im Entwurf des Verfassungsvertrags*, INTEGRATION 414, 422 (2003).

[38] On the notion of dual democratic legitimacy, *see* Armin von Bogdandy, *Europäische Prinzipienlehre*, *in* EUROPÄISCHES VERFASSUNGSRECHT 149, 175 (Armin von Bogdandy ed., 2003).

[39] For details, *see* Armin von Bogdandy & Jürgen Bast, *La loi européenne: Promise and Pretence*, *in* THE EU CONSTITUTION: THE BEST WAY FORWARD? 171 (Deirdre Curtin *et al*. eds., 2005).

is tempted to dismiss this assertion as simply unfounded, even misleading. Yet it conceals a subtle normative truth: the European Council does not adopt laws, in the Constitutional Treaty's vocabulary, and thus its law-making (or, nominally, decision-making) is not subject to the heightened scrutiny that the Constitutional Treaty envisions for legislative acts.

III. Supranational Specialized Regimes

Policy-specific specialized regimes are not peculiar to what has been taken over from the EU Treaty. The heterogeneity of Part III's constitutional rules and procedures cannot be depicted (solely) as intergovernmentalism versus supranationalism. The monetary policy is exemplary, as it is defined and implemented outside the "institutional framework" and beyond the forms of action in Article I-33 CT.[40] Here, none of the mechanisms for democratic legitimation listed in Articles I-46 *et seq*. CT seem applicable.[41] Another illustration is competition policy. A perusal of the relevant legal bases indicates that in this sector, as well, neither laws nor framework laws can be adopted; instead, the Commission and Council enact regulations and decisions, based directly on the Constitutional Treaty. As a consequence, neither national parliaments nor the European Parliament are involved, whether as law-maker or in a monitoring function.[42] A critical reading of Part III of the Constitutional Treaty exposes—and not only in the area of competition—a rather arbitrary classification of allegedly non-legislative legal bases.[43] It is also noteworthy that the "democratic life" still has to get by in the atomic sector without substantial parliamentary representation of Union citizens.

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[40] On the peculiarities of the "ESCB legal order", *see* Jean-Victor Louis, *The Economic and Monetary Union: Law and Institutions*, 41 COMMON MARKET LAW REVIEW 575, 586 (2004).

[41] On this issue, *see* Fabian Amtenbrink, *On the Legitimacy and Democratic Accountability of the European Central Bank*, *in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 147 (Anthony Arnull & Daniel Wincott eds., 2002).

[42] Regarding the questionable classification as an exclusive competence, *see* Jörg Ph. Terhechte, *Die Rolle des Wettbewerbsrechts in der europäischen Verfassung*, EUROPARECHT (BEIHEFT 3) 107, 111 (2004).

[43] Michael Dougan, *The Convention's Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers?*, 28 EUROPEAN LAW REVIEW 763, 784 (2003); Franklin Dehousse & Wouter Coussens, *The Convention's Draft Constitutional Treaty: Old Wine in a New Bottle?* 56 STUDIA DIPLOMATICA 5, 59, No. 1–2 (2003); similarly, Koen Lenaerts, *A Unified Set of Instruments*, 1 EUROPEAN CONSTITUTIONAL LAW REVIEW 57, 61 (2005); further examples in Jürgen Bast, *Legal Instruments*, in PRINCIPLES, *supra* note 4.

D. Policy-Specific Differentiation as a Leitmotif of Union Constitutional Law

I. A Broader Concept of Differentiation

The above findings impel recognition of sectoral differentiation as a theoretical particularity of the Union. In European academic debate, the term "differentiation" is commonly used in connection with the concept of enhanced cooperation ("differentiated integration").[44] Some authors even view the mechanisms for territorial differentiation, introduced by the Maastricht Treaty, as an expression of a new constitutional principle of flexibility.[45] Yet, the heterogeneity of the constitutional regimes in Part III of the Constitutional Treaty calls for an expanded concept of differentiation, which covers the entirety of substantive, decisional, territorial, and temporal arrangements in a given field.[46]

In this broader understanding, policy-specific differentiation is a phenomenon that has accompanied European integration from the outset. One recalls the founding of the Coal and Steel Community and the Atomic Energy Community. The EEC Treaty, as well, was largely systematized according to "policies" (as the title of what is now its Part Three reads), with specialized regulation for transport, agriculture, *etc*. Subsequent revisions to the Treaty included further policy areas, each with its own regime (*cf.* now Arts. 151–181a EC). In that light, the sectoral provisions in Titles V and VI of the EU Treaty were nothing fundamentally new, but merely expanded the regimes' variance.

