

Mapping the Overlapping Spheres: European Constitutionalism after the Treaty of Lisbon

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Abstract

Despite their substantial similarity, there are two principal overarching differences between the abandoned Constitutional Treaty and its intended successor, the Treaty of Lisbon. The latter document has been methodically stripped of many elements that gave the former a “constitutional” flavour; and the latter text has been interspersed with numerous additional safeguards to prevent the encroachment of EU law upon member state law. In this way the Treaty of Lisbon signals, on balance, a rejection of the notion of EU law either as inherently superior to member state law or inherently expansive in its scope. Rather, it is more conducive with a *pluralist* conception of European constitutionalism in which EU and member state law constitute *parallel and overlapping spheres*. They are parallel in that they coexist without either one being superior to the other; and they are overlapping in that they have partly merged, but also remain separate in important ways. In fact if we “map” the overlapping spheres we find three distinct legal “zones” kept apart by well-maintained boundaries, in which the overall constitutional order is relatively stable and coherent. Whether or not the Treaty of Lisbon becomes law, this pluralist conception will endure for the foreseeable future.

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I. Introduction: Interpreting the Treaty of Lisbon

The first difficulty in interpreting the Treaty of Lisbon (2007) is to decide what to compare it to. In the light of the long history of European integration it will be, if it becomes law, one of the most important revisions of the founding Treaty of Rome (1957). From the point of view of institutional reform, it arguably even surpasses in importance both the Single European Act (1986) and the Treaty of Maastricht (1992). In almost every way it is far more consequential than the most recent treaties successfully ratified, those of Amsterdam (1997) and Nice (2000). And yet despite its obvious importance the Treaty of Lisbon appears modest when compared to the even more ambitious document that it replaces – the Treaty Establishing a Constitution for Europe (2004), also known as the Constitutional Treaty. That document, which was painstakingly drafted by the Convention on the Future of Europe in 2002-2003, was abandoned after it was defeated in back-to-back referenda in France and the Netherlands in mid-2005. When the Treaty of Lisbon (TL) is compared to the Constitutional Treaty (CT), as will be the principal comparative focus of this paper, it appears less an advance than a retreat, a climbdown from lofty constitutional aspiration to mere institutional tinkering. The motivating hunch of this paper is that by focusing on the switch from the Constitutional Treaty to the Treaty of Lisbon we can gain insight not only on the political moment in the mid-2000s when the switch occurred, but on the whole constitutional development of the European Union.

The second difficulty in interpreting the Treaty of Lisbon is how, when comparing it to the Constitutional Treaty, to weigh the similarities and dissimilarities between them (see esp. Dougan 2008; also Claes and Eijsbouts 2008; Craig 2008; De Búrca 2008; Pech 2008). Whereas the similarities are so numerous that the two documents are nearly identical, there are but a few differences, many of which are seemingly inconsequential. When these differences are examined in detail, two broad themes emerge, one of which has been widely noted, the other less so. The widely noted thematic difference is that the Treaty of Lisbon has been stripped of much of the former document's constitutional trappings. Most importantly, the language has been changed to remove many terms or references that might imply that the EU is being formed into a state-like entity, and the form of the document is different in that it would amend, rather

than replace, existing treaties. The second, less-noticed thematic difference is that the text has been altered at a number of points to strengthen safeguards against the further encroachment of EU law into the realm of member state law. What these two themes have in common is that they both concern, at the most basic level, the relationship between the EU and the member states. When taken together the many small differences between the two documents suggest that the shift from the Constitutional Treaty to the Treaty of Lisbon signals a deeper shift in the nature of that relationship.

Here it will be argued that the Treaty of Lisbon's significance is that it supports one model of European constitutionalism and refutes another. The refuted model, which might be called for lack of a better term the "federal" model, imagines that (1) EU law is inherently superior to member state law, and (2) that it is inherently expansive in that it may continually encroach upon member state law. In the supported, pluralist model, (1) EU law coexists with member state law on a roughly equal footing, and (2) EU law is maintained within strict limits in relation to member state law. Another way to conceive of the pluralist model is as one in which EU law and member state law represent *parallel and overlapping spheres*. They are (1) parallel in that coexist without either one being superior to the other, and (2) overlapping in that they have in part merged, and but still remain separate. These two aspects of the pluralist model are reflected in the two themes of the Lisbon Treaty mentioned above.

The idea of pluralism is that the broader constitutional order can contain not only a plurality of legal spheres but even a plurality of "supreme" sources of constitutional authority – i.e., the Treaty and Member State constitutions – that coexist within it. The force of EU law derives from the Treaty, of which the European Court of Justice (ECJ) is the final interpreter; the legal systems of the Member States derive their force from their respective constitutions, for which the final interpreters are mainly national constitutional courts. According to the pluralist model, the Treaty and national constitutions are each autonomous sources of constitutional authority, in that neither is reducible to the other. This is in contrast to what may be called the "international law" model, in which the authority of the Treaty is reducible to that of national constitutions, or the "federal" model, in which the authority of national constitutions is subsumed within the EU legal order. Furthermore, the co-existence of these two (or twenty-eight, if the Member States

are counted separately) legal and constitutional systems is relatively cordial, in that each recognizes the authority of the other.

