THE AGES OF EUROPEAN LAW

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Prologue: Habermas on the Transnationalization of Democracy

European integration poses fundamental challenges to political and legal thought. Over the past two decades, Jürgen Habermas has been engaged in a bold and influential project of articulating the normative foundations of political integration in Europe. Habermas's starting point is that the pacification of European states created the preconditions for political decision-making beyond the national level. Once state power was tamed, and states accordingly "civilized", national governments could pursue common policies in response to the pressures of economic globalization. The problem, however, is that the preconditions for political life at the supranational level have not been properly realized. Habermas sees a growing disconnect between the demands of integrated markets, which form one part of the larger, systemic integration of world society, and lingering political fragmentation in Europe. Perhaps the diagnosis of political fragmentation seems surprising given that the member states of the European Union have over the decades consented to ever-greater transfers of powers to the supranational political institutions. But the reality is more complex. The political crises of the past

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decade, and most notably the recent "crucifixion"[1] of Greece in the recent debt negotiations, reveals a state of affairs where the European Council – that "complete anomaly", as Habermas calls it[2] – remains central to the EU's political life. This development is both unfortunate and unnecessary. It is unfortunate because the European Council is a self-authorizing political body that provides a template for the post-democratic, bureaucratic exercise of political authority. It is unnecessary because democracy is capacious enough to structure and guide the exercise of political power at the supranational level. Habermas refers to this latter problem as the transnationalization of democracy and places it at the center of his work.

His first observation is that democracy is not diluted in the process of transnationalization. Democratic self-government remains defined by the demanding standards that Habermas defends in his other work, as the process by which the addressees of laws are the same as their authors. The important point is that democratic self-government is not tied to the level of political organization of the state, where historically it has been located. The transnationalization of democracy requires a decoupling of popular sovereignty from state sovereignty. This decoupling is a three-fold process, and it involves the democratic association of free and equal persons, the organization of collective decision-making powers, and the medium of integration of civic solidarity among strangers.[3] There are many important insights, including concrete institutional proposals, in Habermas's account of how the correct institutionalization of collective decision-making, for instance through the expansion of the ordinary legislative

[1] "They crucified [Greek Prime Minister] Tsipras in there." (senior EU official). This brings to mind the bailouts that countries such as Ireland, which were voluntary only "in the Spanish inquisition sense of the term." See GAVIN HEWITT, THE LOST CONTINENT 246 (2013).
[2] Habermas, The Crisis of the European Union, 43.
[3] Habermas, The Crisis of the European Union, 13.

procedures, furthers political integration and creates a framework for the development of media of communication that in time expands integration from the political to the social spheres.

But here I want to focus on the argument that supranational democratic associations do not replace, but complement, symmetrically positioned associations at the national level. Transnationalized democracy is not democracy that has transcended, in the sense of overcoming, the state. Rather, Habermas interprets the European experience to show that the national and the supranational levels coexist and mutually reinforce each other at the normative level. This last point regarding mutual reinforcement is especially important. Not only do higher forms of integration not replace – or "overwhelm"[4] - lower forms of integration as a sociological matter, but, as far as the relation between the EU and its Member States is concerned, such replacement would be normatively impossible.

Supporting this view is the theory of *pouvoir constituant mixte*. Habermas writes: "Individuals become involved in a two-fold manner in constituting the higher-level political community – directly in their roles as future EU citizens and indirectly in their role as members of one of the national peoples."[5] This is, of course, a rationally reconstructed view since it ascribes retrospectively to citizens the role of EU citizens "from the very beginning" of the process of integration whereas EU citizenship as a formal category became available only in the later stages of that process. But Habermas aims to capture through this shared sovereignty device some of the salient features of the political nature and legal authority of the EU. Specifically, he aims to capture the continuing commitment of the European citizens to their nation states as "guarantors of

[4] Habermas, The Lure of Technocracy, 40
[5] Habermas, The Crisis of the European Union, 35.

the already achieved level of justice and freedom."[6] Because those normative achievements of the democratic state are worth preserving, European citizens have an interest in protecting against "intrusions and encroachments by an unfamiliar supranational polity."[7] There is a prudential aspect to the retention of their national identity by EU citizens as they reject the "hopeless alternative"[8] between nation state and European federal state.

However, my interest here is in the *normative* dimension of shared sovereignty. Habermas relies heavily on European law to make his normative case. He is open about his method: "we need only to draw the correct conclusions from the unprecedented development of European law over the past half-century."[9] He proceeds to offer an account of European law that emphasizes the heterarchical, as opposed to hierarchical, relation between national law and EU law; the limited conferral of powers from national to European institutions; the ultra vires review by national courts; the right of member states to leave the Union. Prominent here is also the constitutional identity provision in the Treaty of Lisbon (Art 4 (2) TEU), which he interprets to safeguard national constitutional principles that are constitutive of the identity of the several member states. In this respect, Habermas tracks closely the standard interpretation of European law.[10]

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[6] Habermas, The Lure of Technocracy, 40.
[7] Habermas, The Lure of Technocracy, 38.
[8] Habermas, The Crisis of the European Union, ix.
[9] Habermas, The Crisis of the European Union, x.
[10] See e.g., Armin von Bogdandy, The European Lessons for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations, European Journal of International Law vol. 23 (2) (2012): 315-334, at 322 (referring to the "dual structure of democratic legitimation" – a "innovative concept of democracy"). See also Koen Lenaerts, The Principle of Democracy in the Case-Law of the European Court of Justice, International and Comparative Law Quarterly vol. 62: 271-315 (2013), at 280 "an essential component of the national identity of Member States, the democratic arrangements provided for by national constitutions are not to be undermined by EU law….[F]or national constitutional courts, the EU's commitment to respecting national democracies is an essential element without which European integration would come to an immediate halt."

According to this interpretation, rather than creating a melting pot in which the individuality of states and their normative achievements is lost, the European project is seen as committed to recognizing the equal claims and to respecting the separate identities of these communities. Nuances aside, Joseph Weiler's principle of constitutional tolerance captures well this feature of European integration – the "normative hallmark of European federalism."[11] In this view, Europe is and should remain a "community", rather a "union" – in the sense of fusion - of states, and for preserving a plurality of distinct political identities.[12]

This interpretation of European law is very useful to Habermas's project. It allows him to anchoring his normative vision in the building blocs of European constitutionalism. Since many constitutional doctrines were first articulated during the early decades of European integration, this anchor gives him a simple and continuous account of European development that mitigates the complex temporality of his rational reconstruction account of a *pouvoir constituant mixte* of EU citizens/European peoples. But it also makes the project vulnerable. Habermas's transnationalization of democracy is only as sound a normative reconstruction of European political integration as the (normative) account of European law on which it rests is defensible. Put differently, the account of the dual allegiance of the participants in the integration process "as if they participated in the constitution-building process from the outset as equal subjects in their

[11] J.H.H. Weiler, *In defence of the status quo: Europe's constitutional* Sonderweg, in J.H.H. Weiler and Marlene Wind, supra note 7 (European Constitutionalism beyond the State), at 17.

[12] For a contrast between the models of unity and community, including an argument that the community vision prevailed at – and from - the early stages of European integration, see J.H.H. WEILER, THE CONSTITUTION OF EUROPE 246 (1999) (citing European Defense Community and European Political Community as evidence for that claim). See also, J.H.H. Weiler, Europe's Constitutional Sonderweg, in J.H.H. Weiler and Marlene Wind, European Constitutionalism beyond the State, at 9-10. But see Jieskje Hollander, *The Dutch Intellectual Debate on European Integration (1948-present). On Teachings and Life*, J. EUR. INTEGRATION HIST. vol. 17 (2): 197-219 (2011), at 207 (discussing how the summits on EC expansion – from 1972 on – started using the concept of "union" to describe new stage of integration.)

dual role as future citizens of the Union and as current national citizens"[13] is as stable as the constitutional/legal account on which it rests. If it turns out that that constitutional account does not sanction, in the way that Habermas argues, relations of heterarchical coordination whereby neither national nor supranational levels of constitutional authority are allowed to overwhelm the other, and thus if it turns out that those orders are not guaranteed their survival as distinct spheres of constitutional authority, then Habermas's account of the *pouvoir constituant mixte* is seriously weakened.

My aim in this paper is to intervene in this debate. I do so with some trepidation regarding the timing of this intervention. Habermas's account of the importance of democracy at the supranational level, and of its insufficiency at the national level, is impressively - and characteristically – farsighted under the circumstances of contemporary politics: bailouts, debt, refugees and all. Against this background, his case for dual sovereignty seems radical. But, I will argue, it is not radical enough. In fact, it is nowhere near as radical, if that is the right word, as the correct normative – and historical – interpretation of European law allows, and perhaps requires, it to be. To be sure, I believe Habermas is right about importance of law to the process of European integration. Nor do I dispute the existence, if not the appeal, of the heterarchical model of the relations between municipal and European law or Habermas's view of its normative implications. Instead, I sketch out here an account of European law whose implications are to question the descriptive accuracy and normative soundness of shared sovereignty thesis. This is an account that emphasis the discontinuities of the different ages of European law, thus placing the age of heterarchy in a context that reveals its limitations.

[13] Habermas, The Lure of Technocracy, 44.

The paper sketches out three main epochs in the project of "Europe's self-constituting"[14], each having its distinct constitutional theory, organizing concepts, forms of discourse and constitutive tensions. First comes the *Age of Vision*, which begins with the Treaty of Rome (1957) and ends in the years after the Single European Act (1986). While arising out of unrepeatable historical circumstances at the end of World War II[15], this was the epoch of a constitutional project of integration of different legal systems into one. The "constitutionalization"[16] of the Treaty of Rome brought European law to the foundation of European unity. It is an age that encased in the normative DNA of European legal doctrine a deep distrust of the state as a locus for social and political organization. Unlike international law, which is premised on a view of states as autonomous units whose continuous existence is taken for granted, the point of European law is integration, understood as a process of unification into one of a plurality of municipal legal orders. The constitutional theory of this age is supra-nationalism and its driving institutional force is the European Court of Justice. The organizing concept of constitutional discourse is effectiveness, which reflects a concern common to all new legal orders to establish their validity or legality. Distilled to its normative core, European law in the *Age of Vision* represented the carefully choreographed uploading, via innovative jurisdictional mechanisms such as the preliminary reference procedure and with the acquiescence of national courts, of ideals of European unity into national and supranational constitutional law.

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[14] Philip Allott, *Europe and the dream of reason*, in J.H.H. WEILER AND MARLENE WIND, EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 202 (2003).
[15] TONY JUDT, A GRAND ILLUSION?: AN ESSAY ON EUROPE (1996)
[16] [Cite Eric Stein. Weiler. For evaluation, see Morten Rasmussen, *Revolutionizing European law: A history of the Van Gend en Loos judgment,* INT'L J CONST. L. (I-CON) (2014) 12(1): 136-163, at 140. (calling the constitutionalization of the Treaty as "'decisive turning point in the history of the European Court of Justice and of European law in general").

But the *Age of Vision* remained fundamentally incomplete. To use a helpful insight of Hannah Arendt's in a different context, what that age needed - and lacked – was thought to complete the action.[17] Without articulating the underlying vision, the extraordinary accomplishments of the early period of legal integration would remain vulnerable to the mishaps of history. The *Age of Transformation,* which starts with the Treaty of Maastricht (1992), exposes that vulnerability. This is the moment of the shift from unification to coordination (or from integration as unification to integration as coordination).[18] In the model of coordination, the existence of different jurisdictions is taken for granted. Since the national and supranational levels exist side by side, the theory of legitimacy for this age is one that shows that (and how) democracy operates at both levels. Enter here Habermas's theory of dual sovereignty. This is the time when, in constitutional discourse, legitimacy captures concerns about the EU's democratic deficit. The European Court of Justice, which is bereft of guidance and has to operate in an increasingly complex institutional environment, fails to anticipate these tectonic shifts and struggles to manage them. This creates a space for the German Constitutional Court, rising to prominence alongside a reunified and revitalized Germany, to reject the basic constitutional structure devised during the *Age of Vision* and to make anew the old case for the centrality of the state. Its nationalist bravado will become the object of criticism, but the conceptual framework that makes the resilient state a self-fulfilling prophecy, will fit right in with the spirit of the age.

That *Age of Transformation* too remains fundamentally incomplete. Remnants of the earlier vision of unity continue to be encased in legal doctrines. For instance, the

[17] Hannah Arendt, Between Past and Future (Penguin, 2006) at 6.
[18] In this essay, I sometimes use "integration" to refer to "integration as unification". The contrast to coordination should be obvious from the context.

wholly internal doctrine, which makes border-crossing a necessary condition for the activation of EU law, is being eroded in ways that allow European law to regulate directly the relations between states and their own citizens. Yet, this fits uneasily with other developments such as the turn to identity in European constitutionalism, which requires that the constitutional identity of member states be protected under EU law. At the level of discourse, there is an understandable tendency to proceed to high levels of abstraction, from principles to values and from legitimacy to justice, in an attempt to escape these tensions. But these tensions, which characterize the post-Lisbon moment of European integration (2009), our *Age of Despair,* are inescapable.

These tensions might also be unsolvable, though that is more contentions. Plato writes in *The Laws* that "[t]he beginning is like a god which as long as it dwells among men saves all things." Whether these tensions can be solved, with or without Habermas's conception, depends on whether the god of the beginning of European integration still dwells among us.

