

## **Introduction: Constitutional Sovereignty and Social Solidarity in Europe**

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Europeans have endeavoured, but not managed, to give themselves a federal constitution. They have, therefore, not established either a conclusive or an adequate legal foundation for the transfer of the essential governmental competences required for the establishment of a fully-fledged federal government. What was hailed in 2004/5 as Europe's "constitutional moment" passed without producing the federal constitution that it was supposed, or hoped, to produce. The rest is history. The Constitutional Treaty of 2004 became stillborn when France and the Netherlands refused to ratify it in 2005.

The lack of adequate, let alone definitive or conclusive, federal constitutional foundation that resulted from the foundering of Europe's "constitutional moment" has, however, not prevented continuing forfeiture by EU member states of governmental competences to the quasi-federal institutions of the EU in the wake of the Lisbon Treaty (which substituted the failed Constitutional Treaty). How should one assess this state of affairs? Conceptually or logically, the options of assessment range from dismissals of at least certain elements of EU government as downright "unconstitutional," on the one hand, to endorsements of EU government as perfectly albeit "indirectly" (through expansive interpretation of Treaty clauses) constitutional, on the other. Between these opposite ends of the conceptual spectrum, a wide range of assessments of these continuing transfers of member state competences to EU institutions as at least constitutionally questionable or problematic are surely also possible. These assessments of the continuing transfers of competences are likely to continue to elicit much political and theoretical resistance against further federalisation of Europe.

These observations regarding opposite ends and middle ranges of possible assessments of continuing transfers of competences from member states to EU institutions will presently receive further attention. It is important to note, though, that they may well provoke a prior line of questioning, the gist of which would be that no further attention to them is warranted at all. This prior line of questioning would be this one: What is one talking about when one is talking about a continuing "transfer" of competences from Member States to EU institutions? Have all relevant transfers of competences not taken place, for the time being at least, in the EU treaties? Should the need for the transfer of further competences arise, would they not obviously have to be transferred in the same way that earlier transfers took place, that is, through properly processed treaty amendments? Should the answer to this question be positive, then the notion of a "continuing transfer of competences" would have to be dismissed as fundamentally spurious. And this dismissal would also render redundant any significant consideration of the constitutionality or unconstitutionality of these continuing transfers of competences. Continuing transfers of competences without express treaty amendments would – from this black and white perspective – simply be too obviously irreconcilable with member state constitutions to warrant incisive engagement with the constitutionality question.

This black and white perspective, however, does not contend with the problem of constant competence creep in the governmental structures of the EU with which many legal and political theorists take issue today. The contributions of Dieter Grimm, Fritz Scharpf and Eleftheria Neframi to this volume are cases in point. They all address the problem of competence creep from their respective perspectives. In their different ways, all three of these scholars acknowledge the problem of competence creep as real and bothersome as far as the constitutionality of EU governance is at

stake. These essays, authored as they are by recognised scholars in constitutional and socio-political theory (Grimm and Scharpf) and European Law (Neframi) are surely already enough indication that the question of competence creep is not redundant and not insignificant. Let us first consider the contributions of Grimm and Scharpf in this regard and then move on to Neframi. What emerges from these essays is the clear regard for the impact of competence creep on the question of sovereignty in Europe.

#### A. Sovereignty and Competence Creep

Grimm and Scharpf ultimately take different positions regarding the process of continuing transfers of competences in the EU, but they both suggest, we shall see, that these transfers are indeed taking place and as such do raise serious constitutional questions, irrespective of their evident realism regarding the further question whether these constitutional questions can still be asked meaningfully or effectively.

Grimm and Scharpf surely invoke the continuation of competent transfers in the EU that exceeds the black and white delimitation of competences in the Treaties. They surely suggest that these continuing transfers ultimately turn the whole nexus of competence delimitation, subsidiarity, and proportionality (Articles 3, 4, and 5 TFEU) into a grey area that spawns serious constitutionality and sovereignty concerns in Europe. How do they do this?

Grimm invokes in this regard exercises of competences by EU officials that may not be reconcilable with Member State constitutional constraints. Such tensions between exercises of EU competences and Member State constitutional constraints evidently render the question of sovereignty in Europe a burning political issue and not just an abstract theoretical concern, according to him. Member State sovereignty, argues Grimm, remains the ultimate source of and licence for all competences transferred to EU institutions. And Member State sovereignty, he contends further, is circumscribed by Member State constitutional constraints. Member State sovereignty does, therefore, not include the competence to transfer competences that their Constitutions constrain them from transferring. This is the pivotal point that can be drawn from the argument that Grimm articulates with reference to Jellinek's conception of sovereignty in terms of a decisive *Kompetenz-Kompetenz*. Member State governments and constitutional judiciaries must safeguard the *Kompetenz-Kompetenz* that their Constitutions define and stipulate. The second crucial point is a consequence of the first: Member states can only transfer competences by duly doing so on the strength of their *Kompetenz-Kompetenz*. They cannot, for instance, simply allow another political entity to usurp one of their competences or – what is essentially the same – extend the scope of whatever competences have been transferred to it. Sovereignty as *Kompetenz-Kompetenz* obviously excludes the competence to allow another political entity to simply deprive sovereignty of one of its competences. Such a competence would make a mockery of whatever sovereignty is still claimed in this context.