Some further explanation of the term “overlapping spheres” is needed. This is a term that has been employed in a number of different contexts: it has been used to describe “overlapping spheres of authority” in a world undergoing globalization (Held and McGrew 1998, p.236; Rosenau 2007, p.88) and in a specifically European context to describe overlapping spheres of identity (Beck 2006, p.166), overlapping spheres of public discourse (Eriksen and Fossum 2002, p.420) or overlapping public and private spheres (Keating 2001, p.34). More closely related to this paper, some scholars have used the term specifically to describe the relationship between the overlapping competences of the legal spheres of the EU and national governments (De Búrca 1999, p.4. Nicolaidis 2001, p.446). In general, the purpose of using this term is to emphasize the extent to which the spheres (of authority/identity/competence/etc.) have merged, and to convey the complexity and ambiguity in the relationship between them. By contrast, my conviction is that the metaphor of overlapping spheres is exactly correct, but for the opposite reason. The metaphor can be deployed instead to emphasize the extent to which the two spheres, while overlapping, remain largely separate from one another. Further, it can be used to graphically illustrate, with a fair degree of precision, the nature of the relationship between the spheres of EU law and member state law. If we “map” the overlapping spheres, the result is not an indistinct jumble but a coherent overall order in which there are three distinct legal “zones” – the supranational zone, the domestic zone, and the zone of overlap – separated by well-maintained boundaries. In two of the three zones, legal authority is quite clear: EU law is authoritative in the supranational zone, as is national law in the domestic zone. It is only in the zone of overlap – the area where EU competence has crossed over into domestic jurisdictions – that the two legal spheres occupy the same space; in this zone, it will be argued below, the two coexist in a *modus vivendi* in which the authority of both is effectively recognized. Thus rather than to convey mergedness, complexity and ambiguity, the notion of overlapping spheres is employed here to convey separateness, clarity, and simplicity.

The arguments of this paper will hold true whether or not the Treaty of Lisbon becomes law. At the time of writing (April 2009) its prospects are still uncertain, but

even if it fails the TL will cast a shadow over any future attempt at treaty revision. The changes from the CT to the TL signal an important change in the political mood between the IGCs of 2004 and 2007 that produced the two documents. Certainly it would be an exaggeration to think of the CT as a document that is fully federalist in character: in fact, in substantive terms, it largely maintained the existing balance of powers between the EU and the member states. However, it did tilt more in a federalist direction than any previous treaty, especially in stylistic terms – i.e. the constitutional concept. Evidently the European leaders at the IGC of 2007 decided that the CT's overt constitutionalism had been a mistake, in that it had inspired opposition and contributed to its demise. That judgement, based on a particular interpretation of public opinion in the countries that rejected the CT, may or may not be wrong. But now that it has produced a blatantly “de-constitutionalized” treaty with a tightened competence regime, it will be much more difficult for a future Convention or IGC to produce a document that is “re-constitutionalized” with a loosened competence regime. Despite the fact that the TL differs only in details from the CT, those details can be revealing. As two observers put it eloquently,

It is true that most of the pieces of the Constitutional Treaty were picked up to find a place in the Lisbon Treaty. But to say that there is no change at all is like saying that the pieces of a smashed vase when glued together make one as good as the original. The difference, however, is not only between the two vases. It is also in the fact that the vase was first smashed and that, glued together, it recalls and records the drama (Claes and Eijsbouts 2008, 2).

No matter what its fate, the Treaty of Lisbon deserves our close attention because it can reveal much about the possibilities for and limitations upon future reform.

This paper has an unusual structure. A typical paper would begin with a theory and then proceed to apply that theory to a particular case. Here I will do the reverse: I proceed first with a long discussion of a particular case, and then go on to discuss its theoretical ramifications. And so the next section of this paper will be taken up with a close analysis of the differences between the CT and the TL. Then in the following section, Section III, I switch gears completely and produce a sketch of a new theory of European constitutionalism, based on a notion of EU and member state law as parallel

and overlapping spheres. It is argued that the theory presented best explains the TL as it has been altered from the CT. After that, I will offer a few brief conclusions to sum up.

II. The Differences Between the Constitutional Treaty and the Treaty of Lisbon

The similarities between the CT and the TL are many, and the differences are few. None of the differences is by itself of critical and unambiguous importance: they range from purely symbolic changes (indeed, that is literally true, as the TL removes the article in the CT that referred to the symbols of the Union), to small but concrete changes such as those that increase the powers of national parliaments, to other changes that may be interpreted as being either of great or negligible importance, such as the manner in which the TL treats primacy and fundamental rights. Yet when these changes are tallied, their cumulative effect is considerable: arguably, they make the TL a qualitatively different treaty from the CT. On the whole, there could be said to be two broad themes to these changes, both of which concern the contours of the basic legal-constitutional relationship between the EU and the member states. The changes have a tendency to confirm, first, that the spheres of EU law and member state law are parallel: they remove elements in the CT that were “constitutional,” implying that the EU would become a state-like entity or that the sphere of EU law would be put in a superior position to the sphere of member state law. Second, the changes confirm that the spheres are overlapping but separate, in that they incorporate numerous additional safeguards against the further expansion of the sphere of EU law into the sphere of member state law.

Incidentally, this is not an exhaustive survey: there are a few differences between the two documents that have little or nothing to do with the two themes that I have highlighted here. Some of the other elements of the Treaty of Lisbon not found in the Constitutional Treaty include: various transitional measures, such as the postponement of the new voting rules in the Council, and the postponement of the jurisdiction of the ECJ over the Third Pillar *acquis* (see Protocol No. 36); other small changes dictated by the politics of the moment, such as the omission of a reference to the creation of “an internal market where competition is free and undistorted” (Art. 2(2) TEU), a new reference to climate change in relation to the goals of environmental policy (Art. 191(1) TFEU) and a new “spirit of solidarity” and the goal of promoting of “the interconnection of energy

networks” in relation to energy policy (Art. 194(1) TFEU); and a few other miscellaneous small differences, such as the fixing at nine, rather than one-third of all member states, as the minimum number required to go forward with enhanced cooperation (Art. 20(2) TEU). Other than these, the main differences between the CT and the TL fit with the two broad themes described here.

A “De-constitutionalized” Treaty

The TL’s confirmation of the parallel relationship between the spheres of EU and member state law is most apparent in the following: differences in form, differences in language, and the cross-referencing of external constitutional sources rather than their incorporation into the document itself. Let us consider these in turn. The form the new treaty would take was stated plainly by the European Council of June 2007 which set out the mandate for the new IGC: “The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution", is abandoned.” Instead, the Treaty of Lisbon would merely amend the existing treaties: the Treaty on the European Union (TEU) retains its existing name, and the Treaty establishing the European Community (TEC) becomes the Treaty on the Functioning of the European Union (TFEU); these two treaties “... shall be of equal legal value” (Art. 1 TEU). As with the CT, the TL will abolish the three-pillar structure created by the Maastricht Treaty, giving the EU legal personality as the formal successor to the EC. Yet strangely the new structure will still be founded on not one but two treaties, despite there being no obvious reason to do so except to underline the fact that the new document is not a constitution (Dogan 2008, p.623-624).

