Toward a European Bund

The Constitutionalism Deficit of Integration and How to Fix It

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This dissertation examines the nature of the European political and legal order and evaluates it in light of the principles of liberal and democratic constitutionalism. The EU, I argue, has features of both an international organization and a heterarchical federation, or *Bund*, in which neither the units nor the center are sovereign and the member state peoples retain their independent political existence. Due to its peculiar hybrid character, the status quo has a constitutionalism deficit: enforcement of formal competence limits is weak, the legislative process is undemocratic, and the European Court of Justice wields too much unchecked power to elaborate the content of basic rights. Adequate reform would eliminate residual features of the international organization model and establish a proper Bund. The dissertation examines how this political form differs from a federal state and provides normative reasons to prefer a heterarchical solution. I further contend that in a possible future Bund, domestic parliaments should have a stronger oversight role. The European Parliament might then still have a supporting function, but direct election would no longer be useful and indeed counterproductive. Last, the dissertation argues that if a federal compact were agreed upon, the best ratification method would be to hold national conventions, similar to the state assemblies that ratified the US constitution. This procedure is superior to both a national referendum and a vote of the domestic parliament.
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<tr>
<td>CAP</td>
<td>Common Agricultural Policy</td>
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<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EFSF</td>
<td>European Financial Stability Facility</td>
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<td>EU</td>
<td>European Union</td>
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<td>EURATOM</td>
<td>European Atomic Energy Community</td>
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<td>ESM</td>
<td>European Stability Mechanism</td>
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<td>FCC</td>
<td>Federal Constitutional Court</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>JHA</td>
<td>Justice and Home Affairs</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Association</td>
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<tr>
<td>OLP</td>
<td>Ordinary Legislative Procedure</td>
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<tr>
<td>OMC</td>
<td>Open Method of Coordination</td>
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<tr>
<td>QMV</td>
<td>Qualified Majority Voting</td>
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<td>SEA</td>
<td>Single European Act</td>
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<tr>
<td>SGP</td>
<td>Stability and Growth Pact</td>
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<tr>
<td>TCE</td>
<td>Treaty establishing a Constitution for Europe</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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Acknowledgments

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Many others were likewise generous with their time and provided much helpful advice. Lucy Goodhart offered a British perspective on Europe and knew which crucial articles I had not yet read. Turkuler Isiksel commented on draft chapters long before she even arrived at Columbia, sharing with me her encyclopedic knowledge of the integration process. When I was tempted to use jargon, I thought of David Johnston and tried to refrain from it. His efforts also prevented a lot of bad arguments from appearing on these pages. Katharina Pistor, finally, did her best to help me write a dissertation that is relevant to legal scholars. I furthermore want to acknowledge Michael Doyle and Melissa Schwartzberg for commenting on the earliest manifestations of this project. Jeffrey Lax deserves special credit for imitating various animal sounds in order to dissuade me from overusing the awkward term “demoicracy.”

Next I owe thanks to my colleagues and friends in the graduate program at Columbia, in particular Jennifer Hudson, Felix Gerlsbeck, Jeffrey Lenowitz, and Ben Schupmann who made countless intellectual and personal contributions.

I am also very grateful to Mary Sammons. She endured the last and worst few months of the writing process, never losing her characteristic sweetness. My largest debt, though, is to my parents who taught me that reading, thinking, and politics are important, and who never spared an expense to make sure I got the best possible education.

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Introduction

“The Basic Law grants powers to participate and develop a European Union which is designed as an association of sovereign national states (Staatenverbund). The concept of Verbund refers to a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the member states alone, and in which the peoples of the member states [...] remain the subjects of democratic legitimation.”

—Federal Constitutional Court, Lisbon Judgment, 2009.1

“Yet, insofar as European and national law are understood as formally autonomous systems, each of which is originally based on the will of the people [...], such a hierarchy does not follow as a theoretical necessity. [...] Rather, the relationship is pluralistic and cooperative.”

—Ingolf Pernice.2

In a 2009 landmark decision, the highest German court (FCC) found the Lisbon Treaty compatible with the Basic Law. At the same time, it described the EU as, in essence, an international organization, whose legal order is subordinate to the constitution of each member state. The judges use the neologism Staatenverbund (association of states) in order to account for the “supranational” elements of the present institutional structure, but the ruling denies the European order the status of a genuine constitution. This doctrine enables the FCC to assert the right to ascertain that individual Union policies conform to the Basic Law. When there is a violation, German state organs will be barred from enforcing the measure in question. Or so, at least, the judges promise.

1 BVerfG, 2 BvE 2/08, headnotes (my translation).
Most journalistic commentators reacted with praise for the decision. But the academic public rejected it almost in unison. The mainstream of scholarship holds that one can no longer understand the relationship between domestic and European norms in hierarchical terms. Jurists and political scientists instead advocate a “heterarchical” conception. These authors believe the FCC should have acknowledged the emergence of a novel species of political regime, in which both the domestic and the transnational level have a proper constitution. The relationship between domestic and Union norms, runs the argument, is therefore coequal. From this viewpoint, portraying the European legal order as subordinate to the Basic Law is anachronistic and detrimental to the integration project.

The tumultuous debate over the Lisbon decision shows that profound disagreement about the nature of the status quo persists. It is not too difficult to explain this fact. The dispute reflects the hybrid form of the EU: while the present institutional structure retains important features of an international organization, it also has traits that are characteristic of a federal order. The result, I will argue, is a doctrinal impasse: neither the FCC nor its critics can mount a persuasive defense of their respective position. This, in turn, is more than an esoteric jurisprudential problem. We should be concerned about the peculiar hybrid character of the EU because it undermines constitutionalism. The first goal of the dissertation is to explain this statement. My second objective is to reflect on possible future reform.

What do I mean by constitutionalism? At the close of the 18th century, the revolutions in America and France inaugurated a new conception of legitimate political order. From then on, public

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4 For a brief review and breakdown of the numerous responses in legal scholarship see Matthias Jestaedt, "Warum in die Ferne schweifen, wenn der Maßstab liegt so nah? Verfassungshandwerkliche Anfragen an das Lissabon-Urteil des BVerfG," Der Staat 48, no. 4 (2009), 497-498.
power has been understood to derive from a positive constitution, whose ultimate source is the people. But a simple reference to popular origin is hardly enough to legitimate the actual practice of ruling. The higher law must also express a substantive conception of how government should work. A wide range of different ideologies can fill this space. The approach that emerged in the West is best called “liberal and democratic.” Constitutions of this kind need to implement the following three principles: the rule of law, democratic legislation, and basic rights protection. Of course, these ideas require further specification. Later on, I will therefore elaborate on each tenet, drawing in particular from the work of Jürgen Habermas. But for the moment, a concise overview is enough: the rule of law means that public power must operate based on formal norms, which are subject to neutral interpretation and enforcement; democratic legislation requires a meaningful connection between political system and public sphere; entrenched basic rights, finally, guarantee individual freedom, subject to the condition that it does not interfere with the freedom of another person or a compelling public interest.

How does European integration affect constitutionalism so understood? The problem is that regardless of how one prefers to construe the nature of the status quo, it will be impossible to find it consistent with the principles just listed. Consider first the position of the academic mainstream. From the perspective of the heterarchical approach, the Union order itself should guarantee the rule of law, democratic legislation, and basic rights protection. This, I will argue, is wishful thinking. First, in one significant respect, the rule of law is weak. European institutions often exceed the powers, which the member states have vested in them under the treaties. Second, integration undermines democratic legislation: power migrates from national parliaments to a Union decision making process that is unmoored from the public sphere. Third, integration deforms basic rights protection. Of course, European law guarantees individual freedoms. But it does so in a manner that affords
judges outsize power relative to elected politicians. None of these findings will unsettle the adherents of the FCC jurisprudence. According to them, member state high courts are going to invalidate Union measures whenever the latter run afoul of values protected under the domestic fundamental order. National constitutionalism, goes the reasoning, is therefore safe against European incursion. Yet this claim, it will become evident, is just as fanciful as the belief in a working heterarchical system.

To be sure, the diagnosis presented here is not altogether original. My argument builds on existing scholarship when I suggest that under the status quo, the rule of law, democratic legislation, and basic rights protection are deficient. One purpose of the dissertation is to defend these critiques against rosier perspectives on integration. But the main contribution is a different one. I ascribe the shortfall on all three dimensions to a common cause: the tension between the international organization features of the EU and its federal traits. This finding has a crucial implication for reform: a structural problem requires a structural solution. I therefore contend that in order to overcome the present legitimation crisis, a political decision to move beyond the hybrid status quo is needed. Under the current regime, the constitutionalism deficit cannot be fixed. For this reason, the dissertation will make a case for European federalism.

Many oppose this idea on the grounds that subjugation of the member states to a central government is undesirable. Yet my concern is not to make the EU still mightier. Brussels has awesome power even now. The trouble is that Union governance lacks a proper constitutional framework. In the wake of the recent woes of the Eurozone, this problem has become all the more urgent. To stabilize the joint currency, the member states were compelled to deepen integration further, and this process looks set to continue in the future. Monetary union, the crisis has made all too clear, must go along with deeper political integration. Against this background, the best route forward is to
build a genuine federal order. Such a reform, it is crucial to understand, does not have to entail the creation of a state. Historical federations have sometimes maintained a coequal relationship between units and center, leaving open which legal order is supreme. Contrary to what the critics of the German jurisprudence believe, the EU does not fit this model yet. But I will argue that it should be pursued in the future.

The case for such fundamental reform is predicated on the belief that we need to care about the fate of liberal and democratic constitutionalism. Gradual erosion of legal and democratic restraints on public power is foremost a moral problem. Yet there are prudential considerations, too. Peace in Europe has come to be taken for granted – its preservation is no longer reason enough for citizens to support whichever policies emanate from Brussels. Nor can we expect that Union governance will generate sufficient economic spoils to ensure its popular acceptance through “output” alone. Against this background, liberal and democratic constitutionalism has a central role in ensuring the continued health and survival of the integration project. Its ongoing demise leads to a widespread sense of citizen disenfranchisement that promotes euroskepticism and nurtures authoritarian political attitudes. Halting these trends, the dissertation will argue, is a goal important enough to warrant an institutional overhaul of the EU.

The analysis proceeds in two steps. Part I sheds light on the constitutionalism deficit. I begin with the dispute over the nature of the status quo. Are the proponents of the heterarchical vision right to criticize the judicial defense of national sovereignty? The first issue here is whether one can, in principle, conceive a political form between federal state and international organization. To make this plausible, it will not be enough to characterize the EU as *sui generis* – the idea of a coequal relationship between units and center within a federal system is older than European integration. At various moments in the history of constitutional thought, legal thinkers have examined how we
might distinguish such an order from both state and treaty organization. The canonical representative of this discourse is Carl Schmitt who called the phenomenon in question a *Bund*.\(^5\) While scholars are right to point out a resemblance of the EU to this political form, one can make just as strong a case that it remains an international organization. This creates a predicament for national high courts. A tribunal embracing the heterarchical conception of the status quo would have to overlook that residual international organization features prevent the full realization of the rule of law, democratic legislation, and basic rights protection in the Union sphere. To be sure, at present, most high courts follow the lead of the FCC and reject the idea of an independent transnational constitution, equal in rank to the domestic fundamental order. But this doctrinal stance comes likewise at a price. It forces judges to obscure that Union governance, where it operates in a federal mode, undermines the legitimation of public power through national higher law. To sum up, no matter through which prism we see the European order, the state of constitutionalism is poor.

Part II considers possible future reform. I will argue that heterarchical federalism is the best route forward. The EU is not a Bund yet, but a renewed attempt to provide it with an explicit constitutional foundation should follow this model. Such a reform would enable the diverse peoples of the continent to retain their independent political existence, while also partaking in a common fundamental order. A European Bund, if well designed, could strengthen the rule of law and overcome the current structural deficit in the realm of basic rights protection. Whether democratic legislation is workable in a heterarchical context is a somewhat more difficult question. Most observers believe that a bicameral process, mediating between an overarching continental *demos* and the member state peoples, would be the right solution. Yet such “dual legitimation”, it will become clear, is bound to remain elusive. If that is so, how else might citizens hold the federal government account-

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\(^5\) The term is best translated as “federation.” To underline the difference to a federal state, I leave the German expression untranslated.
able? For a heterarchical EU, I suggest, enhanced oversight from domestic legislatures is the most suitable device to guarantee adequate democratic participation. Under this scheme, the Parliament in Strasbourg might still perform a useful supporting role. Direct elections, however, should be abolished. The dissertation closes with a discussion of how a shared higher law might be ratified. Past experience with integration referendums has been rather disappointing. In light of this, national conventions, similar to the to the state assemblies that ratified the US constitution, are preferable.

What is the Nature of the Union Order?

By way of introduction, let us now examine the dispute over the status quo in some more detail. I will summarize the German jurisprudence and present the alternative understanding of the Union order favored by the academic mainstream. Our first question is whether one side gets it right. Many will naturally seek the answer in positive law, be it the European treaties or the domestic constitutions. Yet I will conclude my exposition of the issue stating that a textual solution is not available. The problem at hand requires a judgment of constitutional theory.

In Defense of Member State Sovereignty

Despite the uproar of protest, the central aspects of the Lisbon ruling cannot have surprised legal scholars. The FCC simply reiterated its previous stance and elaborated on the concrete implications. For our purposes, a brief summary of this doctrinal approach will suffice; it has been discussed at length elsewhere. At first glance, such an exclusive focus on the German jurisprudence might seem too parochial. But even if there is a great deal of variation in detail, the rulings of the FCC have

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6 Dieter Grimm, a former judge on the FCC, provides the best overview. See Dieter Grimm, "Defending Sovereign Statehood against Transforming the Union into a State," European Constitutional Law Review 5, no. 3 (2009a).
been rather influential with high courts across Europe. For this reason, the following discussion is relevant far beyond its local context.

The core tenet of the Lisbon decision is that all public power emanates from the German people, and hence the Union legal system has to remain a derived order, whose application is governed by the domestic constitution. This does not call into question the “primacy” of European law, which requires that lower German courts grant it precedence over conflicting domestic norms. Yet the FCC reserves the right to examine if Union measures conform with the Basic Law. To be sure, the principle of “European law friendliness” limits such review to exceptional situations, for the judges recognize an imperative to protect the homogeneity and effectiveness of the Union order. Nonetheless, the claim that German constitutional law remains supreme defies the position of the European Court of Justice (ECJ), which holds that a domestic norm can never trump a transnational one.

How precisely does the FCC seek to defend the Basic Law? The judges point out three grounds, based on which a European norm can be found invalid (*Table I*). First, the member states have to remain the “masters of the treaties.” Sovereignty, as the judges understand it, does not require that a state exercise all public power within its territory. Delegation of competences to international bodies, in particular the EU, is possible – the Basic Law actually encourages it. Yet such a transfer of power presupposes an explicit legislative grant. Hence the “principle of conferral” stipulates that changes of European primary law presuppose the approval of the German parliament, even when the treaties do not require it. Furthermore, delegation must always be revocable. Given the past tendency of EU organs to extend their competences through a liberal interpretation of their mandate, the court emphasizes that it will admit *ultra vires* complaints alleging that an EU

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8 BVerfG, 2 BvE 2/08, paras. 228-232.

measure has transgressed the parameters of delegation set forth in the relevant national ratification statute.\textsuperscript{10}

Second, to preserve the identity of the Basic Law, a set of “core state functions” must remain at the domestic level. In particular, the judges prohibit excessive outside regulation in the following areas: the penal law, disposition over police and military, the tax system, social policy, and fields with a strong cultural aspect such as family law, education, and religious policy. Beyond this protected sphere, the weaker and mediated legitimation of transnational governance is acceptable. Yet within the realm of core state functions, the FCC will interpret the competences of European organs in a restrictive manner and prohibit broad delegation of power to Brussels.\textsuperscript{11} The rationale behind this doctrine is that Union governance remains undemocratic. For one thing, the judges note that despite the gradual emergence of a continental public sphere, the perception of political issues and personnel remains connected to linguistic, historical, and cultural patterns specific to the member states.\textsuperscript{12} But the main argument is that “excessive federalization” violates the “one person, one vote” principle. Relative to population size, small countries and their citizens wield disproportionate influence within the EU organs, which is true in particular for the Parliament. For this reason, the FCC does not regard the latter as the voice of a European \textit{demos}. We should rather understand it to represent the member state peoples as collective entities. In doing so, the Parliament supplements national legislative control of executive leaders and their actions on the European stage, which remains the most important channel of democratic input.\textsuperscript{13}

Third, all grants of power to international bodies are subject to the rights protected under the German constitution. External delegation of competence, goes the argument, is a mere extension of the institutional scheme of the Basic Law. Therefore, agencies so empowered cannot escape the

\textsuperscript{10} BVerfG, 2 BvE 2/08, paras. 226-243.
\textsuperscript{11} BVerfG, 2 BvE 2/08, paras. 219, 244-272.
\textsuperscript{12} BVerfG, 2 BvE 2/08, para. 251.
\textsuperscript{13} BVerfG, 2 BvE 2/08, paras. 261-297.
restrictions of the latter. The FCC, to be sure, holds that, at the moment, European law offers equivalent protection of individual freedom, and hence the judges will, for the time being, not review acts of the EU on this basis. Yet the court pledges to resume hearing complaints if the required minimum standard is no longer satisfied (the *Solange* doctrine).\(^\text{14}\)

<table>
<thead>
<tr>
<th>Ultra vires control</th>
<th>The FCC will strike down European measures that are not authorized by the treaties (as construed in light of the German ratification law).</th>
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</thead>
<tbody>
<tr>
<td>Identity protection</td>
<td>In the realm of core state functions, the FCC will restrictively interpret the authority of European organs, and it will prohibit broad delegation of power.</td>
</tr>
<tr>
<td><em>Solange</em> doctrine</td>
<td>The FCC will review European measures for conformity with basic rights, if the general standard of protection guaranteed by the EU is no longer sufficient.</td>
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**Table 1: Mechanisms to protect the German constitutional order**

In embryonic form, this conception of the EU as a derived and subordinate legal order has already been present in the *Solange* decisions of 1974 and 1986.\(^\text{15}\) These rulings superseded an earlier judgment, according to which the “special nature” of European law did not allow German courts to second guess Brussels.\(^\text{16}\) The FCC reversed this position in *Solange I*, noting that domestic application of external norms is subject to constitutional review.\(^\text{17}\) In particular, the judges at the time held that German state organs must not enforce a European measure, if the latter violates fundamental rights guaranteed in the Basic Law. The ECJ henceforth sought to demonstrate greater respect for individual freedom. In the *Solange II* decision, the FCC acknowledged this effort, ruling that it would cease to review European measures, “so long as” the effective protection of rights is

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14 BVerfG, 2 BvE 2/08, para. 191.
15 For a detailed analysis of how the German EU jurisprudence developed over time see Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001), 64-123.
17 BVerfG, 2 BvL 52/71.
“generally” ensured.\textsuperscript{18} Despite making this concession, the FCC did not renounce the supremacy of the Basic Law. It rather affirmed the notion that, at least in principle, European measures can be subject to domestic constitutional limits. When the court approved the Maastricht treaty in 1993, it forcefully restated this point. The judgment once again emphasized the right of the FCC to enforce basic liberties against the EU; it also vowed to uphold the principle of conferral and mentioned for the first time that certain core state functions are nondelegable.\textsuperscript{19}

What is new about the Lisbon decision, apart perhaps from its sharper tone, is a more detailed enumeration of the fields, in which competence transfer is problematic. The court moreover expresses greater skepticism regarding the Parliament, which it had previously described as capable of further evolution toward a genuine democratic legislature. Finally, the Lisbon judgment declares that so long as the Basic Law is in force, the German state will remain sovereign. This represents another shift from the Maastricht ruling, which seemed more open to future developments. According to the current doctrine, a new domestic constitution would need to replace the Basic Law before the German state can participate in some form of European federation. To accomplish this, posits the FCC, the people itself would have to exercise its constituent power and endorse the transformation of its political existence through a referendum.\textsuperscript{20}

\textsuperscript{18} BVerfG, 2 BvR 197/83.
\textsuperscript{19} BVerfG, 2 BvR 2134, 2159/92.
\textsuperscript{20} BVerfG, 2 BvE 2/08, para. 179. Art. 146 Basic Law explicitly allows for such a constitutional replacement.
The Heterarchical Approach

The numerous critics of the Lisbon decision reject its hierarchical perspective.21 These authors believe that, in actual fact, the member states and the EU have gone a long way toward becoming co-equal partners. Hence the critics suggest to accept the irrevocable loss of exclusive national sovereignty. This, goes the reasoning, does not mean that the EU itself is now a state. We should rather understand the relationship between the domestic constitution and Union law as “heterarchical.” This idea entered the academic debate around the time of the Maastricht decision, prior to which most scholars believed that domestic courts had an unconditional obligation to enforce European norms, regardless of possible conflict with domestic law.22 The FCC had already signaled its opposition to this narrative in the Solange I case. But the real shock came in 1993, when the court put forward a comprehensive account of the EU as subordinate to the German constitution. Faced with the Maastricht judgment, the college of European lawyers had to save the notion that Union norms are not simple international law. A new paradigm became dominant: “constitutional pluralism.”

21 In response, Andreas Voßkuhle – the current President of the FCC and coauthor of the Lisbon decision – published an article, in which he claimed that it would be false to read a hierarchical approach into the judgment. According to Voßkuhle, terms like “equal footing” or “supremacy” are unhelpful – we should rather focus on specific “techniques of cooperation” used by national and European courts. See Andreas Voßkuhle, "Multilevel Cooperation of the European Constitutional Courts. Der europäische Verfassungsgerichtsverbund," European Constitutional Law Review 6, no. 2 (2010). This rhetorical shift is quite surprising – the Lisbon decision makes it rather clear that from its perspective, the domestic constitution is superior to European norms. But, in substance, Voßkuhle does not question the doctrine of the judgment: since Union law remains a derived order, its enforcement can be subject to domestic review. Perhaps it is an oversimplification to call this situation “hierarchical.” Yet the fact remains that a European norm is valid or invalid, depending on whether it passes muster under the domestic constitution. In practice, this does of course not preclude a “cooperative” approach. The FCC has never found a Union measure in outright conflict with the Basic Law. But if that is so, can we believe the court that it makes a serious effort to protect the legitimation framework of the domestic fundamental order? Or is something else going on? Chapter 3 will address this question.

The intellectual father of this concept is Neil MacCormick. In a 1995 article, he notes that domestic and Union law represent “distinct but interacting” legal orders. Each system determines its own content and scope, but implementation of European norms relies on member state organs. This creates a potential for conflict because domestic judges must enforce two separate legal orders, which might overlap. In such a case, there is no ultimate instance that can decide which norm is applicable. According to MacCormick, this implies that sovereignty has nothing more than a symbolic meaning in Europe today: “there are special reasons of constitutional rhetoric that require a German court to [assert the] sovereignty of the people that the [...] Constitution postulates as fundamental to itself.” The use of this language, goes the argument, does not change the fact that Union law, too, asserts the right to the ultimate decision. While this claim is otherwise equivalent to that of a domestic legal system, the Luxembourg court need not employ the term “sovereign” because the EU never understood itself as such. MacCormick concludes that simultaneous assertion of supremacy means that neither legal system is actually sovereign, even if national judges hold on to a different rhetoric.

But this reasoning is too facile. The empirical coexistence of multiple supremacy claims has no direct bearing on how the European order works in practice. Since the enforcement of Union meas-
ures depends on member state cooperation, national high courts are, in principle, free to impose their preference. On the face of it, the situation is therefore no different from the relationship between domestic and regular international law. The latter also construes itself as supreme over the former, while local enforcement in fact depends on a municipal incorporation act. In the case of the EU, then, everything hinges on member state judges. A genuine heterarchical constellation will not emerge until national high courts embrace pluralism or, in other words, until these tribunals recognize that European norms can sometimes trump the domestic constitution because the two orders are coequal. Scholars have put forward different theories of how such a jurisprudence should look like. Their shared prescription is that national high courts abstain from review of Union measures, unless the latter jeopardize a central value of constitutional government itself. The conditional nature of this deference, goes the expectation, will motivate the ECJ to engage in conflict avoidance on its part as well.

Of course, this position stands and falls with the assertion that the EU has a constitution in the same manner as the member states do. What evidence can be adduced here? The EU lacks a formal constitutional document. But one cannot dispute that it operates based on – as Hans Kelsen would put it – a “material” constitution: European law sets forth “rules, which regulate the creation of general legal norms, in particular the creation of statutes.” It also explains in detail how these norms will be interpreted and enforced. The Union legal order, then, is a “functional” constitution in the sense that it enables the effective use of public power. Yet is that sufficient to elevate it to

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26 At least, the European treaties do not advertise themselves as “constitutional.” This, I will argue in Chapter 3, is a rather significant fact.


coequal status with national higher law? The answer should be obvious. More or less any international regime has some form of functional constitution. Unless one wants to argue that judges must grant all of them equal footing with the domestic order, pluralism cannot rest on this factual observation alone.

To solve the puzzle of when the heterarchical approach is justified, we rather need to make a normative assessment. Our question should be the following: which features of a constitution vindicate its claim to represent the supreme law of the land? At the most general level, the answer is that a fundamental order establishes a structure for the legitimate exercise of public power. Coercion is acceptable, so long as it takes place within this framework. External norms, then, pose a prima facie challenge. The constitution has to assimilate them, before it can authorize implementation, and norms that fail to survive this procedure should be void. But what if an external regime legitimates public power in the same manner as the domestic constitution. Under these circumstances, it would indeed appear unjustified to insist on a hierarchical relationship. So when does such a scenario obtain? To approach this question, let us consider which specific traits of a fundamental order render state coercion acceptable to citizens. One standard explanation refers to “constituent power”, or the will of a particular collective to give itself a higher law: norms that emanate from this framework are legitimate, given that one can trace them back to the initial popular founding. A second ra-

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29 Miguel Maduro proposes a different approach. According to him, one should accord Union law coequal status with domestic constitutional norms because it performs three important functions. First, it gives European citizens a voice in the policies of each member state, which might affect the entire continent. Second, it empowers the member states to address problems that none of them could solve alone. And third, Union law imposes external constraints on domestic governance that correct for institutional pathologies such as irrational path dependence or interest group capture. See Miguel Poiares Maduro, "Three Claims of Constitutional Pluralism," in Constitutional Pluralism in the European Union and Beyond, ed. Matej Avbelj and Jan Komárek (Oxford: Hart, 2012). But this line of argument misses the point. Maduro presents a valid rationale for the existence of the European order, yet he does not establish that it merits coequal status with the member state constitutions. Suppose the President of the Commission declared himself a benevolent dictator who is legibus solutus. In this case, the Union system could still fulfill all three roles listed above. But without popular support for such a transformation, and given the abolishment of limited government, the new order could not legitimate public power or even provide much of a “functional” constitution. Hence Maduro cannot be right. A normative rationale for the heterarchical approach must be found elsewhere.
tionale points to the substantive limits that a constitution imposes on public power. In the case of a liberal and democratic fundamental order, these include the principles mentioned earlier: the rule of law, democratic legislation, and basic rights protection. For the moment, we need not examine how such a framework makes coercion acceptable (I shall address this question in Chapter 1). But it should be clear enough that adherents of liberal and democratic constitutionalism will embrace this or a similar account of legitimate rule.

Does the Union order meet either or both of the above criteria? Few believe that it has a foundation in constituent power (although there have been attempts to defend such a claim, as Chapter 2 will discuss). Most proponents of the heterarchical approach refer instead to the second yardstick, noting a “constitutionalization” of European law over time: landmark rulings of the ECJ have turned Union norms into binding obligations, subject to neutral interpretation and enforcement; citizen participation has been enhanced, in particular through making the Parliament a strong legislative institution; and European law has come to protect a comprehensive set of individual freedoms. Therefore, it might seem as if the EU implements the rule of law, democratic legislation, and basic rights protection. If that is so, runs the argument, one can disregard the fact that international treaties remain the ostensible basis of integration. What matters is that – in substance – Union law guarantees the same values that a domestic constitution embodies and guarantees. But is that in fact true? And can a fundamental order legitimate coercion when it lacks a basis in constituent power? The persuasiveness of the heterarchical approach is at stake here. We shall return to these questions.

The FCC, of course, does not accept the constitutionalization argument. Its approach to domestic review is therefore, at least on the face of it, more aggressive than pluralism would permit. To begin with, ultra vires control goes against the presumption that one can trust the European rule
of law. Constitutional identity protection is likewise incompatible withpluralism. From the perspective of the heterarchical approach, domestic and Union norms have, or at least might acquire, equivalent democratic pedigree – there is hence no a priori reason to place a list of “core state functions” beyond the reach of integration. The sole element of the German jurisprudence that does not stand in evident tension with pluralism is the Solange doctrine: it offers the EU a carte blanche, so long as it refrains from systematic and egregious basic rights violation.

In other words, there is a significant doctrinal rift between the Lisbon decision and the heterarchical approach. To be sure, for reasons that will become clear later, this will make little or no practical difference. Regardless of whether Union organs heed the limits set forth in the ruling, we can expect the FCC and other high courts to remain on the sidelines. The threat to intervene is just not credible. Still, the academic reaction to the Lisbon decision has been livid. In the eyes of its critics, the FCC says “Ja zu Deutschland” but not to European integration.30

A Judgment of Constitutional Theory

The preceding has suggested that in order to referee between FCC doctrine and the heterarchical approach, we need to undertake a conceptual investigation as to whether the European order can legitimate public power in the same manner as the constitutions of the member states. At this point, one might object that it would be more appropriate to consult the positive law first. Yet a textual analysis will not yield a definitive result. Why is that so? The European treaty framework remains ambiguous concerning its own nature (I elaborate in Chapter 2). Irrespective of this, domestic courts must first look to their own constitution. But here textual guidance is scant as well. While some member states regulate EU membership in their higher law, these provisions – with the excep-

30 Daniel Halberstam and Christoph Möllers, "The German Constitutional Court says 'Ja zu Deutschland!'," German Law Journal 10, no. 8 (2009).
tion of the Dutch case – leave the proper relationship question to judicial interpretation.\(^{31}\) This of course opens the door for complex doctrinal argument. Consider, for illustration, the following two positions in the academic debate around the German jurisprudence.

Matthias Kumm claims that Art. 23 of the Basic Law mandates the heterarchical approach: “With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union […]. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat.” This clause is the result of a 1992 constitutional amendment, passed before ratification of the Maastricht Treaty. Yet the goal of a united continent already featured in the original preamble of the Basic Law. Kumm understands this formula to demand a European constitution that is coequal to the domestic fundamental order. Hence, goes the argument, the FCC must not review Union acts unless a particular measure violates a basic principle of constitutionalism itself.\(^{32}\) Art. 23, on this view, stipulates a wholesale incorporation of European norms into the German legal system. In other words, their force does not derive from legislative ratification of each new set of treaties.\(^{33}\) Kumm therefore denies that German courts have the power to examine whether the EU has acted *ultra vires*.

Udo di Fabio puts forth a competing view. He claims that Art. 20 (2) – an unamendable provision of the Basic Law – implies a conception of statehood that requires the stance of the Maastricht decision. The first sentence of Art. 20 (2) reads as follows: “All state authority is derived from the people.” According to di Fabio, this language refers to the enlightenment idea of the state as based on the free association of individuals who endow a government with the power to regulate their collective life. This mandate, he elaborates, is limited by universal human rights, but otherwise, the people, as represented in parliament, can legislate whatever it deems appropriate – external re-

\(^{31}\) Huber, "Vergleich," 420–421.
\(^{32}\) Kumm, "Who is the Final Arbiter of Constitutionality in Europe?," 378.
\(^{33}\) ———, "Who is the Final Arbiter of Constitutionality in Europe?" 382.
gimes must not permanently circumscribe this freedom. The EU, then, cannot move beyond the international organization model, unless it becomes a federal state. Di Fabio considers such a development undesirable because he finds the linguistic and cultural differences within Europe too large. In any case, as the founding of a new state would eliminate the constituent power of the German people, it would require a popular decision to replace the Basic Law.34

Di Fabio is right to lift the issue to the plane of philosophical argument. Neither the authors of the German constitution nor the parliamentarians who voted for the new Art. 23 had made up their mind as to the precise nature of European integration. Kumm fails to acknowledge this. He reaches his conclusion through a rather too ambitious reading of the text, which does not rest on historical proof that Art. 23 has in fact been understood to affirm an independent European constitution, equal in rank to the Basic Law. That is not surprising – such evidence would be hard to find. As so often in constitutional jurisprudence, we can therefore not answer the question based on the text and its legislative history. The issue rather turns on our theoretical assumptions regarding the nature of a fundamental order.

Di Fabio approaches the subject at this level, but he fails to make a persuasive case. His view is that a democratic constitution presupposes a sovereign state. But this line of reasoning does not take into account that popular government and the state form might have been linked due to contingent factors. Indeed, there are political theorists who believe that in the age of globalization, democratic principles call for the integration of existing states into new constitutional frameworks. For di Fabio, this could only mean the reproduction of the state form at larger geographical scale. But he provides little justification as to why popular government requires traditional sovereignty, except that in the past, these phenomena have occurred together. Unless a deeper conceptual nexus is shown, the democratic idea cannot bar a pluralist conception of the relationship between domestic

and Union norms. However, another concern of di Fabio remains valid: would a decision to establish a genuine transnational higher law eliminate the constituent power of the German people? And, if that is so, would such a step not presuppose a referendum to supersede the Basic Law? These questions are still going to concern us.

Di Fabio sat on the bench when the FCC decided the Lisbon case. As we have seen, the judgment follows in the tracks of his 1993 article. Making a disputable understanding of constitutionalism axiomatic, the court ignores the possibility of a middle ground between sovereign nation states and one single continental Leviathan. Thus it fails to engage a large share of the relevant academic discourse. We should instead take the heterarchical approach seriously. But, as I have suggested, there remain doubts as to whether its proponents have a convincing argument. While the idea of constitutionalism as such might not rule out the existence of a heterarchical order, the latter cannot emerge from thin air. How would a political system based on a coequal relationship between units and center look like? We need a precise answer in order to find out if the European integration process has created such a regime.

**Chapter Outline**

Chapter 1 develops a conceptual framework to assess the nature of the status quo. I elaborate a particular understanding of liberal and democratic constitutionalism, which leads us to distinguish among three possible forms of a layered political structure: a federal state has a single higher law; the center is sovereign. In contrast, an international organization does not have a constitution in the emphatic sense; here the units are sovereign. Beyond this classical distinction, we can distinguish a

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35 That is all the more surprising, given that in a 2001 article, di Fabio has argued in favor of a stateless constitution for Europe. See ———, "A European Charter. Towards a Constitution for the Union," *European Law Journal* 7, no. 1 (2001). Against this background, one would have expected the Lisbon judgment to explain why the EU does not have such a fundamental order at the moment.
third political form. The Bund is a heterarchical system: both units and center have a fundamental order that legitimates public power; the question of the ultimate decision remains therefore open.

Chapter 2 shows that aspects of the present institutional structure are consistent with the Bund ideal type. Yet the EU also retains important traits of an international organization. In other words, neither the academic mainstream nor the FCC is quite right about the nature of the Union order. Our initial puzzle, it turns out, has no straightforward answer – the status quo remains a bewildering hybrid.

Chapter 3 then argues that we should be concerned about this fact. Proponents of the heterarchical approach claim that, at present, European public power is, or could in principle become, just as legitimate as its domestic counterpart. This, I will show, is not so: residual international organization features undermine the rule of law, democratic legislation, and basic rights protection. The FCC and its followers meanwhile believe that judicial review in the member states will compensate for the deficit at the Union level. But making good on this promise, it will become clear, would subvert European governance where it operates in a federal mode. No member state high court will be prepared to incur such a cost. To sum up the current predicament: since the EU is a hybrid between international organization and Bund, it cannot fulfill the normative demands of either model.

Chapter 4 begins the discussion of possible future reform. Some believe that modest institutional adjustments would enable adequate legitimation of Union policies along the lines of the international organization model. Others want to slice the Gordian knot and create a federal state. Yet the best route forward is to establish a genuine Bund. Under this political form, the member state peoples retain their independent political existence, while also partaking in a common fundamental order. A heterarchical federation, then, can preserve valuable traditions of domestic constitutional
practice; it also has the potential to overcome the shortfalls of the status quo. Does this prospect warrant the cost and risk of a drastic institutional overhaul? The chapter will argue that, in addition to the moral case for reform, there are prudential reasons to embark on this path. Under the status quo, citizen disenfranchisement promotes euroskepticism and nurtures authoritarian political attitudes. Resolving the constitutionalism deficit is therefore an urgent concern.

Chapter 5 investigates how democratic legislation could work in a European Bund. I criticize the mainstream position that Union governance must be subject to “dual legitimation.” On this view, the Parliament should represent European citizens, while national deputies hold their respective government accountable for its actions in Brussels. The problem here is that turning the Strasbourg legislature into an effective voice of a continental demos would require much stronger competition among transnational parties than we see at present. How to make this happen seems to be a riddle without a good solution. Therefore, I suggest to focus on the domestic legitimation channel, whose potential for enabling democratic participation has so far been somewhat neglected. In this scenario, the Parliament could still have a useful supplemental role. Direct election of its members, though, should be abolished.

Chapter 6 (which is coauthored with Jeffrey Lenowitz) concludes the dissertation with a proposal as to how a federal compact should be ratified. While the member states peoples have to endorse such a document, a referendum or a legislative vote are unsuitable procedures to render the decision. The chapter recommends instead that, similar to the American precedent, ratification proceed through conventions in the member states.
Part I

The Constitutionalism Deficit
Chapter 1

Constitutionalism and Layered Political Structures

How should one construe the relationship between the domestic constitution and European norms? I have argued that, in the absence of an unambiguous textual solution, the answer turns on a theoretical investigation as to whether the European order merits coequal status with national higher law. This chapter establishes a conceptual framework that will enable us to address this question. Here is the scheme in a nutshell: within a layered political structure, the center can be sovereign, the units can reserve the ultimate decision, or the issue remains open. Three kinds of relationship between unit and center law are hence conceivable: subordination of the former (monism), subordination of the latter (dualism), and heterarchy (pluralism). Each option corresponds to a respective ideal type of political form: federal state, international organization, and Bund.

This framework, it will become clear, presumes an understanding of constitutionalism that we have inherited from the revolutions in America and France. I shall refer to it as the "classical paradigm." On this view, the constitution legitimates public power in a twofold sense. For one thing, it has popular sanction: the higher law rests on "constituent power", or a decision of the people to give itself a fundamental order. At the same time, the constitution implements a certain understanding of how a legitimate government needs to operate. In combination, these factors make the fundamental order the supreme law of the land. But this outlook is controversial today. According to some, the classical paradigm has become obsolete. Faced with the emergence of transnational governance regimes, the critics seek to reconceptualize the legal world. Their suggestion is to abandon

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1 With the term “layered political structure”, I refer to a system, in which at least two different units govern their internal affairs, while also being subject to common rules that emanate from a central governance mechanism. This definition, of course, includes a wide range of different phenomena. What it does not cover is a unitary state, in which the sole or main function of local government is to implement laws made at the national level.
the idea of constituent power: for a legal system to legitimate public power, it should be enough that it operates according to certain principles; whether one can ascribe its existence to a collective decision to establish or sustain a constitution is irrelevant. From this perspective, all public legal orders can function as supreme law, and therefore, pluralism is the sole permissible relationship between domestic and external norms.

I will reject the above criticism of the classical paradigm. Yet this does not mean that a heterarchical system is unthinkable. To be sure, the classical paradigm has long been understood to entail that within a layered political structure, either the units or the center must be sovereign. But this view is misleading. The historical practice and theory of federalism indicate that one can imagine a middle ground between sovereign state and treaty organization. In such an order, both units and center have a constitution that legitimates public power – the relationship between them is therefore coequal. Carl Schmitt introduced the term “Bund” to refer to this political form. Recent scholarship has given renewed attention to his account of heterarchical federalism because there seem to be parallels with the present Union system. I agree – the Bund model can be a useful conceptual tool for understanding the European constellation. Yet in order to find out whether the status quo does in fact represent an instance of heterarchical federalism, we need a complete institutional description of the ideal type.

The goal of the chapter is to develop such an account of the Bund and to contrast it with the federal state and the international organization. My analysis proceeds as follows. First, the chapter will elaborate on the meaning of the classical paradigm. Second, I defend the latter against its critics. Third, the chapter reconstructs past discourses on heterarchical federalism, focusing in particular on Schmitt and the application of his ideas to the EU. Fourth, I juxtapose the institutional features of
the Bund model to those of the federal state and the international organization. The final section of the chapter discusses the epistemological function of the resulting classification scheme.

**The Classical Paradigm**

The late 18th century inaugurated a new understanding of legitimate government, which one might refer to as “constitutionalism.” Both American settlers and the French third estate sought to de-throne princes who justified their rule based on divine right. Against this idea, the revolutionaries put forward the notion that public power stems from a positive constitution that trumps all other internal or external law. In the course of the 19th century, this view prevailed in a struggle against the old regime. Today it has become universal, forming the basis of legitimate rule almost everywhere.2

But what gives the constitution its exalted status? The discourse of the Western revolutions provides a twofold answer. First, the special nature of the fundamental order is ascribed to its popular origin: “We the People” have exercised our *pouvoir constituant*. Yet neither American nor French revolutionaries believed that popular origin is all that matters. On their view, the special nature of the constitution is just as much the result of its substance: the fundamental order should prevent the arbitrary exercise of power, enable the formulation of the popular will, and protect individual rights. Around these principles developed a practice of constitutionalism that is best called “liberal and democratic.” This regime is now hegemonic in large parts of the world, but it has not achieved universal acceptance. The Iranian constitution, for example, implements a theocratic system; under the Chinese fundamental order, legitimate rule is party dictatorship. What unites these cases with the Western tradition of constitutionalism is a reference to popular origin. As Dieter Grimm points out, most existing states claim that their higher law is based on a democratic choice

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of the people. Yet not all of them embrace the same view as to what makes the exercise of public power good and just. In this regard, different communities have adopted different solutions, ranging from the liberal and democratic model in the West to the more authoritarian practice of countries such as Iran or China. Still, the general pattern is similar: the peculiar status of the constitution is derived from its supposed popular origin and the appropriateness of its content. This dual rationale is what I refer to as the “classical paradigm.”

For the purposes of investigating the European constellation, we can disregard variants of constitutionalism that do not fit the approach practiced on the continent. Our sole concern, in other words, lies with the liberal and democratic model. Below I will summarize this conception of legitimate government in three tenets: the rule of law, democratic legislation, and basic rights protection. From the perspective of the classical paradigm, a liberal and democratic fundamental order should have a basis in constituent power and realize these principles. Some theorists, as we noted, disagree: these authors contest the notion that higher law derives its status from both popular origin and substantive content. From their perspective, constituent power discourse is a dangerous relic of 19th century political romanticism. We can dismiss the concept, goes the reasoning, because the institutional substance of liberal and democratic constitutionalism is sufficient to legitimate the exercise of public power. I reject this position as incoherent. Let us, however, begin with a more detailed account of the classical paradigm. The following will first elaborate on the idea of constituent power, and examine when one can regard a legal order as having popular origin. Second, I flesh out the liberal and democratic account of legitimate government. Third, we shall discuss the implications of the classical paradigm for the relationship between unit and center law in a layered political structure.

[^3]: __________, "The Achievement of Constitutionalism and its Prospects in a Changed World," 9. It is true, however, that borderline cases and exceptions remain. The Iranian constitution, in fact, leaves it ambiguous whether it derives from popular or divine will. In Saudi Arabia, the king asserts the right to make and unmake the higher law at his discretion.
Constituent Power

Constituent power is the power of a people to determine its own constitution. The idea emerged in reaction to the demise of religious justifications for political order. Once there is no longer a transcendent source of legitimate rule, the subjects of public power must themselves establish the rules for its exercise. According to this view, the people alone can invest a set of norms with the status of higher law, whose function is both to regulate the process of normal legislation and to limit its permissible content. The constituent power stands therefore in opposition to the “constituted power” of public organs that perform the work of government. These bodies derive their competences from the people and must heed the limits the latter has set on them.

On closer examination, the idea of constituent power turns out to harbor several paradoxes. To begin with, there is the question as to who belongs to the people: what gives a particular collective the right to include some persons, who might prefer not to be members, and to exclude others, who might in fact wish to join? A full discussion of this problem is beyond our scope here. Suffice it to note that for popular constitution making to be possible at all, some boundaries will have to be drawn. These will be rightful in some cases, and less so in others. For our purposes, though, the issue of boundaries has little relevance. Let us rather focus on three further paradoxes of constituent power that will emerge as more pertinent to assessing the European status quo. The first is that a people is an amorphous multitude before it has a constitution. As such, one might argue, it cannot resolve to create a higher law because collective action presupposes an existing decision procedure. If that is so, how can we speak of a democratic choice to establish a fundamental order? A second puzzle is whether a founding that occurred long in the past can legitimate a fundamental order in the present. Is, for example, the manner in which the US constitution was adopted still relevant

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4 For a historical synopsis and a review of the literature see Jeffrey Lenowitz, "Why Ratification? Questioning the Unexamined Constitution-Making Procedure" (Columbia University, forthcoming).
more than 200 years later? A third problem is that a significant number of democratic states never experienced a popular founding. Instead, their constitution has been imposed through an undemocratic process, or there is no written higher law at all. Does this mean the legal order in question is illegitimate, regardless of how well it functions in practice?

The first of these paradoxes directs our attention to the procedural aspect of constitution making. In some cases, it will be plausible to impute the ultimate outcome to the will of the people, while in other cases, this will not be so. Andrew Arato lists the features that lend a framing process a democratic character: wide pluralistic inclusion, consensus decision making to the largest extent possible, openness to public oversight and input, scrupulous adherence to rules defined at the outset, elections as soon as possible after the constitution has been established, and the attempt to operate under a “veil of ignorance” concerning the distributive implications of the new order. This approach demystifies the idea of constituent power. It acknowledges that imputing the constitution to the people relies on an institutional approximation that can never be perfect. But this fact, Arato implies, should not lead us to throw our hands up and discard the aspiration of popular constitution making altogether. Rather the goal should be to devise procedures that make the higher law as legitimate as it can be under the particular circumstances of a given historical situation.

The second and third paradoxes lead us to consider what happens to the constituent power, once a higher law has entered into force. Does it disappear until the people gives itself a new constitution, or does it somehow remain active? Here it is crucial to recognize the significance of acquiescence. Citizens who make use of a constitution that a group of framers has created behave as if the collective had given itself fundamental norms, to be followed because of their popular origin. In other words, so long as the higher law remains accepted in practice, we can impute democratic pedi-

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gree to it. This of course means that, in a sense, constitution making is a permanent exercise. Compliance with the higher law and its further development signal identification of the current generation with the initial founding – the citizens of the present come to participate in the act, which is not finished until their shared fundamental order ceases to exist. Once we adopt this perspective, it does not matter when the framers established the constitution. What is more, even lack of a proper founding in the past need not preclude the existence of a legitimate fundamental order in the present. Take the German example. The 1949 convention that wrote the Basic Law did not aspire to channel the constituent power of the people. As the country was divided and under tutelage of foreign powers, the framers aimed to create a provisional order, intended to last until the political situation allowed for a more democratic process. Yet in the aftermath, the Basic Law acquired general support due to its successful operation. Today it stands undisputed as the constitution of the German people, regardless of its peculiar genesis. Similar considerations pertain to countries that lack a written higher law altogether. In the few polities that fall into this group, custom and legal precedent make up an effective fundamental order, which regulates the day to day working of public organs. So long as the people accept this framework in practice, we can regard it as based on constituent power.

Of course, there remain a lot of difficult questions here. In particular, we need to know the precise meaning of “accept.” How much approval does a constitution require? What is a valid expression of support? Are there reasons that warrant entrenchment of the fundamental order against future majorities? But for the course of the present investigation, these and other puzzles will be irrelevant. What matters is that we have defined general criteria to examine if a given order has a basis in constituent power. That is the case if there has either been a genuine popular founding, or if cit-

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7 This group includes Israel, New Zealand, and the UK.
izens have, over time, come to accept the order as their legitimate constitution. For our examination of the European status quo (see Chapter 2), this level of abstraction will suffice.

*Liberal and Democratic Constitutionalism*

The purpose of a liberal and democratic constitution is the simultaneous realization of private and public freedom. In other words, the higher law creates a sphere of individual protection from state interference, but it also sets up a structure for collective action that enables the formulation of popular will. Just like the notion of constituent power, this ideal reflects the lack of a transcendent power, which all members of a collective recognize as sovereign over their affairs. Liberal societies rather consider each person as free to develop and pursue her own conception of the good life. Regarding matters of collective interest, there is hence nothing but an immanent guide – free and equal individuals must come together to work out their differences and find solutions that everyone can live with.

The first countries to replace monarchical regimes with liberal and democratic constitutions were the United States and France. To be sure, revolutionaries in both cases drew on earlier traditions: ancient republicanism inspired the quest of the founding fathers to counteract the danger of mob rule and chart a more secure path to the common good; at the same time, the liberties contained in the *Déclaration des Droits de l'Homme* would have been inconceivable without the longstanding practice of enforcing individual privileges based on social group affiliation in more or less independent courts. But we should nonetheless recognize the late 18th century as the historical watershed that it was. Modern liberal and democratic constitutionalism enlisted older concepts and institutions to pursue a new goal – equal freedom in a disenchanted world. Much of the subsequent political development in the West and elsewhere can be understood to reflect a struggle for this

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ideal, in the course of which, progress had to be wrested from the social forces that opposed this modern Weltanschauung.

