

9-1-2004

A New Constitution for Europe - Symposium Transcript (Major Innovations of the Proposed New European Constitution Treaty)

Louis F. Del Duca

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

Recommended Citation

Del Duca, Louis F. (2004) "A New Constitution for Europe - Symposium Transcript (Major Innovations of the Proposed New European Constitution Treaty)," *Penn State International Law Review*: Vol. 23: No. 1, Article 2.
Available at: <http://elibrary.law.psu.edu/psilr/vol23/iss1/2>

This Transcript is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Transcript

A New Constitution For Europe — Symposium Transcript (Major Innovations of the Proposed New European Constitution Treaty)

Louis F. Del Duca* – Editor and Moderator

Participants:

Philip McConnaughay – Dean and Donald J. Farage Professor of Law, The Pennsylvania State University Dickinson School of Law; J.D., B.A., University of Illinois.

Takis Tridimas – Professor of European Law, University Of Southampton School Of Law; LLB, Athens, LLM, Cambridge, PhD, Cambridge.

Jacques Ziller – Professor of Law and Head of the Law Department, European University Institute in Florence; J.D., Paris II University, *Dipômes d'Etudes supérieures*, Paris Institute of Political Studies.

* A. Robert Noll Professor of Law and Director of The Center for International and Comparative Law, The Pennsylvania State University Dickinson School of Law; Dott. Di Giur. University of Rome Law School, J.D. Harvard Law School; A.B. Temple University.

Mark Tushnet – Carmack-Waterhouse Professor of Constitutional Law, Georgetown University Law Center; J.D., M.A., Yale University, B.A. Harvard.

Larry Backer – Professor of Law, The Pennsylvania State University Dickinson School of Law; J.D., Columbia University, M.P.P., Harvard University, B.A., Brandeis University.

Christine Kellett – Professor of Law, The Pennsylvania State University Dickinson School of Law; J.D., The Dickinson School of Law, B.A., University of New Mexico.

I. Introduction

What follows is an edited transcript of the Symposium on “A New Constitution for Europe (Major Innovations of The Proposed New European Constitution Treaty)” presented at Penn State Dickinson School of Law on October 30, 2003. The symposium initially focuses on the evolution of the European Union, its basic constitutional structure as set forth in Part 1 of the draft new European Constitution Treaty, and the human rights provisions of Part 2 of that document. The issues addressed are as follows:

A NEW CONSTITUTION FOR EUROPE
(Major Innovations of the Proposed New European
Constitution Treaty)

Evolution from the European Coal and Steel Community of 1952 to the European Union 2002-2003 Constitutional Convention and the 2003 Intergovernmental Conference

Division of Powers between the Union and Member States

- Exclusively delegated Powers (Exclusive Competences in the European Union)
- Concurrently Delegated Powers (Shared Competences in the European Union)
- Reserved Powers
- Supremacy Clause

Federal and Intergovernmental

- Common Foreign and Security Policy (CFSP)
- Internal Matters—Merging the European Community and Justice and Home Affairs (JHA)

Division of Legislative, Executive and Judicial Functions Amongst the Institutions of Community

- Parliament
- European Council
- Commission
- Council of Ministers
- Court of Justice

Simplification of Legislation

- Voting Procedures
- Types of Legislation and Executive Acts (Legal Instruments)

Protecting Human Rights

Intergovernmental Conference—The Next Step

Addendum – July 6, 2004

MCCONNAUGHAY: Our first speaker is Takis Tridimas, a long – standing friend and visiting professor of our law school. Professor Tridimas, recently the Chief Counsel of the 2003 Greek Presidency of the European Union Council of Ministers, also is a distinguished Professor of European Law at the University of Southampton School of Law in Great Britain. Professor Tridimas is the author of several leading scholarly works concerning European Community Law.

Our second guest is Mark Tushnet, one of the world's leading scholars of United States and Comparative Constitutional Law and the Carmack-Waterhouse Professor of Constitutional Law at The Georgetown University Law Center. Professor Tushnet is a former law clerk to United States Supreme Court Justice Thurgood Marshall and the author of many leading scholarly articles and books, including a couple of leading biographies of Justice Marshall. Professor Tushnet also is the current president of the Association of American Law Schools.

Our third visitor is Jacques Ziller, currently a Professor of Law and Head of the Law Department of the European University Institute in Florence. Professor Ziller also is a Professor of Public Law at the Sorbonne at the University of Paris and a leading scholar of French Public Law and European Community Law. He is one of Europe's foremost scholars of Public Administration and the author of several books and articles on each of these topics. Please join me in welcoming our distinguished guests.

Our commentators on today's panel include Christine Kellett and Larry Catá Backer, two of our own professors. Each of them also brings considerable expertise to questions of Comparative Constitutional Law. The symposium will commence with some brief remarks by Professor Del Duca.

DEL DUCA: Thank you Dean. Welcome ladies and gentlemen. It is a wonderful time to be interested in international and comparative law. It is certainly a wonderful time to be interested in the host of new experiments in constitutionalism that are emanating out of Eastern Europe, Africa, Asia, and all around the world. Constitutional law has recently assumed a substantially more important role in the world of comparative law and legal education. For example, we now have at least two casebooks available in the United States on comparative constitutional law.¹ One of these is authored by our colleague who is

1. NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

with us today, Professor Tushnet. This is a new development in legal education in the United States. Increasing interest in European Union constitutional issues is part of this new development.

It is preliminarily worth a moment to look at where we in the United States were in 1787 and where this exciting European constitutional experiment is in 2003 and 2004. Our purpose in pursuing this inquiry is not to focus on a provincial perspective, but rather to emphasize the importance and magnitude of what is happening in Europe in this area at this moment of time.

We as a society generally have not really begun to appreciate the importance of what is here involved. There are, of course, obvious differences and some similarities to our 1787 experiment. Problems of vertically dividing power between a central government and its component units, and horizontally dividing power amongst legislative, executive and judicial entities in a central government are inherent in any constitutional structuring. We are familiar with the vertical and horizontal division of power issues addressed in the 1787 Convention. Our symposium today will, in part, address the unique manner in which the current European constitutional revision process is addressing the matters of vertical and horizontal division of power.

Our discussion today will also note other similarities and substantial differences between the challenges Europe is currently addressing and those presented to the 1787 Philadelphia Convention. Contrast the three-month essentially closed-door 1787 sessions in Philadelphia with the eighteen-month, essentially transparent deliberations of the Convention before the draft Constitution was presented to the Intergovernmental Conference which is currently deliberating what the final text will be of the Constitution it will submit to the Member States for approval.² Note also the substantial differences in the population to be governed by the two constitutions. Approximately three million people (essentially sharing a common culture resulting from their status as former English colonies) were scattered across the Atlantic coast line in 1787. Contrast the fifteen countries that are currently members of the European Union. These countries have a population of approximately 350 million people, 11 different languages, different cultures and traditions, and a long history of individual sovereign nation state status. The current Union of fifteen states is scheduled to become a Union of twenty-five states located in western, eastern, northern and southern Europe with a

2. The December 2003 Brussels meeting of the Intergovernmental Conference did not reach a decision on the final text of the Constitution. The matter will therefore be before an Intergovernmental Conference that will be under the Presidency of Ireland for the first six months of 2004, and The Netherlands for the last six months of 2004.

population of 500 million people and twenty-one different languages. These differences in language, history, tradition and individual national identity, etc. cause some skeptics to question whether the proposed new European Constitution will enter into existence. Others find a basis for cautious optimism in the successes thus far achieved.

Consider briefly the history of the evolution of Europe in the past fifty years. Out of the ashes and chaos of World War II came a generation of politicians, who overnight became statesmen in an international globalized world. People like Monnet, Schuman, Spaak, Adenaur and DiGasperi were ordinary politicians turned statesmen who concluded that new institutions had to be created to make possible rational and peaceful resolution of economic and political problems that had driven Europe into three major wars in three generations. They created marvelous things. They created the Council of Europe—a talking society yes—but a talking society which despite the lack of any legislative power nevertheless possessed the capacity to generate a consensus that produced the European Convention on Human Rights. Today this Convention involves commitment by forty-five countries representing over 800 million people to submit themselves to the jurisdiction (i.e., *mandatory jurisdiction*) of the European Court of Human Rights in Strasbourg on issues pertaining to human rights—a marvelous accomplishment.

Contemporaneously, the notion developed that new economic institutions were necessary to meet new challenges. The unique genius of these statesmen and other European leaders and people developing the institutions was demonstrated by their combination of idealism with a unique sense of realism and practicality. They did not proclaim a goal of creating a pervasive economic entity. Instead they very cautiously surveyed the terrain, and identified a single sector (i.e., coal and steel) for experimentation in a program to produce some sense of rationality rather than political and military confrontation in determining how the coal and steel resources of Europe should be developed and distributed. This single sector approach through the creation of the European Coal and Steel Community also provided experience and lessons in cooperative enterprise amongst the European Member States.

A new level of cooperation emerged in 1957. The incremental evolution from a single sector to a broad-based economic union involving all sectors of the economy is characteristic of the general incremental economic and political evolution of Europe over the past fifty years. The idea in 1957 was to expand the single sector coal and steel experiment into a broad-based general economic union. This led to the European Economic Union consisting of the Benelux countries and France, Germany, and Italy. In 1957 these countries created a free trade

area and a customs union to abolish tariffs amongst the Member States and also create a common tariff as to goods coming into the free trade area.

We know what happened after that. In 1987 the Single European Union Act initiated a detailed set of practical steps to establish a single integrated European Economic Market. Maastricht followed, explicitly addressing the need for European cooperation in foreign policy and security matters and justice and home affairs. This was done in the context of giving the European Union a talking kind of power (not an actual power) in foreign policy and security affairs and justice and home affairs. Member States were to meet regularly to talk about foreign policy, security policy, and justice and home affairs issues, but they were not ready or willing to surrender sovereignty on these matters. Subsequently came Amsterdam, Nice, and now we have the Constitutional Convention and the Intergovernmental Conference.