In other ways the language of the TL rejects some of the more “constitutional” rhetoric of the CT and reverts to the blander style of the treaties. The preamble of the TEU remains largely the same as in the Treaty of Maastricht, with only an additional clause from the CT referring to “the cultural, religious and humanist inheritance of Europe.” Gone, for example, is the clause, “...while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny...” An even more telling difference is to be found in the very first article. In the CT it begins with the

words, “Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union...” The TL reverts back to the traditional treaty language: “By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION...” The effect of this change is to reconfirm that national governments alone retain their powers as the “Masters of the Treaty,” which they might otherwise have been forced to share with the “citizens” of Europe. Another change is the outright removal of Art. I-8, which would have fixed the familiar “symbols of the Union” – its flag, anthem (Beethoven’s “Ode to Joy”), motto (“United in diversity”), and celebratory holiday (“Europe day,” May 9th); the only “symbol” which remains, mentioned elsewhere in the TL, is the euro as the currency of the Union.

Another change in the language of the document involves the substitution of innocuous-sounding words in place of terms employed in the CT which implied that the Union might become a state-like entity. Not least of these changes, of course, is the elimination of the word “constitution” itself. Another example is that the new post of “Union Minister for Foreign Affairs” has been renamed the much more cumbersome “High Representative of the Union for Foreign Affairs and Security Policy.” These changes are largely superficial, but there is one set of name changes that will do appreciable damage to one of the original goals of the CT, which was to simplify the EU’s legal instruments. The CT would have for the first time introduced a clear distinction between legislative acts (“laws” and “framework laws”) and non-legislative acts (“regulations” and “decisions”). The TL reverts back to the old classification of first-pillar legal acts – regulations, directives, decisions, recommendations and opinions – and then classifies them not on the basis of the nature of the action involved but by the procedure by which they are adopted: they are “legislative acts” if adopted either by an ordinary or special legislative procedure and non-legislative if they are not (e.g. delegated or implementing acts). This distinction is not always clear, in that some acts are difficult to class as one or the other (for a discussion of the difficulties, see Dougan 2008, pp. 637-652). Moreover, and this lack of clarity has unfortunate consequences, in that some democratic procedures – the Council’s obligation to deliberate and vote in public, or the early warning mechanism involving national parliaments – are only applied to draft

legislative acts. Thus this change from the CT to the TL does not merely involve the substitution of words but the reintroduction of substantive confusion.

Perhaps the most significant of the differences between the two documents is the fact that two key “constitutional” elements which had been incorporated directly into the CT are only brought into the TL as cross-references to external sources. These are the references to the ECJ’s case law on primacy (i.e. supremacy) and to the Charter for Fundamental Rights of the European Union. The principle of primacy was directly codified in the CT: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States” (Art. I-7). This article is entirely omitted from the TL. What is included in its stead is a declaration (No. 17) – which, unlike the protocols, is not technically part of the treaty and thus is not legally binding – recalling that

in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

It then goes on to annex an opinion of the Council Legal Service stating that in the opinion of the Court, primacy is inherent to the specific nature of EC law and that therefore its absence from the treaty does not affect its existence in the Court’s case law. This is a highly equivocal statement compared to the much stronger, now-excised article from the CT. It is true that the principle of supremacy/primacy is well-established in EU law, as it features in the jurisprudence of the ECJ. But that is not the same as having the principle actually codified in the treaty.

The other instance of cross-referencing is to the Charter of Fundamental Rights. That document was drafted by a special convention in 1999-2000 and solemnly proclaimed by the Nice European Council of December 2000, but it still is not legally binding. The CT would have rectified this deficiency by incorporating the entire text of the Charter within the body of the CT. The TL, rejecting the “constitutional concept,” cross-references the Charter as it was (re-)proclaimed in an adapted form by the Commission, Council and European Parliament in December 2007:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union... which shall have the same legal value as the Treaties.

Unlike the principle of primacy, the Charter will unequivocally be given a legally binding status by the TL. Yet the fact that it is not actually incorporated into the document affects whether it should be perceived as the EU's "bill of rights." For one thing, it is now unclear how the Charter would be amended. Moreover, it is unclear whether the Charter has any special claim to pre-eminence vis-à-vis other international human rights instruments that are external to the treaty, such as the venerable European Convention on Human Rights (1950), which under the TL the EU itself is obliged to become a signatory (over and above the fact that all member states are already signatories). On top of this, the Charter must also compete with "general principles of European law" as the basic foundation for human rights protections, and is already hemmed in by various clauses that restrict its interpretation (to be discussed in greater detail below); under such circumstances the Charter looks less and less like an EU bill of rights, which in turn makes the TL look less and less like a constitution – which is exactly the point.

A Stricter Competence Regime

The above-mentioned elements of the TL, which tend to confirm that it does not elevate the EU's legal structure to a superior position vis-à-vis the member states, have received a fair amount of notice among observers. Less well noticed is the fact that the TL at numerous points fortifies the boundary that separates the sphere of EU law from the domestic zone, the area of member state law beyond the reach of EU law. It should be said the CT, despite its constitutional concept, was not a document that was generally expansive of the EU's realm of competence; in fact in many ways it defined it in rather restrictive terms. Yet the TL has had the effect of curbing the expansion of EU law even more, by incorporating even more stringent safeguards against its encroachment into the realm of member state law. These concern how the boundary between the zones is constructed and maintained: what the powers of the EU are, the legal limits of those powers when they bump up against the powers of the member states, the limits on how

those powers may be exercised, and limits on how the treaty may be changed for the EU to acquire new powers.

The TL reiterates and strengthens a statement in the CT regarding the relations between the EU and the member states. The CT enjoins the EU to respect member states' "...national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" (Art. I-5). It then goes on to state, in starkly Weberian terms, that the EU must respect member states "...essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security." For good measure, the TL adds one additional sentence: "In particular, national security remains the sole responsibility of each Member State" (Art. 4 TEU).