II. Sectoral Constitutional Compromises

The sector-by-sector differentiation reflects respective sets of interests and varying preferences of constitutional politics among the Member States. One can speak of policy-specific negotiations on constitutional compromises. In constitutional theory, the concept of constitutional compromise describes a constitution's potential to

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[44] Exemplary, Claus-Dieter Ehlermann, *Increased Differentiation or Stronger Uniformity*, *in* REFORMING THE TREATY ON EUROPEAN UNION 27 (Jan A. Winter *et al.* eds., 1996); FILIP TUYTSCHAEVER, DIFFERENTIATION IN EUROPEAN UNION LAW (1999); *see also* the contributions in THE MANY FACES OF DIFFERENTIATION IN EU LAW (Bruno de Witte *et al.* eds., 2001).

[45] Gráinne de Búrca & Joanne Scott, *Introduction*, *in* CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? 1 (Gráinne de Búrca & Joanne Scott eds., 2000); Jo Shaw, *European Union Legal Studies in Crisis?*, 16 OXFORD JOURNAL OF LEGAL STUDIES 231, 246 (1996); for a critical view, *see* von Bogdandy, *supra* note 38, at 196.

[46] For elements of a theory of differentiation ("variability") in European constitutional law, *see* AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 193 (2002).

reconcile sociopolitical groups with conflicting interests in the constitution-making process.[47] The category is particularly prominent within a school of thought that traces back to Hermann Heller.[48] If this idea of a constitution as a "peace accord" between conflicting but interdependent parties is applied to the European Union, then the Member States conceptually correspond to the constitution-making groups. Sectoral constitutional compromises in primary law, thus, handle and moderate the structural conflicts of interest between large and small Member States, between industrial and agricultural economies, between Member States with high regulatory standards and those with low, *etc.*

One manifestation of constitutional compromises is what Carl Schmitt derisively called "*dilatorische Formelkompromisse*"[49] ("dilatory formulaic compromises"), that is, postponing a decision in the given matter by using intentionally vague legal terms. In this case, substantive decisions are passed on to the legislator or a constitutional court. But more often constitutional compromises take on the form of detailed regulation, by which the groups involved hope to ensure their particular interests and spheres of autonomy.[50] The reason is a pronounced distrust of constitutional institutions, whose decision-making processes are seen as insufficiently protective of the interests likely to be affected. The result is so-called anchoring norms, which are provisions included in the text of the constitution not for their substantive "constitutional" content, but merely to benefit from the protection of the constitution's procedure for amendment.[51] Thus, one should be careful when using state theory to derive a substantive concept of "constitutional norms" without taking into account the concrete conflicts within the respective polity.[52]

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[47] *See, e.g.*, Ernst-Wolfgang Böckenförde, *Geschichtliche Entwicklung und Bedeutungswandel der Verfassung*, *in* STAAT, VERFASSUNG, DEMOKRATIE 29, 45 (1991); on backgrounds in the history of ideas, *see* JÜRGEN BAST, TOTALITÄRER PLURALISMUS 52 (1999).

[48] Ilse Staff, *Der soziale Rechtsstaat: Zur Aktualität der Staatstheorie Hermann Hellers*, *in* DER SOZIALE RECHTSSTAAT 25 (Christoph Müller & Ilse Staff eds., 1984); for the Weimar Constitution, Franz L. Neumann, *The Change in the Function of Law in Modern Society*, *in* THE RULE OF LAW UNDER SIEGE 101, 122 (William E. Scheuerman ed., 1996); for the German Basic Law, Wolfgang Abendroth, *Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland*, *in* AUS GESCHICHTE UND POLITIK 279, 297 (Alfred Herrmann ed., 1954).

[49] CARL SCHMITT, VERFASSUNGSLEHRE 31 (1928); CARL SCHMITT, DER HÜTER DER VERFASSUNG 44, 48 (1931).