These are the key points of Grimm's argument that sovereignty – as *Kompetenz-Kompetenz* – still rests, at least conceptually speaking, with the Member States in the European Union. And this conceptual essence of sovereignty that remains in the Member States, he suggests, at least provides a conceptually coherent and principled way of dealing with and perhaps even resisting further competence transfers in the EU that are not reflected in additional treaty agreements that are reconcilable with the national constitutions of Member States. Grimm builds a caveat into this argument to which we shall turn presently. Suffice it for now to note that the reading of Grimm's argument offered here is also reflected clearly in Scharpf's

response to Grimm in this volume. According to Scharpf, Grimm's argument furnishes the German Federal Constitutional Court (GFCC hereafter) conceptually with the capacity or jurisdictional title to be the ultimate judge when the constitutionality and legality of all exercises of competences by EU institutions are concerned. Scharpf appreciates Grimm's argument, no doubt. He evidently also shares Grimm's substantive concerns with the need to insist on the ultimate sovereignty of Member States vis-à-vis the EU. We shall turn more squarely to these substantive concerns below and will then also see that Alain Supiot joins Grimm and Scharpf in no uncertain terms. However, Scharpf has serious doubts whether this conceptual insistence on Member State sovereignty vis-à-vis the EU can still do the substantive work that some Europeans – here Grimm, Scharpf and Supiot evidently among them – may still want it to do. In this regard, we shall see, he is much more sceptical than Supiot to whom we turn below. Here are Scharpf's reservations in a nutshell:

- 1) Mistaken transfers of competences and ensuing over-centralisation cannot easily be undone in the EU in the way a proper democratic federal state – itself endowed with adequate *Kompetenz-Kompetenz* – can constructively regulate centralisation through “decentralizing as well as centralising reforms of the constitutional structure.” Any attempt to revoke a mistaken transfer of competence in the EU can be vetoed by any single Member State. A transferred competence is therefore effectively a lost competence, argues Scharpf. Mistaken or undue transfers of competences are nevertheless not likely to happen through EU directives or regulations themselves. High consensus requirements embodied in the Community Method make this unlikely. Undue and irreversible transfers of sovereignty is much more likely to occur in (2) the interpretation and application of directives and regulations by the European Court of Justice (ECJ hereafter), and (3) the emergency euro saving or stabilising measures of the European Commission and European Central Bank.
- 2) As regards the competence transferring *interpretation* of directives and regulations, Scharpf highlights in this regard the way the ECJ has been promoting a market liberalising jurisprudence in its *Laval* and *Viking* series of judgments that evidently took social security competences away from Member States in a way that left these competences effectively lost. One might also want to note in this regard that the directive at issue in *Laval* – the Posted Workers Directive 96/71 – indeed received a thick “economic liberty” interpretation that is hardly, if at all, warranted by the text of that directive.<sup>1</sup>
- 3) The emergency Euro-saving or -stabilising measures with which Scharpf takes issue in his response to Grimm include the whole range of rescue mechanisms – low interest emergency credit conditioned by severe demands for cuts in public spending, Stability Pacts, Six Pack Regulations, and, in particular, the Excessive Imbalances Procedure devised in 2011 – with which the European Commission, Eurogroup Council and European Central Bank moved to save the Eurozone during the worst years of the credit crisis. Some of these measures concerned short-term emergency arrangements, but some of them have come to stay. And they all have the following three features in common, argues Scharpf: They constitute direction of and control over Member State powers of government that are not reflected in the European Treaties as transferred competences. They are

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<sup>1</sup> Cf. Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (Berlin/Boston: Walter de Gruyter, 2014), 338–348.

not specified in authorising legislation. And they are not and cannot be bound by predefined legal rules with general application.

Scharpf's arguments provide a striking background to the arguments that Neframi develops with reference to acts or spheres of government that fall "outside the reach of competences but within European law." Her contribution to this volume explains and underlines further, this time through the meticulous technical analyses of the European lawyer, why the problem of competence creep raises the sovereignty concerns that Grimm and Scharpf have in mind. Neframi attaches much significance to the observation of the GFCC regarding the ECJ's *Akeberg Fransson* ruling.<sup>2</sup> In *Akeberg*, the ECJ forwarded the open-ended formulation of governmental functions that belong to the sphere of Member States competences, but nevertheless fall "within the scope of European law." The GFCC considered this notion to raise the *ultra vires* question. Neframi's question, in response to *Akeberg*, concerns the extent to which the ECJ's recourse to the criterion of 'falling within the scope of European Union law' in order to restrain the Member States' sphere of action is in accordance with the principle of conferral. As she puts the matter:

A possible "competence creep" could bring into question the balance between national sovereignty and loyalty towards the European Union, as well as regenerate the constitutional conflict which the dialogue between national constitutional courts and the Court of Justice is supposed to balance.

Neframi explores the question of competence creep resulting from the criterion "falling within the scope of European law" in view of two possible areas of tension between EU and Member State authorities. The first concerns instances of normative conflict between Member State action or inaction, on the one hand, and EU law obligations, on the other. The second concerns enforcement of EU law obligations by Member States that may require actions that exceed the scope of legitimate law enforcement afforded by Member State constitutions. Let us take a closer look at Neframi's engagement with the question of normative conflict. The fact that the source of normative conflict – an alleged infringement of EU law by a Member State – falls outside the field of conferred competence, argues Neframi, is not likely to justify the Member State conduct at stake. "The duty of loyalty not to jeopardise the attainment of the objectives set out in the Treaties," she contends, "finds its specific expression in the obligation incumbent on the Member States to place the exercise of their retained competence within the scope of EU law and not to infringe specific EU law provisions." The question that follows from this, she continues, is "whether the impact of EU law obligations on the Member States' sphere of competence is compatible with the principle of conferral."

The duty of loyalty seems to be the wild cat then that ultimately threatens the order established by the neat pigeonholes of transferred and retained competences. But the really wild cat among the pigeons may well be the ECJ, as both Scharpf and Anna Katharina Mangold suggest in this volume. We turn to Mangold's arguments below. Let us, however, first follow Neframi's argument a little further, for it seems to also lead her to acknowledge the crucial role that the ECJ plays in all of this.

"Certainly," she writes, "the obligation of loyalty implies that Member States should remedy infringements of EU law by adapting their legislation." It is here that we enter the grey zone and leave the black and white arrangements of conferral. "[T]he main question," continues Neframi, "concerns the level at which the balance between loyalty obligations towards market integration and respect for the retained Member

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<sup>2</sup> Case C-617/10 (2013).

