

# COMPARING CONSTITUTIONAL REVIEW BY THE EUROPEAN COURT OF JUSTICE AND THE U.S. SUPREME COURT

by

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## A. Introduction

Neither the European Court of Justice (“ECJ”) nor the United States Supreme Court (“USSCt”) is a constitutional court, yet they both engage in constitutional review. These two courts are similar in one key respect: they are both non-specialized courts of general jurisdiction. The ECJ handles many different kinds of matters spreading over a wide range of specialized areas<sup>1</sup>, as does the USSCt<sup>2</sup>. Moreover, the two courts function both as courts of first instance and as courts of last instance<sup>3</sup>.

Although both courts are courts of general jurisdiction, that is typical in common law countries but not in the civil law countries of continental Europe<sup>4</sup>. Furthermore, both courts engage in extensive constitutional review though neither is unmistakably established as the authoritative constitutional interpreter within the legal system which enshrines it as its highest court<sup>5</sup>. There is, however, a major difference between the two. The USSCt is a national court operating in a country with a written

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1 See, Grainne de Burca & J.H.H. Weiler eds., *The European Court of Justice* 6 (2001).

2 See U.S. Con., Art. III.

3 In the area of constitutional review, however, the vast majority of ECJ cases are ones of first instance whereas the overwhelming majority of USSCt constitutional cases are appellate ones.

4 For example, unlike the ECJ, Germany has a system of specialized federal courts, including the Constitutional Court, the Labor Court and the Administrative Court, as does France with its Cour de Cassation, Conseil d’État, and Conseil Constitutionnel.

5 Unlike the German Basic Law, see Art. 93, or the French 1958 Constitution, see Art. 62 § 2, the U.S. Constitution does not designate the USSCt as the authoritative interpreter of the Constitution. See Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 Int’l J. of Con. L. (I.CON) 633, 637 (2004).

constitution whereas the ECJ is a transnational court operating in a legal context that lacks a functioning written constitution equivalent to the U.S. Constitution<sup>6</sup>.

This difference between the two courts raises two threshold questions that must be answered before attempting any cogent comparison regarding constitutional review. First, can the ECJ as a transnational court operating in a legal regime such as that of the EU meaningfully engage in constitutional review? And second, can one plausibly maintain that the EU has a constitution that the ECJ can interpret and apply given that the European Treaty Constitution is not in force and that it or anything closely resembling it may never be?

Part I below deals with these two threshold questions and explores how the two courts may be regarded as comparable from the standpoint of constitutional review. Part II examines how each of these courts confronts and manages constitutional review. Part III focuses on the respective sources of, and threats to, legitimacy of constitutional adjudication for each of the two courts. Part IV provides an account of the contrasting styles and rhetoric of the respective constitutional judgments and opinions of the ECJ and the USSCt. Finally, Part V draws a comparison between the respective canons of constitutional interpretation used by the ECJ and the USSCt, leading to an assessment of how the ECJ as a constitutional adjudicator within the EU fares in relation to the USSCt as its counterpart in the United States.

*B. Are the ECJ and the USSCt Comparable from the Standpoint of Constitutional Review?*

*I. Transnational versus National Court*

The first threshold question, whether a transnational court can function as a constitutional court, is ultimately inextricably linked to the second threshold question, whether the treaty-based EU can cogently be regarded as functioning within the bounds of a constitutional regime notwithstanding that it presently lacks a formal constitution. Nevertheless, these two threshold questions can be initially dealt with separately.

If one compares the ECJ and the USSCt on the one hand, and the German Constitutional Court on the other, one notices that neither of the former is explicitly empowered to engage in authoritative constitutional review whereas the latter is<sup>7</sup>.

6 This is true in a literal sense in that the proposed European Constitution approved by the European Union's ("EU") member-states has not been ratified, and is unlikely to be after the negative results in the French and Dutch 2005 referenda. In addition, this may also be true even if some European constitution were fully ratified and implemented as it is unclear that a transnational constitution for an unprecedented supra-national socio-political entity could actually function as constitutions have within the ambit of democratic nation-states.

7 See note 5 *supra*.

Moreover, the German Constitutional Court is designated by the Basic Law as the authoritative interpreter of that country's constitution<sup>8</sup>, a status that obviously neither the USSCt nor the ECJ can claim confidently.

The USSCt has maintained its right to engage in constitutional review since its landmark 1803 decision in *Marbury v. Madison*<sup>9</sup>, and its legitimacy as constitutional adjudicator has been generally accepted ever since. Its claims to being the authoritative interpreter of the U.S. Constitution<sup>10</sup>, however, are by no means uncontested<sup>11</sup>. In *Marbury*, the USSCt declared that the U.S. Constitution is law, that it is superior to other law, that infra-constitutional laws must yield to the Constitution when the two are in conflict, and that the USSCt is empowered to interpret laws and to vindicate the superiority of the Constitution in the course of adjudicating legal disputes in "cases or controversies". No one contests that USSCt interpretations of the Constitution and invalidations of inconsistent infra-constitutional law are authoritative and binding on the parties to "cases or "controversies" standing before it. What is contested – and that only intermittently and with varying degrees of zeal – is the *erga omnes* effect of USSCt constitutional decisions. *De jure*, USSCt constitutional adjudications do not have *erga omnes* effects though, in most cases, *de facto* they do.

In contrast to the USSCt, the ECJ is the creature of a treaty rather than a constitution and its mission is to interpret EU treaties and the laws issued from, or pursuant to, them<sup>12</sup>. In the broadest term, treaties are typically concluded to regulate external relations between two or more sovereigns whereas constitutions typically regulate internal matters within a unified whole, most commonly a nation-state<sup>13</sup>. Thus, for example, a free trade treaty between two nation-states usually creates legal obligations that may well require judicial interpretation and adjudication, but the latter is clearly distinguishable from constitutional review<sup>14</sup>. From a formal standpoint, therefore, the ECJ appears to have no legitimate constitutional review function and does not engage in constitutional interpretation.

8 *Id.*

9 5 U.S. 137.

10 See, e.g., *Cooper v. Aaron*, 358 U.S. (1958).

11 See e.g., Edwin Meese, *The Law of the Constitution*, 61 Tulane L. Rev. 979 (1987) (Meese who was then President Reagan's Attorney General claimed that, as coequal branches of the federal government, the Congress and the Executive Branch, were as qualified as the USSCt to render authoritative interpretations of the US Constitution).

12 See Art. 220 of Treaty Establishing the European Community as Amended by the Treaty of Nice ("TEEC").

13 See Michel Rosenfeld, *The European Treaty-Constitution and Constitutional Identity: A View From America*, 3 Int'l J. Con. L. (I. CON) 316, 319 (2005).

14 Judicial interpretation and implementation of treaties may, of course, raise domestic constitutional issues, but these remain separable from treaty interpretation itself. See e.g., *Missouri v. Holland*, 252 U.S. 416 (1920) (state of Missouri's objection to federal interpretation of migratory bird treaty with the U.K. on US federalism grounds rejected as unwarranted under the U.S. Constitution).

From a practical and functional standpoint, however, matters seem quite different. Many contemporary treaties, such as the European Convention on Human Rights (“ECHR”) deal with subjects that are much more “internal” than “external” and have a far more extensive impact on the relationship between a citizen and her own state than on relationships among states. Consistent with this, moreover, the European Court of Human Rights (“ECtHR”), while a transnational court interpreting and applying ECHR treaty based rights, engages *substantively* in what is very much akin to adjudication of constitutional rights<sup>15</sup>. In the context of the EU, the relevant treaties also deal with “internal” as well as “external” matters in relation to the member-states, though arguably their “internal” impact is less comprehensive than that of the ECHR. Nevertheless, early in its tenure the ECJ itself played a key role in widening and deepening the “internal” reach of the relevant treaty-based supra-national European order. Indeed, in its landmark 1963 decision in *Van Gend en Loos*<sup>16</sup>, the ECJ held that Community law has direct effect conferring rights on citizens against their own state for the latter’s violations of certain of its treaty-based obligations.

Although the EU is not a federation like the United States or Germany, it does possess certain institutional features commonly found in federal systems. This is the case not only with respect to direct effect, but also with respect to EU regulations which operate within member-states much like US federal law does within the fifty US states, and EU directives which require member-states to undertake internal implementation or risk becoming liable to citizens for injuries caused by its failure to do so<sup>17</sup>. Accordingly, like the USSCt and other courts that engage in constitutional review in federal states, the ECJ adjudicates issues pertaining to the vertical division of powers. Such vertical division may be treaty-based in the EU while established by the constitution in federal nation-states. From a functional standpoint, however, the role of the ECJ in dealing with vertical division of powers issues is analogous to that of the USSCt.

There is another important area of constitutional adjudication in the context of nation-states, namely that of the horizontal separation of powers, which has its analogous treaty-based counterpart in the EU. The USSCt has thus adjudicated controversies concerning the proper apportionment of powers among the three separate and co-equal branches of the US federal government. For example, it held that President Truman usurped legislative power when he seized privately owned steel mills without congressional authorization during the Korean War<sup>18</sup>. Similarly, the ECJ has jurisdiction to adjudicate horizontal separation of powers controversies as

15 See *e.g.*, *Thlimmenos v. Greece*, 31 E.H.R.R. 15 (2001) (ECtHR) (Greek state action against own citizen declared invalid under ECHR Arts. 9 regarding freedom of religion and 14 concerning non-discrimination).

16 C-26/62, [1963] ECR I.

17 See C-6/90 and C-9/90 *Francovich and Bonifaci v. Italy*, [1991] ECR I-5337 (Italy liable to its citizen for failure of implementation of requirements imposed by an EU directive).

18 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

between, the European Council, the European Commission and the European Parliament<sup>19</sup>. Consistent with this, the ECJ has held, for example, that the European Parliament can bring an action for annulment against the Council or the Commission provided the Parliament is acting to safeguard its prerogatives<sup>20</sup>.