[50] On this relationship, *see* INGEBORG MAUS, BÜRGERLICHE RECHTSTHEORIE UND FASCHISMUS: ZUR SOZIALEN FUNKTION UND AKTUELLEN WIRKUNG DER THEORIE CARL SCHMITTS 27 (1980).

[51] *See* GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 533 (4th edition 1922).

[52] Niels Petersen, *Europäische Verfassung und europäische Legitimität*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 429, 450 (2004); Heller, *supra* note 19, at 391.

If one construes the policy-specific variability of Union constitutional law as an expression of constitutional compromises, it becomes clear that the Union's tendency to "overconstitutionalize" reflects the structural heterogeneity of the parties to the constitution and the resultant need to fence in the constitutional institutions. These insights reveal the great unlikelihood that the Convention or the ensuing IGC could have drafted a concise, highly abstract text to replace the detailed regulation of current primary law.[53] A renegotiation of all constitutional compromises was not intended, nor would it have been promising.[54] For the same reasons, the proposal of a bifurcation into a basic treaty and a detailed part, amendable by majority, was condemned to failure. Such a project fails to realize that what is now the Constitutional Treaty's Part III is by no means a "technical" chapter; rather, it forms part of the Union's constitutional core.[55]

E. The "Community Method" as the Constitutional Standard Case

Thus, the Convention faced a problem with an elusive answer: how can general rules and principles for the entire scope of Union action be formulated, while simultaneously leaving the sectoral constitutional compromises largely undisturbed? Conflicts between the relevant sections of the Constitution were preprogrammed. Against this background, the Constitutional Treaty remarkably manages to define a specific model of institutional balance as the standard case in European constitutional law.

I. Towards a New Institutional Balance

Catalyzed by the near failure of the Maastricht Treaty, the demand for a principled reorganization of the Union was prevalent in the constitutional debates during the 1990s, often formulated as a call for parliamentarization.[56] Successively, elements of

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[53] Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 EUROPEAN LAW JOURNAL 125, 141 and 146 (2001).

[54] *See* Armin von Bogdandy & Claus-Dieter Ehlermann, *Guest Editorial: Consolidation of the European Treaties: Feasibility, Costs, and Benefits*, 33 COMMON MARKET LAW REVIEW 1107, 1109 (1996); on the state of consolidation by the Treaty of Amsterdam, *see* Christoph Schmid, *Konsolidierung und Vereinfachung des europäischen Primärrechts*, EUROPARECHT (BEIHEFT 2) 17 (1998).

[55] For a German constitutional law perspective, *see* Hans-Jürgen Papier, *Die Neuordnung der europäischen Union*, EUROPÄISCHE GRUNDRECHT-ZEITSCHRIFT 753, 754 (2004).

[56] *See* Renaud Dehousse, *Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?*, 18 WEST EUROPEAN POLITICS 118, No. 3 (1995); on the Parliament's position in the constitutional setting, Philipp Dann, *European Parliament and Executive Federalism*, 9 EUROPEAN LAW JOURNAL 549 (2003).

an institutional structure crystallized, basically agreed on between the institutions and among the Member States. This is evident from the deliberations of the IGC which led to the Treaty of Amsterdam. The largely consistent positions of the institutions and the intergovernmental Reflection Group are testimony to the state of political consensus.[57] Therein, a remarkable recurring motif is that the Union's further development must take place while "maintaining the institutional balance."[58] Legally, institutional balance refers to a somewhat bland legal doctrine, molded by the ECJ from the normative material of Article 7 EC.[59] This concept sets limitations on irregular displacement of competences through institutional practice.[60] So what does it mean, when the demand for "institutional balance" is made in constitutional politics? It gives recognition to the fact that decision-making in the Community/Union takes place, as a general rule, by collaboration of various institutions, that is, in the form of cooperation of powers. In particular, there is a consensus that democracy in the Union requires a strong parliamentary component, which must not, however, outweigh other methods of formulating and bundling interests, especially through the work of the Council and Commission.[61]

Hence, institutional balance is no longer merely a description of the horizontal powers of the institutions, as conceived in the Treaties; it became a political and constitutional vision of a "balanced constitutionalism."[62] Certain constitutional doctrines, such as the Commission's monopoly on initiative, the co-decision procedure, or the qualified majority in the Council, were increasingly understood to be the standard case in European constitutional law, equally meeting demands for efficiency and democratic legitimacy. This is particularly remarkable for co-decision, which became the established method of parliamentarily legitimated law-making, only a few years after its introduction. Yet, the abovementioned political

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[57] Analysis in Paul Craig, *Democracy and Rule-making within the EC*, 3 EUROPEAN LAW JOURNAL 105, 107 (1997).