1. The Age of Vision: Europe of Rome

> "*We are not sharing furniture – we are building a new and bigger house*."
>
> Walter Hallstein, United Europe[19]

It has become common to read the Treaty of Rome (1957) as a "fundamentally ambiguous"[20] text. Negotiated with due alertness to realpolitik considerations about the

[19] WALTER HALLSTEIN, UNITED EUROPE 66 (1962).
[20] Morten Rasmussen, The origins of a legal revolution—the early history of the European Court of Justice. J Eur Integr Hist vol. 14, at 145 (2008).

need to gain ratification in national legislatures, after recent failures to expand the institutional architecture of European Coal and Steel Community in the direction of either a defense or full-blown political community, the Treaty of Rome is said to have weakened supranational institutions and enhanced the role of states in the institutional architecture of the Common Market.[21] It follows, in this reading, that the "constitutionalization" of the Treaty of Rome was the work of a "little group of entrepreneurs"[22] that hijacked with impunity the political project of the six signatory states, disregarding their intentions and departing from the letter and spirit of their agreed-upon text. [23] The act of hijacking itself is said to have been quite elaborate, with the so-called grand decisions of the European Court of Justice playing an important but limited role. According to this interpretation, those decisions were "empty vessels."[24] What turned them into grand political moments was a complex process of meaning-ascription staged and executed by a network of jurists.[25]

What this interpretation gets right is the central role of jurists in the making of Europe. But it does little to explain that role or to illuminate the nature of their work. To start, it decouples their work from the objective basis of the Treaty. It is at best an

[21] Evidence for this claim is given in the form of the weakening of supranational institutions, especially the Commission and the Court of Justice, and the greater legislative powers, including the veto, given to states as represented in the Council of Ministers. See supra note.
[22] Antoine Vauchez, Integration Through Law, at x.
[23] See, for instance, Anne Boerger-De Smedt, Negotiating the Foundations of European Law, 1950-1957: The Legal History of the Treaties of Paris and Rome vol. 21(3) (2012): 339-356, at 340 (arguing that "a small number of politicians and jurists managed to insert the potential for constitutional practice into the treaties despite the conscious attempt by the majority of the governments not to establish a European constitutional order."). In this context, it is worth remembering that, in the large majority of cases, subsequent treaties ratified the decisions of the court by incorporating them into the text of the revised treaties.
[24] Antoine Vauchez, The transnational politics, at 9.

[25] Rasmussen, A history of the Van Gend en Loos Judgment, ICON (2014), vol. 12(1): 136-163 (calling Van Gend "a focal point for a rich patchwork of constantly reproduced historical memory and myths used for ideological purposes", at 137.).

exaggeration to see the Treaty of Rome as fundamentally ambiguous as a step in the direction of integration. While it is true that Rome had diluted compliance mechanisms by states with their Community obligations that existed in the Treaty of Paris establishing the European Coal and Steel Community (1951) [26], in important respects Rome strengthened supranational institutions. For instance, and even leaving the much-discussed preamble aside[27], the rejection of French proposal to replace the European Court with an ad-hoc arbitration tribunal combined with the strengthening of the Court's preliminary reference jurisdiction in the interpretation of norms were deeply consequential. The relatively open-ended delineation of competencies between states and the Community enabled the Commission to expand the jurisdiction of the Community considerably.[28] After all, it should not be forgotten that the Treaty of Rome provided sufficient leeway to transition the European Parliament to direct elections.

It is equally unjustified, in my view, to see the early decisions of the Court as empty vessels. While the sociological study of networks of jurists helpfully shows the wide reach of the law of integration within the profession and beyond, thus debunking the long-held view that the European Court worked in splendid isolation from public opinion[29], this perspective does little to engage the jurisprudential vision underlying the

[26] The infringement procedure, the main legal tool for securing compliance from states, was weakened because the ECJ could not longer levy fines. Compare Art 169-171 Rome with Art 44 ECSC. In addition, infringement proceedings started by the Commission were lengthened, a two-step process. Similarly, the Treaty limited standing for private litigants in the Court of Justice, that modified the institutional architecture of the ECSC. This was done by "by blurring the distinction between decisions directed towards a particular firm and general decisions and acts." See Rasmussen, Origins of Revolution at 85. Cases are Case 3/28 Associazione Industrie Siderurgiche Italiane (ASSIDER) V. High Authority of the European Coal and Steel Community, 11 Feb. 1955 E.C.R. 63; Case 4/54 Industrie Siderurgiche Associate (ISA) v. High Authority of the European Coal and Steel Community, 11 February 1955 E.C.R. 91

[27] [Weiler]

[28] [The Court of Justice obliged, not striking down any piece of Community legislation as *ultra vires* for the first four decades of European integration.. Mention Tabacco Advertisement cases in the 1990. Cite Mancini, on Democracy in the EU]

[29] [Eric Stein.]

constitutionalization of the Treaty. One can always look for the sites in which the battle for a particular vision took place. But that is marginally helpful and, by itself, almost always distracting. Without engaging the underlying vision, which includes making the effort to piece it together and identify some of its core features, the point of European integration will remain mystifying. That is my first – methodological - claim, and I will not belabor it further.

My second, and more controversial, claim refers to the point of European integration, that is, to the constitutional vision as articulated during the Europe of Rome. I argue that that vision did not sanction the coexistence of the national and supranational legal orders. Instead, it presented a far-reaching, if partial and preliminary, challenge to the existence of the states as an autonomous level of political organization. Contrary to Habermas's claims, this vision of distrust of states that originated at the supranational level and entered the member states through the capillaries of their own protective systems (their legal systems) made European integration unique as a political and constitutional project. This is the "leap into the unknown"[30] which one of the founding jurists described with understandable excitement: "[w]e are experiencing the beginning of a process which undermines categories of thought which have been settled for centuries, overturns deeply-rooted political ideologies and strikes at powerfully organized interests."[31]

The doctrinal features of European constitutionalism under the Treaty of Rome are well known but it is helpful to re-state them without coloring nuance. The European Court of Justice interpreted the Treaty of Rome to create a new legal order autonomous

[30] *Id.* at 26 (1974).
[31] PIERRE PESCATORE, THE LAW OF INTEGRATION 43 (1974).

from both municipal law and international law, for which purpose its signatory states limited their sovereignty.[32] Unlike with international norms, whose implementation into domestic law depends on the mechanisms prescribed by the constitutional rules of each system, the decision regarding the effect of Community norms in domestic law is centralized in the European Court of Justice.[33] That Court held that European legislation automatically becomes part of domestic law upon enactment, or when the term of implementation has expired.[34] Community law confers rights on individuals, which in specific, though broadly construed, circumstances, they can enforce in national courts. [35] Furthermore, and importantly, in a case of conflict, Community law has priority over national law.[36] National judges are under a duty to give effect to the primacy of European law by setting aside any norm of municipal law that violate either a Treaty or legislation of European institutions. In principle, this secondary rule of legal hierarchy applies not only in a clash between national constitutions and the Treaty of Rome, but also between the former and ordinary legislation enacted by the political institutions of the Community. National judges have the power under European law to dis-apply, or "set

[32] The Dutch version of Costa mentions the limitation of "sovereignty". Versions in other languages – Italian, French and German – mention limitations of "sovereign rights." See Editorial: For History's Sake, EuConst 10 (2014), page 195, fn 13. The relevant holding is: "The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community." Andre Donner, former president of the European Court, captures this well: "…the treaties themselves and the rapidly grown system of community regulations are to be considered as rules of law having effect not only between states and the institutions but also between private persons and public authorities, in a way that confers rights and legal claims that should be protected by the courts, then, and only then, will the communities obtain the solidity necessary to give them the stature of a legal order." In Donner, Lawyer in European Communities, supra note x at 82.
[33] Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) Case 26/62
[34] Van Duyn v Home Office [1975] C-41/74
[35] Van Gend en Loos, Defrenne v Sabena (No 2) (1976) C-43/75
[36] Flaminio Costa v ENEL [1964] ECR 585 (6/64)

aside"[37], national law even in circumstances when they lack such power under national law.[38] Because the Treaty constitutes an independent source of law, the European court alone has the authority to interpret its meaning and to invalidate European legislation. [39]While the European Court does not decide cases before national courts, national judges are under an obligation to apply European law or to consult the European court whenever its interpretation is in doubt. The Court would later accept the corollaries of this approach, that Member states can be held liable in tort under European law for failure to send preliminary references to Luxembourg.[40]

One intensely debated issue is whether, leaving aside procedural specifics, these legal claims are sufficient to distinguish the European legal order from the international legal order. International law has a recognized capacity to give treaties direct legal effect, and even to create rights for individuals.[41] The same goes for the supremacy doctrines insofar as international law could mandate the primacy of international norms over domestic norms.[42] The Permanent Court of International Justice had held that municipal norms, including norms of constitutional rank, could not be invoked to bar or otherwise

[37] Italian Minister of Finance v Simmenthal (Case 106/77) 1978
[38] As it is the case in centralized systems of judicial review. See generally Víctor Ferreres Comella, Centralized Courts and Democratic Values (2009).
[39] Foto-Frost.
[40] Kobler.
[41] Derrick Wyatt, New Legal Order, or Old, 7 European Law Review 147, 148 (1982). The ECJ itself had previously hinted in that direction. Under treaty of Paris, the Court had recognized direct effect in Case 8/55 Federation charbonniere de Belgique. See also David Edwards, Judicial Activism – Myth or Reality? Van Gend en Loos, Costa v ENEL, and the Van Duyn family revisited, in Essays in the honour of Lord Mackenzie –Stuart (Angus Campbell & Meropi Voyatzi, 1996). In this view, *Van Gend* was revolutionary because of its far-reaching implications, not because of some radical break with the past or departure from the Treaty. Joseph Weiler re-writes the Van Gend decision from the perspective of international law. See J.H.H. Weiler, Rewriting Van Gend & Loos: Towards a Normative Theory of ECJ Hermeneutics in Ola Wiklund, Judicial Discretion in European Perspective.
[42] Bruno de Witte, at 48 ("I doubt whether primacy is really a feature of EU law that tears it away from international law."). Bruno de Witte, Retour a "Costa": La primaute du droit communautaire a la lumiere du droit international, in Revue Trimestrielle de droit europeen, vol. 20 (1984): 425-454.

limit that effect of international law.[43] Furthermore, the special features that the Court saw in the Treaty of Rome are, from this perspective, not that special after all. It was not uncommon at the time, and it has become even less so today, for international treaties to establish institutional structures that are endowed with certain extent of sovereign rights.

I see three difficulties with this challenge to the autonomy of European law, which offers a helpful lens into the *Age of Vision*. First, and most briefly, the challenge is partial in the sense that it does not cover the entire array of claims made on behalf of European law. Joseph Weiler has long pointed out that European law lacks a doctrine of state responsibility, which is at the core of the international legal architecture.[44] This is no coincidence. European law rejects of the contractualist paradigm that was[45] – and to some extent remains[46] – dominant in international law. Coordination of sovereign states remains rooted, though – importantly - it does not have to be, in the premises of contractualism.

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[43] Permanent Court of International Justice, Polish Postal Service in Danzig (Advisory Opinion of 16 May 192). Expanding this analysis, Wyatt argued a few decades ago that pretty much everything the Court did in *Van Gend* could already be accomplished under international law. See supra note x.

[44] On features that set European law apart from international law, including removal of doctrines of state responsibility, see Weiler, Constitution of Europe at 296. [Cite also exchange Weiler – Habelstram in the Worlds of European Constitutionalism.]

[45] Another shortcoming of the international law paradigm was contractualism, which Court did not think it captured the nature of the Treaty: "more than an agreement which merely creates mutual obligations between the contracting states." Van Gend at 12. The ECJ elaborated in an infringement cases brought under Article 169 by Commission against Luxembourg and Belgium, and decided the year after *Van Gend*. The member states argued in their defense a failure to meet its obligation to legislate on the part of the Council itself. The reasoning of the states was typical of international law – according to which a party, injured by the failure of another party to perform its obligation, may withhold its own performance. In response to this line of defense, the ECJ held that "the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of said persons… (T)he basic concept of the Treaty requires that the Member States shall not take the law into their own hands." Joined Cases 90 and 91/63 (1964), at 631. See William Phelan article. The Troika: The Interlocking Roles of *Commission v. Luxembourg and Belgium*, *Van Gend en Loos* and *Costa v. ENEL* in the Creation of the European Legal Order, 21 E. L. J. 116 (2015).

[46] Ronald Dworkin, A New Philosophy of International Law, Philosophy & Pub. Affairs vol. 41 (1): 2-30.

The second difficulty concerns more facts than norms. Assuming *arguendo* that international law had the doctrinal resources to make claims similar to those of European law, the traction of international law in municipal legal systems is far from comparable. The reason for this is a general effectiveness deficit of international norms. It is, again, no coincidence that the European Court deployed the effectiveness rationale, often in a tantalizingly tautological fashion, during the easy stage of European integration.[47] A concern with effectiveness is, essentially, a concern with validity. It is a concern with the executive – not the normative – force of norms, which is critical for a legal order at the early stages of its development. Effectiveness is a function of the uniformity of interpretation and implementation. Approached prospectively, from the standpoint of the designer of norms, effectiveness cannot be left to depend on the fluctuating interests of their addressees.[48] As it was often repeated at the time, the Community is not guided by "the laws of expediency but should be built upon a more permanent and objective foundation."[49] Effectiveness also offers a key for understanding other structural features of the European legal order. The preliminary reference procedure, which centralizes the process of eliciting the meaning of the Treaty, also solves a long-standing problem of enforcement under international law. [50]

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[47] Costa's essential holding is a case in point: "(T)he law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question." Flaminio Costa v ENEL [1964] ECR 585 (6/64)

[48] "The obligations undertaken under the treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories." Flaminio Costa v ENEL [1964] ECR 585 (6/64).

[49] Donner, Lawyer in European Communities, at 59.

[50] See also Bruno de Witte, The Continuous Significance of Van Gend en Loos, in in Miguel Poiares Maduro and Loic Azoulai, The Past and Future of EU Law: The Classics of EU law revisited on the 50th Anniversary of the Rome Treaty (2010), at p. 10. Because, in preliminary references, the case itself remains at all times before the referring national court, the judicial decision to be enforced is that of the national court, rather than the European Court of Justice. This is another significant difference from international law. As Derrick Wyatt has argued, direct effect – including the role of individuals – is not rare in

The third, and most important, reason has to do with the inadequacy of international law to provide the legal structure of European integration. *Costa* provides a good starting point.[51] In his Opinion, Advocate General Lagrange presented to the Court an account of the Community legal system that was separate, but intimately and even organically related to that of the Member States. He argued that "the system of the Common Market is based upon the creation of a legal system separate from that of the Member States, but nevertheless intimately and even organically tied to it in such a way that the mutual and constant respect for the respective jurisdictions of the Community and national bodies is one of the fundamental conditions of the proper functioning of the system instituted by the Treaty and, consequently, the realization of the aims of the Community."[52] AG Lagrange's vision is essentially a view of two separate legal orders that ought to seek coordination in the spirit of mutual and constant respect.

The *Costa* court did not endorse this model.[53] Not only is European law only autonomous from international law, but it is also of a different *type* of legal order than international law. According to the Court, and "by contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply."[54] Integration, it seems, is different - but different how?