If this narrative is right, the task of normative constitutional theory becomes to work out how a liberal and democratic fundamental order can best achieve its purpose – the simultaneous realization of private and public freedom. One central problem here is to delineate these spheres from each other. Prima facie, private and public freedom stand in tension: each citizen has a right to pursue her own happiness without political meddling, but the people is free to regulate its collective life. An account of liberal and democratic constitutionalism has to work out the specific content of these desiderata, and it has to explain how to mediate the tension between them. I shall draw here on a particular response to this challenge: the “discourse theory of the democratic constitutional state”, which Jürgen Habermas developed in his seminal work Between Facts and Norms. To structure the discussion, let us distinguish three core tenets of liberal and democratic constitutionalism: the rule of law, democratic legislation, and basic rights protection. The following will set out a specific interpretation of each principle that will inform our investigation later on.

The rule of law (in the narrow sense I use the term) implies that public power must operate based on formal norms that are subject to neutral interpretation and enforcement. At the most basic level, this presupposes a “separation of powers”: executive organs implement statutes, the legislature writes them, and the courts ensure the correct and impartial application of the law. There is a lot to explain here. What features define each branch? What is a statute? What does “correct and impartial” application mean? Yet our investigation can leave these issues aside. Let us rather focus on a more basic question: which reasons demand that state organs respect the parameters of their legal competence? For one thing, of course, the rule of law makes the exercise of public power foreseeable. Private actors know which norms to follow and can expect impartial treatment. A degree of
such legal certainty is an indispensable prerequisite for social coordination. But the rule of law also serves the end of public freedom. If the people is to govern itself through democratic legislation, the implementation of the latter must be as faithful as possible to the text. This holds *a fortiori* with regard to the constitutional norms that divide powers among the branches of government and geographic units. Who should decide what is always controversial. A fundamental order embodies a judgment of the people, resolving this question. The purpose of judicial review is to preserve the resulting scheme. If this framework has to be changed, the proper route is a constitutional amendment.

*Democratic legislation* is the main vehicle of public freedom. Law should express the popular will. This abstraction, to be sure, has little content apart from the particular reading that we give to it. For Habermas, a genuine popular will has to emerge from rational deliberation over the common good, which lends collective decisions a moral claim to bind citizens who oppose the ultimate outcome. This neorepublican account is of course not undisputed. It differs in particular from “elite” theories, for which electoral selection of political leaders is sufficient, and “economic” perspectives that put the optimal aggregation of private interests center stage.\(^9\) Here I will not defend the Habermasian view against the competing paradigms. Let us rather consider some main features of this approach, which shall later be relevant to our assessment of the European status quo.

Rational discourse, according to Habermas, produces norms that all whom these will affect should be able to endorse. For this to be the case, deliberation has to remain free from illegitimate domination: no participant should exert force, except that of the better argument.\(^10\) The reasons put forward must furthermore transcend private interests and values. Such “public justification”, to use a term John Rawls coined, might refer to universal moral demands; it might appeal to the specific

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ethos of the collective in question; or it might advance a particular account of how the world functions (based on scientific evidence). To be sure, on all three dimensions, consensus will for the most part prove elusive. When a decision is needed, voting brings an end to discussion, at least for the time being. But while engaged in deliberation, the participants should make a good faith effort to find the most persuasive solution. All of them have then rational grounds to accept the outcome, for the latter will be the best current approximation of the common good, while the losers retain the option to challenge the result in the future.

How should we imagine the practical realization of this ideal? Modern societies cannot implement the ancient Greek model, under which all citizens assemble to deliberate. Habermas instead suggests that participation should occur primarily at the stage of public opinion formation. Citizens must hence be free to receive political information and to address others. The sum total of such communication is the “public sphere.” Habermas believes that deliberation within this arena can lead citizens to adopt rational opinions about the content of the shared interest, which should in turn influence political decision making. Ideally, then, legislative debate pits those reasons against each other that have found the most support in the public sphere.

Let me insert a caveat here. Statutes are not the sole form of important collective decisions. In modern states, the executive can often make autonomous policies. Growing functional demands on the welfare state have amplified this power, which now reaches far beyond traditional fields of executive prerogative. Legislatures were forced to delegate a multitude of tasks to regulatory bodies that

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11 ———, Between Facts and Norms, 108.
12 Habermas is of course not oblivious to the fact that interest assertion is a pervasive feature of democratic politics. He even argues that for some questions, bargaining among social groups is the best mechanism to work out the content of the public interest (so long as there is an appropriate legal framework to ensure fairness). See ———, Between Facts and Norms, 165-167. In general, the notion of the common good must be understood as a regulative ideal, whose realization depends on both institutional design and the political culture.
13 ———, Between Facts and Norms, 305-306.
14 ———, Between Facts and Norms, 354-359.
need significant independence to fulfill their mandate.\textsuperscript{15} Sometimes this means the complete isolation from political influence, as for example in the case of central banks. The justification for such bureaucratization is that with regard to certain state functions, parliaments are ill positioned to make good choices – legislators might lack expertise, fall victim to irrational mood swings of the electorate, or succumb to excessive interest group pressure. When that is the case, administrative delegation is consistent with the principle of democratic legislation as understood here: if the ultimate end of all exercise of state power is to realize the common good, parliaments should take a backseat where bureaucrats stand a much better chance to accomplish this.

Given the relentless expansion of the administrative state, democratic societies have made considerable efforts to give citizens a voice in this sphere. Some even argue that such direct participation is now a more important form of democratic input than traditional representative government.\textsuperscript{16} This claim, however, is exaggerated. Legislatures remain central from both an empirical and normative perspective. It would be absurd to maintain that general statutes have become irrelevant – such laws continue to shape the general direction of policies, even if details are often left to bureaucrats. We should also keep in mind that representation via a parliament is usually more inclusive than direct participation, which tends to empower organized interests that have an immediate stake in a given issue. Against this background, I submit that popular government is unthinkable without traditional parliamentarism. The most important question for a conception of democratic governance remains therefore how public opinion can influence legislative deliberation.

Habermas elaborates a set of conditions for such a nexus to emerge. Consider first the level of the public sphere. Democratic opinion formation, it will be obvious, presupposes freedom of association, speech, and press.\textsuperscript{17} But legal rights are not enough. Habermas notes that robust political

\textsuperscript{17} Habermas, *Between Facts and Norms*, 368-369.
discourse also requires a vibrant realm of civil association, composed of groups that bring concerns of possible collective relevance to the attention of the public. Moreover, there must be a media infrastructure that permits the dissemination of information and moderates a rational debate among different views.

Consider next the level of the political system. Even the most vibrant and sophisticated public discourse about the shared interest is of little value, if decision making fails to reflect it. Here institutional architecture matters. At the most fundamental level, it has to enable policies based on the common good. This means in particular that factional interests need to be prevented from holding the process hostage – constitutional design has to limit veto points within the decision making structure. Politicians must furthermore be forced to engage with public opinion. That is one main purpose of elections: voters should evaluate in how far parties and individual leaders represent their considered preferences and deliver on their promises. To the extent that is the case, politicians who desire to remain in office must either follow public opinion or seek to influence it.

To meet the Habermasian ideal, both the public sphere and the political system depend on two further background conditions. First, social power must be neutralized. Each citizen should have a fair chance to exert influence. This requires adequate social and economic rights, which allow everyone to make use of their political freedom. In addition, suitable regulation should prevent that special interests bypass the court of public opinion and exert direct control over elected leaders. Second, democratic legislation feeds, to some extent, on political virtue. Both the general population and elites have to share in a culture accustomed to freedom and oriented toward the common good.

18 ———, Between Facts and Norms, 367.
19 ———, Between Facts and Norms, 378.
20 That is a direct and more or less obvious implication of the concept of a rational legislative discourse, even if Habermas does not make this point explicit in Between Facts and Norms. I bring it up here, because the issue will turn out to be significant for us later on.
21 Habermas, Between Facts and Norms, 487-488.
22 ———, Between Facts and Norms, 417-418.
When citizens never transcend their private interest, public opinion formation cannot be rational in the sense defined earlier. And when politicians always cater to their clients, even the most rational public opinion will have little effect. To be sure, Habermas argues that political virtue should be “exacted in small increments.”\(^23\) His conception, it is true, asks less of the individual than ancient republicanism in the vein of Aristotle or Cicero. Nonetheless, the roles envisaged for the normal citizen and the statesman impose profound ethical demands.

**Basic rights protection** guarantees individual freedom, subject to the condition that it does not interfere with the liberties of another citizen or a compelling public interest. Constitutional entrenchment of rights forbids majorities from imposing unacceptable rules on minorities, and it prevents state officials from abusing their power. This serves both private and public freedom: the former is established through basic rights that guarantee the greatest possible freedom of individual action; the latter is protected through basic rights that create equal opportunities to participate in public opinion and will formation. To ensure the fair value of both civil and political liberties, citizens moreover need to have basic rights to adequate social and economic living conditions.\(^24\)

There is a paradox here: entrenchment of individual freedom is *prima facie* inconsistent with the principle of democratic legislation – guaranteed liberties circumscribe the freedom of the people to govern itself. Can the tension be reconciled? In *Between Facts and Norms*, Habermas places this question at the heart of the argument. His answer is that democratic legislation and basic rights protection presuppose each other.\(^25\) What does this mean? As mentioned above, democratic legislation requires, on the one hand, freedoms that secure the public sphere, and on the other hand, participation rights, such as, for example, the franchise. We also noted that political freedom depends on social and economic liberties, which give each citizen a fair chance to exert influence. The

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\(^23\) ———, *Between Facts and Norms*, 487.

\(^24\) ———, *Between Facts and Norms*, 118-131.

\(^25\) ———, *Between Facts and Norms*, 82-131.
supportive relationship between civil rights and popular government is less obvious. Private freedom can seem like an irreconcilable antagonist of democratic legislation. But Habermas points out that modern subjects develop and flourish in the sphere of free personal choice – without protection of such a realm, the basis of the entire constitutionalist project would disappear. In this sense, private freedom is a precondition of popular government, not a constraint on it. At the same time, the whole system of basic rights relies on the democratic process to legitimate its specific content. Constitutional freedoms can take different legal shapes – particular communities must therefore fill in the blank. That is true, in particular, when reasonable people disagree over the proper implementation of a right. Such argument will often arise when liberties collide with each other or undermine a justified public interest. Habermas insists that – as for all important political controversies – the democratic process has to resolve the dispute.

This perspective would seem to allow court supervision of the executive, but militate against judicial review of statutes: in the face of reasonable disagreement, one might argue, legislatures should elaborate the content of rights because this procedure is more representative than a court decision. But even so, judicial review still has an important role. Majority rule carries the risk of minority oppression. Politicians have little incentive to heed concerns of people that will not vote for them, and they might deliberately choose to violate individual rights. Or they can simply fail to anticipate the violation of a protected freedom, which might result from the concrete application of a general statute. Either case must be distinguished from bona fide disagreement about the interpretation of fundamental liberties. High courts should act if legislators trample freedom, or if a statute raises an unforeseen constitutional problem. Yet judges should not have the last word in a genuine controversy over the meaning of a right.

How does this principle translate into practice? Of course, it is impossible to distinguish *ex ante* when courts or politicians are better placed to decide. Any system of judicial review will therefore enable high courts to rule on questions better left to democratic legislation. Since the demarcation line will always be fluid and contested, the appropriate stance for judges is to engage with public opinion and elected representatives, when the content of a right is not obvious. This will happen more often, if constitutional amendment is a realistic option, because judges need then to anticipate that an unpopular decision might be overruled. Yet courts should also react to other forms of political intervention.\(^{27}\) If elected representatives persist in challenging doctrine, judges should eventually relent. As Habermas puts it: “The [high] court must not assume the role of a regent who takes the place of an underage successor to the throne. Under the critical gaze of a robust legal public sphere, [it] can at best play the role of a tutor.”\(^{28}\) Real world judges, of course, might not see their role in such modest terms. For evident reasons, courts are prone to exaggerate the rationality of the legal process, relative to democratic will formation. But even when judges perceive themselves as philosopher kings, public opinion and political intervention can represent factual limits to their power. Insofar as written law is able to accomplish this, the constitution should therefore establish a proper balance among these forces, such that rights do not open the door to juristocratic domination and can instead become the vehicle of a collective learning process.

*The Problem of the Ultimate Decision*

Let us next consider in how far the classical paradigm is relevant for the main subject of this chapter: the relationship between unit and center law in a layered political structure. To elucidate this

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\(^{27}\) Potential “curbing” devices include legislative override, withholding funds from the court system, jurisdiction stripping, court packing, and replacement of judges that hold a particular legal view. These mechanisms have been studied in particular with reference to the power of the judicial branch in the United States. For a review of the literature see Daniel Kelemen, “The Political Foundations of Judicial Independence in the European Union,” *Journal of European Public Policy* 19, no. 1 (2012), 44-45.

\(^{28}\) Habermas, *Between Facts and Norms*, 280.
connection, we need to examine what it means for a state to be sovereign. Under the classical paradigm, this concept has a particular meaning. A constitutional state claims supreme power over its territory, both against domestic contenders and outside actors. Sealing off the domestic realm guarantees the legitimate exercise of public power. Just like a challenge against the state from the inside, obedience to an external actor would undermine the aspiration of holding public power accountable to one higher law. For this reason, there must be no foreign interference with the domestic affairs of a sovereign state. This does not mean that international law can never bind. States are free to accede to treaties, and international custom reflects their implicit consent to a certain set of rules. But in either case, local enforcement of an international norm must not violate the domestic constitution. The latter remains the source and framework of all public power in the land.29

To be sure, some aspects of the present global order are in obvious tension with the stylized picture I have just drawn. The shell of territorial sovereignty is not impenetrable anymore. For one thing, states cannot exit from the UN collective security regime, which is empowered to authorize interventions against delinquent parties. Certain *jus cogens* norms furthermore limit the domestic jurisdiction of governments.30 These developments are significant, but one should not forget that enforcement is rather haphazard, and that it concerns, for the most part, a limited number of weak and failing states. Meanwhile, the bulk of international law retains its traditional character.

Where does this leave us with regard to the classification of layered political structures? On the one hand, we can imagine a hierarchical resolution of the question as to who shall render the ultimate decision: either the center is sovereign, or the units are. In the former case, the order is a federal state. There is just one legal system, composed of multiple subparts. Since an overarching con-

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30 *Jus cogens* is usually considered to include the prohibition of international aggression, genocide, crimes against humanity, war crimes, apartheid, slavery, torture, and piracy. These norms are understood to be valid independent of treaty codification or customary status. Some progress has been made toward establishing universal enforcement mechanisms, notably the creation of the International Criminal Court.
stitution establishes the units, their law remains subordinate to it; we might describe the relationship as “monist.” The converse scenario is that independent states cooperate through a treaty organization. Such a regime belongs into the realm of international law, and hence domestic enforcement of common rules is subject to each respective constitution. The legal orders remain separate and stand in a hierarchical relationship; “dualism” is the pertinent term of art. In the dispute over the European status quo, that is the ostensible position of the German jurisprudence (see Introduction).

But do the state and the international organization exhaust the universe of possibilities? A two-fold scheme has without doubt intuitive appeal. The modern idea of sovereignty emerged during a time of internecine conflict. Hence political thinkers advocated the creation of a single power center to adjudicate disagreement and maintain the peace. This conceptual genesis, it seems, lies behind the refusal of some theorists to allow for a via media between state and international organization.

Yet is a clear decision as to which level is sovereign really a prerequisite of proper constitutional rule? I submit that it is not: one can imagine a layered political structure, in which unit and center law are coequal. The heterarchical nature of such an order implies a relationship between the levels,

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31 To be sure, in a small number of jurisdictions, all international norms trump domestic law (the Netherlands provide a textbook example). But this form of “monism” remains at heart still dualist: the higher status of the outside norm is a postulate of the domestic constitution (which is subject to amendment); it does not follow from the nature of international law as such.

32 Hans Kelsen famously challenged the distinction between monism and dualism. He claimed that every legal norm is part of just one global system. According to him, international law authorizes the creation of domestic legal systems, which remain subordinate to it. See Kelsen, General Theory of Law and State, 363-388. H.L.A. Hart rejected this claim, arguing that Kelsen was guilty of a non sequitur: the fact that international law treats domestic legal systems as continuous with itself does not establish the objective reality of this situation. Hart maintained instead that legal systems with different “rules of recognition” must be understood as separate. See H.L.A. Hart, “Kelsen’s Doctrine of the Unity of Law,” in Essays in Jurisprudence and Philosophy (Oxford: Oxford University Press, 1983). This dispute still haunts legal theorists – see for example Alexander Somek, “Monism. A Tale of the Undead,” in University of Iowa Legal Studies Research Paper No. 10-22 (Iowa City: The University of Iowa College of Law, 2010) – but I will not pursue it here. From a pragmatic viewpoint, the question is simply irrelevant. Courts must decide between domestic and external norms whenever there is a conflict. Maybe a coherent explanation of their authority to make this decision requires that one attribute it to decentralization within one global system of law. Yet that is not going to change the outcome. What does affect the result is how judges view the relationship. Monism, dualism, and pluralism are significant at this level of interpretation. Whether Kelsen or Hart is right about the objective nature of law is a philosophical riddle we can ignore here.

33 See for example Grimm, Souveräniät. Herkunft und Zukunft eines Schlüsselbegriffs.
which one might characterize as “pluralism.” As we recall, that is how the academic mainstream describes the European status quo (see Introduction).

How can one reconcile this idea of a heterarchical order with the notion that a constitution derives from (and makes) a sovereign people? The decisive conceptual move here is to acknowledge that in a layered political structure, both units and center can have a fundamental order that rests on constituent power. The historical practice and theory of federalism suggest that such a regime—which one might call a Bund—is feasible. Yet before I can make this argument, let us consider a fundamental objection to the classical paradigm itself.

The Classical Paradigm Under Attack

It has for some time been a mantra of contemporary legal scholarship that our understanding of constitutionalism should be adjusted to a changing political world. Governance is more and more privatized and transnationalized, which calls into doubt that it is still possible for a single higher law to regulate all public power within a particular territorial realm. Here our focus lies on the second development—the proliferation of law beyond the state. In response to globalization, a plethora of new governance structures has emerged, some of which are said to have undergone a process of “constitutionalization.” What does this term refer to? The expansion of public power beyond the state went hand in hand with legalization. International regimes now often make binding rules, whose interpretation is delegated to dispute resolution bodies that look more and more like actual

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34 Jean Cohen has pointed me toward the insight that heterarchical federalism and constitutional pluralism are related ideas. She elaborates her own version of this argument in a recent book: Jean Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2012).


36 As Türküler Isiksel observes: “International institutions ranging from the UN to the WTO, NAFTA, IMF, and ICSID, human rights regimes including the UDHR and the ECHR, juridical constructs such as jus cogens, transnational contract law, and treaties from the Vienna Convention on the Law of Treaties to the New York Convention on the Enforcement of Foreign Arbitral Awards have all been considered forms of constitutional order at one point or another.” See Türküler Isiksel, "Europe's Functional Constitution. A Theory of Constitutionalism Beyond the State" (Yale University, 2010), 6.
courts. Furthermore, present day international regimes often allow for some form of citizen participation, and several international courts protect individual liberties. Does this mean the rule of law, democratic legislation, and basic rights protection have transcended their origins within the domestic realm?

Some theorists believe that such a trend undermines the privileged status of national higher law. Constitutionalization, goes the claim, abolishes the rationale for a hierarchical relationship between domestic and international norms. Matthias Kumm has articulated the most developed formulation of this view. He argues that constitutional legitimation does not presuppose that we can link higher law to a particular collective. Rather, all public legal orders have latent constitutional status, which becomes actual once the regime in question meets certain substantive criteria. In other words, constituent power is irrelevant; a particular institutional constellation is sufficient to legitimate public coercion. From this perspective, a threefold classification scheme of layered political structures is anachronistic: heterarchy would be universal, pluralism the only game left in town.

Let us consider this argument in some more detail. Kumm suggests nothing less than a “Copernican revolution” in jurisprudence. He elaborates a new “cognitive frame”: when domestic courts face a decision about enforcing an outside norm, the judges should not use the dualist test as to whether the norm is properly authorized and consistent with constitutional law. “[T]he basic point of reference for the construction of legal authority” ought rather to be a “complex standard of public reason.” One can summarize its criteria as follows:

Legal norms from a relatively higher level must be accorded precedence over norms from a local system unless the local court is able to show a violation of 1) subsidiarity: norms must be made at the

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level, which can “best” regulate the subject in question; 2) due process norms must be created through a transparent procedure, allowing for the fullest participation of those affected, which is possible under the circumstances; 3) basic rights norms must conform with basic rights.

These rules supposedly do not create a monist scenario, under which international law always trumps domestic norms. Kumm would rather like to offer a “cosmopolitan pluralist” stance. From the perspective of this approach, international regimes have prima facie the same status as the domestic constitution, but judges can still set aside external norms, if the regime in question fails to meet the above criteria.

Kumm maintains that cosmopolitan pluralism so understood has begun to replace the classical paradigm. This approach, he argues, is “better able to make sense of contemporary public law practice, [it] fits that practice and shows it in the best light.” I will discuss in a moment whether “fit” is the right yardstick to use here. But we should first note that Kumm treads shaky ground when arguing that cosmopolitan pluralism is more or less the established practice. One problem is that his evidence is rather thin. He focuses on the Bosphorus judgment of the ECtHR, and the ECJ decision in Kadi. A persuasive generalization about international law would require supporting material from regions other than Europe (and we should entertain some doubt that it can be found). Yet even Bosphorus and Kadi are no perfect exemplars of cosmopolitan pluralism. Both judgments put forward a version of the Solange principle: an external measure will not be subject to review, so long as the protection of individual freedom under the outside regime is overall acceptable. This doctrine is indeed akin to the third part of the cosmopolitan pluralist standard. But Kumm fails to demonstrate that courts also use the other two criteria.

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39 Somek, however, argues that Kumm is a “closet monist” because the “complex standard of public reason” integrates all domestic and international law. See Somek, "Monism. A Tale of the Undead," 33.

We should furthermore question the methodological appropriateness of a fit investigation. Kumm sees the global practice of public law as one integral whole striving for coherence: judges need to examine what other courts do and fit their rulings into the existing landscape. Perhaps, that is a valid demand for rendering judgment within a legal system. But from the viewpoint of the classical paradigm, precedent from other jurisdictions has no binding effect on domestic courts: how judges structure the relationship with external legal orders should depend on criteria internal to their respective constitutional system. Therefore, a fit argument cannot be a strong rationale for cosmopolitan pluralism – it must fail to persuade an adherent of the classical paradigm that her position is incoherent.

Yet the main thrust of the case for the new cognitive frame is anyway different. Kumm maintains that cosmopolitan pluralism is superior from a moral point of view: courts should embrace the paradigm change because dualism has never been compatible with the equal freedom of individuals – the core value animating constitutionalism in the Western tradition. Needless to say, it smacks of philosophical imperialism to build normative principles of global law on this foundation (a charge Kumm seems prepared to accept). The classical paradigm allows for diverse political ideologies – each people has the right to determine its own system of government. Cosmopolitan pluralism, in contrast, presumes a universal commitment to liberal and democratic values. One can debate if that is the appropriate starting point for a general account of the relationship between domestic and international law. But I will leave this problem aside here. The goal of the following discussion is rather to show that cosmopolitan pluralism fails by its own lights: even the legal system of a liberal and democratic state should not adopt such a stance toward outside norms.

41 The concept of “fit” was introduced by Ronald Dworkin. See Ronald Dworkin, "Hard Cases," Harvard Law Review 88, no. 6 (1975).

The first shortcoming of the suggested cognitive frame is that, as the proposal stands, it would destabilize political order. Abandoning the idea that specific collectives establish their own supreme law empowers courts below and above the state to use the cosmopolitan pluralist standard. Under this scenario, the principle of subsidiarity becomes dynamite. How to allocate competences over different levels of governance is often enough a controversial question, which does not have a single rational answer. The classical paradigm solves this problem: the constitution defines which state organ has which power, subject to dispute resolution in a court of last instance. In contrast, discretion for all judges is a recipe for chaos. I take it, however, that Kumm does not intend to advocate such a radical decentralization of judicial power. He rather seems to believe that application of the cosmopolitan pluralist standard would remain limited to the high courts of states and international regimes. Such a rider could mitigate the diagnosed problem, yet it seems inconsistent with his overall approach.

For the sake of argument, let us assume that one can somehow circumvent this challenge. Should we then embrace cosmopolitan pluralism as the proper default stance? In defending his approach, Kumm focuses on the claim that national judges must not be allowed to undermine solutions to international collective action problems. Under the classical paradigm, a national high court is able to set aside an external norm that is seen to violate the constitution, regardless of whether the subject matter is “best” regulated at the domestic level, and even if the norm fulfills the due process and basic rights criteria. Kumm believes that such review privileges a narrow local interest over the more inclusive concern for effective transnational governance. The ideal of equal freedom, he objects, does not permit exclusion of this kind. Subsidiarity is hence not just a technical criterion

but a moral demand as well: it guarantees representation to everyone who is affected by a collective
action problem, regardless of their nationality.\textsuperscript{44}

This argument, I submit, remains unpersuasive. If domestic courts adopted the proposal, international cooperation would probably not improve much. The main obstacle to finding collective solutions for global problems such as carbon emissions, financial regulation, or poverty is not that judges stand in the way. Rather, national governments are unwilling or incapable to negotiate workable compromises. A judicial paradigm shift will not change this. It would, however, strip constitutional law of its democratic pedigree. For Kumm, it does not matter whether citizens have endorsed a particular order as their higher law. According to him, judges should have the power to grant or withhold this status. Such a regime, I believe, would erode constitutionalism. As the following will argue, the proposed subsidiarity criterion would undermine the rule of law; the due process standard remains a far cry from genuine democratic legislation; and transnational basic rights protection is not equivalent to its counterpart in the domestic realm.

Consider first the rule of law: under the classical paradigm, national judges have the right to enforce the mandate that an international regime has received from the domestic legislator. Such \textit{ultra vires} control safeguards the principle that all exercise of public power requires a legal basis. Modern constitutions permit the government to delegate competences to an international regime, which often presupposes the assent of the national parliament. Via the delegation act, the external order becomes part of the domestic scheme of competence distribution. If that is so, the national high court must be able to enforce the terms of conferral. Kumm wants to replace this constraint with his subsidiarity test. The interesting point here is that he does not attempt to persuade us that international regimes can safeguard the rule of law on their own, such that domestic courts need not in-

\textsuperscript{44} Kumm, "The Cosmopolitan Turn in Constitutionalism. On the Relationship between Constitutionalism in and beyond the State," 296-301.
tervene. In fact, the cosmopolitan pluralist standard does not evaluate if a regime establishes, for instance, a proper separation of powers. Nonetheless, it seems fair to assume that Kumm would like international bodies to make norms that are binding and subject to neutral interpretation and perhaps enforcement. Legalization in this sense permits effective governance, for it stabilizes expectations about the content of binding rules. But, according to Kumm, the reach of positive law should end there. Under cosmopolitan pluralism, the substantive jurisdiction of an international regime is not subject to prior determination. That is because, for Kumm, there are no collective entities that could establish such a mandate. Instead, cosmopolitan pluralism derives the competences of a regime from its supposed fitness to regulate a particular field. Judges, goes the reasoning, should have the right to make this assessment.45

Why should high courts not wield such a power? Above I have noted that a constitutional division of labor represents a considered judgment of the people as to who should exercise what kind of competence. The modification of this scheme via delegation to an international regime should again have democratic sanction – hence the requirement of legislative ratification under the classical paradigm. Kumm would like to avoid this hurdle, for he assumes that domestic politicians will pander to selfish interests of their voters, whereas judges will safeguard the more inclusive transnational interest. That is a rather pessimistic outlook on democratic politics, and it might well be a too optimistic view of courts. Kumm also ignores the potential for reasonable disagreement about whether a competence should be exercised at the domestic or international level. For example, social democrats often fear that economic regulation above the state will undermine their political values.

45 Note here that cosmopolitan pluralist subsidiarity is rather different from the subsidiarity principle that has long been part of European law. The latter is laid down in a treaty and it refers only to the question as to when the EU can exercise a competence shared with the member states (see Chapter 2). Cosmopolitan pluralist subsidiarity, in contrast, is a doctrinal invention that gives judges more or less unlimited power to decide at which geographical level a given issue should be regulated.
Is that a legitimate reason against delegation to an external regime? To resolve this question, a representative procedure is adequate; judicial discretion, in contrast, would have an oligarchical flavor.

Consider next the principle of democratic legislation: under the classical paradigm, a domestic court can find that an international regime must not exercise a particular competence, if its governance procedures do not meet democratic criteria. This test might affect the interpretation of a mandate the national parliament has ratified, or it can lead a high court to strike down a delegation of power as unconstitutional. Kumm is concerned that such review will frustrate international cooperation. He suggests that courts use instead the less demanding standard of due process: so long as an external regime allows for the greatest feasible citizen participation, it has sufficient legitimation of its own. One problem is the rather nebulous character of this formulation – Kumm offers no criterion to assess what counts as feasible. But I also submit that an international regime must remain so far below the standard of a constitutional state that we should maintain a categorical distinction between them. Recall the Habermasian prerequisites of democratic legislation: (1) individual rights that safeguard the public sphere, (2) a vibrant realm of civic association, (3) sufficient media infrastructure, (4) legislative institutions that can adopt policies based on the common good, (5) incentives for politicians to engage with public opinion, (6) tamed social power, (7) and virtuous dispositions on the part of citizens and elites. Governance beyond the state fails to meet most of these criteria.

Regarding prerequisite (1), let us make the – often unrealistic – assumption that domestic governments respect freedom of association, speech, and press, such that citizens might in principle join a transnational conversation. Even then, development of a robust transnational public remains improbable. Outside the domestic realm, civil society is much weaker than within states. Condition (2), in other words, is at least problematic. To be sure, in some issue areas, transnational NGOs
bring together citizens from different countries and formulate relevant shared concerns. Still, one must be skeptical as to whether these groups provide adequate representation of their supposed constituents. Prerequisite (3) is likewise hard to meet in the transnational realm. At present, there is little media infrastructure that could foster genuine discourse across borders.

Once we move from the level of the public sphere to the level of the political system, matters look even worse. Governance beyond the state does not fulfill condition (4), as the procedures of international bodies are inimical to a common good orientation. In particular, the decision rule of most regimes is unanimous consent, such that states able to withstand collective pressure can block action for selfish reasons. Prerequisite (5) is not met either: politicians lack a strong incentive to engage with public opinion, insofar as it can be said to exist. There are no elections that hold a particular actor responsible for the policies of a regime. Indirect legitimation of governments via the national parliament cannot quite make up for this deficit because international regimes work, for the most part, based on secret negotiation, such that domestic voters have little information about the performance of their representatives.

Furthermore, beyond the state, the background conditions for rational opinion and will formation do not exist. Regarding prerequisite (6), it should be noted that unequal power remains more or less untamed. There is no welfare state to guarantee the fair value of civil and political rights. It would also be false to claim that each person has equal representation via his respective government: powerful states command better staff and expertise, and sometimes their governments have formal privileges such as greater voting weight. In addition, diplomatic blackmail is a normal feature of international politics. Rule enforcement often enough depends on whether a delinquent state is unable to resist. Finally, transnational governance can empower private interests that have direct access to negotiations, which remain otherwise intransparent to the public. As for condition (7), we must also
conclude that it does not hold: an international regime is unable to count on political virtue (and it does not seek to). Participants in an intergovernmental negotiation are expected to maximize their own utilities, even if that prevents a better outcome for the collective. Contrast this with politics in a state. Here citizens and, in particular, officials are supposed to further the public interest. This attitude is rooted in imagined belonging to a *demos*, engaged in “social cooperation from one generation to the next.” To be sure, even if such a collective is perceived to exist, political virtue is often a scarce good. Yet the situation beyond the state is of a different kind altogether. In the case of a regime, whose legal order is not seen to constitute a specific collective, orientation toward the public weal does not even have a referent. There is neither an expectation that citizens and officials will pursue the common interest, nor the attempt to induce such a disposition.

Of the preceding, Kumm acknowledges the weak development of the global public sphere and the lack of elections beyond the state. But, as we have seen, the gulf between the domestic and the transnational realm is much wider. The differences listed above provide good reasons for domestic courts to police the delegation of power to external regimes. Sometimes the latter might still be defensible on balance. Yet we should not consider “fullest possible participation” as equivalent to democratic participation in a constitutional state.

Consider last the principle of basic rights protection: under the classical paradigm, national high courts must review if an external norm upholds the rights protected under the domestic constitution. Kumm instead recommends deference whenever the international regime provides its own check that individual freedom is not being violated. According to him, it does not matter which court safeguards rights, as long as one does. But is he correct? Earlier we noted that judges should not have exclusive power to determine the meaning of individual freedom. Where reasonable disagreement persists, courts should enter a dialog with elected politicians. In the domestic realm, a

46 This phrase was famously coined by John Rawls.
proper balance of power between judicial branch and legislature can enable such a relationship. But, as the preceding discussion has suggested, an international regime does not allow for genuine democratic will formation – hence there can be no interaction between courts and the institutionalized voice of the people. This, to be sure, does not matter so long as a regime limits itself to protecting rights with more or less straightforward content. Yet the situation is different when international judges rule on disputed questions such as the proper balance among conflicting liberties or the right equilibrium between individual freedom and legitimate public interests. Here, a national high court might have good reason to second guess an external ruling.

In sum, cosmopolitan pluralism, as Kumm describes it, remains an unpersuasive attempt to revolutionize our understanding of the relationship between domestic and international norms. This and potential other efforts to imagine supreme law apart from a specific collective suffer from a fatal defect. Once the people is denied the power to make its own fundamental order, the substantive principles of liberal and democratic constitutionalism lose much of their legitimating force. First, the rule of law will be deficient, if we do not think of competence as a popular grant of power, whose terms need to be enforced against those entrusted with its exercise. As soon as one severs this link between democratic constitution making and legitimate rule, the sole recourse left is the alleged wisdom of judges, lending them special insight as to who is “best” placed to decide a particular issue. Second, democratic legislation, too, presupposes an institutional setting geared towards equal freedom within a circumscribed group, whose members commit to a shared political life. Of course, individuals can “participate” where this condition is not met, but their input will fail to lead to the implementation of a common good – the fundamental purpose of all popular government. Last, if basic rights should not crowd out politics, their elaboration has to occur in dialog with democratic will formation. Where that is not possible, judges will again have more power than is de-
fensible. Against this background, I suggest that we maintain a clear distinction between the higher law of a particular collective, to which one can impute a decision to establish or sustain a framework to govern itself, and the various forms of legal order that exist in the transnational realm. Otherwise, the danger is that we overstate the significance of “constitutionalization.” To be sure, legalization, citizen participation, and rights protection are often desirable for governance beyond the state. But their implementation does not warrant coequal status between domestic and international norms. At best, such institutional reforms create a pale shadow of liberal and democratic constitutionalism. The real thing cannot exist within the transnational realm.

Does this mean that a heterarchical constellation is undesirable in principle? The remainder of the chapter will show that it remains a valid option. But pluralism should not ensue from a “Copernican revolution” in jurisprudence. Coequal standing of unit and center law is rather appropriate if both levels have a genuine constitution in the sense of the classical paradigm. How would such an order look like? The historical practice and theory of federalism provide a starting point to address this question.

A Third Way Between State and International Organization

Unions of states existed already in ancient Greece. Yet the federal idea was not a subject of theoretical reflection until the modern concept of sovereignty emerged around the 17th century. The advent of this idea provoked much debate as to whether the right to make the ultimate decision is divisible among the several organs of a political system. Most theorists, however, soon agreed that it could not be shared across multiple levels of governance: within a layered structure, either the units or the center had to be sovereign. The problem of this binary classification has always been that it failed to capture the empirical reality of federalism. Hence at various moments, challenges against the ortho-
dox view emerged, suggesting that a third way is possible. This story has been recounted elsewhere – a brief survey of the central episodes will therefore suffice here. Once I have sketched the historical background, we can turn to the most important modern advocate of the *via media* in constitutional thought: Carl Schmitt. His account of the Bund will help us to evaluate the dispute about the proper relationship between domestic and European law.

*The Idea of Heterarchical Federalism*

Samuel von Pufendorf was the first writer to distinguish a political form between state and treaty organization. The early theorists of sovereignty, notably Jean Bodin and Althusius, had emphasized the importance of concentrating power in one center. That is not surprising, given that an important motivation behind their doctrines was to propose a solution for the violent religious conflicts pervasive in 17th century Europe. In several places, the consolidation of a centralized state was in fact underway, but the federal structures of Switzerland, the Netherlands, and the Holy Roman Empire resisted classification within the new conceptual scheme. These polities were neither states, in the same way as, for example, absolutist France nor simple alliances, which is how the school of indivisible sovereign power conceived them. Pufendorf makes the difference quite clear:

>"The other kind of system is that which consists of several states bound to each by a perpetual treaty, and which is usually occasioned by the fact that the individual states wished to preserve their autonomy, and yet had not sufficient strength to repel their common enemy. [...] simple treaties have usually before their eyes only the particular advantage of the different states, as it happens to coincide, and do not produce any lasting union in matters which concern the chief object of states. The case is entirely different with the treaties that appear in systems, the purpose of which is that distinct

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states may intertwine for all time the prime interests of their safety, and on that score make the exercise of certain parts of the supreme sovereignty depend upon the mutual consent of their associates.\footnote{Andreas Pufendorf, \textit{De Jure Naturae et Gentium Libri Octo}, trans. C.H. Oldfather and W.A. Oldfather, vol. 2 (London: Clarendon Press, 1934), 1046-1047.}

Permanence is hence the first mark of such an order, setting it apart from a treaty or alliance, which provide a temporary framework to pursue a narrow shared purpose. The second distinctive feature is the creation of a sphere, in which the units cannot act without the center. Given the partial character of the union, this mandate remains limited to a specific range of powers. A third characteristic of a Pufendorfian “system” is that it deals with the political “chief object” – survival of the participating states.

The issue of heterarchical federalism came up again in the context of American political development.\footnote{Forsyth, \textit{Unions of States. The Theory and Practice of Confederation}, 105-132.} Writing as “Publius”, Alexander Hamilton and James Madison argued that under the 1787 constitution, both the states and the national government were sovereign within their domain: since the competences of each were clearly defined, two layers of supreme power could exist without contradiction. Yet \textit{The Federalist Papers} left important questions open: who interprets the extent of the unit and central sphere? Can the states invalidate federal laws held to be unconstitutional? Are the states permitted to secede from the union? These were the issues that John Calhoun, the great defender of state rights, raised in the 1840s. Calhoun denied the Supreme Court – whose national character he emphasized – the right to adjudicate competence disputes between the states and the central government. Furthermore, he considered nullification of federal laws possible and insisted on the right of the states to secede. Of course, proponents of a strong national government, led by Daniel Webster, disputed each of these claims. Which side was right? Mere recourse to the text of the constitution could not answer this question – the conflict was rooted in a disagreement over the
nature of the union. Webster presumed that one American people had established the constitution, whereas his opponent maintained that it represented a compact among independent states. The dispute was not resolved until the Civil War, which established the federal government as the ultimate sovereign.

Somewhat later, German theorists engaged in a similar debate. Here the historian Georg Waitz advocated the doctrine of *The Federalist Papers*, whereas Max von Seydel emerged as the defender of Bavarian “state rights.” Just like Calhoun, von Seydel argued that coequal sharing of sovereign power was a paradoxical notion: a layered political structure must be either a *Bundesstaat* (federal state) with a sovereign center or a *Staatenbund* (confederation), based on a treaty among states. According to von Seydel, the Second Empire of 1871 belonged into the latter group. This claim met near universal rejection – most legal thinkers now placed the German federation in the state rubric, contrasting it with the Bund of 1815, which in their view represented a confederation. Von Seydel, then, stood alone with his interpretation of the status quo. But his theoretical categories turned into textbook wisdom that such giants of legal thought as Georg Jellinek, Otto Gierke, or Louis Le Fur would propagate. As a result, the idea of federalism became assimilated into the state model. No longer was it open to a coequal relationship between units and center; theorists now understood federalism as one more instrument to disperse power in a single constitutional order.

*Carl Schmitt*

The most significant challenge against this orthodox view came from a somewhat unexpected corner. Readers of Carl Schmitt will associate with him the belief that stable political order presupposes a clear decision as to who is sovereign. But there is an exception to this most “Schmittian im-

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51 *———, Unions of States. The Theory and Practice of Confederation*, 133-146.
At one point in his work, Schmitt argued that federations of states can, under auspicious circumstances, leave the question open. The participants in the German debate of the 1870s missed this insight, he maintains, because of their polemical rather than scientific motives. Legal theorists, goes the claim, opted for a twofold classification scheme in order to make as clear a distinction as possible between the 1871 constitution and the Bund of 1815. This permitted them to emphasize that, at last, national unification had been achieved. From a more disengaged perspective, Schmitt holds, one would have to acknowledge the need for a conceptual middle ground. In the last chapter of his *Constitutional Theory*, he therefore developed a systematic description of a heterarchical federation or, as he calls it, a Bund. This political form is defined in a Pufendorfian vein as a permanent union among states, which pool certain sovereign powers in order to guarantee their survival. The units retain their own independent constitution, but the center also has a fundamental order, distinct from international law. Insofar as the paradox of coequal status is concerned, Schmitt offers the following resolution: while a heterarchical federation harbors an obvious tension, conflict need not break out – so long as that is the case, the question as to which level is sovereign can remain undecided.

To make sense of this argument, we have to understand the conceptual background. Schmitt views sovereignty as the factual power to decide an existential conflict, which for him means disagreement over who counts as friend and enemy. This kind of dispute is not amenable to a legal answer – the person or institution with the greatest political strength is going to assert their will. But Schmitt points out that, for the most part, the exercise of public power operates through legal channels, which is possible in the absence of existential struggle in the sense just defined. Federalism per se does not disturb this mechanism, despite the fact that it might entail the lack of a predefined ulti-

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54 ———, *Constitutional Theory*, 379-408.
mate arbiter. Schmitt argues that units and center can differ about a legal question if neither raises the dispute to fundamental significance. Such “disagreements [can] be mediated by [prudent] and just persons in good conscience.” A stable Bund must therefore be homogeneous to some degree. Here Schmitt does not have in mind a single cultural or ethnic nation; a heterarchical federation is rather a union of separate peoples. But these communities should not disagree about questions that permit of no compromise. If there is such a dispute – for instance over a basic moral issue – the problem of the ultimate decision becomes acute, it must be determined who is sovereign, and the union comes to an end, at least in its present shape. A heterarchical federation is therefore a fragile construct. Nonetheless, Schmitt implies that historical instances of this model have endured long enough for it to represent a discrete political form.

The Renaissance of Schmittian Federal Thought in EU Scholarship

Schmitt failed to make a dent in the canonical status of the “federal state” versus “confederation” antithesis. One reason is perhaps the general odium that would soon surround the “crown jurist” of the Third Reich; another impediment might have been his controversial definition of what it means to be sovereign. The immediate postwar era also came to be a golden age of the nation state, which made the issue of federalism at larger geographical scale less urgent. Whatever the correct explanation, the view that one should distinguish among three, not two, possible forms of layered political structures remained marginal. A problematic consequence is that, from a doctrinal perspective, some historical federations are indistinguishable from alliances or specialized international organizations. So long as the power of the center to render an ultimate decision is not established, both unions of states and much looser forms of political association belong into the “confederal” rubric.

55 __________, Constitutional Theory, 389. The translation puts “astute” instead of “prudent”, which is a somewhat imprecise rendering of the original “klug.”
European integration brought this classification issue to the fore again. While the ECJ once called the legal system of the Communities a “new order of international law”, the judges in Luxembourg soon dropped this phrase, failing to offer a clear alternative description. Meanwhile, lawyers across the continent embraced the notion that European norms are supreme, as if there was an overarching sovereign (of course no one would put it as blunt). The German Maastricht judgment exposed the illusory character of this “fable.” It described the EU along the lines of the confederal model, accepting the blurred distinction to an international organization. Neither view seems quite right: the EU, it should be evident, is not a federal state, but the judicial defense of the sovereign nation state is likewise questionable.

Already in 1966, Heinhard Steiger used the Schmittian Bund concept to escape the impasse. But this approach did not gain a foothold until the 2000s. In a recent book, Olivier Beaud provides a historical reconstruction of the via media in constitutional thought. He speculates that it might offer a useful template to describe the EU, but he does not take a definitive stance. Others have been less circumspect: these authors believe there is good reason for us to think of the status quo in terms of the Bund model. However, it remains an open question if this assessment is correct. Those who consider the EU a heterarchical federation point to certain features that are, without doubt, reminiscent of this political form. Yet the literature is still missing a comparison with a full

57 Baquero Cruz, "The Legacy of the Maastricht-Urteil and the Pluralist Movement," 389-391.
59 Beaud, Théorie de la fédération. See also Cohen, Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism, 80-158.
institutional account of the ideal type. Such an investigation, though, has the potential to be quite fruitful. The advantage of a Schmittian approach is that it precludes a premature classification of the European constellation as heterarchical. Analysis of the EU faces the same pitfall as the discourse about transnational constitutionalism in general. Sure enough, we can observe the presence of legalization, citizen participation, and rights protection. Yet that is not sufficient to establish co-equal status with the domestic constitution. As I have shown above, the crucial question is whether a transnational order embodies the higher law of a genuine political union. Most arguments for a heterarchical understanding of the European order disregard this point (see Introduction). Using the Bund concept will prevent us from making the same mistake.

The Ideal Typology

Let us summarize what has been established so far. A layered political structure that divides competences between units and center can take three forms: 1) It can be a federal state, which is a framework through which a single people, spread across multiple geographical units, governs itself. Here the center is sovereign. 2) It can be an international organization that provides a means for states to cooperate with regard to a narrow purpose. Here the units are sovereign. 3) Or it can be a Bund, which is a constitutional union of independent states, established to realize important shared goals. Here the question of the ultimate decision remains open.

The political logic that underlies each ideal type is associated with particular institutional features. As for the federal state and the international organization, these should be more or less familiar. I recapitulate the distinction in order to bring the traits of a Bund into sharper relief. Our discussion of the latter will, to a significant degree, follow Schmitt. This raises an obvious question: can we draw from this author, given his problematic theoretical commitments?
For Schmitt, as we have seen, the tension inherent to the heterarchical model is that both units and center can decide questions of existential importance. This creates a latent potential for conflict, and hence, Schmitt believes, there must be consensus over the distinction between friend and enemy. If political actors within the federation agree on this matter, the question as to which level is sovereign can be left open. Schmitt, it bears emphasis again, does not think that Bund citizens form a single nation – in fact, the point of creating a shared order is to enable different peoples to remain distinct from each other. This, goes the argument, presupposes consensus over basic political values: a theocratic state, for example, could not federate with liberal and democratic republics. So far, it would be hard to disagree with Schmitt. More worrisome, though, he goes on to maintain that national “kinship” is the best guarantee that existential conflict does not arise. However, the same passage acknowledges that a federation might be homogeneous in other regards: its population could share the same “civilization” (a rather malleable criterion), religious views, or it might define itself in class terms. The basic claim here is that a Bund cannot survive when a conflict among the member states becomes so intense that dissolution of the union or even internal war seem adequate means to settle the matter. This, of course, is more or less a truism. We can accept the point and still disagree with Schmitt about the importance of ethnic or cultural likeness for a stable and lasting federation.

One further problem, though, still remains: the constitution of a state claims to be supreme over external norms, regardless of whether an existential question is at stake or not. If our goal is to use the idea of the Bund to understand the European constellation, we must therefore consider how judges can enforce federal norms that stand in tension with the domestic higher law. That is possible, I submit, if the Bund fulfills the same standard of constitutionalism that governs public power at the unit level. Unlike in a “cosmopolitan pluralist” scenario, the fundamental order of a heter-

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archical federation has democratic sanction. With the decision to join the Bund, a member state people establishes the law of the center as part of its total constitution, together with the existing domestic order (see below). Hence the sole remaining question is whether both levels espouse the same fundamental principles of legitimate rule. Insofar as that is the case, there is no unbridgeable tension between unit and center law. Should conflict arise over a particular question, it will be interpretive disagreement, rather than a conflict about basic axioms. With regard to the European case, this means that a member state court should be able to recognize a federal measure, so long as the latter has been enacted in accordance with the rule of law, democratic legislation, and basic rights protection. Domestic judges interpreting domestic law might still reach a different result, but enforcement of the Union norm would not undermine the project of constitutionalism as such.

Although Schmitt fails to address this particular dimension of the heterarchical paradox, his account of the Bund is still relevant for us. To be sure, the infamous advocate of populist dictatorship has little concern for the principles of liberal and democratic constitutionalism as we have defined them. Yet he responds to a more fundamental question: in what sense can the units of a layered structure remain independent states, while also forming a genuine political union? As we have seen, the existence of the latter is the conditio sine qua non for the proper realization of the rule of law, democratic legislation, and basic rights protection. Since Schmitt resolves the tension between independent peoplehood and loyal participation in a federal scheme, we can glean from his discussion at least the basic contours of how a genuine fundamental order beyond the state could look like. For this reason, the idea of the Bund remains useful. However, we must go beyond Schmitt in some respects. One point that requires further elucidation is the nature of the federal collective referent. For Schmitt, a Bund is a union of states, not of citizens. Yet some theorists of heterarchical federalism have argued that it contains both elements. Another question we need to grapple with is the rela-
tionship of individual citizens to the federal order, which Schmitt leaves unexamined. Below is an overview of the classification scheme that I propose (Table 1). The following discussion will elaborate on each typological dimension in turn.