Colleagues on either side of me will go into detail on these developments. Note again, that we are not discussing the lot of a few million people along the Atlantic coast, as was the case in 1787. We are discussing a union of fifteen Member states already having a population of 350 million, which in 2004 is expected to have twenty-five Member States with a population of 500 million people. This is an enormous experiment in creating governmental institutions. It is unique. It has no precedent. The much-discussed European Institutions are, in many respects, unlike the legislative, executive and judicial institutions in the United States, Europe, or any other place. They are in a class of their own—created in response to the special needs of a supranational organization responding to the needs of Nation States and their populations, who instinctively desire to retain their individual sovereignty but are also aware that resolution of economic and political issues rationally and peacefully requires creation of new institutions in which portions of their sovereignty are shared.

Our speakers will initially focus on Part 1 of the Constitution, which addresses the first five issues listed on the program—essentially the basic constitutional structure. They will then address Part 2 of the Constitution, which pertains to human rights.

Between those two parts we will have some comments by our two commentators on the discussion that has proceeded up to that point and we will invite questions, comments, and observations from the audience.

Our first speaker is our distinguished colleague, Takis Tridimas, who was very actively involved in this whole process in his capacity of counsel for the Greek Presidency while the drafting was occurring. Let's welcome our distinguished colleague.

TRIDIMAS: Ladies and Gentlemen, thank you very much. Let me first say what an honor it is to be invited to this Conference and what a great pleasure it is to be back in Carlisle. I would like to thank Dean McConnaughay and Professor Del Duca for organizing this event so marvelously. My thanks are also due to all members of the Dickinson Faculty for making me feel, once more, so welcome.

As Professor Del Duca pointed out, we have come a long way since 1952 when the first steps towards European integration were taken with the establishment of the European Coal and Steel Community. In fact, there have been more than ten major constitutional revisions, nine of which have taken place within the last twenty years or so. Since 1980 there have been four new Accession Treaties: Greece acceded to the Communities in 1981; Spain and Portugal in 1986; Austria, Finland and Sweden in 1995; and the latest accession, which is the largest, will take place in May 2004 following the signature of the Treaty of Accession with ten new States in Athens on 16 April 2003.³ In parallel, the original treaties were revised by the Single European Act (1986), the Treaty on European Union (1992), the Treaty of Amsterdam (1997), and the Treaty of Nice (2001). There is no nation state which has had its constitution revised so frequently in such a short period of time. Europe is in political turmoil. This constant need for revisions and adjustments reflects the quest for optimal structures, procedures, and rules to make the project of European integration workable and sustainable, but also, equally importantly, the quest for Union legitimacy.

Before discussing the provisions of the draft Constitution, let me outline briefly some recent trends in the broader field of EU judicial protection and governance which, although diverse in their origin, form part of the wider constitutional framework within which the draft Constitution has emerged.

The first trend is what can be referred to as *formalization*, namely, a tendency to provide for the express declaration and entrenchment of rights in constitutional texts. This trend began with the Treaty on European Union, which, for the first time, enshrined respect for fundamental rights at Treaty level and declared the Union to be founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.⁴ It also amended the EC Treaty by providing express recognition of fundamental constitutional

3. The new States are the following: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

4. See Treaty on European Union, adopted as part of the Treaty of Maastricht (signed Feb. 7, 1992; effective Nov. 1, 1993), art. 6(1) and (2), O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719.

doctrines, for example, subsidiarity and proportionality.⁵ Another prime example is provided by the adoption of the Charter for the Protection of the Fundamental Rights, which now forms Part II of the draft Constitution. The draft Constitution itself represents the culmination of this tendency towards formalization.

The second trend, which is prevalent in the case law of the European Court of Justice, is a trend towards *equivalence*. This is to say that the Court increasingly subjects the Community institutions and the Member States to the same standards of scrutiny and accountability. This applies, in particular, to the fields of judicial review and liability in damages for breach of Community law. The Court, in other words, increasingly views supra-national and state agencies as being part of the same administration.

The third trend could be referred to as *selective deference*. By this, I mean that in some areas the Court of Justice is content to defer to choices made at national level, uphold the powers of the Member States or leave matters to the national courts to decide. But in other areas, the Court is willing to provide leadership and dictate the results. Risking over-simplification, one could say that in recent years the Court has been active and interventionist in the fields of European citizenship, human rights, and remedies but less so in the field of Community competence.

Let me now take you through some of the provisions of Part I of the draft Constitution. I will deal, first, with Articles 1 and 2 and then the provisions pertaining to the division of competence between the Union and the Member States. As a preliminary point, allow me a terminological clarification. One of the innovations of the draft Constitution is that it abolishes the European Community as a separate entity. It brings the European Union Treaty and the European Community Treaty under one roof and also abolishes the current three-pillared structure of the European Union, which comprises the European Community, the Common Foreign and Security Policy, and the Police and Judicial Co-operation in Criminal Matters. The intention is that all aspects of Union law will be governed by one overarching document, namely the Constitution.

Article 1(1) of the draft Constitution, headed "Establishment of the Union," is instrumental in helping us to understand the function and the nature of the European Union as a supra-national entity. It states as follows:

Reflecting the will of the citizens and States of Europe to build a

5. See Treaty Establishing the European Economic Community (Treaty of Rome), opened for signature Mar. 25, 1957, art. 5, 261 U.N.T.S. 140 (entered into force Jan. 1, 1958).

common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives that they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community way the competences they confer on it.

Article 1 suggests that Union legitimacy derives from a dual source, namely the citizens and the States of Europe. Whilst the second source is indisputable, one may question the extent to which the Union is based directly on the wishes of the citizens of the Member States. The project of European integration is primarily an elite-driven process. The European Community has evolved, expanded and mutated to a supra-national system of government which rivals the nation-state because, in the post-war years, successive governments of European States have remained firm in their belief that, at the very least, it is better to be members of the Community rather than to remain outside it. This is not to say that the citizenry has not influenced the process of integration but to illustrate that the European project has been driven primarily by the political elite. The draft Constitution provides no exception.

The assertion of Article 1 that the Constitution establishes the Union "reflecting the will of the citizens" receives support from the fact that the national governments are themselves accountable to their electorates. Approval of the Constitution by the national Parliaments ensures that the wishes of the citizens are taken into account since the parliamentarians are themselves elected by the people. This logic is impeccable under the model of representative democracy but one may question whether it is appropriate for a document that aspires to the title of a Constitution for Europe. The claim that the Constitution derives authority from the people would be much stronger if the Constitution provided that it should be approved by referendum in each of the Member States. Instead, the Constitution, which has the form of an international treaty, leaves the method of its ratification to the "respective constitutional requirements" of the Member States (Article IV-8(1)). This, it may be argued, denies it the character of a true constitution.

Another aspect of Article 1 is that it adopts a functional approach towards the European Union by defining it as an entity that has been mandated by the Member States to attain common objectives. Implicit in this statement is the assumption that, at least in relation to certain issues, the nation state is not the optimal political structure for reaching decisions. However, while Article 1 recognizes the limitations of the nation state, it perceives the Union as an agent of, and therefore subordinate to, the Member States.

Article 1 states that the Union shall exercise "in the Community way" the competences conferred upon it. This inelegant expression is a

solecism inserted in the Treaty to avoid the use of the term “federal” to which some national delegations vehemently objected. It means that the Union institutions are empowered to act by the means, instruments, structures, and methodology that have developed over the years in the Community context and whose distinct feature is that they go much further than classic intergovernmental forms of co-operation.

Article 2 reflects the values of the Union. It declares that “the Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights.” This provision encapsulates the spirit of liberal democracy. It provides ideological continuity with the constitutional traditions of the Member States and defines what the Union stands for. In doing so, it seeks to forge a common political identity but also serves as a postulation: respect for the values enshrined therein becomes a political and legal imperative both for the Union institutions and the Member States. This dual character of Article 2 provides a declaration of nascent nationhood and lays down the underpinnings for the recognition of European citizenship in subsequent provisions of the Constitution. Article 2 also defines the Union as “a society of pluralism, tolerance, justice, solidarity and non-discrimination.” This statement, which is reminiscent of language used by the European Court of Human Rights,⁶ (envisages a notion of democracy which extends beyond majoritarianism and incorporates a broad conception of human rights.

I turn now to examine the provisions on competence. One of the innovations of the Constitution is that it contains express and detailed provisions concerning the division of competence between the Union and the Member States. These dispositions provide, to a good extent, a restatement of principles laid down in the existing Treaties or elaborated in the case law of the Court of Justice in an attempt to clarify the law and enhance legal certainty.

Article 9 recasts with minor amendments the provisions of Article 5 of the European Community Treaty, and lays down the principles of attribution of competence, subsidiarity, and proportionality. These principles are well known and I need not refer to them in detail. Suffice it to say that the division of competence between the Union and the Member States is governed by two fundamental principles. First, the presumption of competence lies with the Member States. As stated in Article 9(2), the Union only has those powers which are given to it expressly or by implication by the Constitution. Competences not so conferred upon the Union remain with the nation state. Thus, the institutions of the Union do not have self-executing powers and, by

6. See, e.g., *Smith & Grady v. United Kingdom*, 29 Eur. Ct. H.R. 493 (1999).

default, power lies with the Member States. Secondly, where the Union has competence, such competence is, as a general rule, shared with the Member States and not exclusive to the Union; or, to put it differently, the Union only has exclusive competence where that is stated by the Constitution. This derives from the nature of Union competence and also from Article 13(1) to which I will return later.

Article 10(1) provides expressly for the principle of primacy of Union law. Where there is conflict between Union law and national law, the former prevails. This is a principle well-established in the case law of the Court of Justice since the early years of the European Community. Indeed, one of the most important characteristics in the development of Community law is the way the Court has progressively expanded the content of primacy and derived from it remedial implications, including the right to reparation against the State for breach of Community law.

Article 10(2) further states that Member States must take all appropriate measures, general or particular, to ensure fulfillment of the obligations flowing from the Constitution or resulting from the acts of the Union institutions. This obligation binds all organs of the Member States, i.e., the legislature, the executive and the judiciary, and is a specific expression of the general principle of solidarity and co-operation which is provided for in Article 5(2) of the draft Constitution and currently found in Article 10 of the European Community Treaty. The Court of Justice has used the duty of cooperation in conjunction with the principle of primacy to impose specific duties on national courts to provide full and effective protection of Community rights and to colonize, at least to some extent, the law of remedies.