In short, given that the ECJ performs much the same function as the USSCt with respect to vertical and horizontal division of powers issues, it does not appear unsuited to engage in constitutional adjudication. Thus, neither its being a transnational court nor its operating in a treaty-based rather than a constitution-based environment seem to present any serious impediment to its functioning as a court that engages in constitutional adjudication in a federal system.

## II. Does the EU Have a Constitution Given that the Treaty Constitution is not in Force

From a formal standpoint, there are enough provisions within the various EU treaties to make up a basic constitutional framework for the Union. Furthermore, consistent with the discussion above, from a substantive and functional standpoint, through direct effect and “internal” impact within the member-states, EU treaties and laws as well as the jurisprudence of the ECJ furnish a sufficient array of written and unwritten judicially sanctioned norms to circumscribe a workable scheme of vertical and horizontal division of powers. In these areas, the EU has pretty much the equivalent of a complex and sophisticated constitutional order comparable to that of a federal nation-state like the U.S. or Germany<sup>21</sup>.

Besides dealing with separation or limitation of governmental powers, modern constitutions operative within democratic nation-states guarantee observance of the rule of law and afford protection to fundamental rights<sup>22</sup>. Leaving to one side the proposed European Treaty-Constitution which remains unratified, the EU treaties do not provide an explicit set of rule of law and fundamental rights protections<sup>23</sup>. The ECJ, however, has inferred rule of law and fundamental rights protection requirements in its interpretations of the relevant treaties. The ECJ has declared that the

19 See TEEC Arts. 230 and 234.

20 See C-70/88 *European Parliament v. Council of the European Communities*, [1990] ECR I-02041, Para. 27.

21 This is not to say that the EU is configured as a federal system. It is in fact *sui generis* and has both federal and confederal aspects. Be that as it may, the EU does possess judicially reviewable division of powers norms comparable to those prevalent in federal nation-state constitutions.

22 See Michel Rosenfeld, “Modern Constitutionalism as Interplay Between Identity and Diversity” in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* 4-5 (Michel Rosenfeld, ed. 1994).

23 The EU Charter of Fundamental Rights proclaimed by the European Council in 2000 in Nice does not have binding effect though the proposed European Treaty-Constitution would give it the force of law by incorporating it as its Part II.

“European Economic Community is a community based on the rule of law”<sup>24</sup>. The ECJ has also made clear that “fundamental rights form an integral part of the general principles of law” which it secures<sup>25</sup>. And, for that purpose the ECJ “draws inspiration from the constitutional traditions common to the member-states and from the guidelines supplied by international treaties for the protection of human rights .... of which [the Member-States] are signatories. The [ECHR] .... Has special significance in that respect”<sup>26</sup>.

Are the rule of law and fundamental rights constraints recognized by the ECJ analogous to equivalent constraints imposed by the US Constitution on the USSCt? The answer to this question depends primarily on two variables: 1) the bindingness of an authoritative constitutional text; and 2) the need for a commonly shared identity in order to elaborate a cogent constitutional jurisprudence regarding fundamental rights.

There is no current equivalent to the US Bill of Rights<sup>27</sup> in the EU. USSCt interpretations regarding fundamental constitutional rights are thus based on binding constitutional texts whereas equivalent ECJ interpretations are not. Upon closer examination, however, this difference does not seem that significant. Indeed, many of the provisions of the US Bill of Rights are highly general and abstract leaving room for a highly contested unenumerated rights USSCt jurisprudence. For example, there is no explicit textual support for the privacy<sup>28</sup> or abortion<sup>29</sup> rights recognized by the USSCt. More generally, with the passage of time, it may seem inevitable that there be gaps between the “written” constitution and the “living” constitution<sup>30</sup>.

It may be objected that there is a considerable difference between departure from a text and postulating constitutional rights in the absence of a written constitutional text. In the former case, arguably there is at most a mere interpretive excess; in the latter, an unwarranted judicial creation of constitutional norms *ex nihilo*. Upon reflection, however, if the legitimacy of a constitutional text is based on broad based consensus regarding the constituent power of its authors, then unmistakable depar-

24 See C-294/83 *Parti Écologiste “Les Verts” v. European Parliament* [1986] ECR 01339 Para. 23.

25 See C-4-73 *J. Nold v. Commission of the European Communities*, [1974] ECR 00491, Para. 13.

26 See C-309/96 *Daniele Annibaldi v. Sindaco del Comune di Guidonia* [1997] ECR I - 7473, Para. 12.

27 The “Bill of Rights” comprises the first ten amendments to the US Constitution which were adopted in 1791.

28 See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

29 See *Roe v. Wade*, 410 U.S. 113 (1973).

30 See Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 *American Political Science Review* 853, 861-62 (1962).

tures from the acceptable bounds of textual interpretation would seem as objectionable as the postulation of constitutional norms without a constitutional text<sup>31</sup>.

Short of direct contradiction of relevant constitutional texts or of the operative constitutional framework (the constituent treaties in the case of the EU), there seems to be little difference between clear departure from constitutional text and postulation of a constitutional norm in the absence of a written constitutional text. What seems more important is that a postulated constitutional norm be backed by a commonly shared constitutional identity. For example, the USSCt's constitutionalization of an abortion right without explicit textual support has been highly controversial as the country is sharply divided over whether abortion should be constitutionally protected, left to infra-constitutional majoritarian regulation, or constitutionally prohibited. In contrast, in a country with a broad based consensus that a woman's basic liberty and equality requires that she be free to decide whether or not to have an abortion, the constitutionalization of abortion by judicial fiat would be solidly grounded in the polity's constitutional identity even absent a written constitution.

In its landmark decision in the *Migdal* case,<sup>32</sup> the Israel Supreme Court advanced cogent arguments for deriving constitutional fundamental rights in the absence of a written constitution as well as for justifying constitutional review in relation to such rights. The Court's arguments, framed on the scale of the nation-state, were based on the purportedly uniform needs of contemporary rule of law polities combined with appeal to the constitutional identity of the Israeli people. The core of the Court's argument was that a rule of law democracy needs a cogent constitutional framework that is judicially interpreted, adapted and applied; and that the fundamental beliefs and self-image of Israeli society require instituting special protection of fundamental rights to freedom and human dignity<sup>33</sup>.

Whether the reasoning of the Israeli Supreme Court can be made relevant in a supra-national setting such as that of the EU depends to an important extent on the vexing question of whether the EU has or can develop a genuine constitutional identity<sup>34</sup>. There are serious doubts as to whether the EU can acquire a sufficiently

31 This conclusion is buttressed by consideration of the "countermajoritarian" problem raised in the context of the USSCt's constitutional jurisprudence which is discussed below. See *infra*, at 44.

32 See *United Mizrahi Bank Ltd. v. Migdal Village* C.A. 6821/93, 49 (4) P.D. 221 (1995) (Supreme Court of Israel). An edited version in English translation is found in Norman Dorsen, et al., *Comparative Constitutionalism: Cases and Materials* 103-110 (2003).

33 These rights had been embodied in parliamentary "basic laws" prior to the Court's *Migdal* decision but their constitutionalization and susceptibility to judicial elaboration remained open to debate.

34 For skeptical views concerning the existence of a sufficient European constitutional identity, see Armin von Bogdandy, *The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe*, 3 Int'l J. Con. L. (I.CON) 295 (2005); and Michel Rosenfeld, *The European Treaty-Constitution and Constitutional Identity: A View from America*, *supra*.

elaborated and commonly shared constitutional identity to allow for abstract fundamental rights much like the USSCt and other nation-state courts have done. Nonetheless, by drawing on the common constitutional traditions of the member-states and on the ECHR and on its judicial interpretation by the ECtHR, the ECJ can anchor its interpretive constitutional mission in a workable and sufficiently concrete frame of reference.

Consistent with the preceding analysis, although it lacks a written constitution concerning fundamental rights and a sufficient positive constitutional identity, the ECJ possesses the requisite minimum to function in the realm of constitutional adjudication much like the USSCt does. If to this one adds the greater congruity between the two courts with respect to division of powers adjudication, then it should become clear that comparison between the courts might be quite fruitful.

### C. *Confronting and Managing – Constitutional Review*

Both the ECJ and the USSCt are non-specialized courts that decide constitutional cases among others<sup>35</sup>. The two are also courts of last instance, though the ECJ is also in most constitutional cases a court of first instance<sup>36</sup>. Finally, the decisions of both courts are binding on other courts and all institutional actors within their constitutional domain and can only be overruled by constitutional amendment or its equivalent – in the EU, by treaty revision. The bindingness of the two courts' decisions does not seem automatic or obvious given the respective political and institutional framework in which each of these courts is embedded. Thus, for example, in the nineteenth century state supreme courts disputed the bindingness of USSCt interpretations of the US Constitution or federal law with which such state courts disagreed<sup>37</sup>. The USSCt rejected the state courts' position, but challenges by various

35 Technically, every time the ECJ is called upon to interpret the relevant European treaties which are constitutive of the Union it engages in constitutional review. See J.H.H. Weiler "Epilogue: The Apr□s Nice" in Grainne de Burca and J.H.H. Weiler, eds., *The European Court of Justice*, *supra*, at 220 n. 167. For present purposes, however, only cases that are functionally constitutional – i.e., that deal with division of powers, rule of law or fundamental rights issues – will be deemed to involve constitutional review.

36 Indeed, horizontal separation of powers cases are usually initiated before the ECJ, See e.g., *European Parliament v. Council of European Communities*, *supra* note 20. Similarly, most vertical division of powers cases come directly to the ECJ through the preliminary reference under Article 234 of the TEEC which requires national courts to refer challenges to the validity of community law or measures to the ECJ. As a matter of fact, these preliminary references constitute well over half the cases brought before the ECJ. See Harm Schepel and Erhard Blankenburg, "Mobilizing the European Court of Justice" in Grainne de Burca and J.H.H. Weiler, eds., *The European Court of Justice*, *supra*, at 30.