<table>
<thead>
<tr>
<th></th>
<th>Federal State</th>
<th>Intl. Organization</th>
<th>Bund</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal basis</strong></td>
<td>Constitution</td>
<td>Treaty</td>
<td>Constitutional treaty</td>
</tr>
<tr>
<td><strong>Permanence</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Amendment rule</strong></td>
<td>Majority</td>
<td>Unanimous consent</td>
<td>(Majority)</td>
</tr>
<tr>
<td><strong>Jurisdiction</strong></td>
<td>Limited/ original</td>
<td>Limited/ delegated</td>
<td>Limited/ original</td>
</tr>
<tr>
<td><strong>Supremacy</strong></td>
<td>Yes</td>
<td>No</td>
<td>Undecided</td>
</tr>
<tr>
<td><strong>Direct effect</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Enforcement</strong></td>
<td>Yes</td>
<td>No</td>
<td>(Yes)</td>
</tr>
<tr>
<td><strong>Citizenship</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes (tiered)</td>
</tr>
<tr>
<td><strong>Legislative process</strong></td>
<td>Bicameral parliament</td>
<td>Conference of the parties</td>
<td>Federal diet or bicameral parliament</td>
</tr>
<tr>
<td><strong>Subject of intl. law</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**Table 1: The Ideal Typology**

**Legal Basis**

A federal state is founded on a constitution that prescribes a distribution of competences between the central government and geographical units. Even so, the decision to establish the fundamental order is attributed to the constituent power of a single people. The purpose of the higher law is to enable this collective to pursue its common good. In contrast, an international organization is based on a treaty among states. This agreement does not establish a political union. Its goal is rather to empower the member states to cooperate insofar as each of them has an interest to do so – common policies must therefore lead to a Pareto improvement.⁶²

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⁶² Pareto improvement is a concept in economics. It refers to a change in a given allocation of goods that makes at least one actor better off, while making no one worse off.
The legal basis of a Bund is a “constitutional treaty”, or a hybrid between a constitution and an international agreement. Its contracting parties are peoples that retain an independent political existence but, at the same time, change their previous fundamental order. The resulting federal compact is the higher law of the union; it also becomes part of each member state constitution. To enter such a federal compact is hence a decision that one must attribute to the constituent power of the respective member state people. This act founds an overarching political union: a Bund is the referent of a shared interest, whose pursuit goes beyond Pareto optimization. However, the exact nature of this collective referent is disputed. Schmitt conceives of the Bund as a union of peoples; according to him, there is no federal demos of individuals. But other theorists believe that a heterarchical order is a union of states and citizens. One author who favors such a bipartite understanding of the federal subject is Habermas. Following Madison, he argues that a heterarchical system is based not just on the constituent power of each member state people, but also on that of the federal citizens who form an overarching demos. Of course, this conception does not make a great practical difference with regard to the founding moment. If all member state peoples agree to a federal compact, it follows that a majority of individual citizens support the decision to found a Bund. The disagreement about the nature of the federal subject is nonetheless significant – it leads to divergent views about democratic representation in the normal legislative process. We return to this point below.

Permanence

The federal state is a political order aiming for permanence. Secession of a unit is illegal, and when it occurs, it will often involve violent rebellion. Why is that an important feature of the ideal type?

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63 Schmitt, Constitutional Theory, 385.
64 Habermas, Zur Verfassung Europas, 62-69.
The unlimited duration of the state enables solidaristic redistribution among the units. Transfer of resources is considered to profit the whole, and present recipients can be expected to provide their share in the future. In contrast, an international organization permits unilateral termination of membership. Since the regime has been created to pursue a specific overlapping interest, states can exit, if participation is no longer useful to them. Here the Bund is distinct from the international organization because it represents a genuine political union. To be sure, the partial character of the latter limits the extent of possible redistribution. Yet in order to reach a better outcome for the whole, federal policies will often disregard the particular interests of the units. A possible threat of secession would undermine such an orientation toward the common good. Unilateral exit of a member state is hence not foreseen.  

Amendment Rule

The constitution of a federal state is amendable through popular decision, which means in practice a legislative vote or a referendum. Sometimes, there is a minimum number of units that must vote in favor to pass a change. In contrast, amending the ground rules of an international organization requires unanimous consent among the member states. The rationale here is that a treaty does not create a collective subject, which can henceforth make autonomous decisions. Rather each member state retains its full independence, and therefore all of them have to sanction a change of the initial agreement.

What kind of amendment rule is suitable for a Bund? On the one hand, the federal compact establishes a political subject that can make autonomous decisions. But this collective is unable to exercise constituent power independent from the will of the member state peoples. Since each do-

\footnote{Schmitt, \textit{Constitutional Theory}, 385. Note that Schmitt does not explicitly mention the link between permanence and solidarity.}
mestic fundamental order changes along with that of the Bund, all unit communities must consent to a significant reorganization of the federal system. Yet note that even in a state, amending the higher law does not have to involve the constituent power of the people. Schmitt, at least, holds that changes, which respect the applicable legal procedures, can be understood to result from the constituted power of legislative organs. To be sure, gradual expansion of central power via this route might transform a Bund into a state. Such a misuse of the amendment mechanism has to be prevented because it would negate the aspiration of the unit peoples to determine the nature of their political existence. The aspects of the federal order that define its heterarchical character should therefore be protected from amendment based on majority decision.

However, even with such a proviso in place, the problem is not quite resolved: could one not imagine amendments that leave political form untouched, but which are nonetheless significant enough to implicate the exercise of constituent power? For example, some consider the New Deal in 1930s America to represent a moment, during which the people itself has updated the higher law. A fundamental change of this kind would seem impermissible for a Bund, unless all member states consent to it, even despite the fact that a transformation of the relationship between state and market need not affect the heterarchical character of the federation. The crux here is that it would be rather difficult to rule out such a transformation through a formal limit on the use of the regular amendment mechanism. This problem underlines the inherent challenge of making good on the promise of the Bund to uphold the independence of its units. Success will depend in some measure on the readiness of political actors to honor the commitment.

66 ———, *Constitutional Theory*, 150-158.
68 Bruce Ackerman, *We the People. Foundations* (Cambridge, MA: Harvard University Press, 1991), 3-33. For Schmitt, in contrast, genuine decisions over the fundamental order are limited to the establishment of a new form of government or accession to a Bund. See Schmitt, *Constitutional Theory*, 75-77.
Jurisdiction

In a federal state, the constitution distributes competences among units and center. This division of powers reflects a decision of the people to design their fundamental order in a particular manner (and it can be revoked through a constitutional amendment). Since no external agent has bestowed it, the jurisdiction of the federal government is original. The competence of an international organization, in contrast, is delegated: the member states grant the organization powers over a narrow field, which it must not exceed. Since domestic law regulates the act of conferral, the ratification statute and pertinent constitutional norms remain the ultimate measure for adjudicating possible conflict about the precise meaning of the delegation. The mandate of a Bund will be less circumscribed, although it will tend to be not as wide as that of a federal state. Unlike the mission of a typical international organization, the tasks of the federation will often have a direct bearing on the survival of each unit. The jurisdiction of the center is moreover original. As we have seen, the right of the Bund to govern within the federal competence sphere derives from the constituent power of the member state peoples. Disagreement regarding the precise extent of this mandate can still arise. But the yardstick here is the federal compact; domestic norms are irrelevant to the question.\(^69\)

Supremacy

The constitution of a federal state is the supreme law of the land. Its provisions always trump conflicting norms from the lower tiers of governance, and so do acts of the central government. The rules of an international organization claim to stand in a similar relationship to domestic law, but member state courts will often not enforce them in case of a collision, in particular when the latter involves constitutional norms. A Bund, in contrast, leaves the precise relationship between unit and

\(^{69}\) Schmitt does not analyze the nature of jurisdiction in a Bund. This ought not to surprise us, given that he does not consider the risk of norm collision to be an important aspect of the “federal antinomy.”
center level open. While the federal order is, for practical reasons, often allowed to override local norms, an ultimate hierarchy does not exist. This becomes clear if we bring to mind what it means that national constitution and federal compact make up equal parts of the fundamental order within a member state. National high courts determine the meaning of the former, yet their power does not extend to interpretation of the latter. The federal compact rather establishes a separate judicial system. As the relationship between the orders is coequal, there is no institution that could reconcile conflicting appraisals of the same situation, which might arise if both levels claim jurisdiction.

Direct Effect

The central government of a federal state can impose rights and obligations on individual citizens. In contrast, an international organization regulates the behavior of governments. The absence of an unmediated legal relationship between individuals and the regime limits the influence of adjudication on legal evolution. Independent judicial norm creation would be problematic, because the ideal type prescribes that each member state assent to a common decision (see below). To the extent that courts develop norms, this principle is undermined. Hence the role of judges must remain limited to dispute settlement among governments. This does not altogether rule out that a regime will evolve in a direction the principals have not foreseen. But when court access is restricted to governments, judges will less often have the chance to influence the content of the law than in a situation where private actors have standing to litigate. A Bund, in contrast, abolishes the categorical distinction between internal and external norms. Uncontrolled legal evolution is therefore less of a concern. The judicial system of the center has the same constitutional legitimation as its domestic counterpart. In particular, the federal courts operate within a separation of powers framework, which is

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designed to prevent excessive latitude in judicial lawmaking. Against this background, direct effect is unobjectionable and indeed crucial to effective discharge of the federal mandate.\textsuperscript{71}

\textit{Enforcement}

A federal state monopolizes legitimate violence within its realm. The center has either direct control over the execution of its policies, or it might supervise local government, whose compliance it can exact through force. An international organization, in contrast, does not have access to instruments of coercion. It might be able to “shame” delinquent parties or impose penalties on them, but it cannot use violence to assert its will. The Bund occupies a position in the middle. It needs to oversee the implementation of federal policies within the units, and it requires means of intervention to react to violations.\textsuperscript{72} Yet, unlike a state, the Bund does not monopolize legitimate violence, since this would contradict the aspiration of the units to remain independent outside the federal sphere. Each local government therefore retains its own coercive potential. This means that even though the member states commit to a permanent union that can punish rule violation, a measure of doubt as to the effectiveness of the shared order might linger. If an existential question is at stake, a unit could decide to resist the center. Provided the former has enough wherewithal, such an attempt to dodge a federal obligation might succeed.

\textit{Citizenship}

The constitution of a federal state defines who is a citizen and establishes their basic rights and obligations. As we discussed earlier, the objective here is to guarantee equal civil, political, social, and economic freedom. Rights set forth in the higher law constrain both the federal government and the

\textsuperscript{71} \textit{Constitutional Theory}, 398.

\textsuperscript{72} \textit{Constitutional Theory}, 387.
unit authorities. Furthermore, the member states have to afford each citizen the same treatment, regardless of where in the federation she hails from. In contrast, there is no individual membership status within an international organization. Does it exist in a Bund? Schmitt leaves this question unexamined. For him, the Bund is a union of states; he does not address the issue of citizenship. Yet Christoph Schönberger has shown that real world federations give member state nationals two characteristic privileges: free movement and some degree of equal treatment. What does this mean? Everyone can move to and reside in any place within the federal realm; there she partakes in at least some of the rights and obligations that national citizens have. In other words, borders within the federation become porous. The precise meaning of this aspiration will of course be subject to dispute. To what extent can the host government still impose conditions on newcomers from other member states? How far does equal treatment go – should it also include welfare entitlements or the right to vote and stand for office? Such questions concern what Schönberger refers to as the “horizontal” aspect of federal citizenship – the rights and obligations of individuals against the member states. The “vertical” dimension is the relationship between the citizen and the Bund itself. Individuals require a legal guarantee that federal public power will respect and seek to promote civil, political, social, and economic freedom. This, however, generates a peculiar tension. The enumerated powers of the Bund limit its potential to realize the promise of equal rights and opportunities for all citizens. It must leave enough freedom for the member state communities to pursue their own course toward this end within their respective sphere. But this means that federal citizens can never be quite equal, for each member state will establish a different set of rights and obligations. The more the Bund seeks to harmonize, the less space each unit people has to express its own democratic preferences. Another riddle of Bund citizenship is the nature of its political aspect. Should

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representation at the federal level occur through member state governments? Or should individuals have a more direct voice? If, as we shall discuss in a moment, one adheres to the bipartite understanding of the overarching subject, a mixture of both would seem to be the right solution. But again, we have to keep in mind that empowering the federal citizen means reducing the collective freedom of the member state peoples. In sum, then, one can think of citizenship in a Bund as tiered. Each individual has a full set of rights and obligations at the unit level, and there will be significant variation regarding its precise content across the member states. On top of this, the federation establishes a second tier of citizenship, subdivided into horizontal liberties that individuals have against member states other than their own, and vertical liberties, which individuals have against the central government. Both bundles of rights contain just a subset of the comprehensive list of freedoms that make up the privileges of citizenship in a state.

**Legislative Process**

The legislative institution of a federal state is a bicameral parliament. While the lower chamber speaks for the whole people, representation of the units in the upper chamber ensures that political will formation takes into account local preferences. In contrast, an international organization legislates through a conference of the parties. As mentioned earlier, rules agreed here should make all member states better off. No government can therefore be obligated against its express will – the decision rule is unanimous consent.

The design of the legislative process in a heterarchical federation depends on how its collective referent is understood. If, as Schmitt believes, the Bund is a union just of states, its legislative organ must be a diet, which consists of instructed delegates from the member state governments.74 Since consensus rule would impede the formulation of policies based on the common good, decision

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making in such an institution will often be majoritarian. The purpose of this setup is to determine a federal public interest, based on fair compromise among the member state preferences. Yet, as we noted, there is another view of the Bund as a union of both states and individuals. Similar to a federal state, legislative power must then be vested in a bicameral parliament. The diet becomes the upper chamber, whereas the lower chamber represents the overarching *demos*. Political will formation under this arrangement is supposed to mediate between the public interests of the member state peoples and that of the federal citizens.

There is disagreement in the literature, we should note, as to whether the second approach is still consistent with the heterarchical model. Murray Forsyth agrees with Schmitt that a Bund is foremost a union of states. According to him, it cannot seek to represent a *demos*, although the latter might of course emerge over time and claim institutional representation. But this process, Forsyth believes, amounts to a transformation into a federal state.\(^7\) Olivier Beaud, in contrast, holds that a Bund committed to democratic governance cannot but establish a federal parliament that gives a direct voice to individual citizens.\(^6\) His central example is the American case: the founders created an order that, at the outset, resembled a Bund more than a state, and which established a popular chamber at the federal level. To be sure, in the course of its political development, the United States departed from the heterarchical model and established a sovereign center. Yet the initial constellation lasted for almost eight decades, before the Civil War undid it.

Neither position in this debate is quite persuasive. Forsyth, as the American example suggests, is wrong to argue that a heterarchical system cannot, in principle, go together with a popular chamber at the federal level. The creation of such an institution is hence not tantamount to a transition from a Bund to a state. At the same time, Beaud is wrong that a federation committed to democratic

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governance must establish a popular chamber. At least in principle, we can imagine a diet scheme that derives its legitimation from democratic processes at the unit level. Such a constellation, to be sure, has little historical precedent. Past heterarchical federations that governed through diets alone were predemocratic (Switzerland, the Netherlands, and the German Bund of 1815) or, at best, protodemocratic (the United States under the Articles of Confederation). Nonetheless, Chapter 5 will argue that in the specific case of the EU, it is both possible and desirable that a future Bund operate without a federal popular chamber.

Subject of International Law

States are the main addressees of international law and participate in making it. An international organization is likewise subject to treaties and custom, but it cannot author legal rules (at most, it provides a forum through which the member states generate them). The Bund, in contrast, has full international legal subjecthood – it represents the union against the external world insofar as the constitutional treaty so envisages. Yet the member states retain competence over the fields that remain outside the federal mandate, and therefore hold international legal subjecthood as well. 77 This distinguishes the units of a heterarchical federation from regional and municipal organs within a state, which are neither direct addressees of international law nor participate in making it.

The Epistemological Function of the Ideal Typology

What do we gain from this classification scheme? And why this particular typology in the first place? There are of course other ways of telling apart layered political structures. For instance, one standard distinction in comparative political science is based on how fiscal authority and electoral control are distributed. The “unitary state” monopolizes fiscal resources and the people as a whole elects its

77 Schmitt, Constitutional Theory, 396.
leaders; in a “union”, the center has exclusive fiscal authority, but representatives of the units make up the central government; a “federal state” divides fiscal authority and electoral control; the “confederation” remains in both aspects dependent on the units. Further definitions and categories abound. The crucial point here is that no such scheme is “right” in general. We should rather evaluate the different approaches relative to their stated analytical purpose.

Our eventual goal is to address a problem of constitutional theory: what is the proper relationship between domestic and European norms? The suggested typology is adequate to examine this question. Monism, dualism, and pluralism exhaust the range of possible answers: in a layered structure, unit law may either be subordinate to center law, the reverse may be the case, or the relationship is coequal. This chapter has suggested that each relationship corresponds to a respective political form: state, international organization, or Bund. Which ideal type fits a given structure ought to determine the relationship between unit and center norms.

But why should empirical match with a theoretical construct lead to such a conclusion? To make this plausible, I have to elaborate on how the notion of an ideal type is used here. Max Weber developed the concept for application in empirical sociology. He proposed to arrange concrete individual phenomena into a unified analytical construct, making relevant similarities among them evident. For him, the ultimate goal of ideal type formation is to describe a context, in which certain actions make sense, while others do not. This allows the scientific observer to understand social phenomena. For example, in a setting where the “Protestant ethic” is prevalent, individuals will consider it rational to defer consumption and to save. According to Weber, the advent of this mindset in the wake of the Reformation accounts for the emergence of capitalism. The concept of the Protestant

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79 It might be objected that, instead of discrete categories, one could imagine a continuum between centralization and decentralization. But this notion is unhelpful for doctrinal purposes. A continuous scale has an infinite number of points, and hence it cannot provide much specific guidance concerning the relationship of unit and center law.
ethic is an ideal type. Its explanatory power does not stem from the fact that all or most people in early modern Europe subscribed to precisely the same ethical system. The idea rather emphasizes certain shared aspects of the prevalent value orientations, which are germane to understanding the capitalist transformation.\footnote{Oswald Schwemmer, "Idealtypus," in \textit{Enzyklopädie Philosophie und Wissenschaftstheorie}, ed. Jürgen Mittelstrass (Mannheim: J.B. Metzler, 1984).}

However, we are not engaged in sociological explanation – our question is normative: how should one construe the relationship between unit and center norms in a given layered structure? The Weberian notion of contexts of meaningful action, though conceived for the purpose of empirical investigation, can help us to disentangle this puzzle as well: state, international organization, and Bund each have an underlying political logic, which makes it appropriate for courts at the unit level to deal with the legal system of the center in a particular manner. For us, then, the point of drawing up a classification scheme is not to understand how judges behave in fact, but rather to determine which doctrinal stance would be appropriate from a theoretical standpoint.

Of course, the conceptual matrix we have developed to address this question is not neutral: it derives from what I call here the liberal and democratic reading of the classical paradigm – a specific philosophical account of constitutionalism. The chapter has furthermore argued for the unorthodox position that within this framework, it is possible to conceive of a heterarchical system that leaves the question of the ultimate decision open. One might reject this claim or adhere to a different understanding of constitutionalism altogether. But if the chapter has succeeded in developing a plausible ontology of layered political structures, the puzzle becomes an empirical one: which ideal type fits the structure under investigation? Sometimes, this will not be obvious because the system in question is a hybrid. When that is the case, ideal types can turn into polemical weapons that interested parties use to advance their preferred reading of the status quo. All we can then do is to evalu-
ate which camp has the better of the dispute. Yet it might be that a clear answer is not possible. The EU poses such an intractable conundrum, or so the next chapter will argue. But this does not make our classification scheme useless. Rather it points to a state of crisis. But let us not get ahead of the story.
Chapter 2

The Hybrid Status Quo

What is the political form of the EU? A plain reading of its foundational documents does not lead to an immediate answer. Consider Art. 1 TEU: “By this Treaty, the High Contracting Parties establish among themselves a European Union […] on which the Member States confer competences to attain objectives they have in common.” So far, there is nothing that points to the existence of an federal constitution. “High contracting parties” – a term characteristic of international treaties – enacted the agreement in order to delegate certain powers to a designated agent. Yet the text then continues in language that is reminiscent of the US constitution: the treaty, we learn, “marks a new stage in the process of creating an ever closer union among the peoples of Europe.” This formulation might well be understood to suggest the existence of a Bund or even of a federal state.

Pointing out the *sui generis* character of integration does nothing to resolve the puzzle. The status quo must fit somewhere into the classification scheme from the previous chapter. As we have seen, this analytical framework exhausts the set of possible constitutional relationships within a layered political structure. The following analysis will therefore use the proposed threefold heuristic to assess the present European system. I conclude that a straightforward classification remains elusive. The EU, it should be obvious, is not a federal state. But whether the current institutional structure fits the international organization or the Bund model is a more complex issue. The 1957 Rome Treaty created a regime that approximated the former in most respects. What is more, politicians or voters rejected several explicit proposals to establish a federal system. Nonetheless, over time, a gradual process of evolution and reform created a framework that resembles a Bund up to a point. Some features of the EU, though, still cohere with the international organization model. In sum,
the continent has made important steps toward heterarchical federalism, but the present constellation remains a hybrid.

**The Status Quo and its Evolution**

Our main focus is on the EU after Lisbon. But given the mixed character of the status quo, it will be useful to consider the history of integration as well: does it show an unequivocal, if still incomplete movement from one ideal type to another? It will become clear that even here, the evidence is ambiguous. While the EU has evolved to match the Bund model in certain respects, some more recent institutional changes hark back to its roots in the sphere of international relations. To assess the present constellation and, where relevant, its historical evolution, let us consider each dimension of our classification scheme in turn.

**Legal Basis**

The EU is based on the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). This body of “primary law” is the result of a standard treaty making procedure. National governments negotiated its content; once agreement had been reached, the outcome was ratified in each member state. To be sure, the Treaty establishing a Constitution for Europe (TCE) of 2004 deviated somewhat from this pattern: a transnational convention worked

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1 This legal framework has emerged through a complex process. In 1957, the Rome Treaty established the European Economic Community (EEC), whose internal market regulation became the centerpiece of the integration project. At the same time, the original six member states created the European Atomic Energy Community (EURATOM). Six years earlier, the history of integration had begun with the European Coal and Steel Community (ECSC). The three Communities later merged their institutions. In 1986, the first major amendment of the treaties took place: the Single European Act (SEA). Under the 1992 Maastricht Treaty (the TEU), the European Communities became the first pillar of the newly created EU; its second pillar was Justice and Home Affairs (JHA), and its third pillar the Common Foreign and Security Policy (CFSP). Both JHA and CFSP built on previous cooperation outside the Community framework. Maastricht also renamed the EEC as European Community (EC). The TEU and the treaties preceding it were amended further at Amsterdam (1997) and Nice (2001). In 2004, the member states signed the TCE, which consolidated European primary law into one document. Ratification failed, however. The Lisbon reform of 2007 retained the old multipronged structure. It amended the TEU and the EC Treaty, which became the TFEU (the ECSC Treaty had expired in 2002; EURATOM remains a separate organization).
out a draft text and then submitted it to an intergovernmental conference tasked with the negoti-
ation of the final document. Yet, after ratification had failed, the member states reverted to the old way of doing things when negotiating the Lisbon Treaty. This genesis implies that the EU does not have a constitution in the same manner a state does. But its treaty framework might still represent a federal compact in the Schmittian sense. We should hence ask if one can ascribe to the member state peoples a decision to join a Bund. To answer this question, one must know what it means that participation in a federal union has popular sanction at the unit level. In the previous chapter, I have suggested that a legal regime is founded on constituent power, if there has either been a genuine democratic founding, or if citizens have, over time, come to accept the order in question as their legitimate higher law. Hence a federal compact might result from an explicit constitution making process, in which a foundational document is proposed for ratification in each member state, be it through a legislative vote, a popular referendum, or a national convention (Chapter 6 will examine the relative merits of these options). But one can also imagine a process of gradual evolution. Citizens might over time adopt the view that an erstwhile international order has become a federal system.

The EU, it should be evident, did not have a “constitutional moment” of the first kind, for the member state peoples never adopted a formal federal compact. National parliaments, to be sure, have ratified each successive amendment of the treaties. But these were understood as international agreements – there was no public declaration of constitutional significance. John Erik Fossum and Agustin Menéndez nonetheless believe that a founding of sorts took place. According to them, the 1957 Rome Treaty marked a “synthetic constitutional moment.” The original six member states, goes the argument, rejected the immediate creation of a federal system. Instead, national leaders en-

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2 Schmitt himself does not consider this question.
visaged the piecemeal development of a common fundamental order. Their objective, Fossum and Menéndez claim, was a gradual merger of the domestic constitutions into a European higher law, or at least the Rome Treaty “struggled to express” this idea. What is more, the project of synthesis had indirect popular authorization, insofar as five of the six national founding texts included clauses that opened the respective state toward European integration.⁴

How persuasive is this account? From a historical perspective, the notion of a synthetic constitutional moment is rather fanciful. The authors provide no direct evidence of their assertion that participants in the negotiations leading to the Rome Treaty wanted to fuse domestic norms into a shared fundamental order.⁵ But what about the anticipation of the integration process in domestic higher law? There is no doubt that greater European cooperation was an issue of the greatest importance for the postwar generation. The first half of the 20th century witnessed the most violent conflict in history, and unrestrained Westfalian sovereignty had been a structural cause. Against this background, the new constitutions of European states permitted and encouraged the transfer of competences to international organizations. The existence of such provisions, however, does not establish that national founders intended to build a shared fundamental order for the continent. As Peter Lindseth has shown in a recent book, the relevant clauses are better interpreted to envisage

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4 Fossum and Menéndez refer to provisions that allow the government to transfer sovereign powers to international organizations. Some of these clauses make an explicit reference to the goal of peace on the continent. But no domestic constitution envisages a European fundamental order in so many words.

5 Even as description of what happened after 1957, the notion of synthesis is problematic. One might consider European law to build on member state traditions of balancing individual rights with each other and the public interest. Yet in how far a combination of these disparate bodies of law has in fact taken place, or is even possible, remains questionable. Hence the authors must argue that synthesis is about drawing the “best reasons” from the overall doctrine pool. See Fossum and Menéndez, *The Constitution’s Gift*, 172. This presupposes an epistemological assumption that genuine and reasonable disagreement over rights does not occur, or at least not often. From such a perspective, constitutional jurisprudence aims for a progressive movement toward the most rational pacification of social conflict. For understandable reasons, this view is popular among scholars of jurisprudence. Yet in rights dispute, a single best answer remains often elusive – which solution to adopt is then not simply a matter of legal rationality, but a political question, to which different communities will find different solutions. Insofar as the ECJ makes these decisions, domestic higher law is replaced, and not in some alchemical way preserved (see Chapter 3). Moreover, we should note that a constitution does not just serve to protect rights. It also establishes an institutional framework for the exercise of public power. Regarding this aspect, Fossum and Menéndez concede that it would be misleading to describe the European system as the product of a synthesis. See ———, *The Constitution’s Gift*, 53.
“administrative governance” beyond the state. This, at least, is how most of the 1957 drafters understood their mandate.⁶

What does the notion of administrative governance entail? Lindseth notes that in the 20th century, the ideal of parliament enacting all important political decisions through general legislation turned out to be impracticable. Increased functional demands on the state motivated the delegation of power to regulatory agencies, which needed significant independence to fulfill their task. This, in turn, led to a new constellation of public law that he refers to as the “administrative governance settlement.” Under this framework, executive oversight and, less often, parliamentary intervention ensure that bureaucrats remain accountable to elected leaders. In addition, judicial review prevents transgression of the delegation mandate and violation of individual rights.⁷ According to Lindseth, the European Communities represented a transnational manifestation of this new paradigm. The new regime was created, because the member state governments believed that experts (meaning the Commission) should make enforceable regulation to promote economic growth across the continent. One underlying motivation for this project was to build a stable peace that was expected to result from commercial integration. How did the drafters of the Rome Treaty plan to get there? According to Lindseth, the answer was intelligent administration, not a federal constitution. Of course, it is up for debate whether the subsequent progress of integration did in fact follow a path of bureaucratic delegation. Lindseth believes this has been the case; the administrative governance paradigm, he argues, remains the best framework to understand the EU, and future reform should begin from this insight. Here I disagree with him (see Chapter 4). But for now, the crucial point is that it would be false to see 1957 as a moment of constitutional founding.

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⁶ Lindseth, Power and Legitimacy, 107-120.
⁷ ———, Power and Legitimacy, 61-90.
If that is so, we still need to examine whether European citizens have, over time, come to think of the Union order as their shared higher law. The answer to this question is rather straightforward. When faced with a choice, voters and elected leaders have time and again rejected the idea of a transnational constitution. Ingolf Pernice counts three attempts to establish an explicit higher law for the EU. None of these efforts aimed to create a single European Leviathan. Rather the proposal was to establish a federal compact among states, which retain an independent political existence. But the undertaking failed each time. In 1984, Altiero Spinelli prepared a constitutional draft for the Parliament, but it could not garner enough political support. The member states instead chose to adopt the Single European Act (SEA), which remained within the symbolic framework of international law. Ten years later, the Parliament submitted the Herman Report, another constitutional blueprint. Yet, once more, the member states ignored the proposal and negotiated the Amsterdam Treaty. The furthest advance came with the TCE, which the heads of government signed in 2004. A new drafting method as well as form and content of the document signaled that it was again time to take a stand on the nature of the European legal order. Sixteen national parliaments and referendums in Spain and Luxembourg confirmed the document, but Dutch and French voters rejected it, and the ratification effort was then abandoned. While the subsequent Lisbon reform kept most of the envisaged institutional changes, it returned to the symbolism of international law.

In sum, the European order neither had a constitutional moment at the outset, nor have member state citizens recognized it as their shared higher law over time. Pernice, I should mention, does not agree with the latter half of this conclusion. For him, the failure of the TCE was a close enough miss to warrant treating European norms as proper higher law:

“the very process of drafting a Constitution in a manner as open as that of the Convention, the [...] debating of ratification in national parliaments and referenda, and [...] reflecting upon the con-

sequences of the rejection of the Constitutional Treaty and the Treaty of Lisbon, has raised public awareness, stimulated discourse, and formed minds about the Union, its institutional framework, its powers, and its goals.”

That is without doubt true. But the fact remains that Dutch and French voters rejected the TCE, or at least considered its fate less important than showing dissatisfaction with their national leaders. What is more, referendums scheduled in Ireland and the UK were expected to yield similar outcomes. One should also note that most successful ratifications occurred through a simple legislative vote, which raises the question if the support of the political class alone is sufficient to make a decision of such fundamental importance (see Chapter 6). Against this background, it would be inappropriate to characterize EU membership as resting on constituent power at the unit level – the current legal framework remains an international agreement; it does not represent a federal compact.

Permanence

Art. 50 TEU guarantees a right of unilateral exit. Member states that wish to leave must inform the European Council. The next step is negotiation of a termination agreement, which defines the future relationship between the state seeking to withdraw and the EU. Both parties have to accept this agreement, but if no deal has been struck until two years after the initial request, the treaties cease to bind the state in question. This set of rules is an innovation of the Lisbon reform. Before 2009, most legal scholars believed that unilateral exit would be prohibited in more or less all conceivable scenarios. The new regime upends this doctrinal position. Some authors, to be sure, consider the obligation to negotiate withdrawal conditions as proof that national governments lack sovereign

9 ———, "The Treaty of Lisbon. Multilevel Constitutionalism in Action," 359. Jürgen Habermas, it seems, shares this viewpoint. He wants to undertake a “rational reconstruction” of the integration process, so as to lend credence to the idea that European law has a foundation in constituent power. See Habermas, Zur Verfassung Europas, 61.

control over their membership status. But this argument, I submit, is a somewhat disingenuous attempt to save the idea that European law is a proper constitution in all significant respects. The fact that after two years, exit negotiations end with automatic termination of membership means that, in effect, member states face no real legal obstacle to withdrawal. In this regard, the EU fits the international organization model.

Still, it might be objected that leaving the EU is a rather unrealistic prospect, so that Art. 50 has little practical meaning. The political cost of withdrawal is without doubt considerable. Nonetheless, there are several member states where euroskeptic forces, some of which advocate wholesale exit, have gained significant clout. Against this background, scholars have argued that a threat of withdrawal might be realistic enough to influence the dynamic of intergovernmental negotiation within the Union decision making process. If this were true, the new Art. 50 would make it more difficult the European common interest against the preferences of individual member states. But even if that is not the case, there remains the symbolic dimension of the exit clause, which underlines that integration has not yet created a genuine federal system.

Amendment Rule

Changing the European treaties requires the unanimous agreement of the member states. National governments, the Commission, and the Parliament have the right to propose a revision. Minor changes that do not increase EU competence can pass through a consensus vote in the European Council. To implement more significant amendments, the member states can either establish a convention (similar in design to the precedent of 2002) that will draft the terms of refer-

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11 See for example Habermas, *Zur Verfassung Europas*, 71.
14 Art. 48 TEU.
ence for a subsequent intergovernmental conference or call for the latter without a prior conven-
tion. In both cases each national government has to endorse the amended legal text before ratifica-
tion procedures begin at the domestic level. This categorical requirement of unanimous consent re-
mains unchanged since 1957; it fits the international organization model.

Jurisdiction

The powers of the EU are enumerated – it can act where the member states have delegated such
competence to it.\textsuperscript{15} One can distinguish between its remit of internal governance and the mandate
to formulate a common foreign and security policy (CFSP). Let us begin with the former aspect. Here the EU has three main goals.\textsuperscript{16} First, it seeks to establish an internal market, based on the free
movement of goods, services, capital, and labor (this objective shall not come at the expense of so-
cial, cultural, and environmental interests). Second, the EU will pursue an economic and monetary
union. Third, it aspires to create an “area of freedom, security, and justice”, based on the abolition
of internal frontiers, an external border regime, and cooperation in law enforcement. To realize
these goals, the EU has exclusive, shared, and supporting competences. Powers in the first group
are narrow and specific: Brussels governs customs regulation, competition rules of the internal
market, monetary policy for the Eurozone, marine conservation, and trade policy.\textsuperscript{17} Competences
of the second kind are held concurrent with the member states. The powers in this group serve
foremost the internal market, or, in other words, the twin goals of eliminating hindrances to cross-
border economic interaction and regulating it in line with the public interest. Further shared com-
petences include the common agricultural policy (CAP), the promotion of regional development,
energy governance, and the field of judicial and police cooperation.\textsuperscript{18} An important question here is

\begin{itemize}
  \item \textsuperscript{15} Art. 5 TEU.
  \item \textsuperscript{16} Art. 3 TEU.
  \item \textsuperscript{17} Art. 3 TFEU.
  \item \textsuperscript{18} Art. 4 TFEU.
\end{itemize}
when the EU can exercise a concurrent power, and when it must leave the field to national regulation. The principle of subsidiarity provides the answer. Since the broad objectives of integration often permit a wide reading of Union competence, the legislative organs have been obliged to explain why a particular issue requires a common solution. Brussels should act if the member states cannot achieve a particular objective to a sufficient extent, and if joint regulation is expected to fare much better.\textsuperscript{19} Consider last the supporting competences. Powers in this group cover a wide range of issue areas. The EU, however, cannot use them to make law; its role is rather limited to advice and coordination. In particular, Brussels has the right to issue guidelines for harmonizing economic governance, employment rules and social policies within the Eurozone countries\textsuperscript{20}

One notable characteristic of EU jurisdiction is the option of selective exit. Several member states have negotiated to remain exempt from certain aspects of the treaties. The most important example is the permanent waiver of the obligation to adopt the Euro for Denmark, Sweden, and the UK.\textsuperscript{21} As a consequence of the ongoing debt crisis, this integration gap has widened further. To begin with, the Eurozone countries had to set up a bailout fund to prevent that governments must default on their obligations.\textsuperscript{22} A second pillar of the crisis response has been to strengthen the commitment of national governments to the budget deficit limit and maximum permissible debt level set forth in the 1997 Stability and Growth Pact (SGP).\textsuperscript{23} To accomplish greater spending discipline, the member states, with the exception of the Czech Republic and the UK, adopted the Fiscal Com-

\textsuperscript{19} Art. 5 TEU.
\textsuperscript{20} Art. 5-6 TFEU. Further areas of supporting competence include: “(a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.”
\textsuperscript{21} Seven further countries have not yet introduced the Euro, but must join when meeting the criteria for accession. Further opt outs include the following: Ireland and the UK are not obliged to participate in police and judicial cooperation and remain outside the Schengen agreement to abolish border controls within the EU; Denmark has withdrawn from defense cooperation; Poland and the UK have not ratified the Charter of Fundamental Rights.
\textsuperscript{22} The permanent rescue fund is known as the European Stability Mechanism (ESM), which can provide loan guarantees up to €500 billion. It will begin operations in 2013. The ESM is not an official EU institution, but the TFEU has been amended to permit its establishment (Art. 136 TFEU).
\textsuperscript{23} The SGP is laid down in Art. 121 TFEU, Art. 126 TFEU, and Protocol No. 12 on the excessive deficit procedure.
This agreement strengthens the hand of Brussels in an “excessive deficit procedure” against a delinquent government and requires the signatories to enshrine a balanced budget rule in the domestic constitution. Furthermore, a large number of member states joined the so-called Euro Plus Pact. This instrument makes use of the Open Method of Coordination (OMC), whose purpose is to align national policies in fields that do not fall under the mandate set forth in the treaties. The Pact stipulates that governments will negotiate benchmarks with regard to labor market policies, education and research, financial regulation, social insurance, and taxation. National legislation will then seek to implement the agreed upon criteria. The new regime aims foremost to address the problem of disparate policies within the monetary union, which has been identified as one important cause of the present crisis. Six member states outside the Eurozone participate as well; the UK, Sweden, Hungary, and the Czech Republic have not joined the Pact, though. One striking aspect of the new mechanism is of course the sweeping breadth of its mandate, which intrudes on fields long seen as vital to member state independence. Another crucial feature is that it stands outside the regular framework of Union lawmaking and enforcement. We shall return to this point below.

Insofar as its mandate of internal governance requires external action, the EU represents the member states on the international stage. Brussels also coordinates the overall foreign and security policy of the member states. CFSP, as this regime is known, has a separate procedural framework, distinct from the normal legislative process (which I describe below). The national heads of state or government establish broad strategic guidelines. On this basis, the Council decides on joint action or a common position of the member states. The voting rule at both stages is unanimous consent.

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24 The Fiscal Compact is a regular international agreement outside the framework of the European treaties. Nonetheless, Union organs, in particular the Commission and the ECJ, will participate in the implementation of the new rules. The Compact will enter into force in 2013.


26 The OMC was introduced in 2000, and it has since been applied within the fields of employment, social policy, and health. For an overview see Luc Tholoniat, “The Career of the Open Method of Coordination. Lessons from a 'Soft' EU Instrument,” West European Politics 33, no. 1 (2010).

27 Art. 23-41 TEU.
But there is also an element of supranational leadership. A High Representative chairs deliberation in the Council, speaks on behalf of the EU where a common stance has been agreed upon, and presides over a transnational diplomatic service. The substantive reach of this coordination is wide: the EU is supposed to act whenever a shared interest is at stake. CFSP has even a defense arm. The member states coordinate development of their military capabilities (on a voluntary basis), and the Council can initiate armed missions, using earmarked national force contingents.

Does the limited jurisdiction of the EU fit the international organization or the Bund model? We have seen that scholars and practitioners disagree on whether Union competence is delegated or original. Some national high courts believe that it remains subject to construction under domestic higher law, whereas the academic mainstream holds that European norms delimit their own sphere. In light of the fact that no constituent act invested Brussels with supreme power over its sphere of competence, the former position can at first sight appear more plausible. But we should note that since the beginning with joint coal and steel regulation, the substantive ambit of integration has become vast. This, in turn, implies that it makes little practical sense to conceive of Union power as the delegated mandate of an international organization – given the wide jurisdiction of the EU, domestic courts are no longer able to enforce the terms of conferral (see Chapter 3).

The expansion of transnational competence has been a unidirectional and permanent development. Each amendment of the treaties gave Brussels a stronger grip over economic regulation. What is more, the makeshift character of the most recent crisis responses forebodes another significant integration push, when the inevitable successor of the Lisbon Treaty is negotiated. Police and judicial cooperation has likewise seen continuous growth since the outset in 1975.28 It now comprises border control and immigration policies, concerted efforts against organized crime and ter-

28 Police and judicial cooperation began with TREVI – an intergovernmental forum outside the Community framework, which sought to coordinate terrorism and crime policing. The Maastricht Treaty turned this regime into the JHA pillar of the EU.
terrorism, as well as significant collaboration among national law enforcement or judicial bodies. Even CFSP has expanded over time, despite the undeniable centrifugal forces that militate against its success. To be sure, decision making under the current regime still has the intergovernmental character of the first coordination mechanism set up in 1970. But the creation of the High Representative, who disposes of an ever growing bureaucratic apparatus, has lent greater momentum to finding a shared voice on the international stage.

This inexorable jurisdictional expansion has made the EU quite different from a standard international organization. The reason is not just the sheer number of Union competences. In the previous chapter, we have noted that a central purpose of federalism is to ensure the survival of each member state. The EU is now vital in this regard: the chances for sustained economic growth hinge on effective administration of the internal market and the monetary union, police and judicial cooperation is essential to internal order, and CFSP is responsible for the geopolitical posture of the continent. To be sure, one can debate the extent of European control over each domain. In particular, does Brussels limit national independence when the decision rule is consensus? Regardless of the answer, the overall substantive reach of the EU is consistent with the Bund model.

**Supremacy**

Whether the domestic constitution, European law, or neither should be understood as supreme is the puzzle, from which our investigation took off. Hence it will not be a surprise that primary law does not provide a clear solution. In the *Costa* judgment of 1964, the ECJ asserted that European norms supersede conflicting national law, including constitutional norms. This ruling complemented the *Van Gend en Loos* case, which established their direct effect. I will discuss the impact of

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29 The Maastricht Treaty established CFSP as the third EU pillar. Before 1993, the member states coordinated their foreign and security policy through the informal European Political Cooperation mechanism.

30 ECJ case 6/64.
this judicial revolution in a moment. But for now, let us observe that until the Lisbon reform, the supremacy doctrine had no textual basis. Even the TCE fell short of an unambiguous codification. Rather it stated that European law has “primacy” over domestic norms within its realm of application. This of course skirts the issue, as it leaves open who draws the line between domestic and European law. Whatever the precise meaning of the provision, it never entered into force. At Lisbon, the member states took an even more guarded approach, relegating the new language to a declaration in the unbinding annex. The treaties, we must conclude, offer just as little textual guidance on the problem of the ultimate decision as domestic constitutional law (see Introduction).

**Direct Effect**

European law has direct effect in member state courts: private legal actors can seek to enforce the treaties and secondary legislation, if the norms in question meet certain requirements. Courts in the member states rule on these claims, but when the meaning of European law is unclear, national judges must consult the ECJ via the “preliminary reference mechanism.”

The Luxembourg court invented the principle of direct effect in the *Van Gend en Loos* decision of 1963. It, too, had no textual basis in the Rome Treaty (nor was it codified in a subsequent amendment). The ECJ instead put forward a teleological argument: the internal market has a better chance of realization, if private actors can make use of transnational norms in domestic courts. Combined with the supremacy doctrine, the assertion of direct effect marked a fundamental change in the working of the European order: treaties and secondary legislation turned from a diplomatic commitment into enforceable law. This judicial revolution is often claimed to have established a transnational constitution. It would, however, be more accurate to think of it as a sweeping

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31 Art. I-6 TCE.
32 Declaration No. 17 Concerning Primacy, annexed to the Treaty of Lisbon.
33 The procedure is laid down in Art. 267 TFEU.
34 ECJ case 26/62.
legalization of European governance. Public power in the member states became subject to an additional set of binding rules, which are subject to neutral interpretation and enforcement. But such legalization alone does not yet make a genuine constitution, or so I have argued in the previous chapter. Nonetheless, the significance of the ECJ jurisprudence from the 1960s cannot be overstated. It amplified the impact of the European order far beyond what the architects of the Rome Treaty had imagined. Countless private actors came to monitor compliance and to seek an interpretation of the law that suits their preference. If standing to litigate were confined to governments and Union organs, transnational norms would be much less consequential.

This increase of effectiveness, we should note, brought with it a much greater role for judges. The never ebbing stream of references from domestic courts enables the ECJ to address numerous questions that treaties or secondary legislation have left open. Thus it has become an important source of “political” decisions, alongside Commission, Parliament, and Council. Such an empowerment of the judicial branch stands in tension with the international organization model, for it disenfranchises the member state principals. The Bund model, in contrast, permits a strong federal court system, because here judicial norm making can occur within a proper separation of powers framework. Is that rationale available to legitimate the powerful role of the Luxembourg court? The next chapter will raise significant doubts in this regard. But justified or not, direct effect is part of the European status quo. On this dimension, the latter fits the ideal type of heterarchical federalism.

*Enforcement*

The EU does not wield means of violence to enforce its policies. Despite this, the record of member state compliance is better than even in the German federal system, let alone the WTO – a clas-
sical international organization. One main reason is that domestic courts do most of the enforcement work. The bulk of European litigation pits individuals against member states. This kind of lawsuit is brought at the domestic level first. The ECJ will not be involved until a national judge demands a clarification of European law. We shall return to the motivation of domestic courts to embrace this role as executor of the Luxembourg tribunal. The important point here is that member state compliance is to a large extent a result of the fact that national governments will be reluctant to disregard instructions from their own court system. But we should also note that compliance is high for disputes where the ECJ has original jurisdiction. National governments almost never sue each other for a violation of European law, but the Commission often brings infringement cases against member states. Of course, the EU has no physical means to coerce a government to implement the ruling in such a lawsuit. But since the Maastricht Treaty, the ECJ can fine a member state that ignores a decision. Continued refusal to implement the law or failure to remit the fine might jeopardize EU membership in good standing—a cost that, up to now, no government has been willing to incur.

This enforcement regime would appear to locate the status quo in the Bund rubric. Yet it is important to emphasize that some European rules are not subject to ECJ jurisdiction. This holds true in particular for the SGP, the Fiscal Compact, and OMC instruments such as the Euro Plus Pact. In the case of the SGP and the Fiscal Compact, rule violation can lead to public censure or a fine. But this decision is reserved for the Council, which has so far been hesitant to use its power—the political cost of punishing a peer government has proven too high. It remains to be seen whether

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36 Art. 260 TFEU.
37 CFSP, too, is for the most part beyond ECJ jurisdiction (Art. 24 TEU).
38 France and Germany breached the SGP criteria several years in a row, without sanction. Proceedings against Portugal (2002) and Greece (2005) took place, but they did not lead to fines. In 2009, it turned out that Greece had manipulated data to prove its compliance. Perhaps implementation of the SGP will be more effective in the future: since 2011, the decision on sanctions is subject to “reverse QMV.” If the Commission recommends a fine, a quali-
the member states will heed their assurances to be more vigilant regarding enforcement in the future. The Euro Plus Pact has even less teeth. Here the Commission will report on member state compliance, but neither it nor other actors can sue for breach. There is no sanction for rule violation beyond public contempt.\textsuperscript{39} In other words, SGP, Fiscal Compact, and OMC norms have what one might call a low degree of legalization: these rules are not justiciable and will therefore be less binding and precise.\textsuperscript{40} Such “soft law” is characteristic of an international organization. The EU, we must conclude, remains a hybrid on the dimension of enforcement.

\textit{Citizenship}

Member state nationals have fundamental rights under European law. The ECJ protects these against Union institutions; it also reviews member state actions that implement European law or might interfere with the free movement of goods, capital, services, and labor (the “internal market freedoms”).\textsuperscript{41} The content of this jurisprudence derives from three sources. First, the rights of EU citizenship defined in Art. 18-25 TFEU. These include free movement across the Union and equal treatment independent of national origin (within the range of application of European law). Citizens have comprehensive access to official documents, elect the Parliament, and can launch an initiative to request legislation from the Commission.\textsuperscript{42} Further privileges include: the right to vote and stand in host state municipal elections, the right to petition the Parliament, the right to file a complaint about poor administration with the European Ombudsman, the right to consular protection

\textsuperscript{39} An official censure of infringement would seem to require unanimous consent among the heads of government.

\textsuperscript{40} Kenneth Abbot et al. have suggested that one can measure the legalization of a regime along the following dimensions: a) the degree to which judicial bodies have the power to interpret norms, b) the degree to which norms are binding, and c) the degree to which norms are precise. See Kenneth Abbott et al., "The Concept of Legalization," \textit{International Organization} 54, no. 3 (2000).

\textsuperscript{41} Art. 26 TFEU.

\textsuperscript{42} The European Citizens' Initiative enables one million individuals, who must hail from at least one quarter of the member states, to invite a piece of legislation; the Commission is not bound to follow such a request (Art. 11 TFEU, Art. 24 TFEU).
from other member states, and the right to communicate with EU organs in all official Union languages. Second, the ECJ construes the internal market freedoms as basic individual rights: these liberties have direct effect and if a member state wishes to restrict them, it must prove a compelling public interest. Third, the Charter of Fundamental Rights protects a broad range of liberties, similar to a domestic schedule of constitutional rights.\textsuperscript{43}

This bundle of freedoms is consistent with Bund citizenship. Unlike the constitution of a state, the European treaties do not establish who is a citizen. Rather the member states make their own rules on this question. Yet once a person is recognized as a national, she becomes a Union citizen as well. This status cannot be reconciled with an international organization understanding of the EU.