Article 11 of the draft Constitution distinguishes three types of Union competence, namely exclusive, concurrent, and complementary. I will examine those in turn.

Under Article 11(1), where the Union enjoys exclusive competence, only the Union may legislate and adopt binding acts. The Member States may do so only if they are empowered by the Union or for the implementation of acts adopted by the Union. Thus, in case of exclusivity, Member States may intervene only as agents of the Union. Such agency may exist for the purposes of implementing Union obligations into national law or if Union law delegates legislative power to the Member States. The powers of Member States in this context are less certain, and possibly wider, than a first reading of Article 11 would suggest. Thus, Union law may grant delegated powers to the Member States not only expressly but also by implication. Also, the implementing powers of the Member States and the discretion of national authorities may be wide even in areas where the Union enjoys exclusive competence. An example for this is provided by competition law, in

relation to which Union competence is exclusive but the enforcement of which has recently been decentralized and entrusted to national competition authorities. Further, in exceptional circumstances, the Member States may be allowed to take action temporarily as “trustees” for the protection of Union interests, although it appears from the case law that this remains a rather theoretical possibility.⁷

Article 12 provides for the first time for a list of exclusive competences. So far, the founding Treaties have remained silent on this and it has fallen to the Court to determine, as and when a dispute arises, whether a specific area falls within the exclusive or shared competence of the Community. Article 12(1) states that the Union has exclusive competence to establish the competition rules necessary for the functioning of the internal market. The scope of exclusivity here is narrower than it appears. The Union is granted exclusive power to prescribe the competition rules of the Treaty, i.e., the rules prohibiting anti-competitive conduct (competition *stricto sensu*). Exclusivity does not extend to the rules that are necessary to remove distortions of competition in the internal market, in relation to which, under Article 13, the competence of the Union is shared.

Article 12(1) defines the competence of the Union as being exclusive also in the following fields:

- monetary policy for the countries that have adopted the euro
- common commercial policy (i.e. trade relations between the Union and third countries)
- customs union
- conservation of marine biological resources.

In relation to these areas, the draft Constitution does not innovate but provides a restatement of the law and endorses the principles laid down in the case law of the Court of Justice. The same is true for Article 12(2) which defines exclusivity in the context of external action, namely the treaty-making power of the Union. It states that the Union has exclusive competence for the conclusion of an international agreement in the following cases: where its conclusion is provided for in a legislative act of the Union; where it is necessary to enable it to exercise its internal competence; and where it affects an internal Union act.

The detailed consideration of these provisions lies beyond the scope of this symposium. Suffice it to say that, although the articles of the Constitution make a noble attempt to increase legal certainty in a sensitive area, the notion of competence remains elusive, partly because of its nature and partly because the consequences of exclusivity are difficult to define in the abstract. In fact, competence is an area where

7. See Case 804/79, *Commission v. United Kingdom*, 1981 E.C.R. 1045, [1981].

the Court has taken a less principled approach than other areas and, on occasion, although it has used the language of exclusivity it has refused to draw the legal implications which one would expect to flow from it.

I turn now to shared competence. Under Article 11(2), where the Union and the Member States share competence, both have the power to legislate and adopt binding rules. The Member States, however, may exercise their competence to the extent that the Union has not exercised its own or has decided to cease exercising it. Thus, the exercise by the Union of its competence has a blocking effect. The Member States may no longer adopt laws which might affect Union rules or alter their scope.

Article 13 provides for the areas of shared competence. This enumeration, however, is indicative and not exhaustive since, as I said earlier, shared competence is the "default mode." This is recognized by Article 13(1), which states that the Union shares competence with the Member States where the Constitution confers on it a competence that does not relate to the areas of exclusive or complementary competence as defined by the Constitution.

Article 13(2) lists, *inter alia*, the following areas of shared competence:

- internal market
- establishment of an area of freedom, security and justice
- agriculture and fisheries, excluding the conservation of marine biological resources
- energy
- certain aspects of social security
- environment
- consumer protection

It should be noted that the inclusion of the internal market in the shared rather than the exclusive competence of the Union proved controversial but was dictated by political considerations. But what does shared competence mean in this context? Clearly, the Member States may not individually adopt rules providing for interstate free movement outside the aegis of the Union. The lack of Union exclusivity however has, among others, the following legal implication. It means that the principle of subsidiarity applies in relation to Union harmonization measures introduced in order to provide for the establishment or the functioning of the internal market. It may also leave open the possibility of some Member States pursuing enhanced cooperation in this field under Article 43 of the proposed Constitution, although this is an area marred with difficulties of interpretation.

The third type of Union competence recognized by the draft Constitution is complementary competence. Under Article 11(5), this means that the Union may carry out actions to support, coordinate or

supplement the actions of the Member States “without thereby superseding their competence in these areas.” Under Article 16(2), complementarity exists in the following areas: industry; protection and improvement of human health; education; vocational training; youth and sport; culture; and civil protection. The specific powers of the Union in those areas are laid down in Chapter V of Part III of the Constitution. The Union may adopt binding acts, to the extent provided for in Chapter V, but such acts may not entail the harmonization of national laws (Article 16(3)).

The complementary nature of Union competence circumscribes the scope of Union powers *ratione materiae*. It means, in other words, that the Union may only adopt measures which support national measures in the respective fields as provided for in the provisions of Chapter V of Part III. These are areas where policy making power rests primarily with the nation state and the Union may only play the role of the assistant, coordinator, or mentor. It will be noted, however, that this subordinate role of the Union is subject to countervailing forces. First, where the Union validly introduces legislation in those areas this legislation binds the Member States, which may no longer introduce measures that affect or alter the Union laws. Secondly, Union presence in these areas may potentially be enhanced by a “spill-over effect,” although so far there is little evidence of this happening.

Finally, Article 17 of the draft Constitution, termed “flexibility clause,” recasts in more detailed terms the provision of Article 308 of the European Community Treaty. It bestows the Council with open-ended residual authority to adopt measures for the attainment of the Community objectives. Article 17(1) states as follows:

If action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures.

In drafting terms, Article 17(1) is an improvement over the current provision of Article 308 of the Treaty. It differs from Article 308 in the following respects: It omits the proviso that the necessity of Union action must have emerged “in the course of the operation of the common market.” This proviso, in any event, has not been attributed much legal significance by the Court of Justice. Also, it makes clear that the Union is vested with residual law making power only within the framework of the policies defined in Part III of the draft Constitution. This endorses the case law of the European Court of Justice, according to which Article

308 “cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those which define the tasks and the activities of the Community.”⁸ Finally, Article 17(1) requires the consent of the European Parliament whereas Article 308, as it currently stands, requires only its consultation.

In addition to the tripartite classification of exclusive, shared, and complementary competence, the draft Constitution also provides for Union competence in further areas. Thus, the Union has competence to define and implement a common foreign and security policy (CFSP) under Article 11(5). Also, the Union is bestowed with competence to promote and coordinate the economic and employment policies of the Member States under Article 11(4). The detailed examination of these areas falls beyond the scope of this symposium. Suffice it to mention that, under Article 15 of the draft Constitution, the Union’s competence on the CFSP covers all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defense policy. Under Article 15(2), the Member States are required to actively and unreservedly support the CFSP in a spirit of loyalty and mutual solidarity and comply with the acts adopted by the Union in this area. One of the many questions raised in this context is whether this provision may be justiciable thus giving to the Commission the power to bring proceedings against a Member State for failure to comply with the duty of solidarity.

Overall, the provisions of the draft Constitution on competence should be viewed in a positive light. They seek primarily to restate and clarify rather than to reform. Although they give rise to a number of interpretational difficulties, only some of which I was able to highlight in this seminar, and leave a number of matters undecided, they are an improvement over the current position of the EC Treaty which contains precious little about competence. I would therefore prefer to view the glass, on this occasion, as half full rather than half empty. By way of conclusion, it may be remarked that competence remains, by nature, an elusive concept. What matters is not so much the general provisions of the draft Constitutions but the specific dispositions of Part III, which provide the legal basis for Union action in specific fields, prescribe the scope and form of such action, and the procedures for its adoption, and the Court of Justice which remains the final arbiter.

DEL DUCA: Thank you very much for those very enlightened

8. See Opinion 2/94, Accession by the Community to the European Human Rights Convention, 1996 ECR I-1759, ¶ 30, [1996] 2 C.M.L.R. 265 (1996).

remarks. We might note at this juncture some differences in terminology from one legal system to another.

The references to “competence,” “exclusive competence,” and “shared competence” in the European Union context are essentially references to “delegated powers,” “exclusive delegated powers,” and “concurrently delegated powers” in the lexicon of our United States Constitutional system. Under Article I, Section 8 of the United States Constitution, Congress is given “delegated powers.” Some of those powers are “exclusively” delegated, and some are “concurrently” delegated. For example, the power to declare war is said to be delegated because it is delegated to the Federal Congress by Article I, Section 8. It is also said to be “exclusively delegated” because it is prohibited to the states by Article I, Section 10. The power to regulate interstate commerce is “concurrently delegated” because while it is delegated to the Federal Congress by Article I, Section 8, it is not prohibited to the states by Article I, Section 10.

The new European Draft Constitution lists in one section “exclusive competences” (i.e. “exclusively delegated powers”) and in another section “shared competences” (i.e., “concurrently delegated powers”). This compartmentalization of separate lists of the two types of delegated competences is more direct and simpler than our two step process of utilizing a general comprehensive list of delegated powers in Article I, Section 8 followed by Article I, Section 10, which prohibits states from exercising certain powers listed in Article I, Section 8.

In summary, in the United States Constitution we have put exclusive and concurrently delegated powers all together in Article I Section 8. To determine which are “exclusive” and which are “concurrent,” we have to revert to Article I, Section 10 which lists powers denied to the states.