37 See *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (Supreme Court of Virginia accepted to be bound by the US Constitution, but refused to accept USSCt's interpretation of it as superior to its own).



states continued for many years. Similar challenges were launched anew in the middle of the twentieth century after the USSCt held state mandated racial segregation unconstitutional<sup>38</sup> in its landmark *Brown v. Board of Education* decision<sup>39</sup>. The ECJ would seem *prima facie* even more vulnerable than the USSCt in that it depends on member-state courts to follow its decisions in preliminary reference cases. Indeed, whereas the US federal government was able to send federal marshals to force resisting state officials to implement USSCt desegregation decisions<sup>40</sup>, nothing comparable exists within the EU to back the ECJ if needed. Nevertheless, national judges have thus far accepted ECJ decisions in an exercise of judicial cooperation that has been characterized as “quite extraordinary”<sup>41</sup>. Theories on why this is so abound<sup>42</sup>. What is most important in terms of a comparison between the ECJ and the USSCt, however, is that both courts may be vulnerable in terms of the uncontestability of their decisions; and that, in spite of this, their respective supremacy has not come under serious challenges since the 1960’s when the first preliminary reference by a member-state court reached the ECJ<sup>43</sup>.

There is a big contrast between the two courts’ control over constitutional review, and it relates to both size of, and control over, the docket and extends to all cases, but has special repercussions in constitutional cases. Overall, the ECJ decides more than 500 cases per year<sup>44</sup> whereas the USSCt decides about 80<sup>45</sup>. Moreover, the USSCt has virtually complete discretion over the selection of cases before it for adjudication. In contrast, the ECJ has very little discretion with constitutional cases, such as those referred to it by national judges.

Not only does the USSCt pick and choose which cases to adjudicate, but it also can have the benefit of many judicial decisions by lower federal courts and/or state courts on the constitutional issues which it must decide. In contrast, by being in most cases a court of first instance the ECJ cannot count on the experience of other courts in interpreting the relevant EU laws provisions.

The ability of the USSCt to pick and choose among constitutional cases presented before it on appeal from lower federal courts or from the highest state courts give it two important advantages. First, it can defer deciding politically explosive issues until after strong passions have cooled off; and, second, it can wait to assess how

38 See Kathleen Sullivan and Gerald Gunther, *Constitutional Law* 680 (15th ed. 2004).

39 347 U.S. 483 (1954).

40 See *Topics of the Times: The Road from Racism*, N.Y. Times, Oct. 21, 1988, at A.

41 See Harm Schepel and Erhard Blankenburg “Mobilizing the European Court of Justice” *supra* at 30.

42 *Id.* at 32.

43 *Id.*, at 30. From the standpoint of the USSCt, it is remarkable that as divided, divisive, controversial and important a decision as that in *Bush v. Gore* 531 U.S. 98 (2000) was followed without question even if thoroughly criticized.

44 See *Statistics Concerning the Judicial Activity of the Court of Justice* 3 (2004). <http://curia.eu.int>.

45 See *The Justices’ Caseload*, <http://www.supremecourtus.gov>.

conflicting decisions on the same constitutional issue by different lower courts fare from an empirical and a pragmatic standpoint before stepping in and definitively settling the issue in question for the polity as a whole<sup>46</sup>. To illustrate the first advantage, one can imagine a constitutional dispute regarding a legislative reapportionment of a state's electoral districts in the context of a highly contested election exacerbating deep partisan rifts. In such a case, a nearly contemporaneous USSCt decision would almost surely add fuel to the fire and unwittingly draw the USSCt into a highly undesirable partisan conflict<sup>47</sup>.

The second advantage is one that looms as particularly important in the context of a common law judicial system. Common law adjudication is understood as an inductive, incremental, empirical process in which the more cases and the more experience a judge has to draw upon the greater the probability that she will arrive at a better decision. This stands in stark contrast to the paradigmatic model of adjudication issued from the civil law tradition, which conceives the judicial task as a deductive one involving application of a general rule embodied in a code syllogistically to a set particular facts<sup>48</sup>. Consistent with its common law approach, the USSCt has drawn on the empirical fate of constitutional doctrines applied in numerous precedents to either adopt them, reinforce them or abandon them if they prove overly burdensome or unworkable<sup>49</sup>.

The ECJ does not appear to have anything akin to the two above advantages enjoyed by the USSCt. The lack of the first of these advantages has not visibly hurt the ECJ given its success with the national judges that refer questions of EU law interpretation to it<sup>50</sup>. This may be due to the special skills and the care with which these referrals are handled by the judges of the ECJ, or to the fact that ECJ decisions in

46 I am leaving aside, for present purpose, the USSCt's power to repudiate its own precedents which means that strictly speaking none of its decisions is "definitive". Nevertheless, when considering a novel constitutional issue *prospectively*, the USSCt is not focused on overruling precedent, but rather on forging a workable, fair and acceptable precedent.

47 This is what happened to the USSCt in the immediate aftermath of its *Bush v. Gore* decision *supra*. Justice Kennedy, one of the five justices who in effect decided the 2000 U.S. presidential election defended the Court's decision by emphasizing that they had not sought the same which came to them by way of appeal from lower courts, and that to have refused the appeal would probably have led to greater unrest and political instability. See David Kaplan, *The Accidental President*, Newsweek, Sept. 17, 2001, at 28.

48 See Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States*, *supra*, at 635-36.

49 A dramatic example of this, is provided by the reversal of the USSCt in less than a decade of a constitutional jurisprudence based on a distinction between federated states as employers acting as sovereigns or as other private or public employers. The distinction based on whether the employment related to a function historically performed by states rather than non-state actors was made constitutionally relevant in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and abandoned as unworkable in practice after a series of judicial applications over a nine year period in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

50 See *supra*, at note 41 and accompanying text.

preliminary reference cases foster strong professional bonds between the ECJ and national judges<sup>51</sup>. As will be discussed more fully below<sup>52</sup>, there has been one area of greater tension and that is in the relationship between the ECJ and certain member-state constitutional courts. That tension, however, seems to have much more to do with the constitutional framework of the EU – specially its being a kind of hybrid between a federation and a confederation – and with substantive constitutional issues than with the political passions of the moment.

Because its constitutional jurisprudence comes principally from its preliminary reference decisions, the ECJ cannot, for the most part, avail itself of the second USSCt advantage. The ECJ must render constitutional decisions without the benefit of lower court determinations that it may critically examine before definitively settling an issue. Is the lack of this second advantage, however, a disadvantage?

The answer to this question depends on whether constitutional adjudication by the ECJ should be regarded as fitting better within the civil law paradigm or within its common law counterpart. Unlike the incremental and inductive common law approach, civil law adjudication is supposed to involve a deductive process whereby a general (code based) rule is applied to a particular set of facts syllogistically<sup>53</sup>. Consistent with this, a civil law court seems much less susceptible to benefiting from the experience of courts than a common law court. From the standpoint of its composition, the ECJ is a civil law court as none of its judges till the U.K. and Ireland became members came from a common law tradition and as the vast majority of its judges continue to come from civil law jurisdictions. From the standpoint of its constitutional jurisprudence, however, the ECJ – like, for that matter member-state constitutional courts such as that of Germany – is increasingly functioning more like a common law court<sup>54</sup>. This is due, in part, to the generality of constitutional norms, and, in part, to the open-ended meaning of constitutional values, such as dignity, or constitutional principles, such as non-discrimination. It would therefore seem, on balance, desirable if the ECJ were to decide more constitutional cases in an appellate capacity rather than as a court of first instance.

#### *D. Bases of Legitimacy of Constitutional Adjudication by the ECJ and the USSCt*

Because, as we have seen, neither the ECJ nor the USSCt are set explicitly as the authoritative constitutional interpreters, they both confront challenges to their le-

51 See Harm Schepel and Erhard Blankenburg, “Mobilizing the European Court of Justice”, *supra* at 32 (discussing various theories seeking to account for success of the ECJ with the judiciary of member-states).

52 See *infra*, at note 75 and accompanying text.

53 See Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States*, *supra*, at 655.

54 See *id.*, at 662-663.

gitimacy as the ultimate constitutional adjudicator. The respective bases for such challenges are however, different. Objections to the authoritativeness of the USSCt are based on two principal grounds: separation of powers and the “countermajoritarian” problem. The separation of powers argument is predicated on the fact that all three branches of the federal government are co-equal and thus the executive and legislative branches are as empowered to interpret the constitution as the judiciary. The “countermajoritarian” argument, on the other hand, boils down to the claim that life tenured unelected judges should not dictate virtually irreversible policy on the polity as a whole. In contrast, the supremacy of US constitutional and of federal law over state constitutions and laws is beyond dispute and has been enshrined in Article VI of the Constitution.<sup>55</sup>

For its part, the ECJ confronts altogether different legitimacy issues. The “countermajoritarian” difficulty is virtually non-existent and the ECJ does not confront much of a separation of powers problem. The greatest challenges to the ECJ’s legitimacy are mainly vertical in nature. They come from the member-states and especially from the latter’s constitutional courts. Several of these have asserted that their state’s constitution is paramount and that conflicting EU law is not entitled to supremacy and should yield. The ECJ has constantly rejected this position, but has bent over backward to avoid head on conflicts with nation-state constitutional provisions.