[58]Reflection Group's Report, SN 520/95, 5 December 1995, paras. 79 and 96, *available at* http://www.europarl.eu.int/enlargement/cu/agreements/reflex1_en.htm; similarly, European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference, OJ 1995 C 151/56, para. 18.

[59] Summarizing, Jean-Paul Jacqué, *The Principle of Institutional Balance*, 41 COMMON MARKET LAW REVIEW 383, 387 (2004).

[60] Case 25/70, Köster, 1970 E.C.R. 116; Case 98/80, Romano, 1981 E.C.R. 1241.

[61]Koen Lenaerts & Amaryllis Verhoeven, *Institutional Balance as a Guarantee for Democracy in EU Governance*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 35, 42 (Christian Joerges & Renaud Dehousse eds., 2002); Miguel Poiares Maduro, *Europe and the Constitution: What if This is as Good as it Gets?*, *in* EUROPEAN CONSTITUTIONALISM, *supra* note 5, at 74, 90.

[62] Craig, *supra* note 57, at 113.

consensus does not include making these doctrines valid and applicable across all sectors. The focus of the discussion has, however, shifted to the controversy over whether peculiarities of a given sector or specific national interests hinder an extension. This line of discourse also shaped the debates of the Convention and the subsequent IGC.

II. The Invention of "the Community Method"

The proliferation of these constitutional doctrines has benefited decisively from a conceptual synthesis which goes by the name "the Community method." The authorship of this term, in its present meaning, belongs to the Commission. Even before the European Council fired the official starting shot for the Convention in December 2001, the Commission had presented its White Paper on "European Governance," emphatically calling for a "strengthening" and "renewal" of the Community method.[63] In another paper, it addressed its appeals to the Convention: the Community method should not be "cut back to its historic success" but should, instead, be extended to policies not previously within its application.[64]

Talk of the supposed success "for almost half a century"[65] of this method is an astonishing historical construct. First of all, it proves blind in terms of the technocratic-functionalistic heritage, for which a democratic legitimation of Community action hardly had any meaning.[66] Second, the tale of continuity ignores the profound divisions and institutional shifts through which the Union became what it is today.[67] And, third and most relevant in the present context, the Commission apparently intentionally obscures the empirical heterogeneity of the truly existent Community in all its sectoral variability. Talk of *the* Community method evidences a strategic chutzpah because it describes not an image, but an idealization of the EC, creating a certain discursive normality.[68] The designation

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[63] European Governance: A White Paper, at 9 and 34, COM(2001) 428 final. *See* MOUNTAIN OR MOLEHILL? A CRITICAL APPRAISAL OF THE COMMISSION WHITE PAPER ON GOVERNANCE, Jean Monnet Working Papers, No. 6/01 (Christian Joerges *et al.* eds., 2001).

[64] Communication from the Commission: A Project for the European Union, at 24, COM(2002) 247 final.

[65] European Governance, *supra* note 63, at 34.

[66] Christian Joerges, *Europe a* Großraum*? Shifting Legal Conceptualisations of the Integration Project*, *in* DARKER LEGACIES OF LAW IN EUROPE 167, 189 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003); Bo Stråth, *Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community*, 6 GERMAN LAW JOURNAL 255, 268 (2005).

[67] JOSEPH H.H. WEILER, *The Transformation of Europe*, *in* THE CONSTITUTION OF EUROPE 10 (1999).