Let’s welcome our next speaker Jacques Ziller.

ZILLER: Thank you, first to The Dickinson Law School for the invitation to speak. Thank you to the audience for attending this session and being interested in the European Union and thank you Professor Del Duca for starting your remarks with 1787 because this allows me, being French, to start with 1789, two years later. Article 16 of the Declaration of Human Rights and the Rights of the Citizen says, (the French is much better than my rough English translation): “Any society in which rights are not guaranteed and the separation of powers is not being established has no constitution.” This is one of the ways of looking at the new European Constitution.

What I want to address is the question of whether the new European Constitution contributes to a better establishment of separation of

powers. I consider at this time the horizontal division of power between branches of the central government and not the question of vertical division of power between the central government and its component parts. I submit that with the new European Constitution there is a better separation of powers than we had previously. With the new European Constitution, we now have a clear separation between legislative power and executive power.

To understand this matter, one must appreciate what the Treaty of Paris establishing the European Coal and Steel Community in 1951, the Treaty of Rome establishing the European Economic Community in 1957 and the Maastricht Treaty establishing the European Union in 1992 were trying to set up. You have on one side, as in any Constitution, different institutions that participate in the functions of government. In the United States the only function that is really independent from the others is the judiciary. Legislative and executive functions operate through different elements of checks and balances. Different procedures are shared to a certain extent.

What we did not have in the earlier European framework was a clear idea of what is legislation and what is not legislation (e.g. executive decisions). What we had was something which in 1951-57 was very useful for the limited purposes of the European Economic Community (EEC), namely a list of instruments which were differentiated according to the impact they had on member states—i.e., regulations, directives, decisions, recommendations, and opinions (Article 189). This was all very fine at the time, but it is not satisfactory today for two reasons.

First the function of the different instruments is not clear to the citizens in Europe or elsewhere. It is not what we are accustomed to. It is not the familiar terminology we are accustomed to like bills, Acts of the Congress, or Acts of Parliament, “laws” etc.

The other reason is that during the past fifty years, several reforms in the treaties have occurred. In addition, the Community institutions have also developed new practices. For instance in 1957, we had a very clear list of five, and only five, possible types of instruments that could be utilized. Today however, (depending on how you count them) you can find at least fifteen or even twenty-five different types of instruments. This is very confusing. In addition, the current names are confusing. For example, what is called a “regulation” should be called a “law.” A “directive,” as literally understood is a legally binding instrument. There are also legal problems as to the impact of the different types of instruments. Trying to provide clarification in the types of instruments the institutions are authorized to utilize was thus one of the main tasks of the European Convention.

Article 32 of the draft Constitution is accordingly both a

consolidation of the present system utilizing new names and consequently a more understandable system of authorized instruments. Article 32, (entitled "The Legal Acts of the Union"), is only one part of this exercise in clarification. The English version is not very good, because the whole vocabulary of European Community law was developed at the time when Britain was not part of the Community. The vocabulary is therefore based on French, Italian, German and to a small extent, Dutch concepts. For example, United States scholars are not accustomed to speaking of "competences" but of "powers." Our British colleagues nevertheless, are speaking about "competence" (a French term).

What are the "instruments" authorized by Article 32 of the text of the proposed new European Constitution? We will have "European laws," "European Framework laws," "European regulations," "European decisions," "recommendations," and "opinions." These are named first in Article 32, and addressed in the following articles which provide a little more detail. The main idea is to replace an "EC" specific vocabulary with something that is more familiar: "Directive," "regulation," and "recommendations" are replaced by "Laws." The British tradition would call them Acts of Parliament. The new terminology authorizes legislation called "laws," and other acts called "regulations" or "decisions." You now have "instruments" that are the product of the legislative function, and "instruments" that are the product of the executive function.

This is a major step forward because it is accompanied with a change in the procedures. I would like next to talk about exercising competence, (i.e. powers), granted to the Union. "The Union shall use legal instruments in accordance with the provisions of Part III."⁹ Part III at Article III-302 provides for what is called the "ordinary legislative procedure."

If you were working with the present European Community/European Union treaties the best way to get a tremendous headache would be to try to understand and then try to explain the present decision making procedure. Article III-302 of the draft Constitution is far more simple. It is similar to what you have in various constitutional systems. There is a provision for a single reading. The whole process stops if both "houses" (i.e., The European Parliament and the Council¹⁰) agree. You do not need to go further. They have agreed.

9. Article 32.

10. The present Treaties use "Council" as an abbreviation for Council of the European Union, which means the "Council Ministers" to be distinguished from the "European Council." The Council of Ministers is composed of members of national governments having the status of a minister.

If they do not both agree immediately you will have a second reading. This is followed by a conciliation procedure between the two. This conciliation procedure is something which you do not know in the United States between the two Houses of Congress. It is also unknown in Italy between the two houses of Parliament which are on equal footing. However, it is known in most European countries, where the two Houses of Parliament are not on an equal footing, but where a conciliation between them is being sought. If needed, there is a third reading.

Without going into detail, I note that the important step forward is that in the draft Constitution, the European Parliament is on equal footing with the Council of Ministers. Nowadays, under the present treaties, this is not yet the case. At present the European Parliament has far less powers than the Council of Ministers. There are even still a few instances where the Parliament only has the ability to give an advisory opinion.

Now what is specific and remains so in the European Union, is that both the Parliament and the Council can only adopt legislation if the European Commission has put forward a proposal. This procedure is not changing with the draft Constitution, because it is particularly well adapted to the system of the Union and it is one of the ways of guaranteeing the vertical division of powers. Nevertheless in one area the Commission does not have this monopoly of proposing legislation. In the Area of Freedom and Security, which is about police and justice affairs, it is possible to adopt legislation upon initiative of a government of a Member State.

Then we have another aspect, which is a tremendous change initiated by the draft Constitution. Apart from a very limited number of cases, we will have one and the same procedure for adopting European Union legislation. In the former system we had a differentiation along the so-called "pillars"—not the one Takis Tridimas was alluding to, but a horrible system invented with the Maastricht Treaty which was very confusing. The pillar structure is being suppressed in the draft Constitution. This is a fundamental change which leads to a number of other changes.

In order to have the full picture one should also go to the end of the draft Constitution and look at two so-called "Protocols." There is one Protocol "[o]n the Role of National Parliaments in the European Union" and another Protocol "[o]n the Application of the Principles Subsidiary and Proportionality." The important point here is that those two Protocols have as their purpose and will have the effect of bringing National Parliaments into the legislative procedure at the European level to a small but nevertheless important extent. This is something which

you do not have in the United States, especially since Senators are now directly elected and not any longer representatives of state legislatures. It is something Germany knows in its European version of federalism. In Germany there is some participation on the state level in legislation generated at the federal level.

What are the consequences of this horizontal separation of power from the perspective of the institutions? The first consequence is that the European Parliament is gaining an enormous amount of power, perhaps not quantitatively but certainly politically and symbolically. It is becoming a real co-legislator as if we had two Houses (i.e., the European Parliament and the Council). This impression is reinforced if we look at budgetary powers where the changes give far more power to the European Parliament.

There is hardly any change in the powers of the European Commission. This is quite logical because the European Commission is still a composite institution, which participates in legislating through proposing drafts (having a monopoly of proposing legislation) and also has important executive powers. The draft Constitution gives more executive power to the Commission than it has at present. The Commission, in a sense, participates also in the exercise of the judicial function, because it functions like a kind of attorney general of the European Union.

The draft Constitution does not say a lot about the European Court of Justice, but what is said is very important. Article III-270, at first glance, reproduces the present text of the European Community treaty apparently with a very minor change. However, if you read further there is an important change. The change is in the difference in “standing” conditions based on whether one wants to review the (lets call it) “constitutionality” of the European Law or whether the Court is reviewing regulations, in which case the standing conditions are broadened.

As far as the Council of Ministers is concerned, what is interesting is that there is an idea of transforming quite clearly the Council into a double-headed machinery. The first part makes the distinction in Article 23 between different “Formations” of the Council of Ministers, a French word that does not mean anything in English and should have been better translated. “Formation” in this context is intended to mean the “Component” Councils of the Council—the idea is that we have one institution, the Council of Ministers with different operating components. What the Constitution further proposes is to have one component of the Council of Ministers which would be the “Legislative Council” and others that would address particular fields as an executive function or as a more general function of monitoring. However, Foreign Ministers of

Member States dislike this idea and will probably suppress the "Legislative Council."

The idea is that the Council meet privately when it meets as a particular Component Council and meet publicly like any House of Parliament when it acts as a legislature. In Article 23 ("Formations of the Council of Ministers"), there is a clause requiring transparency and this will certainly remain. So when the Council legislates, it legislates publicly: it has a procedure like the legislative procedure we know in state constitutions. On the other hand, when the Council is acting as an executive institution it meets behind closed doors like the executive in all our democracies. You know the results of the meeting, but you are not supposed to know the detailed discussion between the President and Secretaries, or in Europe between the Prime Minister and ministers. This is something which is not fully stated but which is also a result of the separation between legislative and executive functions.

In conclusion, I note that there are a lot of other things in the draft Constitution, which could be linked to this subject. However, at this time I will note that if you go beyond the idea of separation between legislative and executive function there is a lot of institutional engineering in this Constitution. We will not spend very much time on this for the simple reason that is what the press is getting excited about. How many Commissioners should we have, should there be one for each Member State or not? I think it is very important from a symbolic point of view. The Commission is supposed to represent general European interest and not the Member States—and that is why I am one of the people who think its wrong to argue that there should be one Commissioner for each Member State. But that is really an issue which, in a sense, is secondary because it might change over time.

Also, there is institutional engineering which the press has reported. I think that it is indeed very important to have a permanent President (the English text says "Chair" but this is a rather clumsy formulation). The President of the European Council¹¹ is something new, which is not linked to the separation of powers, but which is certainly worthwhile discussing. Whether he has a high profile function (like the President of the United States) or a low profile function (like the German or the Italian President for instance) is another story, which only the future will tell us.