As already mentioned, objections to the authoritativeness of USSCt decisions are few and far between but they nonetheless pose a significant challenge to the US highest court’s legitimacy as the ultimate interpreter of the constitution. These objections are usually cast in terms of separation of powers concerns for the preservation of the co-equality of all three branches of the federal government. Thus, in the Attorney General Edwin Meese’s attack against the USSCt authoritativeness<sup>56</sup>, the concern was preservation of asserted Executive Branch prerogatives, in the context of strong divergences between the Reagan Administration and the federal courts over politically explosive issues, such as abortion and affirmative action. Meese’s central argument was that though all three branches of the federal government were equally bound by the “Constitution”, USSCt decisions and precedents made up “constitutional law” which was not binding on the executive or legislative branch<sup>57</sup>.

As the two other branches of the federal government, the so-called “political branches” are led by democratically elected officials whereas US federal judges are appointed for life, there is significant congruity between the separation of powers challenge to the USSCt’s authoritativeness and that predicated on the counterma-

55 What remains subject to dispute is the scope of powers delegated to the federal government such as the power to regulate interstate commerce. *See e.g., US v. Lopez*, 514 U.S. 549 (1995) (5-4 decision on whether federal government can regulate gun possession in state schools). The supremacy of valid federal regulations however, remains unquestioned.

56 *See supra* note 11.

57 *See* Edwin Meese, *The Law of the Constitution*, *supra*.

majoritarian difficulty. Unlike the British traditional reliance on parliamentary sovereignty, the American constitutional architecture is built upon a foundation of “checks and balances”. The countermajoritarian difficulty arises as consequence of the USSCt’s constitutional adjudication emerging as a practical matter as “check that is itself unchecked”<sup>58</sup>. When the US Congress disagrees with the USSCt’s interpretation of a federal statute, it can in effect overrule the USSCt through further legislation<sup>59</sup>. In the constitutional area, however, the only possible check on the USSCt is through constitutional amendment which is extremely difficult to achieve in the US<sup>60</sup>. Hence the countermajoritarian difficulty: the US Constitution sets a multi-layered democracy (federal v. state; federal legislature v. federal executive); and while the Constitution does contain certain antimajoritarian provisions<sup>61</sup>, expansive judicial interpretation can illegitimately and unduly constrict the domain left by the Constitution to democratic politics<sup>62</sup>.

The ECJ has no significant (horizontal) separation of powers or countermajoritarian problem because, paradoxically, there is less democracy in the context of the EU than in that of the US. Indeed, the US is generally perceived by its citizens as having a healthy working democracy at both the state and federal levels of government (except, according to some, to the extent that there are unwarranted judicial excesses). In contrast, the EU as a whole is widely perceived as suffering from a “democratic deficit”<sup>63</sup>; and accordingly the ECJ is not, and need not be, singled out as a countermajoritarian institution. Furthermore, because EU institutions are not as well or as deeply embedded in the constitutional self-identity of member-state citizens as US federal institutions are in that of US citizens, inter-institutional rifts among the ECJ and the other major EU governing bodies would risk posing a serious threat to the smooth implementation of EU policy. There is no equivalent to this in the US<sup>64</sup>.

58 See Michel Rosenfeld, *Constitutional Adjudication and in Europe and the United States*, *supra*, at 652.

59 *Id.*

60 See *id.*, at 653.

61 For example, the First Amendment protects freedom of speech and freedom of religion and in a democracy it is unpopular minority views and religions which are most likely to be hindered or suppressed by popular demand.

62 See Robert Bork, *The Tempting of America: The Political Seduction of Law* 146-47 (1990).

63 See J.H.H. Weiler *Does Europe Need a Constitution: Reflections on Demos, Telos and the German Maastricht Decision*, 1 *European Law J.* 219, 232-35 (1995).

64 In the US, tensions between the three branches of the federal government are at least, in part, seamlessly weaved into the country’s politics. For example, criticism or praise of the USSCt may be linked to abortion politics or to degree of support or opposition to the President’s politics. In contrast, in the political arena in which the EU operates, it is often the political role of the EU as a whole that is in question rather than e.g., a substantive policy adopted by the Commission that divides the member-states’ citizenry into distinct groups that are more or less supportive of the Commission.

In spite of the separation of powers and the countermajoritarian objections, the USSCt enjoys by and large a high level of acceptance and respect. This is principally due to two factors: the special role of the judge – and a very active role at that – in the common law tradition; and, the prevalence in the US of the Lockean conception of rights as being negative and asserted against the state as opposed to positive and dependent on state intervention<sup>65</sup>.

In the common law tradition, the judge makes law by incrementally fashioning strings of precedents through resolution of sets of conflicts that bear certain similarities to one another. The common law judge can, for example, elaborate contract or tort rules, and thus literally makes law. It is true that contemporary common law judges must apply legislatively enacted codes which, in principle at least, should greatly limit their legitimate law making role. It is also true that the US Constitution is formally a statute rather than a judge made body of law<sup>66</sup>. Nevertheless, the combination of the generality and abstract quality of many constitutional provisions – e.g., “due process of law” or “equal protection” – and the common law judicial tradition afford great latitude for judicial constitutional lawmaking.

Notwithstanding the broad latitude enjoyed by the common law judge, there is great respect in the US for the judicial function which is due in part to the judge’s pivotal role in the protection of the citizens’ fundamental rights against government intrusion. Thus, unlike the civil law judge who appears to be always on the side of the state, the common law judge is often on the side of the citizen against the state, including in constitutional cases in which a citizen’s negative right is (or risks being) trampled upon by the state. Although this does not make judges immune to criticism or challenge, it provides them an enormous amount of good will that has yet to dissipate even in times of great political divisions. Even the judges’ greatest critics on countermajoritarian grounds do not advocate taking constitutional review out of the hands of judges, but only to limit the scope of their discretion through interpretive constraints<sup>67</sup>.

In spite of the remarkable success that it has had with national judges which was noted above<sup>68</sup>, the ECJ does have a vertical division of powers legitimacy problem. Like the US Constitution’s Supremacy Clause which makes federal law paramount<sup>69</sup>, Community law is supreme and prevails over inconsistent member-state law. Unlike

65 See Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States*, *supra* at 645-46.

66 See *id.*, at 648.

67 See Robert Bork, *The Tempting of America*, *supra*. Periodically, some legal scholars have advocated greatly reducing or abolishing judicial review of constitutional issues, see e.g., Mark Tushnet, *Taking the Constitution Away from the Courts* (1999), but thus far such proposals have had little, if any, impact beyond academia.

68 See *supra*, at note 41 and accompanying text.

69 See *supra*, at 12.

the US Constitution, however, the EU treaties do not address the supremacy issue<sup>70</sup>. It is the ECJ itself which ruled that Community law is supreme in its landmark *Costa* decision<sup>71</sup>.

That the EU's supremacy is judicially grounded rather than explicitly provided for by the treaties already makes it less rock solid than its US counterpart. What poses an even more serious threat to its legitimacy, however, are conflicts between Community law and national member state constitutions. In a federal system like as that of the US, such conflicts are easily resolved and supremacy secure as federated state constitutions must yield to the federal constitution and federal law just as any other inconsistent state law or regulation<sup>72</sup>. In contrast, in the hybrid *sui generis* EU system that is neither wholly federal nor wholly confederal, there are no prescribed means to deal with conflicts between EU law and national constitutions. In addition, several member-state constitutional courts have asserted that EU law could not be granted supremacy within their country to the extent that it conflicted with the latter's constitution. Thus, in its famous *Solange I* decision, the German Constitutional Court made it clear that if Community law would violate a fundamental right protected by the German Basic Law, then the latter would prevail<sup>73</sup>. The Italian Constitutional Court took a similar position in its *Frontini* decision<sup>74</sup>.

Thus far, notwithstanding these conflicting assertions of supremacy, no showdown has occurred between the ECJ and national constitutional courts. Both have seemed to go out their way to avoid creating an impasse. As mentioned above, the ECJ has incorporated fundamental rights into its general principles of law and has drawn inspiration from the common constitutional traditions of the member-states<sup>75</sup>. On the other hand, national constitutional courts have several times noted potential conflicts between EU law and their state's constitution, but ruled that there was no actual conflict in the case before them<sup>76</sup>.

In spite of the prevailing high degree of comity between the ECJ and national constitutional courts, the vertical division of powers difficulty that confronts the ECJ

70 See Ralph H. Tolsom, *Principles of European Union Law* 59 (2005).

71 C-6/64 *Costa v. Enel* [1964] ECR 585.

72 See, e.g., *Romer v. Evans* 517 U.S. 620 (1996) (USSCt holds amendment to Colorado Constitution ratified by referendum unenforceable as violative of Equal Protection Clause of US Constitution).

73 37 BVerfGE 271 (1974) Para. 24.

74 *Frontini v. Ministero delle Finanze*, Case 183 Corte Constitutionale (Italy), 1973 [1974] C.M.L.R. 372, Para 21.

75 See *supra*, at note 25 and accompanying text.

76 See e.g., *Frontini, supra*; *Maastrich Treaty Case*, 89 BVerfGE 155 (1993) (German Constitutional Court). A further means to avoid conflict is wherever possible and relevant for the member-state to amend its constitution. Thus after its Constitutional Council declared provisions of the Amsterdam Treaty unconstitutional, see *Treaty of Amsterdam Decision* 97-394 DC of 31 Dec. 1997, France amended its constitution in 1999 to eliminate the conflict. See Norman Dorsen, et al., *Comparative Constitutionalism, supra*, at 65.

could potentially lead to a legitimacy crisis for the Court. One can wonder whether the French and Dutch referenda rejecting the European Constitution<sup>77</sup> mark the onset of an era of retrenchment within the member-states. If that were to prove the case, it could trigger a crisis in the ECJ's legitimacy, the likes of which now seems unthinkable in the context of the USSCt.