One aspect of the CT which is carried over basically unchanged into the TL is the competence catalogue. One of the most important achievements of the CT was to set out for the first time a comprehensive catalogue of EU competences, in three categories: exclusive, shared, and supporting/ coordinating/ supplementing. The list of exclusive competences, areas in which only the EU may legislate (or member states if so empowered by the EU) is actually quite short, covering six items: the customs union, internal market competition rules, monetary policy for the Eurozone, fisheries conservation, external trade, and the power to conclude certain international agreements. The list of shared competences, in which both the EU and member states may legislate, is longer, including such important areas of EU activity as the internal market, agriculture and fisheries, economic and social cohesion, and the environment. In the third category of competence – areas such as health, industry, tourism and culture – member states retain primary legislative competence: the EU may support, coordinate, or supplement member state action, but cannot harmonize the laws of the member states.

A key principle of EU law reiterated many times in the Treaty of Lisbon is that of conferral, also known as the principle of limited competences or the attribution of competences. Conferral was codified in the Treaty of Maastricht, which for the first time stated clearly that the powers of the EU are limited to those explicitly conferred upon it by the Treaty. This marked a shift in the "deep structure" of the EU's relationship to the member states (Dashwood 1996). Unlike a typical national legislature, the EU has no

general law-making competence. The TL keeps the same formulation as in the CT, but with one word – “only” – added, to ensure that it is interpreted restrictively:

Under the principle of conferral, the Union shall act *only* within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein (Art 5(2) TEU, emphasis added).

Beyond this change, the TL includes three additional references to conferral not mentioned in the CT, in Art. 4(1), and Declarations 18 and 24.

The TL also clarifies matters relating to the EU’s areas of shared competence. The Treaty of Rome had no notion of shared competence: it merely specified the competences of the EEC without reference to the residual competences of the member states. According to the doctrine of exclusivity, all of those original competences should be deemed to be exclusive, in that the member states have in effect transferred them to the supranational level; member states can only take action in those areas when the EU authorizes them to do so, in which case competence has been “delegated back” to the national level (Toth 1994). Closely related to this is the doctrine of pre-emption, the notion that even in areas where member states have concurrent competence, they lose the power to act to the extent that the EU has acted; the EU has “occupied the field,” which then becomes an area of exclusive EU competence (Weatherill 1994). The CT, and later the TL, relaxed this rigid doctrine, making clear not only that some competences are indeed shared, but also that member states can continue to act to the extent that the EU has not acted, and that the EU may also cede ground back to the member states:

The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence (Art. 2(2) TFEU).

The second sentence cited above signals that the EU may “retreat” from the field that it previously occupied, which may then be “reoccupied” by the member states. Moreover, the first sentence confirms that the occupation is only limited to the precise extent of the action, and that member states may continue to take action right up to that limit. For good measure the TL reiterates this latter point in a Protocol on the Exercise of Shared Competence (no. 25), which states that

when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.

The TL reiterates the point yet again in its Declaration in Relation to the Delimitation of Competences (No. 18), which also underlines the point that member states regain their competence to act in areas where EU legislation has been repealed.

Another instance where the TL tightens the CT's rules with respect to EU powers is in its use of the flexibility clause. Article 235 of the Treaty of Rome enabled the EC to take action even in an area where it lacked competence, if such action should prove necessary "to attain, in the course of the operation of the common market, one of the objectives of the Community." This article was used many times over the years to circumvent the strictures of the Treaty, as it allowed the EU *carte blanche* to legislate in new areas so long as there was unanimity in the Council. Its role was diminished somewhat by subsequent treaties, especially Maastricht, that gave the EU the explicit competence to take action in many areas where previously Article 235 would have been employed; the new competences were conferred in such a restrictive manner that the net effect was to limit the EU's sphere of action. The flexibility clause was carried over into the CT, though there it was made more difficult to use because it requires not only unanimity in the Council but the consent of the European Parliament as well, and it will also be subject to the early warning mechanism involving national parliaments, to be discussed below. Moreover, the formulation in the CT also specified that measures adopted under this article shall not entail harmonization of the member states' laws in cases where the harmonization is prohibited, i.e. in areas of supporting/ coordinating/ supplementing competences. The TL adopts the CT's approach to the flexibility clause, now Article 352 TFEU, but with the additional restriction that the clause cannot be used in the area of common foreign and security policy.

Another curb on the actions of the EU present in the CT and somewhat strengthened by the TL concerns the principles of subsidiarity and proportionality. These principles are complementary to the principle of conferral. As the TL puts it: "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality." What

that means is that whereas conferral concerns whether the EU has the legal power to act in a given circumstance, that action is further constrained by considerations of whether it ought to act (subsidiarity) and how it ought to act (proportionality). Whereas conferral is a strictly legal norm, these latter two are largely political norms that place limits on EU action even when it is legally entitled to act. The CT introduced an early warning mechanism whereby national parliaments – political bodies with a vested interest in placing limits on EU action – would become subsidiarity watchdogs, scrutinizing proposed EU legislation for breaches of subsidiarity, the principle that the EU should refrain from taking action if action at the national level is more appropriate. Under the CT’s “yellow card” early warning mechanism, one third of national parliaments can force a Commission review of any proposed legislative measure if they believe that it violates subsidiarity. The TL strengthens this system by adding an “orange card” procedure whereby the objections of a simple majority of national parliaments triggers first a Commission review and then a vote in the Council and the EP, where a negative vote by either chamber would be sufficient to stop the measure (for full details see Protocol (No.1) on the Role of National Parliaments in the European Union, and Protocol (No.2) on the Application of the Principles of Subsidiarity and Proportionality).