There are also a lot of other things in the draft Constitution. For example, there is a very mysterious formula about the future composition

11. Articles 20 and 21, as distinguished from the Council of Ministers. The European Council is composed of the top executive branches in Member States, i.e., Prime ministers and—for France—the President.

of the Parliament, saying that it should be “degressively proportional.” The advantage is that nobody knows what “degressively proportional” means. Mathematicians say that it should not be “degressively” but “regressively” proportional, but I leave that to the specialists of institutional engineering. I think these comments address the most important matters relating to the institutional side of the draft Constitution.

DEL DUCA: Takis, you may wish to make a few comments regarding the Commission, Council, Parliament, and the European Court of Justice in the context of how they relate to our three branches of government? The two systems are not identical by any means.

TRIDIMAS: There are four institutions, the Council of Ministers, The Commission, The European Parliament, and the European Court of Justice. Under the proposed constitution the pillars are fused and have become a single entity under the name European Union. In addition to the four institutions I have mentioned, there is also the European Council. The European Council is a political organ of the European Union. It is composed of the Heads of Government of the Member States.

The Council of Ministers changes formation depending on the topic that is being discussed. It has one representative at the cabinet level for each Member State. When it discusses agriculture it is the national minister of agriculture that takes part in the discussion. When it discusses environment it is the national minister of environment etc. So it has various formations (i.e. components). The General Affairs Council, as things currently stand, is made up of the foreign ministers of the Member States.

The Commission, on the other hand, can best be characterized as the executive of the European Union. The Commission is independent of national interest. Each Member State currently has a Commissioner. As you know we have fifteen Member States and the current law is that the big Member States have two Commissioners each, and the small Member States have one Commissioner each. The big Member States are the United Kingdom, France, Germany, Italy, and Spain. The tricky thing is that you are now going to have twenty-five Member States. It has been said that a Commission composed of twenty-five members would be an unworkable institution. The proposed Constitution devises a rotation system under which all Member States do not have a Commissioner at the same time. There are currently negotiations going on about this. The smaller Member States think they should always be allowed to have a Commissioner as a way of protecting their national

interest. The precise formation and composition of the Commission is one of the issues currently being discussed in the Intergovernmental Conference. We shall have to wait to see what emerges.

The European Parliament as Jacques explained so well has now been elevated to a co-legislative status with the Council. One of the characteristics of the successive Treaty amendments throughout the last 20 years has been a very gradual increase in the powers of the European Parliament. The European Parliament has now developed into a democratic body which exercises, together with national Parliaments, control over the administration of the Commission.

There is also a new post created by the proposed Constitution, which is found in Article 27. This is the Union Minister of Foreign Affairs. The function of this person is to develop the common foreign and security policy by receiving instructions from the Council of Ministers. But Article 27 states that the Minister of Foreign Affairs will also be a member of the Commission. I can not see how this is going to work in practice. It seems to me that it runs counter to the separation of powers. Inevitably, the incumbent will find himself or herself in conflict of interest situations. There may be cases where the Commission feels that the Council of Ministers does not do enough to promote common foreign and security policy. I cannot see how the same person can wear two hats at the same time and yet avoid conflict of interest. Let us see again how this is going to develop. I am just picking up on a couple of points, I was not intending to dwell.

DEL DUCA: Well, Jacques has the floor again.

ZILLER: I would just like to add one comment, I fully share Takis Tridimas' idea on competence. One of the most important things is what is not being said in Article 10. I share with him the view that it is a good thing that it does not say who has ultimate legitimacy.

In order to understand what changes, because there is a change with the European Constitution, you have to look at Article 59 dealing with voluntary withdrawal. We visited Gettysburg yesterday. The symbolism of Gettysburg is obvious in this context. The big difference between Europe and the United States is that we have in the draft Constitution a clause on voluntary withdrawal from the Union. This is a tremendous innovation in the European Constitution because it is solving a question which we, as academics have disputed. There is one version whereby if you apply international law, withdrawal is possible but if you apply Union law, withdrawal is not possible.

This is very important because we provide a solution to a question which (let's forget about Gettysburg) the Canadians are asking every ten

years, and which the Supreme Court of Canada has had to answer. Is it possible or not to withdraw? That is very important because if a member feels it is possible to withdraw, it also means that it cannot lose its competences forever. If it is losing its competences to the benefit of the Union it is only temporary. This temporary nature might last for the whole life of the Union, or simply, if one day a member is not happy with what the Union does, it withdraws. This is an important change because it is stating something which was unclear before.

DEL DUCA: Before we leave this subject I would like to look at these five institutions from a comparative perspective. I ask myself, how does the system differ from our traditional United States system? In the United States system we think in terms of the President, Congress, and judiciary while on the European Union side, Parliament, European Council, Commission, Council of Ministers, and Court of Justice. It does not work out that simplistically in the complicated European Union system because of the carefully measured surrender of sovereignty by Member States to the Union, and the interplay of the dynamics of assertions of power by the various institutions.

Look at the Commission (fifteen members at the present time, one from each Member State, potentially twenty-five when the Union grows). We are looking at fifteen people, who under the terms of both the existing and future Constitutions, owe their loyalty to the Union, not to the country from which they come. That is very clear, and these fifteen people (under the present system and under the new system) will have the power to initiate legislation. They have this exclusive power except for the one situation that our distinguished colleagues refer to. All legislation must be initiated by this fifteen person group.

This is legislative power. However, the same fifteen person Commission is essentially the executive branch in that it has the power to bring proceedings in the European Court of Justice to enforce the requirements of the Treaty and Community legislation. We do not have that mixture in the United States system. There are reasons for this. Consider the nature of the allocation of power in this Union amongst sovereign nations that are surrendering a modicum, measured amount of sovereignty. In this context, look at the Council of Ministers which up until now has essentially been the legislative body. I should say "legislative bodies" because of the references to "formation" of Councils (we translated "formation" in this context to "component" Councils of the Council of Ministers). Here is how the Council of Ministers works. Each country appoints one person to the Council of Ministers. The loyalty of the appointees is not to the Union, but to the country that appoints. Legislation, up until now, was essentially adopted by the

Council of Ministers, with the Parliament essentially having an advisory function and limited operational powers. It is a complicated process, but the Council is essentially where the legislation was adopted and not in the popularly elected Parliament which has close to 700 members.

Another factor that I think has to be explicitly stated here is that the European Union system does not have one Council. Instead, it has component or so called "formation" Councils. If the legislation the Commission has proposed has to deal with agriculture there are fifteen agricultural specialists (one from each country) that decide whether to adopt or not to adopt the legislative proposal. If it is banking, fisheries, if it is consumer protection, if it products liability, etc. there are, in each instance, fifteen different member Councils for each area. These Councils can work simultaneously. They do work simultaneously. It always was a puzzle to me how the massive amounts of legislation that come out of the European Community could be accomplished. But this is one of the features of the system that makes it possible.

Now, on the matter of the Parliament: In 1957 it wasn't even referred to as a Parliament. It was referred to as an Assembly, and that language remained until 1987 when the Single European Act was adopted. The word "Parliament" was used there for the first time. That was no accident. There was no intention on the part of sovereign nation-Member States to surrender law-making power to a Parliament elected popularly from particular districts. That was a degree of surrender of sovereignty that they were not willing to make. It is measured amounts of sovereignty that have been surrendered, although an increasingly greater amount of sovereignty over a fifty year period. The Parliament very painfully evolved from a group of people who were elected but were essentially to give advice on the propriety, and desirability of legislation, but not to vote on it. The new treaty now, as Jacques so well described here, will, for the first time, make this Parliament something like a real Parliament. But, although the concurrence now of the Parliament to adopt a legislative act is needed, they certainly do not have the first vote on pendency legislation.

Such fundamental differences make the European Union system unlike the system of any European, United States, or any other country. It picks and chooses and creates new institutions in devising power very intentionally and very carefully to solve the schizophrenia of nations recognizing the need to surrender power in order to create an institution that can peacefully create rules that will solve economic and political problems, yet instinctively wanting to retain their sovereignty.

Are there other comments on this point?

Well, then we will move on to the next part of the program and give our distinguished commentators on my left, my colleagues Professor

Chris Kellett and Larry Backer a chance to make comments.

KELLETT: I was thrilled to be part of this and to hear these comments. Takis has pointed out very carefully that the pillars and the reasons for this new Constitution are to bring peace and prosperity to the continent of Europe and the Member States of the European Union.

Clearly, there may be prosperity without peace but there is rarely peace without prosperity. So I guess I need to address some questions to what I found is an area that—Professor Del Duca looked over at me because I had asked this yesterday—the inherent problems of reconciling sometimes Article 12 and 13 about the anti-competitiveness. While the Union Law has primacy, what we have found in the U.S. is that we have to have some Union policies that have primacy without the Supremacy Clause in our economic policies, and that where laws of the Member States in the guise of being health, welfare, and safety laws actually prove to have an anti-competitive effect, that the policy of Union overcomes the shared competency of the state to control the economic well being. This is a theory that has developed through judicial decisions and not really through any part of our Constitution. We call it the Dormant Commerce Clause (for second and third-year law students). It means that no one has made any laws, but the court itself looks to the policies of Union for prosperity and says laws in effect become anti-competitive even though they are not intended to be so. Do you see your courts dealing with that as a policy in the absence of a primacy or an economic European Law?

TRIDIMAS: Two points, I think, are relevant here. As I mentioned earlier, the principle of primacy of Community law is entirely a judge-made principle. It was established by the European Court of Justice in *Costa v. ENEL* in 1964 on the basis of a teleological interpretation of the Treaty. Also, it is true that, in assessing the compatibility of Member State laws with Community law, especially whether a national measure is an obstacle to inter-state trade, the Court focuses on the effects rather than the objects of the measure. The notion of restriction is “results driven” and interpreted broadly so as to encompass, in many cases, not only discriminatory measures but also indistinctly applicable ones, i.e., measures which apply both to domestic and imported products or services.

Allow me here to make a broader constitutional point. The principle of primacy of Community law has led to a transfer of powers at three levels. First, there has been a transfer of power from the nation state to a supranational state, i.e., the European Union.