*E. The Contrasts in Style and Rhetoric between the ECJ and the USSCt*

As has been widely noted, the judgments and opinions of the ECJ and the USSCt are vastly different<sup>78</sup>. The ECJ follows a Cartesian deductive syllogistic French style whereas the USSCt follows a much more dialogical, conversational, analogical and argumentative style<sup>79</sup>. Furthermore, also in the French style the ECJ speaks with one institutional voice and no dissents whereas the USSCt speaks with a multiplicity of individual voices, and dissenting opinions, concurring opinions and at times in important constitutional cases with only a plurality agreeing on the reasons why the winning party is entitled to judgment in her favor<sup>80</sup>.

In the French style, the court "speaks" the law or the constitution in the name of the Republic as an indivisible whole. In contrast, in the American common law context, judges "make" or infer or construct the law (notwithstanding political slogans to the contrary)<sup>81</sup> by a process of interpretation, accretion, experimentation, argumentation and trial and error. Constitutional cases taken by the USSCt are generally overwhelmingly difficult ones over which reasonable judges can disagree and which have often been resolved in inconsistent or contradictory ways by different lower courts. French constitutional cases are no less difficult or controversial, but in the French model the rule of law republic speaks with one voice regardless of the actual difficulties presented by the constitutional issue at stake. In the American model, on the other hand, the difficulties are in full view and competing arguments

77 See Elaine Sciolino, *The French Decision: French No Vote on Constitution Rattles Europe*, N.Y. Times, May 31, 2005, at A1; Marlise Simons *Dutch Voters Solidly Reject New European Constitution*, N.Y. Times, June 2, 2005, at A3.

78 For a thorough and enlightening comparison of the differences between the two courts, see Mitchel de S.-O-L'E Lasser. *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (2004).

79 See J.H.H. Weiler, *Epilogue: The Judicial Après Nice*, *supra*, at 225.

80 See *e.g.*, *U.S. v. Hamdi* 124 SCt 2633 (2004) (constitutionality of indefinite detention without charges of an "enemy combatant" decided with controlling opinion by a plurality of four justices).

81 For example, during the 2000 Presidential debates, then - candidate Bush said: "I don't believe in liberal activist judges... I believe in strict constructionist". Bush went on to say that his opponent Gore would appoint judges that would "subvert the legislature". *The 2000 Campaign, Transcript of Debate Between Vice President Gore and Governor Bush*, N.Y Times, Oct 4, 2000, A 30..



extensively presented. The French Constitutional Council speaks with one institutional voice and issues a single unsigned opinion without dissents. In contrast, the USSCt proceeds in most cases through individually signed opinions and publishes dissenting opinions as well as concurring ones which agree with the majority on the result but not on the grounds or the reasoning of the majority. Many important constitutional issues are decided 5-4, and the losers best case is laid side by side with the winner's in the USSCt's official reports.

The ECJ style seems anomalous because the EU is not in an analogous position to that of France. The latter is an established nation-state with a long history and constitutional tradition. The EU, on the other hand, is still in an experimental phase, under construction, enlargement and constitutional flux. As one observer has argued, viewed closely, ECJ judgments are bifurcated, with judgments *à la française* and Advocate General ("AG") opinions that are much more in the style of American opinions<sup>82</sup>.

To place the USSCt's and the ECJ's respective distinctive style and rhetoric in context, these will be examined in terms of the role of each court within the institutional and constitutional framework within which it operates and in relation to its contribution to the ongoing production and preservation of the constitutional identity required to sustain the relevant constitutional order involved. That order is that of the US federation for the USSCt, and that of the emerging and evolving hybrid federal and confederal order of the EU for the ECJ.

In the American constitutional vision of divided centers of democracy and of "checks and balances", judicial power is based on argument, judgment, and persuasion or, in other words, is the "power of the pen" as opposed to the executive power, which is the "power of the sword," and to the legislative power, which is "the power of the purse"<sup>83</sup>. Constitutional review by the USSCt may amount to an "unchecked check", but that should be mitigated by the fact that the judiciary is supposed to be the "least dangerous branch"<sup>84</sup>. Placed in its proper context, therefore, the USSCt's dialogical and argumentative style seems to be shaped above all by its common law origins and methodology. If the common law judge could legitimately make law it is because he could combine authoritativeness and persuasiveness<sup>85</sup>. Such authoritativeness was derived from the common law itself inasmuch as it incorporated the fairness, wisdom, common values and learning through empirical experimentation that embodied what was best within the polity. Because of his social position, sense of responsibility and training, the common law judge was in the best position to discover and preserve that which was deserving of being authoritative.

82 See Mitchel Lasser, *Judicial Deliberations*, *supra*, at 103-115.

83 See Alexander Hamilton, *The Federalist* No. 78.

84 *Id.*

85 See generally, Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. Cal L. Rev. 1307 (2001).

On the other hand, persuasiveness was of paramount importance to the common law judge as he stood as an intermediary between the state and its citizens (or subjects in the case of the British monarchy). To the extent that his judgments are official and enforceable through deployment of the state's police powers, the common law judge looms as an agent of the state against the citizen. At the same time, as mentioned above, in elaborating constitutional protections (whether they be the unwritten norms of the British constitutional system or the written provisions of the US Constitution) against the state, the common law judge functions as if he were the defender of the citizen or subject against unwarranted or unconstitutional state intrusion. To maintain a workable equilibrium between these two functions, the common law judge must be persuasive *vis à vis* the state and *vis à vis* the citizen. In the context of a democratic state, moreover, this means being persuasive to the requisite majorities while at least in principle remaining persuasive to all those who belong to some unpopular minority or other and are yet subject to the full force of majoritarian law<sup>86</sup>.

In her pivotal institutional role as mediator among various centers of governmental powers and among the latter and the citizen, the common law judge must as best as possible combine authoritativeness and pervasiveness. Moreover, when the tensions between the latter two are too high for integration, the common law judge must fairly and judiciously mediate between them. Unlike in French constitutional adjudication where authoritativeness is predominant – hence resulting in major decisions of the French Constitutional Council handful of paragraphs long, summarily citing the sources of authority without apparent effort to persuade the reader<sup>87</sup> – in American constitutional adjudication authoritativeness depends to a large extent on persuasiveness. And there is perhaps no better example of this than Chief Justice Marshall's opinion in *Marbury v. Madison* in which he argues forcefully for the authority of the USSCt as constitutional adjudicator notwithstanding a lack of clear textual guidance in the US Constitution.

In terms of constitutional identity, the most important influence on the USSCt's judicial style and rhetoric comes from the American approach to reconciling unity

86 In terms of separation of powers, the two other federal branches, though political are also inevitably concerned with institutional prerogatives. Nevertheless, when an USSCt decision has broad democratic appeal, one of the political branches will be hard pressed to disregard it to protect an institutional prerogative. *See e.g., U.S. v. Nixon*, 418 U.S. 683 (1974) (In midst of impeachment investigation, President Nixon ordered to turn over documentation over which he asserted executive privilege). Though Nixon left it unclear whether he could obey such an USSCt order, he announced he would comply eight hours after the decision was issued. *See Sullivan and Gunther, Constitutional Law, supra*, at 424, n.4.

87 *Compare e.g.,* the first French case to consider the constitutionality of affirmative action, the *Feminine Quotas Case* 82 - 146 DC of 18 November 1983 (Constitutional Council) in which the core analysis is four short paragraphs long to its American counterpart *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) with numerous separate opinions running over one hundred and fifty pages long. *Id.*, at 265 - 421.

and diversity encapsulated in the motto “E Pluribus Unum”<sup>88</sup>. From the outset, the US has been a country of immigration and a haven for persecuted religious minorities from abroad<sup>89</sup>. Moreover, Americans regard their socio-economic and political space as animated by clashes among competing interests kept peaceful and orderly by fair rules of engagement<sup>90</sup>.

To complete this rough sketch, mention must be made of the role of the adversary system of justice on the American conception of law and of constitutional identity. In the legal arena as in the economic one, diverse interests compete and such competition is supposed to be channeled to peaceful and productive ends through means that transcend the particular interests of the competitors. Ideally within this vision, what sustains the economy is protection of property and contract rights and the “invisible hand” of competition. What sustains the system of justice, on the other hand, is resolution of hard fought adversary litigation by a neutral arbiter – neutral, at least, in the narrow sense of not being biased in favor or against any adversary before her – in the best of cases through application of procedural rules, or in any event through legal norms that can be persuasively defended as authoritative. In constitutional cases, moreover, adversarial competition is over differing interpretations of the constitution – *e.g.*, the constitution does or does not authorize electronic surveillance of citizens without prior judicial authorization – and the judge must justify through pervasive argument in her opinion her choice among these or her decision to impose one advanced by none of the adversaries before the Court.

The USSCt relies on both formal and policy oriented arguments, often using one against the other<sup>91</sup>. The USSCt also makes great use of “weighing”, “balancing” and is prone to focusing on a multitude of “factors” and “considerations” when tackling constitutional issues<sup>92</sup>. These techniques – even the contradictions between formalism and anti-policy – are entirely consistent with reconciling unity with a multiplicity of competing interests and with achieving both authoritativeness and persuasive-

88 This motto is in sharp contrast to the weaker motto, “united in diversity” including in the proposed European Constitution. See Michel Rosenfeld, *The European Treaty Constitution*, *supra* at 327-23.

89 This did not prevent the institution of discriminatory immigration regulations or religious bigotry at home, but the *ideology* of openness to immigration and promotion of religious diversity has remained strong. For example, religious diversity may have at one time meant all different protestant denominations but not Catholics and Jews, whereas today the latter two religions seem fully included in the popular conception of acceptable religious diversity.

90 Consistent with vision, the multiplicity of recognized interests does not seem reconcilable with French Rousseauian conceptions of the “general will” which imbue the French state with legitimate authority and so too the French Constitutional judge through whom the state “speaks”.