To begin with, it guarantees the characteristic horizontal dimension of federal citizenship: free movement and some degree of equal treatment. In particular, this includes the right to pursue economic activities in all member states. But individuals can move across national borders, regardless of whether the purpose is to work or to do business. What is more, in their host state, EU citizens have access to public services and can participate in municipal politics. However, consistent with the idea of tiered federal citizenship, such equal treatment is limited. For one thing, EU aliens lack political rights beyond the municipal level. Their access to social assistance benefits is furthermore restricted.\textsuperscript{44} At the same time, the member states cannot, for example, draft resident foreigners into their armed forces.

At least on paper, the vertical dimension of EU citizenship looks robust as well.\textsuperscript{45} First, European policies must not infringe on civil freedom, which is protected under the Charter of Fun-

\textsuperscript{43} The Charter of Fundamental Rights is a freestanding document. Art. 6 TEU accords it the same legal value as the treaties.

\textsuperscript{44} Directive 2004/38/EC limits the right to free movement to individuals that will not become a burden on social assistance in the host state. Regulation (EEC) No 1408/71 stipulates that Union citizens who live and work in another member state must be able to participate in “social security” arrangements such as retirement insurance, health insurance, or unemployment insurance. Equal treatment, however, does not extend to means tested “social and medical assistance.”

\textsuperscript{45} As Chapter 3 will discuss, legal protection of the vertical citizenship rights is somewhat feeble.
damental Rights. Second, individuals elect the Parliament, have comprehensive access to information, and can invite legislation from the Commission, all of which establishes a certain degree of political freedom at the European level. One can dispute if these liberties are meaningful, when compared to the national context. But it is certain that no international organization permits a similar degree of individual participation. Third, while the EU does not have a positive obligation to realize social and economic freedom, the Charter of Fundamental Rights is supposed to prevent Union governance from hollowing out the national welfare state.

This regime of transnational citizenship was not there from the outset. The Rome Treaty made a commitment to the internal market freedoms, but it came in the form of a vague promise to realize certain policies later on. At the time, the member states did not seek to create enforceable rights for private legal subjects. However, the revolutionary jurisprudence of the ECJ transformed the four freedoms into basic individual liberties, which impose a genuine constraint on permissible member state policies. From the 1960s onward, this principle effected an inexorable expansion of the sphere, in which economic agents have the right to equal treatment from their host state. Beyond this peculiar form of market citizenship, the introduction of a more general status for individuals featured on the European reform agenda for a long time. Yet the project did not succeed until the Maastricht Treaty, which introduced the language of citizenship proper. The new status decoupled free movement and equal treatment from the internal market, such that individuals can now claim these rights without a link to economic activities. Maastricht also emphasized that Union citizenship implies a degree of public oversight and participation in transnational decision making. Subsequent treaty reform led to further consolidation, in particular through incorporation of the

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Fundamental Rights Charter at Lisbon.\textsuperscript{47} The sum total of these individual freedoms makes citizenship the most significant federal dimension of the European status quo.

\textit{Legislative Process}

After Lisbon, most secondary norms emerge from the Ordinary Legislative Procedure (OLP).\textsuperscript{48} Under these rules, the Commission has the sole right of legislative initiative. In the subsequent process of codecision, Parliament and the Council have equal power. A proposal is first read in Parliament, which can endorse or amend it. If the Council approves the resulting text, it becomes law. The Council may also propose its own version and submit it to Parliament for a second reading; the latter can endorse, amend, or reject this proposal. If disagreement persists after renewed consideration in the Council, a conciliation procedure begins, which leads to a joint version or abandonment of the legislative project. For a law to pass in Parliament, a simple majority is required. Under the OLP, the Council employs qualified majority voting (QMV). From 2014 onward, this means 55 percent of member states, which must account for at least 65 percent of the EU population.\textsuperscript{49}

At first sight, the OLP fits a Bund, whose referent is a political union of states and individuals. Recall that in such an order, the goal of the legislative process is to reconcile national public interests with each other and the democratic will of a federal people. Under the European status quo, the member states are represented in the Council. Given that it operates based on QMV, one might perceive this institution as the federal diet and upper chamber of a bicameral legislature. Such a view gains further support from the fact that deliberation is public when the Council reads a pro-

\begin{itemize}
\item \textsuperscript{47} This step had largely symbolic character. For the most part, it formalized the existing practice of the ECJ to enforce standard basic rights. The latter emerged in reaction to the \textit{Solange I} decision of the FCC, which made clear that European norms must not violate the rights enshrined in the Basic Law. See Alter, \textit{Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe}, 90-98.
\item \textsuperscript{48} The OLP is laid down in Art. 294 TFEU.
\item \textsuperscript{49} Art. 16 TEU. Before 2014, the QMV criterion of the Nice Treaty remains in force: absolute majority of states, 74 percent of voting weights (that give small member states greater weight relative to their population), and 62 percent of the EU population. Any member state can request use of the Nice rules for a particular vote until 2017.
\end{itemize}
posed law. The Parliament could be seen as the lower chamber in this system. Election is direct and voting blocs are based on ideological affiliation rather than national origin. These features make it at least somewhat plausible to understand the Strasbourg legislature as the voice of a transnational demos.

But the picture gets more complicated, once we consider the role of the European Council. This institution does not have a formal legislative function. Yet it has emerged as the main agenda setter for the Commission. No more than 10 percent of EU legislative output goes back to genuine initiative from the latter. The remainder is drafted at the request of the Council, Parliament, and in particular the European Council. This body is composed of the national heads of state or government; it meets at least four times a year; these summits are not public, and decision making is based on consensus. Under the treaties, the European Council has the task to provide general political guidelines. In practice, this means that, at each meeting, the heads of government prepare a list of assignments for the Commission and seek to resolve disagreements over legislative measures that arose in the Council. Another important power of the European Council is to appoint the Commission President (subject to approval of the Parliament) who hence depends on political support from the national leaders.

In light of this, it should be clear that EU lawmaking retains a significant element of the international organization model – the European Council is a conference of the parties, steering a bicameral legislative process. One might note that expansion of the OMC through the Euro Plus Pact has reinforced the diplomatic element in this mixture. The European Council wields exclusive power to define the criteria, which the member states commit to implement. As we have seen, these standards are not law proper. Nonetheless, benchmark setting under the Pact might become an im-

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51 Doreen Allerkamp, "Who Sets the Agenda?," in EUSA (Boston: 2011).
portant aspect of EU normative output, limiting national autonomy to a significant extent. To be sure, the substantive reach of the Pact is atypical of an international organization. But its procedural features derive from this model.

The present constellation is the result of a complex multidirectional evolution. During an initial transition period, the Rome Treaty stipulated consensus as the standard decision rule in the Council. For 1966, it scheduled a major expansion of QMV. Yet a French boycott led to the infamous “Luxembourg Compromise”: member states with a vital interest at stake could veto an unwanted decision. This regime turned the Council more or less into a conference of the parties. It survived until 1985. From the SEA onward, QMV became the dominant voting mechanism, reflecting growing concern over political deadlock in the shadow of the veto. The Lisbon Treaty furthermore introduced public deliberation, which underlined the legislative as opposed to diplomatic nature of the Council.

The Parliament started out with a rather insignificant role. Under the Rome Treaty (and the earlier ECSC agreement), it had a consultative function; members were delegated from national parliaments. Still, the fact that such a body was created at all is remarkable. This decision set the stage for the piecemeal creation of a powerful legislative institution: the Luxembourg Treaty of 1970 established some degree of budget power; in 1979, the first direct election took place; the Maastricht reform allowed the Parliament to vote on the investiture of the Commission; and under the SEA, it gained the formal right to participate in lawmaking. Expansion of this power has since been the main focus of the effort to improve the democratic legitimation of Union governance. Each reform after the SEA fortified the legislative role of the Parliament. Today codecision has become the baseline rule, from which there is little deviation.

We must not forget, though, that the rise of Parliament coincided with that of the European Council. The first informal meeting of the latter took place in 1974, the same year in which the member states gave the green light for direct election of the Strasbourg representatives. Over time, summit meetings became the engine of institutional change, and the heads of government also took on a more important role in setting the legislative agenda. The Lisbon reform codified this development, making the European Council a formal Union organ. In other words, there is now a clear separation between the technical process of lawmaking, on the one hand, and political oversight exercised in a diplomatic mode, on the other. The European Council, one might conclude (with perhaps a little exaggeration), has become the de facto government of the EU, while the Commission functions as its secretariat.

Subject of International Law

The EU is an independent subject of international law. When its mandate of internal governance requires it, Brussels can enter agreements with third parties or participate in an international organization such as the WTO. CFSP likewise allows for the conclusion of treaties. In both fields, the Commission represents the EU; the Council formulates negotiation mandates and renders the final decision on whether to sign a legal instrument (depending on the question at issue, the voting rule is either QMV or unanimous consent). At the same time, the member states retain their own international stature, insofar as EU competence does not preempt national action. This arrangement is consistent with the Bund model. It goes back to the Rome Treaty, which already permitted the EEC to enter international agreements. Then, the substantive range of this power was narrow, but its growth has since kept pace with the expansion of internal Union powers.

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53 For a comprehensive discussion of the legal principles that govern the external relations of the EU see Piet Eckhout, *External Relations of the EU: Legal and Constitutional Principles* (Oxford: Oxford University Press, 2004).

54 In addition to political reform, the ECJ played an important role as well: from its 1971 *ERTA* judgment onward, it has often recognized an implied power of external action, when it deemed the latter necessary to effective pursuit of
**An Intractable Puzzle**

Few real world phenomena fit neat ideal types. The EU, though, is hybrid to a quite remarkable extent. The preceding has shown that it matches the international organization model on three important criteria: its legal basis is a set of treaties, which citizens do not see as their shared constitution; the Union is not permanent; and primary law amendment requires unanimous consent among the member states. At the same time, broad jurisdiction, the direct effect of European law, robust federal citizenship, and the possession of international legal subjecthood cohere with the Bund model. Regarding the question of the ultimate decision, the silence of the treaties leaves open if we should assume that domestic constitutional norms can, in principle, trump Union law, or if the ECJ has in fact a coequal or even superior claim to delimiting the scope of the transnational sphere. Finally, the enforcement powers of the EU and its legislative process fit neither the international organization nor the Bund model. Here, the status quo amalgamates features of both ideal types (Table 1). This constellation, as we have seen, is the result of a complex evolution. At the outset, the EU deviated little from the international organization model. Over time, it came to resemble a Bund to a degree. Some recent changes, however, point in the opposite direction. By way of conclusion, let us take a brief look at the historical processes that brought about this nonlinear and incomplete transformation.

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a treaty goal. See ———, *External Relations of the EU: Legal and Constitutional Principles*, 58-100.
Table 1: The EU between international organization and Bund

During the first three decades of integration, the ECJ was the motor of deepening. It is significant to note here that most national governments opposed the *van Gend en Loos* and *Costa* jurisprudence, but were unable to overrule it (this would have required a unanimous decision to amend the treaties).\(^55\) Hence the main obstacle for the ECJ was to convince national jurists to implement direct effect and supremacy in their legal system. It is a little known fact that this feat succeeded, at least in part, due to an organized lobby effort. Karen Alter has shown that European law associations played a crucial role in the initial phase of judicial integration.\(^56\) These professional networks worked to strengthen the role of transnational norms in their respective countries. Association members engineered disputes – including *Van Gend en Loos* and *Costa* – that would allow the ECJ to promulgate its revolutionary doctrines. Once direct effect and supremacy had been established, lower domestic courts faced an incentive to refer questions to Luxembourg, as the application of European norms could render them more independent from appellate instances within their own


legal system. Alter, however, admonishes that we cannot understand the phenomenon of lower court participation without also bearing in mind the ideological climate produced by the effort of the associations. If she is right, the lobby campaign of the European law profession has been a monumental success: through doctrinal innovation, the continent made a big step in the direction of federalism, against the political design of the immediate postwar generation.

Beginning in the 1980s, however, the momentum of integration shifted to the diplomatic sphere. In more or less constant reform negotiations, federalist visionaries and international law conservatives have since been working to resolve their differences. Here is not the place to recount in detail what happened so far. Suffice it to observe that each side has won and lost some fights. The federalist camp achieved a massive expansion of EU competence, the strengthening of transnational citizenship, and greater power for the Parliament. Actors that favored an international law framework prevented ratification of the TCE, defended unanimous consent as the amendment rule, and managed to introduce an exit clause. Furthermore, summit negotiations in the European Council emerged as the most important decision mechanism at the Union level.

Against this historical background, the hybrid nature of the status quo is no surprise. The present institutional structure embodies a historical bargain, resulting from a drawn out and multidimensional struggle between champions of a federal constitution and their opponents. What is remarkable here is that integration progressed despite profound disagreement about its ultimate goal. To some extent that is the result of the astute maneuvering of European judges and lawyers. But at the political level, the secret has been the “Monnet method”, named after the French diplomat and chief architect of the Communities in the 1950s. At the heart of this approach lies the belief that European integration should advance piecemeal rather than in one big stroke – small and concrete


projects, on which states desire to cooperate, are preferable to endless debate of grand schemes that have no chance of implementation. As we have seen, the wisdom of this method has sometimes been challenged, on the most recent occasion with the 2004 attempt to establish a genuine transnational constitution. Yet, in the end, the member states always returned to the incrementalist path.

There can be little doubt that without the pragmatism of the Monnet method, the splendid and improbable achievements of integration would not have been possible. But from the perspective of constitutional theory, this institution building style has left the EU in a rather awkward position. Recall that if the Bund model fit the status quo best, one should embrace the pluralist conception of the relationship between domestic and European law. In contrast, were the EU still more or less an international organization, domestic courts would be justified to assert the right of ultimate decision. This chapter has shown that a definite solution to the puzzle remains elusive. To support either view, strong evidence for the opposite interpretation has to be discounted.

National judges must of course pick a side. Should we care that no matter what, their doctrine will brush over a powerful counterargument? Many observers counsel not to get hung up on the issue. The question of the ultimate decision, runs the argument, carries at best academic interest, as the matter is settled in practice. While national high courts – most of all the German FCC – engage in dualist posturing, actual litigation results are more or less indistinguishable from what pluralism would prescribe. Adherents of the heterarchical approach see this as proof of judicial wisdom: even if domestic courts refuse to acknowledge the federal nature of the Union order, judges are not so imprudent as to disturb its actual working. Perhaps we should indeed be glad that domestic courts recoil from their sometimes belligerent threats to rein in the EU. But there is still no reason for celebration. The mismatch between dualist rhetoric and pluralist outcomes is one symptom of a con-
stitutionalism deficit that stems from the peculiar hybrid character of the status quo. This, at least, is the argument of the next chapter.
Chapter 3

The Constitutionalism Deficit

This chapter develops the pivotal claim in my overall argument: the peculiar hybrid nature of the EU undermines constitutionalism. Before I support this assertion, let us recapitulate the preceding analysis. We started our investigation with the following puzzle: what is the proper relationship between domestic and European law? The German jurisprudence on this question champions dualism, or the view that Union norms are subordinate to the domestic constitution. According to the FCC, the EU remains in essence an international organization, and the member states are still sovereign. Critics of this doctrinal stance reject such a hierarchical conception of the relationship between domestic and European law. They recognize that integration has not created a state, but also dismiss the international organization narrative. According to them, the EU has a fundamental order that is equivalent to national higher law. One should therefore understand the relationship between domestic and European norms as pluralist.

I have argued that, from a theoretical viewpoint, a heterarchical system is indeed conceivable: we can imagine a federal union of independent states, or Bund, that leaves open which level is sovereign. However, the European status quo does not quite fit this model. While the EU is neither a state nor an international organization, it has also not traversed the full distance from the latter to a Bund. The present institutional structure remains instead a bewildering hybrid. Hence the riddle of the proper relationship between domestic and European law does not have an evident or in fact any correct solution. That is more than an esoteric jurisprudential problem – it should alert us to a quite real erosion of constitutionalism. Both dualism and pluralism suggest a certain form of mediation between national and Union norms. Yet, at the same time, these conceptions entail a particular nar-
rative as to how the EU fulfills or should fulfill the demands of constitutionalism. The problem is that under the status quo, neither route is viable.

From the pluralist viewpoint, the European order itself should realize the rule of law, democratic legislation, and basic rights protection within its sphere. National high courts are to remain on the sidelines, so long as there is no flagrant violation of these principles. Those who advocate such a judicial ethos point to a gradual “constitutionalization” of the EU over time. However, as Chapter 1 explained, a regime can undergo legalization, permit citizen participation, and protect individual freedom, but still fail to meet the full demands of constitutionalism. To accomplish this, the order in question must also represent a genuine political union. I have introduced the concept of the Bund to describe a federal structure that fulfills this condition, without being a state. As we have seen, the EU resembles such an order up to a point. Yet the following will show that its residual international organization features undermine the rule of law, democratic legislation, and basic rights protection.

From the dualist viewpoint, this conclusion misses the point. The main defense of constitutionalism, goes the reasoning, is located at the member state level. Integration might have the potential to subvert national higher law. But, as Peter Lindseth puts it, high courts have reacted with the promulgation of “resistance norms”, which compel EU organs to respect the treaty mandate, to leave the most important political decisions to the democratic process in the member states, and to uphold the basic rights protected under national law. The domestic constitutional order, runs the argument, will therefore remain intact. But this promise is not credible, or so I will demonstrate here. Redeeming it would deal a serious blow to the effectiveness of European law, for earnest review must undermine Union governance where it operates in a federal mode. That is a price no high court has been willing to pay, nor should one expect this in the future.

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It does not matter, then, if the empirical glass is half full for pluralism and half empty for dualism, or if the reverse is the case. Regardless of which prism we see through, the state of constitutionalism in Europe is poor. To substantiate this claim, the chapter looks at the present condition of the rule of law, democratic legislation, and basic rights protection in turn. For each principle, I discuss, first, in how far the Union system itself falls short of the relevant criteria. To show that member state high courts are unable to make up for this deficit, the chapter then examines the relevant jurisprudence of the FCC. In a third step, it will become clear that the current dilemma stems from the peculiar hybrid nature of the EU, which is no longer an international organization and not yet a Bund.

**Rule of Law**

As we have seen, the rule of law in the European order is robust when it comes to enforcing member state obligations. The ECJ has also cast a tight net of judicial review around the EU organs. But this regime, I will now argue, suffers from a striking defect. Throughout its history, the EU has shown a remarkable aptness to exceed its competence mandate – with tacit acquiescence and sometimes active help from the court. In this particular regard, integration undermines the rule of law. Why is that so? The European institutional setup does not compel the ECJ to enforce competence restrictions. On the contrary, the Luxembourg court has incentive and opportunity to expand the Union sphere at the cost of member state independence. Domestic *ultra vires* litigation, the following will suggest, cannot rein in this development.
The Deficit at the Union Level

From the pluralist viewpoint, we should trust the European order to enforce its own competence rules. This expectation, I submit, is rather too optimistic. Often enough, the ECJ has overlooked usurpation of power through legislative or executive measures, which seemed to transgress either the enumerated powers of the EU or to breach the subsidiarity principle. What is more, the Luxembourg court itself has sometimes been the original culprit of apparent ultra vires action.

Let us begin with the issue of legislative or executive usurpation that fails to elicit a response from the ECJ. Here we should first note that judicial review is not the sole protection against illegal competence expansion. One important political safeguard is the strong representation of the member states in the legislative process. National governments can restrain the Commission when it makes a proposal that exceeds Union competence. But what if the Council itself breaches the rules? This scenario is far from unusual: member state leaders have often made European law, whose basis in the treaties was questionable (see below). Another political safeguard is the watchdog function of national parliaments. Since the Lisbon reform, member state legislatures can stall a measure, if a sufficient number of them consider it to violate subsidiarity. Yet this “early warning mechanism” is expected to show at best modest practical impact – national parliamentarians have little incentive to make use of the new procedure.

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2 Under Art. 5 TEU, the requirement of proportionality is a further constraint on EU power. This principle stipulates that content and form of Union action must not exceed what is necessary to achieve the objectives of the treaties. The ECJ seems to be a great deal more prepared to enforce this requirement than to police enumerated powers and subsidiarity. See Alec Stone-Sweet, "Proportionality Balancing and Global Constitutionalism," Columbia Journal of Transnational Law 47, no. 1 (2008). That is not surprising. The Luxembourg court increases its power through judicial review of how the EU seeks to achieve its goals. In contrast, whenever it limits the range of goals the EU can pursue, it forgoes potential influence.

3 Art. 12 TEU. Under this provision, one third of the member state parliaments can prompt a reconsideration of draft legislation, but the Commission is under no obligation to change its proposal. A majority of national parliaments can force a vote in Council and Parliament on whether legislation passed under the OLP violates subsidiarity. If either body finds an infringement, the legislation is quashed.

tire range of European norm production: the Commission and several bureaucratic agencies have
significant regulatory power, whose exercise does not require the participation of Council or Parlia-
ment. In light of this, a strong judicial safeguard against illegal competence usurpation would be
desirable.

But so far, the ECJ has not assumed this role. Proceeding from the assumption that a “preference
for Europe” is built into the treaties, enforcement of the competence mandate has been rather
indulgent. Until 2000, the Luxembourg judges never struck down an ultra vires measure. Tobacco
Advertising found that a Council directive, whose ostensible purpose was to regulate the internal
market, aimed in fact to harmonize public health regulation, over which the EU does not have juris-
diction. Lack of potential infringements cannot explain this passive stance of the ECJ. As Stephen
Weatherill notes, the Council in particular has shown a “readiness to act with slender regard for [...] the principle of attributed competence.” This observation refers to the frequent misuse of the
mandate to regulate the internal market. In ostensible pursuit of the latter objective, the Council –
often united in consensus – has enacted numerous pieces of legislation with little relevance to mar-
ket integration. Another controversial point has been the question of correct legal basis. The treat-
ies establish different procedural regimes for different issue areas. Hence the choice of a particular
legal basis over another can make it easier to pass legislation: it determines whether the decision rule
is QMV or consensus, and if the format of a “regulation” can be used, which unlike a “directive”
does not require a domestic implementing statute to become effective. Member states have on sev-

6 Peter L. Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism," Columbia Law
Review 99, no. 3 (1999), 701. The phrase goes back to former ECJ judge Federico Mancini: “The preference for
Europe is determined by the genetic code, transmitted to the court by the founding fathers, who entrusted to it the
 task of ensuring that the law is observed in the application of a Treaty whose primary objective is an ever closer
union among the peoples of Europe.” See Federico Mancini and David T. Keeling, "Democracy and the European
7 ECJ case C-376/98.
eral occasions sued the Council for referring to an inapplicable provision in order to establish its competence to act. In such disputes, the court has usually favored the legal interpretation that minimized the prerogative of national governments.\textsuperscript{10}

To be sure, Weatherill intimates that since the 1980s, periodical treaty amendment has replaced legislative transgression as the mechanism of choice to widen the EU mandate.\textsuperscript{11} At the same time, greater procedural standardization has made the problem of correct legal basis somewhat less relevant. Is \textit{ultra vires} legislation therefore an issue of the past? The situation after \textit{Tobacco Advertising} does not confirm this hypothesis. Weatherill himself points out that several measures that seemed questionable in light of the new test went unopposed in court.\textsuperscript{12} And when a case reached the ECJ, it refused to grant relief. The most striking instance of this concerned a new attempt to regulate tobacco advertising in 2006. Here the judges upheld a directive of more or less the same content as the measure struck down in the original decision.\textsuperscript{13} Against this background, it seems indeed right to conclude that “\textit{plus ça change, plus ça reste la même chose}.”\textsuperscript{14}

Let us pause to consider a possible objection. At least when a presumed competence transgression is the result of a unanimous vote in the Council, must the ECJ not defer to member state will? There are without doubt times when judges should give in to a political consensus to disregard the established law. If formal legal change is too arduous or impossible, a flexible doctrinal stance can accommodate popular desire to alter the rules. But we should be skeptical if one can interpret a Council vote – even a unanimous one – as the proper expression of democratic will in the member states. Were the Council allowed such discretion to rewrite competence rules, national executive leaders could strengthen their own position relative to the legislative and judicial branches within

\textsuperscript{10} Lindseth, \textit{Power and Legitimacy}, 705-706.
\textsuperscript{11} Weatherill, "Competence Creep and Competence Control," 6.
\textsuperscript{12} ———, "Competence Creep and Competence Control," 14.
\textsuperscript{13} ECJ case C-380/03.
\textsuperscript{14} Weatherill, "Competence Creep and Competence Control," 15.
their respective domestic order. Loose interpretation of the treaties permits them to accomplish this goal, without a public debate regarding whether the EU should in fact have a particular competence. In this manner, the power equilibrium between units and center might lose its democratic legitimation. A proper constitutional order should prevent such a development.

So far, then, we have seen that enumeration of powers did not prove a too strong legal constraint for the EU. What about subsidiarity? Recall that under this principle, Brussels must explain why a particular issue demands a joint solution, when it seeks to exercise a competence shared with the member states. Concerning this requirement, the approach of the Luxembourg court is again rather permissive. Some observers applaud this stance, arguing that if the EU or national governments are better placed to reach a particular objective is a political question, which the court should leave to the legislative process.\(^{15}\) On this view, the main virtue of the subsidiarity principle is to increase awareness of possible EU overreach, given that bureaucrats and politicians must now confront the issue of whether common action is justified. Florian Sander, however, argues that absent court review, one cannot expect serious engagement with this question. If the legislative organs had complete discretion regarding the interpretation of subsidiarity, there would be little incentive for reflection.\(^{16}\) The ECJ should hence at least demand a reasoned explanation, to which it can then choose to defer. Sander holds that it fails to deliver on this task. First, the court accepts formulaic protestations of subsidiarity compliance – it does not require a substantive rationale for why a European solution is preferable over national independence.\(^{17}\) Second, the judges exempt certain kinds of legislation from subsidiarity review altogether. These include harmonization of national law and the removal of trade obstacles in the internal market. Here the ECJ argues that for logical reasons, subsidiarity cannot be violated: the member states are unable to pursue harmonization and


\(^{17}\) ———, "Subsidiarity Infringements before the European Court of Justice," 543-544.
removal of trade impediments on their own. But this reasoning is sophistic – it absolves the EU of an explanation as to why exercise of its competence and the implied substitution of national rules are beneficial in the first place.¹⁸

From a rational choice perspective, the approach of the ECJ is not difficult to understand. We can assume that one factor influencing the doctrine of a court is a desire to enhance its own power.¹⁹ Since a wider Union sphere also means greater jurisdiction for the ECJ, it has an incentive to turn a blind eye on EU organs that reach beyond their mandate. What is more, the Luxembourg court itself has often been the prime mover of controversial encroachment on the member state domain. In fact, such *ultra vires* action seems to be a more important problem than legislative or executive usurpation. Let us now take a closer look at this issue.

Judicial development of European norms is common. This need of course not always be a reason for concern. Indeed, it is frequently desirable: a legal text might remain silent on a particular situation that, given the legislative intent, should be regulated – courts are expected to fill such an evident gap.²⁰ But the ECJ goes beyond this role. Often against the manifest will of the member states, it has reinterpreted the law, making Union rules intrude deeper into national legal systems. Martin Höpner distinguishes three scenarios of such norm development, in which the ECJ is the prime mover of apparent competence transgression.

First, the court has sometimes construed secondary legislation in a manner that let it cover more ground than Council and Parliament had foreseen.²¹ One recent example is the *Laval* case: in this decision, the judges limited the right to strike on the basis of a directive, whose text appears to exclude the governance of collective labor bargaining from its ambit. Second, the ECJ has applied

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¹⁸  ———, "Subsidiarity Infringements before the European Court of Justice," 544-545.
²¹  ———, "Von der Lückenfüllung zur Vertragsumdeutung," 171-172.
primary law to fields, which the member states had not planned to regulate in common. The most significant instance of this has been the frequent use of the internal market freedoms to strike down national regulation in areas, which the treaties reserve to the member states. Finally, the court has sometimes fashioned unwritten treaty principles with a dubious connection to either text or drafting intention. The most notorious example is perhaps the assertion of the Costa ruling that European law is supreme over the member state legal orders. A more recent such case is Mangold. Here the ECJ claimed the existence of a universal ban on age discrimination. This pronouncement led to a heated debate as to whether the court had invented a legal principle from thin air (I discuss the Mangold saga in more detail below).

To be sure, whether or not the scale of judicial lawmaking is in fact a worrisome problem (and one that is more prevalent at the Union level than in a typical domestic legal system) remains to some extent a disputed question. Höpner concedes that with regard to norm development of the first kind, observers disagree about how often it occurs and what significance it has. There is, however, less debate as to the momentous effect that judicial lawmaking of the second and third kind had on the course of European integration. The transformation of the internal market freedoms into basic individual rights and the assertion that Union norms trump domestic law have defined the nature and content of the present European order. And even if we count this development as water under the bridge, the ongoing controversies regarding cases such as Laval and Mangold demonstrate that ECJ overreach remains a live concern.

How can one explain the prominent and sometimes outsize role of the judicial branch in the creation of Union norms? A well designed fundamental order would match the power of courts to misconstrue the law with a realistic threat of legislative correction, either through a statute or

23 ———, "Von der Lückenfüllung zur Vertragsumdeutung," 175.
24 ———, "Von der Lückenfüllung zur Vertragsumdeutung," 179.
through constitutional amendment. Such a response might indeed occur in the European system: legislation and even treaty changes have sometimes reversed ECJ doctrine regarding the extent of the Union sphere. Nonetheless, such intervention is rare.\textsuperscript{25} This does not mean that judicial norm distortion has found tacit member state acceptance. It is rather a sign of a structural imbalance between the Luxembourg court and the EU legislative branch. The former will seldom meet opposition because the latter will often find it difficult to respond. Compared with the relative ease of passing legislation and constitutional amendments in a domestic legal order, the Union system establishes high obstacles to political action. When the ECJ misconstrues secondary norms, a legislative response would entail a revision of the measure in question. Such an intervention requires not just the support of enough member state governments, but also the cooperation of the Commission and the Parliament, both of which have an incentive to countenance judicial expansion of Union power. When the ECJ misconstrues the treaties, a political response is even harder to mount. Amendment of the treaties presupposes consensus among the member states. In light of this, empirical research has come to the more or less unanimous conclusion that fear of override does not influence the jurisprudence of the Luxembourg court.\textsuperscript{26}

A skeptic might interject here that even if political response is a rather ineffective check on the ECJ, the latter must still persuade member state judges to implement Union norms, which restricts the elbowroom to misconstrue them. That is without doubt true. Yet we have reason to believe that a possible enforcement strike makes at best for a modest constraint. There is just one instance where this dog has in fact barked: Keck (which I discuss in more detail below) limited the application of an earlier ECJ ruling. The adjustment occurred in part because national judges often refused

\textsuperscript{25} \textit{Von der Lückenfüllung zur Vertragsumdeutung}, 180-181.

\textsuperscript{26} For an overview see Kelemen, \textit{"The Political Foundations of Judicial Independence in the European Union,"} 45-46. The same hurdles that forestall a legislative correction of an ECJ ruling also prevent measures such as court packing, resource deprivation, or jurisdiction stripping. Kelemen furthermore argues that member states will find it difficult to use judicial appointments to influence the Luxembourg court. See \textit{"The Political Foundations of Judicial Independence in the European Union,"} 50-54.
to implement the prior doctrine. Of course, such resistance does not have to be a regular event in order to restrain the ECJ. The mere chance that it can happen might force the court to observe the letter of the law, especially when it comes to sensitive competence norms. Perhaps there is a grain of truth to this hypothesis. But given the evidence of systematic transgression that Höpner has collected, the size of the effect must be limited. That is not surprising. One can presume that judges in general are disinclined to flout the doctrine of a superior instance. What is more, lower domestic courts benefit from cooperation with the ECJ. As we noted, the implementation of European norms renders them more independent from appellate instances within their own legal system (see Chapter 2). The matter is of course somewhat different for high courts, whose institutional role shrinks in proportion to the expansion of the Union sphere. Let us next consider how German constitutional judges have responded to this threat.

Obstacles to Effective Domestic Review

The preceding has shown that in one particular sense, the rule of law remains weak at the European level: enforcement of competence norms is lackadaisical. From the Maastricht decision onward, the FCC has claimed that it will make up for whatever bias Union institutions might have (see Introduction). Domestic *ultra vires* control, runs the argument, will catch violations that have been overlooked at the European level. What is more, the mere threat of such an intervention is expected to have a positive effect: in the shadow of domestic review, the Luxembourg court will pay greater attention to competence limits, because it must account for a possible reversal of its jurisprudence by member state high courts. Or so believe adherents of the dualist position. Yet what if the threat is not credible? I will now suggest that national judges have little choice but to forgo effective *ultra vires* control.

The jurisprudence of the FCC since the Maastricht judgment illustrates this point. Legislative usurpation has sometimes been alleged in proceedings before the court. But the latter never upheld such a claim. Neither has it found the ECJ itself in violation of its power under the treaties. As the recent *Honeywell* decision makes clear, this will not change in the near future. *Honeywell* addresses the *Mangold* judgment of the ECJ, which struck down a German waiver of restrictions on temporary labor contracts for employees older than 52 years. The Luxembourg court found this law to violate a universal ban of discrimination on any ground. Although not codified, such a norm is reportedly a general principle of European law.28 This assertion met strong criticism: legal scholars accused the ECJ of making up primary law to extend its authority.29 The FCC considered this objection weighty enough to investigate whether *Mangold* amounted to an *ultra vires* act. To answer this question, *Honeywell* puts forward a general test for competence violation. But, first, the German judges recognize the ECJ as the primary interpreter of European law. Therefore, a domestic complaint is not admissible until the Luxembourg court had a chance to pronounce on the dispute. In other words, all such claims must refer to an infringement by the ECJ, regardless of which institution committed the original alleged violation. The FCC will then strike down the judgment in question, if the alleged breach meets the following two criteria: it must be serious, in the sense that it leads to a significant transfer of competence, and it must be manifest, in the sense that the Luxembourg court has disregarded accepted legal method.30

This test makes an *ultra vires* finding quite improbable. As several observers remarked, past judicial competence expansion has not usually occurred through an individual ECJ decision. Shifts that were ultimately momentous resulted instead from a line of precedent, which had cumulative ef-

28 ECJ case C-144/04.
29 See in particular Lüder Gerken et al., "Mangold" als ausbrechender Rechtsakt (Munich: Sellier, 2009).
30 BVerfG, 2 BvR 2661/06, paras. 60-61.
fect. Any single link in that chain would not have met the serious breach criterion. Manifest violation, I submit, is just as lax a standard. The FCC was obviously reluctant to embrace a genuine review function. Within a judicial hierarchy, a superior instance decides whether the lower court has offered the most persuasive interpretation of the law. In contrast, the ECJ must leave the realm of accepted legal method before the FCC intervenes. What precisely this means remains somewhat nebulous. In fact, the German judges left open whether Mangold still meets the requirement – the complaint was rejected on the basis of the serious breach criterion alone. But it seems that Honeywell establishes a purely formal test: does the reasoning of the ECJ take the shape of juristic argument? One need not be a radical legal realist to see that such a criterion does not impose much of a limit. The past jurisprudence of the Luxembourg court is not questionable because of a complete absence of juristic argument; the problem is rather its systematic preference for a lenient interpretation of EU power, despite the fact that a different result seemed often more convincing.

Why did the FCC choose to make its ultra vires control toothless? The crucial obstacle to domestic court supervision of the EU is the risk of legal fragmentation. If the FCC engages in substantive review, high courts in other member states can be expected to follow suit. This would over time lead to a cacophonous interpretive landscape. To see why, one need just consider how often appeals succeed within a domestic legal system. Once the applicable standard is the most persuasive argument, judges will often disagree about the right solution. For this reason, the FCC has put forward a formal criterion in place of substantive review. Yet such a test, as we have seen, does not provide a real check on the freedom of the Luxembourg court to render biased judgments. In other words, a choice has to be made between effective ultra vires control and legal fragmentation. Ter
tium non datur. One can be more or less certain that faced with this dilemma, domestic constitu-

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31 Judge Landau dissented from the majority in Honeywell, stressing the piecemeal nature of competence transfer via ECJ rulings. See also Dieter Grimm, "Die große Karlsruher Verschiebung," Frankfurter Allgemeine Zeitung, 9 September 2010b.
tional judges will forgo resistance against European intrusion on the member state sphere, even if this weakens their own institutional position. The alternative would be to jeopardize the working of the entire system of Union governance. No court will be prepared to shoulder the blame for such an outcome.

Legal scholars have been quick to point out that *Honeywell* marks a step back from the ostensible dualism of the Lisbon decision. The new test rather fits a pluralist ethos: the FCC trusts the ECJ to police competence rules; domestic review becomes a power reserved for egregious violation. Authors who adhere to a heterarchical understanding of the EU celebrate this stance as a return to reason. But its actual meaning is rather less happy. From the Maastricht decision to the Lisbon judgment, the FCC has assured the German public that it will contain illegal EU overreach. *Honeywell* exposes the emptiness of this promise. The overriding importance of effective European governance forces the court to shrink back from meaningful review. Instead, the judges choose to depend on faithful legal interpretation at the Union level. As we have seen, there is little reason to expect that the ECJ will deliver on this hope.

*Discontents of Hybridity*

In significant part, the problem described above stems from the mixed character of the status quo. Consider first the pluralist desideratum that European law itself should provide a sufficient guarantee that Union organs heed their competence limits. As the preceding has argued, that is not the case at present. One important reason, I submit, is that amalgamation of international organization features and federal traits impedes the enforcement of the mandate set forth in the treaties.

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To be sure, weak judicial resistance against expansion of central power is a problem that can affect layered structures in general. Regardless of which political form the EU will take, the ECJ has an incentive to expand its own jurisdiction via loose competence review. But it seems nonetheless fair to speculate that the ambiguous nature of the status quo fuels the zeal of the Luxembourg court. The judges (along with the entire European law profession) have often imagined themselves as the vanguard of federalism, engaged in a fight against political inertia that leaves the continent unable to complete the historical mission a putative founding generation has assigned to it. A clear answer to the constitutional question might lead the ECJ to focus more on sound legal interpretation and less on such activism.

However, the more obvious and more important problem for the pluralist approach is the imbalance between the judicial branch and the legislative. The power of the Luxembourg court as the sole interpreter of Union norms has no adequate political counterweight, as the EU retains the amendment rule of an international organization and emphasizes consensus even in the normal legislative process. Given this failure to heed the logic of checks and balances, one should not be surprised that illegitimate judicial norm development is a significant phenomenon.

Of course, from the dualist perspective, the lack of a proper equilibrium at the Union level is no reason for alarm – national ultra vires control should motivate the EU to respect its enumerated powers. But, as we have seen, this expectation is just as fanciful as the pluralist assertion that sufficient limits exist at the Union level. The mixed character of the present regime is an important explanation here as well. EU jurisdiction, we recall, has the substantive extension of a federal competence mandate. Wide reach and broad functional goals make disagreement about its boundaries inevitable. Dissatisfaction with how the ECJ manages this friction has provoked the FCC to threaten ultra vires control. But the irony of the current situation is that precisely because competence dispute
is an ever present risk, national judges cannot perform such review in earnest. The European order might perhaps tolerate the occasional domestic invalidation of a Union norm. Yet an effective system of supervision would seem to entail permanent litigation before member state courts, and hence significant legal fragmentation. Given this prohibitive cost, national judges are unable to make a credible promise to rein in EU overreach. In practice, domestic review must therefore fail to compensate for the shortfall at the Union level.

**Democratic Legislation**

Let us next consider the second principle of constitutionalism. To make European legislation more democratic has long been a goal of treaty reform. But, as the following will argue, the status quo still fails to meet the standard required of a genuine democratic constitution. The German Lisbon decision recognizes this problem. Its answer is to police future competence delegation, such that powers that require strong legitimation remain under domestic control. This approach, it will become clear, is futile because the EU has already encroached too far into the domain of what must count as “essential” competences. Once again, domestic court review is unable to make up for the faults of the European institutional structure.

**The Deficit at the Union Level**

The literature on whether or not the EU has a democratic deficit is vast and rather perplexing, given the multitude of viewpoints, from which scholars have addressed the issue. Here I will refer to existing scholarship only insofar as it bears on the specific question before us: can one maintain that

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under the status quo, Union governance has, or could in principle acquire, sufficient democratic le-
gitimation of its own to warrant a pluralist relationship with domestic norms?

Put in the most abstract terms, this would require that European law is made on the basis of rational opinion formation in the public sphere. Here I assume of course that Jürgen Habermas provides the right general understanding of the democratic legislation principle (see Chapter 1). Re-
call that, on his account, rational deliberation means that participants seek to formulate norms that all whom these will affect should be able to endorse. The outcome must hence reconcile moral prin-
ciples, the specific ethos of the collective in question, and pragmatic calculation. Or in short, it should manifest the best interpretation of the common good. In an intact democratic system, the public sphere approximates this ideal of rational deliberation. Actual decision making, in turn, should reflect the opinions formed there.

Using this standard implies that we reject the need for a *sui generis* approach to the normative evaluation of European lawmaker. Some authors believe that a transnational order like the EU can-
not in principle become democratic, and hence, goes the argument, one must use alternative criteria such as, for example, "justice" to assess it.35 But instead of making normative principles fit the em-
pirical object, we should criticize the latter from the viewpoint of the same philosophical standard that we otherwise subscribe to. Or at least, this must be our approach, if the goal is to support a heterarchical understanding of the European order. For domestic and Union norms to stand on co-
equal footing, European governance needs to possess an equivalent potential for democratic legitim-
ation as the political process in the member states. An investigation of whether that is the case should entail the application of like normative criteria to both spheres. However, this does not mean that we must bring the exact same yardstick to bear on the EU as would be appropriate for a state.

In the latter setting, the normative *telos* of legislation is to reflect the common good of a single people. A heterarchical order, though, has a different kind of collective referent: the Bund is a political union of peoples. Individuals, to be sure, hold a membership status as well. But, as Chapter 1 observed, exactly how citizens should participate in decision making remains controversial. We shall return to this question later (see Chapter 5). At the moment, it will suffice to note that a heterarchical order has a composite subject, which encompasses preexisting communities.

Can one adapt the Habermasian understanding of democratic legislation to such a context? The decisive conceptual move is to posit that in a Bund, the member state peoples embrace the federal common good as part of their respective public weal. A domestic citizen has then rational ground to accept laws that emanate from the center. That is the case even when her own unit government has opposed the measure in question. Just as minorities in the domestic sphere are obliged to accept the results of majoritarian procedures, so must whole peoples live with the outcome of a lost vote, at least so long as the federal decision has a reasonable claim to reflect the overarching common good. Whatever institutional framework is suitable to elaborate the content of the latter, it must differ from the legislative process in a state, which seeks to formulate the will of a single unified people. The question is hence not if Union lawmaking looks just the same as its domestic equivalent. Rather we should investigate whether the status quo permits the rational determination of the European public interest, given the composite nature of its referent.

Let us recall the seven prerequisites of the Habermasian ideal. An intact public sphere depends on individual rights that safeguard it, on a vibrant realm of civic association, and on a suitable media infrastructure. For the political system to connect with rational opinion formation, legislative institutions must permit decision making based on the common good. Politicians need furthermore to have an incentive to engage with public opinion, either through heeding it or attempting to influ-
ence the debate. To function as Habermas envisages, both the public sphere and the political system require furthermore the neutralization of social power and – somewhat less tangible – a disposition toward virtuous behavior on the part of citizens and officials. Lawmaking in the EU, I submit, fails to meet at least some of these criteria.

Consider first the level of the public sphere. Here it is crucial to recognize that a European space of political communication must have a different structure than its domestic counterpart. The latter connects fragmented publics via nationwide mass media, such that a large audience can participate in the same discourse. So long as the EU does not itself become a nation state, the common public sphere cannot reach the same level of integration. Language barriers and the continued political relevance of borders will prevent the emergence of continental media that cater to a large audience. But a rational debate about topics of shared interest might still be possible, if there is enough linkage among domestic public spheres. According to Habermas, such an interweaving of national discourses offers the best chance for the emergence of a robust European communication space.

There are several possible interfaces that can link public spheres with one another: Union officials and transnational NGOs can address each local audience at the same time; domestic media can include guest speakers from other member states; European media that serve a transnational elite audience can influence local opinion makers; and domestic news reporting can converge around salient political events, such as for example summit meetings. If these interfaces were developed enough, national public opinion formation could avail itself of all relevant information and per-

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37 As Brüggemann et al. observe, the lack of European media with a large audience is a “commonplace” in the literature. See ———, "Transnationale Öffentlichkeit in Europa. Forschungsstand und Perspektiven," 396.
39 Brügmann et al. discuss each of these possible links in detail. See Brügmann et al., "Transnationale Öffentlichkeit in Europa. Forschungsstand und Perspektiven," 396-405.
spectives. Citizens in each member state would then be able to debate the same topics at the same time, with similar degrees of attention paid to them. What is more, shared frames of meaning and reference could emerge, which is an essential precondition for a genuine transnational conversation.\textsuperscript{40}

Is there a robust European communication space in the sense just defined? Let us assume that domestic public spheres fulfill the criteria of legal rights, civil society development, and media infrastructure. Our main concern is then whether these separate communication spaces are linked to a sufficient degree. This question poses various operationalization and measurement challenges. One would furthermore have to define a cutoff point for the adequate empirical degree of “Europeanization.” Yet here we need not consider the issue in detail. Based on existing studies, it would seem fair to conclude that linkage among national public spheres falls short of a desirable level; at the same time, the goal of interweaving does not appear unrealistic altogether.\textsuperscript{41}

Optimism regarding the democratic potential of the EU would nonetheless be premature. As the following will show, the main faults of the status quo lie elsewhere. The design of legislative institutions hinders pursuit of the common good. Elected representatives are furthermore under insufficient constraint to engage with public opinion. In addition, the commitment of both citizens and elites to the European public weal appears to be rather shallow, calling into question that rational opinion and will formation is possible to a meaningful extent.

Consider first the problems at the level of the political system. As we have seen, Union law-making has two pillars: the European Council shapes the agenda, whereas Commission, Council, and Parliament hammer out the details of legislation through a bicameral process (see Chapter 2).

\textsuperscript{40} Scholars using the Habermasian paradigm have for some time seen these criteria as indispensable for a working European public sphere. See Thomas Risse, \textit{A Community of Europeans} (Ithaca: Cornell University Press, 2010), 113-120.

\textsuperscript{41} Brüggemann et al. and Risse provide the best summaries of the empirical literature. See Brüggemann et al., “Transnationale Öffentlichkeit in Europa. Forschungsstand und Perspektiven.” and Risse, \textit{A Community of Europeans}, 127-174.
To be sure, in how far the European Council is a genuine principal in this scheme is difficult to ascertain. We have noted that it guides the work of the Commission. Yet it might still be the case that most important decisions occur later in the process. This empirical question is beyond the scope of the present analysis. Let us just observe that it seems probable for the summit meetings to have a more than negligible impact on legislative output. We should also keep in mind that national leaders exercise sole decision making power where the OMC is used, including, for example, the coordination of labor market regulation, social insurance, and tax policies under the Euro Plus Pact. Against this background, our assessment of the status quo should depend in significant measure on the procedural features of the European Council.

This institution will find it hard to pursue the common good because it operates under consensus rule. Hence one should not expect deliberation about the public interest. Rather, national leaders will bargain to reach a Pareto efficient outcome. Since no member state can be outvoted, the leaders assembled in the European Council have little incentive to build coalitions on the basis of a persuasive vision of the common good. The heads of state and government might in fact be under pressure from their respective electorate to mount an intransigent defense of the national interest. Given these circumstances, it will be difficult for the European Council to adopt policies that impose sacrifice for the whole on some or even just one member state.

Why is that so problematic? A skeptic could respond that we have in fact no better measure of the common good than the Pareto principle. In fields where national peoples value their independence, the argument might run, governments should rule out losing a vote. Even if this means that some potential benefits of cooperation remain untapped, no member state will end up in a worse position or need to submit to external domination. But the objection is unpersuasive. The same reasoning would be absurd, if one applied it to the domestic context. Here individual citizens or so-
cial groups do not have a veto to ensure that public policies make all better off. Rather it seems evident that individuals will often need to accept sacrifice in order to ensure the long term health and justice of the commonwealth. Holding European governance to a different standard would be a mistake. In fields of exclusive Union power, the member states can no longer make their own rules. Even where national governments still have the competence to legislate, a common regime is often the best or sole chance to realize a certain public objective. In other words, when consensus requirements impede the creation of joint rules, the member states remain unable to pursue the goal at issue. This represents an illegitimate constraint on democratic legislation. Insofar as legal preemption hamstrings public power, the member state peoples are worse off than under the status quo ante. And even where factual interdependence is the immediate obstacle to national action, one can find institutional hurdles to common policies objectionable. Uncoordinated domestic regulation fails in the presence of dense crossborder social relations. The existence of such ties is often, in the first place, due to European integration, and Brussels should therefore make up for the weakening of national governments. When it fails to do so, the blame for the resulting democratic shortfall lies with the EU. In addition, one might question if a single people has ever an unconditional right to block a solution to a transnational problem. Such a veto, this much is certain, would contradict the ethos of a Bund that, unlike an international organization, pursues solidaristic cooperation.