Secondly, there has been a transfer of power from the executive and

the legislative to the judiciary. This is because it is possible to challenge national legislation and administrative measures before the European Court of Justice and the national courts on grounds of incompatibility with Community law.

Thirdly, at a more subtle level, there is a shift of power from the higher national courts to the lower national courts. As a result of the preliminary reference procedure, a national court has a choice to refer a question to the European Court of Justice instead of following the case law of the higher domestic courts.

ZILLER: We have the same three different mechanisms and the point is that this is a problem the convention has to face. On one side you have a number of special politicians of members of states or even a lower level of states who hate this idea. What they want is a clear layer cake of competence. We lawyers and political scientists know that this doesn't exist. So, what the Constitution does is to try to make some things clearer but it does not avoid and certainly we keep all of the potential of the Dormant Commerce Clause.

The second one is somewhat related. We have in the Constitution but we had it already in the EC treaty what in a country like Italy or Spain is called the "Economic Constitution." You see it with the discussion on the competition rules for instance. One point which is important to see to relate it again to the starting point. Today we tend to think that 1957 is trying to impose market theory on Europe. It is partly true that it is also the idea which is linked again to war. We know what cartels did to German industry and how it lead, or we think we knew how it lead partly to the War. There is always this component of let's avoid going into what lead us to war.

DEL DUCA: Larry, would you like to make some comments for us?

BACKER: I have what I think is perhaps a very American comment and I hope you will bear with me. I have noticed much of our discussions, and virtually all of our discussions about the new European Constitution and the need for its replacement, tend to focus exclusively on text. The focus, of course, is in keeping with the civil law tradition of the primacy of text. It is also in keeping with emerging global traditions of crafting constitutional text as both a working document and as a symbol of the highest aspirations in the political community. I don't mean to suggest that the concentration on text and the implications of the socio-political choices reflected in the text ought not to be taken seriously. I would even agree that, to the contrary, close analysis of text

is necessary and important for any community intent on adopting a new basic law.

Like both of you, I'm willing to start with the text and I would even agree that text is central to constitutional discourse. The legislature, the administrator, and even the citizens (who we don't talk about very much) really need to be able to rely on something—and that something tends to be text. And it is common now for societies to employ constitutional text as the source for the development of a firm and stable grounding of the social and political order.

However, this is the point where I may begin to diverge a little from the common understanding. A discourse of constitutionalism that centers on text ignores the revolutionary and transformative potential of the text in the hands of what increasingly appears to me to be one of the greatest institutions for constitutional innovation in Western Europe and U.S. This institution is the constitutional court. In the hands of a constitutional court, constitutional text, no matter how definitive it appeared to be, has proven to be quite fluid. Even those most self evident provisions of the text, those which when written were meant to stand the test of time against shifts in understanding and application, have in time been susceptible to interpretation, and worse, to reinterpretation.

In most democratic states I understand the principle as firmly established that the constitutional court must be allocated supreme authority to interpret constitutional text. This authority has proven difficult to resist. With it the courts have demonstrated a propensity to go outside of constitutional text in the service of this interpretation. The history of the jurisprudence of the European Court of Justice is particularly telling in this respect, as is that of the U.S. Supreme Court. This judicial proclivity might suggest that it may be naive to focus discussion on the text of a constitution, and in so doing ignore the possibilities for judicial reconstruction of that text. Moreover, and especially in the case of the European Constitution as currently constructed, I wonder whether the proposed text itself might serve as a cover to provide the European Constitutional Court with a greater rather than a more constrained array of interpretive tools with which to impose its vision of Europe from its reading of the text and not necessarily the text of the Constitution itself.

Indeed, when you look at European Constitutionalism, it is clear that the European Court of Justice certainly has never been dependent on a blind adherence to textual uniformity or to a uniformly interpreted text by a political community built on a singular vision of the institutions and powers of EU. The Court of Justice has, over the last half century, authoritatively articulated a vision of the European Community through

the application of a number of jurisprudential interpretive devices, not the least of which is a development of the jurisprudence of non-textual general principles of law through which to interpret the treaties.

I don't believe the new constitution will alter the habits of the European Court of Justice in the use of these jurisprudential devices. Nor will the new constitution change the Court's role as supreme arbiter of the scope and nature of community law, and necessarily of whatever residuary authority is left to the Member States through the application of these general principles of "constitutional law." Indeed I might argue, and perhaps the speakers can comment on the suggestion, that the proposed constitution appears to provide, for the first time, a fairly large formal nod in this direction through the articulation within the text of the proposed constitution itself of general principles of interpretation to be applied by the Institutions of Europe. In this respect at least, the drafters of the proposed constitution appear to be very clever. The slew of principles making up the greater portion of the first part of the draft and including principles of subsidiarity, of cooperation, of federalism, of separation of powers, of good behavior, is no doubt meant perhaps to constrain the European Court of Justice. These principles are all meant to limit the power of European institutions vis a vis the Member States.

But as Americans discovered over the course of several generations, it is dangerous to try to use the master's tool to dismantle the master's house. Even if the principle originally intended by someone to have some limiting effect on the authority of European government, and especially its Court, the authoritative interpretation of those limitations will necessarily have to come from the center, and particularly from the judicial institutions of European government. As in the U.S., I think the European Constitution is set to vest the institutions of European government with the authority to determine the limits of its own power by vesting the European judicial institutions with unlimited power to make those determinations.

Text, in this case, even European Constitutional text, will provide little more than the foundation of an analysis. The conclusions to be drawn from that analysis may not follow in a way supposed nor be self-evident. More importantly perhaps, this new form of constitutionalism, this creation and acknowledgment of the European Court of Justice as a constitutional quasi-national Court may actually expand the jurisprudential tools available to the ECJ in ways that would have been unthinkable a year or two ago. These textual tools may make it easier for the ECJ to deploy non-textual *juridicus* in order to craft its own vision. I am thinking particularly of two methods of European constitutional jurisprudence that might be interesting if applied by the ECJ.

First, I think, comes out of the traditions of Germany and it is a

tradition that creates hierarchy of constitutional values starting with general constitutional principles pursuant to which it is possible to view particular and inferior provisions, black letter provisions of constitutional text as unconstitutional. These values can be applied to void the constitutional text itself. This tradition is most famously articulated in the Southwest Case.¹² And the second, refers to the French proclivity, certainly since 1971, to expand constitutional value (“valeur constitutional”) to non-constitutional text.¹³ French tradition now extends constitutional value to the Preamble of its Constitution and to the documents incorporated by reference therein.

Imagine a case in which a new European Constitutional court applied this tradition to give constitutional value to the preface and the preamble of the European Constitution. Consider the possibilities in that case, of using French Constitutional values to include within European Constitutional text to give constitutional value to Thucydides great work on the Peloponnesian War by the artifice of the quotation of one small portion of a very large work as part of the preface of the European Constitution.

An implausible reading, to be sure. But more interesting from the perspective of the Europeans, would be the use of basic German constitutional principles, for instance, those now in Part 1 Article 2, to void specific provisions with respect to the allocation of authority among the institutions of the EU that are set forth in Part 3. As a result, it may be useful in any discussion of the European Constitution to talk about these possibilities as we consider what might well be the textual house of cards that Europe may be building.

DEL DUCA: Thank You. Well, we have to give equal time to our guests here. Who wants to go first?

ZILLER: I agree and disagree with what you say. I agree at the level of legal analysis. The main point of my view is that this Constitution does not say “we the legal professionals” but “we the citizens.” Certainly, in order to dispense some fears of national politicians, the constitution is setting a few things like interpretive principles. I don’t think it is to constrain the court. On the contrary, it is to enhance its legitimacy.

The very clear example is the principle of primacy. We have had it for forty years. Nobody discusses it amongst lawyers. When the first

12. Southwest Case, I BVerfGE 14 (1951) (Federal Constitutional Court of Germany).

13. CC decision no. 71-44 DC of 16 July 1971 (Loides Associations).

draft was made in the Convention, the British representative said we don't want this, it's just for the show by the way. However, the fact that we have this has one advantage. If the text is adopted nobody will be able to say what some politicians still say "this ECJ is doing things that which it is not permitted." So, I think you are right, but it is not constraining the court on this.

The second thing—I think the text is very important due to the specific nature of the EU. What you have in Part 3 is indispensable. We cannot do European Law without addressing the issue of the legal basis for the Union. The Court knows it and the Court, also being very constructive does not go far beyond what is possible. Where there is an enormous change, I think, it is what Professor Tushnet was discussing, the court will now have a legal basis for using the Charter without going through very complicated reasoning like the French do. So I agree and disagree.

TRIDIMAS: I have three very brief comments. I think that the Constitution enhances the function of the Court as the Supreme Court of the Union. I think it enhances it because it brings it closer to the political game. If you give to the Court jurisdiction to act as a moderator in disputes between the institutions, in the disputes about the division of competence, and about subsidiarity, I think the effect of the Constitution is to make for a stronger court, not for a weaker one.

Secondly, I think the Court itself is going further in assuming the function of the Supreme Court for the Union. Interestingly, although the European Community started as an economic organization, what you are experiencing over the last three or four years is judicial activism in non-economic spheres—like the sphere of remedies or the sphere of community citizenship. The European Court derives rights which can be enforced out of the context of the European citizenship. So the court itself enhances its function, also an innovation to human rights. This is an area in which the court has been very active.

Thirdly, I think we are going to find interesting changes in the composition of the Court. This is because it is going to be a much bigger one with the accession of the new Member States; and I think we ought to be honest about the fact that the incoming Member States are quite different from the existing ones. They are not at the same level of economic development, nor do they necessarily share traditionally the same values. This will be perhaps reflected in the way the Court responds to conflict between economic freedoms for example and issues for national morality. I think the court is stronger in terms of its jurisdiction. As to the jurisprudential policy, I think that will be affected by its composition.

DEL DUCA: Thank you very much. We must now, because of time limitations, go to the very important subject of how this constitution impacts on human rights. We have our distinguished colleague and friend, Professor Tushnet, to address that subject.