91 See Mitchell Lasser, *Judicial Deliberation*, *supra* at 62-63. Lasser asserts that the American judiciary has engaged in a “policy oriented discourse, which goes hand in hand with a virulently anti-formalistic rhetoric” while at the same time deploying a “formalist application [of legal norms], which often goes hand in hand with an explicating anti-policy rhetoric...” *Id.*, at 63.

92 *Id.*, at 280.

ness. Indeed, when a formal legal (constitutional) norm is well established and widely accepted, it is prone to being perceived as rising above interests. Under such circumstances, adherence to formalism is likely to be more authoritative and persuasive than engaging in policy analysis. Conversely, when no widely acceptable formal solution is at hand, interest analysis seems inevitable. In the latter case, finding the best interests, the ones prompted by the largest majorities, and weighing and balancing competing interests to reach the most productive and least restrictive accommodation of interests, seem to provide the best means for purposes of reconciling unity and diversity.

Within this institutional context, and consistent with the constitutional identity sketched above, the publication of concurring and dissenting opinions and even the rendering of 5-4 USSCt decisions on important constitutional issues by and large strengthen rather than weaken the Court's legitimacy. Indeed, for one thing, in the face of disputed values and interests, dissenting opinions can give a voice and preserve inclusiveness of the loser in the relevant adversarial contest. For example, in 1986 the USSCt held in a 5-4 decision that the constitutional right to privacy does not extend to homosexual sex among consenting adults<sup>93</sup>. Arguably, the vehement dissent by four justices provided a measure of comfort to the losers that would have been lacking had the Court been unanimous, or had it been compelled like a French Court to render a single institutional judgment. Moreover, where it is difficult to come by a persuasive resolution of a constitutional conflict which the USSCt cannot avoid, the 5-4 decision can be authoritative *because* it is a binding opinion without seeming authoritarian. Finally, as the common law is incremental and empirically grounded, over time dissenting opinions may become more persuasive. Thus, for example, in 2003 the USSCt in a 6-3 decision reversed itself and overruled its previous decision on the privacy rights of homosexuals.<sup>94</sup>

Whereas the style and rhetoric of the USSCt appears well integrated, the bifurcated approach of the ECJ with French style judicial decisions and American style AG opinions seems quite puzzling. First, as already noted, the EU unlike France is not a long established republic with a distinct well entrenched constitutional identity<sup>95</sup>. Second, juxtaposition of seemingly authoritative conclusory syllogistically ordered terse judicial opinions with multifaceted dialogical, broadly encompassing AG opinions that attempt to deal with all plausible arguments relating to constitutional issues before the ECJ seems at first counter-productive. If there is a deductive syllogistic way to adjudicate a constitutional question, why resort to argumentation and to exposing all weaknesses and uncertainties surrounding a particular constitutional issue? Conversely, if the complexities and uncertainties manifest in the AG opinions

93 See *Bowers v. Harwick*, 478 U.S. 186 (1986).

94 See *Lawrence v. Texas*, 539 U.S. 558 (2003).

95 See Michel Rosenfeld, *The European Treaty-Constitution and Constitutional Identity*, *supra*, at 327-331.

reflect core concerns, does not resort to conclusory syllogistic judicial opinions undermine the authoritativeness of the ECJ?

When placed in its proper context, the ECJ's bifurcated approach can be understood as being coherent and as meeting the Court's and the EU's unique needs and objectives. The ECJ's uses French style judgments for different reasons and purposes than does the French Constitutional Council. Furthermore, the AG American style opinions have only partial congruity of purpose with the dialogical thoroughly argued USSCt opinions. Finally, ECJ judgments have not remained static as their length and content have evolved, if not their form. This evolution has been from a style and rhetoric that were thoroughly French to one that has become somewhat closer to the American one.

The French judge "speaks" the law both because she is an agent of the state and because under the civil law paradigm legal interpretation is supposed to boil down an objective deductive operation. More specifically, the French judge is an agent of the Republic as an indivisible whole and of the legislator (constitutional or ordinary) who has issued the applicable legal norm(s). Moreover, the style and rhetoric fashioned to reflect the above mentioned institutional and identity-based arrangement is so firmly entrenched that it endures even when the foundation upon which it rests is undermined. Thus, in its landmark 1971 *Associations Law Decision*<sup>96</sup> the French Constitutional Council "made law" in perhaps a bolder manner than did Chief Justice Marshall in *Marbury* and yet presented its decision in its customary few conclusory paragraphs. Under the guise of "speaking" the law, however, the Council transformed its role from mere guardian of the boundary between executive and legislative power to a guarantor of individual rights against legislative infringement<sup>97</sup>.

In contrast, the ECJ not only lacks a unified republic for which it can speak but it also does not have to deal with the institutional concerns that confront the French judge. In the French tradition, the judiciary is subordinated to the legislature, but there is nothing similar in the EU. Actually, as already pointed out, there are no serious tensions between the ECJ and EU governing institutions. Accordingly the ECJ does not have to "speak" the law to avoid offending the Commission or the Council. Instead, the ECJ has to "speak" the law to promote its and the EU's authoritativeness as if the latter were a stable long established republic when it in fact is an evolving work in progress without fixed constitutional identity<sup>98</sup>. Initially, all the ECJ judges came from civil law countries and may have thus been predisposed toward the French approach. Be that as it may, by using the deductive conclusory French style, the ECJ was able to communicate to the member-states that the treaties they had entered into compelled the "constitutional" results reached by the Court. This is well illustrated in the *Van Gend and Loos* decision where the ECJ was as

96 71-41 DC of 16 July 1971.

97 See Norman Dorsen et al., *Comparative Constitutionalism*, *supra*, at 123.

98 See Armin von Bogdandy, *The European Constitution and European Identity*, *supra*.

bold as the French Constitutional Council would be a few years later in its *Associations* decision. In the words of the ECJ:

„The wording of Article 12 [of the Treaty] contains a clear and unconditional prohibition which is not a positive but a negative obligation... The very nature of this prohibition makes it ideally adapted to produce direct effects in the relationship between member-state and their subjects.“<sup>99</sup>

In contrast to the ECJ judges, the AG submits an individually signed opinion that is dialogical and argumentative in style. Article 222 of the TEEC provides that it is the duty of the AG “acting with complete impartiality and independence to make, in open court, reasoned submissions” meant to assist the judges in disposing of the cases before the ECJ. AGs consider interpretive issues regarding EU treaties and legislation as well as the Court’s previous decisions and academic commentary on the latter and they concentrate above all in an extensive review of the ECJ’s jurisprudence<sup>100</sup>. What is perhaps most striking about the AG opinions is their personal style and their inclusiveness both in terms of relevant issues and of the positions and arguments of all parties likely to be affected by the ECJ’s decision.

In sharp contrast to the judges’ impersonal language, the AG uses language such as “such an approach seems unsatisfactory *to me*”<sup>101</sup> – and “it seems *to me* to be appropriate to reconsider the effect of directives”<sup>102</sup>-- the latter statement opening the door to major changes on a most important issue of ECJ jurisprudence<sup>103</sup>. Moreover, the AG states and evaluates the pros and the cons of the various arguments presented on all sides of issues raised by the case at hand.<sup>104</sup> The AG arguments are presented in language that connotes objectivity and fairness with phrases such as “substantial arguments exists against such a change in the case law”<sup>105</sup> or “reference is made to ... the wording of ... the Treaty...”<sup>106</sup>. When it comes to the AG’s own arguments and positions, however, the rhetoric turns unmistakably subjective, e.g., “*in my view* those arguments [previously characterized as “substantial”] can be refuted”<sup>107</sup>. Finally, the AG’s opinions are inclusive not only of a wide panoply of relevant argu-

99 *Van Gend & Loos, supra*, at I. B. This rhetoric is all the more remarkable since the Treaty itself is silent on direct effect and since traditional treaties customarily grant rights and impose obligations on signatory states rather than on the latter’s citizens.

100 See Mitchell Lasser, *Judicial Deliberations, supra*, at 115-117.

101 C-91/92 *Facini Dori v. Recreb SRRL* [1994] ECR I-3325, para. 47 (opinion of AG Lenz) (emphasis added).

102 *Id.*, at para.49 (emphasis added).

103 The issue at stake was whether EU directives not followed by the requisite member state implementing regulation should have “horizontal” effects – i.e., should be directly binding on non-governmental actors. The prevailing ECJ jurisprudence being questioned by the AG was to the effect that there was no such horizontal effect.

104 See *e.g., id.*, at para. 56 ff.

105 *Id.*, at para. 57.

106 *Id.*, at para. 58.

107 *Id.*, at para. 53 (emphasis added).

ments, but also of the positions of all interested and potentially affected parties, and in particular the member-states who, though not parties to the case, have an interest in its outcome<sup>108</sup>.

AG opinions are, on the one hand plurivocal<sup>109</sup>, open to a wide panoply of plausible arguments that often expose the complexity, contradiction, fragility or near equivalence in terms of persuasiveness of contending arguments or positions. On the other hand, AG opinions are at the same time personal, seemingly subjective, and often suggest that the multiple levels of diversity that emerged in the course of the opinion's narrative can only be reconciled into a workable unity through processing from the singular perspective of an individual – as learned and impartial as this individual may be. In other words, in the AG's opinion, it is not the institution that speaks but rather, after due deliberation and consideration of all institutional factors, an individual who sees it all from her uniquely situated position and who accordingly advocates what she thinks the ECJ decision should be .