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international law: "it is simply a phenomenon invariably side-stepped by international adjudication machinery calculated to establish State responsibility." Derrick Wyatt, New Legal Order, or Old, 7 European Law Review 147, 154 (1982).

[51] Flaminio Costa v ENEL [1964] ECR 585 (6/64). The distinction was little noticed at the time, but Eric Stein did see it. See Stein, supra note x.

[52] AG Lagrange, Opinion in Flaminio Costa v ENEL [1964] ECR 585 (6/64). at 606.

[53] And apparently, it did so unanimously. We rely here on circumstantial evidence – see Editorial: For History's Sake, EuConst 10 (2014), page 195, fn 12 - since there is no access to the Court's files. By contrast, there have been sufficient accounts to establish that Van Gend was decided by the Court by the narrowest of margins (4 to 3 votes).

[54] Flaminio Costa v ENEL [1964] ECR 585 (6/64).

Pierre Pescatore contrasts international law as a law of "conflicts, equilibrium and coordination" and, when particularly successful, of "inter-state cooperation" to European law, which is "more than that: it is a law of solidarity and integration."[55] Coordination of states, taken as they are, is the logic of international law given a "society which is weakly organized and profoundly heterogeneous in the political, legislative and judicial needs."[56] By contrast, the aim of European law is "formation of a political will, the creation of a common body of legislation" – ultimately, "unification according to a coherent idea of order."[57] As far as legal interpretation is concerned, this vision of integration as unification provides the normative basis for a teleological method (as well as limited role of comparative law) in the early decisions of the European Court of Justice.[58] But its implications are broader. It is important to remember that the coherent idea of order beyond the state is political, not only legal.[59] As such, it underpins a political project that goes beyond pacification, prosperity or supranationalism for its own sake.[60] What follows, by way of cooptation of national actors and institutions (citizens, courts, executives, parliaments), is the full axiological panoply of collective self-government: equality, liberty, solidarity and unity.[61]

To restate, the European Court did not constitutionalize European law as a byproduct of remedying the coordination gap in international law. The opposite is true:

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[55] Pierre Pescatore, International Law and Community Law – A Comparative Analysis, 7 Common Market Law Review 167, 169 (1970).
[56] Id at 170.
[57] Pescatore, L'application directe des traits europeenes par les juridictiones nationales: la jurisprudence nationale, Revue Trimestrielle de droit europeen, 1969, pp. 697-723, at 700.
[58] [Cite sources.]
[59] Pescatore, L'objectif de la Communaute Europeene, at 351 and 361
[60] [Cite Weiler, The Constitution of Europe].
[61] Pescatore, L'objectif de la Communaute Europeene comme principes d'interpretation dans la jurisprudence de la cour de justice, in Miscellanea W.J. Ganshof van der Meersch, vol. 2, Bruylant (1972), pp. 325-363.

the Court remedied the gap as a byproduct of constitutionalizing European law. But what role do states play in the vision of integration? It would seem that the bolder the interpretation of European integration, the less likely it is that states would have ratified their own demise. At this point, it helps to return to Pescatore, who saw a difference between integration and federation. The root of the difference is the limited domain of integration.[62] Quite sensibly, if one looks to the text of the Treaty of Rome, the domain of integration is limited to the fields in which the states transferred their sovereign rights to the European level. And yet, it might or it might not have surprised Pescatore to find out that this limited transfer by itself would prove a rather precarious foundation on which to rest the continuing existence of the nation state. Even under the Treaty of Rome, the domains of transfer expanded significant. Indeed, they expanded to the point that, writing already in 1990, one prescient commentator notes that "simply there is no nucleus of sovereignty that the Member States can invoke, as such, against the Community."[63] More importantly, however, is that the vision of integration was from the beginning indivisible and comprehensive.[64] For instance, the need for the European Economic Community to become a signatory to the European Convention on Human Rights, a process only recently completed, had been advocated during the very early stages of European integration by Walter Hallstein.[65] Similarly, from the very beginning, there were calls for

[62] See Pescatore, Federalism and Integration
[63] Koen Laenarerts, *Constitutionalism and the Many Faces of Federalism,* 38 AM. J. COMP. L. 205, 220 (1990). See also Schmitter, *Imagining the Future of the Euro-Polity with the Help of New Concepts*, in Gary Marks et. all (eds.), Governance in the European Union at 124 (1996) ("there is no issue area that was the exclusive domain of national policy in 1950 and that has not somehow and some degree become incorporated within the authoritative purview of the EC/EU.").
[64] There is unity precisely because the vision is political. One way that unity translates is a striking clarity about the steps of the project of integration. Why the detailed plan for integration: because politics is indivisible: everything related to everything else. For this argument, see Walter Hallstein, supra note x. at 28.
[65] [Id. (Hallstein) at 49. See de Burca, Road Not Taken, American Journal of Int'l Law – but check]

the strengthening of democracy through the European Parliament.[66] They came not only from academic commentators but from within the Court as well. In his *Opinion* in a case decided even before *Van Gend*, Advocate General Lagrange surmised about the need for more effective participation by the parliamentary organ of the Community in the legislative process.[67] What took the Union so long to move into these directions was not vision, but political will. The difference between integration and federation is, then, more political than normative.

I suggest this lens for approaching the relation between municipal and European law, specifically the claim of European supremacy. The dominant view has been that supremacy is "necessarily bi-dimensional." As Joseph Weiler explains this now-widely accepted theory: "One dimension [of the doctrine of supremacy] is the elaboration of the parameters of the doctrine by the European Court. But its full reception, the second dimension, depends on its incorporation into the constitutional orders of the Member States and its affirmation by their supreme courts."[68] It follows that the perspective of national courts is co-constitutive of the claim to supremacy. If national courts modify the nature of the claim in the process of incorporating it into municipal law – for instance, by making such acceptance conditional – then that modification introduces a qualification in the very nature of the claim to supremacy. As I read it, the bi-directional theory of European sovereignty makes a descriptive and a normative claim. The descriptive claim is that the theory captures accurately the convoluted reaction of national courts to the

[66] Isaac Druker, Strengthening Democracy in the E.E.C.: The Parliament and the Budget, 2 Common Market L. Rev. (1964-1965). This included arguments about the need for EP elections on European issues (see Ball, intro to Hallstein at 7). See also Van Leeven, Contemporary European History, on Dutch reforms at 361

[67] AG Lagrange, Joined cases 16 and 17/62, Producteurs de Fruits v. Council, at 486-487 (as soon as he made that decision, he begged "to be excused from this incursion in the political arena.")

[68] Weiler, The Dual Character of Supranationalism, at 275.

claim of supremacy made by the ECJ, especially the early reactions of dualist systems, as well as the latter's accommodation to those reactions. The normative claim is that bi-directional sovereignty shows how the national and the supranational levels provide mutual checks against excesses to which each level is prone (for instance, the excess of nationalism from nation states, and the excess of bureaucracy at the supranational level). In different ways, both claims support the case for the co-existence of national and supranational levels.

I discuss here the descriptive claim, and particularly its assumption of continuity in dialogue between national courts and the European Court across the span of European integration. I contrast this view with an alternative account of radical discontinuity in the reception of European law in municipal legal systems. Since the nationalist bravado of the German Constitutional Court in the *Maastricht* decision is pretty much beyond interpretation, the choice between continuity and discontinuity comes down to the account of the earlier process of reception of European law into municipal legal systems. In the continuity/bi-directional sovereignty interpretation, that encounter was characterized by resistance and pushback. In the account I can only sketch out briefly here, while a certain degree resistance is undeniable, what stands out is rather the degree of acquiescence on the part of national courts, especially given the momentous the claim of supremacy originating from Luxembourg. If correct, this interpretation calls into question the view that European supremacy is *necessarily* bi-directional.

Since much of the analysis focuses on dualist systems, and especially on Germany, let me start with a quick note about reception of European law in monist systems of the original signatories of Rome. These systems understandably used the

template of their relation to international law, but they nevertheless signaled awareness of the difference between the European and international legal orders. In Luxembourg[69] and the Netherlands[70], the special nature of European law was expressly recognized as the basis for recognition of its supremacy. In France, as it is well documented, long-entrenched disorientation about courts and judicial review shaped the reception of European law and led administrative courts initially to rejected the claim to supremacy on the ground of its implications for judicial review.[71] Once courts revisited this decision, more than two decades later[72], they started acting in a way that, as one commentator put it, "must be recognized as a full-blown success for European integration through law."[73] In the constitutional context, where the supremacy of EU law was recognized as early as 1975[74], that recognition rested not only on the provisions of the French constitution but also on the acceptance of the Costa reasoning of the European Court of Justice.[75]

A particularly interesting case, and easy to misinterpret, was Belgium. At the time of its encounter with the *Costa* jurisprudence, Belgian constitutional law was still working out the relation between municipal and international law. The claims of European supremacy were deployed in that context of support an evolution of the status of international legal norms, which national elites had deemed "exceptionally

[69] Thrill, La primaute et l'effet direct du droit communautaire dans la jurisprudence luxembourgoise, (1990) RFDA 978. For case-law, see Cour de Cassation July 14, 1954; Conseil d'Etat November 21, 1984.
[70] Kellermann, Supremacy of Community law in the Netherlands, El rev 175-185 (1989)
[71] March 1, 1968, Syndicat generale des Fabriquants de semoules en France
[72] Conseil d'Etat signals it might reverse, in Smanor (Nov. 1986) and reverses in 1990, Arret Nicolo. The ground for acceptance of EU law is art 55 of French Constitution, not the reasoning of the ECJ about specificity of European law. By contrast to 1975 Conseil Constitutionnel (based on both Art 55 and Costa)
[73] Jens Plotner, Report on France, The European Courts and National Courts: Doctrine and Jurisprudence, at 48
[74] Café Jaques Vabres (1975), French Cour de Cassation.
[75] In that case, attorney-general Touffait asked the court to hold EU supremacy on basis of ECJ doctrine in Costa, not art 55. From Jens Plotner, Report on France, The European Courts and National Courts: Doctrine and Jurisprudence, at 45). Court chooses both Art 55 and Costa-reasoning.[75] Find exact language in decision. (Conseil Constitutionel recast the conflict as internal to French law: as between act implementing the international law, and the statutory norm - check)

retrograde"[76] and had already unsuccessfully sought to change. By contrast to monist jurisdictions that recognized the supremacy of treaties over national law, Belgian law deemed norms of international law to have the status of statutory norms- and hence subject to the later-in-time rule of priority. So deeply ingrained was this rule about the effect of international norms that jurists thought that change required a constitutional amendment.[77] While the reversal, which came a few years after the *Van Gend/Costa* jurisprudence of the European Court[78], was occasioned by a case involving a conflict between Art 12 of the Treaty of Rome and a statute enacted after Belgium had ratified the Rome Treaty, and while the Belgian court refers to the Costa rationale, the decision itself ground the holding in the "very nature of international law."[79] Still, the case showed the acceptance of the *Costa* rationale. [80]

The reception of European supremacy in Germany – as well as in Italy, though I do not discuss the Italian case - follows a different path.[81] This case is particularly relevant since the strongest support for the bi-directional sovereignty thesis rests on an

[76] 72 Michigan Law Review 118, 120 (1973), Case Note: Conflicts between Treaties and Subsequently Enacted Statutes in Belgium: Etat Belge v. S.A. " Fromagerie Franco-Suisse Le Ski" – find page
[77] Id.
[78] 27 May 1971 (Etat Belge v. S.A. "Fromagerie Franco-Suisse Le Ski")
[79] Id.
[80] In his submissions to the Court, the Procureur General dwelled on the specificity of European law, incorporating almost verbatim the *Costa* jurisprudence of the European Court. Submission of Procureur General Ganshof van der Meersch "Community law is a specific and autonomous law which is binding on the courts of member-states and makes it impossible to set against any domestic law whatsoever. The very nature of the legal system instituted by the Treaty of Rome endows the primacy with its own foundation, independently of the constitutional provisions in the states. The special character of Community law flows from the objectives of the Treaty, which are the establishment of a new legal system to which are subject not only states but also nationals of those states. It also stems from the fact that the Treaty has set up institutions having their own powers and in particular the power to create new sources of law" (Submissions, 903) also published in English in International Law Reports (1993). Furthermore, Le Ski was accepted by the Parliament, lower courts and judicial elites. Herve Bribosa, Report on Belgium (in The European Courts and National Courts: Doctrine and Jurisprudence, at 18-19:
[81] The constitutional text in both countries mentioned the limitation of national sovereignty through transfer to international organizations in the interest of peace (See Article 11 Italian Constitution; see the Preamble to the German Basic Law) , yet the sharp distinction national/international law was the only available lens through which to respond to claims of supremacy.

account of this reception. I will argue that the support the German reception gives to this thesis is not inexistent, but rather weak. I make two points, both part of the larger case about the role of law as a mechanism of political unity through integration during the first age of European integration. First, while national judges did require additional guarantees regarding the protection of fundamental rights at the supranational level, on their first encounters they accepted important parts of the *Van Gend* rationale regarding the autonomous nature of the European legal order. Their analysis is under-theorized and hesitant, which is unsurprisingly given the magnitude of the claims that these courts had to process. Secondly, one should not exaggerate the role of national judges in bringing about a fundamental jurisprudence in European law. That role is limited to the timing of that jurisprudence, rather than the very incorporation of these elements into the European legal order. A final caveat is that the below analysis is confined to the jurisprudence developed by constitutional courts in these two jurisdictions. That is consistent with the bi-directionality thesis, which, like much of the recent literature, is confined to a study of the reaction of apex courts. Nevertheless, there might be interesting lessons to be learned from the study of how ordinary courts reacted to the claims of European supremacy especially before their constitutional courts had an opportunity to step in. Some preliminary evidence appears to indicate acquiesce with the *Costa* jurisprudence but more work needs to be done.[82]

In its first encounter with the claims of European supremacy, in *Solange I* (1974), the German Constitutional Court held that "[w]hen conflict occurs between secondary

[82] For instance, in a decision from 1967, the *Finanzgericht Saarland*, the court contrasted the Rome Treaty with GATT. Whereas the latter was a classic international law treaty, the CEE treaty was recognized as having created a new legal order with the features that the ECJ had spelled out. See Eversen et Sperl, 1967, no 2708-2710.

legislation and the standard of fundamental rights protection of the Basic Law, then the Court retains the right to review the validity of the Community legislation – that is, to render it without effect within the jurisdiction it controls." Yet this limitation of the authority of European law rests on an acknowledgement of the autonomy of Community law. As the German Court put it, "in agreement with the law developed by the European Court of Justice, [the German court] adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source …; for the Community is not a state, in particular not a federal state, but 'a sui generis community in the process of progressive integration'."[83] The implications of accepting the autonomy of the European legal order are quite hazy. Right after stating its acceptance, the German Court goes on to discuss coordination model: "the two legal systems [i.e., national and European] stand independent of and side by side one another in their validity." The implication is that each apex court – the ECJ and the German Constitutional Court- can make binding decisions within their separate spheres of competence. But, and this point is critical, the relationship between the two legal orders is in flux. The German Court's decision is shot through with references to its temporality. The judges refer to the "*present* state of integration" in which the Community "*still* lacks a democratically legitimate parliament". The legal difficulty of having to sort out the ranking of legal orders is a "legal difficulty arising exclusively from the Community's *continuing* integration process, which is *still in flux* and which will end with the present *transitional* phase." (my italics). But if things are in flux, it is at least possible that neat and static relation between the two legal orders is itself temporary. As the Community evolves, and

[83] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (1974).

the decision makes clear that the German court expected that to happen, presumably its relationship with the German order will change accordingly. Now, that relationship is of a special type. As the German constitutional court itself described later, "the legal orders of member states and the legal order of the Community are not abruptly juxtaposed in a state of mutual insulation but are in numerous ways related to each other, interconnected and open to reciprocal effects."[84] Therefore, it is to be expected that changes in the relationship between the Community and the German legal order will lead the latter to change too. Even at the time of the Court's holding, the German legal itself could be said, in this respect, to be in flux.