TUSHNET: Thank you. I want to begin by saying that I was particularly pleased to be asked by Professor Del Duca to participate in this event, and pleased that we were able to reschedule it after Hurricane Isabel, because I regarded my participation in this event as a small way of honoring Professor Del Duca for the work he has done to introduce people like me to these larger questions of comparative constitutionalism.

Before describing some of the aspects of protection of fundamental rights in the new constitution, I want to comment on Professor Backer's observation. As he was speaking, I noted that he is drawing from a U.S. tradition where an important component of the kind of judicial behavior that he is anticipating out of the European court or courts (which is of course a point I'll make in a moment) arises from the fact that our Supreme Court is dealing with an old and, for all practical purposes, unamended Constitution for the past 150 years (taking the reconstruction amendments as a significant transformation). I think that the interpretive stance that is likely to occur when you are dealing with a new constitution is less aggressive (or less ambitious, depending on your point of view). But, then it occurred to me to go back to something that Takis Tridimas said. One of the questions that has animated U.S. discussions of the European process is whether it is possible to create a constitution where there are no people, where Europe is the way, we in the U.S. imagine it to be. Professor Tridimas said that that may indeed be a problem, which is why he would like a referendum in each nation to get the people behind it. But, what is really happening here is essentially an elite driven process. If that is so, as the elites that sponsor the constitution withdraw from the field, the elite judicial institutions might come to replace them as the elite to push the project forward even in the absence of a "European" people.

On this last point, just a quick note. Earlier this year I saw the film by a U.S. film maker called "Barcelona." It was set in Barcelona in the late 1980's or early 1990's. Then I saw a film called "L'Auberge Espanol," which is set in Barcelona today. "L'Auberge Espanol" can be understood to be propaganda for the proposition that there is an emerging European citizenship. But to the extent that it captures anything or that it gets close to reality, the degree of European citizenship that it depicts is miles ahead of what we in the U.S. think there is in Europe. Now, "L'Auberge Espanol" is about people who are in their upper twenties.

People who are in their 50s and 60s may be different, but the proposition that there is no European ethos, and that therefore the constitution is premature (which you tend to hear in the U.S.), is more questionable than you might think.

Let me say now something about the Charter of Fundamental Rights in the Constitution. The Charter of Fundamental Rights is a standard list of modern human rights. It encompasses civil rights, political rights, equality rights (ideas of equality), and social and economic rights of the sort that emerged in constitutions after World War II. There is also some recognition of what are sometimes called third generation rights, that is, cultural rights and environmental rights. The cultural rights provision says that the Union shall respect cultural, religious, and linguistic diversity; the environmental provision says that the union shall guarantee a high level of environmental protection. It's a comprehensive, modern list of rights, and its comprehensiveness is what I want to address.

Of course, when you have such a comprehensive list of rights, everybody knows (that is, people have learned) that you have to include qualifications of those rights. You can not conceptualize them as absolute rights, as the U.S. is sometimes criticized for conceptualizing its rights. The qualifications are interesting. Some of what I have to say may arise out of translation difficulties but I want to note a couple of points about the qualifications.

First of all, there is a general qualification provision, which again is typical of modern constitutions. It is Article 252, which provides: "Subject to the principle of proportionality limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others." The Canadian version, which reads "subject to such limitations as are demonstrably justifiable in a free and democratic society," indicates that the European Constitution's approach is of a piece with other modern approaches to constitution-drafting.

The comprehensive qualifications to all of the rights previously granted are recognized elsewhere in the document. I want to note two of these as typical drafting issues—but they strike me as interesting. When you recognize social and economic rights, you know that you are going to have problems if you protect the right to private property. You can't fully protect private property and simultaneously fully protect social and economic rights. As a result, the protection of the right to property in modern constitutions has been intensely controversial. The Canadians did not include such a right precisely because they were concerned about the *Lochner*-era experience in the U.S.

What does the European Constitution say? As to the right to property, everyone has the right to own, use, dispose, and bequeath his or

her lawfully acquired property. The use of property may be regulated by law in so far as is necessary for the general interest. What strikes me as interesting about that (as a U.S. lawyer and focusing on drafting) is that this provision contains no proportionality requirement. I can imagine that that was intentional. That is, it is too easy to characterize social and economic regulations aimed at promoting social and economic rights as disproportionate in the extent to which they actually do so. For those of you familiar with U.S. discussions, consider rent control laws. Their proponents contend that such laws promote a right to housing. But, economists will tell you they are, except under very unusual circumstances, unlikely to do that. So a comprehensive rent control statute would be disproportionate to the goal of promoting a right to housing. An interesting question may be whether this is a drafting oversight, or an intentional recognition of what I have just described as a sensible argument that drafters might want to worry about.

The other provision I like is also connected to social and economic rights. This is the provision dealing with the right to collective bargaining and action. I do not quite understand (again from a lawyer's perspective) what these are doing. Workers and employers have the right to negotiate and conclude collective agreements at the appropriate level, and to take collective action that defend the rights, including strike action. That is the recognition of the right to collective bargaining and the right to strike. But, I left out the qualifications: "in accordance with Union law and National laws and practices." This seems to me to say that if there is a national law that prohibits a strike under certain circumstances then the Constitution does not protect the right to strike. What that means to me, in turn, is that there is no right to collective bargaining and strikes provided by the European Constitution independent of the recognition of those rights in national law, which means, finally, that this provision does not add anything to the Constitution.

I want to turn now to a broader concern. The interesting question that will arise inevitably after the adoption of the Constitution is that there are two judicial institutions in Europe that protect human rights. One is the European Court of Justice, which is the instrument of the European Union and its Member States. The other is the European Court of Human Rights, which implements and enforces the European Convention for the Protection of Human Rights and has more members—a larger jurisdiction—than the Constitution will encompass. But all of the members of the European Union are Member States that are bound by the European Convention of Human Rights. There has to be some way to coordinate the European Court of Justice and the European Constitution, on the one hand, and the European Court of

Human Rights and the European Convention on the Protection of Human Rights on the other. The draft of the Constitution tries to do that in the following way. Article 252(3) provides: “insofar as this charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the Convention.”

From my point of view, there are three problems here, two minor ones and one really serious one. The first minor one is the formulation *which corresponds to rights guaranteed by the convention*. Does that mean “they are exactly the same as,” or does it mean “they are sort of about the same kind of problem as”? If it means *exactly the same as*, then there are no coordination problems. The European Court of Justice will go off on its own and say, “the problem that we are dealing with here is part of the non-overlap between what the European Constitution does and the European Convention does.” If it means *dealing with roughly the same problem*, then you have a coordination issue.

The second minor point is this. To say that the meaning and scope of the Constitution’s provisions shall be the same as the meaning and scope of the Convention’s provisions, is not to say that the meaning and scope of the Constitution’s provisions are the same as the meaning and scope of those provisions *as articulated by the European Court of Human Rights*. There are two views you can have about the meaning and scope of constitutional provisions. One is that everyone authorized to interpret the provision is entitled to make an independent judgment of what the meaning and scope of those provisions are. In that case, the European Court of Justice could say: “The European Court of Human Rights says this provision—which we agree is common to both documents—means ‘X,’ but they are wrong—it means ‘Y.’ It means ‘Y’ in our provision, and it means ‘Y’ in their provision. They just got it wrong when they did it the first time.”

The alternative view is that the Europeans Court of Human Rights interpretation of meaning and scope somehow has to automatically prevail. In the U.S., in the federalism context, we have solved that problem—it’s the *Martin v. Hunter’s Lessee* problem—and we solved it by a jurisdictional hierarchy that gives the U.S. Supreme Court the authority to review and reverse independent judgments made by state Supreme Courts.

One can imagine a similar jurisdictional arrangement between the European Court of Justice and the European Court of Human Rights. The solution that you can imagine here derives from the statement in the Constitution that the European Union will have a legal personality and shall seek accession to the European Convention on Human Rights. If I were negotiating that accession agreement (subject to the next really

serious problem), I would push to set up a system of review of ECJ decisions by the European Court of Human Rights with respect to the Charter of Rights. That is the way of coordinating things.

But, here is the serious problem. The European Convention on Human Rights is not a comprehensive modern Charter of Rights. It deals with civil rights, political rights, and equality rights. It has half of what the Charter has and lacks half of it. You can imagine the following occurring. The European Union enacts legislation that is challenged as a violation of a Charter political right (e.g., that it violates freedom of expression). The legislation is defended in court on the ground that while in some sense it might violate freedom of expression, it advances some social and economic rights. This kind of problem has arisen in connection with equality provisions and affirmative action. The general experience is that at “time one” you enact a general equality provision like our equal protection clause. At “time two” the legislature enacts an affirmative action program. At “time three” the Constitutional Court says affirmative action is inconsistent with the general equality provision. This scenario played out in India and in the U.S. There’s not a lot of experience with it but those are two pretty good examples.

What constitution drafters have learned is what the drafters of the Convention have learned. You have to put in a provision that says the equality provision does not invalidate affirmative action. They did that with respect to equality and affirmative action for women in the European Constitution. They did not do it, and I don’t think it could be done with respect to the whole range of protecting cultural diversity, social and economic rights, etc. The difficulty is that when you try to coordinate the ECJ and its implementation of the broad range of Charter Rights with the European Convention on Human Rights, which protects a narrower range, it’s going to be a mess. I can imagine the European Court of Human Rights thinking its way out of the problem, but it’s not an easy problem to get out of and it’s going to be interesting to see what happens.

I think I will leave it at that. Because of the differences in age of the European Convention on Human Rights and the European Constitution, this problem is going to arise and it is going to take some ingenuity to preserve the Constitution’s vision of human rights—that is, the modern vision of human rights—against the less-comprehensive vision embodied in the European Convention.

DEL DUCA: I would like to invite the panelists comment at this point and then we’ll take a few minutes to answer questions from the audience. Does anybody have any comments?

KELLETT: No, I think it would be good to let those who have listened so carefully ask some questions.

DEL DUCA: Alright, I agree.

AUDIENCE QUESTION: (unintelligible)

ZILLER: I will try and respond shortly. The first thing is that's because I am a French administrative lawyer. I totally reject the idea that the civil against common law perspective would be irrelevant here. What seems to be typically common law attitude of the ECJ is what we have with the French *Concilidat* but that is another story.