A second problem with the summit mechanism is that national leaders are under too little pressure to defend their stance before the domestic public sphere. Diplomatic bargaining in the European Council takes place behind closed doors. It is hence all the more important that national parliaments have adequate procedures in place to hold the government accountable. Chapter 5 will consider this subject in greater detail. For the moment, let us just note that, while comprehensive empirical data is unavailable, it seems that in most member states, the legislature does not reach its

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full potential in making the European policies of the executive subject to ongoing public debate between government and opposition. Insofar as this holds true, national leaders are free to act without much regard for the views of their voters.

What about the bicameral pillar? Here the institutional parameters are more favorable to a common good orientation. First, the Commission is independent and technocratic. Its members are expected to represent the European public interest and do not report to the national government that has appointed them. Second, the Council operates based on QMV (at least under the OLP). This could open the door for a deliberative form of lawmaking, in which national governments seek to convince their peers that a particular solution realizes a shared interest. To succeed, a delegate would then need to persuade a winning coalition of its viewpoint. Since defeat is possible, each participant would be forced to listen. Nonetheless, it might of course still be the case that member states bargain, without arguing over the common good. Empirical studies have demonstrated that both modes of interaction play a role; in fact, bargaining seems to remain somewhat more important than deliberation.\textsuperscript{43} Even so, given that no individual member state can block legislation for a selfish reason (unless it blackmails the other governments, threatening to make use of its right to exit from the EU), the outcome is likelier to reflect the interest of the whole than under consensus rule. Consider last the Parliament. Voting in this institution is majoritarian. The deputies furthermore represent parties, not their countries of origin. This should facilitate a deliberative mode of proceeding. And, indeed, research has shown that debates in Parliament meet a high standard of rational discourse.\textsuperscript{44}

\textsuperscript{43} Daniel Naurin, "Most Common when Least Important. Deliberation in the Council of Ministers,"\textit{ British Journal of Political Science} 40, no. 1 (2010). Andreas Warntjen, though, cautions that observational equivalence makes it difficult to ascertain if deliberation or bargaining is the predominant interaction mode. See Andreas Warntjen, "Between Bargaining and Deliberation. Decision Making in the Council of the European Union,"\textit{ Journal of European Public Policy} 17, no. 5 (2010).

But even if the bicameral process faces less of an institutional barrier to pursuit of the common good, it still does not give elected leaders enough incentive to engage with public opinion. Some might blame the peculiar nature of the Commission: national governments appoint its members – their work is not subject to evaluation at the polls. This, however, does not have to be a shortcoming. Perhaps, a union of peoples should assign the executive function to technocrats. It might be unwise for a heterarchical system to create a government with its own electoral mandate, as this could lead to a gradual eclipse of the member states as independent political units (see Chapter 5). From such a perspective, the Commission should remain a trustee of the national executives, charged with rule enforcement and legislative initiative at their behest.

In contrast, there is no question that Council and Parliament must interact with the public sphere. Yet, at the moment, neither institution performs well on this dimension. The former, unlike the European Council, meets in public, at least when it reads legislation. In principle, citizens can therefore access information regarding the actions of their government. But here, too, we have to question if national parliaments subject the policies of the executive to the right form of oversight. Some will find this issue of minor relevance. The Strasbourg legislature, the argument might run, has become powerful enough to supplement the domestic legitimation channel and make up for its weaknesses. Indeed, through continuous reform, the Parliament has turned into a formidable legislative actor. European citizens, alas, remain unimpressed. The continental polls are still foremost “second order” elections: national parties contest the seats within their respective member state, and voters tend to choose representatives based on the performance of government and opposition in the domestic political arena.45 At the same time, low participation makes for a regular embarrassment to the EU. Turnout has seen uninterrupted decline since 1979, when the first direction elec-

tion took place. In 2009, it reached the new historic low of 43 percent overall, with national participation as low as 20 percent in Slovakia. As Chapter 5 will explain, such voter disinterest is a response to the lack of meaningful political competition at the Union level. This situation cannot be changed without drastic institutional reform: so long as there are no genuine continental parties, and so long as the member state governments maintain their current role in the legislative process, the Parliament cannot emerge as the voice of a transnational demos (if such a transformation would even be desirable is of course a different question).

To complete the argument of this section, let us next examine whether the background conditions for rational opinion and will formation hold for European politics: is social power neutralized in the legislative process? And can it depend on the virtue of citizens and elites? The first question turns foremost on whether transfer of competence to Brussels implies a more unfair distribution of access to power than we find in the member states. Scholarship has so far not identified such an effect, although one might speculate that secret European Council negotiations are more susceptible to undue influence than open deliberation in a parliament. Another relevant issue concerns the distribution of power among the member states. Here it seems that Union institutions make an effort to strike a fair balance between large and small countries—procedural rules are designed to protect the latter from marginalization, but also take account of population size in allocating power. Therefore, relations among the member states differ from the anarchical environment of international politics, where might is often enough right. In sum, there is little evidence that Union governance is subject to greater distortions from social power than national decision making. As for the issue of political virtue, one has to be more skeptical. The decisive question here is whether

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46 All member states have one vote in the European Council; each national government appoints one Commissioner and one ECJ judge. Under the Nice QMV rules (in force until 2014), voting weight in the Council depends on population size, but smaller countries have greater proportional influence; the Lisbon QMV system requires a 65 percent population majority, in addition to 55 percent of the member states. Seat distribution in the Parliament is likewise based on a formula that gives smaller countries more representatives per citizen than larger countries have.
Europeans share a political identity that motivates a commitment to the public weal, similar in
strength to the equivalent attitudes toward national peoples. Note that in a heterarchical setting, this
sentiment does not have to and indeed should not replace attachment to a member state. Identification
with the latter is desirable, so long as it does not remain exclusive. An ideal citizen of a Bund
has a dual sense of belonging that implies simultaneous affiliation with the unit and with the over-
arching collective. Such a mindset is essential to rational opinion formation in the continental public
sphere, for it allows citizens to perceive European questions as matters of shared concern, rather
than in terms of what is best for their respective member state.47 Similar considerations hold for
political elites. To be sure, their behavior depends in the first instance on institutional factors. Above
I have argued that voting rules in particular determine whether Union decision making can reflect
the European public interest. Still, even the best designed legislative process will to some extent de-
pend on congenial dispositions of its participants.

Thomas Risse has undertaken the most comprehensive effort to assess if normal citizens and
political elites possess the requisite attitudes. The results paint a mixed picture. Risse refutes the as-
sertion that an imagined community does not exist at all.48 But allegiance to it remains uneven
across the member states, and we should question if this sense of belonging engenders a deep com-
mitment to the Union public interest. In 2004, a narrow plurality of Eurobarometer respondents
identified both with their member state and Europe (46 percent). But at the same time, 41 percent
reported exclusive national attachment. These average figures mask large disparities among the
member states. In some countries, more than 60 percent of respondents have a dual identity (Lux-
embourg, Italy, France, Spain, and Germany). But in other member states, exclusive nationalists re-
main in the majority (UK, Finland, Sweden, Greece, Austria).49 With regard to the elite level, Risse

47 Risse, A Community of Europeans, 120-125.
48 For the various incarnations of this claim see ———, A Community of Europeans, 38.
49 ———, A Community of Europeans, 41-42.
has analyzed discourse in the UK, Germany, France, Spain, and Poland. He concludes that in the
UK, most politicians still adhere to an exclusive form of British identity. German, French, and
Spanish leaders embrace a dual affiliation to nation and EU; in Poland the question remains unde-
cided.\footnote{———, \textit{A Community of Europeans}, 63-86.}

These findings might suggest cautious optimism that political attitudes suitable to undergird a
heterarchical order exist. But we should note that even insofar as citizens and elites feel attached to
the EU, the depth of their commitment to its public weal remains doubtful. There is little survey
data relevant to this question.\footnote{———, \textit{A Community of Europeans}, 59-61.} In any event, it would seem more useful to observe actual behavior
instead of taking questionnaire responses at face value. Risse presents some indication that national
public debates frame questions of European governance as involving a shared concern. In other
words, speakers ask what is good for the whole continent, rather than focusing on the interest of
their respective member state. This held true regarding the controversies over the Eastern enlarge-
ment, the TCE, and the participation of the extreme right wing politician Jörg Haider in the Aus-
trian government.\footnote{———, \textit{A Community of Europeans}, 162-168.} But none of these debates involved a recognizable conflict of interest among
different member state peoples. Thus one cannot infer much from the observation that national dis-
course took a continental perspective. Moreover, anecdotal evidence from the Eurozone crisis sug-
gests that when the distributive stakes are high, public debate can lose sight of the shared interest
and even take a jingoist turn.\footnote{Severin Weiland and Philipp Wittrock, "Griechen vs. Deutsche," \textit{Spiegel ONLINE}, 16 February 2012.} This leads one to suspect that transnational solidaristic feelings re-
main shallow and have limited behavioral impact.

What about political elites? Measuring the depth of their commitment to the Union common
good is rather more difficult. A systematic evaluation would have to take a stance on the content of
the shared interest and compare it with the actual positions that leaders adopted. In order to prove
that a lack of European public spirit explains a deviation from the range of acceptable behavior, one would furthermore have to show that it did not result from institutional constraints (such as consensus voting) or unsurmountable electoral pressures at home. Such an investigation – if at all possible – is beyond our scope here. But let us again take a (not so rigorous) look at the woes of the Eurozone. The actions of member state leaders before and during the crisis suggest that one must doubt their common good orientation. Greek politicians, for example, manipulated budget data to gain admission into the Eurozone and continued to doctor the statistics for another decade. At the same time, the leaders of member states with sounder public finances did not make a flattering impression either. In the debate about the best response to excessive sovereign debt, politicians in the richer North often seemed to pursue short term national advantage, instead of a solution that would maximize the good of the whole.

In conclusion, the status quo has a significant democratic deficit, at least if we judge it from a Habermasian perspective. There is an incipient, though still weak, transnational communication space that might, in the future, permit rational deliberation about the shared interest of the continent. But this will remain of limited use, so long as there is no proper link between public sphere and the Union political system. At the moment, that is not the case because the latter retains institutional hurdles to pursuit of the common good, and because it does not impose sufficient constraint on elected leaders to defend their actions before voters. We should furthermore question if citizen and elite identification with the EU is strong enough to support rational opinion and will formation.

Obstacles to Effective Domestic Review

In agreement with the preceding, the German Lisbon decision holds that European lawmaking remains undemocratic. To be sure, the standard of evaluation that informs this judgment is different from the one we have applied. The FCC often strikes rather Habermasian notes. Yet its main concern is that Union organs deviate from the “one person, one vote” principle: small member states and their citizens wield disproportionate influence (see Introduction). Of course, this reasoning misses the point, if our question is whether the EU meets the standard required of a heterarchical order. The latter establishes a political union of peoples, and hence it would seem permissible for small member states to have some protection from marginalization. Nonetheless, the status quo also fails to meet the criteria that are in fact germane to it. Or so I have argued above.

But whatever makes European lawmaking undemocratic, from the dualist viewpoint of the FCC, there is no serious problem. The Lisbon decision argues that, given its limited substantive reach, Union governance does not in fact require the same legitimation as political decision making in the domestic context (see Introduction). What matters is that national governments retain control over certain essential fields – the “core state functions.” As we recall, these include the penal law, disposition over police and military, the tax system, social policy, and fields with a strong cultural aspect such as family law, education, and religious policy. The court will engage in “constitutional identity protection”, striking down European norms that encroach on this sphere. But outside of

55 According to the Lisbon judgment, the essence of democratic legislation is the link between public opinion and collective decision making: voters come to understand political choices through observing the struggle between government and opposition; elections guarantee that such public opinion formation has an impact on decision making. See BVerfG, 2 BvE 2/08, para. 250.

56 In response to the Lisbon judgment, Christoph Schönberger has pointed out that federal polities often allow for significant deviation from the “one person, one vote” principle. See Christoph Schönberger, "Lisbon in Karlsruhe. Maastricht’s Epigones at Sea," German Law Journal 10, no. 08 (2009).

57 Peter Lindseth observes a parallel between the notion of core state functions and the “essentialness” doctrine, which the FCC applies to administrative delegation in the domestic context. This jurisprudence forbids the German parliament to give up certain powers to the executive. In particular, the latter should not be able to create norms that affect constitutional rights or matters of similar importance. As noted in Chapter 2, Lindseth holds that Union governance is based on a form of administrative delegation. On his view, the FCC must therefore put forward an equivalent of the essentialness doctrine, ensuring that integration does not remove power from the national sphere,
the reserved domain, national executive leadership combined with legislative oversight is sufficient. What, then, is the role of direct citizen participation at the Union level, in particular via the Parliament? The latter, according to the court, has a useful “supplemental” role, on whose precise nature the judges decline to elaborate further.

This line of reasoning is unpersuasive. For one thing, limiting permissible fields of Union action does not address the problem that, due to the consensus orientation of the legislative process, Brussels can often not pursue the shared interest of the continent. And even if we disregard this aspect of the European democratic malaise, the notion of core state functions is confused – there is no systematic rationale behind the list the court has drawn up. The Lisbon decision states the obvious, when it points out the need of democratic participation within the enumerated fields. Yet the judges fail to explain why this catalog is exhaustive. To demonstrate that European lawmaking can proceed without strong independent legitimation, the FCC would have had to examine what Brussels does, instead of what it does not do.

Such an investigation might have stood on the shoulders of an important strand in EU scholarship, which describes Union governance as unpolitical. In a 1998 book, Giandomenico Majone claimed that most European rules do not entail redistribution of material benefit, but rather deal with market failures, whose correction is good for all. Hence one should not be too concerned about democratic participation. Most scholars, including Majone himself, believe this account is now outdated, given that current EU policies often create winners and losers. But we should note

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which the Bundestag should retain. See Lindseth, Power and Legitimacy, 186. Without doubt, the notion of core state functions is akin to the essentialness doctrine. Note, however, the large difference in scope: constitutional identity protection is restricted to enumerated fields; the criterion of rights impact has been dropped altogether. Given this narrow ambit, one cannot maintain that integration leaves all important political choices to the national democratic process. Or so, at least, I argue below.

This point has often been made in the literature. See for example Halberstam and Möllers, "The German Constitutional Court says 'Ja zu Deutschland!'".


Lindseth, Power and Legitimacy, 36-37.
that Andrew Moravscik has put forward a different version of the claim that integration does not in fact pose a democratic challenge. He argues that Union governance lacks salience for national voters. Although some common rules might have a redistributive effect, the wider electorate does not consider European topics when making political choices. Meanwhile, all the issues that people in fact care about remain under national control.61

The problem here is that Moravscik takes the lack of voter interest at face value; he does not take into account that it might result from a deficient institutional setup. In response to him, Andreas Føllesdal and Simon Hix maintain that salience hinges on whether a question is contested within the political system. Unless identifiable factions disagree over some topic, voters cannot include the issue in their decision calculus, when choosing among parties and individual leaders.62 As we noted earlier, contestation of European issues remains weak, both in the domestic and transnational realm. In light of this, the right question to ask is not whether voters pay attention, but rather: should they care, given the objective importance of Union governance? If the latter has a strong influence on their life, we should expect a different institutional structure, allowing for more political competition, to increase the salience of European issues.

To be sure, Moravscik is right that, in the past, the impact of Union regulation has often been exaggerated. Former Commission President Jacques Delors once claimed that 80 percent of domestic legislation implements a European measure. This number does not hold up to scrutiny. As Moravscik reports, the accurate figure is closer to 10-20 percent.63 But how important is that share? Recall the scope of the treaty mandate: the EU governs the internal market, it pursues an economic and monetary union, and it seeks to establish an “area of freedom, security, and justice” through police and judicial cooperation; in addition, the member states formulate a common foreign and secur-

61 Andrew Moravscik, "The Myth of Europe's 'Democratic Deficit'," Intereconomics 43, no. 6 (2008), 332-333.
63 Moravscik, "The Myth of Europe's 'Democratic Deficit'," 333.
ity policy (see Chapter 2). The following will argue that in all these fields, except the last one, Union governance touches on controversial issues that deserve of stronger politicization.

Consider first internal market governance. By means of court rulings and legislation, the EU removes barriers to the free movement of goods, services, capital and labor. If domestic norms constitute such obstacles, the ECJ will annul them. Via legislation, Brussels can establish a harmonized regime to replace national limits. Later in this chapter, it will become clear that judicial market integration has often high political stakes – European rules need to balance private economic freedom and public interests, which domestic courts might otherwise choose to protect. Legislative harmonization can likewise affect important social concerns. One prominent example has been the 2006 “Bolkestein directive” on the liberalization of trade in services. In fact, the debate around this particular measure contradicted the hypothesis that normal citizens do not care about Union issues. Left wing political forces ran an intense public campaign against the directive because it was expected to put pressure on wages in the richer member states. In France, negative perception of the initial Commission draft might even have been responsible for the referendum vote against the TCE.64

What about the economic and monetary union? Moravcsik argues that, here, it would make little sense to diagnose a legitimation deficit. EU competence in this field rests for the most part with the European Central Bank, which is (and should be) just as independent from democratic control as its national counterparts.65 That is correct. Yet, as the Eurozone crisis has brought home, the shared currency is not sustainable without coordination of labor market regulation, social insurance, and fiscal policies. Moravcsik, writing in 2008, could not anticipate this development, but the latest crisis responses mark, or at least foreshadow, a significant expansion of Union governance into the most contested fields of modern politics (see Chapter 2).

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65 Moravcsik, "The Myth of Europe's 'Democratic Deficit'," 335.
Police and judicial cooperation likewise touches upon questions that might give rise to vigorous public dispute. According to Moravscik, the EU does not play an important role with regard to the maintenance of “law and order.” That is false. Past and ongoing debates about the European Arrest Warrant, telecommunications data retention, or external border policing in the face of strong immigration pressure suggest that Brussels has the power to enact controversial rules. If the institutional framework allowed for partisan contestation of such issues, one should expect the wider electorate to take notice and to evaluate politicians on the basis of their respective stand.

The sole aspect of Union governance that does not require improved democratic legitimation is CFSP. Foreign policy is, qua its nature, not based on general statutes that emerge from open deliberation in the legislature. Rather it demands the concentration of decision making power in the executive, which must often act in secret to realize the public interest. The fact that member state leaders negotiate common policies behind closed doors – without much involvement from domestic or European parliamentarians – is therefore unproblematic. Coordination at the Union level does not give a member state executive undue power that it would otherwise lack.

In sum, the integration process has removed enough competences from the national sphere to necessitate strong democratic legitimation. This demand is all the more urgent given that power transfer to Brussels looks set to continue in the future. “Constitutional identity protection” must therefore fail to achieve its stated goal. When the FCC put forward this notion, it entered a fight

66 ________, "The Myth of Europe's 'Democratic Deficit,'" 333.
that has been lost some time ago. If the court were serious about keeping the EU out of fields that demand robust citizen participation, it would have to strike down a vast amount of extant and future legislation. But that is of course an unrealistic prospect. The sole benefit of the new doctrine, we must conclude, is to let the FCC maintain the semblance of a coherent dualist stance. It does little or nothing to compensate for the shortfall of independent democratic legitimation at the Union level.

*Discontents of Hybridity*

To a significant extent, the predicament just described results from the mixed character of the EU. From the pluralist viewpoint, the legitimation of European norms should be comparable to parliamentarism in the domestic sphere. Yet that is not the case, at least in part because the Union order retains international organization features, leaving its transition to a federal system incomplete. To be sure, this fact is not responsible for all the problems we diagnosed. First, the treaties cannot prescribe a confluence of the national public spheres into a shared communication space. At best, one can hope that a more federal institutional structure would encourage such a development. Second, the domestic legitimation of executive action in Brussels is outside the purview of European law – reform would have to occur at the member state level. Last, the failure of the Parliament to establish a meaningful connection between voters and legislative decision making could persist even if the EU became a genuine Bund (see Chapter 5).

However, the tension between international organization traits and federal characteristics lies behind the remainder of the democratic deficit, as seen from a pluralist standpoint. To begin with, the central role of the European Council is detrimental to the common good orientation of the legislative process and makes it less accountable to voters. The rise of summit diplomacy since the
1970s is a testament to the success of the antifederalist camp that has sought to rein in the supranational element of integration. Combined with the simultaneous expansion of the Union mandate, this trend has proven inimical to democratic legitimation of the ever more powerful European Behemoth. The dubious commitment of member state citizens and politicians to the overarching public weal might likewise be related to the hybrid nature of the status quo. I have argued that we cannot understand the treaties to derive from a popular choice to establish a transnational constitution (see Chapter 2). Even if certain other features of the present constellation place it rather close to a federal system, the decision to scrap the 2004 TCE underlined once more the reluctance of the continent to embrace political union in symbolic terms. The recent introduction of an explicit withdrawal clause and, for that matter, dualist court rulings such as the German Lisbon decision also cultivate a public impression that European integration remains focused on traditional cooperation among sovereign states. Against this background, the nature of the EU remains too ambiguous to inspire widespread dedication to its common good. So long as there is no definite symbolic commitment to a federal regime, we should not expect this situation to change.

From the dualist perspective, of course, the democratic anemia of Union lawmaking is not that worrisome: member state high courts, runs the argument, preserve the legitimation function of the domestic constitutional order through forestalling delegation of sensitive powers to Brussels. Yet, as we have seen, that is a chimerical promise. Here, too, the reason is the mixed character of the EU. Chapter 2 observed that Union competence has reached federal proportions. This makes it impracticable for judges to treat it like the more circumscribed mandate of an international organization. If a court nonetheless takes such a stance, it must – like the FCC – restrict the constitutional imperative of democratic legitimation to a range of public tasks that is both arbitrary and too narrow.
Basic Rights Protection

We have one more principle of constitutionalism to examine. As the previous chapter has discussed, the ECJ protects fundamental liberties against Union organs, and it reviews member state actions that fall under European law. Recall the legal bases of this jurisprudence: individuals can sue to enforce the rights of EU citizenship, the internal market freedoms, or the liberties enshrined in the Fundamental Rights Charter. This system of rights protection, I will now argue, suffers from important structural deficits. Once more, domestic review cannot make up for the shortfall: it must fail to preserve the substance of the domestic constitutional order against the transformative impact of rights litigation in the ECJ.

The Deficit at the Union Level

The pluralist understanding of the status quo postulates that European law guarantees an adequate scheme of basic rights. At first sight, this seems indeed to be the case. Union citizens have a full set of standard constitutional protections. However, the institutional framework through which rights are being enforced is deficient: there are gaps with regard to access to justice, and the ECJ wields disproportionate power to elaborate the content of individual freedom. Let us consider each problem in turn.

Potential complainants will often find it difficult to initiate judicial review of a Union measure alleged to violate a European basic right. There is no constitutional complaint procedure that would permit an individual to challenge legislation in Luxembourg. Private access is limited to executive measures that address the plaintiff or acts of “direct and individual concern” to a legal person. The ECJ has made it next to impossible to meet this standard: in effect, the complainant has to

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68 Private legal subjects can attempt to challenge a European measure via the annulment procedure set forth in Art. 263 TFEU. The Lisbon version of this clause has dropped the requirement of “individual concern” for acts that do not require formal domestic implementation. A challenge to such a measure is admissible, if the plaintiff can show “direct concern”, meaning some effect on her legal position.
show that a measure operates as if it were addressed to her and no one else. Hence a detour via a domestic court is often the sole avenue for an individual to obtain redress. But this route to Luxembourg is less than ideal from a legal protection viewpoint. First, it cannot be used to challenge a Union act that does not require a national implementation measure (unless the plaintiff first breaks the law to invite a domestic enforcement proceeding, in the course of which she might then contest the European norm). Second, a litigant cannot formulate the terms of a preliminary reference – the national judge will define the issue for the ECJ to resolve. Third, a plaintiff will often have to go through several instances before she can persuade a domestic court to refer a question, or the case reaches the highest appellate level, which is obliged to involve the ECJ. On the whole, then, it is more difficult for private actors to challenge a European measure than to challenge a member state legal act. In a telling contrast, this does not hold true for the European rights that individuals have against the member states. ECJ doctrine compels each member state to guarantee an effective system of remedies to enforce obligations that national governments have against private legal actors, including free movement, equal treatment, and the internal market liberties. To sum up, in terms of enforcement, the vertical dimension of Union citizenship is much stronger than its horizontal dimension.

However, the more serious fault of European basic rights protection is the asymmetric power of the judicial branch: when the ECJ elaborates the content of individual freedom, it does not enter a dialog with democratic will formation. As Chapter 1 has argued, rights jurisprudence should be an iterative process, through which courts educate public opinion, while remaining, at the same time, sensitive to its political expression. A constitutional order, we noted, can promote such a relation-

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70 Alexandra Dubová, "Individuals at the Gates of the European Court of Justice" (Central European University, 2010), 64-67.
71 George Bermann et al., Cases and Materials on European Union Law; 2nd ed. (St. Paul: West Group, 2002), 387-422.
ship through a proper balance of power between judicial and legislative branch – courts will be more disposed to listen to public opinion, if their jurisprudence might trigger a response in the form of a constitutional amendment or a statute.

To be sure, such interaction with democratic will formation is most important when reasonable people disagree about the proper meaning of a right. Does such contestation occur with regard to European liberties? When the Luxembourg court examines if Union measures violate a basic individual freedom, this does not seem to be the case. The outcome in such lawsuits has seldom, if ever, provoked a strong critical reaction. This might of course change as the European sphere continues to expand into new fields. But at present, the rights that individuals have against the member states furnish the more important source of disagreement. Here interpretation has turned out to be controversial, for these “horizontal” liberties often stand in tension with domestic rights or public interests.

Sometimes, of course, the ECJ seeks to avoid conflict with existing national practice. One much cited example is the Grogan judgment.\(^{72}\) In this dispute, the ECJ had to weigh market integration against the right to life of the unborn, protected under the Irish constitution. Student union leaders had argued that an injunction to cease publishing the addresses of abortion clinics in the UK violated the freedom to provide services. The ECJ found that such a link was not evident (although some believed that precedent would have suggested the opposite result).\(^{73}\) Thus it staved off a direct confrontation with the Irish Supreme Court, which had made clear that it would uphold the injunction, regardless of the European decision. Another instance of such conflict prevention is the Keck ruling mentioned above. This decision modifies the earlier Cassis de Dijon judgment, which forbids any national regulation that hinders marketing of goods from another EU state, even if the measure

\(^{72}\) ECJ case C-159/90.

in question does not discriminate in favor of domestic products. A national government has to demonstrate a legitimate public concern to override this interpretation of the free movement of goods principle. Under the *Cassis* test, the ECJ has been able to sanction consumer protection or environmental policies. But it could not recognize more diffuse social, cultural, and economic interests as permissible limits to the internal market. To make this stance more flexible, *Keck* exempts “selling arrangements” from review, so long as there is no discrimination against goods from other member states (“product characteristics” remain subject to the old test).\(^{74}\)

But the ECJ does not always pursue conciliation. Often its rulings have a transformative impact. In particular, the court has destabilized longstanding national equilibria between social and economic freedom. One prominent critic of this jurisprudence is Fritz Scharpf. He points out that strict implementation of equal treatment undermines the domestic welfare state. The Luxembourg judges have consistently ruled in favor of EU citizens seeking access to public services in a host state. This approach might undermine the local welfare state because it creates a chance to freeride: immigrants from other EU countries can take advantage of public services, but often do not make a long term contribution to their funding. Such opportunistic behavior could force governments to reduce the provision of services.\(^{75}\) Scharpf also notes that ECJ rulings have strengthened the internal market at the cost of labor rights, national influence over corporate governance, and national taxation of mobile capital.\(^{76}\)

In these cases, rights enforcement should have interacted with democratic will formation. Free movement, equal treatment, and the internal market freedoms are of course essential to the integration project. But politicians should participate in balancing these rights with other individual liberties.

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\(^{74}\) ECJ case C-267/91 and case C-268/91.


\(^{76}\) ———, "Legitimität im europäischen Mehrebenensystem," 264-265. Scharpf does not think of the Luxembourg judges as neoliberal conspirators. His point is rather that in order to strengthen its own power, the ECJ gives ever more weight to the internal market freedoms. On this view, the weakening of the national welfare state is a more or less accidental byproduct of an institutional bias.
and public interests. Such a dialogical relationship between ECJ and elected officials cannot develop under the status quo. For one thing, as discussed earlier, Union lawmaking is less democratic than it should be. But even if this deficit were remedied, there would still remain the structural imbalance between judicial and legislative branches that we observed before. Scharpf notes that in the EU, social democratic welfare states outnumber countries adhering to a more liberal paradigm. One would expect the former to resist ECJ judgments, when these undermine domestic social policies. But such a reaction has not come forth. The reason is not difficult to see: the same institutional hurdles that forestall a political response in the realm of competence dispute prevent it here. This high degree of assurance that a judgment will not be challenged distinguishes the Luxembourg court from its peer tribunals at the domestic level. The latter, for the most part, operate in an institutional environment where a reaction to an unwanted ruling is possible. National judges must therefore take into account the political climate when elaborating the content of basic rights. The ECJ, in contrast, is under no such pressure.

Obstacles to Effective Domestic Review

From the dualist perspective, domestic review should make up for the shortfalls of European rights protection. In theory, at least, a member state high court might halt implementation of a Union measure that it deems to conflict with an individual freedom or public interest, recognized under the domestic constitution. To be sure, creating an effective review mechanism is not altogether straightforward. When one can argue that a European norm infringes on a specific individual right, legal remedies are simple to conceive, and the FCC has in fact made one available in the past (see below). The situation is more complex, if the issue at stake is a conflict between a public interest and

77 ———, "The Asymmetry of European Integration or why the EU cannot be a 'Social Market Economy'," KFG Working Paper, no. 6 (2009a).
European rights doctrine. National judges might be willing to recognize such a concern as a legitimate reason to override an individual freedom. Yet how can a court enter into this kind of dispute, if there has not been a violation of subjective right? Scharpf notes that in Germany at least, “constitutional identity protection” could fill the lacuna. Recalling that under this doctrine, the FCC has committed to ensure that, with regard to core state functions, significant decision making power remains at the member state level (see Introduction). Litigants might therefore argue that an ECJ ruling must be annulled, if it undermines a cherished value of the domestic constitutional order.

But, at present, all this remains speculation. Member state high courts do not in fact second-guess European rights doctrine. This has not always seemed to be a natural state of affairs. In Germany, the 1974 Solange I judgment of the FCC permitted citizens to sue against the implementation of a European measure, alleged to violate an individual freedom guaranteed in the Basic Law. Yet the court has since revoked this doctrine. Responding to Solange I, the ECJ moved to incorporate standard constitutional liberties into European law – a development that later culminated in the adoption of the Fundamental Rights Charter. The German judges applauded this effort: in the Solange II decision, the FCC waived its power to hear complaints against EU infringement of fundamental liberties (see Introduction). It will not admit such a case so long as the Luxembourg court guarantees “equivalent” protection (the judgment does not elaborate further on the meaning of this rather enigmatic formula). The mere threat of a return to national control is supposed to preserve the substance of the Basic Law.

This expectation is problematic. Review of individual cases would seem to be a more effective approach. As we have seen, free movement, equal treatment, and the internal market freedoms can trump rights that are otherwise guaranteed under national constitutional doctrine, or subvert a public interest that a domestic court would not sacrifice to the protection of individual liberties. Why

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78 ______, "The Asymmetry of European Integration or why the EU cannot be a 'Social Market Economy'," 28-29.
does the FCC hesitate to preserve the substance of the German fundamental order against such coloniza-
tion from Luxembourg? The answer is again the fear of fragmentation. Frequent domestic review would lead to an unacceptable patchwork of exceptions from Union rules. One should expect different member state high courts to find different aspects of European rights incompatible with their constitution. As soon as one tribunal asserts its preferences, others would follow suit, dealing a massive blow to the effectiveness of Union governance. It follows that for integration through law to work, one single court must have the exclusive competence to balance free movement, equal treatment, and the internal market freedoms with other individual rights and public interests.

This imperative forces the FCC to contradict itself. Just like the *Honeywell* test for competence transgression, the *Solange* approach does not square with the first principles of its jurisprudence. From a dualist perspective, “equivalence” between domestic and European rights protection has to mean identical substance. The FCC could let the ECJ decide on rights interpretation, if such deference made little or no difference in outcome. But the current doctrine rather implies procedural equivalence. In effect, the German judges accept European law as a coequal order, which can be trusted to offer adequate protection of individual freedom, even if the content of the resulting jurisprudence will differ from national doctrine. Hence legal scholars often quote *Solange II* and similar decisions from other member states as proof that pluralism informs the EU jurisprudence of national high courts. Regarding the FCC, it would be more accurate to conclude that dualist rhetoric shrouds a pluralist practice. This mismatch is unfortunate, because it deceives the general public about the de facto relationship between German and European law. But the crucial point is a different one: as we have seen, the institutional framework of ECJ rights protection does not actually measure up to its domestic counterpart. The protection of individual freedom in the European sphere is unsound, and national judges can do little about it.

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79 ———, "The Asymmetry of European Integration or why the EU cannot be a 'Social Market Economy'," 29.
Discontents of Hybridity

The root cause behind the dilemma is again the mixed character of the EU. From the pluralist viewpoint, European law should offer adequate protection of individual freedom. As we have seen, that is not quite the case. First, it is too difficult for individuals to challenge a Union measure. This would not be an issue, if the EU were still an international organization. Private litigation at the regime level would then undermine the power of the member state principals, and hence legal protection should remain limited to the domestic sphere. But given the federal traits of the status quo – broad jurisdiction, direct effect, and primacy – it would be desirable to establish a safeguard against rights infringement that is commensurate to the actual extent of Union power. A second and more important deficit is the now familiar issue of excess judicial power: the European order matches a strong court, reminiscent of a federal system, with a feeble political apparatus that is more characteristic of an international organization. The member states have little choice but to acquiesce to controversial rights jurisprudence, for it will normally be too difficult to mount a legislative response. This leaves the ECJ in exclusive charge of important decisions that would require broader democratic legitimation.

The peculiar hybrid nature of the status quo is also responsible for the problems with the dualist narrative. As we noted in Chapter 2, the European scheme of fundamental liberties has the specific profile of a federal citizenship regime. The Luxembourg court ensures that EU organs heed standard basic rights, but it also protects free movement and equal treatment, as well as their economic variant – the internal market freedoms – against the member states. This latter element is the driving force behind an inexorable displacement of member state constitutional traditions. Domestic review could attempt to stem the tide on the ground that inflowing Union norms are not as legitimate as the extant national doctrine. Given the persistent international organization features of
the EU, this would have some justification. Yet such a jurisprudence would also fragment Union law and undermine an important goal of integration – to open up national societies to each other. This partial leveling of internal boundaries is a characteristic end of heterarchical federalism. Member state judges have tolerated its progressive realization, while also holding on to the illusion that a dike as porous as the Solange doctrine can preserve the domestic constitutional order unchanged.

**A Rotten Compromise**

Joseph Weiler has famously likened European integration to the Mosaic covenant. According to scripture, the Israelites bound themselves with the phrase: “We will do, and hearken.” Weiler believes that Europeans, in a similar vein, undertook an obligation, without grasping its actual significance, and later began to “hearken”, or seek to understand the meaning of the covenant they had joined. This process of interpretation should take a particular direction: European law, Weiler argues, is a “constitutional order the constitutional theory of which has not been worked out.” A great deal of scholarship has proceeded on this assumption, before and after publication of The Constitution of Europe in 1999. But the suggested route of inquiry has a potential danger: it might lead us to presume that one can somehow reconcile the principles of constitutionalism with the factual character of the Union legal order. What if that is not true?

To avoid unjustified idealization, I have rejected the premise that Europe has a proper constitution, whose underlying principles just need to be elaborated in order to better understand its nature. Rather the dissertation has first asked if a liberal and democratic constitution beyond the state is conceivable in principle. This investigation led us to the concept of the Bund. Such an order is neither state nor international organization; it has an independent higher law, standing in a heter-

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archical or pluralist relationship with the member state constitutions. Comparing the EU with an ideal typical account of the Bund, we found it to resemble this model to some degree. However, important features of the present institutional structure remain characteristic of an international organization — a political form that does not have a fundamental order in the emphatic sense of the term.

As this chapter has shown, the peculiar hybrid nature of the status quo undermines the principles of liberal and democratic constitutionalism. Since the EU is not a Bund yet, it cannot, to a sufficient extent, implement the rule of law, democratic legislation, and basic rights protection. Hearkening alone will not reconcile these values to European integration. But neither should we ignore the features of the present institutional structure that lead Weiler and others to see it through a constitutional lens. The FCC and its followers gloss over these aspects. Seen from their dualist angle, Union governance is an extension of the domestic constitutional system, not an independent fundamental order. Member state judges, goes the claim, protect their respective higher law against in-flowing European norms. But this attempt is bound to fail: since the EU is no longer an international organization, earnest domestic review would undermine its effective operation. No matter which perspective is taken, the status quo has a constitutionalism deficit.

How did the continent end up in the above predicament? Regarding this question, the image of “do and hearken” is again somewhat unhelpful. The actors who built the EU over the years often knew quite well what they were doing, or at least what they sought to achieve. Weiler misconstrues their mindset when he claims these institutional architects wanted to create something, whose ultimate form was not understood. The peculiar feature of the integration process has rather been that it moved forward, even though its participants disagreed about the final destination. Judges on the ECJ and some national leaders pursued federalist aspirations. Other actors envisaged an intergov-
ernmental union, whose member states retain full and exclusive sovereign power. The status quo represents the historical equilibrium that emerged from the clash of these forces (see Chapter 2).

Alas, the compromise is rotten. Piecemeal integration, based on give and take between federalists and their opponents, has produced a dysfunctional hybrid – the EU of Lisbon is a powerful Behemoth lacking the appropriate constitutional framework. This will be of significant concern for all those who believe in the political union of the European peoples: the present institutional shape of the project is deficient, which might well undermine its success in the long run (see Chapter 4). Proponents of national independence have even more reason to pause and reflect. Their insistence on preserving certain international organization features of the EU has distorted the institutional relationships between politicians, judges, and voters, creating just that sort of unaccountable beast, which advocates of l’Europe des Patries fear and criticize.

Given this state of affairs, the famed Monnet method has exhausted its usefulness. To address the legitimation deficit of the present constellation, the member states rather need to make a clear decision about the political form of the integration project. The TCE of 2004 reflected this insight, even if the substance of the draft lagged behind its symbolic ambition. But when ratification failed, national governments reverted to the old approach. Perhaps the time is now ripe to revisit the constitutional question. Despite all protestations that Lisbon created a lasting framework, the Eurozone crisis has put fundamental reform back on the agenda. In the medium term, the best route ahead is to complete the federal project and create a genuine Bund. Or so the next chapter will argue.
Part II

How to Fix It
The Case for a European Bund

When the Lisbon Treaty entered into force on 1 December 2009, a decade of protracted reform efforts had come to an end. At the time, most commentators held that further institutional change would be off the table for the foreseeable future. But the debt woes of the Eurozone have thwarted the hope for an enduring settlement. The political response to the crisis brought with it a further significant expansion of the Union sphere (see Chapter 2). Few observers believe that reform will end there. A shared currency, it has become clear, must go along with deeper political integration. This prospect makes the issue of how to give the power of the EU a proper constitutional framework all the more urgent. When the upheaval of the moment has abated, the continent should address the deficit that we have diagnosed in the previous chapter. The best solution, as I will now argue, is to create a genuine Bund.

Recall the basic features of the constitutionalism deficit. Neither the claim that European law itself meets the standard of a proper fundamental order nor the assertion that domestic judges fill the breach is defensible. The Union order provides an insufficient judicial check to ensure that its organs heed their competence mandate; the legislative process often fails to pursue the shared interest of the continent, and it is not accountable enough to voters; basic rights protection, finally, operates within an institutional framework that gives judges too much power relative to elected politicians. Member state high courts will not compensate for these problems, because serious review of European measures would be so disruptive that it is more or less out of the question. As we have seen, one central explanation for this predicament is the peculiar hybrid nature of the present
institutional structure. The state of constitutionalism is poor because the EU is no longer an international organization, and not yet a Bund.

To overcome this structural weakness, a clear decision about political form is needed. Which model should the continent follow? Some will argue that the member states should turn the EU into a more or less standard international organization again. This position, I believe, does not merit a sustained rebuttal. To recapture Union norms within the legitimation framework of domestic constitutions, radical changes would need to occur: the jurisdiction of the EU would have to shrink, the internal market freedoms could no longer function as federal basic rights, and the use of QMV might need to be curtailed. A demolition of the acquis on this scale is undesirable for the rather obvious reason that it would undermine whatever chance European countries have to realize their economic and geopolitical ambitions in the future. There is, however, a less extremist reform agenda, whose goal is to preserve the spirit of the international organization model without dismantling the past achievements of the integration project. In Chapter 2, we noted that Peter Lindseth recommends a more perfect implementation of the “administrative governance” paradigm. He believes that modest adjustments to the status quo would suffice to overcome the present legitimation shortfall, whereas a transnational constitution, equal in rank to domestic higher law, is neither required nor desirable. On the spectrum of reasonable plans for reform, this position represents one pole. At the other end, we find the claim that an effective and legitimate European order presupposes the creation of a federal state.

Neither vision, this chapter will show, is quite persuasive. The following will instead suggest a middle course, based on the idea of heterarchical federalism. My argument has four steps. First, I demonstrate that better implementation of the administrative governance paradigm cannot overcome the constitutionalism deficit. Second, the chapter explains how founding a Bund might ac-
complish this goal. Third, I elaborate further on the distinction between a heterarchical order and the federal state model, contending that Europe would fare better with the former approach. Fourth, the chapter argues that, despite the undeniable risk and cost, the creation of a Bund is a worthwhile project.

**The Administrative Governance Reform Agenda**

European integration began with the creation of a transnational administration, on which the member states conferred technical functions related to economic governance. The signatories of the Rome Treaty sought enduring peace through cooperation, but they did not think of the new order in constitutional terms. National leaders rather understood the transfer of power to Brussels along similar lines as bureaucratic delegation in the domestic sphere. To be sure, compared with previous international organizations, the Communities had a wider mandate and were more autonomous. But we must interpret this fact as the transnational manifestation of a more general trend toward a stronger role for independent technocrats – it should not mislead us into seeing the Rome Treaty as the founding moment of a federal Europe. This, at least, is how Peter Lindseth recounts the initial years of the integration process (see Chapter 2). From a historical perspective, he seems to be right. But Lindseth goes on to claim that administrative governance remains the correct paradigm for the legitimation of Union power in the present. Here I disagree with him.

The “administrative governance settlement”, as Lindseth describes it, relies on the executive, the legislative, and the courts to oversee the bureaucratic sphere. Elected government leaders steer the administration. Parliaments might intervene when bureaucrats violate their mandate. The pivotal role, though, is reserved for judges who must police the competence limits of agencies, prevent the legislative from giving up too much power, and enforce basic individual rights. Without such review,
goes the reasoning, administrative delegation is more or less certain to eat up liberal and democratic constitutionalism from the inside.\(^1\)

Does this legitimation triad function in the present European order? The original 1957 scheme, Lindseth notes, evinced striking parallels with the structure of the national bureaucratic state, and more similarities emerged over time. From the beginning, the member state governments exercised significant clout over the Commission – akin to executive control of domestic agencies. This oversight has in some ways even intensified as integration progressed.\(^2\) National parliaments, too, retain a degree of influence, although it cannot be compared with their power over bureaucrats at home. Still, in particular after the Maastricht reform, domestic legislators have developed a range of instruments for holding executive leaders responsible for their actions in Brussels.\(^3\) Lindseth, then, is right to observe that national executives and, to a lesser degree, parliaments oversee Union decision making. What he does not acknowledge is the failure of the judicial check. To be sure, following the lead of the German high court, domestic judges in several member states have asserted the competence to review if European norms overstep the terms of delegation. Their goal, as we have seen, is to compel Union organs to respect the treaty mandate, to leave the most important political decisions to the democratic process in the member states, and to uphold the basic rights protected under national higher law.\(^4\) But domestic review of European measures is a sham exercise. Or so, at least, I have argued in the previous chapter. Domestic courts are unable to ensure that Union organs heed their mandate, that decisions in need of strong democratic legitimation remain at the member state level, and that basic rights protection work as it should. The cause of this failure is rather obvious: through its progressive movement toward federalism, European governance has outgrown the limits that a bureaucratic delegation framework can impose.

\(^1\) Lindseth, *Power and Legitimacy*, 74-88.
\(^2\) ———, *Power and Legitimacy*, 91-132.
\(^3\) ———, *Power and Legitimacy*, 189-250.
\(^4\) ———, *Power and Legitimacy*, 133-188.
Lindseth, to be fair, does not believe the status quo is perfect. He acknowledges that Union organs have often gone beyond their mandate, without meeting judicial resistance. In his opinion, the adequate response is to set up a “conflicts tribunal” that would permit a wide range of litigants to contest European measures based on alleged _ultra vires_ action. Lindseth also concedes that integration has forced domestic legislators to relinquish a vast range of competences, leaving executive leaders with too much unchecked power. To counter this development, he suggests that member state parliaments obtain better tools to hold their government responsible for its actions in Brussels.

The first weakness of this reform agenda is that it remains silent about the structural faults of European basic rights protection. Lindseth never discusses the transformative impact of the present citizenship regime. The reason is not difficult to see: this phenomenon stands in tension with the claim that Union law is administrative, rather than constitutional. Yet, as we have seen, domestic courts are unable to prevent the ECJ from unsettling constitutional practice in the member states through a recalibration of extant legal equilibria among rights and public interests. For this jurisprudence to be legitimate, the Luxembourg court would need a political counterweight. The latter, as the previous chapter has shown, does not exist at the moment: the sluggishness of political decision making gives the ECJ outsize power to define the scope and content of fundamental liberties. A solution to this problem would have to involve a more flexible amendment rule, less consensus orientation in the legislative process, and democratization of the latter. But such reform is anathema to Lindseth, because it would amount to the creation of a federal order.

Even so, a partial solution to the constitutionalism deficit is perhaps better than none. Would a conflicts tribunal and enhanced oversight from national parliaments bring about positive change?

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5 [Power and Legitimacy], 266-277.
6 [Power and Legitimacy], 225-249.
Let us consider each proposal in turn. According to Lindseth, the conflicts tribunal should be composed of judges from both national high courts and the ECJ. It would rule on disputes regarding the distribution of competence between member states and the Union. Domestic public organs, European institutions, and individuals should have standing to bring a case. Given that under the administrative governance paradigm, the member states need to remain masters of the treaties, national high courts would still have the right to invalidate a finding of the conflicts tribunal. Yet the point of the proposed institutional design is that, before it comes to such a veto, domestic and European judges negotiate the question in a joint forum. One can expect that, at least most of the time, member state courts would accept the outcome of this mediation process.

A conflicts tribunal, I agree, then, might establish a useful check on the expansion of EU power. Under the new regime, there would seem to be a real chance for annulment of a legal act on the basis that it violates competence rules. Hence Union organs, including the ECJ, could no longer follow their natural inclination to widen the European sphere in disregard of treaties and secondary norms. Lindseth is furthermore right to point to the French legal system as proof that a conflicts tribunal, ruling on the limits of administrative jurisdiction, is workable in practice. One possible drawback of the proposed scheme is that it would further complicate the Union order, in which, even at present, the administration of justice proceeds with rather unhurried pace. A new appeal instance would further lengthen the period until legal certainty is reached. Is that a price worth paying for effective policing of the line between domestic and European competences? From a constitutionalist perspective, the answer might be yes.

The suggestion that improved legislative oversight at the domestic level will eliminate the democratic deficit of Union lawmaking is more problematic. Lindseth believes that we should perceive the problem in terms of a disconnect between member state parliaments and their European
trustees, to which the former have delegated some of their power. The legitimation chain between domestic legislators and Union governance, goes the argument, could be strengthened, if the deputies had better means to hold their respective government responsible for its behavior on the European stage. Lindseth does not offer a specific institutional blueprint as to how the member states could accomplish this. But he is correct that successful reform along such lines would be possible (see Chapter 5). The problem is that, as an isolated measure, strengthening the role of the domestic legislative remains an incomplete solution. While parliaments might oblige executive leaders to defend a particular viewpoint, this does not guarantee that Union policies will in fact reflect it. Given the consensus orientation of the legislative process, Brussels will often be unable to pursue collective goals, even when these command wide support across the continent (see Chapter 3). And to the extent that decision making is majoritarian, the inverse problem arises: national preferences can be outvoted.

For Lindseth, that is not too worrisome: he insinuates that an imperfect legitimation chain is the price of integration. Yet there is of course an alternative. I have argued that in a heterarchical setting, national peoples would see the common good of the EU as integral to their own public weal (see Chapter 3). Once that is the case, the initial position of a member state government no longer matters. The question becomes rather if the overall legislative process enables rational deliberation over the shared interest of the continent. In this scenario, one need neither hold on to the illusion that each member state retains full political freedom, nor presume the existence of a single transnational people. Lindseth, however, is unable to entertain such a conception of Union lawmaking, for he opposes the idea of a federal order, even when it does not establish a state.

In conclusion, the reform based on the administrative governance paradigm cannot eliminate the constitutionalism deficit. Perhaps it would rein in illegal competence expansion. But Lindseth

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does not have a good enough plan to make political will formation more democratic, and he ignores that, at present, the ECJ has too much power to define the content of individual freedom. The better solution, I will now argue, would be to complete the federal project.