Rather than a rebellion within German law in response to the claims originating in Luxembourg, *Solange I* created a normative opening, a call for help to work out the implications of the claim to supremacy in German law. The opening remains there in the period post-*Solange I* when the German Court adopted a non-confrontational approach.[85] Much has been made about the emphasis on fundamental rights, which is important, though it has to be recalled that during this entire period the German Court never found one instance in which Community law violated German fundamental rights.[86] If any institution had an appetite for confrontation, it was the Commission who berated the German court endangered fundamental principles of European law, and informed the German government that it reserved right to start infringement actions against

[84] BVerfGE 73, 339 2 BvR 197/83 Solange II-decision (1986)
[85] For instance, in the *Vielleicht-Beschluss (Maybe Decision)* of 1979, the Court held that EC Treaty requires respect of the ECJ's interpretation of community norm, hence the German court can't decide meaning of Community norm in German. Vielleicht-BeschluB (52 BVerfGE 187 (1979). While some commentators see in that decision a step back from Solange I, (see Kokott, Report on Germany, supra note x, at 84), a strong case can be made that it is consistent with that decision's respect of the authority of ECJ within the autonomous realm of European law.
[86] See, e.g., Mittlerweile-BeschluB, 36 NJW 1258 (1983).

Germany.[87] But equally noteworthy is that the holding of *Solange I* was deeply controversial in the German legal culture. Three of the (total of eight) judges of the Constitutional court issued a strongly worded dissent, arguing that Community law protects the (without a need for a "catalogue of fundamental rights.")[88] Academic commentators called the decision "wrong in its reasoning and conclusions … as well as digressive, superfluous, and political misguided."[89] All this suggests that *Solange I* was not quite a rebellion against European supremacy.

Solange II confirms this view. Its specifics needn't be rehearsed at length. In that case, the German Constitutional Court found the level of protection of fundamental rights within the Community as "substantially similar to the protection of fundamental rights required unconditionally by the (German) Constitution." It held that, so long as the European institutions "generally safeguard the essential content of fundamental rights", it would no longer exercise jurisdiction to review the applicability of Community legislation within its jurisdiction. It hastened to add that it saw " no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated and is only of a transitory nature."[90] This assessment of the state of affairs at the European level is quite striking, since none

[87] Kokkot, supra note x, at 119.
[88] Id.
[89] Jo Eric Khushal Murkens, From Empire to Union 161 (2013). *Solange I* was criticized as a "parochial" decision
[90] Later cases confirm the high bar for actions in German law against the EU legislation on fundamental rights grounds. In the *Banana Market* decisions, the Court held that actions against a EU legislative act were not admissible if it did not demonstrate that the standard of fundamental rights protection had slipped below a certain threshold. Decision 7 June 2000, BVerGE 102, 147. Thus, whatever flaws any particular legislative act of the Community might have, it would not be rendered effectless within the German legal systems, unless the German court's analysis of Community law *taken as a whole* was that it failed to meet a minimum threshold of protection. But were that to happen, such developments would presumably already trigger the actions of the political mechanisms. Later cases confirmed that the fundamental rights review of the German court is virtually toothless. See European Arrest Warren Case, 18 July 2005, BVerGE 113. See also the European Patent Office case, 27 January 2010, 2 BvR 2253/06.

of the remedial measures the German Court had listed in *Solange I* had been implemented. The institutional structure of the Union had not changed significantly since the court's previous judgment, with the exception of the first direct elections for the European Parliament in 1979, which was by itself insufficient to turn parliament into an institution "to which the Community organs empowered to legislate are fully responsible on a political level."[91] The German Court gives great weight to the "joint declaration" of the Parliament, the Council and the Commission which "stressed the prime importance they attach to the protection of fundamental rights", although that declaration articulated a general political program and lacked the binding legal force.

One significant development had been the recognition by the European Court of Justice, in a number of successive decisions, that fundamental rights are a part of the European legal order. [92] Mancini rightly calls "[r]eading an unwritten bill of rights into Community law [as] indeed the most striking contribution that the Court has made to the development of a constitution for Europe."[93] And it is common to see the origins of the development of the Court's jurisprudence of fundamental rights as a reaction to the jurisprudence of the German – and Italian - courts.[94] But, as Mancini and Keeling also argue convincingly, it is an exaggeration to argue that, but for the decisions of national courts, that initial non-rights friendly approach would have prevailed. [95] The development of the fundamental rights jurisprudence might have been delayed, but it is far from

[91] There was also a requirement of a parliament elected by general suffrage. The first direct elections for the European Parliament did take place in 1979.
[92] [The main cases are Nold, Case 4/73, Hauer Case C-44/79, Rutili Case 36/75 etc. Cite de Burca on evolution of human rights jurisprudence]
[93] Mancini, A Constitution for Europe, CMLRev vol. 26: 595-614 (1989), at 611.
[94] And there is evidence that, prior to those decisions, the Court did not see fundamental rights as an integral part of the European legal order. Cite ECJ decision.
[95] See also G. Federico Mancini and David T. Keeling, Democracy and the European Court of Justice, 57 Modern L Rev 157, 187 ("It would be an exaggeration to say that the European Court was bulldozed into protecting fundamental rights by rebellious national courts.")

obvious that, given the general political and legal context in the second half of the twentieth century, the need to secure the effectiveness of European law as well as the EU's growing powers would not sooner or later had had to be accompanied by fundamental rights guarantees.

Solange II does not provide an answer to the normative opening that *Solange I* had created. However, it is a matter of interpretation whether it shut that door or left it ajar. It has been argued that, despite its integration-friendly approach, *Solange II* "laid the doctrinal groundwork for the *Maastricht* decision [of the German Constitutional Court]."[96] This claim rests on the observation that *Solange II* fails to mention the autonomy of European law, instead grounding the analysis on how the German Basic Law regulates the relation between national law and international law.[97] Scholars see in German Court revisiting its earlier acquiescence to the claims about the special nature of the European legal order. One can debate this legal interpretation of *Solange II,* specifically whether the Court had to reconfirm its previous approach. After all, the German court dutifully reviews the recent human rights cases from Luxembourg, also reminding of Germany's duties of loyalty under art 5 (1) CE. Still, the risk of tracing to *Solange II* the basis for *Maastricht* is the failure to appreciate the radical nature of the transformation in the European law of which the *Maastricht* judgment was an important part. Rather, the *Maastricht* moment, in its complexity, provided its own doctrinal groundwork, and ushered in an age of transformation that broke radically with the past.

[96] Kokott at 85.
[97] Specifically, the question of transfer in Art 24. For analysis, see Kokott at 90 "Solange II, which is commonly understood as integration-friendly, clearly points to the international law basis of the Community." I explain why in text above.

2. The Age of Transformation: The Europe of Maastricht

> **"***It seems to me that the closer the Union moves toward statehood, the greater the resistance to the attainment of this goal becomes*."[98]
>
> Federico Mancini (Judge, European Court of Justice)
>
> "*The center of human co-existence grounded in a lasting order remains the state*."[99]
>
> Paul Kirchhof (Judge-Rapporteur in the Maastricht Judgment, German Constitutional Court)

Maastricht was supposed to be the apogee of European integration, the moment when, after the Single European Act unlocked political decision-making in supranational institutions and with the benefit of a new geopolitical situation, history was finally catching up with a vision of unity whose essential elements had been encased in the doctrines of European law. From the dramatic transfer of powers from national to the supranational level and the creation of new common institutions, the Treaty of Maastricht itself sought to move Europe in the direction of unity, understood as the final stage of the process of integration, an institutional project that had been started constitutionally in the 1960's and institutionally –haltingly - in the early 1970's.[100] And yet, far from a time of fulfillment, the Treaty of Maastricht ushers in a time of discontinuity, a moment of transformation. This is not the transformation of Europe that Joseph Weiler famously described, but a moment of transformation within that transformation. From an object of distrust, nation states – purportedly transformed, or "civilized" - become rehabilitated.

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[98] G. Federico Mancini, Europe: The Case for Statehood, European Law Journal vol. 4 (1) (1998): 29-40, at 31.
[99] Supra note x.
[100] E.P. Wellenstein, Unity, Community, Union – what's in a name?, CML Rev vol. 29: 205-212 (1992), at 207.

Habermas's idea that the civilizational advances of the nation states ought to be preserved captures well this spirit, with the caveat that it constitutes only one account of a much wider ideological spectrum that coalesced in supported of the good old states. Integration as unity now becomes integration as coordination among autonomous states. To be sure, this will be a partial, or imperfect, transformation. European unity remains in the normative DNA of legal doctrine, causing disruptions and tensions ever more difficult to resolve. But it is after Maastricht that the house of Europe starts having windows.

It is useful to start with the *Maastricht* judgment of the German Constitutional Court. The reason is not that the tectonic shift from unity to coordination has its origins in that decision – it does not - or because the German judges manage to present that shift in an especially compelling form. Rather, it is useful to start with *Maastricht* so that we get it out of the way, so to speak, to get past the layer of barely concealed nationalistic overtones and focus instead on core elements of its underlying vision of European integration that did capture and to some extent defined the sprit of the *Age of Transformation*.

The *Maastricht* judgment rejected three core claims of European law, which the German Court had previously accepted in *Solange* – that the Treaty as an independent source of law[101], the autonomy of the European legal order from international law, and the direct link between the Community/Union and its citizens.[102] In *Maastricht*, the German Court sees the European legal order as a subset of the international legal order: "The Maastricht Treaty constitutes an agreement under international law establishing a

[101] See also Calliess, Future of the Eurozone, at 406 (pointing out the international law paradigm of the German court, which ignores both Art 10 to 12 on democracy and the direct elections for the European Parliament. The author also argues that the German court is setting an excessively high standard for the EU).
[102] See Weiler, Does Europe Need a Constitution?, supra note x.

compound of States of the Member States which is oriented towards further development. The inter-governmental community is dependent upon the Treaty continually being constantly revitalized by the Member States; the fulfillment and development of the Treaty must ensure from the will of the contracting parties."[103] The Treaty of Maastricht is seen as establishing a community of States, whose identity is respected and autonomy guaranteed, as it is the case in any international organization – "and not with membership in a single European State."[104] The conclusion, replete with international lingo is, is that "Germany is therefore maintaining its status as a sovereign State in its own right as well as the status of sovereign equality with other States in the sense of Art. 2, sub-para 1 of the UN Charter of 26 June, 1945."[105] States are and will remain the main actors – unsurprisingly, given this classic international framework.