What is more important I think that you have put your finger on two essential failures of the Convention. Not the Convention on Human Rights, but the Convention which drafted this constitution. They did not look at the exemptions Britain and Denmark have which are not consistent with this. They could not because if they have started this, I guess everybody would have said every national government would say "just go on talking, we are not interested in what you are producing." Political realism avoided looking at this. What I mean with this is that the extraordinary thing is that due to several clauses on enhanced cooperation, etc., what this constitution does is to say we made a mistake in Maastricht and further down the road by providing exemptions to countries. We made a mistake by providing exemptions to Britain and to Denmark and an exemption to Ireland. We will not do it again.

This is totally implicit for new countries for "*acquis communautaire*" is everything. In a sense, you can read this through Article 59, and I think that is the good thing. It is saying well, you like or you don't like it. If you like it, you join, if you dislike it, you get out. Practically speaking obviously, I wonder if any country will ever leave but it is putting the weight of what is membership in another way. What is missing is an explicit clause about "*acquis communautaire*" for joining. Certainly, what is missing is a clause about not having exemptions and what is missing more, but how could you have it, politically speaking, would be a kind of sunset clause saying those exemptions should disappear within a definite time limit. This is missing because it was not politically feasible to have it.

The other thing which the Convention did not look at is something that we don't have only treaties, we have an enormous amount of protocols which are regulating a lot of things and which have the same legal level as the Constitution itself and that is where the ICJ might look at it. There are things which are terribly complicated in the Constitution.

DEL DUCA: Thank you. There are some lovely refreshments waiting for us and we use a technique of providing sidebar conferences while the refreshments are being served in order to ask questions that should have been addressed but which time limitations did not permit to be addressed. Before I make this statement, I had one person who said may I make a comment, and since he comes to us from across the Atlantic. Takis, you may make your comments.

TRIDIMAS: Thank you very much. I didn't mean to keep you, just a very brief response to the question asked. I endorse everything that Professor Ziller said with the accession of the Member States. The reason why there were not a lot of doubts is simply because they did not have any negotiating power to enforce. However, there is a lot of compromise in the *acquis communautaire*. There are multiple examples of permanent derogation for the treaty, no other state ever has got a permanent derogation and this is in the acquisition of secondary residences. Because Malta is such a small place there was a fear that the whole of Malta would be bought up by British German tourists who go there in the summer. That is why they successfully negotiated a permanent [unintelligible].

Now, what they found in the state in the negotiations of the accession is this, that there was a lot of hard bargaining and the new Member States found that they couldn't get anywhere because the fifteen existing states would not accept their suggestions. They thought of another technique which is to ask the presidency to include declaration. Now there's a difference between protocol and declaration. The protocol has the same clause as the treaty itself. A declaration can be included after the signature and strictly speaking does not have legal force.

The practice that developed after we agreed on everything, negotiators from the new Member States would come up and say, according to the declarations and of course, by reading these declarations, I found out that they were not declarations at all. They were reservations. They were undoing commitments under the treaty. To start with, we accepted some of them and of course, once these were presented to the committee drafting accession, then I would have the general delegation come in and say, can we include a counter declaration to the declaration. There were a series of declarations and counter declarations that I thought were going to be completely unwelcome. What appears is this, one single counter declaration from the existing Member States which goes at the very end. There are the declarations of the acceding states who disagree with some issues and then you will find (I think it is declaration 26) it comes from the existing Member States and says very simply "we think that the previous declaration do not

affect any of the provisions of this treaty.” It is a kind of “chapeau” counter declaration saying the new Member States say what we think when in fact that does not change the obligations under the treaty. That was an interesting change which I think is related to your question. Thank you very much.

II. ADDENDUM – July 6, 2004

After the agreement reached on 18 June 2004 by the Heads of States and Governments in the Brussels European Council meeting, the Treaty establishing a Constitution for Europe needs only to be signed (probably in early Autumn) by the representatives of the twenty-five Member States, prior to submission to Member States for ratification. Some time is still needed to establish the final consolidated text in twenty-one languages, but generally speaking, the entire text is now available in a final wording in French¹⁴ and will shortly be available in English.

An overview of major changes to the text adopted by the European Convention one year ago follows.

LEGISLATIVE COUNCIL

The idea of a specific Legislative Council of Ministers has been abandoned. (art. I-23). The relevant provision now provides:

The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.

A major element is maintained by retention of the distinction between public meetings for legislative acts and nonpublic meetings for other Council activities. The Convention however had envisioned a specific Legislative Council composed of up to three Ministers of each government (without affecting the number of votes for each country), thus allowing for the Council to be identified as a kind of upper-house in the legislative process.

EUROPEAN COMMISSION

The final number of members of the European Commission will be equal to two thirds of the Member States, after a transition period which will last until 2014 (with one Commissioner for each Member State in the interim). (art. I-25). There will be no Commissioners without voting rights.

The system proposed by the Convention was for 15 full Commissioners, whatever the number of Member States would be.

¹⁴ Available at <http://www.statewatch.org/news/2004/jun/constitution-amendments-june22.pdf>

These 15 would be matched by a number of Commissioners without voting rights in order to come to a total equal to the number of Member States.

None of these systems is fully satisfactory. They suggest that Commissioners are some kind of representatives of Member States (like members of the Parliament or members of the Council). Commissioners actually are supposed to represent only the Union's interests. In addition, eighteen members seem too many to develop a solid team spirit and collegial decisions to which each Commissioner contributes in an equal manner. However the text adopted by the IGC allows for the European Council to change the eighteen-member requirement by a unanimity vote. This provision was probably introduced to reassure governments who want each member state to be represented in the Commission. It might on the contrary be used in order to adjust the number of Commissioners downward to facilitate creation of an efficient team and facilitate collegial decision-making.

COUNCIL QUALIFIED MAJORITY

The qualified majority in the Council will consist of 55% of Member States (with a minimum of fifteen states) representing 65% percent of the population of the Union. (art. I-24). This is in lieu of the convention proposal for a majority (50% + 1) of member states representing three fifths (60%) of the population. This was the provision on which most of the debates focused. Spain and Poland had declared during the Italian presidency of the Union (second part of 2003) that they wanted to retain the position they had acquired with the Treaty of Nice. That treaty gave them twenty-seven votes, as opposed to twenty-nine for France, Germany, Italy, and the United Kingdom. It therefore gave them a weight far greater than their relative population. Spain and Poland each have about 40 million inhabitants, while Germany has 80 million and the three other "big" countries have about 60 million each. The Netherlands, with 15 million inhabitants only has thirteen votes under the Nice system.

The IGC solution has kept the main two advantages of the "double majority" system. However compared to the present one it is more simple, and more equitable. A blocking minority will need to consist of at least four Member States, which should avoid a coalition that is not representative enough to block decisions of the Council.

MINIMUM NUMBER OF MEMBERS OF PARLIAMENT FOR A MEMBER STATE

The minimum number of Members of Parliament for one Member State will be six, regardless of the size of its population. (art. I-19). The Convention proposed a minimum of four. This means that very small Member States, like Luxembourg and Malta, who have less than a half a million inhabitants, will have a relative over-representation. This is to compensate for the disadvantage incurred by small states in utilizing population in the qualified majority voting system of the Council.

UNANIMITY

In a few cases where the Convention foresaw qualified majority voting, unanimity has been maintained (e.g. in taxation). Overall the Constitution has increased the number of fields where decisions are made by qualified majority voting. Some important fields (foreign affairs, taxation, social regulations) remain under the unanimity rule and a single Member State may thus oppose any innovation in those fields.

NEW PROVISIONS

The IGC has included some new provisions in the Constitutions. A new provision of particular interest is Article III-2a that stresses the importance of social policy aims and elevates them to a pervasive EU parameter underpinning the whole spectrum of EU activities. It states that, in defining and implementing its policies and actions, the Union:

... shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

This provision does not as such give any new competence to the Union but mandates the EU institutions to take account not only of economic considerations but also social policy objectives in making policy choices.

Further, Article I-16 of the Constitution adds tourism as an area where the Union has recognized competence to carry out supporting, coordinating and complementary action.

AMENDMENT PROCEDURES

The IGC has made it more difficult for the European Council to amend the voting procedures of the Council of Ministers. Article I-24(4) of the draft Constitution as adopted by the European Convention in July 2003 enabled the European Council to change the decision-making procedures of the Council of Ministers. It provided, in particular, that the European Council could decide in the future on its own initiative and by unanimity that the Council of Ministers could adopt legislation by qualified majority in an area where the draft Constitution required unanimity. The only procedural condition imposed was that the European Council was under an obligation to send to national Parliaments any such proposed change no less than four months before any decision was taken. The IGC has limited the power of the European Council to decide a change from unanimity to qualified majority in two ways. New Article IV-7a(1) states that such a change cannot take place in relation to decisions with military implications or those in the area of defense. Also, under Article IV-7a(2), a national parliament has the power to veto any change from unanimity to qualified majority taken by the European Council.

The IGC, however, has provided for a simplified procedure for amending the provisions of Title III of Part III of the Constitution that define the powers of the Union in the field of internal policies (i.e. internal market, environment etc, the area of freedom, security and justice, and the areas where the Union may take coordinating action). Under Article IV-7b, an amendment to those parts of the Constitution does not require the setting up of a convention and an IGC (which is the ordinary procedure for amendment of the Constitution under Article IV-7) but may be made by the European Council acting unanimously after consulting the European Parliament and the Commission. This simplified amendment procedure is subject to two limitations: Any amendment made therefrom may not increase the competences conferred on the Union by the Constitution; and it cannot come into force until it has been approved by the Member States in accordance with their respective constitutional requirements.

OTHER CHANGES

These are only the highlights of the changes to the Convention's draft. The rest consists mainly of changes in wording ("Council" instead of "Council of Ministers") or specific changes in procedures in some policy fields (like that which applies when a Member State has a deficit which is too high). These changes are not unimportant, but they do not

change the overall architecture or balance of the Convention's draft.