**The Bund Option**

Creating a proper heterarchical order might overcome the incomplete realization of liberal and democratic constitutionalism under the status quo. Such a reform would need to entail in particular the following changes: replacement of the current legal framework with a constitutional treaty, abolition of the exit clause, introduction of supermajority voting as the amendment rule, and further loosening of consensus orientation in regular decision making. This reform scheme, as the following will show, has the potential to enhance the rule of law, democratic legislation, and basic rights protection. Once it has been implemented, the European order will be prepared for genuine constitutional pluralism. In other words, judges could then, with reasonable justification, treat domestic and Union norms as coequal.

**Rule of Law**

There is a good chance, I submit, that a federal reconstitution of the EU would lead to better policing of the line that separates member state and Union competence. What is the reasoning behind this expectation? In a Bund, the relationship between the judicial branch and elected politicians is more balanced than under the status quo, and hence the ECJ would have less freedom to ride roughshod over legislative intention, usurping power that national governments did not intend to transfer to the EU. When the Luxembourg court interprets primary law, it will have to take into account that a supermajority of member states might reverse a decision that goes against the reading
of the treaties favored in most national capitals. This would stand in marked contrast with the current situation. At the moment, a ruling will hold up, provided that it has the support of at least one member state and does not antagonize domestic courts so much that it leads them to disregard the norm at issue (see Chapter 3). Regarding the interpretation of secondary law, the power relationship between judges and politicians is not quite as skewed. But we have seen that, even in the era of QMV, the ECJ has been able to distort the meaning of regulations and directives. Hence a further loosening of consensus orientation in the Union legislative process might still be useful (I discuss below what this might entail). For one thing, it would empower the member states to override an interpretation of secondary norm that most of them oppose. What is more, the chance of such a response might deter the ECJ from handing down such rulings in the first place.

Yet a more balanced separation of powers scheme is of course no panacea. In particular, it would fail to prevent competence expansion that violates the letter of the law but commands the support of national governments (and the Parliament). The previous chapter has argued that it would be desirable to block this particular route to a power shift in favor of Brussels – executive leaders might otherwise increase their own clout, without a public debate as to whether the EU should control the field at issue. In light of this, a separate competence adjudication mechanism might still have a place. Regarding its composition and jurisdiction, such a tribunal need not differ from the Lindseth proposal. But in a heterarchical setting, such an institution would not be part of the administrative realm. Rather it would take on a constitutional role. This difference in underlying rationale might lead to a less restrictive jurisprudence than Lindseth envisages. From his perspective, the treaties should be read in a similar manner as the delegated mandates of bureaucratic actors in the domestic sphere. The legal basis of a federal union, though, establishes an independent order,
and therefore, doctrinal tools such as teleological interpretation (which the ECJ has of course long employed) would be legitimate.

In sum, a nimbler political apparatus together with a separate competence adjudication mechanism should make for a powerful constitutional limit on the reach of federal law in a European Bund. Judges would have to anticipate the legislative correction of rulings that expand the Union sphere against the original intention behind the norm in question. At the same time, politicians and bureaucrats would face judicial review in a tribunal that, unlike the present ECJ, does not have an incentive to overlook possible transgressions of competence.

Democratic Legislation
Recall how we specified the second principle of constitutionalism: legislation should be a rational discursive process, in which everyone can participate via the public sphere and elections (see Chapter 1). From this perspective, the Bund model has the advantage that it might orient Union decision making toward the European common good. Such a transformation is a basic precondition of a legislative process, which is rational in the sense that each citizen should be able to endorse its outcomes. As the previous chapter has shown, the present institutional structure erects procedural obstacles to deliberation about the shared interest of the continent, and it perpetuates a political culture that militates against rational opinion and will formation. Founding a European Bund, I contend, might overcome both problems.

To be sure, even if this were true, there would still be the question of adequate democratic input. According to our Habermasian criteria, politicians must heed opinions formed in the public sphere, and citizens should be able to assess elected leaders on the basis of their performance in this regard. We have seen that, under the status quo, neither is the case to a sufficient extent. How could
a future Bund perform better? This puzzle is rather complex. As Chapter 1 discussed, theorists have put forward two opposing conceptions of federal will formation. On the first account, a Bund is a political union of states. Its sole legislative institution should be a diet that determines the interest of the whole, based on fair compromise among the member state preferences. According to the second view, a heterarchical federation is a political union of both states and individuals. Legislative power should be vested in a bicameral parliament, in which the diet turns into an upper chamber, whereas the lower chamber provides direct citizen representation. Political will formation under this arrangement is supposed to mediate between the public interests of the member state peoples and of the overarching demos. For the moment, I leave open which model is better suited to fulfill our standard under the particular circumstances of the European case. The next chapter, though, will argue that a possible reform effort should look for guidance in the first approach.

At this point, let us focus on how the suggested reform plan might enhance the common good orientation of Union lawmaking. Here the first possible benefit lies in the elimination of procedural obstacles. The most important such hurdle is consensus decision making in the European Council. This organ, we recall, directs the work of the Commission, and it has therefore an important agenda setting function. Under the current procedural regime, the guidelines negotiated at the summits must remain limited to the lowest common denominator of national preferences. If the EU turned into a Bund, this vestige of its international organization heritage would need to disappear, at least in fields where Brussels has the competence to make law (as opposed to the mere coordination of policies). Such an extension of the majority principle would enable the member state governments to draw up a legislative agenda that is focused on the public weal of the continent. Of course, in

8 The increased use of the OMC (see Chapter 2) has exposed that it can be difficult to tell apart genuine legislative competence and “mere” coordination. In the realm of CFSP, the distinction is straightforward because here the goal is to align executive decision making. Yet where national leaders agree on common “benchmarks” for national legislative output, the line separating coordination from lawmaker might be crossed. Such an empowerment of the national executive branches is undesirable. The fields in question should either remain in the domestic sphere or fall under the normal legislative mandate of the EU.
this scenario, member states will sometimes have to put up with a lost vote; at the same time, however, the federation could be more vigorous in addressing shared concerns.

The need for reform is less urgent for the Council, which has long operated based on QMV. At the moment, the hurdle to pass legislation is still rather high. Yet this will change in 2014 when the Lisbon procedural rules enter into force (see Chapter 2). Further amendment of the voting regime is perhaps not required to bring the Council in line with the Bund model. It would, however, be prudent to abolish the formal right to leave the EU. So long as this option exists, governments might blackmail the other member states, threatening to secede if the Council enacts a measure that conflicts with a strong national preference. As we noted, the danger of such a crisis might – at least under some circumstances – reduce the effect of QMV on the behavior of member state leaders (see Chapter 2).

The second possible benefit of the suggested reform plan operates at the level of political culture: founding a European Bund has the potential to increase the commitment of citizens and elites to the shared interest. Adoption of a federal compact and successful working of the new institutional framework could inspire a general belief that for each member state to prosper, the whole EU must thrive. If this scenario came to pass, political actors would less often prioritize short term national interest over a course of action that promotes the good of the entire continent. As a result, opinion formation in the public sphere and decision making in the political system could lead to more rational outcomes than under the status quo.

To be sure, such a development is not certain. A skeptic might question if a formal constitutional treaty would bring about the suggested positive effect. Codified higher law is not an absolute requirement for a political culture that is conducive to popular government: Israel, New Zealand,  

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A legal norm, to be sure, cannot eliminate the factual threat of secession. But such an illegal exit would amount to a hostile act, which might in turn lead to corresponding reprisal. The political cost is therefore higher than when a state exercises a legal right to leave the EU. How significant this difference is will depend on contingent factors.
and the UK – all of which lack a constitutional document – have more or less intact democratic cultures; there is little reason to believe that writing down the higher law would improve public spiritedness in these countries. On the other hand, there are cases where the act of making a constitution has promoted social integration. Dieter Grimm points to the reverence for the founding fathers in the United States and observes further that West German patriotism after the Third Reich is using the Basic Law as its central reference point.\textsuperscript{10} Yet he cautions that for such an integrative effect to occur, a constitutional moment must take place against the right historical background: it must distance the collective from a “past viewed with disdain and shape a new idea of political order.”\textsuperscript{11} The failed TCE of 2004, Grimm argues, did not fulfill this condition. It rather aimed to propel an ongoing process of integration one stage further.\textsuperscript{12} Founding a Bund in the next decade or so would likewise just continue the process that began a long time ago with coal and steel regulation. Nonetheless, given the economic dislocations that have afflicted the continent since 2009, one can speculate that a relaunch of the integration project might be seen as instrumental to overcoming a “past viewed with disdain.”

Regardless of whether a federal compact will be perceived in this manner, adopting such a document has a significant potential benefit at the level of political culture. Note a crucial difference between countries without a formal constitution and the EU: Israel, New Zealand, and the UK are states, and no one would dispute this fact. There is hence a clear expectation that citizens embrace the public weal of the communities in question. With regard to the EU, that is not the case. As we have seen, its political form is hybrid. Some commentators focus on international organization features, others emphasize federal traits. The general public rather often hears a message that goes like this: “European integration has progressed quite far – but the member states are still sovereign, and

\textsuperscript{11} \textit{———}, "Integration by Constitution," 204.
\textsuperscript{12} \textit{———}, "Integration by Constitution," 204-206.
Brussels is not.” National leaders invoke this argument when blocking undesired common policies; high courts reason along these lines when asserting the supreme character of the domestic constitution. Given this discursive climate, we should not be surprised to find that, at present, citizens and elites have a rather shallow commitment to the public interest of the whole continent (see Chapter 3).

In light of this, a constitutional document that fits the Bund model with regard to symbolism and institutional substance might provide useful clarification. Once a federal compact has been adopted, it would be unmistakable that Europeans have a political obligation to pursue an overarching common good. That is no guarantee that anyone will in fact heed this demand. Yet it would seem to be a precondition for the emergence of a political culture that supports the aspiration of democratic rule at the Union level. So long as the nature of the integration project remains ambiguous, one cannot expect that such a transformation will take place.

To be sure, even if the envisaged attitude shift occurred, it would not happen overnight. Hence the decisive question is whether the incipient European public spiritedness of the present would be strong enough to keep a Bund afloat in the immediate aftermath of its creation. If this were the case, the initial success could breed further success. The history of state formation teaches us that a sense of communal belonging can emerge over time, even when it is absent or weak at the beginning. If majority rule is not abused to suppress minorities, generalized trust can develop, permitting voters to support candidates and platforms that focus on the shared interest rather than benefits for a particular social group. A federal reconstitution of the EU, so we can at least hope, would be the first step to initiate such a virtuous circle, in which democratic practice begets the preconditions for its own continued working. Yet it is of course also possible that a Bund would founder at the outset. Political disagreement might be so intense that national citizens fail to recognize lost

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13 Simon Hix, *What's Wrong with the European Union and How to Fix It* (Cambridge: Polity, 2008), 105-106.
votes at the Union level as legitimate. In this case, European governance would acquire the taste of foreign imposition. Such a development could lead to a situation that is worse than the status quo or even an outright collapse of the integration project. I will address the question as to whether this chance is worth taking in the last part of the chapter.

Basic Rights Protection

A federal reconstitution of the EU might go along with an expansion of individual standing to sue against rights violation. We have noted that, at present, private actors must often take the route via domestic courts when seeking redress against Union organs. For reasons the previous chapter discussed, this form of judicial protection is less than ideal. To eliminate the problem, a reformed EU might offer a complaint procedure for individuals at the federal level. Unlike an international organization, a Bund can permit direct access to its court system, for the latter has no less constitutional standing than the member state judiciaries. Yet it should be obvious that such a step would empower the European level relative to domestic courts and perhaps tilt the federal balance of power too far in the direction of the center. In other words, the values of adequate judicial protection and member state independence stand in tension. Here I shall remain agnostic concerning the right tradeoff between them.

Another potential benefit of reform is more important: founding a Bund might correct the present imbalance between the judicial and legislative branches, when it comes to elaborating the substance of European rights. Just like in the realm of competence dispute, making the amendment rule and the legislative process more federal would enable the member states to overrule undesired ECJ doctrine. If, at the same time, the democratic deficit of Union lawmaking were overcome,
judges and elected representatives could enter a dialogue about the proper content of individual freedom.

We should note here that Fritz Scharpf has offered a different plan as to how one might counteract the excessive power of the ECJ. According to him, the European Council should be the ultimate arbiter in controversial questions of rights interpretation. Under this proposal, a member state that disagrees with a ruling could refuse to enforce it and refer the question to the heads of state and government. A simple majority in the European Council would then suffice to overrule the judgment in question. But if the summit upholds the decision, it will remain binding on all member states.¹⁴

This model is much in line with the hybrid nature of the status quo. On the one hand, it leaves the international organization features of the present decision making system intact: the amendment rule could remain unchanged, and the EU would not have to abandon consensus orientation in the legislative process. The sole difference to the current situation is that a simple majority of the member state leaders could invalidate a decision from Luxembourg. On the other hand, the proposal recognizes the federal nature of the Union citizenship regime. Scharpf rejects unilateral resistance to ECJ rights doctrine, embracing the notion that even questions of high constitutional import must have a uniform transnational solution, provided the subject matter falls within the scope of the integration project.

He is willing to pay a high price for this compromise solution. A veto right of the European Council might indeed force the Luxembourg court to become more attuned to opinion in the member states. But it would also undermine the rule of law. If the heads of state and government exercised their veto, a particular decision of the ECJ would become inapplicable. Yet the law in the books would still be the same, and the reasons that informed the original ruling might remain valid.

in the eyes of the judges. Against this background, how should the legal dispute at hand be resolved? Would the European Council write its own judgment, or would it just annul the decision, leaving the Luxembourg court to engineer a more palatable outcome? And how should the judges decide future disputes of a similar kind? These questions illustrate what should be obvious in the first place: direct executive interference with the judicial process is a bad idea. To balance the excessive clout of the ECJ, the Union legislative branch should become stronger; but we must not give up on the separation of powers itself.

**Genuine Constitutional Pluralism**

If a European Bund succeeded in restoring liberal and democratic constitutionalism, national judges could move beyond their current schizophrenic attitude toward the relationship between domestic and Union law. We have seen that, at present, constitutional pluralism is an unacknowledged fact in Europe: member state high courts still emphasize their hypothetical competence to review European measures, but never make actual use of it, even when this would seem to be indicated. *Pro forma*, Union law is denied coequal standing with the domestic constitution, but in practice there is little distinction between them. Some authors see no reason for concern about this doublespeak: “Constitutional pluralism does not require courts to talk about constitutional pluralism.”

What should matter is that judges engage in a pluralist practice. But this position sanctions that member state high courts misrepresent the de facto relationship between domestic and European law to their national publics, and it finds no fault in the fact that judges promise to enforce the domestic constitution against Union measures, when having no such intention. Perhaps this would still be acceptable if the European order itself realized the principles of liberal and democratic constitutionalism to a sufficient extent. Yet, as we have seen, that is not the case either.

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In a European Bund, national high courts might escape from their current dilemma. With a genuine federal constitution in place, judges could acknowledge that domestic and Union norms are coequal. Once reform has taken place, European governance will operate through a framework that is founded on constituent power and implements the rule of law, democratic legislation, and basic rights protection. Member state high courts would then have good reason to suspend their competence to enforce national higher law against conflicting Union measures. The latter would be just as legitimate as the former, but the functional imperative of legal consistence across the member states would tip the balance in favor of the European norm. To hedge against grave abuse, domestic courts might still put forward a generalized version of the Solange doctrine and pledge to reassert control when Union organs engage in systematic violation of constitutional fundamentals, which goes unpunished at the federal level. Meanwhile the ECJ should accommodate extant national solutions whenever possible. Unlike at present, it would have a real motivation to do so: the Luxembourg judges would know that a too activist jurisprudence will meet political resistance from an empowered legislative branch. This expectation, it stands to be reasoned, should influence them more than an implausible threat of domestic court intervention. In sum, a genuine European Bund might realize the aspiration of legitimate coexistence, which the de facto pluralism of the present can at most pretend to.

Why Not a Federal State?

From Winston Churchill in 1946 to Gerhard Schröder in 2011, political leaders have on occasion called for a “United States of Europe.” But the precise meaning of such references to American federalism remains often unclear. In particular, one might wonder if the allusion is to 1787 or the

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16 Churchill made this suggestion in a speech at the University of Zurich on 9 September 1946. Schröder called for the United States of Europe in a recent magazine interview. See Christoph Schwennicke and Georg Mascolo, "Europa muss aufwachen," Der Spiegel, 5 September 2011. Of course, both statesmen did not hold office at the time of their federalist exhortations.
United States of today. The original Philadelphian system – as Europeans tend to forget – looked rather different from the present. At the outset, the United States bore a significant resemblance to the Bund ideal type. Yet, over time, the central government became more powerful, and the notion that autonomous states had contracted to form a union lost ground to a narrative of nationhood – America turned into a federal state. Should the EU adopt this political form, instead of pursuing a heterarchical solution? A federal state, it could be said, would dispose of the constitutionalism deficit just as well or better than a Bund; in addition, the argument might run, this political form delivers essential goods, which neither the status quo nor a heterarchical order can provide. I shall rebut this position below. There is a prior question, though, which needs our attention first. Some will not yet have been persuaded that one can draw a meaningful line between hierarchical and heterarchical federalism. From their perspective, talk of a via media between state and international organization will seem either confused or dishonest: federalism, goes the objection, cannot but lead to the creation of a sovereign center. To dissipate such qualms, the following will build on the discussion in Chapter 1 and provide a more concrete account of how a possible European Bund would differ from a federal state.

**Bund or Federal State – a Real Choice**

In terms of the classification scheme presented in Chapter 1, Bund and federal state differ along the following dimensions. First, the latter is based on a single constitution, not a compact between sovereign entities. Second, this fundamental order is supreme over unit norms, as opposed to coequal

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18 Such a development has been rather typical for erstwhile heterarchical federations. Switzerland, the Netherlands, and Germany underwent a similar metamorphosis. See ———, *Unions of States. The Theory and Practice of Confederation*, 17-60. This, of course, raises the question as to whether the Bund is a transient political form that – in the long run – cannot but turn into a federal state. I believe that at least in Europe, where longstanding national identities exist, this does not have to be the case. So long as the federal compact anticipates possible centripetal tendencies, a continental Bund should be able to retain its heterarchical character for a significant period.
with them. Third, in a federal state, the central government monopolizes legitimate force, whereas a Bund does not have exclusive control over the means of violence. Fourth, the units of a federal state, unlike those of a heterarchical system, relinquish international legal subjecthood. On the remaining dimensions of the classification scheme, Bund and federal state resemble each other. Both are permanent forms of political association, majorities can amend the fundamental order, the jurisdiction of the federal government is limited and original, central norms have direct effect, there is an overarching citizenship status, and often a Bund will have a bicameral parliament, just like a federal state.

Against this background, some will question that a meaningful distinction can in fact be made. Does it matter that, at the symbolic level, a federal compact refers to the member state peoples, and not, like a constitution, to a single unified collective? Does it matter that we describe the law of a Bund as coequal to member state norms, when the latter must in practice still yield to the former. Does it matter that units of a Bund keep some control over the means of coercion when, even under the status quo, the EU achieves more or less optimal compliance? And does it matter that the member states retain an international presence outside the federal sphere? If we had to conclude that, in sum, these differences do not amount to much, the whole concept of the Bund would be superfluous. The sole relevant distinction would then lie between the state – unitary or federal – and the international organization model. From this perspective, the idea of a via media is at best a theoretical misconception or, more insidious, a Trojan horse to blindside the opposition toward what is, for practical purposes, a proposal to create a single European Leviathan.

In response, let me emphasize once more that it would be a mistake to subsume the whole of federalism under the state model. Such a conflation of political forms, as Chapter 1 has argued, passes over real differences among historical federations. It also deprives us of a theoretical frame-
work, which can be used to imagine a viable future course for European integration that remedies the faults of the status quo, without subjugating the member states to an omnipotent sovereign. To vindicate this claim, the abstract typological distinction I have made so far is perhaps not enough. Let us therefore take a more detailed look at how each model would operate in practice. The following will argue that all the differences listed above do in fact matter. What is more, even where Bund and federal state appear similar on the institutional surface, a more thorough inspection will often reveal this impression to be misleading.

Recall the divergent fundamental principles that animate either model. A Bund establishes a permanent bond among the member state peoples, which nonetheless seek to retain an independent political existence. In contrast, a federal state is based on a single people.\textsuperscript{19} This difference of political logic has a number of concrete implications. First, a compact to establish a European Bund would enter into force through a different procedure than the constitution of a federal state. In the former case, each national people would have to approve the proposed higher law. Hence member states that reject the document cannot become part of the reformed Union (Chapter 6 examines the ideal design of such a ratification process). Creating a federal state, on the other hand, does not presuppose national consent. European citizens would decide about its constitution via a single referendum or representative procedure.

A second difference concerns amendment of the fundamental order. To effect such change, neither the Bund nor the federal state require a unanimous decision of the units. But in the former case, there is a qualification. As Chapter 1 has noted, a revision of the higher law that abolishes its heterarchical nature would eliminate the constituent power of the member state peoples, on which

\textsuperscript{19} Such a collective, Federico Mancini reminds us, does not have to be a nation. He points out that Belgium, Canada, India and South Africa, which harbor diverse ethnic groups and languages, are more or less functioning democracies. Against this background, Mancini argues that peoplehood in a political sense would suffice for a European federal state; the member states, in other word, could still hold on to their respective national cultures and languages. See Federico Mancini, "Europe. The Case for Statehood," \textit{European Law Journal} 4, no. 1 (1998).
the system is based. Hence a European Bund would have to forbid changes that unmake its peculiar character; amendments that might erode the latter over time should at least be more difficult to pass than a normal constitutional revision. In contrast, the higher law of a European state could forgo such a limit on permissible change. Here federalism would rest on a decision of the people to organize itself in a particular manner. Several rationales might account for this choice: federalism can serve the protection of minorities, it can bring public decision making closer to the affected population, and it can introduce a further element of checks and balances into the constitutional division of powers. Yet, unlike the cardinal purpose of a Bund – which is to maintain the independence of each unit people – these goals are not absolute. If other values emerge as more important, the people might later resolve to amend the fundamental order and espouse a different mode of political organization.

The third contrast between heterarchical and hierarchical federalism regards the issue of which legal order is supreme. In a Bund, unit and center norms are coequal, whereas, in a federal state, the former subordinate the latter. Above I have mentioned the possible objection that, in practice, this difference might have little significance. It is true that no federal regime – Bund or state – can permit the units to disregard the law of the center on a regular basis. Courts should give precedence to federal norms, even when these conflict with a unit constitution, so as to preserve the effectiveness of the shared legal system. The peculiar feature of a Bund is that judges have an obligation to minimize tension between unit and center norms. To be sure, apart from the risk of a legislative response to judicial overreach, there can be no hard and fast guarantee that federal courts will in fact heed this demand. Culture is therefore important. So long as the spirit of heterarchical federalism pervades the institutional practice, judges will seek to manage tension between unit and center
norms in a manner that reflects their coequal status (or at least politicians will beat them to it). Once that is no longer the case, the Bund is en route to dissolution or turning into a state.

A fourth difference between Bund and federal state lies in the nature of citizenship. While both models establish such a status, it is less encompassing under a heterarchical order. Here the function of federal citizenship is to make the boundaries that separate the unit communities porous, yet not to eliminate them altogether. Recall the characteristic form that Bund citizenship takes in order to fulfill this specific purpose. First, the member states must grant individuals free movement and some degree of equal treatment with nationals. However, this does not mean that federal citizens have the exact same rights, irrespective of unit affiliation. Certain privileges and duties remain limited to national citizens. Second, the Bund itself has to respect and seek to implement civil, political, social and economic freedom. Yet, at the same time, it must leave the member states a degree of freedom in pursuing their own path in this regard.

The preceding is of course a valid description of European citizenship at present (see Chapter 2). Against the member states, Union citizens are entitled to free movement and equal treatment. But, as we have seen, certain freedoms and obligations do not extend to them. Individuals can furthermore appeal to basic rights in order to contest a particular European measure that affects them. However, there is no equivalent to the 14th Amendment of the US constitution – the Fundamental Rights Charter does not govern national acts outside the realm of Union law. The situation would be rather different in a European federal state where federal citizenship would supersede member state citizenship. In other words basic rights protected in the constitution would bind all public organs, and everyone could assert them regardless of national status. The federal constitution might even guarantee more or less equal living conditions across the continent, obligating richer member
states to transfer wealth to poorer governments through a fiscal equalization mechanism.\textsuperscript{20} If the EU adopted such a citizenship regime, national affiliation would turn into a mere cultural attribute—rather similar to being a Texan, a Bavarian, or perhaps a Québécois (given the multitude of languages spoken in Europe).

The fifth contrast between heterarchical and hierarchical federalism is that under the former model, the center does not monopolize legitimate violence. As we noted, one might argue that since the EU has an impressive compliance record even now, the contrast is unimportant. But this would be too rash a conclusion. Dispersion of coercive resources in a heterarchical order implies that more powerful units can refuse implementation of policies that contradict a strong local preference. This might of course unravel the Bund, given that such resistance calls the federal compact into question. In other words, the center faces a constraint not to adopt rules that a member state could be willing to disregard, even if this meant the end of the union. A federal state does not have to make the same calculation. It controls at least the armed forces, if not the police as well. Hence the units have little choice but to implement whatever the central government decrees, regardless of how intense their opposition might be. Where does this leave us regarding the practical difference between a possible European Bund and the federal state alternative? Under the status quo, the limited enforcement power of Brussels is consistent with the heterarchical model. The distribution of coercive resources could therefore remain unchanged, should the EU become a genuine Bund. In contrast, the creation of a federal state would necessitate a dramatic shift in the balance of power between national governments and Union institutions.

A sixth difference between Bund and federal state pertains to the working of the legislative process. The units of a Bund require a genuine voice in central governance. Hence the main law-

\textsuperscript{20} All existing federal states, with the exception of the United States and Mexico, have instituted such a geographical redistribution of wealth. See Ronald L. Watts, \textit{Comparing Federal Systems} (Kingston, Ontario: Institute for Intergovernmental Relations, 2008), 108-112.
making institution is a federal diet. To be sure, this organ might form part of a bicameral parliament, whose lower chamber provides for direct representation of individual citizens. At least *prima facie*, this constellation resembles the legislative mechanism characteristic of the federal state model. But a closer look should lead us to recognize an important contrast. The purpose of lawmaking in a federal state is foremost to express the will of the overarching *demos*. Unit representation in the second legislative chamber is a side constraint that ensures local interests receive a hearing. One cannot, however, equate this process with the representation of member state executives in a federal diet, which is typical of the Bund model. In the latter kind of legislative institution, votes result from a complex will formation process inside the respective government, which must explain itself to the national opposition and the public sphere. Unit delegates in the upper chambers of federal states have a much weaker claim to represent the public interest of their constituents. There is of course significant variation with regard to institutional design among real world bicameral parliaments. Yet in most cases, election to the second chamber is direct.21 An individual politician that prevails in such a contest will lack the resources to focus on more than a handful of issues. She will furthermore not operate within a procedural framework that would make it plausible to consider her actions to manifest the democratic will of her respective unit. Against this background, it will not surprise that in the upper chambers of federal states, national parties tend to call the shots, imposing voting discipline on their caucus. That is often the case even when local parliaments or governments appoint the deputies.22

A European Bund would have to institutionalize a rather different form of unit representation. To ensure a meaningful voice for the member state peoples, governments must continue to speak for them in the legislative process. These national delegations should determine their position via

21 ———, *Comparing Federal Systems*, 147-152.
22 ———, *Comparing Federal Systems*, 151-152.
the existing domestic channels of will formation and not become subservient to continental parties instead. While the latter could bundle the preferences of individuals across the EU, their structure would make it difficult to represent the varied collective interests of the member state peoples. In other words, partisan organization at the Union level has to remain weaker than in a typical state. A Bund does not replace *l’Europe des Patries* with *l’Europe des Partis*. If that is so, we must of course ask which role the Strasbourg legislature can perform in such a context. Let us defer this issue until the next chapter. There I will argue that under a possible heterarchical system, bicameralism should have a different character than in a typical federal state.

The seventh and last distinct feature of a hypothetical European Bund is that its member states would remain full international actors that conduct diplomatic relations outside the federal competence sphere. Whether this has practical significance depends of course foremost on how much actual power is left at the unit level. Yet, even if Brussels controlled the most important fields of external affairs, national governments would retain a diplomatic infrastructure. Should the union break up, this might help the member states to resume their previous role on the world stage (here it would also matter that a Bund does not centralize its armed forces). The units of a federal state, in contrast, would disappear from the global arena, making it rather more difficult to resuscitate them as international actors when the need arises.

*The Value of Member State Independence*

The preceding has spelled out in how far a European Bund would be a looser form of political association than a federal state. If the continent adopted the former model, national institutions could retain their diverse shapes, even though Brussels might have greater influence on them. Should the

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23 This formulation goes back to David Marquand who called for just such a transformation in 1978. See David Marquand, "Towards a Europe of the Parties," *The Political Quarterly* 49, no. 4 (1978).
integration project ever collapse, the member states would still be viable on their own. Hierarchical federalism, in contrast, requires a more profound transformation of each domestic system that would be quite difficult to undo later on. This difference matters. Advocates of a European federal state might argue that a Bund will be unstable and less effective in making decisions that impose sacrifice on individual units. These claims are not altogether implausible. Yet a heterarchical order, the following will argue, has the advantage that it preserves valuable traditions of constitutional practice in the member states. What is more, in the European case, the structural frailties inherent to the Bund model should be manageable. For these reasons, the heterarchical model is, all things considered, the preferable approach to reform.

Let us begin with the advantages that derive from the relative conservatism of the Bund model. These are in part prudential. At the moment, public opinion across the continent appears to be, on the whole, rather skeptical of federalism. Therefore, one can expect that citizens will be easier to persuade of fundamental change, if the proposed scheme guarantees a larger degree of national independence. A federal solution would moreover be an experiment that can fail. Member state citizens, as mentioned before, might come to see European governance as foreign imposition and elect leaders that seek to impede effective common policies. This risk, it would seem, is greater in the case of the hierarchical approach, given that it entails a wholesale transformation of existing political institutions at the domestic level. And should the federal experiment indeed fail, a state would be harder to dissolve than a Bund. Seen in this light, the heterarchical route is the less dangerous one.

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24 Herfried Münkler has pointed out that democratization based on the state paradigm would entail the risk that Europe becomes ungovernable, similar to, for example, Belgium, whose federal institutions are often paralyzed through conflict along ethnic lines. See Herfried Münkler, "The Need for a Centralization of Power," *Spiegel Online International*, 8 July 2011.

25 Here one might draw a parallel with the creation of the Euro, which in retrospect seems to have been a rather significant blunder. Yet undoing the scheme, it turns out, would have so catastrophic effects that holding on to it, no matter how expensive this will be, is the least bad option for the participating states. Against this background, the question as to whether a proposed reform would be reversible takes on significant importance.
Yet the case for the Bund model rests on principled grounds as well: it would be a moral wrong to establish a single European Leviathan, which subordinates existing national institutions. The first relevant consideration here is that in order to ensure the allegiance of its citizens, a federal state would need to become the central focus of political attachment for its citizens. But, at present, the main allegiance of most Europeans is to their respective member state. Modern political identities, to be sure, are manufactured. States have created them via conscious efforts to promote attachment to the nation, while suppressing more local identities. Might Europe not follow a similar path? Of course, Brussels can seek to mold citizen attitudes through education campaigns and the like. Such efforts have indeed long been ongoing. Yet a simultaneous active marginalization of existing national identities, it should be obvious, is not in the cards.\textsuperscript{26} Hence the most that can be achieved is to create attachment to Europe alongside national identities. To a degree, as we have seen, this has in fact been accomplished (see Chapter 3). The political form that best reflects such overlapping attachments is the Bund, which does not prioritize one layer of communal belonging over subordinate identities. A federal state, in contrast, would relegate national affiliation to second rank. It seems improbable that one could bring Europeans to accept this without resorting to coercive strategies of attitude transformation.

The federal state model, then, is problematic because its realization might presuppose the use of illiberal means. But existing domestic institutions also have an intrinsic value that justifies their preservation. Theorists who adhere to “liberal nationalism” derive such worth from a supposed entitlement of nations, understood as cultural communities, to govern themselves.\textsuperscript{27} I believe this line


of reasoning is mistaken. To set the stage for a more persuasive argument, let us nonetheless consider the liberal nationalist approach in some detail.

One version of this doctrine militates against European federalism in general, be it heterarchical or hierarchical. David Miller, for example, holds that solidaristic cooperation presupposes the existence of a nation, whose members share a language, traditions, and collective memories. He maintains that achievements like, for instance, the welfare state depend on such a background, as it motivates individuals to sacrifice for the collective. European citizens with their diverse cultures, goes the argument, can never develop this form of commitment to the shared interest. Politics at the Union level, Miller believes, must therefore remain limited to bargaining among sovereign peoples – a transnational republic is out of the question.\(^{28}\)

If this were right, the continent would be in trouble. As we have seen, integration has progressed so far that effective and legitimate Union governance is impossible unless the European order completes its transformation into a federal system. Should this project be doomed to certain failure, the sole possible answer to the present constitutionalism deficit is to roll back the scope of integration. Given the negative impact of such a decision on the economic and geopolitical prospects of the entire continent, I have rejected this option at the beginning of this chapter. We must therefore hope that individuals can in principle develop meaningful political attachment to a transnational collective without a unified culture. Such an expectation is not frivolous. Miller is correct that, in the past, republican politics has been confined to settings of homogeneous culture, first cities and then nation states. But this link might well be contingent. To be sure, certain forms of sacrifice for the common good are difficult to imagine when there is no unified cultural group: soldiers, to the extent their motivation is moral, often fight to defend a particular way of life.\(^{29}\) Yet the

\(^{28}\) Miller, "Republicanism, National Identity, and Europe."

\(^{29}\) Müller, *Constitutional Patriotism*, 74.
situation appears to be different with regard to more mundane sacrifices, such as – to keep with the example – paying taxes to finance the welfare state. Do citizens feel obliged to contribute because the recipients of benefits share their culture? This hypothesis seems rather implausible. The welfare state is better understood as the result of political struggles, in which some actors force others to accept certain redistributive measures.\(^{30}\) For the most part, the champions of these policies will not appeal to the fellow feeling of their compatriots but to inalienable rights ascribed to humans or at least to the members of a political association. Insofar as such reasoning gains traction, citizens support the welfare state for moral reasons. But this commitment derives from recognition of universal principles, not from identification with a shared national culture. A possible rejoinder is that even if fellow feeling does not motivate acceptance of redistributive policies, it creates social trust, which permits citizens to act on their moral preferences without fear of exploitation. Yet this claim does likewise not establish that sharing a language, traditions, and collective memories is a prerequisite for republican politics. Being familiar with the other can make it easier to begin cooperative interaction (although the opposite could be true as well). In the long run, however, trust will arise from the actual prevention of freeriding. Whether this feat succeeds will depend on numerous factors, and it seems improbable that sharing the same culture – regardless of content – is a decisive variable.\(^{31}\) The burden of proof rests on those who believe otherwise.

Consider next a different liberal nationalist argument. Will Kymlicka, for example, holds that individuals have a right to the perpetuation of their language, traditions, and collective memories through the appropriate political institutions.\(^{32}\) The merits of this claim need not concern us here. Suffice it to note that it does not rule out European federalism. As mentioned earlier, the existence of multinational polities demonstrates that diverse communities can live together under one govern-

\(^{30}\) ———, *Constitutional Patriotism*, 73-74.
\(^{31}\) ———, *Constitutional Patriotism*, 73.
\(^{32}\) Kymlicka, *Multicultural Citizenship*. 
ment and each maintain their unique culture. In fact, the argument from individual right could even favor a federal state over the heterarchical option: unlike a Bund that leaves domestic structures more or less untouched, a state might elevate peripheral nations like the Scots or Basques to equal importance with the respective metropolitan communities. Yet whereas Miller inflates the value of existing domestic institutions, this position underestimates it. Preserving member state independence is not just a means to keep national cultures alive (if that is a legitimate goal at all). The main benefit, I submit, is to preserve valuable traditions of constitutional practice.

What does this mean? The abstract principles of constitutionalism permit a great deal of variation regarding their implementation. Liberal and democratic polities differ in terms of how their fundamental order configures the separation of powers, organizes representative government, and interprets basic rights. While each tenet of constitutionalism has a more or less undisputed core meaning, different communities need to adapt these universal precepts to their specific needs. The traditions that emerge in this process merit preservation. For one thing, it matters that local solutions reflect local circumstances. But, even when there is no objective reason to prefer a specific interpretation of a constitutional principle over another, we need to take into account that attachment to a particular fundamental order enters into the formation of political identities. Citizens might cherish domestic institutions as concrete manifestations of universal ideas that have stood the test of time in the local context. From their perspective, maintenance of past accomplishment and ongoing improvement is a task that links one generation to the next. Such “constitutional patriotism” is a more potent motivation for public spiritedness than perceived membership in a cultural nation. Individuals who see themselves as participants in a collective enterprise to uphold liberal and democratic values in a particular bounded setting are – per definition – oriented toward the common

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33 This indeed is the solution favored by the liberal nationalist writer Yael Tamir. See Tamir, *Liberal Nationalism*, 151.
34 Habermas, *Between Facts and Norms*, 128-129.
35 For a comprehensive discussion of “constitutional patriotism” see Müller, *Constitutional Patriotism*. 
good. This source of political virtue dries up, when one disbands their constitutional project in order to create a transnational state.

Even so, the value of preserving domestic institutions is not absolute. In Europe, there are functional and normative reasons that demand integration. The economic and geopolitical strength of the continent hinges on effective common policies. At the same time, interdependence among domestic societies means that freedom to make democratic choices presupposes cooperation among the member states (see Chapter 3). The Bund model would permit the continent to reconcile these imperatives with the justified desire to sustain independent constitutional traditions at the domestic level. While a hetererarchical system allows for legitimate federal governance where needed, it does not altogether eliminate the institutions that give the member state peoples their autonomous political existence. In contrast, the federal state model achieves integration at the cost of merging these communities into a single one. The pursuit of liberal and democratic values at the central level would then trump incompatible practices at the unit level. Perhaps each member state would still have a formal constitution. But it would no longer be a genuine fundamental order.

*The Price of Member State Independence*

We have now seen the prudential and moral reasons that favor hetererarchical over hierarchical federalism. It cannot be denied, however, that choosing the former option has a price. Above I have emphasized that a Bund depends to a large degree on the willingness of domestic leaders to implement common decisions. Unlike a state, a hetererarchical federation might not be able to whip recalcitrant unit governments into line, when these are determined to resist. A skeptic could hence argue that a Bund will either be in permanent danger of collapse or face deadlock, making it unable to implement effective policies. If either or both of these charges were true, the case for hetererarchical feder-
alism would be in doubt. Let us therefore examine whether a European Bund might be too unstable or suffer from decision making paralysis.

Concerning the risk of dissolution, we should recall the Schmittian imperative that in a heterarchical union, the member states need to agree on existential questions (see Chapter 1). In contrast, a mere conflict of interest will, most of the time, not jeopardize the existence of the commonwealth. For Schmitt, an existential question is one that does not permit of a compromise. A prime historical example here is the dispute over slavery in the United States. The South had a vast economic stake in the continuation of this practice, which the abolitionist camp held to be a fundamental wrong. For some time, the parties tried to split the difference, but the moral dispute at the heart of the matter proved irreconcilable. When an abolitionist became President, the confederate states resolved to secede and the Civil War began. In comparison, the EU would seem to be a much better candidate for a lasting Bund. The member states share a liberal and democratic political culture – a breakup of the Union, at least one due to unbridgeable moral conflict, seems therefore rather implausible.

The hazards of deadlock merit a somewhat more detailed investigation. What good is majoritarian decision making without a credible enforcement mechanism? In particular, some authors warn that without a sovereign center, the EU will be unable to engage in redistributive policies and might fail to protect its citizens from external threats. From their perspective, founding a Bund does not go far enough – the federal state is the superior institutional model. Yet, as the following will demonstrate, the various arguments to this effect remain unpersuasive (with one possible exception).

Consider first the problem of solidaristic redistribution. William Scheuerman, for example, believes that unless the EU obtains a sovereign center, it cannot build a continental welfare state. Frag-
mentation of power, he contends, will preclude a significant transfer of resources from the strong to the weak.\textsuperscript{36} Although Scheuerman does not mention it, this argument is also pertinent to the question of whether the Euro is viable in the long run. Economists agree that monetary union has a greater chance of success, if there is a system of fiscal transfer to even out regional differences in economic development.\textsuperscript{37} Perhaps such a mechanism is a precondition for the Euro to function at all. If this were the case, one would indeed have to question whether the Bund is a suitable institutional model for the continent.

Yet let us begin with the argument regarding the welfare state. It seems fair to claim that an integrated system of public services and social insurance would require a sovereign center. The question, though, is whether the EU should in fact pursue this goal. Scheuerman calls on Brussels to promote a fair distribution of resources and individual life chances because democratic citizens must be equal in a meaningful sense.\textsuperscript{38} But this argument forgets about the point of federalism and, indeed, the spirit of the integration project: to make common rules where needed, and to leave national \textit{demoi} otherwise independent. The welfare state, I submit, is a field predestined to fall into the latter rubric. Its design reflects the cultural peculiarities and idiosyncratic needs of a specific people. Across the continent, various different approaches to mediating between economic and social rights prevail. Few British citizens would delight over the adoption of German corporatist arrangements, and Scandinavians would be loath to give up their generous welfare state just because the rest of Europe cannot afford it. For this reason, Brussels should have limited influence on policies that concern education, health insurance, labor relations, unemployment benefits, retirement schemes, and the like. To be sure, it can make sense to enforce certain minimal standards in order to prevent

that member states undercut one another in seeking to attract mobile capital into their jurisdictions. Such a “race to the bottom” might undermine the idea of solidaristic cooperation. Building a single continental welfare state, though, is not desirable. Of course, this means that Union citizens will remain unequal. Yet that is justifiable because the freedom to make choices that reflect the preferences of local communities makes the overall system more democratic, rather than less. 39

If the long run survival of the Euro demands the creation of a federal state is a more complicated question. The current institutional framework rests on the belief that monetary union can function without significant redistribution from rich member states to less developed regions within the Eurozone. To maintain economic balance in the aftermath of the ongoing crisis, national governments have instead pledged to coordinate relevant domestic policies. There will also be more supervision of national budgets, and Brussels will have greater power to dragoon member states to undertake reforms that further economic development (see Chapter 2). Proponents of a Bund must hope for this regime to succeed in practice. To be sure, even the status quo does not operate without fiscal transfer altogether. The Structural Funds and the Cohesion Fund promote economic development on a regional basis; CAP has a redistributive effect as well. Furthermore, the loan guarantees through EFSF/ESM impose a substantial cost on the richer member states, but this effort, it is hoped, will end as soon as the Eurozone crisis has been resolved. Compared with other federal

39 This conclusion presumes of course that independent national welfare policies remain viable in a globalized world. Scheuerman gestures toward the argument – popular among some Europhiles on the left – that an integrated continental regime is the sole hope for the welfare state to survive. See ———, "Postnational Democracies without Postnational States? Some Skeptical Reflections," 48. But so far there is little evidence to support this claim. Most European welfare states do not seem to face an imminent danger of collapse. And where existing social policies turn out to be unsustainable (such as for example in Greece), the causes seem to lie in political mismanagement much more than in the abstract force of “globalization.” We might also observe here that founding a Bund could make it easier for national governments to maintain and update their respective welfare regimes. Earlier I have noted that under a proper heterarchical constitution, the Union legislative branch would be able to prevent the ECJ from eroding domestic social policies in the name of the internal market freedoms and EU citizenship rights. Against this background, it seems rather implausible to maintain that affirmation of social and economic liberties must go hand in hand with support for hierarchical federalism.
polities, then, the EU engages in quite limited resource transfer. More sweeping redistribution might well presuppose the existence of a sovereign center that is able to force recalcitrant governments to hand over a significant portion of their revenue to less developed member states. There is no consensus in the academic debate as to whether the Euro can, in the long run, exist without such a more robust fiscal transfer mechanism. If this were not possible, the continent might face the stark choice between dismantling the monetary union, at least in its current form, and creating a federal state. The cost of the former option might of course be prohibitive. In this case, the argument for the Bund model would be moot. Europe should then establish an overarching Leviathan.

Consider next the issue of whether the continent requires a sovereign center in order to protect itself against external threats. According to some, the longstanding reliance of European countries on American hard power is dangerous. Glyn Morgan, for instance, notes that after the Cold War, the United States has less and less reason to provide its NATO allies with a free security umbrella. He therefore recommends the creation of a federal state, which could establish the EU as a serious geopolitical actor in its own right. I concede that in order to build a muscular global presence, Brussels might need to wield sovereign power. Often enough, intergovernmental coordination within the framework of CFSP is unable to generate a meaningful common position, and progress in the creation of joint armed forces has been glacial indeed. But, again, we should ask if the objective itself is valid. Morgan, writing in 2005, rests his case on the assertion that, given unipolar American dominance, Washington is under little constraint to heed the interests of its ostensible allies. Just a few years later, this argument seems outdated – the period of unchallenged American power turned out to be of rather limited duration. And even if Europe must still consider NATO a somewhat unreli-

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able alliance, the question remains precisely which external threat necessitates the creation of a single Leviathan. The region, one might point out, is for the most part peaceful; foreign invasion seems all but impossible. Some, to be sure, will find this perspective too complacent. In the aftermath of the Cold War, it has been a popular claim that for the West to remain secure, it must be able to reshape the international environment through armed interventions. Yet the limitations of such force projection have since become quite obvious: the United States undertook expensive misadventures in Iraq and Afghanistan, with little to show for it at the close of either mission. Hence it appears that while the cost of preparing for this kind of conflict is vast, the benefit is more than questionable. The future seems instead to belong to limited operations such as, for example, the 2011 Lybia intervention. Europe, it should be noted here, might have failed even at this mission, had there not been significant American help. It seems nonetheless reasonable to assume that preparation for similar contingencies is possible without a unified sovereign. Of course, more serious external threats might arise in the future, and perhaps a federal state will then offer the best or sole viable defense. But at present, it would seem rather premature for the continent to establish a unified sovereign due to fear of its enemies.

In conclusion, a heterarchical EU can deliver effective governance, provided that it does not pursue the misguided goals of an integrated welfare state or imperial prowess on the global stage. The argument that founding a Bund does not go far enough remains therefore unpersuasive. Heterarchical federalism has the great virtue of leaving the member states a large degree of independence. A hierarchical order, in contrast, would level most differences of constitutional practice that define Europe at the moment. There is little reason to embark on this route, at least so long as circumstances do not force the member states to bolster the monetary union through a massive and permanent fiscal equalization mechanism.
The Cost and Benefit of Reform

So far, this chapter has made two points. First, if the objective is to address the constitutionalism deficit of the status quo, a federal relaunch trumps reform based on the administrative governance paradigm. Second, the Bund model is preferable over a federal state, at least if we assume reasonable limits on the substantive ends of integration. Yet another more basic question still remains open: why bother about the constitutionalism deficit in the first place? Let there be no doubt: a federal reconstitution of the EU has immediate costs and brings with it a long term risk of failure. It would bind the political energies of the continent for a significant period. Voters in the member states might once again undo the work of a drafting convention and reject a proposed federal compact (on the issue of ratification, see Chapter 6). Should reform in fact occur, there would still be the danger that, given the complete abolition of national vetoes, Union governance will come to be seen as foreign diktat, which might lead to a collapse of the integration project. From a functional perspective, these costs might seem to lack a sufficient rationale. Perhaps the proposed loosening of consensus orientation would make it easier for Brussels to solve the problems facing the continent. Yet there is no direct benefit of this kind to working out a federal compact, whose purpose is to create an unambiguous symbolic basis for integration. Some will moreover argue that, after the reforms in the wake of the Eurozone crisis, the current institutional framework has sufficient means to discharge its functions, making further changes superfluous. Against this background, should the EU embark on the arduous path of more fundamental reform, just because liberal and democratic constitutionalism is not in perfect shape?

The primary rationale for such an effort is moral. If a political regime falls short of the principles of constitutionalism, then it does not deserve our full support and we must strive for change, be it through resistance in the gravest situations, or through promotion of legal reform, which is
more appropriate in the case of the EU. Here I presuppose of course that liberal and democratic constitutionalism is a valid ideal. My goal is not to persuade those who reject this conception of legitimate government altogether. But even if one embraces constitutionalism and the specific interpretation of its principles that I have suggested, it remains possible to oppose fundamental reform.

What if the problems we have identified are just not serious enough? The EU, after all, is not a tyrannical regime that flouts the rule of law, permits zero democratic participation, and tramples basic rights. A certain measure of constitutional imperfection, one might believe, is the price of integration. The EU should attempt to improve as much as is possible under the hybrid status quo (perhaps through reform along the lines of the administrative governance paradigm), but more fundamental change does not warrant the cost and risk that it would entail. Whether or not this objection is persuasive depends, in the first instance, on how we assess the moral seriousness of the diagnosed constitutionalism deficit. But such an evaluation, it seems, would have to fall back on rather subjective criteria. I shall hence meet the skeptic on her own turf and suggest that even from a prudential viewpoint, the case for drastic reform is strong. While a federal reconstitution of the EU has a price, holding on to the status quo might still be a mistake in consequentialist terms.