Another manner in which the TL puts in place strictures that go beyond those in the CT is in its treatment of treaty revision. In formal terms, every treaty amendment must be unanimously agreed by all member states and ratified by them according to their respective constitutional requirements; this means that each competence wielded by the EU has been formally granted to it by each individual member state. The unanimity requirement has become increasingly troublesome as the number of member states has increased and the use of referenda has risen; nevertheless the CT left this requirement unchanged, and the TL maintains it. Even so, the constitutional ethos of the CT could be interpreted as moving the EU in a direction away from unanimity; if so, TL’s jettisoning of the “constitutional concept” reverts back to it. An editorial in the *European Constitutional Law Review* lamented the TL’s the elimination of the CT’s invocation of the “the will of the citizens and states of Europe” as amounting to the restatement of “the taboo on scrapping the rule of unanimity for ratification of Treaty amendments” (Claes and Eijsbouts 2008, 3). More concretely, the TL adds a sentence making clear that

proposals for treaty amendment “...may, *inter alia*, serve either to increase or to reduce the competences conferred on the Union in the Treaties” (Art. 48 TEU). The TL also introduces a new stricture on the use of the “simplified revision procedures” (i.e. *passerelle* clauses), which allow changes to legislative procedures without full-blown treaty amendment. The CT permitted the European Council to adopt a decision changing a voting rule from unanimity to QMV in the Council, or from a “special legislative procedure” to an “ordinary legislative procedure” (i.e. co-decision). The TL maintains this possibility but gives each national parliament the power to veto such a change within six months (Art. 48(7) TEU). There is justice in this new stipulation because without it national executives acting together could effectively change the treaty without the consent of their respective parliaments.

One final area where the TL goes farther than the CT in reining in EU competence is in the area of human rights. It has already been noted that the Charter of Fundamental Rights was removed from the body of the text and is now merely cross-referenced, as part of the discarding of the “constitutional concept.” The TL specifies that, “The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties” (Art. 6(1) TEU). It also states that the provisions must be interpreted in accordance with Title VII of the Charter; Title VII specifies, among other things, that

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law... The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. (Art. 51(1-2) CFREU).

What this means is that the Charter does not apply to actions of the member states when they are acting within the “domestic zone,” the area of domestic jurisdictions that falls outside EU law; the Charter only applies to actions within the sphere of EU law – acts of the EU itself and acts of the member states when implementing EU law. These limits are reiterated in a Declaration (No. 1) appended to the TL. Furthermore, the TL also adds a Protocol (No. 30) on the application of the Charter to Poland and the United Kingdom, which was inserted at the insistence of these two member states, mainly to prevent any

possibility that the social rights contained in the Charter would be forced upon them. The protocol is not exactly an “opt-out” from the Charter, but rather a restatement in stronger terms of the above-mentioned guidelines of interpretation. Yet the insidious effect of this protocol is to call into question the validity of the Charter not only in those two member states but in the other 25 as well, for what is the use of a “bill of rights” – even an embryonic one – that can be subjected to derogations of this kind? That is an open question which is raised by the protocol on the application of the protocol to Poland and the United Kingdom.

This list of differences between the CT and the TL may strike the reader as a miscellany that does not add up to any logical outcome, let alone point to an overall constitutional order that is normatively coherent and likely to be stable over time. Yet that is the argument here, and in the next section I will set out to sketch the outlines of this pluralist order.

III. Mapping the Spheres: A Pluralist Theory of European Constitutionalism

The story of how the legal spheres of the EU and the Member States came to overlap is the familiar tale of European legal integration. In the early 1960s, the ECJ famously set out the two key doctrines of direct effect and supremacy, using a teleological reasoning that draws not so much on the letter but the spirit of the Treaty of Rome (1957). The ECJ decided in 1962 that EU law is directly effective within national jurisdictions, imposing obligations not only on Member States vis-à-vis one another, but also on the relations between states and their citizens, creating rights that are enforceable in national courts; then in 1964, the ECJ decided that EU law is supreme over any conflicting national law. With some justification, the ECJ adjudged that the Treaty departed from traditional international law in that it established a new legal order, and that these doctrines were the minimum required to make this order effective and uniformly applied. In retrospect, the logic of the ECJ’s doctrines of direct effect and supremacy seems incontrovertible, not least because from the beginning the EU had an ambitious legislative and regulatory programme which would inevitably be invasive of domestic legal jurisdictions. It is difficult to imagine how the EU could have accomplished even its core tasks – such as the customs union, the common commercial

policy, or the internal market – without the doctrines of direct effect and supremacy in place. While these doctrines are sometimes depicted as the ECJ’s first steps in a long and stealthy campaign to overcome national resistance to the new legal order, they are really more of a radical but necessary “big bang,” the reverberations of which are still being felt. It took decades for the constitutional courts of the Member States to accept, even with some qualifications, the implications of these doctrines.

The essence of the pluralist argument is that European legal integration has now reached a stage where EU law and national law are separate but overlapping legal spheres which are based on independent constitutional sources, the Treaty and national constitutions. This idea is captured eloquently by Neil MacCormick in a passage worth quoting at length:

So it would seem reasonable to say that here there are two sets of constitutions, each of which is acknowledged valid, yet neither of which does, or has any compelling reasons to, acknowledge the other as a source of its validity. Where there is a plurality of institutional normative orders, each with a functioning constitution... it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another. In this case, ‘constitutional pluralism’ prevails (MacCormick 1999, p.104).