States competence is situated.” And this question of course leads to the role of the ECJ in all of this:

Member State action in conflict with EU law provisions could be justified as derogation from the EU obligations, either from the perspective of express derogations or from that of imperative requirements, in any case invoking national interests worthy of protection. The task of balancing national legitimate objectives with EU law provisions is incumbent on both the ECJ and the national judge, following a division of competences, the criteria of which stem from the case law of the Court and are not easy to identify.

The ECJ has extended the circumstances in which national justifications apply, enlarged the grounds of justification put forward by the Member States, validated criteria established by the Member States and given them an autonomous content, and admitted the national identity argument. But, it has not necessarily respected the integrity of national rules. The Court is indeed strict in the appreciation of the proportionality of national measures and the duty to respect Member States’ national identity and essential functions does not mean that the competences of the Member States are to be exercised independently of any interference with EU law.

This jurisprudence of the ECJ may well come to effect deviations from the principle of conferral. It may well have the effect of imposing EU norms on Member States within the range of the latter’s competences and outside EU competences. This, argues Neframi, does nevertheless not as such raise an *ultra vires* question, as the GFCC suggested could be the case in *Akeberg*. It is, according to her, a simple consequence of EU membership and the duty of loyalty attached to this membership. She knows that this conclusion will remain problematic for those concerned with the future of Member State sovereignty. As she puts it: “Even if such argumentation is not entirely convincing as far as respect for Member States’ sovereignty is concerned, the impact of EU rules on Member State action is the inherent consequence of membership and the duty of loyalty and solidarity concomitant to it.” But this is the point to which an accurate reading of EU and ECJ jurisprudence leads her and there is not much that the European lawyer as European lawyer could add to this, she would seem to suggest. She uncovers the same situation with regard to the law enforcement demands that compliance with EU law may impose on Member States. To go straight to the point: Law enforcement – and criminal law enforcement in particular – falls squarely within the retained competences of Member States. Yet, the duty of loyalty to EU law may well require Member States to enforce EU law in ways that are irreconcilable with national constitutional imperatives.

Conceptual recourse to *Kompetenz-Kompetenz* as the essence of Member State sovereignty that remains untouched by the transfer of individual competences evidently becomes highly tenuous against this background. It should be noted however, that Grimm is himself evidently aware that the concept of *Kompetenz-Kompetenz* may well not carry his argument in favour of Member State sovereignty the distance that it needs to travel to render it practically significant. He is aware that a sovereign can end up having transferred or forfeited so many essential competences that it can no longer effectively sustain the core *Kompetenz-Kompetenz* element of sovereignty that it may claim to have retained. If this is the situation in which Member States find themselves in the EU today, avers Grimm, it may well be that no one is truly sovereign in Europe anymore. The EU is not sovereign because it does not have *Kompetenz-Kompetenz* and can, in principle, not articulate its own powers. And Member State transfers of competences may well have hollowed out their claim to *Kompetenz-Kompetenz* to the extent of turning it into an empty concept.

Under these conditions, the Member State sovereignty that Grimm has in mind and which he would like Member States' constitutional courts to safeguard, would ultimately seem to turn on the power to leave the EU, a power that seems to be underpinned by the right that Article 50 of the TEU still affords Member States to leave the European Union. A last, but crucial, vestige of sovereignty would indeed remain intact as long as Member States could *realistically* continue to invoke the power to exercise the right of exit that they have secured in Article 50. The peculiar phrasing of this point – one does not regularly or conceptually relate *rights* to the *realistic* invocation of power – is informed by the (indeed realistic) regard for the fact that sovereignty cannot be reduced to the sovereign right or title to govern independently and autonomously. It ultimately turns on the empirical reality of effective power to invoke this right or title. Without *de facto* sovereignty, *de jure* sovereignty becomes an empty concept. One finds recognition of this basic reality in the work of both Schmitt and Kelsen. At issue is not just a typical Schmittian concern with sovereignty as the extra legal force that sustains the sphere of legality.

The question ultimately is whether – and which! – Member States could still take recourse to the effective power to exit the EU. In other words, the same problem that Grimm recognises with regard to Member States remaining *within* the Union – they hang on to *Kompetenz-Kompetenz* that may have become meaningless – may well come to haunt those Member States that may come to entertain the wish to leave the Union. It is a good question whether any of the economically powerful Member States of Union still have the political power to exercise their right of exit today. Their economic entanglement with the EU (from which they evidently or at least ostensibly benefit significantly) and their entanglement with the rest of the globalised world economy (with regard to which EU entanglement remains essential to remain a significant global economic actor – a concern shared across a broad spectrum of convictions which include those of Jean-Claude Trichet and Jürgen Habermas<sup>3</sup>) may well have rendered the power to exercise sovereign rights of exit (from the EU and from the global economy) negligible. The engagement with Grimm's concern is evidently shifting here to the broader question that is often asked in the context of globalisation studies and debates: Who is still sovereign in the time of globalised capitalism? Has the concept not indeed become obsolete, devoid of empirical reality? This is a question for another day.<sup>4</sup> The question that is more pressing here is the question *why* the question of sovereignty still matters, at least to some.

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<sup>3</sup> Cf. Johan van der Walt, "What Germany really owes Greece," *Forum für Politik, Gesellschaft und Kultur*, Nr. 323, November 2012, 12–15.

<sup>4</sup> But, it is not inapposite to briefly register here a purely logical response for future reference, however messianic or out of current context it may sound: If anyone – any person, community, society or state – is still powerful enough today to command the kind of sovereignty that Grimm has in mind, it is probably the one that has hitherto received little enough from globalisation to make an exit tempting enough. Seen from this perspective, the ailing economies of southern European countries may well have rendered them more sovereign, politically speaking, than their better-off northern neighbours. It is no wonder that one of the leaders of the more powerful central and northern Member States went "ballistic" when the Greek leader Papandreos wanted to put their "saving packages" to the test of a national referendum. Cf. Pieter Spiegel, "How the Euro was Saved" *Financial Times*, 11 May 2014. One can be sure that nothing more than a silent erasure will result from any real will to exit the unforgiving mesh of global capitalism, but sovereignty – true sovereignty and significant *Kompetenz-Kompetenz* – may well be a concept that one should reserve today for those who can stomach the risk of silent extinction. One should recall in this regard Bataille's observation that the King's sovereignty is revealed in the moment of (putting him to) death. Cf. George Bataille, *La Souveraineté* in *Œuvres Complètes VIII* (Paris: Gallimard, 1976), 270: "La mise à mort du roi est la plus grande affirmation de la souveraineté."