The judgment places *une certaine idée* of democracy at the normative interface between the German and the European legal orders. Democracy does not "prevent the Federal Republic of Germany from becoming a member of a compound of States which is organized on a supranational basis. However, it is a precondition of membership that the legitimation and influence which derives from the people will be preserved within an alliance of States."[106] Its own previous case-law brushed-aside,[107], the Court opines that

[103] Maastricht Judgment at 26-27. As one scholar put it, the reduction of supranational commitments to the aims of international law was "a slap in the face of [Walter Hallstein's] idea of legal community." Pernice (2004) at 706, cited in Jo Eric Khushal Murkens, at 192. It cannot be argued that Maastricht was different from Rome, as far as legal nature is concerned.
[104] Maastricht Judgment at 16.
[105] Maastricht Judgment at 21. The court would continue along the same lines in its Lisbon judgment. Christian Calliess calls is "almost tragic" that, in adopting an international law perspective, "the court is adopting a restrictive democratic approach towards the very organization which – contrary to classic institutional organizations like the UN and the WTO – actually has a parliament that is directly elected by its citizens and has far-reaching decision-making and control powers." In Christian Calliess, The Future of the Eurozone and the Role of the German Federal Constitutional Court, Yearbook of European Law vol. 31 (1) (2012): 402-415, at 406.
[106] Maastricht Judgment at 18

there is no contradiction between peoples and states: "According to its own definition as a union among the peoples of Europe, the European Union is an alliance of democratic States which seek to develop dynamically."[108] The German court states the constitutional principle that "the democratic foundations upon which the Union is based" continues to expand while at the same time a "living democracy" is maintained in the Member States. In the abstract, this sounds encouraging. Not so in the details. The concern of the constitutional judges is that "if too many functions and powers were placed in the hands of the European inter-governmental community, democracy on the level of individual states would be weakened to such an extent that the parliaments of the Member States would no longer be able to convey adequately that legitimation of the sovereign powers exercised by the Union."[109] In *Solange*, the German Court was concerned with making the Union more democratic. In the *Maastricht* decision, its concern is to preserve Germany as a sufficiently democratic state. *And* democracy is defined in a way that makes it hard to see how the two goals can be pursued concomitantly. Put differently, the *Maastricht* judgment makes unavailable the only path toward a more democratic Union that would meet the democracy requirements of the Basic Law, as the German constitutional judges interpret it. The need for Germany to remain democratic precludes the Union from becoming more democratic – and opens the way for the German court to

[107] The court had written in Solange: "Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source",
[108] Maastricht Judgment at 18. The word sovereign – or, more precisely, the root "souveran" – did not appear in Solange I and II. It is Maastricht decision, it is mentioned eight times. In the Lisbon decision, x years later, the German Court would mention it no less than 49 times. Jo Eric Khushal Murkens, From Empire to Union: Conceptions of German Constitutional Law since 1871, at 193 (2013
[109] Maastricht Judgment at 19.

defend its stance on democratic grounds.[110] As the judge-rapporteur in the Maastricht judgment would put it later, writing extra-judicially, "legal science"[111] holds that "the attempt to explain the European legal community without linking it to a democratic state-bearing people is undemocratic."[112]

Underlying this "scientific" approach is a vision of the supranational and the national systems in a relation of coordination whose terms are settled and policed by the national constitution. While the particular challenge to the Act of Ratification of the Treaty of Maastricht fails, largely on account of the ever-useful fiction that the functions and powers of the European Union are detailed in a "manner sufficiently foreseeable to ensure that the principle of limited individual powers is observed"[113], the Court retains the right to invalidate as ultra vires acts of the Community that do not respect the division of competencies.[114] As Kirchhof explains, "[t]he basis for the validity of European law in Germany is the German Asserting Act. European law reaches Germany as an area of application only across the bridge of the national Asserting Act. Where that bridge does not convey this European law, it cannot, in Germany at any rate, develop any degree of legal force."[115]

Maastricht was roundly -and soundly- criticized as an expression of ugly nationalism, with deep and troubling roots in the collectivist tradition in German political

[110] For a similar argument, see Christian Calliess, The Future of the Eurozone and the Role of the German Federal Constitutional Court, Yearbook of European Law vol. 31 (1) (2012): 402-415, at 406.
[111] Paul Kirchhof, supra note x.
[112] Id at 229
[113] Maastricht Judgment at 16.
[114] [See also reference to the "national identities of the Member States." This is a surprising argument. Decades of evidence shows that the European Union used its "implied powers" to expand its competence in a variety of area with were beyond the specification. (Quotes from MacCormick; Denning).].
[115] Id at 226.

thought.[116] The critics questioned the organic, ethnic conception of the state underpinning the analysis. That this conception resurfaced at the time when Germany's historical self-understanding was undergoing profound shift during the time of German reunification is an event of critical importance for understanding Germany's role in the process of European integration ever since.[117] But there are at least other two ways in which *Maastricht* brought about a normative break from the *Age of Vision*.

The first concerns the emphasis on democracy itself. The *Maastricht* decision reads as if the German judges were the first to plant the flag of democracy. To a certain extent, this self-confidence was invited by the ever-apologetic European perspective, which typically includes a confession of the original sin of no-referendum at the origins of the European constitutionalism[118], no-demos[119], no-say for European citizens about the process of integration until the ratification of the Treaty of Maastricht[120], and no-mention of democracy in the ECJ case law before the 1980's. But the reality is more complex. Historians have amply documented the de-politicization of European society after the Second World War of which the European Community is just an instantiation.[121] And it is true that the institutional structure of the Community, as envisioned by the Treaty of Rome, did not include representative political structures. The European Parliament was

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[116] Weiler, Does Europe Need a Constitution?, 1 E. L. J. 219 (1995).
[117] See Habermas, Crisis of European Law, 124. Cite also Stephan Jaggi.
[118] As Weiler put it, "Europe's constitutional architecture has never been validated by a process of constitutional adoption by a constitutional demos and, hence, as a matter of both normative political principle and empirical social observation the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where federalism is rooted in a classic constitutional order.", in *Weiler, Europe's constitutional Sonderweg, at 9.*
[119] No demos to act as *pouvoir constituante*. Id. (Weiler), at 9. See Dieter Grimm.
[120] Federico Mancini and David T. Keeling, Democracy and the European Court of Justice, 57 Modern L Rev 157, 157 ("the Community was never intended to be a democratic organization.") Weiler makes a lot of this. But one should not forget that they had offered their views indirectly – see de Gaulle and the crisis.
[121] There are also a host of other explanations, which downplay the importance of democracy. Jan-Werner Muller has pointed out that the insulation of the people wasn't only a mark of the early EU but also of politics in the member states right after the war (influence of the Christian Democrats who were instrumental in creating the EU). Muller, Beyond Militant Democracy, supra note x.

initially a forum of debate with little if any power in the legislative process. A directly elected legislative chamber was seen as a danger to the steering powers of national governments, whose control over the European institutions – not only in the Council but also in the Commission – was closely protected. However, in the decades after the Treaty of Rome, the expansion of the powers of the EEC called for greater oversight. Critically important was the practice of the oft-used Art 235 EC that allowed the Community to use "necessary powers" if the Council acted unanimously (that is, if the national executives gave their consent). Without the European Parliament providing oversight, such decisions could formally escape any kind of democratic check. And the European Court of Justice, concerned about these matters, stepped in. In a pivotal case from 1979, the European Court held that the Parliament had the right to be consulted when the Community legislation was enacted on the legal basis that did not specifically made any mention of Parliamentary consultation. In language reminiscent of the grand decisions of the 1960's, the European Court made the point that "[t]he consultation provided for in the Treaty is the means which allows the Parliament to play a part in the legislative process of the Community. Such powers represent an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power though the intermediaries of a representative assembly. Due consultation of the Parliament therefore constitutes an essential procedural requirement disregard of which means that the measure concerned is void."[122] The following decisions of the Court follow develop the principle of institutional balance. The Court found that Parliament could introduce action

[122] Case 138/79, Roquuette Freres v. Council [1980] ECR 3333, para. 33.

in annulment against acts of the Community[123], that its acts could form the object of actions in annulment[124] and, after the expansions of its powers in the Single European Act, that the Parliament had standing to sue the Council and the Commission.[125]

To be sure, one can make the case that the European Court did not go far enough in addressing democratic concerns. The list of shortcomings is long. Its democracy jurisprudence is limited to the episodic expansion of the institutional authority of the European Parliament. While this was certainly important in the overall institutional architecture, it did not fill the normative gaps of European constitutionalism. Even with respect to the European Parliament, the Court did not push for reforms that would have altered dramatically the nature of the Union, such a right of legislative initiative for the Parliament.[126] It certainly did not go far enough develop an account of the legitimate exercise of political power that rests at the core of any theory of constitutionalism, even more so in the context of constitutionalizing an international treaty.[127] The European Court failed to step in the grand debates, for instance in the case of the Luxembourg Compromise (1966) that kept veto rights to member states in the Council.[128] This decision altered the dynamic of European institutions in a dramatic fashioned for two

[123] Case 302/87, Parliament v. Council [1988] ECR 5615.
[124] Case 294/83, Les Verts v. Paliament [1986] ECR 1339.
[125] Case C-70/88 Parliament v. Council [1990] ECR I-20141.
[126] While such an initiative might seem too great of a leap for a court, one must recall the Court's general outlook with regard to its role in the making of the European constitution. See generally, Pierre Pescatore, Role et chance du droit et des juges dans la contruction de l'Europe, Revue Internationale de droit compare, vol. 26 (1): 5-19 (1974).
[127] For some attempts in that direction, see for instance, in Joined Cases 90 & 91/63, Commission v. Luxembourg and Belgium, where the Court held that the European legal orders encompassed not only the substantive doctrines but also all the "necessary procedures" through which states could act. Put differently, States may not act unilaterally and must rely on the Community procedures. See also Case 232/78, Commission v. France, [1979] ECR 2729.
[128] On the Luxembourg Compromise, and Court's relation to it, see Mancini, supra note x. (Democracy) (arguing that there was no provision in Rome allowing the states to retain their veto rights.). In his account, Andre Donner argues that bringing the Luxembourg compromise to the Court would have brought the Communities to an end. See Donner, supra note x (Lawyer in European Communities) at 62/63.

decades. A broad doctrine of the "political question" [129] focused the court on interventions in discrete institutional questions at the supranational level as well as, far more assertively, in the construction of the material constitution. More importantly, the European Court did not make it a priority to hold Community institutions at the same standard as national governments. The European Court's review of Community legislation was far less demanding than its review of national legislation through the preliminary reference mechanism.[130] Importantly, it limited standing for individuals.[131]

But, despite this long list of shortcomings, it was disingenuous for the German Court in *Maastricht* to interpret European law as unconcerned with democracy. To be sure, the meaning of democracy and self-government at the supranational level posed an extraordinary challenge, especially for an actor such as the European Court that had to tread in a highly volatile institutional setting during a time not quite conducive to reflection about democracy. If anything, the European judges correctly saw the process of constitutionalization as a process, rather than an event, but needed help in constructing an adequate normative framework for this experiment in government that was the process of European unification. The German Court does not even ask the question about the meaning of *supranational* democracy, much less offer any answers. Instead, its cry of democracy in the *Maastricht* decision makes a claim on this normative space as if that stage was empty. That the German Court acted that way is less surprising than the deafening silence in response to its claims. The very act of claiming that stage, quite apart

[129] See, e.g., Case C-181/91, Parliament v. Council and Commission [1993] ECR I-3685, para 12 ("acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court.").
[130] Federico Mancini and David T. Keeling, Democracy and the European Court of Justice, 57 Modern L Rev 157, 185-186.
[131] I discuss this at length at pp __.

from the nationalist monologue of the German judges, took aback both the ECJ and the surrounding epistemic community of jurists. A view was legitimized that the European Union could not handle the burden of the rule of law, that is, it could not meet construct of justificatory framework for the exercise of power that it had claimed for itself.[132] One implication was to recognize states – and especially constitutional courts[133] - as the site of expertise about democracy.

The second issue regarding the reaction to the *Maastricht* decision of the German Constitutional Court concerns the shift between unification and coordination. While that decision's nationalist overtones were often criticized, its more fundamental assumptions about the nature of European integration were left standing. I surmise below, that is because those assumptions were not seen as in tension with the earlier vision of unity, which had by now lost its grip over the meaning of the European project of integration.

While theorists of European constitutionalism are understandably displeased to see the origins of their approach traced to the Maastricht decision, they are content to have its origins in a widely influential article that Neil MacCormick published that same year.[134] In *Beyond the Sovereign State*, MacCormick posits that the perspective from national law must be supplemented by the "quite early holding of the [European] Court, substantially affirmed and reaffirmed many times since, that the European

[132] See e.g., Bruno de Witte, European Union Law: How Autonomous is Its Legal Order at 147 ("in the many intervening years since *Costa*, the European Court of Justice never felt inclined to develop a sustained doctrine about a possible non-international nature of the European Community.")
[133] Weiler captures well this phenomenon: "National courts are no longer the vanguard of the "new European legal order", bringing the rule of law to transnational relations and empowering, through EC law, individuals vis-à-vis Member State authority. Instead they stand at the gate and defend national constitutions against illicit encroachments from Brussels. They have received sympathetic hearing, since they are perceived as protecting fundamental human rights a well as protecting national identity. To protect national sovereignty is passé; to protect national identity by instating on constitutional specificity is a la mode.", in Sonderweg at 15-16.
[134] Cite Maduro.

Communities…. constitute a legal order *co-ordinate* with that of Member States." (my emphasis)[135] MacCormick meant this as an uncontroversial description of the claims of the European Court, an obvious interpretation of the claims of the European law.

Contrast this statement with one coming from the Italian Constitutional Court. In *Granital* (1984), the Italian Court held that that in case of conflict between European and national law, the latter can be set aside. As a doctrinal matter, the Court revisited its previous *Frontini* approach[136] and accepted the jurisdictional implications of the ECJ's claim of supremacy in *Costa*. As to the fundamentals of this approach, the Italian Court based it on the idea that the Community legal order and the internal legal order are to be considered as "two separate but coordinated systems".[137] Revisiting its own jurisprudence, the Italian court found "a firm line in this Court's decisions concerning the relationship between Community law and municipal law. Each is regarded as an independent and separate legal system, although there is coordination which flows from the division of competences established and guaranteed by the Treaty." But, and this is the critical point, the Italian Court admitted that this basis was different from what the Luxembourg court had held. It wrote: "the Luxembourg Court also reached the same conclusion. *It is true that it views the legal sources of Community law and of the Member-State's municipal law as integrated in one system only and therefore starts from different premises to those accepted in this [*i.e., the Italian*] Court's decisions.* However, what really matters is that there is agreement between the two Courts to the extent that direct and continuous effects must be ensured for Community secondary legislation of the

[135] Neil MacCormick, Beyond the Sovereign State, 56 Modern L. Rev. 1, 4 (1993).
[136] Cite.
[137] For discussion, see Adelina Adinolfi, 'The Judicial Application Of Community Law In Italy (1981–1997)' (1998) 35 Common Market Law Review, Issue 6, pp. 1313–1369, at 1314

type considered here."[138] Note the distinction between a vision of integration into one system and coordination among different systems.[139]

When MacCormick's writes about the coordination of states, he does not provide the only possible account of European integration. It is particularly puzzling that he traces the account he provides to the early decisions of the European Court of Justice. Why? MacCormick approaches European integration from the perspective of analytical jurisprudence. He wants to show how classical theories of sovereignty in the positivist tradition cannot begin to account for the phenomenon of European experience.[140] What he has to say about Austin and Hart is as insightful and wise as everything else that MacCormick did in the field of jurisprudence. He argues for a non-dogmatic jurisprudential view that is alert to the complexities of a multifaceted political phenomenon. Any "mononuclear" view is necessarily "too narrow." In the particular European context, he writes, the challenge, he writes, is "to avoid imprisoning yourself within one particular viewpoint … [and] to guard against taking too narrow a one-state or Community-only perspective, a monocular view of these things.… Instead of committing oneself to a monocular vision dictated by sovereignty theory, one can embrace the possibility of acknowledging differences of perspective, differences of point of view". [141]

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[138] My italics. After Granital, the Constitutional Court extended this solution to cases where a statute conflicts with an interpretative ruling of the ECJ,(Decision of 23 April 1985, No. 113, Foro it. (1985)) with a ruling given in an infringement proceeding,(Decision 11 July 1989, No. 389, Giur. cost. (1989)) with Treaty provisions producing direct effect (again Decision 11 July 1989, No. 389, Giur. cost. (1989), I) and, finally, with Community directives having direct effect. (also Foro). The, in a decision from 1989 – Fragd - the Court followed a different solution; it argued that it has the power to verify the constitutionality of the law implementing the Treaty whenever any norm of the Treaty itself, as interpreted and applied by the EC institutions, is not compatible with the fundamental principles laid down by the Constitution. See article, Gaja, New Developments in a Continuing Story, CMLRev.