[68] For a discourse-theoretical and sociological analysis of the phenomenon of normalism, JÜRGEN LINK, VERSUCH ÜBER DEN NORMALISMUS: WIE NORMALITÄT PRODUZIERT WIRD (1999).

suggests a description of the operating mode of the first pillar.[69] Only on closer inspection does it become clear that the Commission fuses a substantively loaded concept of institutional balance, as crystallized only in the mid-1990s, with that of a Community method. Of course, the Commission also pursued its own institutional interests: it notably declared its exclusive right of initiative to be an indispensable component.[70] However, the Commission was remarkably successful in contriving acceptance of its conceptually synthesized elements as if they were an indivisible whole. During the process of the Convention, for instance, the Parliament no longer sought to achieve its own right of initiative.[71] In return, the Parliament's major gains (*e.g.*, in agricultural and commercial policies) may have been due to widespread acceptance of its claim for co-decision wherever there is legislation by majority voting.[72]

III. The Community Method as the Standard Case in the Constitutional Treaty

This normalistic discourse translates into positive law in the Constitutional Treaty. It resonates, if somewhat indistinctly, as early as the second sentence of Article I-1(1) CT, according to which the Union shall exercise "on a Community basis" the competences conferred on it. Therein lay a direct reference to the Community method, as though it were an established legal doctrine.[73] The Constitutional Treaty exercises this programmatic confession by bestowing the status of constitutional standard case on all significant elements of the Community method:

- legislation requires agreement between Council and Parliament, on the basis of proposals of the Commission, under the "ordinary legislative procedure" (Art. I-34(1) CT),
- the Council decides by qualified majority (Art. I-23(3) CT),
- the normative implementation of Union law is a task of the Commission (Arts. I-36, I-37 CT),

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[69] *See also* the instructive "Explanatory note on the 'Community method'" by the Commission of 22 May 2002 (MEMO/02/102), *available at*: http://europa.eu.int/rapid/searchAction.do.

[70] Adrienne Héritier, *The White Paper on European Governance: A Response to Shifting Weights in Interinstitutional Decision-Making*, *in* MOUNTAIN OR MOLEHILL?, *supra* note 63.

[71] CHRISTIAN VON BUTTLAR, DAS INITIATIVRECHT DER EUROPÄISCHEN KOMMISSION 274 (2003).

[72] On the Parliament's new powers, *see* Alan Dashwood & Angus Johnston, *The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty*, 41 COMMON MARKET LAW REVIEW 1481, 1484 (2004); Peter M. Huber, *Das institutionelle Gleichgewicht zwischen Rat und Europäischem Parlament in der künftigen Verfassung für Europa*, EUROPARECHT 574, 597 (2003).

[73] Giacinto della Cananea, *Procedures in the New (Draft) Constitution of the European Union*, 16 REVUE EUROPEENNE DE DROIT PUBLIC 221, 228 (2001).

- the standard type of competence is "shared competence" (Art. I-14(1) CT),
- administrative implementation takes place within the Member States in a framework established by the Union (Art. I-37(1) CT), and
- legislation and implementation are subject to the ECJ's jurisdiction (Art. I-29(1) CT).

This, then, is the Constitutional Treaty's constructive solution to the tension between the need for principled assertions as to the operation of the new Union and the concurrent protection of policy-specific compromises: it elevates a certain model to constitutional normality, as defined in Part I. Whether this model is exceptionally not applied in a given situation, is determined in the relevant legal basis, mainly in Part III. In contrast to the current Treaties, even the drafting technique shows which methods make up the standard case. For example, "special legislative procedures" apply only in "the specific cases provided for in the Constitution" (Art. I-34(2) CT). An enumeration principle, thus, exposes deviations in the constitutional text.

F. The Constitutional Treaty as a Reflexive Constitution

A proper understanding of the Constitutional Treaty has to identify the substantive incompleteness in terms of promoting unity, which shows itself in the persistence of sectorally specialized regimes (as described in sections C. and D. above). But it must also reveal the document's ability to spotlight instances of the constitutional standard case (as seen in section E.).

I. Conceptualizing the Relationship of the Parts of the Constitution

A safe point of origin is the insight that Part I's general assertions do not enjoy hierarchical precedence over the partly antithetical provisions of Part III.[74] Methodologically, the Constitutional Treaty must be conceived of as a unity. This, of course, does not rule out tension and value conflicts between individual provisions or groups of provisions. Such conflicts, however, cannot be resolved using the model of a hierarchy of norms. Rather, they involve issues of systematic interpretation.