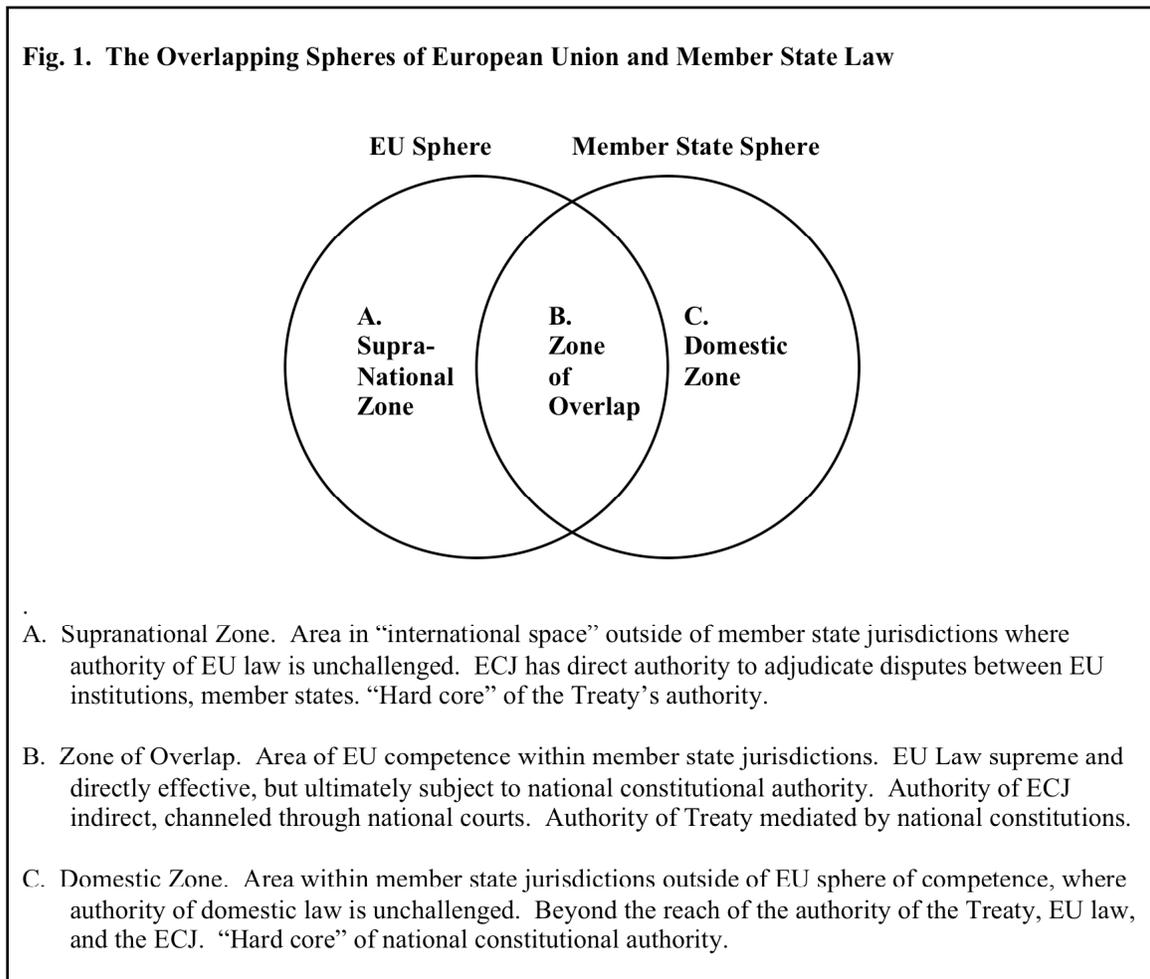
This model differs both from the “international law” model, (see e.g. Hartley 1999; Shilling 1996) in which the constitutional authority of the Treaty is reducible to national constitutions, and from the federal model (See e.g. Mancini 1991) in which the latter is superseded by, or subsumed within, the former. The weakness of the “international law” model is that it overlooks the fact that, as the ECJ has always maintained, the Treaty does establish a genuinely new legal order which is qualitatively different from traditional international law. Arguably, the most important difference is not how EU law is enforced but how it is enacted. The Treaty of Rome was “constitutional” in that created a legislative framework through which “laws” could be passed; thus from the beginning, the EU has been a law-generating institution. This qualitative difference from traditional international law may have been doubted in the period after the 1966 Luxembourg Compromise, when the system for passing laws still resembled consensus-based diplomatic negotiations among sovereign states. But since at least the Single European Act (1986) the EU has had a full-fledged, albeit complex and quirky, legislative system, with qualified majority voting in the Council of Ministers and an elected European

Parliament with guaranteed powers. The Treaty is, of course, not a constitution but a treaty, a unanimous agreement among sovereign states, ratified according to the constitutional requirements of each. In this way, its force could be said to be ultimately derived from the authority of national constitutions. Even so, the simple fact is that the Treaty has autonomous constitutional authority in that it creates a new legal order.

The weakness of the “federal model” is precisely the reverse of the international law model, in that it tends to overlook the fact that national legal orders remain grounded in autonomous constitutional sources – i.e. their respective national constitutions. Just because the Treaty meets some objective standard of what defines a constitution – such as establishing a legal order and a legislative system – does not mean that national constitutions suddenly fail to meet the same standards. A more accurate description is that these legal orders, and their respective constitutional sources, coexist within an overall legal order that is pluralist in structure. If these legal orders were entirely separate, then few conflicts would arise. But the legal orders overlap, in that they create a space within domestic legal jurisdictions in which EU law is directly effective and supreme over conflicting national law. The consequences of this overlap require further explanation.

The overlapping spheres of EU law and Member State law may be represented graphically by a simple Venn diagram of overlapping circles, Figure 1. The diagram is metaphorical but is nonetheless illustrative of the relationship between the spheres. If the spheres were completely separate, without overlap, then the boundary of each legal sphere would be contiguous with both its jurisdiction and its area of competence – that is, supranational jurisdiction would be contiguous with the sphere of EU competence, and domestic jurisdiction would be contiguous with the domestic sphere of competence. As it is, the spheres overlap, making for an anomalous space where jurisdictions and areas of competence do not entirely coincide. The zone of overlap is the area within the domestic (as opposed to supranational) jurisdiction which is nonetheless also within the EU (as opposed to national) area of competence. Thus the legal orders of the EU and the Member States partly overlap and in part remain separate, creating three separate “zones” of law. The five key elements in the diagram are the three zones – the supranational zone, the zone of overlap, and the domestic zone – and the two boundaries between the

zones. The boundary between the supranational zone and the zone of overlap is that between the supranational and the domestic legal jurisdictions; and the boundary between the zone of overlap and the domestic zone is that between the areas of EU and domestic competence. Each of these five elements requires some further explication; let us consider them one by one, from left to right.