[139] Discuss distinction between "order" and "system" but dismiss as not relevant.

[140] But he lucidly argues that "no state in Western Europe any longer is a sovereign state." Neil MacCormick, Beyond the Sovereign State, 56 Modern L. Rev. 1, 16 (1993). He hastens to add that this does not mean that there is a "sovereign" European community. Id.

[141] MacCormick, Beyond the sovereign state, 5 and 6.

He believes it is a mistake to approach the Community from only one perspective – be that of Community law or of national law - and ignored the symmetrically situated alternative standpoints. But this assumes, wrongly, that the two standpoints are symmetrically situated and similar in nature. That might be true at a formal level (regarding the nature of the claims) from the perspective of theories of sovereignty. But it is a distorting view as far as the European case is concerned. The vision of European unity toward states makes the normative premises of the two different systems are incompatible. Perhaps MacCormick's own jurisprudential and political outlook – his lifelong advocacy for Scottish independence and his work on how liberal democracy can accommodate claims of nationalism – obscured his view of the distinction between coordination and unification.[142]

A certain research agenda follows from MacCormick's approach. From the standpoint of a theory of sovereignty, the capacity to leave any one mononuclear is critically important.[143] From here to the system-centered approach is just one small step:

> "to escape from the idea that all law must originate in a single power source, like a sovereign, is thus to discover the possibility of taking a broader, more diffuse, view of law. The alternative approach is system-oriented in the sense that it stresses the kind of normative system law is, rather than some particular or exclusive set of power relations as fundamental to the nature of law. It is a view

[142] On MacCormick, the need to raise his interests in a theory of nationalism compatible with liberal democracy. He rejects the atomistic approach to individuals and takes almost an organic view, which he credits to Hegel ("we are as much constituted by our society as it is by us", in Is Nationalism Philosophically credible at 13). The interest in nationalism is related to the right to self-determination, in Is Nationalism Philosophically credible, at p.16. He claims that there are signs that in the "European Community … we are slowly learning how to transcend the sovereign state *without dissolving the nation*." (in Is Nationalism Philosophically credible, at p.18, my italics).

[143] Id. at 16 ("Juridical foundationalism – our inherited belief that sovereignty alone underpins law and liberty"). Europe offered the historical conditions that made such reflection possible. "No state in Western Europe any longer is a sovereign state", he writes, but that "does not in any way entail the proposition that therefore there must instead be a sovereign Community."

> that law allows for the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or to some third system."[144]

Indeed, if the EU is a "new legal order co-ordinate with that of Member States", the question becomes how to understand the dynamic of coordination among the different legal systems. The research agenda now shifts to spelling out the implications of conflict of final authority. The theory of European constitutionalism is a theory of constitutional conflict. Empirically, the theory seeks to describe the conflicting claims to authority within the European legal space.[145] Normatively, it argues that, by contrast to hierarchical accounts that place all legal norms within an order of priority, constitutional conflicts can remain open. Some theorists go further to claim that this openness in fact represents the best account of constitutionalism *tout court*.[146]

This is a constitutional theory of juxtaposition, or myriad layers that interact along various dimensions. Kumm asks: "under what circumstances should a judge on the highest court of a legal order … accept or refuse hierarchical integration in the more encompassing legal order and insist on the application of its own internal legal standards?"[147] Constitutional authority is connected to principles that mediate the interface between the European, municipal and international legal orders. As Kumm puts it, national courts "generally accept neither EU law nor the national constitution as the supreme law of the land. Instead they look to both EU law and the national Constitution and try to make sense of what the best understanding of the competing principles in play

[144] Id. at 8.
[145] Miguel Maduro, Three Claims of Constitutional Pluralism in Matej Avbelj and Jan Komarek, Constitutional Pluralism in the European Union and Beyond (2012).
[146] Id.
[147] Kumm, Rethinking Constitutional Authority, in Matej Avbelj and Jan Komarek, Constitutional Pluralism in the European Union and Beyond (2012), at 42.

requires them to do."[148] The issues regarding constitutional conflict and the coexistence of conflicting claims to authority come to dominate European constitutional thought during the *Age of Transformation*. As a matter of jurisprudence, these are very interesting questions. Their answers might particularly useful as a matrix for cosmopolitan constitutionalism and specifically for how the constitutional systems of the world relate to one in the absence of hierarchical supranational institutions. [149] That these questions now begin to take center stage shows the extent to which European law and constitutionalism is being transformed during this period.

Contrast this to an alternative research agenda can he formulated using MacCormick's terms. MacCormick dismisses what he calls mononuclear views – that is, the views from within a certain claim of supremacy, either municipal or supranational - as "too narrow". But that dismissal is unwarranted. The construction of the European internal point of view is an urgent and important topic. It is also difficult to see how it would be "too narrow" given everything that would have to do into its construction. Moreover, there is no reason to believe that the construction of the European mononuclear view would be, jurisprudentially speaking, anything less than fascinating.

The choice of one path over the other captures the direction of Europe law under the *Age of Transformation*. The new road taken has its appeal. It brings principle and justification at the heart of legal authority. Moreover, the heterarchical, or pluralist, approach to European constitutionalism kept the project of European integration viable

[148] Id at 56. Kumm (arguing that principles and legal authority are a matter of degree) See also Francis Snyder, The unfinished constitution of the European Union, in J.H.H. Weiler and Marlene Wind, European Constitutionalism beyond the State (Cambridge, 2003), 60-62

[149] Kumm suggests that it is "deeply complacent" not to explore the challenges that the EU poses for thinking about law and politics beyond the EU. In The Jurisprudence of Constitutional Conflict, at 268. However, it is possible – indeed likely - that the EU experience will expose limitations to thinking about supranationalism beyond the EU, since the EU has a robust institutional framework that is inexistent in other supranational contexts.

even after the extraordinary resilience of states has become apparent.[150] As Tim Koopmans put it, "for the future of the peace in the world, the important thing is probably not to abolish States or to replace old States by new States, but to devise levels of coordinate government."[151] In the European context, this does not require abandoning the federalist ideals bur rather adapting them. Federalism, European-style, "can help to explain the evolution that European integration seems to experience as an institutionalized form of intense but peaceful collaboration between states."[152]

This peaceful collaboration is not shallow. Rather, as Joseph Weiler has shown, it has a transformative effect on the states involved.[153] Weiler interprets European integration as a commitment to diversity and toleration of the other, which require fundamental changes internal to the municipal jurisdictions.[154] The European constitutional architecture encapsulates a principle of Constitutional Tolerance, which represents a commitment to the preservation of the plurality of distinct political identities, and political self-determination, as a "civilizing strategy of dealing with the 'other'".[155] By contrast to traditional federative states, where the center mandates obedience, the European construct is voluntary and obedience, as evidenced by the role of the national constitutional courts – guardians of constitutional identity and fundamental rights -, is "invited". Given the special historical conditions in which it developed, "European constitutionalism is constructed with a top-to-bottom hierarchy of norms, but with a

[150] T Koopmans, Federalism: The Wrong Debate, CML Rev 20: 1047-1052 (1992), at 1048 ("the states have strengthened their hold on the population, by maintaining powerful armies and police forces, and by introducing welfare state machineries for the jobless, the homeless and the helpless").
[151] T Koopmans, Federalism: The Wrong Debate, CML Rev 20: 1047-1052 (1992), at 1050.
[152] Id. at 1052.
[153] Cite also Maduro.
[154] Weiler, Worlds of European Constitutionalism, at 14 --- arguing that all constitutional systems, as a matter of ontology, have inherently both hierarchical and pluralist features.
sovereignty is "divisible" (Pescatore)
[155] Id at 20.

bottom-to-top hierarchy of authority and real power."[156] What results is, to some extent, a "mononuclear" account internal to European law albeit one that is quite selective.

Taking the road of heterarchy also has its costs. First, it keeps the project of European integration in a normatively unstable situation. In is doubtful whether, in the long term, states and the supra-state structure can coexist in equilibrium.[157] The right historical circumstances will drive states to break away. In the meantime, however, we face a theoretical problem. There is no outside, neutral ground from which to contemplate the conflicting claims of authority originating from the state level and from the supranational level. MacCormick writes as if there was such an Archimedean account, as if one could deliver descriptive statements from an outside position, which only obscures the normative presuppositions of his own perspective. Another cost of the choice for heterarchy is institutional. In the name of his vision of Europe as a community, rather than unity, [158] Weiler opposes any institutional reform or interpretative project that might result in centralization – whether fundamental rights[159] or a formal constitution or the model of statehood – and thus risk derailing Europe from its identity and values. This can have the unintended effect of ossifying the status quo, precisely at the time when the Union needs institutional reforms and political imagination. Thirdly, it is unclear if this model provides a good enough explanation and justification of the current situation in European law, which I discuss below.

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[156] Weiler, Sonderweg at 9.
[157] MacCormick acknowledges the possibility of a dynamic, although his jurisprudential concerns require that he present a largely static account of system interaction. He allows for the possibility that the phenomenon he discusses "is just the phenomenon of a passing moment" – "it happens that at this very moment no one can say quite where final sovereignty rests in Europe." MacCormick at 17.
[158] [As far as I can tell, his evidence comes primarily from the rejection of the European Defense Community and the European Political Communities in the years before the Treaty of Rome as well as from the reference to the "peoples" in the preamble. Cite Weiler.].
[159] Id

3. The Age of Despair: Europe of Lisbon

> "*The process of European expansion, integration and democratization doesn't automatically move forward of its own accord. For the first time in history, it is reversible. We are experiencing a dismantling of democracy, which I didn't think possible. We've reached a crossroads."*
>
> Jürgen Habermas[160]

In a recent and much-anticipated decision regarding the compatibility of a draft agreement on the EU's accession to the ECHR[161], the European Court offered its most recent and sweeping statement of the nature and authority of the European legal order nature. "The EU is, under international law, precluded by its very nature from being considered a State"[162]; nor is the EU an international organization. Rather, it is a *sui generis* institution: "a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation."[163] At one level, it is surprising that, after more than half a century, we continue not to have a name for the kind of polity that the EU has become. At the same time, however, a name might be available to capture the European experiment. To grasp it, we must first realize that the salient features of its constitutional structure do not exhaust the EU's *sui generis* nature. They provide only the foundations of the EU's constitutional nature and must be understood in a broader context that includes an account of the Union's *raison d'être*.

[160] Jürgen Habermas, The Lure of Technocracy (2015)
[161] [The Treaty of Lisbon]
[162] Opinion 2/13 at 156.
[163] Opinion 2/13 at 158.

Scholars have long debated that *raison d'être.*[164] Now the European Court has made a statement, that the Union's various elements – systemic, substantive and institutional – are "structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself."[165]

The idea of integration as the *raison d'être* of the EU is reminiscent of the *Age of Vision* at the time of the constitutionalization of the Treaty of Rome. But its effect is far from liberating. Quite the contrary, the lingering vision of unity contributes to a general state of disorientation. The legal landscape post-Lisbon shows developments in European law whose significance is obscured by the lack of an adequate normative framework; the European Court unwilling to show how constitutional principle can guide the reform of European institutions; national constitutional courts refusing to engage European constitutionalism by invoking their national identity as a conversation-stopper; political action that can escape the unsustainable logic of coordination only by adopting a form of power politics that reveals the EU's lingering democratic deficit.

Here I document some of these developments. I begin at the jurisdictional level, where the European Court has continued to enhance its authority within national judicial structures. I then move to the structural level and note cracks in the purely internal doctrine, which had made the activation of European law dependent on an event of border crossing. As far as reception in national law is concerned, the situation is somewhat bifurcated. At one level, one finds a remarkable degree of acceptance. As one scholar put it, national courts have realized that "indifference and hostility towards

[164] Weiler, supra note x.
[165] Opinion 2/13 at 172

European integration are losing strategies."[166] At the same time, the opposition of the German Court to integration has become ever stronger and it has provided inspiration to other national courts. These reactions invoke in their own support the rhetoric of the turn to constitutional identity in European constitutionalism. Like other versions of the politics of identity, this turn is an interpretation in search of an event. And, if history is a reliable guide, it is an interpretation that will likely find the event it is searching for.