## B. Sovereignty and the concern with social solidarity and a common good

The contributions of Alain Supiot and Scott Veitch to this volume lead one in the direction of at least one pertinent response to the question why the question of sovereignty still matters to some and why it matters in the EU. The concern with sovereignty may well turn for many on romantic concerns with (ethnically relatively homogenous) national identities. Were the meaning of sovereignty reducible to such concerns, one may well want to consider it a relic of the past, that is, little more than a nostalgic yearning for a bygone age that has evidently come to an end with the high levels of migration associated with postmodern mobility and globalisation. The only future that such romantic concerns with sovereignty could have today would lie with dubious programmes of ethnic suppression and exclusion (not to mention worse). But the concerns that Supiot and Veitch articulate in this volume evidently represent a very different concern with sovereignty, namely, the concern with social solidarity and common goods that resist the reduction of human coexistence to the dynamics of economic liberty and the vicissitudes of capricious individualism. And they both take the ECJ to task for exactly such a reduction of coexistence in the EU to economic liberty and capricious individualism in its *Laval* and *Viking* judgments.

Supiot forwards an argument that evidently resonates firmly with the concerns that Grimm raises with recourse to the concept of sovereignty. He meticulously articulates the concern with basic social security as a fundamental element of human dignity and sees this element of human dignity increasingly subordinated to an ultra individualist understanding of fundamental rights in the jurisprudence of the ECJ. Just like Grimm does with regard to the German judiciary,<sup>5</sup> Supiot puts hope in the possibility that the French judiciary will come to resist and even halt this development and cites significant French case law in which signs of such resistance appear to be in the offing. This argument, we saw above, stands on unstable legs today, but its significance – at least as a voice of resistance to a development that should surely worry all but the most libertarian of liberal democrats in Europe<sup>6</sup> – cannot be

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<sup>5</sup> Cf. Dieter Grimm, "Prinzipien statt Pragmatismus," *Frankfurter Allgemeine Zeitung*, 6 February 2013: "Fehlt es dem Gericht jedoch an Gelegenheiten, seine grundsätzlichen Positionen in konkrete Entscheidungen umzusetzen, könnte es dazu kommen, dass sich das „noch hinnehmbar“ perpetuiert. Was ihm unter diesen Umständen bliebe, wären die kleineren Korrekturen im Bereich der Anwendung der Verträge, also das Halt bei eindeutigen Kompetenzverletzungen oder gravierenden Grundrechtsdivergenzen. Das erste würde eine Revision der Mangold-Entscheidung voraussetzen, wonach selbst in eindeutigen Fällen von fehlender EU-Kompetenz ein europäischer Rechtsakt nur dann unanwendbar sein soll, wenn er zu einer Gewichtsverschiebung im Machtgefüge von EU und Mitgliedstaaten führt. Die zweite würde eine Aktivierung der Solange-Rechtsprechung verlangen, derzufolge das Bundesverfassungsgericht europäische Rechtsakte am Maßstab der nationalen Grundrechte messen darf, wenn die EU es an einem adäquaten Grundrechtsschutz fehlen lässt. Gegenwärtig ruht diese Kompetenz, weil das Bundesverfassungsgericht 1986 erklärt hat, dass der europäische Grundrechtsschutz dem deutschen im Wesentlichen entspricht. Mit fortschreitender Integration treten aber vermehrt Divergenzen zutage. Tendenziell prüft der EuGH nationales Recht streng, europäisches dagegen grosszügig. Tendenziell wiegen in seiner Rechtsprechung die wirtschaftlichen Freiheiten stärker als die personalen und kommunikativen. In der Rechtsprechung des Bundesverfassungsgerichts ist es umgekehrt. Ob sich daran durch die nunmehr in Kraft befindliche Grundrechte-Charta der EU und den bevorstehenden Beitritt zur Europäischen Menschenrechtskonvention etwas ändert, muss sich zeigen. Vorerst bleibt es ein Feld, auf dem das Bundesverfassungsgericht noch eine Wächterrolle zu spielen hat."

<sup>6</sup> I endorse here Frank Michelman's point that the political insistence on concerns with basic social security is not irreconcilable with liberalism but to the contrary an essential element of Rawlsian liberalism. Cf. Michelman, "The Supreme Court, 1968 Term: Foreword: On Protecting the Poor through the Fourteenth Amendment," *Harvard Law Review* 83, no. 7 (1969): 7–59; "Welfare Rights in a Constitutional Democracy," *Washington University Law Quarterly* 3 (1979): 659–693; "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice," *University of Pennsylvania Law Review* 121, no. 5 (1 May 1973): 962–1019; "Poverty in Liberalism: A Comment on the Constitutional

underestimated. Supiot is evidently identifying Member State adjudication as an important platform for an alternative judicial imagination, an imagination that Veitch articulates in inimitable fashion as the “re-imagining of the economic constitution and along with it the establishment of what William McIlvanney described so well as the ‘hard won machineries of compassion’ that were the results of an earlier socialist vision.” Without this re-imagination, continues Veitch, “we may be left for much longer than is either desirable or sensible with a highly competitive social market which has by contrast ‘all the compassion of a piranha.’”