As dialogical and argumentative, AG opinions are similar to those of USSCt justices. The former, however, are much less adversarial in tone than the latter. Operating in an adversary system, once a justice has decided a case, she becomes an advocate for her position, and in the context of disagreements between majority opinions and dissents, each is prone to argue as much against the other as in favor of her own views. For example, in *Printz v. United States*,<sup>110</sup> an important 5-4 federalism case, the various opinions are replete with charges and countercharges. Thus, in his opinion for the Court's majority, Justice Scalia writes: "Justice Souter contends that his interpretation of ... is supported by [federalist 44].... In fact, [federalist 44] .... quite clearly contradicts Justice Souter's reading"<sup>111</sup>. Justice Souter replies in his dissent: "The Court reads [the *Federalist* passages it cites to attack Souter's views]... But I doubt that Hamilton's English was quite as bad as all that. One simply cannot escape from Hamilton by reducing his prose to inapposite figures of speech"<sup>112</sup>.

In contrast to this adversarial and even in some cases confrontational style, the AG opinion seeks whenever possible to harmonize difference and diversity, and even when that is not possible, or when squarely advocating a change in jurisprudence, to proceed in a non-confrontational manner. The role of the AG is to foster "unity out of diversity," to evince openness and acceptability towards all relevant players, and particularly member-states – by both taking their positions into account and trying to persuade them of the soundness of the ECJ jurisprudence and of the position taken by the AG. Moreover, both the ECJ and AG work towards the same

108 See e.g., C-446/98 *Fazenda Publica v. Camara Municipal do Porto* (2000) ECR I-1145 (opinion of AG Alber) (Austrian and German government views and arguments considered in preliminary reference by a Portuguese court concerning a value added tax issue).

109 See Mitchell Lasser, *Judicial Deliberations*, *supra* at 127.

110 521 U.S. 898 (1997).

111 521 U.S., at 914.

112 *Id.*, at 972.

goal: to find, define and preserve the EU's unity as framed by the main objectives founded in the EU treaties. The ECJ judges do it through stylistic and rhetorical devices that connote authoritativeness, the AGs through an inclusive discursive approach that manifests respect for diversity while making a personal appeal for unity – an appeal from someone who understands and empathizes with the concerns of all those who have a high stake in the ECJ's decisions. By comparison, the USSCt does not seem particularly concerned with unity<sup>113</sup> because the unity of the US is much more firmly anchored than that of the polity circumscribed by the EU; because ordinarily the USSCt is less pivotal for the relevant unity than is the ECJ; and because, save in exceptional circumstances, the unity of the USSCt as an institution does not depend on unanimity.

The bifurcation between ECJ and AG opinions has become somewhat attenuated over the years. Thus, for example, in an important relatively early case such as *Nold*<sup>114</sup> in which the ECJ held that fundamental rights as protected in the constitutional traditions common to all member-state form part of the general principles of law which it applies, the Court's judgment consisted of 17 rather short paragraphs. In contrast, more recent cases tend to be much longer<sup>115</sup>. Furthermore, though the recent ECJ judgments are not as discursive as the AG opinions, they are much more so than the Court's early judgments. A key factor in both the increase in length and in the more discursive nature of the more recent judgments is the ECJ's discussion of its past decisions and the close attention it pays to its jurisprudence. There may be many reasons for this shift, but by far the most important for present purposes is that it is the ECJ itself and its body of jurisprudence that have replaced the vague and mostly hidden Community state-like entity (in the name of which the Court spoke in the early days) as the source of authoritativeness for the EU, its legal regime, and the constitutional order it seeks to impose.

#### F. Comparing ECJ and USSCt Methods of Constitutional Interpretation

As made clear in the course of the previous discussion, both the ECJ and the USSCt have engaged in broad and sweeping interpretations far removed from strict textualism. Looking beyond styles and rhetorical modes, both courts rely on types of arguments that overlap. The USSCt uses five types of arguments: (a) textual; (b) from

113 There are, of course, notorious exceptions, such as the unanimous *Brown v. Board of Education*, *supra* in which the USSCt held state mandated public school racial segregation unconstitutional, where the Chief Justice took special steps to insure unanimity. See Sullivan and Gunther, *Constitutional Law supra*, at 679.

114 C-4-73 *Nold v. Commission* [1979] ECR 491.

115 See, e.g., *Fazenda Publica v. Cammara Municipal do Porto*, *supra* (61 paragraphs); and C-20/00 and C-64/00 *Booker Aquaculture Ltd. v. The Scottish Ministers* [2003] ECR I-7411 (96 paragraphs).



the framers' intent; (c) constitutional coherence; (d) from precedent; and (e) value (e.g., moral, policy, teleological) arguments<sup>116</sup>. The ECJ uses above all a purposive and meta-teleological approach<sup>117</sup> that relies on what are essentially value arguments in terms of the American classification. More particularly, the ECJ relies primarily on arguments from: a) history ("which bear some affinity with US arguments from the framers' intent without privileging any particular moments in history); b) "contextual harmonization" (which correspond to US arguments from constitutional theory); c) precedent (which differ from their US counterparts as they are predicated on concern for institutional integrity and continuity rather than on the bindingness of past decisions); "general principles of law" (these are a hybrid of two US categories, namely constitutional theory and value arguments – the values involved being the principles behind the EU treaties and the fundamental principles behind the member-state legal systems)<sup>118</sup>.

Although the nature of the arguments resorted to by the USSCt and the ECJ overlap significantly, the purposes to which these arguments are put by each court differ widely. The USSCt uses different arguments *plurally* to ward off or defuse internal threats to its authority and to the prevailing constitutional balance. The ECJ, on the other hand, combines these arguments to bolster its meta-teleological approach, which it deploys as its main weapon against external threats. The internal threats confronting the USSCt are the breakdown of the fragile equilibrium between democracy and constitutional adjudication brought to the fore by the countermajoritarian problem, and the erosion of the Court's power in relation to that of the political branches as a result of separation of powers wars. For its part, the external threat to the ECJ, as already mentioned, is that posed the member-states and their constitutional courts in particular. Moreover, that external threat extends not only to the ECJ but also to the EU itself.

As noted in Part IV above, in the broadest terms USSCt arguments breakdown at the highest level of abstraction into formal ones and policy oriented one. In terms of the countermajoritarian difficulty, formal arguments are attractive to the extent that they seem to remain impervious to the subjective preferences of judges. On the other hand, policy oriented arguments may exacerbate the countermajoritarian difficulty, but need not if the policies involved are approved by large majorities. Policy argu-

116 See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Adjudication*, 100 Harv. L. Rev. 1189 (1987).

117 See Mitchel Lasser, *Judicial Deliberations*, *supra*, at 208. The AG arguments focus not so much on the purpose of the particular EU legislation before them, but on "meta" purposes, i.e., "the purposes, values, or policies ... underlying the EU's legal structure *as a whole*" (emphasis in original). Moreover, the ECJ has adopted the same meta-theological approach. *Id.*, at 231.

118 See Joxerramon Bengoetxa, Neil MacCormick and Leonor Moral Soriano, "Integration and Integrity in the Legal Reasoning of the European Court of Justice" in Grainne de Burca and J.H.H. Weiler, eds., *The European Court of Justice*, *supra*, at 43, 46.

ments understood broadly as encompassing all values<sup>119</sup>, however, can also play an altogether different legitimating role for those who reject the validity of countermajoritarian objections. Indeed, those who maintain that constitutional rights derive from principles and must therefore be interpreted in terms of the latter, can plausibly claim that a principle-based jurisprudence can at once be countermajoritarian and avoid judicial subjectivism.

Although there is no necessary logical connection between these, there has been a strong congruence that has held over time between a formalist or a logical positivist approach to constitutional interpretation, on the one hand, and originalism – i.e., that the constitutional interpretation must follow the framers’ intent – and confining the judge to the “plain meaning” of the constitutional text, on the other<sup>120</sup>. Proponents of this approach consider arguments from the text of the constitution and from the framers’ intent legitimate and consistent with originalism. They also believe that arguments from precedent and value arguments are illegitimate<sup>121</sup>.

In contrast, those who take the position that the constitution should be interpreted so as to meet the needs of contemporary society, to promote justice or to implement certain principles or policies are likely to be anti-formalists and to rely heavily on value arguments. This does not mean that those in this anti-formalist camp will not use arguments from the text or from the framers’ intent. It means, however, that those interpreters will only use the latter inasmuch as they serve the policies – as broadly defined in the abstract sense above – which the interpreters in question understand the constitution to further.

There are three major approaches to constitutional interpretation and they all make use of the interpretive tools discussed above. These different approaches have been articulated by legal scholars but traces of one or more of them are found in constitutional cases adjudicated by the USSCt. The three approaches in question are: originalism<sup>122</sup>, the principle-based approach<sup>123</sup>, and the process-based approach<sup>124</sup>.

119 Ronald Dworkin distinguishes between principles and policies and justifies rights (including constitutional rights) in terms of former and social goals in terms of the latter. See Ronald Dworkin, *Taking Rights Seriously* 90 (1977). Both principle-based and policy arguments are ultimately value arguments and it is therefore not necessary to maintain the Dworkinian distinction for present purposes.

120 See Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States*, *supra* at 657-58.

121 Arguments from precedent are not in and of themselves contrary to formalism or to the framers’ intent. Actually, if a precedent fully captures the framers’ intent, then following that precedent should be consistent with originalism. Instead, what is inconsistent with originalism is to follow a precedent *because* it is a precedent, and that precisely is what arguments from precedent call for.

122 For an articulation and defense of originalism, see Robert Bork, *The Tempting of America*, *supra*.

123 See, e.g., Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev 461 (1981).

124 See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

Originalism bases legitimacy on interpreting the constitution according to the intent or meaning of the framers which have become authoritative through ratification of the constitution. Principle-based theory on the other hand, maintains that judges should be constrained in their constitutional interpretations by principles enshrined in the constitution<sup>125</sup>. Finally, process-based theory argues that the constitution fosters above all democracy, and that its provisions – particularly those in the Bill of Rights – are meant to prevent or remedy malfunctions or abuses of the democratic process. Thus, for example, freedom of speech guarantees the integrity of the democratic voting system. Indeed, without adequate access to multiple sources of information, the citizen cannot make adequate voting choices. Accordingly, if the majority prohibits the communication of certain political ideas it ultimately undermines rather than promote democracy and the Court is best placed to protect the integrity of the democratic process.