For one thing, the constitutionalism deficit has the potential to undermine popular acceptance of the EU in the long run. To be sure, a normative conception of legitimate government has no direct relationship with actual support for a political regime. Citizens hold that a government has the right to rule, or reject this notion, for diverse reasons that do not need to and often will not coincide with the principles of constitutionalism. In fact, the relevant individual beliefs might not even relate to institutional features of the political system. With some justification, common wisdom holds that “output” is the best empirical predictor of support for a regime. If the system delivers the goods, in particular economic wellbeing, citizens will endorse it, regardless of whether the exercise of public
power fulfills certain normative principles. In a recent article, Joseph Weiler has furthermore pointed out the importance of a third form of legitimation. He argues that political regimes can offer a “messianic” narrative to motivate citizen support when institutional features and output fail to secure it: “the justification for action and its mobilizing force derive [...] from the ideal pursued, the destiny to be achieved, the Promised Land waiting at the end of the road.”

Regimes that fed on this kind of political legitimation include the fascist and communist states of the 20th century. But the European integration project, Weiler reminds us, put forward a messianic narrative, too, though one with a quite different content. The Schuman Declaration, which launched the process, envisaged a lasting peace based on fraternity among nations (rather than just a balance of power) and forgiveness of German atrocities during the Third Reich. It was the appeal of this objective, Weiler argues, that made the creation of a supranational administration palatable to European citizens. The overriding importance of the goal compensated for damage to liberal and democratic values, and it motivated popular acquiescence so long as the economic fruit of integration had not yet ripened.

Yet the persuasive force of political messianism, Weiler notes, cannot but fade over time, either because its promise turns out to be hollow, or because it falls victim to its own success. In the case of European integration, the latter factor has been more important. The pathos of the beginning is now almost unintelligible to the present generation. Peace on the continent, it seems, can be taken for granted, and hence citizens more and more question the institutional design of the status quo or ask what material benefits Union policies generate for them. Such attitude changes led to a breakdown of the “permissive consensus” in public opinion, which until the Maastricht reform enabled integration to proceed without much interference from national electorates. From its high point in

1990, citizen support for participation of their state in the EU has seen a noticeable decline. In the spring of 2011, less than half of Eurobarometer respondents believed that membership was on balance a good thing.\textsuperscript{45} This development in public opinion coincided with greater political contestation of the integration process as such. Mainstream parties have come to incorporate Euroskeptic positions, and, in numerous countries, radical forces have gained significant electoral success through articulating criticism of the EU and outright antagonism to it.\textsuperscript{46} Citizens have moreover rejected further integration when asked to vote on it: several national referendums on proposed amendments of the treaties yielded a negative outcome.\textsuperscript{47} These manifestations of growing Eurokepticism throw sand in the wheels of the present institutional framework and bode ill for the chances to develop the integration project further.

Where can the EU go from here? The road of messianic legitimation seems to be closed for good. Popular acceptance of integration might further wane, if European leaders continue to advertise perpetual peace as the sole reason to support the project, and there is no alternative grand vision in sight to capture the imagination of Union citizens. At the same time, relative geopolitical decline and the demographic aging of the continent suggest that economic abundance will be more difficult to achieve in the future. European societies will face the twin challenge to maintain both their current level of wealth and its equitable distribution. In the process, one can expect intense political conflict among different social groups – the rich and the poor, the old and the young, the winners of globalization and its losers, to name just the more evident fault lines. Intelligent Union policies, so we can at least hope, will make the task at hand easier. But a return to economic cornu-

\textsuperscript{45} Standard Eurobarometer 75.

\textsuperscript{46} Cecilia Leconte, \textit{Understanding Euroscepticism} (Basingstoke: Palgrave Macmillan, 2010), 113-127.

\textsuperscript{47} In 1992, the Danish electorate rejected the Maastricht Treaty, and in 2001, Irish citizens opposed the Nice Treaty. However, both times, a second vote reversed the initial outcome. In 2005, French and Dutch referendums led to the failure of the TCE.
copia, such as Europe has last seen in the 1960s and 1970s, appears unfeasible. Successful legitimation of the integration project through “output” alone is therefore quite improbable.

This brings us back to the relevance of liberal and democratic constitutionalism, or the question as to whether mending it justifies an onerous reform effort. With the other possible sources of popular support depleted, legitimation through adequate institutional design must take on a larger role in ensuring continued acceptance of European integration. For this reason, a push to restore the rule of law, democratic legislation, and basic rights protection has a large potential benefit. Here I do not mean to suggest that citizens in general endorse my own theoretical understanding of these principles and evaluate the status quo in light of that conception. The argument is rather that liberal and democratic constitutionalism, as we have defined it, reflects the desire of the modern subject for private and public freedom (see Chapter 1). To the extent the latter are being denied, people who share in this mindset will feel alienated, even if their reaction might not derive from sophisticated theoretical contemplation.

Let me reiterate the concrete reasons for such discontent. Frequent competence transgression supports the notion that elites in Brussels, Strasbourg, and Luxembourg make their own rules and remain unaccountable to the member state _demoi_ – their ostensible principals. The weak common good orientation of joint decision making leads to an impression that Union governance is based on tiresome wheeling and dealing, which often enough leaves Brussels unable to address pressing shared concerns. At the same time, the process remains opaque and insulated from participation via electoral reward and punishment, leading to popular disinterest and ignorance of European issues. The impression of illegitimate elite rule is further strengthened through the outsize power of the ECJ to elaborate the content of individual rights. While the subversive effect of the Luxembourg court on the national welfare state remains for the most part unknown to the general public (though
not unfelt), some judgments have attracted widespread attention. For example, the restriction of labor rights through *Viking, Laval, Rüffert*, and *Luxembourg* incensed trade unions across the continent.\(^{48}\) Efforts to repeal these decisions are ongoing, but much to the frustration of the continental left, the entrenchment of judicial doctrine against political correction makes success quite improbable.

Founding a European Bund could overcome this syndrome of disenfranchisement, and therefore it might, in the long run, put integration on a more solid foundation of popular support. Empirical research has shown that, at present, dissatisfaction with the democratic performance of the EU is a major driver of Euroskeptic attitudes and voting behavior. The other main factors are the individual perception of utilitarian disadvantage through integration, and the belief that it threatens national identities.\(^{49}\) Those who are critical of the EU for the latter reason will of course not welcome a federal reconstitution. Yet a functioning Bund would persuade the skeptics in the first group. It might furthermore reduce opposition to the EU based on the perception of utilitarian disadvantage. Citizens in this group tend also to believe the status quo is undemocratic.\(^{50}\) One might therefore speculate that improved procedural legitimation will redirect the scorn about perceived losses through Union policies. At the moment, utilitarian skeptics blame the EU itself for their disadvantage. The policies believed to cause their losses result, after all, from a governance process that, in their eyes, does not give them adequate voice. If this deficit were fixed, the disadvantageous rules


will perhaps remain in place, but the affected citizens might then lay the blame on the partisan forces that have enacted the legislation at issue, rather than on integration as such.\textsuperscript{51}

A second prudential reason to entertain fundamental reform is that perceived disenfranchisement has a more general negative impact on European political culture. One recent poll found that large majorities of German, British, French, Dutch, Italian, Portuguese, Polish, and Hungarian respondents feel they have little influence on politics.\textsuperscript{52} Discontent with unaccountable elite rule at the Union level is without doubt a factor here. The result should alarm us because it suggests that large numbers of Europeans might be susceptible to authoritarian political beliefs. A sense of disenfranchisement can provoke the illusory hope that an outstanding leader will give the people a more authentic voice. Indeed, many participants in the quoted poll agree that a strong man should rise above the fray to enforce the popular will against the establishment.\textsuperscript{53} This finding is of course not much of a surprise, given that over the past decade or so, political movements built around charismatic figures have been on the rise across the continent (such groups, needless to mention, are often the same that articulate radical Euroskeptic positions). A successful federal reconstitution of the EU could take much wind out of the sails that propel this worrisome development.

In conclusion, the potential benefit of founding a Bund is considerable. Does it outweigh the cost of reform? At the end, that is a political question. Theoretical reflection can elucidate the stakes on both sides of the argument, but it cannot give us definite assurance regarding their ultimate balance. In my own judgment, the moral and prudential case for reform trumps the countervailing reasons. When the time is auspicious, Europe should therefore establish a heterarchical federation.

To support this argument further and to flesh out the proposed reform agenda, let us next complete

\textsuperscript{51} Hix, \textit{What's Wrong with the European Union and How to Fix It}, 66.


\textsuperscript{53} The desire for a strong leader is expressed by up to 62.4 percent (Portugal); the lowest value is 23.1 percent (Netherlands). See ———, "Die Abwertung der Anderen. Eine europäische Zustandsbeschreibung zu Intoleranz, Vorurteilen und Diskriminierung," 113-115.
the so far unfinished discussion of how democratic legislation might work under the envisaged constitutional structure.
Chapter 5

Democratic Legislation in a European Bund

If the EU were to become a heterarchical federation, how could it establish a robust link between the public sphere and lawmaking? The previous chapter has left this question open. With regard to the democratic shortfall of the status quo, I have argued that founding a Bund might enhance the common good orientation of the European legislative process. But this would not yet suffice to overcome the syndrome of democratic ill health that Chapter 3 has described. Of the problems we diagnosed, there still remains the lack of a proper connection between the incipient continental public sphere and Union lawmaking. What institutional approach should a future European Bund take in order to address this challenge? The following sketches a possible solution.

Recall the broad contours of the present deficit (see Chapter 3). There is some evidence that a transnational communication space is emerging, which links domestic public spheres and might so enable rational deliberation over the shared interest of the continent. Yet the Union political system does not create strong enough incentives for elected leaders to engage with this process. First, we have reason to doubt that national parliaments tap their full potential in terms of holding the government accountable for its European policies. Second, democratic legitimation via the Parliament is deficient as well. When electing this institution, voters react foremost to the performance of parties in domestic politics and do not evaluate the work of their representatives in Strasbourg. Low turnout is moreover a persistent frustration and embarrassment. Such voter disinterest implies that members of the Parliament need neither heed public opinion nor attempt to educate it in order to ensure their reelection.
A possible federal reconstitution of the EU should aim to improve this state of affairs. The first question here is which paradigm of will formation to follow. Heterarchical federations, as Chapter 1 has discussed, legislate either through a diet or a bicameral parliament. Should a European Bund implement the former model and establish intergovernmental deliberation as the central decision mechanism? Or should it retain a bicameral design that places a federal popular chamber alongside the diet, such that both an overarching *demos* and the national peoples can formulate their respective public interests and negotiate among them?

Most observers will not hesitate to come down in favor of the second alternative. The idea that Union governance must be subject to “dual legitimation” is dominant in political and academic discourse. From the 1980s onwards, “democratization” of the EU has therefore primarily meant increasing the power of the Parliament in Strasbourg. The avowed goal of this institution is to represent a transnational collective of individual citizens or, in other words, a continental *demos*. But the European legislature is not expected to supplant national parliaments altogether. Indeed, the treaties recognize the latter as formal participants in Union lawmaking. Their expected contribution is to monitor events at the European level and to hold the national executive accountable. In this manner, goes the official narrative, the transnational and the domestic legitimation channels supplement and reinforce each other.¹ Scholars, at least, have found this notion quite persuasive. The literature is full of praise for the achievements of “multilevel parliamentarism”, and there is a great deal of optimism about its future potential.² From this perspective, the solution to residual democratic problems is to further empower both the Strasbourg legislature and national representatives.

¹ The concept of dual legitimation is codified in Art. 10 (2) TEU.
Yet I shall cast doubt on the received wisdom here: true dual legitimation is difficult to achieve, if not a chimera. Making the Parliament an effective voice of a continental demos would require much stronger competition among transnational parties than we see at present. This presupposes struggle between government and opposition forces, based on identifiable programmatic alternatives. How to achieve the requisite coordination among the domestic parties forming a European ideological bloc seems to be a riddle without a good solution. Or so I will argue below. In light of this, a bicameral design that includes a popular chamber is a questionable choice for a future Bund. What about the diet model? The central objection against this paradigm states that intergovernmental deliberation is, qua its nature, an undemocratic procedure. But domestic legislatures, I will contend, provide a hitherto somewhat neglected resource for linking the interaction among national leaders to opinion formation in the public sphere. Indeed, all things considered, focusing on member state parliaments is preferable to chasing the elusive ideal of dual legitimation. Since the Strasbourg legislature, in this scenario, could not provide meaningful representation of a demos, one would have to rethink its function and design. I believe there is still a useful role for a transnational parliament in overseeing the Commission and improving deliberation in the Union political system. But there is no good rationale for direct popular election. In fact, the latter turns out to have significant undesirable ramifications. For this reason, I will advocate a return to the regime that was in place before 1979, when domestic legislatures appointed the members of the Parliament from their own ranks.

The chapter is divided into four parts. First, I examine the importance of parties within a Habermasian account of democratic lawmaking. Next, the chapter looks at the practical difficulties that beset the ideal of dual legitimation. I then explore the democratic potential of the diet model, focusing on which reforms could strengthen domestic legislatures and what exact role the Parlia-
ment might still have, if these were implemented. Last, the chapter takes a brief look at the idea of European citizenship that underlies the proposed institutional design.

The Importance of Parties

In a recent book, Nancy Rosenblum writes that parties are the “darlings of political science”, but the “orphans of political philosophy.” While empirical investigators produce a never ending stream of pertinent research, theorists give scant attention to the normative evaluation of parties. This has not always been the case. Parties used to be notorious: from ancient Greece to the communist revolutions of the 20th century, philosophers and ideologists have often berated them as sources of faction and corruption, which one should attempt to eliminate. Of course, liberal democrats committed to political pluralism can no longer espouse such a position. Most theorists of this ilk have instead come to see the existence of parties as an unavoidable, if somewhat deplorable, element of a representative system. The acceptance, then, is grudging, and hence it will not surprise that, in the current literature, proposals to improve democratic legitimation tend to focus on direct citizen input, often through novel forms of deliberative engagement. Scholarship in this vein begins from the implicit or express assumption that parties monopolize the political process, drowning out more authentic manifestations of the popular will. As to their positive contributions, silence has long reigned in theoretical discourse.4

Jürgen Habermas, whose account of democratic legislation informs our analysis, is not altogether exempt from this generalization. His magnum opus Between Facts and Norms spotlights the institutional structure of a democratic public sphere. But the corresponding account of the good political system is less developed, and Habermas gives no sustained attention to parties. One might

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interpret this as evidence that he is fixated on an unrealistic and mistaken ideal of consensus, which blinds him to the existence of intense political disagreement and its legitimate expression in partisan contest. Yet this accusation misses the point. Habermas is well aware that citizens have divergent private interests and quarrel over the right interpretation of the public good. Agreement, for him, is a regulative ideal that provides clues as to which institutional structures enable free communication. It does not, however, constitute a goal that real democratic politics will often, or ever, attain. As dispute persists and decisions have to be made, elected representatives vote to settle the matter. The victorious side, though, has no moral claim to bind the losers, unless it has sought to persuade them on the basis of “public reason.” Habermas insinuates that parties support this kind of deliberation: citizens, he notes, depend on “pregeneralized interest positions” to form rational preferences.\footnote{Jürgen Habermas, "Popular Sovereignty as Procedure," in \textit{Deliberative Democracy: Essays on Reason and Politics}, ed. James Bohman and William Rehg (Cambridge, MA: MIT Press, 1997), 60.} Yet \textit{Between Facts and Norms} does little to explore the precise nature of this role. To understand the present democratic crisis of the EU and to chart a path to its resolution, we need to account for the importance of parties in somewhat more detail.

Recall how democratic legislation should work according to Habermas (see Chapter 1). The process, he argues, must begin with a vibrant public sphere, in which individuals and groups debate questions of collective relevance. If things go well, the participants in this discourse and – just as important – passive spectators develop enlightened opinions regarding the substance of the common good. The political system is then expected to assimilate these, as it were, rational preferences and pit them against each other. In this manner, legislation will be shaped through a clash among rival visions of the shared interest, making the outcome acceptable to the whole people.

Without parties, I submit, this ideal cannot work or even be approximated in practice. Their role is, first, to provide the right sort of anchor points for public debate and, second, to offer mean-
ingful ballot choices, so as to enable voters to hold their elected representatives accountable. Of course, parties make further useful contributions such as, for example, recruiting future political leaders and preparing them for the business of government. Yet the following will focus on their role in enabling a robust link between public sphere and political system.

Before we can delve into this investigation, a brief terminological clarification is needed. Parties, most theorists concur, are groups that run candidates for political office. But there is much debate as to whether all such groups should count as instances of the concept. This ontological question does not have to be resolved here. I will argue that groups striving for political office are indispensable to democratic legislation, if these groups also make the two contributions mentioned above. Let me elaborate.

The public sphere contains a multitude of speakers: politicians, journalists, intellectuals, business organizations, unions, NGOs, religious groups, and individual citizens. It manifests itself in countless different arenas: the internet, print, television, radio, formal and informal public discussions. There is no planner that coordinates the myriad exchanges that occur within this decentralized system. How is it possible that public debate nonetheless tends to crystallize around more or less defined issues? Insofar as politics is concerned, partisan contest helps to explain this fact. Parties create tangible lines of division: their role is to propose the ends and means of state power and to criticize each other in a permanent confrontation between government and opposition. The better part of political discussion in the public sphere is a direct reaction to this contest: speakers approve or disapprove of what parties have suggested. Other contributions are more creative. Individuals or groups can propose changes to existing platforms, and sometimes a social movement will put altogether novel questions on the agenda. Most of these interventions have the same goal, be it explicit

7 ———, On the Side of the Angels, 307-308.
or implicit: to influence parties, which can then transmit the argument into the political system. Actors that dismiss this objective must either content themselves with irrelevance or prepare for revolution.

The distinct role of parties in enabling meaningful public debate comes into sharper focus once we imagine the counterfactual of pluralist democratic competition without them. In such a scenario, aspiring leaders would run for office without partisan affiliation. The main speakers in the public sphere would then be individual politicians as well as groups that promote specific issues but do not seek to govern (for example, business organizations, unions, civic associations, or religious groups). How would such a constellation differ from the familiar one, in which a limited number of parties structure the discussion? To begin with, political communication would be a great deal more diffuse. Hence it would be rather improbable that opinions become public in the sense that a large number of people embrace them. A second crucial difference would result from the fact that parties have a stronger incentive to advance proposals that serve the common good. The reason here lies in the need to build an inclusive coalition of social groups. To win votes and hold on to them, parties have to appeal to a wide range of different people. Depending on the electoral system, there will also be more or less pressure to compete for the median voter. These constraints give parties a strong incentive to formulate platforms based on a vision of the public weal, instead of seeking to appeal to factional interests and values. Perhaps, the same is true for independent office aspirants who seek to prevail in a nationwide race. Yet the narrower the geographical boundaries of a contest, the greater the incentive for candidates to pander to the wants and prejudices of the local electorate. Furthermore, unlike parties, leaders without permanent organizations do not create an enduring institutional site where actors who have different preferences can work out a joint agenda. What about

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groups that focus on particular issues? Such associations, it should be clear, are even less predisposed to a common good orientation. Their principal objective is to promote a specific cause. Even if the latter does not stand in direct contradiction to the public interest, there will be little pressure on an issue group to see its goals in the context of the ends that other citizens pursue.

In sum, parties have the unique potential to stimulate public debate and to focus it on rival visions of the common good. To be sure, not all parties realize this potential. Some vie for state power in order to dole out patronage, making little effort to develop and explain programmatic goals. Others seek to further a particular factional interest at the expense of the whole, spill hatred on scapegoats to win support, or exist just to promote a single individual. These parties, it should be clear, have little value for democratic legislation in the Habermasian sense. But it would be false to conclude that I present an unattainable ideal, a utopia in the negative sense of the word. At least in some democracies, parties exist that advocate policies based on reasons that could in principle appeal to all citizens. Such traces of ideal behavior validate the claim that partisan contest might structure an otherwise chaotic public sphere, thus supporting the formation of enlightened opinions within the electorate.

Let us next turn to the second distinct contribution of parties. So far, we have considered their importance for a working public sphere that enables voters to develop an informed understanding of the common good. But even when citizens have such rational preferences, leaders might not respond to them. To nudge politicians in this direction is one central purpose of elections. Partisan contest is useful here, too, because it gives citizens a genuine chance to hold rulers accountable. Candidates for office will offer platforms that reflect public opinion and, once elected, deliver on their promises, if voters in fact reward them for such behavior and penalize candidates that fail to meet these expectations. To make the requisite judgments, citizens need to understand their sub-
stantive choices and must be able to evaluate the performance of incumbents. The existence of parties makes it a great deal easier to obtain the relevant information.

Consider again the counterfactual scenario, in which all candidates are independent. Under these circumstances, voters would have to evaluate the proposals and past achievements of numerous individuals. What is more, the menu of choice would differ from election to election. Citizens might then still be able to make a meaningful decision regarding a small number of the most important races, such as for instance the election of a head of government. But even that is a rather doubtful proposition, and it should be obvious that, most of the time, voters would fail to gather the information needed to evaluate a candidate on the basis of substance and performance. In contrast, when parties or partisans are on the ballot, citizens benefit from a useful shorthand. A limited set of platforms that remain more or less stable over time lends itself to readier assessment than numerous individual campaign manifestos. Performance is likewise easier to judge when a voter just needs to monitor the political effectiveness of a whole ideological camp. In this case, the cognitive burden of selecting good leaders shifts, in large measure, from the whole people to active partisans who select the individual candidates on their ticket.

Still, a skeptic might object that in most democracies, elections do not turn on the substantive proposals and past achievements of politicians. Whether or not that is true is an empirical question that we can leave aside here. The goal of the preceding discussion has been to elucidate a particular ideal of democratic legislation, and not to provide empirical description. Once more, though, it bears emphasis that I do not promote a utopian ideal. Sometimes, at least, elections do in fact constrain leaders to orient their platforms toward public opinion and to deliver on their promises down the road. Indeed, this might happen more often than cynics believe. As Rosenblum notes, one important finding of empirical voting studies has been to demonstrate just how little information cit-
izens need to elect representatives who further their values and interests. Parties deserve a great deal of credit for this phenomenon.

We can then state the following conclusion: the existence of parties is crucial to democratic lawmaking because contest among them ensures, on the one hand, that citizens have the chance to engage in meaningful public debate and, on the other hand, that politicians must heed the opinions that emerge from this process. But where parties do not exist or fail to perform their proper functions, such a feedback loop cannot develop. Armed with this insight, let us now return to the question of democratic legislation in a future European Bund.

The Elusive Ideal of Dual Legitimation

Under the status quo, weak partisan contest is the main obstacle to a strong connection between the European public sphere and the Parliament in Strasbourg. As the following will elaborate, political competition at the Union level is anemic in two respects: first, there is no clash between government and opposition within the Parliament; second, the existing partisan groups fail to advance meaningful common platforms. These factors impede public debate of European issues and ensure that continental polls remain “second order elections”, which motivate few voters to turn out. Reforms to overcome the weakness of partisan contest at the Union level have been proposed. But these, I will show, are unrealistic and have undesirable side effects. In other words, the ideal of dual legitimation, or the notion that Parliament speaks for a European demos while the intergovernmental organs ensure representation for national peoples, might be unworkable in practice.

Let me preface the argument to this effect with some basic facts about the current state of partisan organization in the EU. The election of the Parliament takes place according to rules set at the national level. Domestic parties contest the seats allocated to their member state. Once elected, the

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deputies form transnational groups, which are based on agreements to cooperate among their respective home parties. Cohesion within these ideological blocs is high: votes in the Parliament split, for the most part, along the lines of group affiliation rather than national origin of the deputies.\textsuperscript{10} The “Europarties” also hold regular meetings among functionaries of their member organizations and prepare common election manifestos, which are supposed to guide the separate campaign efforts at the domestic level.\textsuperscript{11}

This system of partisan organization has so far not been able to generate robust political competition. For one thing, there is no struggle between government and opposition. Unlike most domestic legislatures in Europe, the Parliament does not elect an executive. Instead, national governments appoint the members of the Commission and nominate its President on the basis of QMV. The Strasbourg deputies, to be sure, have the power to veto the candidate selected as President or to reject the full roster of appointees. Once a Commission has begun its work, the Parliament can also dismiss it as a whole. Such a censure motion, however, requires two thirds of the votes to pass. In practice, then, the Commission does not exercise its right of legislative initiative on behalf of a government faction or coalition. Rather it seeks to implement the political agenda that is set at the European Council summits and, to a lesser extent, its own preferences (see Chapter 2). In this process, the need to have Parliament approve proposed legislation is a mere side constraint. Political debate in Strasbourg has therefore a peculiar character. When the lawmakers read a draft measure, the plenum will not split into one side that justifies the proposal and one side that subjects it to a rigorous critique. Parliamentarians instead focus on amending the measure under consideration. This effort proceeds in a manner that is more collaborative than adversarial. The working culture in Stras-

\textsuperscript{10} Hix, What’s Wrong with the European Union and How to Fix It, 112-119.
\textsuperscript{11} For an overview of the present state of the Europarties and their historical development see David Hanley, Beyond the Nation State. Parties in the Era of European Integration (Basingstoke: Palgrave Macmillan, 2008).
bourg emphasizes collegial interaction, as opposed to vigorous confrontation. On the one hand, that is a result of the fact that legislative debate is not about the fundamental merit of a proposed law but focuses on finetuning its details. A second explanation is institutional design. Committee chairs in the Parliament are distributed on a proportional basis, not according to a “winner-takes-all” rule as in most domestic legislatures. What is more, under an informal agreement between the two largest political groups (the conservative EPP and the social democratic PES), each faction appoints the President of the institution for half an electoral term. Power relations in the Parliament remain therefore more or less stable over time; election outcomes have at best a marginal influence on the distribution of institutional leverage. In light of this, it makes sense for the Strasbourg lawmakers to negotiate quiet compromises, dispensing with the argumentative belligerence and political theatrics, which characterize the struggle between government and opposition in the domestic sphere.

The second respect in which transnational political competition remains weak is that, most of the time, the Europarties fail to agree on a meaningful joint platform. Their election manifestos contain often little more than vague generalities, and domestic parties tend to ignore them as campaign instruments. The immediate causes of this programmatic emptiness are not difficult to see. To begin with, the sheer number of member organizations makes coordination difficult. What is more, all Europarties work out their respective agenda based on consensus among national delegations. Given that each of the latter wields a veto, one cannot expect the manifestos to put forward more than broad ideological principles and uncontroversial goals. But why do parties refuse to centralize power over the joint platform? One reason, it will be obvious, is that no organization likes to give up influence. Institutional egoism, though, does not seem to be the whole explanation. We also

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13 Hix, What's Wrong with the European Union and How to Fix It, 138-140.
need to take into account that European political families might be too diverse to agree on a unified platform: for example, being a social democrat in Sweden is not the same thing as being a social democrat in the UK.\textsuperscript{15} A further obstacle to deeper programmatic cooperation lies in the fact that national politicians must speak for national voters. Parties that bind themselves to a substantive common program would have to defend it before the domestic public and pursue the agreed upon measures when holding power. In other words, positions negotiated at the Union level would compete with the interests of national constituencies. Against this background, it will not surprise that domestic parties have so far failed to develop more concrete joint platforms.

Is the EU exceptional with regard to its system of partisan organization? Commentators who dispute this often liken the Strasbourg legislature to the US House of Representatives.\textsuperscript{16} This comparison, however, is quite misleading. To be sure, the House does not appoint the executive, and it focuses on working out the language of statutes, instead of just debating the legislative program of the government. In this sense, at least, the Parliament and the American lower chamber resemble each other. Political competition in the United States, though, is still a great deal more robust than under the European status quo. American Democrats and Republicans are in constant public dispute with each other, holding the other side responsible for the policies adopted while in control of the House, Senate, or White House. Furthermore, the two major parties give voters a clear choice between different substantive platforms. One might even consider partisan struggle in the United States as too polarized. The contrast with the almost complete lack of adversarial engagement among the European ideological blocs could not be starker.\textsuperscript{17}

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\textsuperscript{15} For a discussion of the coordination problems within the social democratic bloc see Hanley, \textit{Beyond the Nation State. Parties in the Era of European Integration}, 63-64. Similar problems affect the other ideological families.
\textsuperscript{16} See for example Habermas, "Why Europe Needs a Constitution," 31-32.
\textsuperscript{17} In 2010, the Parliament itself commissioned a report that comes to the same conclusion. See "How to Create a Transnational Party System," (Brussels: European Parliament, 2010), 98.
\end{flushright}
Let us next consider the implications of weak political competition at the Union level. Recall the functions that parties should perform for democratic lawmaking. First, debate in the public sphere relies on contest among them. The Europarties, however, do little to stimulate and structure political discourse. Absent ritualized confrontation between government and opposition, the news media lack stories to report, and hence the Union legislative process escapes, for the most part, the attention of European citizens. Not even the most informed among them have much knowledge of the policies under consideration in Brussels and Strasbourg, let alone enlightened preferences regarding the best course of action. Second, parties should offer the electorate meaningful choices that enable them to hold their representatives accountable. The Europarties fail at this task as well. Given the vagueness of the joint manifestos and the absence of sustained public debate, voters lack the requisite information to evaluate whether a candidate will reflect their preferences and if an incumbent has performed well in the past. What is more, even if the Europarties made clear programmatic statements, the structure of the legislative process would prevent them from implementing these electoral promises. The Commission, as we have seen, is not responsible to a faction or coalition within the Parliament, and the amendment process is based on collaboration among the major political groups. This, in turn, means that elections have little or no influence on actual policies. Voting results cannot perturb the legislative apparatus of the EU, which carries on in the same manner as usual, regardless of which camp happens to win the most seats in the Parliament. It is, then, no wonder that citizens tend to use the continental polls to comment on domestic politics, and that turnout has seen a continuous decline toward ever more abysmal rates.

What sort of reform might overcome the current lack of adversarial engagement? Simon Hix, who shares the concern about this phenomenon, offers a possible solution. He proposes, first, to adjust the procedural rules of the Parliament. If, goes the reasoning, the continental elections had

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18 Hix, What’s Wrong with the European Union and How to Fix It, 101-102.
more influence on the distribution of power within the Strasbourg legislature, citizens would have a greater incentive to vote for platforms that match their preferences on European policies, instead of using the ballot to register disapproval or (less often) support for their domestic government. To bring this about, he suggests a “winner-takes-more” approach to the allocation of committee chairs and recommends electing the President of the Parliament for a full term, so as to reserve this office for the strongest faction.19

The reasoning here appears to be sound. Ending the current system of proportional influence distribution could improve the link between election results and legislative output, and it might also have an effect on the rather too collegial working atmosphere of the Parliament. A further advantage, Hix points out, is that neither proposed change would require a formal amendment of the treaties. But it should also be clear that procedural reform can just be a first step toward stronger political competition. It does too little to establish a real government versus opposition dynamic, as the Union executive would still not be responsible to an ideological bloc or a coalition within the Parliament. Moreover, procedural reform cannot address the failure of the Europarties to agree on meaningful joint platforms.

To eliminate these hurdles to more vibrant adversarial politics, Hix would also like to see an “open contest for the Commission President.” Of course, the easiest solution here would be to let the Parliament elect the chief executive officer.20 But Hix argues that, even without such a radical change of the treaties, a more transparent race for the most prominent Union leadership post is possible. The Europarties, he proposes, should each nominate a candidate for Commission President before the elections for the Parliament take place. This individual would then formulate a concrete platform for the next legislative period, which should guide the campaign efforts of domestic

19 ———, What’s Wrong with the European Union and How to Fix It, 138-149.
20 Several member states, the Parliament, and the Commission advocated such an election procedure during the 2004 European Convention. The final draft constitution, however, did not include this proposal. See ———, What’s Wrong with the European Union and How to Fix It, 159.
parties. Hix believes that, given the prominent role of the candidates during the run up to the vote, the European Council would have little choice but to nominate the politician whose camp won the most seats in the Parliament.21

If this scenario came to pass, the continental elections would be fought on the basis of substantive platforms. The winning candidate might also have a genuine chance to implement her agenda because she would have an electoral mandate to direct the Commission to develop policies in line with her campaign promises. Combined with procedural reform in the Parliament, a genuine struggle between government and opposition might then emerge, for the strongest camp would support the legislative program of their leader, while the remaining factions seek to point out its flaws to the public. In sum, political competition at the Union level would no longer be anemic.

But, alas, the Hix plan is quite unrealistic. A European candidate who unites domestic parties under her manifesto is a *deus ex machina* solution. Politicians in the member states, as we noted, have a strong incentive to refuse to develop a meaningful transnational platform, since this might bind them to policies their own voters reject. It seems therefore rather improbable that domestic parties will empower one individual to formulate a joint manifesto that would guide their campaign for the continental election, and which might become a constraint on the national executive when it participates in the intergovernmental Union organs.

A further weak point of the proposed scheme is that it might lead to an excessive concentration of power in a single leader. We noted that, given their number and diverse preferences, domestic parties cannot be expected to agree on substantive common goals. Selecting one person to write a manifesto solves the problem, but it also bestows enormous power on this individual. What is more, the Commission President, as Hix imagines the office, would be a great deal more influential than under the status quo. Once elected, she would have a popular mandate to implement her

21 ———, *What's Wrong with the European Union and How to Fix It*, 155-163.
electoral promises, and hence the European Council would be under significant pressure to surrender its current agenda setting role (and focus on areas not subject to the normal legislative process, such as CFSP). In other words, personal leadership might replace intergovernmental deliberation when it comes to formulating the priorities of Union governance. To be sure, there are other democratic systems that give similar power to individual politicians. Consider once again the United States for comparison. Here presidential candidates exert strong influence over the programmatic direction of their parties. And once elected to the White House, the President can shape actual policies to a significant extent. Still, there is an important difference to the regime that Hix proposes. American parties use primaries to determine their frontrunners. In these races, a large number of presidential aspirants engage with a partisan subset of the whole electorate in order to win the nomination. Hix, in contrast, envisages a backroom deal among the chiefs of domestic parties. That is understandable, given that it seems difficult to conceive a transnational selection process involving more grassroots participation. But a system that chooses leaders behind closed doors and concentrates enormous power in their person will do little to dispel the widespread belief that European politics is the business of aloof elites.

The Achilles heel of dual legitimation, then, is the need for coordination among multiple domestic parties within one European ideological bloc. Without identifiable programmatic alternatives, there can be no genuine political competition at the Union level, and so long as that is the case the Parliament will remain of dubious usefulness for democratic will formation. The problem here, it appears, is that such coordination faces almost insuperable obstacles. Member state politicians who seek to represent domestic voters cannot, in earnest, delegate the formulation of their European agenda to a transnational process. And even if this hurdle were overcome, the most plausible
method to achieve coordination would be to create partisan sun kings of the sort Hix advocates. Resolving one democratic deficit, it seems, cannot but lead to another.

One hypothetical exit from this predicament is to establish a European system of partisan organization, which is autonomous from existing domestic parties. David Schleicher recommends an election reform scheme that might, at first glance, seem to have such an effect. He proposes to force the Europarties on the ballot in the member states. This could be accomplished through a rule that parties cannot receive seats in the Parliament unless having gained a certain percentage of the vote in a certain number of countries. It would then be impossible for groups that run in just one member state to send deputies to Strasbourg, and therefore local parties would have little choice but to make room for their European ideological blocs on national ballots. Citizens in the UK, for instance, might then no longer pick between Tories and Labor, but rather between EPP and PSS. Schleicher hopes that as a result, the electorate would focus on the public appearance of the Europarties and stop using the continental polls to comment on domestic politics. This expectation appears reasonable, and hence the reform proposal merits serious consideration. Nonetheless, more voter attention to the European ideological blocs is not enough to improve democratic legitimation via the Parliament. The transnational parties would also need to compete against each other with meaningful platforms that stand a chance of implementation following electoral success. For this reason, there would still have to be reforms that, first, bring about more adversarial debate in the Parliament and, second, create a link between the popular vote and the makeup of the Commission. The Europarties would furthermore need to develop programs with real content. Here Schleicher believes that, once his scheme has been implemented, the ideological blocs will seek to build their “brand” in order to improve their electoral fortunes. But this would seem to require a transna-

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23 ———, "What if Europe Held an Election and No One Cared?", 154.
tional process of platform building, which overcomes the hurdles to coordination that we discussed above. In other words, domestic parties would have to give up their current position of dominance. This, however, is unrealistic. Schleicher recognizes that Europarties must continue to depend on national member organizations for infrastructure and personnel.\footnote{24} It appears probable, then, that domestic parties will maintain a hold over the substantive agenda of their ideological bloc. So long as that is the case, the election reform approach is subject to the same objections that I have raised against Hix.

In light of the above, one might come to question the whole concept of dual legitimation. As we noted, the response to the perceived “democratic deficit” of the EU has so far concentrated on increasing the power of the Parliament. The Strasbourg legislature, it is hoped, will come to speak for a European collective of individuals, entering a conversation, as it were, with the member state peoples, whose leaders represent them in the intergovernmental process. But for the reasons laid out above, this ideal has so far proven elusive, and there seems to be no evident solution to the problems we have diagnosed. Against this background, theorists should consider possible alternatives to dual legitimation via a bicameral parliament. The following will therefore take a closer look at what I refer to as the “diet model” of federal will formation.

**European Lawmaking Without a Popular Chamber**

At the time of their initial creation, the historical polities that fit the Bund model were governed through a federal diet, composed of diplomatic legations from the member states. That is true of the Swiss and Dutch federations, the German Bund of 1815, and the United States under the Articles of Confederation. But in all these cases, popular chambers were later installed. When this happened, the Dutch and German federations lost their heterarchical character, whereas the United

\footnote{24 ———, "What if Europe Held an Election and No One Cared? ," 153.}
States (until the Civil War) and, to a lesser degree, Switzerland retained important elements of the Bund model. In other words, even where the existence of a single unified people remained at least doubtful, constitution writers opted for a popular chamber alongside representation of the units through what used to be the diet. While this decision might seem natural in retrospect, there is no logical imperative for a heterarchical federation, even a democratic one, to adopt this particular form of bicameralism. The hypothetical alternative is to retain the diet as the sole or main decision-making organ and hold member state governments accountable via democratic processes at the unit level.

A future European Bund should follow a version of the latter approach, or so I will argue here. That is of course a rather controversial position. Despite widespread disappointment with the present working of the Parliament, most observers cling to the belief that appropriate reform will lead to eventual improvement. Few people concerned with the democratic deficit of the status quo would agree that Union decision making should become more intergovernmental, rather than less. But there is at least one notable exception. Joschka Fischer, the former German foreign minister who once called for a European federation with a “proper” bicameral legislature, revised this stance in a recent newspaper article. Neither the Commission nor the Parliament, Fischer has come to believe, can provide a level of democratic legitimation that is commensurate with the kind of powers Brussels will need to obtain in the future. He therefore proposes that member state leaders form a genuine transnational “government”; member state parliaments, Fischer argues, should guarantee

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25 For the specific histories of each case see Forsyth, *Unions of States. The Theory and Practice of Confederation*, 17-72.
the requisite democratic input. The following will consider how such an institutional scheme might work in practice and develop a normative case for it.

Even at present, the member states reserve the most important decisions to intergovernmental deliberation. The Parliament, to be sure, is the ostensible equal of the Council of Ministers. Yet the Commission determines what kind of legislation is up for debate in the first place, and it does so, for the most past, on the basis of the political guidelines, which the heads of state and government negotiate at the European Council meetings (see Chapter 2). This means that a future Bund could implement a diet system without creating an altogether novel institutional scheme. As far as the intergovernmental process is concerned, little would need to change. The previous chapter, to be sure, has argued for the abolition of consensus rule in the European Council. A reform plan to create a Bund should include this change because it would enable the heads of state and government to make policies in line with the public weal of the entire continent. Yet, with this exception, the intergovernmental process might continue to operate as it does under the status quo. The main effect of a transition to a diet system would instead concern the role of legislatures in Union governance. We have noted that, at the moment, domestic and European representatives divide the work between them. The former scrutinize the actions of their government in Brussels, whereas the latter aspire to represent a continental *demos*. Under the regime proposed here, national parliaments would shoulder a larger burden. Let us first discuss what this might entail in terms of how domestic oversight is performed.

The intergovernmental process is *prima facie* undemocratic because it concentrates power in the hands of a small elite that makes decisions behind closed doors. To address this problem, mem-

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Joschka Fischer, "Es wird einsam und kalt um Europa," *Süddeutsche Zeitung*, 1 Nov 2011. Fischer does not elaborate much on the institutional details of his proposal. He advocates for a “Euro Chamber” composed of delegates from domestic legislatures, but leaves open if this institution would replace or complement the existing Parliament. For another voice in favor of less attention to the Parliament and more emphasis on domestic legislatures see Anand Menon and John Peet, "Beyond the European Parliament. Rethinking the EU’s Democratic Legitimacy," in *Centre for European Reform Essays* (London: Centre for European Reform, 2010).
ber state legislatures have, since the 1990s, increased their effort to hold the executive accountable for its European policies. There is, however, no consensus as to how to approach the task. One position is that lawmakers should have as much influence as possible on the negotiation behavior of their government. But such a focus on the factual power of national parliaments is misplaced. Katrin Auel points out that, in Europe, most governments emerge from and have the support of legislative majorities. This means that, even if a national parliament has the formal right to instruct the executive with regard to its actions in Brussels, the governing factions will, most of the time, support the leaders who have been recruited from their own ranks. Here and in general, it is therefore a mistake to think of the legislative as a counterweight to the executive. The more important role of a parliament is to furnish a stage, on which government and opposition confront each other in view of the public sphere and the electorate. Auel therefore suggests that effective domestic oversight has two elements. First, a national parliament must be able to monitor the progress of Union legislation and the stance, which the government takes in respect to proposed measures. Both the governing factions and the opposition have an interest to obtain such information. The former need it to exercise influence behind the scenes, whereas the latter must know what the government does, so as to be able to criticize it. This, in turn, presupposes a second institutional component. Members of the opposition should be able to force the executive to answer questions about its past, current, and future actions in Brussels. If these conditions are fulfilled, European issues can become part of normal domestic politics, subject to permanent discussion in the public sphere.

Note that, in practice, this ideal seems to conflict with the goal of effective control over the negotiation behavior of the government. At present, several member state parliaments have the formal

right to mandate the position of the executive. The Danish Folketing and the Finnish Eduskunta are paradigmatic examples of this model. Empirical studies have shown that, in these legislatures, public contestation of Union matters does more or less not occur. That is of course not accidental. If negotiation mandates were public, other member states could exploit this information, and it would be more difficult for the government to fend for the national interest. The process of instructing the executive must therefore take place behind closed doors. Such a procedural regime has the further advantage that it creates the impression of a unified national stance. This seems to be relevant in particular for small member states, as it is considered to buttress their negotiation power in Brussels. Yet, whatever the truth of this belief, depoliticization of European issues has a rather significant downside as well. Without public debate, voters will lack the information needed, first, to form rational opinions concerning Union governance, and, second, to hold elected leaders accountable for their policies. This, in turn, strengthens and justifies the widespread perception that integration is an elite project, which leaves normal citizens disenfranchised. Formal mandating is therefore an unsuitable model for democratic legitimation via national parliaments.

To be sure, legislatures that do not follow this approach can likewise fail to engage the public. The British House of Commons, for instance, spent a meager 0.4 percent of total floor time from 1997 to 2010 on European issues. More general statements are difficult to make, given that a com-

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prehensive empirical assessment of different oversight regimes is not yet available.\textsuperscript{32} One positive example, it appears, is the German parliament. The Bundestag devotes up to a third of its debates to Union matters, including both the “high politics” of treaty reform and “normal” legislation. Meetings of the European Affairs Committee are open to the public, and the plenum considers the governmental negotiation stance before each European Council summit.\textsuperscript{33} Of course, there is still much we do not know about this case. In particular, does the work of the Bundestag translate into more vibrant public debate? What the example proves, though, is that a national parliament can, in principle, make the EU quite central to its regular operation.

This finding will be not be too controversial. What should provoke more disagreement is the next claim that I would like to defend: proper domestic oversight renders a popular chamber at the Union level superfluous. Here is the obvious counterargument: even if member state lawmakers succeed in giving European issues a more prominent stature in domestic politics, the Parliament could still provide valuable additional legitimation. But this response assumes that leaving the role and design of the Strasbourg legislature unchanged has at worst a neutral effect. I submit that if the EU turned into a Bund, the current institutional setup would do more harm than good.

The first reason to believe so is that, at the moment, the direct election of the Parliament is a charade, which risks eroding popular support for integration. As we have seen, the lack of adversarial politics in Strasbourg entrenches the second order character of the European polls. This situation will be even more difficult to change once domestic legislatures step up their involvement with Union affairs. National politicians will then need to elaborate more specific positions on European issues, which might further exacerbate the coordination problems that impede partisan

\textsuperscript{32} A concerted effort to gain a better empirical understanding of the current situation is ongoing. See ———, "Introduction," in National Parliaments, Electorates and EU Affairs, ed. Katrin Auel and Tapio Raunio (Vienna: Institute for Advanced Studies, 2012b).

\textsuperscript{33} ———, "Debating the State of the Union? Comparing Parliamentary Debates on EU Issues in Finland, France, Germany, and the United Kingdom," 66.
integration across borders. Against this background, one has to ask whether holding on to direct
elections would be sensible. The continuous decline in turnout signals that citizens are less and less
willing to cast votes that have little meaning and effect. If, at the same time, the Parliament is sold to
the public as the “democratic conscience” of the EU, we can expect cynicism about integration to
rise.

A second and related problem is that elections to the Strasbourg legislature offer a stage to
populist euroskeptic forces. The Parliament, to be sure, has from the beginning included a fair num-
ber of deputies who opposed integration as such. At the outset, most of them belonged to main-
stream nationalist parties like the Gaullists in France or the Irish Fianna Fáil. But the 1990s
brought a rise of groups whose main or sole political end is to criticize EU membership of their
home state. Such lists have won significant election victories in Austria, Denmark, France, the Neth-
erlands, the UK, and Sweden. Given their single issue focus, the parties in question have almost no
role in normal domestic politics. The continental elections, in other words, promote groups that ex-
ist for no other reason but to rail against integration. This might still be acceptable, if the Parliament
in its current form made a useful contribution to democratic lawmaking. But if, as I have argued,
that is not the case, the rise of populist euroskepticism furnishes a consideration against the status
quo.

A third problem concerns the issue as to whether a Bund could be the “final” political form of
the integration project, or at least one that is stable over a long period. Direct election of the Stras-
bourg legislature has created a transnational elite with a vested interest to further centralize power.
Anecdotal evidence suggests that even members of the Commission, who likewise stand to benefit
from a stronger EU, have wearied of the perpetual clamor for more Union regulation and spending

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34 Leconte, Understanding Euroscepticism, 129-130.
35 ———, Understanding Euroscepticism, 119.
that emanates from Strasbourg, often in contradiction to the preferences of national voters. Empirical work on the attitudes of European political elites confirms that being a Union legislator predicts, first, support for a strong role of Strasbourg relative to national parliaments and, second, a preference for a strong role of the EU relative to the member states. Hence it will not surprise that at the European Convention, which drafted the TCE, the delegation of the Parliament included some of the most radical supporters of more centralization.

A future Bund will need to reckon with the fact that where you stand depends on where you sit. The centripetal forces in all federal systems are strong irrespective of how decision making is organized, given that it is often enough more effective to execute policies on a larger scale. To prevent the gradual erosion of its heterarchical character, a European Bund should therefore have institutions that balance the natural drive toward centralization or at least do not further strengthen it. This means, in particular, that it would be prudent to give leaders as few opportunities as possible to advance through posts at the Union level. The Commission, to be sure, cannot be dispensed with. It is needed as a neutral mediator among the member states and reservoir of technocratic expertise. But does the EU also require a popular legislative chamber? The existing one, at least, has so far not proven its worth for democratic participation.

I do not intend to argue, though, that a second legislative chamber, in addition to the Council of Ministers, is dispensable altogether. Such an institution might be ill suited to creating a robust link between public sphere and the Union political system. But it is needed to oversee the Commission. To date, the most important achievement of the Parliament remains that it censured the mismanagement that occurred under Jacques Santer. There is no other actor in sight that would be as

well equipped to supervise the Commission. A second important role of the Strasbourg deputies is to improve deliberation within the Union legislative process. For one thing, when decision making power is shared between two bodies, one can hope that each will scrutinize the work of the other, which should improve the ultimate result. The existence of a transnational chamber might also open the legislative process to a wider set of actors than have access to either member state governments or the Commission. Insofar as that is the case, there is a better chance that European policies will be acceptable to a greater number of affected citizens.

To fulfill these roles, the Parliament requires most or all of the powers that it wields at present. In particular, this includes codecision under the OLP, absent which the Commission and the member states would have little reason to listen to transnational lawmakers. But neither of the two functions mentioned presupposes the direct election of the Strasbourg representatives. Meanwhile, as we noted, this method of choosing deputies has various undesirable ramifications. I therefore suggest that a future European Bund return to the system that was in place before 1979, when domestic legislatures appointed the members of the Parliament. This reform would eliminate continental second order elections and deprive populist Euroskepticism of an important platform. Furthermore, politicians that belong to both a member state parliament and the Union legislature would no longer have much of an incentive to promote deeper integration regardless of what their voters think.

Abolishing direct elections is of course tantamount to the end of dual legitimation. Once the Parliament is composed of national deputies, it can no longer aim speak for a European demos. It would be more sensible then to consider it an instrument for domestic legislatures to do what none

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There is no conclusive support for this hypothesis in the literature. Andreas Dür and Gemma Mateo find that business associations have, in general, better access to decision makers who can influence European legislation than citizen groups. This advantage, though, is more pronounced with regard to access to the Commission and to national governments; the gap narrows somewhat when it comes to access to the Parliament and domestic legislatures. See Andreas Dür and Gemma Matteo, "Who Lobbies the European Union. National Interest Groups in a Multilevel Polity," *Journal of European Public Policy* (forthcoming).
of them is able to do on its own. National deputies can make the policies of their government subject to public debate, ensuring that it acts in the interest of the people. But within a separation of powers framework, the legislative branch has other functions, too. In particular, it must oversee the conduct of executive officers and ensure that decisions are taken on the basis of full information. With regard to Union governance, national parliaments cannot perform these roles, and hence it makes sense for them to work together in a joint European chamber. On the whole, then, the proposed institutional design is a version of a diet system: decision making power would rest with the intergovernmental process, while democratic legitimation is provided through member state parliaments that oversee their own executive and cooperate with their peer institutions.