In the post-Lisbon era, the European court has given few signs of either diluting its jurisprudence of constitutional integration or of adopting a more conciliatory attitude in relation to national courts. The Court's doctrinal pronouncements restated and fortified its central claims to the autonomy and supremacy of the European legal order. As I have already mentioned in the context of the constitutional of the Treaty of Rome, the European Court held that during the early stage of European constitutionalization that ordinary national courts in systems of centralized constitutional review could, acting as courts of European law, "set aside" national legislation that conflicts with EU law.[167] The norms remain formally valid, despite being dis-applied in specific instances by national judges who have added powers under European law when acting in their capacity of enforcers of European law. The European court has recently stepped in to protect judges in lower courts that have been the source of most preliminary references. In a set of bold decisions, it held that national courts are not bound by the decisions of their supreme courts that are in violation of EU law[168], that national constitutional courts may not

[166] Daniel Sarmiento, Case Note: Reinforcing the (domestic) constitutional protection of primacy of EU Law, 50 CML Rev. at 889 (2013).
[167] Amministrazione delle Finanze dello Stato v Simmenthal SpA, Case C-106/77 (1978).
[168] *Križan* Case C-416/10 (15 Jan. 2013)

authorize the legal effect of national legislation that violates EU law[169], that referring courts may choose to retain their preliminary reference in the face of a successful appeal to that reference in a higher national court[170] and that changes in the internal jurisdictional rules may not strengthen the authority of the national constitutional court at the expense of that of the European Court itself.[171] These steps, reflecting strikingly self-confident European Court, were sure to antagonize national apex courts and national governments. These developments come in the aftermath of doctrines developed previously that member states can be held liable for violations of European law by their supreme courts, for instance by those courts' failure to refer preliminary cases to the ECJ.[172] While rejecting strict liability in favor of a negligence regime, this line of jurisprudence is a remarkable breach of comity that is impossible to square with the constitutional logic of toleration and mutual accommodation.[173]

A particularly important set of developments concerns the wholly internal doctrine, a cornerstone of European jurisprudence. The assumption has been that an instance of border crossing is an essential trigger for exercise of rights under European law.[174] European law would not come into effect in the case of regulations of goods, workers or capital that was wholly within the boundaries of the state. That principle is showing signs of erosion. In the field of citizenship where the Court has taken important steps towards "dilut[ing] the notion that the exercise of rights requires actual physical

[169] *Winner Wetten* Case C-409/06 (8 Sept. 2010)
[170] *Cartesio* Case C-210/06 (2008) (16 Dec. 2008)
[171] *Melki and Abdeli* Joined Cases C-188/10 and 189/10 (22 June 2010).
[172] Kobler (2003).
[173] [The Commission threatened to use the Kobler rationale against Sweden as retaliation for the supreme court's failure to send preliminary references. Cite case.]
[174] The classical statement of this doctrine: Case 175/78, Regina v. Saunders, 1979 E.C.R. 1129; then application of the doctrine to free movement of goods (Case 20/87, Ministère public v. Gauchard, 1987 E.C.R. 4879), free movement of services (Case C-41/90, Höfner v. Macrotron GmbH, 1991 E.C.R. I-1979).

movement across a frontier."[175] In *Ruiz Zambrano*[176], the Court interpreted Article 20 of the Treaty on the Functioning of the European Union ("TFEU") to confer to parents of a minor dependent EU citizen a right of residence, as well as a right to obtain a work permit, regardless whether the dependent child has ever exercised his or her right to move. The concern with the effectiveness (or "executive power") of European law, specifically the fact that denying the petitioner the required permit would have the effect of forcing his dependent EU citizens – whether or not economically active[177] - to leave the Union, leads the courts in this direction. As AG Sharpton pointed out in her *Opinion* in that case, there is something "deeply paradoxical about [the toleration of reverse discrimination by the EU] although the last 50 years have been spent abolishing barriers to freedom of movement between [...] Member States."[178] Reverse discrimination is meant to here to signify a situation where a member state can, consistent with European law, treat its own citizens more poorly than it treats the citizens of other states. Since the latter are protected by European laws, the only sphere in which a state can exercise the pieces of sovereignty that is has left is by making its own citizens worse off.[179] Borders

[175] Case C‑34/09, Zambrano v. Office national de l'emploi (8 Mar. 2011), Op. of Advocate Gen. Sharpston, para. 73. See also *Alpine Investments* Case C‑384/93, Alpine Investments BV v. Minister van Financiën, 1995 E.C.R. I‑1141; *Carpenter* Case C‑60/00, Carpenter v. Sec'y of State for the Home Dep't, 2002 E.C.R. I‑6279; *Metock* Case C‑127/08, Metock v. Minister for Justice, Equal., & Law Reform, 2008 E.C.R. I‑6241.

[176] Case C-34/09 (2011)

[177] See supra note x.

[178] Opinion of AG Sharpston in Case C-212/96 *Government of the French Community* [2008] ECR I- 1683, paras 143–144. The issue did not come up in Zambrano for the first time. Sharpton refers to the following three cases as: "The element of movement is "barely discernible or frankly non‑existent." *Sharpston Opinion*, para. 77. See e.g., Garcia Avello Case C‑148/02, Avello v. Belgian State, 2003 E.C.R. I‑11613; *Zhu and Chen* Case C‑200/02, Zhu & Chen v. Sec'y of State for the Home Dep't, 2004 E.C.R. I‑9925; *Rottmann* se C‑135/08, Rottmann v. Freistaat Bayern (2 Mar. 2010).

[179] Alina Tryfonidou, Reverse Discrimination in EC Law (2009). For a discussion of Zambrano, see Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*, 39 Common Mrkt. L.Rev. 731 (2002); Dominik Hanf, *"Reverse Discrimination" in EU Law: Constitutional Aberation, Constitutional Necessity, or Judicial Choice*, 18 Maastricht J. Eur. & Comp. L. 26 (2011).

make those within the state worse off.[180] *Zambrano* shows how, on grounds of the allocation of competencies, an area previously thought to be within the discretion of the states – dealing with situation of family members – was not.[181]

To be sure, the post- *Zambrano* jurisprudence shows that these developments are neither uncontroversial[182] nor irreversible.[183] And one should not expect that such important developments would be linear. However, one should expect that, if they are anchored normatively in an attitude of state skepticism that has remained a part of the normative DNA of European law, these developments should inform other aspects of the European legal order.

I believe that is true in this case, as the debate about the proper response to the recent turn to authoritarianism in Hungary illustrates. Once a poster-child of transition from communism, Hungary, which has been a member of the EU since 2004, has undergone constitutional developments that have raised the question of the role of the EU in policing constitutional developments that, at least on their face, seem to be purely internal to its member states. While the original Treaty of Rome did not make it a formal

[180] Additionally, and as Dimitry Krochenov argues, "it makes little sense to divide the territory of the Union with borders exclusively for the third-country nationals, recreating for this vulnerable category all the problems which the free movement of persons was intended to solve." Dimitry Krochenov, The Present and the future of EU citizenship: A bird eye's view of the legal debate, (Jean Monnet working paper, 2012), at 17.

[181] Anja Wiesbrock, supra note x (Union Citizenshop and the Redefinition of the "Internal situations" rule: the implications of Zambrano).

[182] See AG Kokott Opinion of AG Kokott in Case C-434/09, *McCarthy* [2011].

[183] In later case, the justification for the principle takes over the principle itself. In MacCarthy, the court explained Zambrano as "limitation of genuine enjoyment of the substance of the rights associated with Union citizenship" – so the internal rule was merely modified. Case C‑434/09, Shirley McCarthy v. Sec'y of State for the Home Dep't (5 May 2011). A further limitation of Zambrano – it's about being forced to leave the EU territory as a whole, not just that of any one state. See Case C‑256/11, Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v. Bundesministerium für Inneres, para. 66 (15 Nov. 2011)

requirement for Community members to be functional constitutional democracies[184], the project of European integration moved in the direction of a group of constitutionally democratic states.[185] It is true, however, that the Union has effective tools to demand that at least the formal stage of consolidation take place in states that are candidates to accession.[186] Such powers typically wane after accession, when the newly admitted state joins the other states as an equal.[187]

And yet, democracy is fragile.[188] When Austria voted into office a far-right government in 2000, the other states were left scrambling for a response. That was an early alarm signal. Ten years later, a far more serious problem arose when a newly elected government in Hungary, resting on a reliable and large parliamentary majority that further entrenched itself in office by reforming electoral laws, proceeded to amend the country's constitution. [189] In a few short years the new government engaged in sweeping constitutional reforms, while simultaneously purging public institutions of any politically disobedient members. To be sure, these constitutional reforms are purely internal as they concern the structure of the constitutional government and generally the relation between the state and its own citizens. And yet, their substance and scale raised the question of a supranational reaction.

The ground for that reaction is Article 2 TEU, which Europeanizes the basis

[184] See Art 237 Rome (mentioning accession of "any European state."). For commentary, see Mancini and Keeling, Democracy and the European Court of Justice at 175.
[185] See Copenhagen Criteria 1993
[186] Id.
[187] But see special MCV mechanisms for Romania and Bulgaria. [Cite.]
[188] Weiler, Sonderweg supra note at x at 18 ("A democracy, when all is said and done, is as good or bad as the people who belong to it.")
[189] For a general description of the constitutional evolution in Hungay since 2010, see Kriszta Kovács and Gábor Attila Tóth, Hungary's Constitutional Transformation, European Constitutional Law Review 7 (2): 183-203 (2011); Andras Jakab and Pal Sonnevend, Continuity with Deficiencies: The New Basic Law of Hungary, European Constitutional Law Review 9 (1): 102-138 (2013).

structure of the national constitutions of the member states.[190] Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." While these values are deemed to be common to all member states, note that the process by which they were identified is not necessarily inductive. Rather, all EU members are presumed to have signed onto these values, which are assumed to form the normative basis of their national constitutions. By Europeanizing these values, the states signatories of the Treaty acknowledged that these values are not of "purely internal" interest and relevance. Rather, they have relevance to all the member states.

The sense was that the Hungarian reforms were in violation of these bedrock principles of the Union. There remains, of course, the difficult question of enforcement. In litigation before the Court, of the large-scale transformation of the state, the Court of Justice had jurisdiction and could find that only one provision – concerning mandatory retirement for constitutional court judges – as violating the EU provision against discrimination based on age. [191] The alternative means of enforcement involves the – heretofore untested – use of Article 7 TEU, details a series of measures against member states, up to and including the suspension of votes in the Council. But there is still lack of clarity about the proper mechanisms of enforcement and a sense of insufficiency of their exclusively political – as opposed to judicial – character. The Commission has issued a

[190] Basic structure is a concept from Indian Constitutional Law. See generally Pratab Mehta, The Inner Conflict of Constitutionalism, in India's Living Constitution: Ideas, Practices, Controversies (2004)
[191] See supra note x.

mechanism for activation[192], and other scholars have argued for the use of innovative mechanism such as systemic infringement.[193] However, the challenge of enforcement should not detract from the increasing oversight by European constitutionalism of the relation between states and their own citizens.

Another important dimension of integration concerns the relation between municipal and European law. With expansion of the European Union and the increasingly complex nature of its matters and jurisdiction, it is difficult to tell a unitary story with regard to the reception of European law in the 28 member states. Yet, the attention that the German Constitutional Court enjoys, part of the turn to constitutional identity, obscures the fact that the typical reaction continues to be acquiescence. As one author observes, it is noticeable "the willingness of the constitutional court to act as a guardian of EU law and of its ultimate interpreter, putting the national constitution at the service of EU law."[194] National constitutional courts, which had previously never sent preliminary reference to the ECJ, have not overcome their reluctance. The Court of Justice has in recent years been the recipient of preliminary references from the Italian Constitutional Court, the French Constitutional Council and the German Constitutional Courts.[195] One should not be naïve about the reasons behind some of these references, which might include strategic consideration to pass on to the European Court the responsibility over certain doctrinal developments. Yet, these references show growing integration between

[192] In March 2014, the Commission presented a proposal for the "EU framework for safeguarding the rule of law in Europe" regarding the implementation of Article 7 TEU. The proposal is available here: http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf
[193] Kim Lane Scheppele, supra note x.
[194] Id.
[195] See supra note x. Other apex Courts, for instance in Belgium, have increased exponentially the number of preliminary references

the municipal and European legal orders.[196] In the Spanish case, for instance, the Spanish Constitutional court interpreted that obligation to include "the obligation under EU law to a duty to refer under Spanish constitutional law."[197] This creation of mutually reinforcing legal duties shows an important dimension of integration, in which municipal law internalizes duties that originate from European law.

Meanwhile, the European Court of Justice has largely retained its assertive stance vis-à-vis national courts, which, with a few exceptions, have gone out of their way to submit to the authority of European law. The *Honeywell* saga illustrates this point. The aftermath of the *ultra vires* doctrine, announced by the German court in the *Maastricht* decision, had a complex history. Not only did the German court not make important use of this tool, but it can said to have distanced itself from its own jurisprudence.[198] In *Honeywell,* the judges declined to invalidate as *ultra vires* the effect of the European Court's *Mangold* decision, where the Luxembourg found that, in certain instances, member states have a duty to obey European law even before the deadline for its implementation into national law has expired. The specific situation at issue in this case concerned the principles of non-discrimination based on age, which the European Court interpreted as a general principle of European law with the implication that its application "cannot as such be conditional upon the expiry of the period allowed the Member States

[196] As an example of growing integration, some legal systems – such as Austria's, have incorporated the Charter of rights as part of its own standard of review (in 2012). In Spain, EU law is recognized as having primacy over national law and *all* authorities are required to set aside rules and decisions incompatible with EU law. The Spanish Constitutional court interpreted that obligation to include "the obligation under EU law to a duty to refer under Spanish constitutional law." For analysis, see Daniel Sarmiento, Case Note: Reinforcing the (domestic) constitutional protection of primacy of EU Law, at 882

[197] see Daniel Sarmiento, Case Note: Reinforcing the (domestic) constitutional protection of primacy of EU Law, at 882

[198] See Alcan, Decision 17 Feb. 2000, 3 BvR 1210/98; See also the European Arrest Warrant.

for the transposition of a directive."[199] *Mangold* revealed an important dimension of European integration, which allowed the European Court, as the apex court from the standpoint of European law, to distill the fundamental values of the national legal systems, to recognize them as "European" and enhance their effect in national law

Not only did the German Court reject this particular challenge, but it did it in a way that more or less shut the door on such challenges. The Court held that only itself – and not ordinary courts – can engage in ultra vires review, and that this review must be carried out in accordance with the principle of the Basic Law's openness towards European law. On the substance, the German Court found that only EU legislation or decisions that "evidently violate the principle of conferral or that entail a structurally significant shift in the allocation of competencies" can be struck down as *ultra vires*.[200] More significantly, the tone of the Court in *Honeywell* includes no overtones of skepticism of further European integration rooted in ideas of state sovereignty. Rather, here the court builds on reasoning around the principle of openness to European law.[201]

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[199] Mangold v Helm (2005) C-144/04 at 76. "Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned."

[200] For a similar approach, see also Data Retention decision 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 of 2 March 2010. Yet, nevertheless, in reaction to *Akerberg Fransson* by the German constitutional court (threatening application of ultra vires doctrine for over-expansive interpretation of the EU's human rights mandate), in Case 1 ByR 1215/07 (24 April 2013) (holding that the ECJ's *Akerberg Fransson* decision "must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in a way that questioned the identity of the Basic Law's constitutional order.")

[201] For this observation and thoughtful analysis, see Mehrdad Payandeh, Constitutional Review of EU law after Honeywell: Contextualizing the Relationship between the German constitutional court and the EU Court of Justice, in Common Market Law Review vol. 48 (2011): 9-38, at 26. But a recent and more surprising development is how the concept of ultra vires has migrated beyond the borders of the German system. In the *Slovak Pensions* case (31 Jan. 5/12), the Czech constitutional court held that the decision of the ECJ in Case C-399/09 *Landtova* was ultra-vires. For discussion, see Robert Zbiral, Case Note Czech Constitutional Court, judgment of 31 January 2012, Pl. US 5/12, CMLRev 49: 1475-1492 (2012).