Veitch ends his essay with these forceful words. They come at the end of a meticulous exploration – with reference to especially Alasdair MacIntyre – of the way adherence to the notion of a common good or virtue finally gave way in the modern age to unapologetic pursuits of particular and personal preference. It is this reduction of social solidarity to socially unrestrained pursuits of individual preference and profit that the ECJ has apparently come to identify as the social or common good of Europe.<sup>7</sup> Veitch also relies much on Supiot for the development of his argument, but also remains somewhat reticent with regard to Supiot’s faith in law as a possible source of resistance – or interdiction – on the basis of which a common good can be salvaged in Europe. The “integration through law” drive that the ECJ has launched in no uncertain terms, has all too evidently contributed to the marginalisation of broader conceptions of common goods than the good of economic liberty. As Veitch puts it, now citing the cutting analyses of Joseph Weiler, “[s]ocial mobilization in Europe is at its strongest when the direct interest of the individual is at stake and at its weakest when it requires tending to the needs of the other.” And this, Weiler also points out, “contributes to the national social and political turn against the Union.” Supiot is surely not unaware of the precariousness of the *interdiction through law* argument that he pits against the EU’s and ECJ’s *integration through law* drive, and Veitch also acknowledges this. Supiot’s hope is indeed, along with Grimm, as we saw above, that some interdiction might still be voiced – even if despairingly so – from the direction of Member State judiciaries.

Emilios Christodoulidis’s contribution to this volume again traverses much of the ground covered by Supiot and Veitch. Also relying much on Supiot, Christodoulidis again brings to bear the reduction of citizenship to economic and market concerns, the reduction of “political thought” to “total market thinking.” But he also opens up the question of the collapse of European solidarity to the collapse, in Europe, of political capacity as such. We have already seen above how Weiler (cited by Veitch) links the individualism prioritised by the EU to the “turn against the Union.” We have noted from the outset that Europeans have failed to give themselves a federal constitution. They have failed to become a true “Union.” They turned against it in no uncertain terms in 1992 (Denmark), 2001 (Ireland), 2005 (France and the Netherlands), 2007 (Denmark), and 2008 (Ireland). A considerable contingent of Europeans have again made their anti-Europe sentiments clear in the 2014 European elections, as Veitch also observes. Europe would seem to be politically incapacitated – unable to move towards political union and unable to break out of an evidently non-political “union.” Christodoulidis invokes this incapacity hauntingly:

Solidarity and citizenship: they are the great casualties of the European *peripeteia* in the throes of crisis, and our inability to think them is an index of how profoundly the crisis has hollowed out the political imaginary of the age... The effective collapse of our political capacity as political community

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Essentials,” *Drake Law Review* 60 (2012): 1001–1021. For a discussion of the views Michelman develops in these essays, cf. Van der Walt, *The Horizontal Effect Revolution*, 390–400.

<sup>7</sup> Cf. Van der Walt, *The Horizontal Effect Revolution*, 246–252, 334–352.



is mediated through the move that supplants political with economic thinking, in the substitution, for example, effected through 'corporate social responsibility', ethics committees in companies, etc. And with this, as European citizens, we stand powerless before the loss of the language with which to confront and redress our current disposition.

And now Europe's political incapacity has turned into scandal. *Europas Schande* in the words of Gunther Grass. The ancient land that has given Europe its spirit – *dessen Geist Dich, Europa, erdachte*, writes Grass – has been singled out as the scapegoat for a Europe-wide political failure that was bound to also culminate in economic and market failure. Only the naïve would seriously still contemplate today – after two centuries of experience with market and industrial disequilibrium – the possibility that the indefinite pursuit of politically unfettered self-interest would not again come to devour itself. But rather than admit to a reality that was already clear to Hegel in 1820,<sup>8</sup> European economic and political elites would again, in 2010/11, prefer to blame the credit crisis on those who failed to adhere to the rules of the market, instead of identifying the source of the problem, namely, the reality of market failure that follows political failure like clockwork. Corrupt Greek politicians, tax evading Greek tycoons and even ordinary Greek citizens who benefit from this corruption became the easy target. The rest, however recent or still current, is history. Attention to Europe's structural complicity in the Greek tragedy of our time would become the solitary concerns of discerning social scientists and economists (among them Fritz Scharpf and the Greek economist Costas Lapavitsas, to name just two). Europe's political and commercial elite would by and large continue to ignore it.

Christodoulidis' account of the impact of Europe's austerity demands on Greece is devastating. His essay ends with a contemplation of the nature of tragedy. We return to this contemplation below, for it opens up a different register of thinking to which I also turn in the last contribution to this volume. But we need to cover more ground before we turn to this different register. Let us note first the poignant point that Anna Katharina Mangold's contribution adds to the narrative of political and economic failure that unfolds in the essays of Supiot, Veitch and Christodoulidis. The resort to the "integration by law" thinking that came to mark the jurisprudence of the ECJ, claims Mangold, was a direct response to the failure of political integration in Europe. The political failure that Mangold has in mind is not the one that came to the fore with the negative referenda of 1998, 2001, 2005, and 2008, but one that became manifest much earlier. Mangold writes:

The problem of democratic legitimacy was aggravated and partly even established when the ECJ invented *direct applicability and supremacy of EU law* in the 1960s, thus creating the peculiar method of legal integration that came to substitute political agreements. Ever since politicians could rely on the ECJ to overcome the failure of democratic and deliberative procedures through adjudication. This development created a path dependency that demands incisive critical scrutiny by any serious proposal for significant democratic reforms in the EU.