First, the supranational zone is the location of the “hard core” of the Treaty’s authority. It is not located in geographical space; rather, much like international law, it is located in the notional space outside and above domestic legal jurisdictions. But whereas the subjects of international law are sovereign states, the subjects of EU law

within this zone are the Member States and institutions of the EU. Similarly, this is the zone where the ECJ wields direct authority, interpreting the Treaty and EU law so as to adjudicate disputes between and among the Member States and EU institutions. Disputes of this kind still make up most of the ECJ's caseload, and some may impose quite onerous obligations upon the Member States without crossing over the boundary into domestic jurisdictions. If EU law were confined to the supranational zone, it would be much like a species of traditional international law, but with very robust enforcement powers.

Second, the boundary between the supranational zone and the zone of overlap corresponds to the boundary between the supranational and domestic jurisdictions. The entire left circle that this arc cuts through corresponds to the area of EU competence; thus on both sides of it, the Treaty is the reigning constitutional authority. Yet the boundary is significant in that it divides the supranational zone, where the authority of the Treaty is direct, from the zone of overlap, where it is indirect – that is, mediated by national constitutions and legal systems. The difference is best illustrated by the contrast in the ECJ's authority on either side of the boundary. In the supranational zone, the ECJ wields direct authority, as it adjudicates disputes between and among Member States and EU institutions. But in the zone of overlap, the ECJ has the authority to interpret the Treaty but not to apply the law; that must be done by national courts. Consider the Article 234 reference procedure. National courts, when faced with an outstanding point of EU law, will refer the question to the ECJ; in doing so, they recognize the ECJ's interpretive authority, and the primacy of EU law over conflicting national law. The ECJ will send its interpretation back to the national court, which will then apply it; in doing so, the ECJ recognizes that only the national courts have the authority to apply the law within the domestic jurisdiction. In this way both sides in effect collaborate to maintain the boundary between the supranational zone, where the authority of the Treaty is direct, and the zone of overlap, where it is indirect. This division of labour in turn serves to emphasize that EU law is a separate body of law which has not, despite the doctrine of direct effect, become an "integral part" of national law.

Third, the zone of overlap is the area within domestic jurisdictions which also lies within the area of EU competence, where the Treaty is the reigning constitutional

authority. Whereas the ECJ takes the position that the force of EU law within domestic jurisdictions flows directly from the inherent authority of the Treaty, most national constitutional courts take a different view – in my opinion, the correct one – that in this zone the authority of the Treaty is indirect, mediated by the constitutions and legal systems of the Member States. Most national constitutional courts have asserted that the force of EU law in domestic jurisdictions derives not from the Treaty itself but from the article of the national constitution and/or the initial act of accession that authorizes the delegation of powers to international institutions. This could be called a doctrine of “qualified supremacy”: within the zone of overlap EU law is supreme over conflicting national statutes but not over national constitutions. Thus a number of national constitutional courts have made clear that while they will generally defer to the ECJ concerning the interpretation of the Treaty, they maintain the ultimate right and duty to intervene if EU law threatens basic norms of the national constitution. While Member States have had to make significant adjustments in order to accommodate EU law within domestic jurisdictions, they have done so in harmony with their respective legal traditions and in such a way as to maintain the ultimate authority of national constitutions.

Fourth, the boundary between the zone of overlap and the domestic zone corresponds to that between the areas of EU and Member State competence. The entire right circle represents national legal jurisdictions, and is thus contiguous with a territorial space – the national borders of the individual Member States. Yet the arc which cuts through it represents a boundary that is notional rather than geographical, dividing those areas of human activity governed by EU law from those governed by national law. This boundary is established by the Treaty, which sets out the powers of the EU, as well as the limits on those powers. Thus the demarcation of this boundary is the work of the authors of the Treaty, the Member States acting unanimously in their treaty-making capacity. The exact location of this boundary will sometimes be difficult to discern, not least because in many areas of social life EU and Member State competence is shared, effectively straddling the boundary. Furthermore, the question of which judicial body has the authority to interpret the Treaty and delineate the boundary – that is, judicial Kompetenz-kompetenz – is itself contested, claimed by the ECJ but not entirely surrendered by national constitutional courts, many of which have signalled that they

may intervene if the EU claims powers far beyond those granted to it by the Treaty. In order to prevent such an act of defiance, which could provoke a constitutional crisis, the ECJ needs to be vigilant in policing this boundary, so that national courts need not do so; in addition, the EU must exercise its existing legislative powers with self-restraint, adhering to the norms of subsidiarity and proportionality.

Fifth and finally, the domestic zone is the area of Member State competence within national jurisdictions. This is the location of the “hard core” of the authority of national constitutions, national law, and national courts. The historic tendency of the scope of EU law to expand has led some to suppose that this zone has shrunk to the vanishing point or disappeared altogether. Yet its existence is confirmed by the Treaty, which confirms that the powers of the EU are in principle limited. It is also confirmed by the ECJ, which acknowledges that it is powerless to review the actions of Member States when they are acting solely within the national area of competence. Of course, the scope and extent of this zone will depend on how the boundary with the zone of overlap is demarcated.

There is an intended symmetry to this overall picture. These are parallel spheres in that they are of equal size and arrayed horizontally, implying a relationship of approximate equality. This represents the fact that EU law, concerned principally with efficient economic regulation, is not a “higher law,” possessing greater moral weight than national law. It is true that EU law is supreme over any conflicting national law, yet the national law is not “struck down” but rather “disapplied” to make way for the effective application of EU law; in effect, the offending national law has strayed across the boundary from the domestic zone into the zone of overlap, the area of EU competence. In such a case, EU law prevails for the pragmatic reason that to be effective at all it must be uniformly applied across the EU. There is symmetry also in that each of the legal spheres has a hard core of full constitutional authority located in an outer zone, but finds its authority attenuated within the zone of overlap.