In the context of exceptions to fundamental provisions, the arsenal of legal reasoning permits competing lines of argumentation. On one hand, there is the

[74] Mayer, *supra* note 32, at 399; Öhlinger, *supra* note 24, at 389; Wouters, *supra* note 31, at 7.

principle that more specialized law takes precedent (*lex specialis*). This would prefer the specific provisions of Part III over the fundamental provisions of Part I. On the other hand, however, exceptions are to be interpreted with a view to the fundamental provisions from which they deviate. In particular, the interpretive principle *singularia non sunt extenda* advocates the strict limitation of an exception's scope and the preference for the fundamental provision in case of doubt. The case law of the ECJ has repeatedly applied such a rule in the context of fundamental freedoms.[75] As such, this principle would speak for a formulation such as *in dubio pro parte una*, or more specifically *in dubio pro Community method*.[76] The latter, however, would have to be restrictively applied, owing to the constitutional functions of sectoral differentiation. Sectoral compromises remain binding on both institutional action and constitutional interpretation, even when they stand in conflict with principles used by the Constitutional Treaty in self-description.

II. On the Operating Mode of a Reflexive Constitution

Putting the spotlight on constitutional standard cases may help arrange specific legal consequences, but its primary advantage is the systematization of heterogeneity, that is, the determination of normality and deviance. The tension between—only partially "correct"—self-description (Part I) and normative reality (Part III) cannot, for the most part, be resolved by jurisprudence, but by constitutional politics. This confers on the Constitutional Treaty the status of a *reflexive constitution*. Such a constitution makes normative demands of itself, without (yet) fully accounting for them. The Constitutional Treaty's self-referentiality unfolds in two alternative modes of operation, a "not here" rationale and a "not yet" rationale.

1. The "Not Here" Rationale

In the first mode of operation, deviating configurations stand under the pressure of political justification. Valid reasons are demanded to justify an enduring deviation ("not here"). Convincing justifications are attainable either where the peculiarity of a given sector warrants a departure from the standard model or where substantive legal safeguards for structural minorities are insufficient (*e.g.*, particular concerns of certain or even all Member States). A prominent example of the former is the monetary policy, whose deviation from the standard case of the Community method is justified by the principled desire for an independent central bank, a

[75] *E.g.*, Case C-405/01, *Colegio de Oficiales de la Marina Mercante Española*, 2003 ECR I-10391.

[76] I am grateful to Philipp Dann for this thought; see his contribution to this volume.

deviation which is supported by broad political consensus.[77] As an example of the latter, one could mention the required unanimity under the so-called flexibility clause (Art. I-18 CT); in this case, counterbalancing the wide scope of empowerment with procedural safeguards seems systematically justifiable.

2. The "Not Yet" Rationale

Where such justification is not plausible, constitutional politics set sectorally specialized regimes under pressure to reform; thus, they take on a provisional, stopgap character ("not yet"). Here, the Constitutional Treaty shows strikingly innovative potential. It not only—as is common in written constitutions—lays down the procedure for its own amendment, but also holds in readiness the standard for its own further development.

Certainly, amendability is generally a characteristic of a modern constitution. Defining constitutional amendment as part of law-making itself solidifies the autonomy and continuity of the legal order.[78] Moreover, a constitution's proclamation of an agenda for the future is by no means uncommon.[79] Typically, though, at the moment of its enactment, a constitution claims not only validity, but also consonance with principles.[80] The Constitutional Treaty, in contrast, is defined by its partial imperfection. Conceived of as a reflexive constitution, the Constitutional Treaty does not present itself as a perfect order to be juxtaposed with an imperfect social reality. The Constitutional Treaty's programmatic reference to the future does not address (only) the legislator; instead, it addresses the constitution-making power itself. To take up a metaphor by Kirchheimer,[81] the Constitutional Treaty, to some degree, "lags ahead" of itself.

The paradigm of reflexivity finds its expression in a particular legal concept, the so-called *passerelle* (bridging clause), that is, the power of the European Council or the

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[77] However, it is doubtful whether these considerations justify all deviations from the standard case, see Arts. III-186(2), III-187(4), III-190(3) CT.

[78] Günter Frankenberg, *The Return of the Contract: Problems and Pitfalls of European Constitutionalism*, 6 EUROPEAN LAW JOURNAL 257, 270 (2000); Luhmann, *supra* note 21 at 190.

[79] FRANZ L. NEUMANN, BEHEMOTH: STRUKTUR UND PRAXIS DES NATIONALSOZIALISMUS 31 (1984); Otto Kirchheimer, *Weimar und was dann? Analyse einer Verfassung*, *in* POLITIK UND VERFASSUNG 9, 54 (1964).