What is particularly important is the lack of equivalent non-combativeness on the part of the European Court of Justice. Five years after *Mangold* and in the middle of the German's uproar, the ECJ had the opportunity to revisit or mitigate its previous holding. It did none of the kind. Instead, in *Kücükdeveci*[202], it showed no inclination to back down.

This is an important background for understanding the turn to constitutional identity during the Age of Lisbon. Constitutional identity represents a distinctively German approach in origins ("*identitatsbestimmende Staatsaufgaben*"), mentioned in passim as early as *Solange* and more heavily relied upon more in the Maastricht decision.[203] Yet the concept has been Europeanized. The Treaty of Maastricht incorporates it[204], and the Treaty of Lisbon gives it a more robust formulation by connecting the idea of identity to domestic constitutional structures. Article 4 (2) TFEU states that "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security." This provision has been called it a "beacon of European constitutional pluralism"[205] and has been interpreted as "a strong re-affirmation of the non-federal structure of the European Union."[206]

In reality, the situation is more complex. The identity provision enters European

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[202] C-555/07 (19 Jan 2010)
[203] See Calliess, The Future of the Eurozone and the Role of the German Federal Constitutional Court, Yearbook of European Law (2012), at 404_.
[204] Maastricht Art F (1) "The Union shall respect the national identities of its member states".
[205] Bogdandi & Schill, Overcoming absolute Primacy, supra note x.
[206] De Witte in The Lisbon Treaty at 35 [find exact cite]. See also Leonard F.M. Besselink, National and constitutional identity before and after Lisbon, Utrecht L. Rev. vol. 6 (3): 36, at 48 (remarking that "the provision of Article 4(2) EU forms an important qualification of the rule on the primacy of EU law, and a modification of the case law under Costa v. ENEL").

law, at least in this form, at the moment when it is least likely to have much of an effect. Not quite he extraordinary tool that its advocates see in it, identity receives this more robust formulation at the time when – and, to some extent, precisely because - it can be easily neutralized using existing European doctrines. First, its reach is restricted by the existence of other provisions, such as mainly Article 2 TEU.[207] While the abstract text of neither provision interprets itself, it seems quite straightforward that the several interpretations will have to meet a certain threshold of normative coherence. It is hard to believe that a regime such as Hungary's, for instance, will be allowed to invoke national identity in order to protect itself from European scrutiny. Emphasis here is on the verb "allow" since the Hungarian government will certainly seek to invoke Article 4 (2) (if it hasn't already). And this relates to a second reason why the identity provision is far from a limitation of supremacy. By inclusion into the Treaty, the concept of identity becomes a concept of European law. The implication is that the Court, in its "pre-eminent position of the ECJ as the ultimate interpreter of this legal order"[208], can control its effect by centralizing its meaning. The Court is well versed in such techniques, which it has applied consistently during its history to homogenize the European legal space. The European judges might be particularly inclined to harmonize the meaning of constitutional identity given the lessons of what *ultra vires* tool has done in the hands of disobedient national courts.[209]

So, what constitutes national constitutional identity in the European Union, six decades into the process of European integration? Constitutional courts have thus far struggled to answer this question while maintaining a patina of credibility. The elements

[207] Von Bogdandy and Schill, Overcoming Absolute Supremacy at 1430.
[208] *Id.*
[209] See supra, previous section.

that national courts have subsumed under the rubric of identity are both banal and common. There is a long list of usual suspects (the protection of democracy, the rule of law, fundamental rights), always defined at strategically high level of abstraction.[210] The Italian Constitutional Court, for instance, mentions the "fundamental principles of our constitutional order or the inalienable human rights." Not to be outdone, the Czech Constitutional Court singled out the "foundations of state sovereignty or the essential attributes of democracy or the rule of law."[211] Other candidates include the principle of certainty[212] or the general principles of non-discrimination, principle of proportionality or the obligation to give reasons.[213] Given the generality of these principles, all of which are present in both the European and the municipal (*all* the municipal legal orders[214]), it seems that part of the identity of the legal order only by way of that legal order's interpretation of their meaning. This is identity as turf.

The perspective from the European Court is not much more helpful on this score. A number of cases are said to reveal the Court's approach to identity. They include Sayn-Wittgenstein[215] (holding that national rules regarding surnames, deriving from the Law on the abolition of nobility, amounts to a limitation of the freedom of movement

[210] See von Bogdandy and Schill, supra note x. at 1436
[211] Czech Constitutional Court Case Pl. US 50/04 (8 March 2006); Case Pl. US 66/04 (3 May 2006). For a French example, see French Constitutional Council, Information Society Case 2006-540 (27 July 2006). In later cases, the Czech court refused to list non-transferable competencies or identify a core of the constitution Treaty of Lisbon II, Czech Constitutional Court Case Pl. US 29/09, para 11.
[212] Von Bogdandi & Schil, fn 100 at 1437
[213] Id . 1437
[214] Kumm has argued that "the universality of an ideal does not make it formally inadequate as an ideal central to the identity of a particular community.", in Mattias Kumm Why Europeans will not embrace constitutional patriotism, ICON vol. 6: 117, at 120 (2008). Perhaps in such situations the ideal itself is not formally inadequate, but the ideal can hardly provide a sound basis for identity of a community and its legal order if the point is to distinguish them from other similarly situated communities (or legal orders).
[215] Case C-208/09 (22 Dec 2010)

justified on grounds of national constitutional identity); Omega (human dignity)[216], Malgožata Runevič-Vardyn (Lithuanian language constitutions "a constitutional asset which preserves the nation's identity.'[217]), freedom of assembly and expression (Schmidberger[218]), media diversity (Familiapress[219]), protection of minors (Dynamic Medien[220]). But it is far from apparent what exactly the concept of constitutional identity does in these cases. It is true that all these cases involve some situation of deferral of European law to national law, mostly on some cultural grounds. But if that is sufficient to bring them within the purview of the national identity, then this clause is so broad that it includes virtually everything. Indeed, scholars have argued that constitutional identity in fact re-packages the court's long-time jurisprudence of exceptions to the freedom of movement.[221]

Moreover, very few decision of the ECJ requires EU institutional to take into consideration the national identity of its member states.[222] To my knowledge, in no case thus far does Art 4(2) by itself constitute sufficient ground for the holding. The court has rejected the pleas of some of its AGs about the commitment of EU law to national individuality.[223] There are of course the cases on exceptions from the fundamental

[216] Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn. (14 October 2004).
[217] Case C-391/09 - Runevič-Vardyn and Wardyn (21 May 2011)
[218] Case C-112/00, Schmidberger v. Austria (12 June 2003)
[219] Case C-368/95. Vereinigte Familiapress Zeitungsverlag (2007).
[220] Case C-244/06 Dynamic Medien Vertriebs GmbH v. Avides Media AG (14 February 2008)
[221] Theodore Konstandinides, Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement, 13 Cambridge Yearbook of European Legal Studies 195 (2011). Other scholars have pointed out that the court has accepted such a cooperative attitude, which can be said to include consideration of identity, in the fundamental rights cases. Preshova, supra note x. at 21.
[222] ZZ v Secretary of State for the Home Department, C-300/11 (4 June 2013) (holding that Art 4(2) TEU and Art 346(1)a TEU holds that national security remains the sole responsibility of Member States.
[223] See AG Maduro in Case C-160/03, Spain v. Eurojust [2005] ECR I-2077; AG Maduro in Case C-213/07, Michaniki [2008] ECR I-10999 (para 31). Maduro argues that respect for national identity has been part of European constitutionalism from the beginning.

freedoms but it is hard to see how they can be interpreted as "constitutional identity" cases. Moreover, and importantly, the ECJ has refused to tweak its supremacy jurisprudence to accommodate constitutional identity clause.[224]

There is, however, an important exception from the general line of national courts coming empty handed when trying to distill their national identity. It is the case of the German Constitutional Court in its *Lisbon* ruling. This decision marks the third line of resistance to German law to European law. After fundamental rights in the Treaty of Rome and the ultra vires under Maastricht, the German Constitutional Court stipulated the grounds of the so-called "identity review" under the Treaty of Lisbon. The grounds are similar to its Maastricht decision, namely the theory that the authority of the EU derives from the conferral by member states, as authorized by their respective constitutions. The Lisbon ruling strongly reinforces the duality domestic/international. Accordingly, as the interpreter and protector of the Basic Law, the Court proceeds to detail the conditions under which such transfer from Germany to the Union is constitutional. It held that Article 23 (1)[1] of the Basic Law requires that the European Union conform to democratic principles. However, this provision does not require "structural congruence" between the national and supranational levels, which means that the EU can seek to attain a democratic character through whatever means possible. As we have already seen with the *Maastricht* decision, this point might be theoretically sound but, in this context, it is quite disingenuous.

[224] Case C-409/06 Winner Wetten GmbH v. Burgermeisterin der Stadt Bergheim (8 Sept. 2010). Along similar lines, in Case C-515/08 Palhota, AG Villalon argued that values listed in Art 9 TFEU (high level of employment, adequate social protection, high level of education) are ground for greater discretion to Member States. For discussion, see Sinisa Rodin, National Identity and Market Freedoms after the Treaty of Lisbon, CYELP 7 [2011], 11-41, at 16 (interpreting AG Villalon's position to mean that "a high level of social protection constitutes part of the national identity of Member States and justifies a departure from market freedoms."). The Court did not follow the AG's recommendations. For a similar dynamic, in the procedural context, see Case c-173/09 Elchinov.

First, because the Court uses its own unmovable and largely indefensible lens for interpreting whether the EU has achieved a democratic character. For instance, and by contrast to the entrenched self-understanding of European supranational institution, the German Court held that the European Parliament represents the peoples of Europe as organized in their states and not a unified demos.[225] Now, whatever the limits of the European Parliament, it is difficult to ignore its increased powers and representativeness that set it apart from other supranational parliamentary institutions.[226] The German court uses the same lens to belittle other innovations of the Treaty of Lisbon, such as the citizens' initiative (Art 11.4 Lisbon).

A second reason why the German Court's position in *Lisbon* is disingenuous is the framework of general limitations that the Basic Law requires. The fundamental limitation, in the Court's interpretation, is subsumed to the imperative of respective national identity as outlined in Article 79 (3) of the Basic Law ("*unverfügbare Verfassungsidentität*"). The Court had already interpreted that provision in Maastricht to prevent German authorities from a supranational transfer of powers that undermined self-government and thus democracy. But in *Lisbon* it offers a more robust, and more protectionist, general approach. In short, it interprets the European Union as an association of sovereign national states (a so-called "*Staatenverbund*"). Unlike states in a federation, the states members of the EU remain sovereign and in control of the association they have formed. This view has direct implications for the nature of the

[225] [check exact language paragraph 286]. Contrast to decision of the Czeck constitutional court, which acknowledges that democracy can also come from the EP, not only from national law. Czech Constitutional Court, para 104.

[226] Christian Calliess, The Future of the Eurozone and the Role of the German Federal Court, Yearbook of European Law vol. 31 (1): 402-415 (2012), at 406 ("It is almost tragic that, in [taking the perspective of international law], the Court is adopting this restrictive democratic approach towards the very organization which - contrary to the classic international organizations like the UN or WTO – actually has a parliament that is directly elected by its citizens and has far-reaching decision-making and control powers.")

European legal order – which is "derived"[227], rather than autonomous in the full-blown way that the *Costa* jurisprudence envisions.

The third reason is the Court's detailed specifications on what areas of social and political life ought to be preserved for the German demos. As the Court writes, "particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)." Critics have berated this approach as unsupported by any account of the nature of the state.[228] Part of the problem is the court's own role in defining the limits of integration. In the name of democracy, the court is circumventing the mechanisms of German democracy.[229] By taking it upon itself to define these limits, the German court entrenches these limits in ways that are difficult to overcome. [230]

None of this is to say that the turn to constitutional identity will fail. There is nothing like an idea whose time has come and, for all its shortcomings, the time of this

[227] Paragraph 231.
[228] See, e.g., Daniel Halberstam & Christoph Möllers, The German Constitutional Court says "Ja zu Deutschland!", 10 German Law Journal 1241-1258
[229] Other courts, for instance in France and to some extent in the Czech Republic, returned that question to the legislator. See Mattias Wendel at 128.
[230] The structural coupling between the national and the European orders has meanwhile proceeded along an axis of integration. The Lisbon litigation in national constitutional courts has shown there is little dialogue between the two, especially at the level of national constitutional courts. See Jan Komarek, The place of Constitutional Courts in the EU, European Constitutional Law Review 9: 420-450 (2013).

idea might have come. However, the turn to constitutional identity will solve few tensions and heighten many more. It will not solve, but deepen, the sense of disorientation in European constitutionalism.

Conclusion

In a recent update of Grant Gilmore's magisterial "*Ages of American Law*", Philip Bobbitt found sufficient evidence for a new age in the development of American law.[231] Gilmore had divided American law into the Ages of Discovery, Faith and Anxiety. Surveying developments over the past three decades, Bobbitt added a final chapter, *Age of Consent*. It is difficult to know if a similar fate awaits the project of European integration. Jean Monnet once wrote that "[b]uilding Europe, like all other peaceful revolutions, needs time …. The time to adjust minds."[232] Including, one might add, the time to adjust the mind of the jurists.

Perhaps Habermas is right, and the key is to talk to the German constitutional court. One cannot tell the judges in Karlsruhe that European integration is premised on a deep distrust of states. Rather, one must say that democracy is transnational, that the state is an extraordinary evolutionary achievement and that European integration will protect its identity. This normative package is daring but not 'utopian' – which has always been the invective thrown at cosmopolitans. With some luck, it might even become the vision around which a new Age of Consent will develop in Europe. Utopian would be to say that European unification actually means European unification. Can one imagine an Age of Consent around that vision?

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[231] Grant Gilmore, Ages of American Law with a new Chapter by Philip Bobbit (2015). The first edition of Gilmore's book was published in 1974.

[232] Jean Monnet, Les Etats-Unis d'Europe ont commence [The United States of Europe has Begun] (1955), at 68.