In the decision *Costa v. ENEL* of 1964, the ECJ decided that community law had supremacy over national law. To this day, the judgement is the bedrock of the importance of EU law in all Member States. Without this decision, EU law would have remained merely international law. It is only when the doctrine of supremacy turned Community law away from international law that it became truly "supranational" as intended in the European treaties. Put bluntly, with *Costa v. ENEL* the ECJ entered the political stage as a political player. The Court replaced the ruling modus of "political integration," that prevailed until then, with the modus of "legal integration." It was not accidentally that the ECJ reached its decision at a time when consensus between the leading politicians of the Member States had begun to fail. The European integration process – envisaged as a way in which another catastrophic war in Europe could be avoided – appeared to be foundering. National interests

<sup>8</sup> Cf. G.W.F. Hegel, *Grundlinien der Philosophie des Rechts in Werke in 20 Bänden*, Vol. VII (Frankfurt a.M.: Suhrkamp Verlag 1970), 386, 389.

had become more important again. The exemplary shift in France's motivation for European integration culminated in the famous expression "Europe des patries" ("Europe of nation states") emerged in 1961, three years before the decision of the European Court in *Costa v. ENEL*

Overall, it became clear to all vigilant observers from the early 1960s that integration on the basis of political consensus, such as had been possible in the beginning of the EEC, was bound to fail sooner rather than later. In light of this situation the ECJ had to consider two political alternatives: The judges could either just move on with the times and accept the prospect of the end of the integration project, or they could take over the political helm themselves. In its *Costa v. ENEL* decision (taken on 15 July 1964), chose the second of the two options.

Mangold questions the viability of grand judicial political programmes like the one the ECJ launched in 1964. Express judicial politics already pose serious legitimacy questions within nation states, she observes. How can such judicial political programmes hope not to become exponentially more exposed to questions of legitimacy when they enter the scene from outside the nation state and impose "foreign" law on peoples who never appointed the judges at work for such far reaching – indeed sovereignty destroying – political purposes? This is the question that Mangold poses. The "integration through law" drive of the ECJ had and still has no realistic chance of achieving the greater political unity in the EU to which it aspires, is her evident response.

This response resonates with the assessment of the *Laval* and *Viking* judgements that I offer in a long footnote in my contribution to this volume. In *Laval* and *Viking*, the ECJ resorted to judicial "balancing of interests" to resolve deep social political tensions – class struggles, to be more exact – that have been burdening Europe for close to two centuries now. That the Court imagined itself able to do so without burdening itself with a questionable political – or class – profile, boggles the mind. The lessons that the United States Supreme Court learned in *Lochner v New York* must evidently still be learned in Europe. The point here is not that the ECJ made substantively incorrect decisions in *Laval* and *Viking*. The point is that the Court should not have opted for substantive resolutions of these cases. It should never have entered the fray of an irresolvable normative dispute that has burdened Europe ever since the industrial revolution. It should have decided the matter with recourse to a strictly procedural judicial discourse, that is, by deferring to relevant legislation or – and this is the same thing – absence of legislation.

The procedural recognition of the absence of clearly applicable EU legislation in these cases would have compelled the Court to defer to the legislative and general legal status quo within the Member States. This is the well-recognised duty and classical method of liberal democratic judiciaries that honour the separation of state powers on which liberal democracy turns. There are exceptional times – dark times, Hannah Arendt calls them – when a judiciary should also have the courage to strike down majority legislation, no doubt. But the status quo of Member State law in *Laval* and *Viking* surely did not confront the *Laval* and *Viking* courts with an eclipse of reason, to use Max Horkheimer's phrase somewhat out of context. Its activism was uncalled for and politically highly questionable.<sup>9</sup>

It is time for a "fresh start," suggests Mangold. It is time for a restoration of the political. This "fresh start" would involve a certain "taming of the ECJ" through the cultivation of vibrant critical legal scholarship and critical public debate regarding its decisions and jurisprudence. But the "fresh start" would ultimately require much more, she suggests. "Europe needs a new constitution with a federal two chamber

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<sup>9</sup> Cf. fn. 76 of my contribution to this volume as well as Van der Walt, *The Horizontal Effect Revolution*, 334–352.

parliament as legislature,” proposes Mangold. She would appear confident that the political resistance to such an uncomplicated federalisation of Europe could be overcome. Transnational democracies are possible, she insists, following the cue of Habermas. We shall return presently to the hopes and frustrations that Habermas has been articulating in this regard, for they may point to a significant turn in his thinking that should be noted. Let us, however, first turn to two contributions to this volume that appear less despairing as far as the EU’s and ECJ’s “integration through law” drive is concerned and less despairing regarding the democratic deficit that burdens this drive.

### C. Integration through the laws of others

Ulrich Preuss’ contribution to this volume brings to the table a remarkable narrative about Europe’s discovery of a new mode of governance that is not based on the sovereignty of a people or demos. Preuss regards this as nothing less than the latest in the long history of eminent discoveries that Europe bequeathed to the world. The discovery of this new mode of governance, argues Preuss, further attests to Europe’s *Sonderweg* of rationalisation to which Max Weber already paid tribute, and to “Europe’s political creativity.” These assertions may come across as Eurocentric, but Preuss takes due care not to communicate a Eurocentric message. Appreciating Europe’s legacy of rationalisation and political creativity does not imply disregard for the significant achievements and legacies of other cultures, he argues, and it does not imply ignoring the reality of a Europe that all too often also descended into the darkest depths of irrationality.

Preuss’ narrative highlights the Roman transformation of citizenship – *civis Romanus* – into a legal category that encompassed both the private and public legal capacity of the citizen and exceeded the narrower significance of the political status of the citizen as member of a political community. A further beacon in this development was the extension of this broad category of citizenship by the Emperor Caracalla to all free subjects of the Roman Empire. This extension of citizenship to all free subjects of the Roman empire, observes Preuss, rendered the distinction between *ius civile* and *ius gentium* irrelevant and turned the *ius civile* itself into a “bond that connected all free men of the Empire to a single legal community.” The *ius civile* became nothing less than the “common law of the then universe which was tantamount to the civilised world.”

One might say that Preuss identifies “an integration through law” thread in Europe’s political history that starts long before this notion became current in latter day conceptions of European integration through European law. And Preuss discerns an emancipatory narrative in this history. Roman citizenship was, according to him, the reflection of “an international legal community” that “emancipated the [citizen] from the parochialism of his local origin[.]” It made him a “world citizen.” This is crucial background for that which Preuss highlights as the latest evidence of Europe’s political creativity, namely, “the sharing of sovereignty of a plurality of democratic nation-states and the establishment of a composite transnational constituent power of the peoples of the European Union and their respective democratic nation states.”