[80] HASSO HOFMANN, DAS RECHT DES RECHTS, DAS RECHT DER HERRSCHAFT UND DIE EINHEIT DER VERFASSUNG 55 (1998).

[81] Otto Kirchheimer, *Verfassungsreform und Sozialdemokratie*, *in* FUNKTIONEN DES STAATS UND DER VERFASSUNG 79, 85 (1972).

Council to adopt constitution-amending decisions (*e.g.*, Arts. III-210(3), III-300(3), III-422, IV-444 CT). The ultimate end of these bridging clauses is the constitutional standard case, namely, the crossover from unanimity to qualified majority and the crossover from a "special" to the "ordinary legislative procedure." The institutions so empowered are, for the sake of the Constitution, called to permanent examination of whether the justification of a "not here" still exists, or whether the time has come for an "also here."

III. The Constitutional Treaty between Manifesto and Constitutional Statute

As a reflexive constitution, the Constitutional Treaty is a set of guidelines, an aspiration, for how the Union should become in the future.[82] Hence, the Constitutional Treaty connects to older layers of constitutional reasoning, to the tradition of the manifesto-constitution, whose archetypes are the Declaration of Independence and the *Déclaration* of 1789.[83] In contrast to these, however, the Constitutional Treaty—in the tradition of the constitutional statute[84]—purports, in all its parts, to be a normative constitution, a directly valid legal text with detailed rules for the constituted community. The construal as reflexive constitution makes it possible to take the Constitutional Treaty seriously, despite its contradictions, and to appreciate its characteristic tension between the polar extremes of manifesto and statute. Such a reading permits us to maintain a critical distance from the actual reality of the implementation of constitutional principles, as set out by the Constitutional Treaty itself. Nothing requires the lowering of the normative standards of democracy, for example, simply to match the level actually attained.[85] The Constitutional Treaty points forward, beyond itself: it is an important phase, but not the end point, of European constitutionalization.

G. What if the Constitutional Treaty Fails?

The obvious result of a failure of the Constitutional Treaty—a realistic scenario after the referenda in France and the Netherlands—would be that the European Union has to live with its current Treaties for quite a while. It is difficult to assess which direction European constitutionalism would then take. Yet, the constitutional consensus that the unity of the Union should be based on the Community method

[82] *See* Birkinshaw, *supra* note 26, at 45.

[83] Frankenberg, *supra* note 78, at 261.

[84] *Id*. at 264.

[85] Augustín José Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUROPEAN PUBLIC LAW 105, 142 (2005).

seems to be still intact. What was in fact rejected by the French and Dutch voters arguably applies more to the incomprehensible Union of today than to the Union outlined in Parts I and II of the Constitutional Treaty. One has to admit, however, that reflexive constitutionalism has a weak textual basis in the current Treaties. *De lege lata*, co-decision is only "the procedure referred to in Article 251," *i.e.*, one among various equal-ranking procedures provided by the Treaties. But there is no way back to the state of innocence. Today we *know* what the standard procedure is, and this forms the basis for disagreement on whether to extend it to, let us say, harmonization of direct taxes—in the language of this chapter: whether the "not yet" rationale applies or the "not here." Our reading of the current primary law has already changed, and this will heavily influence the way we construe its provisions. Henceforth, they will be read against the backdrop of what is considered the standard case in Union constitutional law. In a sense, a reflexive constitution once agreed on does not have to enter into force to become effective.

Again, we end up with the tension between fragile unity and contested differentiation, a tension that has proven to be a leitmotif of Union constitutional law, albeit with a lot more differentiation than under the Constitutional Treaty. On one hand, the sectoral constitutional compromises of positive law have to be respected. Even a blatantly unfounded deviation cannot be abolished by jurisprudence alone: it has ultimately to be remedied by formal Treaty amendment (*e.g.*, by using Art. 42 EU). On the other hand, legal scholarship is mandated to strengthen unity by construing the law from the perspective of the standard case and the constitutional principles it is meant to serve, namely the rule of law, democracy, and federal balance. The recent judgment of the ECJ in the *Pupino* case[86] sets an example of how a strong case for unity could be made.

[86]ECJ, Case C-105/03, Maria Pupino, (16 June 2005, http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0105:EN:HTML).