How would implementation of this scheme affect the legislative work of the Parliament? In some important respects, little would need to change. The existing political groups could operate in more or less the same manner as under the status quo (but the associated Europarties would be relieved of the futile burden of working out a common program). A seat in Strasbourg would also not turn into a second class political office, at least not more so than is the case at present. The Parliament, after all, would retain its current powers. Moreover, its members would still have a popular mandate, given that domestic elections would determine the partisan makeup of national delegations. One main challenge of the reform would be logistic. National parliaments would need to coordinate their work calendar with Strasbourg. Representatives would furthermore come and go in the rhythm of national polls, rather than at one specified time. This means that seat distribution among the different ideological blocs might change often. Sometimes, offices within the institution or a partisan caucus would have to be refilled at inopportune times. It cannot be denied, then, that

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40 This might not be as difficult as it sounds. Representatives who hold seats in the Parliament could be assigned fewer or no additional committee duties in the domestic legislature, and electronic communication might be used to hold meetings, votes, and the like.
reform poses certain difficult issues. But the grave disadvantages of the status quo, I believe, tip the scale in favor of the proposed change.

To conclude the argument for reform, let us next consider three possible objections, which might be raised against the notion that national parliaments can bear the whole burden of democratic legitimation in the EU. The first goes like this: political supervision of the national executive is not enough because, even when the latter represents its constituents well, it can still lose a vote at the Union level. I have discussed a solution for this apparent problem in Chapters 3 and 4. Let me reiterate the point and elaborate further. Communities that form a Bund have rational ground to accept legislation their government has opposed, so long as it can be presumed to reflect the common good of the union. In this regard, the position of the losers in a federal decision procedure is the same as that of minorities in domestic politics. The decisive question for us is hence not if a member state has voted for a particular measure, but rather if the procedural framework of the Bund justifies the presumption that legislation expresses the shared interest of the whole. There is no reason to believe that for this to be the case, the federal legislative institutions have to include a popular chamber. Intergovernmental deliberation has the potential to mediate among unit public interests, such that one can regard the outcome as the common good of the Bund. The main precondition here is the elimination of member state vetoes. Furthermore, the political culture has to permit unit governments, first, to adjust their preferences in response to persuasive arguments regarding the content of the shared interest and, second, to compromise with other member states, both without losing face before the domestic electorate. Pure intergovernmental deliberation, to be sure, might shut out relevant voices, lessening its potential to formulate policies in line with a true shared interest. As we noted, that is one reason for the EU to maintain a second legislative chamber, in ad-
dition to the Council of Ministers. But, again, such an institution can be effective without direct popular election.

The second objection is that one cannot depend on national politicians to formulate an inclusive view of the European common good. If, runs the argument, citizens do not interact with transnational parties, their preferences will reflect the narrow interests of their member state. This objection is not persuasive either. For one thing, it seems rather doubtful that, at present, exposure to the platforms of the transnational partisan blocs has much effect on the attitudes of national voters. What is more, the proposed institutional scheme would make it hard for leaders to take a stance that focuses on the interest of their member state and nothing else besides. Given that QMV would be the standard decision rule, even in the European Council, a blatant failure to consider the interests of a wide range of countries would isolate a government. It seems hence quite possible that national politicians will make an effort to persuade their constituencies that it is wise to forgo certain immediate benefits, so as to permit the whole continent to prosper in the long run. Indeed, hearing such arguments from their own leaders might have a greater impact on the attitudes of citizens than listening to representatives of transnational parties. Of course, as I have said in the previous chapter, there is no guarantee that a political culture oriented toward the common good of the continent will in fact emerge. We cannot rule out that voters remain obstinate and demand from their government to insist on the short term national interest, regardless of the political consequences. But even so, there is no reason to believe that abolishing direct elections to the Parliament would aggravate this risk.

The third objection states that reliance on indirect legitimation means that citizens will never have a chance to “throw out the rascals” when dissatisfied with Union policies. Again, the same is true at the moment, too, and hence the proposed reform would at least not make things worse. To
be sure, under the status quo, voters can elect and dismiss their representatives in Strasbourg. But, as we have seen, this choice has little impact on actual legislative output. For this to change, the EU would need to give up its current system of dual legitimation and move in the opposite direction from what I have suggested. In particular, the Commission would have to be responsible to the Parliament, and the intergovernmental process could not be more than a marginal side constraint on it. Once that is the case, there will be a direct link between the outcome of the European polls and future policies. Yet such an institutional design is, of course, incompatible with the principles of the Bund model. In a heterarchical EU, continental elections can never be referendums about the performance of the federal government, as the member states have to retain a significant role in the legislative process. But this does not mean that democratic control is altogether impossible. Under the scheme I have proposed, European issues should become one aspect of normal domestic politics. Voters will then be able to evaluate national leaders in light of their promises and actions regarding Union affairs. To be sure, that is not the same as making a decision whether to retain or change a government based on its record in office. Yet, it seems, that such indirect legitimation is the most that we can hope for in a federal order, which aspires to uphold the independent political existence of the member state peoples.

**Democratic Federal Citizenship**

We noted earlier that, in a Bund, citizenship has two separate tiers (see Chapter 1). First, each unit legal order establishes its own scheme of constitutional rights and obligations. At the same time, there is federal citizenship: member states must grant certain privileges to all nationals of the other units, and individuals have rights against the central government. These should cover the whole range of the standard constitutional liberties – civil, political, social, and economic. Yet the reach of
the legal norms in question has to be circumscribed. The federal system of rights must not super-

sede that of the member states. It will set forth negative limits on the conduct of the central author-

ities, but public power in the unit sphere should be left free to operate according to different criteria.

Perhaps the Bund will also undertake measures to honor liberties, whose implementation demands

positive government action instead of government restraint. Yet, again, the member state peoples

need some latitude to realize their own vision of how to fill the system of rights with specific con-
tent.

Bund citizenship, then, is “demoicratic.”41 Those who hold it do not become equals like the

members of a single demos. Depending on their unit affiliation, individuals will rather have different

bundles of rights and obligations. The federal constitution, to be sure, modifies the schemes of

equal freedom that exist within each member state. Foreigners gain easier access to at least some of

the privileges of national citizens, and each person obtains additional rights against the central gov-

government, irrespective of unit affiliation. Nonetheless, the limits on federal harmonization ensure

that citizens in different member states have different liberties and duties. In this sense, a Bund is a

union of demoi.

What kind of political rights should a federal citizen have in such an order? The preceding has

examined this question with regard to the specific case of the EU. I have proposed a sharp limita-

tion of the individual entitlement to direct participation: intergovernmental deliberation should be

the central decision mechanism; popular election of the Parliament is to be abolished. If this

scheme were implemented, citizenship of a future European Bund would be demoicratic in a

second sense. The purpose of the suggested institutional design is to enable fair compromises

41 Several authors, including foremost Joseph Weiler, have used this neologism to characterize the EU as based on
“mutual recognition” among peoples, which aspire to maintain their cultural uniqueness. For an overview see Jan-
Werner Müller, "The Promise of 'Demoicracy'," in Political Theory of the European Union, ed. Jürgen Neyer and
Antje Wiener (Oxford: Oxford University Press, 2011). Here I attempt to develop a political rather than cultural in-
terpretation of the term.
among the public interests of the member state peoples. It does not presume the existence of a federal collective of individuals that must articulate its preferences through a continental popular chamber. Rather, political participation is expected to take place foremost at the domestic level. Of course, Union citizens should receive transparent information about what EU organs do, have the chance to put forward grievances, and might even keep the right to start popular legislative initiatives that was introduced at Lisbon (see Chapter 2). However, the more demanding aspiration of representing a continental demos via the Parliament is impracticable, and the EU should therefore abandon it. Or so, at least, this chapter has argued.

There is yet a third sense, in which one can describe a heterarchical federation as democratic. Unlike the members of a unified people, the citizens of a Bund do not form a single overarching collective that has established a fundamental order and gives ongoing consent to its existence. Instead, constituent power remains with the member state communities, each of which has made a separate democratic choice to join the union and to submit to a common higher law (see Chapter 1). What remains for us to explore is how such a decision to federate might occur in the European context.
Imagine the EU undertook an effort to reconstitute itself as a Bund. The first step would then be to hold a transnational convention that prepares a draft federal compact. Several issues regarding the design of this process deserve attention. First, who should participate? Would it be wise to reproduce the makeup of the last European Convention, which included delegates from both the existing Union organs and national governments? Or should the framers be more disinterested and not answer to specific institutions? Second, would each national government need to endorse the proposed federal compact? In 2004, when the European Convention had finished its work, member state leaders came together for an Intergovernmental Conference to work out a consensus draft of the TCE. National parliaments and citizens were then asked to pass the ultimate verdict on the amended proposal. The alternative would be to follow the example of the American founding and skip the intermediate step between convention and ratification stage. In the following, however, we focus on a different question: what happens once a draft federal compact has in fact been submitted for approval? For most, the answer will be obvious: the member states should hold referendums on the proposed document. Others will favor a vote of the domestic legislature. But this chapter will

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1 Of course, what happened in 1787 is somewhat more complicated. It was in fact the subject of acrimonious debate whether the states assembled in the Confederation Congress had the right to amend the proposed constitution or needed to approve it before sending it to the ratifying conventions. The Philadelphia delegates, in their most audacious moment, had declared the existing rule for amending the Articles of Confederation inapplicable. According to them, no unanimous vote in Congress was needed; rather, it would suffice that nine of thirteen states accepted the constitution. In the end, this gambit was successful. Congress passed a resolution to submit the draft for ratification without commenting on its substance. See Pauline Maier, *Ratification. The People Debate the Constitution* (New York: Simon and Schuster, 2010), 52-59.
argue that a third procedure would be preferable. All things considered, the best solution is to hold ratifying conventions, similar to the state assemblies that decided the fate of the US constitution.\(^2\)

To be sure, a small number of domestic constitutions prescribe a referendum on significant changes of Union legal framework.\(^3\) However, at least from a theoretical viewpoint, it would be possible to ignore such rules. If, as Chapter 1 argued, joining a heterarchical federation is an exercise of constituent power, legal norms of the present cannot govern the modalities of the act. When making or remaking the fundamental order, the people has total freedom and is not obliged to adhere to a preexisting framework, although it might of course resolve to do so. Hence the problem before us is not what the law of a particular member state requires, but rather which procedure is most appropriate to formulate the constituent will regarding participation in a European Bund.

Of course, the above presumes that national ratification has to take place at all. But is that in fact true? The hypothetical alternative would be a common European decision. One possible approach here is to hold a single continental referendum. In such a ballot, a positive outcome might require that a certain proportion of all participants vote yes. Or the rules of the referendum could stipulate that for the constitution to enter into force, it would need to win a certain share of the total European vote and, in addition, secure majorities within a certain number of member states. In principle, we can also imagine that a drafting convention enacts its proposal without ratification. Yet both procedures are incompatible with the idea of a Bund. In either case, a collective decision at the Union level is allowed to overrule the will of individual member state peoples. This violates the

\(^2\) Other authors who believe that a European constitution should be debated in national conventions include Anneli Albi and Andrew Arato. The former mentions the idea in passing without further discussion. See Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge University Press, 2005), 162. Arato envisages that conventions in the member states propose amendments to an initial draft produced at the European level; transnational framers should then have the final word. He, too, does not provide a full normative comparison of different possible ratification devices. See Arato, "Conventions, Constituent Assemblies, and Round Tables. Models, Principles, and Elements of Democratic Constitution Making," 199-200.

\(^3\) That is the case in Denmark and Ireland. In addition, the German high court has ruled that participation in a federal EU presupposes the direct approval of national voters (see Introduction).
political logic of heterarchical federalism. Under such an order, we recall, the higher law of the center is valid alongside the constitutions of the units but does not supersede them. Hence the federal compact cannot bind states, whose citizens have rejected it. If the document enters into force despite such opposition, the people in question has forfeited the power to determine its fundamental order, and it will then no longer possess an independent higher law. To join a Bund, national citizens must therefore give their approval, which establishes the federal compact as part of the total unit constitution. A common European decision, in contrast, would institute a continental state with a single unified people.

Our question, then, is which procedure is most suitable for national ratification of a federal compact. The argument proceeds as follows. First, the chapter examines the strengths and weaknesses of the different possible ratification devices. A referendum, we argue, is an inferior means to register democratic approval or rejection of a federal compact. Most participants would lack the knowledge needed to evaluate such a document. What is more, there could be no proper deliberation about the merits of the proposed system. A vote of the domestic legislature, it will become clear, is an even less suitable mechanism. Constituted bodies should never decide on the creation of a new fundamental order, given that politicians might have different interests from normal citizens. A ratifying convention, finally, has the potential to overcome all of these problems. Provided the institutional design is appropriate, the members of such assemblies can be expected to have sufficient knowledge, to engage in proper deliberation, and to focus on the common interest. The chapter concludes with some thoughts regarding the number of member states that would need to endorse a shared higher law before it can enter into force.
Ratification Procedures Compared

A federal compact, we noted, must undergo ratification in order to ascertain whether the member state peoples agree to incorporate the proposed document into their respective constitution. The nature of this question determines which procedure is most suitable to answering it. Our comparison of the possible choices will be structured around two general themes. First, we pose a normative question: in how far is each procedure fit to channel the exercise of constituent power? The variables of interest here include who makes the decision, and how do these participants arrive at their vote? Second, we need to consider probable empirical implications: how will the choice of ratification device affect the working of a reformed EU? In particular, this decision might influence the level of popular support and identification with the new order. The following will discuss both sets of issues with regard to each possible option.

The Referendum

Referendums are in fashion. Democratic states hold more and more popular votes on local and, sometimes, national policies and legislation. In addition, citizens are often asked to decide on proposed constitutional amendments or the ratification of a new higher law. National ballots on EU matters represent a further manifestation of the trend toward more direct participation. With the exception of the UK, all member states that joined after 1957 called for a referendum when seeking to accede.⁴ Danish and Swedish citizens voted on, and rejected, the introduction of the Euro. Furthermore, there have been referendums on various reform treaties. Until 2005, these took place just in Denmark, Ireland, and France. However, when the TCE came up for ratification, no fewer than

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⁴ Following a change in government, the UK held a popular vote after it became a member state in 1973. Norwegians refused to join the EU twice; all other accession referendums were successful. Note further that, in 1973, France held a popular vote on the first wave of enlargement. At the time, there was no legal obligation to call for a referendum. However, since 2005, the domestic constitution (Art. 88-5) prohibits the French government from approving the accession of new member states without a referendum.
ten member states planned to involve the electorate in the decision. Right now, there is discussion of a referendum on EU membership in the UK, while German politicians contemplate a popular vote on a new domestic constitution in order to remove legal obstacles to further integration. Against this background, it seems fair to assume that support for national referendums on a federal compact would be strong. The case for this ratification procedure rests, first, on the belief that a popular vote is the ideal mechanism to formulate the constituent will and, second, on the expectation that citizens would not perceive the new order as legitimate, unless it has passed the test of a referendum. How persuasive are these rationales?

The intuitive force of the claim that a popular vote is the best mechanism to channel the exercise of constituent power derives from the fact that all citizens, rather than just a subset of representatives, can participate. But we must be careful not to make things too simple here. When all citizens vote, the whole demos, it might seem, has spoken. Yet what justifies this equation of separate individual actions with a decision of the collective? The latter, after all, has no concrete existence – it is a fictional subject. Proponents of the referendum procedure will respond that imputing the outcome to the popular will is plausible for two reasons. To begin with, universal participation forestalls elite capture. As one author puts it, referendums on European integration provide for a check on the “empire building” schemes of a transnational political class. More important, though, the advocates of direct popular ratification will maintain that it can best reflect the values and interests of the electorate.

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5 The French and Dutch no votes brought this process to a premature halt. Further referendums were scheduled but not held in the Czech Republic, Denmark, Ireland, Poland, Portugal, and the UK. Voters in Spain and Luxembourg approved the TCE.


The first of these arguments has some merit. One should indeed expect politicians to have different interests from normal citizens. This, as the next section will elaborate, makes for an important consideration against legislative ratification. Compared to the latter, a referendum has the advantage that it limits the influence of the political elite. Note, however, that sitting officeholders might still control the timing of the decision and, perhaps, the public education campaign that precedes it. Popular votes, then, can diminish the power of selfish politicians but not eliminate it. Furthermore, a national convention, too, has the potential to rein in the influence of sitting officeholders. Or so we argue below. Referendums, in other words, offer at best a small advantage on this score.

The claim that a popular ratification vote would best reflect the values and interests of the people opens a more complex debate. At first sight, it might seem that referendums provide the fairest possible method – each voice is heard and given equal weight. However, one should also take into account how citizens reach their decision. One relevant observation here is that participants in a referendum might refuse to express a preference on the question at stake (“issue voting”) and use their ballot instead to communicate an opinion regarding domestic politics (“second order voting”). An even more serious problem is that most citizens will lack the knowledge needed to assess how approval or rejection of a proposed federal compact would affect them. These two factors call into question that direct popular ratification would reflect the values and interests of the people. Let us consider each aspect in turn.

It has long been a widespread opinion that most participants in referendums concerning European integration are second order voters. Recent empirical work, though, demonstrates that individual attitudes toward the EU provide a stronger explanation of how citizens decide. Nonetheless, satisfaction with the national government, general trust in politicians, and perception of the current economic situation have likewise significant predictive value.\footnote{Sara Binzer Hobolt, Europe in Question (Oxford: Oxford University Press, 2009), 65-83.} This means that contingent
factors might determine the fate of a federal compact, if the latter is put to a referendum. Depending on the size of the second order vote, and depending on how close the issue vote splits, the result could hinge on parameters such as whether citizens believe the government is doing a good job, whether there is high unemployment, and the like. This element of randomness provides a first indication that a referendum might not offer the best means to reach a decision in line with the values and interests of the people.

A second consideration is voter ignorance. Of course, we do not mean to argue here that Europeans are too stupid for democratic participation. It is quite plausible to believe that voters are capable of electing leaders who then represent them well. Without doubt, citizens are likewise competent to evaluate referendum questions such as, for example, whether a town should build a new train station or if gay marriage should be legal. Assessing a federal compact, though, is a rather more complex task. Voters would need to understand how the new order would balance Union power with member state independence. They would need to evaluate how much influence their national government would have relative to other countries. They would need to predict other distributive effects of the new order. They would need to ponder if the proposed document establishes a proper framework for the exercise of public power: would it guarantee the rule of law, permit sufficient democratic participation, and safeguard individual rights? In addition, voters would need to think about the probable effects of failed ratification. Perhaps the status quo ante would be preferable to the proposed order, but approving the latter might still be more attractive than dealing with the consequences of a rejection. Given how difficult all of these calculations are, it seems fair to assume that most Europeans would find it hard to reach a meaningful judgment.

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9 The following is partly based on the more general discussion of voter ignorance and constitutional ratification in Lenowitz, "Why Ratification? Questioning the Unexamined Constitution-Making Procedure."
The available empirical data support this claim. Large numbers of citizens do not know basic facts about the EU political system. Ignorance about the latter is much higher than with regard to national institutions. A 2004 Special Eurobarometer, conducted after the member states had signed the TCE, showed that a third of the respondents had not even heard of the document. Less than half of the participants were able to answer simple question about its content. Furthermore, in polls taken subsequent to national referendums, a third of the participants in Spain and a fourth of Dutch voters reported “lack of information” as one reason for their rejection of the TCE. To sum up, one cannot expect that an average person would be able to grasp the implications of approving or rejecting a federal compact.

Voter ignorance, then, is a serious challenge to direct popular ratification. If most citizens do not understand the consequences of their decision, we must question whether a referendum would in fact lead to an outcome that is consistent with the values and interests of the people. Some of the uninformed participants will misjudge which option is best for them. Others will not even attempt to formulate an issue preference and follow second order considerations instead. A third group will recognize their information deficit and – like the Spanish and Dutch voters just mentioned – opt for the status quo, which might appear to provide a safer bet than supporting an unknown alternative. In all three cases, at least some of the referendum participants will cast votes that contradict their actual values and interests.

Let us now consider two possible counterarguments that might be raised in defense of direct popular ratification. The first is that suitable education programs can reduce voter ignorance to an acceptable degree. Efforts of this kind often precede referendums on a proposed constitution. Pos-

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sible instruments to enhance voter knowledge include websites, television and radio programming, print materials, public hearings, civic workshops, and town hall meetings. So far there is no comparative empirical work on the effectiveness of such measures. It is, however, rather implausible that education programs could have a strong enough impact, even in affluent countries with sophisticated electorates. To begin with, the threshold for someone to meaningfully assess a proposed federal compact is just too high. This task requires specialist knowledge about the working of a transnational constitution and, in addition, a grasp of the political dynamics that approval or rejection might generate. What is more, exposure to the messages of the yes and no campaigns would likely undermine the effectiveness of a simultaneous effort at citizen education. The purpose of the latter is to impart objective information; campaigns, in contrast, aim to persuade individuals of a particular viewpoint. At least in the run up to a popular ratification vote, the shortest route to achieve this goal involves manipulative tactics. Why is that so? Compared to regular elections, more citizens will be undecided because the issue at stake is complex and unfamiliar. These same factors make it easier to mislead the public.\(^\text{12}\) Campaigns have therefore a strong incentive to take particular true facts out of context, focus on select topics instead of accounting for all relevant considerations, prime an issue that is unrelated to the vote, or make altogether false statements. Such an information environment will hinder voters from reaching an educated assessment of a federal compact.

The electoral fights preceding the French and Dutch referendums on the TCE corroborate this hypothesis. Public debate in France concentrated on the social and economic consequences of integration. One major topic of the campaign was the “Bolkestein” directive on the liberalization of trade in services, which the Commission had just introduced for legislative consideration.\(^\text{13}\) Without doubt, French politicians offered legitimate reasons to be concerned about both this particular

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measure and the perceived neoliberal bias of the EU in general. However, the debate had at best a tenuous link to the provisions of the TCE, whose main purpose was to overhaul the Union decision making process and to change the symbolic basis of integration. Dutch voters, too, were exposed to a campaign that gave short shrift to the actual content of the proposed document. Here the discussion focused on a rather diffuse fear that national culture was under threat from Brussels. The main instigator of this debate was the far right politician Geert Wilders who also managed to plant the rather absurd notion that approving the TCE would lead to Turkish EU membership. In light of past experience, then, we need to expect that campaigns preceding referendums on a federal compact would spread distorted, irrelevant, and false information, subverting whatever beneficial effect citizen education programs might otherwise have.

A second, more powerful response to the voter ignorance challenge is that people might not in fact require much knowledge to make a competent decision in a referendum. The use of “heuristics”, goes the argument, enables the participants to vote as if acting on complete information. In particular, the endorsements of political parties, interest groups, religious authorities, or prominent individuals are supposed to provide cues regarding the consequences of the alternative choices. Often, this might well be the case. But would such information shortcuts work in the context of a popular vote on a European federal compact? During the campaigns leading up to past integration referendums, the most salient cues have been the endorsements of parties. This, of course, is somewhat ironic: if most voters depend on these recommendations, would it not be easier to let politicians decide without the detour via a popular vote? Another consideration here is that partisan endorsements might have rather limited heuristic value. While most parties on the continent have formed around the left-right cleavage, support for integration cuts across this dimension: at

16 Hobolt, Europe in Question, 144.
least for mainstream parties, there is no clear relationship between location on the ideological spectrump and their attitude toward the EU. This means that citizens need to know specific details about the platform of a particular organization in order to evaluate its recommendation. Some of them lack such information – for these voters, partisan endorsements do not provide useful cues.\(^{17}\) A related problem is that, sometimes, parties send ambiguous messages before a referendum. For example, the French Parti Socialiste (PS) struggled to formulate a unified stance during the campaign preceding the vote on the TCE. Its leadership was divided over the issue, and hence an internal referendum was needed to determine the position of the PS.\(^{18}\) Given that national mainstream parties often face similar disagreement regarding European integration, one can expect that popular votes on a federal compact would provoke more such disputes over the appropriate endorsement. The latter, as a result, would have limited heuristic value.

We have reason to believe, then, that voter ignorance will tend to prevent referendum outcomes that are consistent with the actual values and interests of the people. There is, however, yet another, more profound objection to direct popular ratification. So far we have taken for granted that a suitable procedure must somehow aggregate private utilities. On this view, citizens have values and interests that should lead them to prefer either approval or rejection; the sole problem is for a voter to find out which option lies closer to her ideal point. This task, as we have seen, is rather difficult. Nonetheless, if enough people were able to perform it, a referendum would provide the best means to determine the popular will, understood as the sum of private utilities. We should question, though, if that is the right yardstick in the first place.

Few political choices will have as profound an impact as the decision whether to enter a European Bund. Rejection of a proposed federal compact might leave the member state in question

\(^{17}\) ——, *Europe in Question*, 145-147.

\(^{18}\) 58 percent of the participants opted for supporting the TCE.
isolated from the rest of the continent. And if the overall ratification process failed, integration would suffer a massive and perhaps irreparable setback. On the other hand, in joining a Bund, a people remakes its constitution. From then on, it must see the values and interests of the other unit communities as integral to its own public weal, and hence the national government will have to follow binding rules that can impose sacrifice for the good of the whole. Unilateral exit from the new commonwealth is moreover not foreseen. Future generations will either have to live with the decision to participate in the Bund or secede in breach of the shared higher law. The new order will also set forth the basic rules that govern public power in the federal sphere. Given the coequal relationship between these norms and the domestic constitution, the latter can no longer impose additional limits. Unless the Bund tramples its own founding principles, member state organs should not resist it on the grounds that national higher law is being violated. In other words, ratifiers must think hard if the new order will function at least as well as the present domestic constitution. Here we should also note that a federal compact will be entrenched against change. Amendment, to be sure, need not require unanimous consent. Nonetheless, future generations will have to overcome significant hurdles to revise the federal higher law.

Against this background, unfiltered aggregation of private utilities is the wrong normative standard. In a sense, of course, such a conception of democratic will formation is questionable per se. What reason do the losers of a vote have to accept the outcome when it only benefits the winners? Under the conditions of normal politics, this can perhaps still be acceptable. For one thing, respect for majoritarian procedures secures the peace, and no one, it is to be hoped, will be on the losing side all of the time. What is more, there are courts that safeguard the basic rights of minorities. Even so, a democratic system is healthier when citizens seek to persuade each other through “public reason”, or justifications that appeal to values and interests common to all. This holds a fortiori for
constitutional politics, whose purpose is to define the rules of the game and entrench them against future change. Ratifiers of a federal compact should therefore transcend their private perspectives. Their goal must be to reach an informed judgment as to whether the proposed document serves the shared interest of current and future compatriots. For this to happen, it is crucial that, before the final vote, there is enough deliberation. Open and fair exchange of arguments has been proven to motivate participants to reevaluate their normative commitments, to think past their immediate selfish concerns, to assume the perspectives of others, and, not least, to gain a better factual understanding of the proposal under consideration.\footnote{For an overview of the empirical literature on the benefits of deliberation see Michael X Delli Carpini et al., "Public Deliberation, Discursive Participation, and Citizen Engagement. A Review of the Empirical Literature," \textit{Annual Reviews of Political Science} 7 (2004).} When such a transformation of individual perspectives takes place, the ultimate outcome will tend to approximate the common good, and therefore, it should be acceptable to the whole people.

Popular ratification votes cannot live up to this more demanding criterion. The ideal paradigm of deliberation is face to face argument. Here the participants have little choice but to listen to the other side and to answer to their reasoning. Attempts to mislead and manipulate the audience can be met with a direct response. Of course, the whole electorate cannot engage in such a direct exchange of arguments. If a European federal compact were put to a referendum, the best that participants could do is to track public debate and weigh the reasons pro and contra ratification on their own. At least in principle, such “internal” deliberation can still lead to a rational judgment. However, most citizens will not follow the disputes taking place on the editorial pages of major newspapers, attend deliberative events such as townhall meetings, or make a point of perusing the information materials that public authorities might distribute. As we argued earlier, the average person will go to the polls uninformed or, worse, misled through manipulative campaigning. In light of this, one should not
expect popular ratification votes to produce outcomes that reflect considered views as to which decision is best for the public weal.

We still have to address the claim that citizens would not perceive a federal compact as legitimate, unless it has passed the test of a referendum. This argument is perhaps the strongest that advocates of this procedure can muster. A belief that direct participation is always the most democratic approach might have become ingrained in public opinion. If this were true, ignoring the demand for a popular vote could indeed undermine support for the new order. Still, the force of the argument from empirical acceptance relies on contingent facts rather than on the attractive moral properties of the referendum procedure as such. Hence, if another mechanism turns out to be superior from a normative perspective, one should advocate for its use and hope that citizens at large will recognize the benefits of this choice. Such an expectation might not be altogether unrealistic. In the American case, at least, the ratifying conventions proved rather successful in generating widespread acceptance of the new constitution (see below). But can this achievement be replicated today, given the social changes that have occurred since the 1780s? Let us postpone this discussion until we have considered the merits of the other two ratification devices.

*The Legislative Vote*

From Rome to Lisbon, ratification of European treaties has, for the most part, been the preserve of national parliaments. Even the TCE was supposed to be approved in all 27 member state legislatures; 17 countries, moreover, did not plan to hold additional binding or consultative referendums. Of course, past treaties, including the TCE, have normally been understood as international agreements. If the member states sought to adopt an explicit federal compact, the issue of ratification
would appear in a somewhat different light. Nonetheless, it seems probable that opponents of direct participation would still regard legislative votes as the default alternative.

What are the strengths of this procedure? First, we can expect that parliamentarians are knowledgeable enough to assess the implications of approving or rejecting a federal compact. Professional representatives will be able to familiarize themselves with the issue and to consult with experts when needed. Second, parliament is, to a degree, a suitable forum to deliberate the reasons pro and contra ratification. Indeed, the traditional justification for empowering legislative bodies is that debate among the representatives will lead to more enlightened policies. Of course, this ideal is not always met in practice. Legislative debates will often just serve to produce soundbites for public consumption; good faith attempts to persuade the other side of a particular view tend to be scarce. This could well hold true for the ratification of a federal compact, too. Partisan leaders might take a decision behind closed doors and then suppress dissent within their own ranks, preventing a genuine exchange of arguments between different camps. On the other hand, it seems also possible that, given the profound importance of the issue, parliamentarians would disregard caucus discipline and make a genuine effort to assess the proposed document on its merits.

Legislative ratification, in other words, has at least the potential to overcome the weaknesses of the referendum procedure. However, it suffers from a crucial flaw of its own. As “constituted bodies”, legislatures should not be permitted to create a new fundamental order. What is the rationale behind this principle? The most basic purpose of a constitution is to separate the authorization of public power from its exercise. Higher law, which derives from the constituent power of the people, is supposed to prevent that officials use the coercive resources of the state for their own private interest or similar illegitimate purposes. If the bearers of public power had discretion to remake the constitution, this objective would be jeopardized. Parliaments, to be sure, can amend the higher law
according to certain procedures. Adoption of a federal compact, it might be said, falls under this power – domestic legislatures should therefore be allowed to take the decision. Yet this argument is misleading. Participation in a Bund vitiates the claim of the domestic constitution to regulate all public power within the land. The shared higher law replaces the existing fundamental order insofar as the federal competence sphere is concerned. Such a transformation, we noted, involves the exercise of constituent power, and hence constituted bodies should not have the final word.

Proponents of legislative ratification might dismiss this line of reasoning as too abstract. Let us therefore discuss in more concrete terms how leaving the decision to parliament could distort the process of making a federal compact. The general problem is that, with regard to European integration, politicians might have different interests from normal citizens. At first sight, it could seem as if the main concern here is that national officials, in particular legislators, have an incentive to resist a stronger Union, given that it would strip domestic institutions of their power. However, there are in fact a number of reasons to think that selfish interest can lead politicians to prefer deeper integration than normal citizens. George and Takis Tridimas provide a list of relevant factors. Partisan leaders who hold executive office or vie for it might benefit from a more powerful EU insofar as it would enhance their position relative to the opposition, their own backbenchers, and subnational officials, all of whom remain shut out from European decision making. This, of course, presupposes that member state governments keep a strong hold over Union policies, which might not be the best institutional arrangement in all cases. What is more, politicians in general stand to profit from deeper integration because it enables them to shift blame for unpopular policies to Brussels. It also gives them additional opportunities to dole out patronage or to advance their own career.\footnote{Tridimas and Tridimas, "Electorates v. Politicians. The 2005 French and Dutch Referendums on the EU Constitutional Treaty," 281-285.}
We have reason to believe, then, that legislative ratification introduces significant bias into the making of a federal compact. Another consideration that militates against this procedure is that it could hurt popular acceptance of a European Bund. Citizens would have no role whatsoever in the creation of the new order. The latter might therefore come to be seen as an elite project, of which the people as a whole has little ownership. Such a perception could destabilize the Union, in particular during times of crisis. To sum up, while legislative ratification might overcome the central weaknesses of a direct popular vote, it brings with it another set of disadvantages. Let us next consider an institutional device that relies on representation as well, but is less susceptible to the problems just discussed.

The Convention

When, in 1787, the federal convention in Philadelphia had finished its work, the stage was set for “one of the greatest and most probing public debates in American history.”21 So writes Pauline Maier, the foremost scholar of the process through which separate conventions in the thirteen states ratified the US constitution. In each case, local freemen elected representatives who then came together to discuss and decide the fate of the proposed document. Eleven of these conventions voted for ratification. The big exception was Rhode Island, which, at first, held a referendum that brought a resounding defeat to the federalist camp. A convention did not take place until after the constitution had entered into force. The final vote was narrow, but Rhode Island chose to remain in the union. North Carolina, too, hesitated for some time. But, in the end, all thirteen former confederate states approved the new order.

What motivated the founding fathers to prescribe state conventions as the ratification mechanism? According to Maier, these assemblies were understood as “embodiments of the people” that

21 Maier, Ratification. The People Debate the Constitution, ix.
could formulate the constituent will better than individual citizens voting in a referendum. The delegates, went the expectation, would be more intelligent and educated than the average person, and the conventions would enable a genuine debate leading the participants to appreciate the merits of the proposed document. Furthermore, the delegates, it was hoped, would put the common good above their private interest. In other words, the founding fathers trusted the convention procedure to avoid the weaknesses that beset direct popular ratification and legislative votes. Yet were their optimistic expectations justified? If so, could the feat be repeated in the European context?

Let us begin with the claim that convention delegates will, on the whole, be more intelligent and educated than the average person. This should be uncontroversial, and there is little doubt that it held true in the American case. It is a somewhat different question, though, if one can expect that representatives will be competent to meaningfully assess a constitutional document. The historical record of the ratification debates in the United States indicates that most of the delegates were in fact “capable” and “remarkably well informed.” But should one expect a similar level of qualification from representatives asked to decide on a European federal compact? Above we listed the different issues that ratifiers would have to consider in this scenario. Most normal citizens, ran our argument, could not succeed at the task. Is it possible that delegates to a ratifying convention would not do much better? One author is rather critical of the sort of people that now participate in constitution making bodies: “in this age of television and mass media dominance”, we should fear that a “convention [is] filled with pop singers and athletes who, among other deficiencies, lack expertise in constitutional matters.” Yet that is a too pessimistic view. Even if some or most delegates are unfamiliar with the issues facing them, this might change in the course of the process. Edu-

22 ———, Ratification. The People Debate the Constitution, 146.
23 ———, Ratification. The People Debate the Constitution, 468.
24 The following draws from the more extensive discussion in Lenowitz, "Why Ratification? Questioning the Unexamined Constitution-Making Procedure."
cation programs, we argued, cannot but fail if the target audience is the electorate as a whole. However, it is much easier to impart the knowledge needed to assess or even write a constitutional document to a small group of representatives. Individuals chosen to draft a new higher law often receive extensive training before their actual work begins. National ratifying conventions might likewise distribute information materials to their members and invite experts to teach inexperienced delegates the requisite technical knowledge. What is more, the representatives would learn about the proposed federal compact through observing and participating in the debate about its merits.

This brings us to the claim that a ratifying convention is a deliberative forum. In the American case, the hopes of the founding fathers were borne out. At least in the states where significant opposition to the constitution existed, the conventions examined the document in sometimes excruciating detail. Just like the federalists had expected, this gave them a chance to convince enough delegates to join their side. Such persuasion could not have occurred if all ratifiers had arrived at the conventions with their minds already made up. Some of the delegates, to be sure, received binding instructions from their constituents, although the latter had of course little power to enforce these. Others were diehard supporters or foes of the constitution. But in most states, there were a significant number of delegates who remained undecided and were prepared to give each side a fair hearing. As a result, the convention debates were serious and probing. The participants, Maier summarizes, “put their mind to complicated problems, tried to reconcile the ideals of the Revolution with the needs of the nation, and considered the impact of contemporary decisions not just on their own lives but for the future.”

Could one expect a similar outcome in the European setting? In principle, there is little reason to believe that convention delegates in the member states would not rise to the occasion. The main danger, it seems, is that most of them arrive with an imperative mandate. In this case, deliberation

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26 Maier, Ratification. The People Debate the Constitution, 468.
would be more or less superfluous. Therefore, institutional design matters. Election rules should state that mandates are free; votes during the convention should be taken in secret. These simple provisions would ensure that delegates will not suffer the rancor of disappointed constituents, making it likelier that a genuine debate occurs. In addition, the rules might forbid candidates to run on the ticket of political parties. Such a restriction would prevent that most of the delegates represent larger organizations that define their position before the convention has even begun. Another possible means to protect free mandates is to appoint, rather than elect, at least some of the delegates, choosing from prominent figures in public life.27

What about the claim that members of a ratifying convention put the common good above private interest? As we just observed, this seems to have been true in the United States. But are there structural reasons that such delegates will care more for the public weal than voters in a referendum or parliamentarians? Regarding the former comparison, it should be noted that members of a convention undergo the transformative effect of deliberation, which distinguishes them from participants in a popular ratification vote. At the same time, these representatives need not have the same distorting incentives as members of the legislature. So long as the number of professional politicians in the convention remains limited, the selfish interests of this functional elite will not bias the ratification process. Once again, then, the rules of delegate selection matter. Perhaps, it would be too extreme to prohibit all members from holding elected office for a period after the convention has taken place.28 The suggested ban on partisan election tickets might suffice to ensure that enough candidates hail from walks of life other than politics. Appointing prominent individuals to unelected seats can likewise help to generate a more diverse group of representatives.

27 To prevent a “convention filled with pop singers and athletes”, it might then be helpful to also select NGO representatives, religious leaders, intellectuals, and the like. One relevant model here is the German Bundesversammlung. State parliaments choose half of the members of this institution, whose sole task is to elect the federal president. Often, the appointees are prominent public figures rather than professional politicians.

Let us next address the probable empirical implications of using conventions to decide on a European federal compact. Above we speculated that citizens will not view such a document as legitimate, unless there has been a referendum. It is worth noting, though, that in the United States, the ratifying conventions appear to have bolstered popular acceptance of the constitution. During the process, opposition to the proposal was fierce and when it came to the final vote, the federalists often prevailed with a rather narrow margin. Yet once ratification had been successful, most of the critics embraced the new order as legitimate. One delegate in New York said that, after careful reflection, he could not approve the constitution but would nonetheless “aid it all he can” if the other side ended up winning. This statement, according to Maier, illustrates the general mood that settled over the opposition camp after the ratification fight had been lost. In other words, using the convention procedure did little harm to the American constitutional project.

A skeptic could respond that circumstances have changed since the 1780s. In particular, voters have become more educated and public communication is now instantaneous. These factors might lead citizens to prefer direct participation over representative procedures. Indeed, as we mentioned earlier, there is a general trend toward more frequent use of referendums. Against this background, the idea of holding national conventions to decide the fate of a European federal compact is more or less certain to be decried as undemocratic. From a theoretical viewpoint, this charge misses the point. Or so, at least, we have argued here. Still, the limited role of normal citizens is a significant concern. Ratifying conventions should therefore strive to include as much as possible all voices that wish to be heard. Such popular input can take multiple forms. During the election campaign, voters should be able to communicate their views to candidates. Once chosen, delegates should continue to interact with their constituents. Furthermore, the meetings of the convention should be broad-

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29 Maier, *Ratification. The People Debate the Constitution*, 400.
cast to the public, and citizens should have a chance to submit questions and comments for debate. These channels of access would make a convention more inclusive than legislative ratification. Of course, there would remain a gap compared to a referendum, and hence some citizens might still feel disenfranchised. In member states where this attitude is expected to be widespread, it could be prudent to give in to the demand for direct participation.

There is one further advantage of the convention procedure that deserves mention. In the American case, the ratification debates launched a conversation about interpreting the constitution that is still ongoing. The critics of the proposed system forced its supporters to explain just how the new order would protect the freedoms that were gained during the revolution. One response to this challenge were the famous Federalist Papers, which still provide an important guide to understanding the American higher law and indeed the idea of constitutional government as such. At the same time, the critics urged changes to the initial draft. The first ten amendments to the constitution, which have since come to be known as the Bill of Rights, resulted directly from this effort. Ratifying conventions, in other words, have the potential to generate an intense focus on the strengths and weaknesses of a proposed higher law. If the latter is approved, this debate can inform subsequent practice and, when needed, trigger changes to the original document. Neither referendums nor legislative votes have a similar constructive effect.

**The Ratification Threshold**

So far, the chapter has discussed which procedural device is most suitable to approve or reject a European federal compact. Before we conclude, let us briefly examine a second important question related to ratification: how many member states would need to approve the shared higher law before it can enter into force? In 2005, the negative result of the French referendum on the TCE effect-
ively sealed the fate of the latter. At the time, the framers relied on all EU countries to endorse the proposed document. It seems that a future effort to make a constitution should follow a different approach. With now 27 member states, the chance that all of them approve a federal compact is quite small. Against this background, it would be frivolous to allow just one single negative decision to derail a process that, once it reaches the ratification stage, will have consumed an enormous amount of resources.

Consider once more the American precedent. Here the federal convention famously decided that nine out of thirteen votes would suffice to adopt the constitution. This did not mean that states could be forced to participate in the new order. Rather, once there were enough yes votes, rejecting the constitution implied automatic exit from the union. In other words, the remarkable thing about the ratification threshold was that a subset of states could abolish the existing Articles of Confederation against the will of the rest. This was more or less an illegal usurpation on the part of the Philadelphia delegates, even if, afterward, the states reluctantly agreed to let the ratification process move ahead.

To avoid a similar breach of existing law, the EU member states would need to authorize a transnational convention to draft a federal compact that can enter into force short of unanimous consensus. Setting the ratification threshold would then be up to the framers. The hurdle should be low enough that success is in fact possible. Yet it should also prevent the creation of a rump federation – a European Bund without, for example, French or German participation is rather hard to imagine. In light of this, the best solution might be to follow the model of the Lisbon QMV rules, which count both member states and population size. A sensible threshold, we believe, would permit the federal compact to enter into force, even if a certain number of countries reject the pro-

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32 Rhode Island, to be sure, was given little choice when, in 1790, Congress threatened to impose a complete trade embargo. Even so, the state ratifying convention would still have rejected the constitution, if four of the delegates opposed to it had not missed the final vote. See Maier, *Ratification. The People Debate the Constitution*, 459.
posed document; these states could then be offered new terms of partnership with the reformed EU. However, ratification should fail as soon as the no column exceeds a certain population limit. The latter could be defined such that it would be impossible for the new order to take effect if several large member states refuse to join.

Whatever threshold is chosen in the end, a decision to approve or reject a federal compact involves high political stakes. National peoples that oppose the proposal would risk isolating themselves, whereas overall ratification failure would undo a strenuous effort to give the integration project a better constitutional framework. The risk of a rash and thoughtless rejection must therefore be minimized. On the other hand, ratification should not be a foregone conclusion either. Perhaps, federalism is, after all, the wrong approach for the continent or, at least, for some of the current member states. And even if founding a Bund is in fact desirable, the framers should be under pressure to design a shared higher law that respects the values and interests of national peoples. This cannot be assured if approval for the draft will be too easy to obtain. It matters a great deal, then, which ratification mechanism is chosen. Our goal in the preceding was to show that, on balance, ratifying conventions provide the best solution. This procedure has the potential to overcome the weaknesses of both referendums and legislative votes. While it does not involve all citizens in the final decision, imputing the outcome to the popular will is nonetheless plausible, given that delegates can be expected to make an informed and considered judgment, based on their view of the common good. Furthermore, ratification assemblies might begin a constructive dialogue about how to interpret and improve the new order. If the EU ever sought to adopt a federal compact, the member states should keep these virtues of the convention procedure in mind.
Conclusion

When I began to work on this dissertation, it seemed to me as if the EU was looking forward to a period of relative calm, following the tumultuous decade of reform that began with the Laeken Declaration of 2001 and ended on 1 December 2009 when the Lisbon amendments entered into force. How wrong I was. Today the European house is on fire. The sovereign debt crisis and the attendant economic recession call into doubt not just the future of the Euro, but also the survival of the integration project itself. The latter, it appears, cannot thrive unless the member states pool still more of their power. But which specific additional competences should Brussels obtain? I leave this question to others. My goal here was rather to examine how a suitable constitutional framework for a yet mightier EU could look like.

We have seen that, even at present, there is a significant deficit in this regard: enforcement of competence limits remains weak, the legislative process is undemocratic, and judges have too much unchecked power to define the content of individual freedom. To overcome these problems, the member states should join together in a heterarchical federation, or Bund, that has a strong center, but nonetheless preserves the independent political existence of national peoples. Such an order would look quite different from the status quo. First, a Bund would derive its power from an explicit constitutional document rather than a set of international treaties. Second, it would abolish the exit option under the current Art. 50 TEU. Third, amending primary law would no longer require unanimous agreement. And fourth, regular decision making, too, would need to become more flexible, in particular through ending consensus rule in the European Council.

This reform agenda gives a clear answer to one of the more perplexing questions of the present crisis: how should the continent deal with the rift that has opened between, on the one hand, member states that wish to integrate far beyond the single market and, on the other, countries
that are hesitant or unwilling to embark on such a path? In particular, of course, this gap has emerged between the Eurozone and member states that hold on to national currencies. Monetary union, one can no longer dispute, is bound to fail without more centralized economic governance. It seems as if politicians and citizens in the Eurozone have woken up to this realization, however grudging their acceptance might be. Change will nonetheless be difficult to achieve. For one thing, there remains profound disagreement about which exact reforms are needed. The other great challenge is that countries outside the Eurozone, foremost of course the UK, will resist greater centralization, or at least seek to remain exempt from it, while also seeking to maintain their influence within the Union governance process.

One potential response to this problem is to adjust the current institutional framework in order to better accommodate multiple speeds of integration. For example, German foreign minister Guido Westerwelle and colleagues from other member states have proposed to give Brussels more power over economic policies inside the monetary union. Democratic legitimation, the plan envisages, shall flow from those members of Parliament that represent the electorate of the Eurozone. This subset of deputies is supposed to oversee policies that concern their home countries, but which are not binding for the rest of the member states. Such a reform, we might object, would give the EU an even more byzantine structure than it has now. Under the proposed scheme, it would be possible that power in Strasbourg shifts between different coalitions of parties, depending on which countries are subject to a particular legislative measure. Intricacies of this sort seem unavoidable, if one attempts to hold together a club of 27 countries that have far divergent preferences on integration. As a result, popular identification and engagement with the EU might further decline. The far better alternative, I believe, is reform along the lines of the Bund model. Once a

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federation has been established, new terms of partnership could be negotiated with member states that prefer to remain outside.

In making the case for a European Bund, the dissertation has tried to subvert certain widespread beliefs that pervade the current discourse on integration. First, I needed to refute the view that a proper transnational constitution has long been in place. “The real must be rational” seem those academic observers to think who hold that Union norms deserve coequal status with domestic higher law. But this view ignores that integration progressed through a series of somewhat haphazard compromises. The latter have produced a hybrid system that operates, in practice, like a federal constitution, yet fails to meet the commensurate normative standards. As the member states prepare to delegate even more power to Brussels, this needs to change.

Second, I have sought to undermine the notion that a more democratic EU must entail a stronger Parliament. This dogma disregards the crucial role of partisan contest, or at least overlooks the fact that so long as the member states retain independent political cultures and institutions, transnational partisan contest has to remain weak. Direct election of the Parliament, then, seems no longer useful, and it might indeed have been a bad idea from the start. To improve democratic legitimation, a European Bund should rather focus on better oversight from national lawmakers.

A third established wisdom I have opposed is that citizens must themselves approve or reject a federalist relaunch of integration. The reasoning here does not sit well with the ever more prevalent attitude that plebiscites are the ideal form of democratic rule, whereas representation is a poor second best. However, referendums make little sense when voters cannot be expected to understand a proposed constitutional document and when there is no serious deliberation of its merits. National ratification conventions offer a superior procedural alternative, which enables an informed and reasoned decision without bestowing undue power on the political class.
These views, I admit, are unorthodox. Some, or perhaps most, readers will disagree. However, as the future of the Union seems once again wide open, questioning old certainties might be just what is needed to move the reform debate forward.