“[T]he problem of European democracy is not that there is no European *demos*,” concludes Preuss. “The *demos* presupposes the fusion of the many into one body whose coercive character requires homogeneity of the rules and the ruled in order to legitimize the necessity of obedience.” This “is not the political vision of the European Union,” stresses Preuss. Its vision is, rather, “the idea of solidarity grounded on the

mutual recognition of otherness and the development of modes of cooperation and, yes, also the collectively binding decisions taken by others.”

The emphasizing “yes” in the last line quoted relates to a point that Preuss makes earlier on with reference to an observation of Joseph Weiler. “The more heterogeneous and diverse the addressees of a law or any other authoritative regulation are, the more do they sense the law as imposed upon them by ‘others’, not by ‘themselves.’” “Weiler rightly observes,” avers Preuss, that this is “a remarkable instance of civic tolerance.” It is a remarkable instance of civic tolerance “to accept to be bound by precepts articulated not by ‘my people’ but by a community composed of distinct political communities: a people, if you wish, of others.” This is the pivotal point of Preuss’ contribution to this volume of essays. Severing sovereignty and legal authority from the existential unity of a demos – the classical Schmittian insistence – is surely a precondition for somehow bringing the different peoples of Europe together under a yoke of law that is not self-constructed and self-imposed. If the project of European integration is to go ahead, it will have to forgo the nostalgia for an existentially united demos.

Ioana Pelin-Raducu’s contribution to this volume surely echoes Preuss’ sentiments in this regard. She stresses the need to avoid the “no European demos’ thesis” and avers that this is possible. The realistic acceptance that the time of the existential demos is over in Europe (at least as far as the EU is concerned) will of course not silence the nagging concern with Europe’s democracy deficit that continues to haunt European integration. Pelin-Raducu is aware of this nagging concern and suggests that this can be addressed by alternative forms of participatory democracy (such as forms of direct democracy instituted in Switzerland) envisaged by the citizens initiative. She recognises that this is not likely to be a feasible option at transnational levels, even though the European Parliament and Commission have implemented the European Citizens Initiative at the European level. Her suggestion for an alternative in this regard is to simply begin with the “power that the EU enjoys *de facto*.” The specificity of this *de facto* power consists in the “EU regulatory laboratory of governance of institutions that mutually interdepend, reflexive and sometimes competing ‘in the primordial soup of governance.’” From this “primordial soup of governance” – a term that Pelin-Raducu borrows from J. Leca – “should emerge new concepts allowing researchers to think about the political legitimization of the European political system without going back to more or less appropriate existent concepts.”

Preuss and Pelin-Raducu both encourage or endorse the discovery of new political forms in the EU. These new political forms could provide Europe with new conceptions of political legitimacy. They could come to fill the legitimacy void that currently accompanies the democracy deficit. They both appear to embrace at least some features of a certain post-democratic political thinking to which Hauke Brunkhorst alerts his readers in a remarkable little book on the two faces of Europe,<sup>10</sup> and to which Mangold also refers in her contribution to this volume. European political and legal theory surely needs to engage with this rise of “post-democratic” thinking, for there is no point or wisdom in simply ignoring a development that has already sprouted and has already begun to set significant roots. And we take Preuss’ and Pelin-Raducu’s essays as cues for doing so here, without suggesting that they have taken firm positions with regard to this new post-democratic thinking and without aiming any of the observations regarding this post-democratic thinking that follow here at either of them. They both are evidently concerned with a “post-demos” and “post-sovereign” reconception of democracy, and not with a departure from

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<sup>10</sup> Cf. Hauke Brunkhorst, *Das doppelte Gesicht Europas* (Frankfurt a.M: Suhrkamp, 2014), 40, 109.

democracy. And Pelin-Raducu meticulously explores and highlights the new democratic structures of the European Union. Suffice it therefore to stress again that some of the thoughts articulated in their essays allow and require one to bring the question of post-democracy into focus here.

The rise of post-democratic conceptions of political legitimacy – promoted especially by theorists of functional differentiation and private governance – signals, according to many observers, a return to feudal organisations of power.<sup>11</sup> This observation should alert one to the deep normative considerations at stake in this development. Post-democratic thinking surely puts the normative legacy of modernity on the line. Certain elements of Enlightenment political normativity – the Kantian concern with *Mündigkeit* or emancipation – surely appears critically challenged by the notion of the civic tolerance of law that is imposed on others “by others,” to invoke again Preuss’ invocation of Weiler’s observations in this regard.

However, a certain civic tolerance of law as an imposition by others on others also mark, on the other hand, the most vibrantly democratic legal and political systems. It is only as a matter of abstract concept or theory that Enlightenment thinkers from Rousseau to Hegel could contemplate law as the *non-imposition*, however coercive, of the will of everyone – *chacun* – on everyone.<sup>12</sup> The regular coerciveness of this *non-imposition* tells the tale of an empirical reality that rarely or never corresponds with this abstract ideal. No democracy would ever survive a single assembly or sitting were it not capable of sustaining this transposition from the empirical to the conceptual. What renders this crucial transposition possible?

This question requires us to suspend for a moment, the question whether the integration through imposition of law by others on others had better take the form of Enlightenment conceptions of liberal democracy or whether legitimate impositions of law by other on others can also take post-democratic and possibly neo-feudal forms. We need to suspend this question for the sake of asking the prior question regarding the transcendental conditions that render the civic acceptance of the imposition of law feasible in the first place. This prior question requires a change of register that few are still prepared to consider seriously in contemporary debates regarding constitutional sovereignty and social solidarity in Europe. So we will risk this change of register here with due awareness that many a reader will be lost exactly here. Those who do consider themselves “lost” after reading the last pages of this introduction that follow now – or rather, those who consider the author of these pages “lost” – should rest assured that the change of register contemplated here only concerns the last two contributions to this volume of essays and at that only part of the second to last contribution. But this change of register, we insist, is crucial, for it is only after having ventured it that one can return meaningfully to the question whether post-democratic forms of government may, just as well, perform the task of integration through law, considering that not only post-democratic – neo-feudal or other – but also democratic forms of government turn on impositions of the law of others on others. What *difference* does democracy really make then, after all? This is

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<sup>11</sup> Cf. Alain Supiot, *Homo Juridicus – Essai sur la Fonction Anthropologique du Droit* (Paris: Editions du Seuil, 2007), 250–274; “The Public–Private Relation in the Context of Today’s Refeudalization,” *International Journal of Constitutional Law* 11, no. 1 (January 1, 2013): 129–145.