Although, each of the three approaches handles the countermajoritarian difficulty in its own way, none of them has definitely dealt with countermajoritarian or institutional objections to the broad interpretive powers of the USSCt. To a large extent, this is due to the fact that each of these approaches is vulnerable to internal and external objections<sup>126</sup>. For example, even if one accepts the legitimacy of originalism, there may be internal questions concerning whose original intent should be relevant, the framers or ratifiers, whether subjective or objective intent is at stake, and whether in many crucial instances discovering the relevant intent is altogether possible. On the other hand, from an external standpoint the very legitimacy of the originalist position may be questioned<sup>127</sup>. Similarly, one may accept the principle-based approach but dispute whether a particular set of principles, such as the liberal-egalitarian ones advanced by Dworkin, are authoritative. Or, one may altogether reject the principle-based approach as originalists do. Finally, one may question the scope or workability of the process-based approach, or one may insist, as proponents of the principle-based approach do, that the constitution is much more about substance than about process.

The plurality of these approaches or of the interpretive methods used by USSCt and examined by observers do not necessarily preclude achieving unity amidst this diversity. Viewed individually, each of the above interpretative methods, approaches, and types of argument can be used as a sword or shield in the internal struggle to achieve a proper constitutional balance. Originalist arguments can be used to attack judicial activism in cases such as those that afford protection to abor-

125 See, his *The Forum of Principle*, *supra*.

126 See, Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States*, *supra*, at 658-659. The following remarks are based on the more extensive discussion in *id*.

127 For an interesting historical view that combines an internal and external challenge to originalism, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985) (the framers were not originalists; they expected future generations to adapt the constitution to their needs).

tion rights; principle-based ones can be advanced to eradicate the vestiges of racial segregation; and process based arguments can be interposed to ward off legislative or executive encroachments upon judicial power. Viewed collectively and dynamically, the plurality of conflicting approaches, methods, etc., can serve to promote reconciliation between unity and diversity, so long as that is understood as a dynamic process that is in a constant state of flux.

Ultimately, the achievement of a workable unity depends on maintenance of a sufficient consensus on the legitimacy of the USSCt as constitutional adjudicator. This can be done in part through acceptance of the substance of its decisions – either because there is broad popular support for them or because various approaches converge to legitimate the particular result produced by the Court – or of the process involved, including evidence of serious consideration of various contending viewpoints as evinced by the publication of dissenting opinions, or on the basis of the USSCt’s position *vis à vis* the political branches consistent with a broadly appealing conception of the separation of powers. Finally, for the USSCt to get sufficiently ahead in the internal war to preserve constitutional unity and coherence through interpretation, it must not only counter internal threats defensively, but must also do so proactively. In part, the USSCt must react against attacks or threats by critics or co-equal branches; in part, however, it must also fill certain vacuums. In particular, given that the USSCt works with a constitution that is more than two hundred years old and that is very difficult to amend, it must inevitably update its constitutional jurisprudence and fill gaps through its interpretive practices. The main challenge to the USSCt is thus clearly internal and its success in the end will depend on whether it can sufficiently divide those who challenge its authority while at the same time rally enough supporters on its side.

Turning to the ECJ, as noted above, its broad interpretive tools are similar to those used by the USSCt, but the ECJ puts them to use mainly against external threats coming from the member-states. Although like the USSCt the ECJ seeks to accommodate at once both unity and diversity, the ECJ’s places most of its emphasis on unity and does that above all through deployment of meta-teleological arguments and through harmonization that involves subsuming other arguments under meta-teleological ones. As one observer puts it, the ECJ frames its “analysis primarily in terms of *systemic* meta-policies... deployed in an overtly purposive... fashion to promot[e]... the ‘effectiveness’ of the EU system and its legal provisions... [I]t is the fashioning of a proper Community *legal order* - not the advancement of the Treaty provisions’s purpose, nor the promotion of substantive economic or political ends - that takes priority”<sup>128</sup>.

Given the preponderance of preliminary references from national judges, most of the meta-teleological arguments that shape the ECJ’s interpretations are addressed in the first instance to member-states. Such arguments, however, are not exclusively

128 Mitchel Lasser, *Judicial Deliberations*, *supra*, at 288 (emphasis in original).

used to ward off external threats or to address issues directly concerning member-states. In certain cases such as *European Parliament v. Council of the European Communities*, a horizontal separation of powers cases mentioned above, the ECJ used a meta-teleological arguments to give the European Parliament standing to sue though the treaties were silent on the matter. That silence, the ECJ noted,

„... may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the treaties establishing the European Communities“<sup>129</sup>.

For the most part though, meta-teleological arguments have been put to use in cases involving relationships between the ECJ, the EU and member-states, and on many occasions for purposes of advancing sweeping EU powers. For example in *Van Gend and Loos* discussed above, in determining whether community treaties should be given direct effect within member-states, the ECJ deemed it “necessary to consider the spirit, the general scheme and the wording” of the relevant treaty provisions<sup>130</sup>. The Court went on to specify that, in view of the fact the EEC treaty’s purpose is to establish a common market,

„... the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights... and the subjects of which comprise not only member states but also their nationals“<sup>131</sup>.

In its efforts to promote “unity out of diversity”<sup>132</sup>, the ECJ has not only imposed substantial burdens on member-states, but to avoid clashes with national constitutional courts, it has also incorporated, in the areas of general principles of law and of fundamental rights, norms that emerge from the common constitutional traditions of the member-states<sup>133</sup>. In this connection, it is not surprising that the ECJ spoke at the beginning as if it were expressing the will of a highly powerful sovereign, and that subsequently, as a consequence of its incorporation of rights best protected by courts and of its considerable jurisprudence devoted above all to promoting unity, it has become increasingly self-referential. It is also remarkable that in its most sweeping decisions promoting the unity of the EU’s system of governance, the ECJ did not simply rule in favor of the community against a member-state, but also in favor of a citizen against her own member-state. Thus the *Van Gend and Loos* decision availed Dutch citizens of a Community benefit assertable against the Netherlands, and in *Francovich* the ECJ granted an Italian citizen a right against Italy for the latter’s failure to implement an EU directive.

In the end, it is remarkable that the ECJ has had so much success thus far given the precariousness of its position and the boldness of its jurisprudence. There is little

129 *European Parliament case, supra*, at para. 26.

130 *Van Gend, supra*, at part. I B.

131 *Id.*

132 *See supra*, at note 88.

133 *See supra*, at note 25 and accompanying text.

question that the ECJ's position is far less secure than that of the USSCt and that the ECJ's jurisprudence is bolder than that of the USSCt. Paradoxically, it may well be the juxtaposition of the ECJ's precariousness and of its meta-teleological approach that best accounts for its success. It is as if in each case the ECJ communicated that the basic architecture of the EU was at stake and that if its decision were not accepted, its very precariousness might preclude it from remedying the irreparable damage that may ensue to the EU and derivatively to the member-states.

### G. Conclusion

Though neither was established as a constitutional court, both the USSCt and the ECJ have developed into powerful and bold constitutional adjudicators. This should not be surprising in an age of juristocracy<sup>134</sup>, in which several tribunals devoted to constitutional review, such as the German Constitutional Court, have achieved enormous influence and prestige. Both the USSCt and the ECJ – as well as the German Constitutional Court and others, such as the South African Constitutional Court – have had a very active hand in the constitutionalization of politics. Such constitutionalization proceeds by removing issues and controversies from the give and take of the day to day political arena and transforming them into constitutional problems to be settled by adjudication. A dramatic example of constitutionalization of politics is provided by the USSCt decision in *Bush v. Gore*. Indeed, in that case the USSCt took what is a paradigmatic political matter, a presidential election, and for all practical purposes dictated its outcome on constitutional grounds<sup>135</sup>. The success of the constitutionalization of politics depends on the authoritativeness and persuasiveness of the constitutional adjudicator. Absent such authoritativeness and pervasiveness, however, the constitutionalization of politics is bound to produce the politicization of the constitution and discredit constitutional review and the courts that engage in it. This came close to happening in the aftermath of *Bush v. Gore*. But because of the institutional capital and prestige of the USSCt it did not: the USSCt judgment was followed, the election settled, and although the Court was heavily attacked by public opinion at the time, these attacks soon subsided.

Both the USSCt and the ECJ enjoy great institutional stature due to the quality of their work, their ability to keep the constitutionalization of politics above politicization of the constitution, and their capacity to blend constitutional identity and insti-

134 See Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

135 The US Constitution provides for the Congress ultimately to resolve disputed presidential elections. See U.S. Con. Art. II, Sec I and Amend. XII (1804). For a critical account of the USSCt decision, see Michel Rosenfeld, "Bush v. Gore: Three Strikes for the Constitution, the Court and Democracy, But There Is Always Next Season" in Arthur Jacobson and Michel Rosenfeld, eds., *The Longest Night: Polemics and Perspectives on Election 2000* 111 (2002).

tutional balance – in the case of the USSCt through promoting and managing diversity, in that of the ECJ through extracting unity out of diversity. Having survived *Bush v. Gore*, the USSCt's foreseeable fate seems secure. That of the ECJ, however, may not be. So far, the EU has lived through a phase of expansion – both in terms of geographic breath and institutional depth – and the ECJ has been both pivotal and at its forefront. But if, the French and Dutch referenda rejecting the proposed Constitutional Treaty mark the beginning of a phase of EU retrenchment, then the ECJ's bold activism may well become less sustainable. In the end, courts like the USSCt and the ECJ are powerful constitutional adjudicators but they must still navigate political waters carefully lest they lose their authority and persuasiveness.