It should be noted, however, that the picture’s perfect symmetry may be somewhat misleading. While the authority of each legal sphere is attenuated in the zone of overlap, they are attenuated in different ways. In this zone, EU law is substantially effective, but indirectly and provisionally so. In contrast, national competence has been

entirely displaced by EU competence, even as national constitutions and courts retain formal legal jurisdiction. In addition, the two internal boundaries are different in kind. The jurisdictional boundary between the supranational zone and the zone of overlap is fixed and stable over time. The boundary between the zone of overlap and the domestic zone, based on competence, is less determinate – i.e. fuzzier – and has shifted over time. But despite these small asymmetries, this map presents a broadly accurate, albeit stylized, picture of the overall relationship between the two legal spheres.

This map demonstrates the advantages of the pluralist model of EU constitutionalism, as against the international law or federal models. A map of the international law model would depict two spheres that are entirely separate from one another. This would ignore the fact that they do substantially overlap, in that EU law is a new legal order that is supreme and directly effective within domestic jurisdictions. In a map of the federal model, by contrast, the internal boundaries would dissolve and the spheres would collapse into one another. This would imply that the entire system has become a single, vertically integrated legal regime with the Treaty at its apex. Such a map would overlook the substantial variation in the force of EU law, corresponding to the three zones: in the supranational zone, its force is direct; in the zone of overlap, it is indirect, mediated by national constitutions; and in the domestic zone, it is powerless. The existence of these separate zones is borne out even by actions the ECJ itself which, while exercising direct authority in the supranational zone, acknowledges the authority of national courts to apply the law in the zone of overlap, and its own lack of authority in the domestic zone.

Perhaps the principal advantage of this sketch of the EU constitutional order is that it helps to put in proper perspective the difference of opinion between the ECJ and national constitutional courts regarding the source of the authority of EU law within national jurisdictions. As mentioned above, the ECJ has always maintained that the authority of EU law is inherent and flows directly from the Treaty. This position was challenged most famously by the German Constitutional Court's Maastricht decision, which warned that the applicability of EU law on German territory remained provisional, mediated by the national constitution. That decision provoked particular consternation in legal circles, but in fact the German court had only voiced in strident terms an opinion

similar to what constitutional courts in many other member states had already said in milder terms (see Slaughter et. al., eds. 1998). This has led some observers to be concerned about a constitutional standoff, given that the foundations of the EU's constitutional order seem to be essentially contested (Bańkowski and Christodoulidis 1998). It sometimes seems that the ECJ and the national constitutional courts are locked in a zero-sum game, in which neither side can recognize the inherent authority of the other's legal sphere without undermining the very foundations of its own. The advantage of the overlapping spheres model as presented here is that it has the effect of lowering the stakes in this debate. It does not fully resolve the problem of contested foundations but it confines it to one of the three legal zones in question, the zone of overlap. Each legal sphere has its own "hard core" zone where its legal foundations, grounded in its own autonomous constitutional source, are uncontested. The problem is that these "hard core" areas are difficult to perceive because one, the supranational zone, occupies a nonterritorial space and the other, the domestic zone, is separated from the zone of overlap by a boundary that is notional rather than territorial. Yet when one realizes not only that these outer zones exist but are sustained by well-maintained and commonly respected boundaries, this gives the entire constitutional order much more an appearance of coherence and stability.

IV. Conclusion

The significance of the Treaty of Lisbon is that it has been altered from the Constitutional Treaty in a number of small but meaningful ways, which when taken as a whole have a tendency to confirm the picture of the EU's overall constitutional order depicted above. These are twofold. First, many elements that gave the document a "constitutional" flavour were removed: the overall effect of this is to reconfirm that the EU law is not "higher" than member state law, but that the two are parallel spheres coexisting in a horizontal rather than vertical relationship. The balance of the above picture would be fatally upset if in some way EU law were put in an inherently superior position to member state law. Of course, EU law is already "superior" in that EU law effectively has primacy over any conflicting national law; but that form of primacy is merely pragmatic, in that it is necessary to ensure the uniform application of EU law, and

qualified, in that it is subject to national constitutional authority. The fact that the principle of primacy has been removed from the treaty in its transition from the CT to the TL confirms its provisional status. A similar point could be made regarding the Charter of Fundamental Rights: the fact that the Charter has been removed in the transition tends to confirm that the treaty, lacking as it does a Bill of Rights, does not have a superior claim to moral authority over national constitutions.

The second thematic difference between the CT and the TL is more subtle but just as important. The TL takes great pains at a number of points to impose a somewhat stricter “competence regime” on the EU than that of the CT, and one that is in many ways much stricter than the status quo. This can be seen in terms of a positive definition of member state competence with respect to national security, a stricter understanding of the principle of how competences are conferred and where EU competence ends and member state competence begins, more strictures on how the EU actually exercises its existing competence, and greater strictures on changes to the treaty which could bestow new competence on the EU at the expense of the member states. The relationship between these moves and the model presented here is that for the above picture of overlapping spheres to be sustainable the “hard core” of member state law (the domestic zone) must be substantially large and not shrinking; otherwise, the zone of overlap could expand so far that the domestic zone would disappear. National law, constitutions and courts must retain primary jurisdiction over an substantially large field of law. And most of the competence-related elements of the TL (as it differs from the CT) concern exactly this question: how to shore up and maintain the boundary between the zones so that the domestic zone remains robust and not constantly shrinking in the face of an expanding EU law. That is why at a number of points the TL underlines the fact that the shift of competence is not only one-way: it can be transferred not only upwards (from the member states to the EU level), but also vice versa.

Andrew Moravcsik has argued that the European Union has perhaps reached a “plateau,” a state of constitutional maturity that does not necessitate further integration:

Perhaps, then, we are starting to glimpse what we might term a ‘European Constitutional Compromise’... – a stable endpoint of European integration in the medium term. The EU appears indeed to have reached a plateau. It may expand geographically, reform institutionally, and deepen substantively, but all this will take

place largely within existing contours of European constitutional structures.
(Moravcsik 2005, p.364.)

The modesty of the Treaty of Lisbon seems to confirm Moravcsik's perspective. If that is the case, then it becomes all the more imperative to understand the normative principles that underlie the current constitutional order – that is, the parallel and overlapping spheres of Member State and European law.

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