<sup>12</sup> For Rousseau’s articulation of this paradox, recall his notorious observation that those who do not willingly accept the freedom that the general will affords them must be forced to be free. Cf. Rousseau, *Du Contrat Social* (Paris: Gallimard, 1964), 186: “Afin donc que le pacte social ne soit pas un vain formulaire, il renferme tacitement cet engagement qui seul peut donner de la force aux autres, que quiconque refusera d’obeir à la volonté générale y sera contraint par tout le corps : ce qui ne signifie autre chose sinon qu’on le forcera d’être libre.”

the question that is pursued in what follows. Legal and political theorists with no background in or taste for more radical philosophical inquiry may well want to skip this last bit.

#### D. A change of register

A definite call for a significant change of register has recently been coming from a scholar whom one would consider a very unlikely candidate for such a call. Jürgen Habermas has in recent writings repeatedly chastised European politicians for their “mindless incrementalism” (*kopfloser Inkrementalismus*). He has chided them for their technocratic tinkering in the face of a crisis that demands incisive political creativity and assertiveness.<sup>13</sup> And he has gone so far as to invoke the sheer cowardice of European and German politicians.<sup>14</sup> Habermas, the thinker recognised for his faithful promotion – over decades – of modernity and Enlightenment as a continuous learning process, the thinker who for a long time resisted the thinkers of discontinuity,<sup>15</sup> would seem to have finally come around to promote a certain discontinuity himself.

Habermas may well want to deny this assessment of his call for more incisive and creative political action. He may well want to insist that his call for creative and assertive political action remains firmly anchored *within* the continuity of the Enlightenment project. Such insistence would be understandable in view of the resistance to a different kind of thinking that has also marked his thinking for half a century now, namely, the resistance to a phenomenological contemplation of temporality that one might want to call “Heideggerian.” This resistance is itself understandable, considering the bizarre baggage that Martin Heidegger would consistently heap on the shoulders of the phenomenology of temporality at issue here.<sup>16</sup> However, stripped of the bizarre baggage with which Heidegger would burden and obscure the legacy of Husserl, and his own legacy at that, the phenomenological contemplation of temporality and the temporal emergence of the political allows for a thought that phenomenologists may want to read into Habermas’

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<sup>13</sup> Jürgen Habermas, *Zur Verfassung Europas, Ein Essay* (Berlin: Suhrkamp, 2011), 41.

<sup>14</sup> Habermas, “Schluss mit der Feigheit der Politiker,” *Vorwärts*, 2 February 2012, [http://www.vorwaerts.de/Politik/Europa/23482/schluss\\_mit\\_feigheit.html](http://www.vorwaerts.de/Politik/Europa/23482/schluss_mit_feigheit.html).

<sup>15</sup> Cf. Jürgen Habermas, *Der philosophische Diskurs der Moderne* (Frankfurt a.M: Suhrkamp, 1985).

<sup>16</sup> Preliminary perusal of the recent publication of his *Schwarze Hefte* 1931–1938, 1938–1939 and 1939–1941, *Gesamtausgabe* 94, 95, 96 (Frankfurt a.M: Vittorio Klostermann, 2014) would seem to confirm what already became evident with the publication of *Beiträge zur Philosophie, Gesamtausgabe* 65 (Frankfurt a.M: Vittorio Klostermann, 1989), namely, the descent of one of the most powerful philosophical minds of the 20th century into the cloudy depths of a philologically-autistic desperation for “historical truth” on a planet that would offer none. His affirmation of the deep historical truth and greatness of the National Socialist movement in a lecture series of 1935 – later published as *Einführung in die Metaphysik* (Tübingen: Max Niemeyer Verlag, 1953) – is not surprising for one who had a deep inclination to hear and listen to the “call of Being” as if there were really something to hear out there that only he, and Hölderlin, and the pre-Socratic philosophers could hear. However, in between this “hearing of voices” that so consistently clouds Heidegger’s texts, one also finds acute philosophical reflections on time and temporality that became and remained one of the major sources of inspiration for later phenomenological thinking, especially in France. This inspiration, I would like to suggest, may well have been indispensable for the thought or kind of thinking with which Claude Lefort uncovered the structural conditions of democracy. I stay with Lefort in the rest of this introduction, but also return to essential elements of Heidegger’s phenomenology of temporality in the last contribution to this volume.

call for a break with the mindless incrementalism that has come to paralyse European politics. What is this thought? Claude Lefort would articulate it in a nutshell in a passage that we will quote here in a somewhat reversed sequence:

Every religion states in its own way that human society can only open onto itself by being held in an opening it did not create. Philosophy says the same thing, but religion said it first, albeit in terms that philosophy cannot accept.

What philosophical thought strives to preserve is the experience of a difference that goes beyond difference of opinion (and the recognition of the relativity of points of view that this implies).<sup>17</sup>

The key terms here are “an opening it did not create” and “the experience of a difference that goes beyond difference of opinion.” Societies can only open up to themselves – i.e., become what they are, for as long as they are what they are – by being held in this opening and in this difference. Democracy, argues Lefort, is the first form of the political that came round to grasping and sustaining this “opening that it did not create” and to sustaining the “difference beyond the difference of opinion,” hence his now famous but often little understood definition of democracy as

of all regimes ... the only one to have represented power in such a way as to show that power is an empty place and to thereby maintained a gap between the symbolic and the real ... by virtue of a discourse which reveals that power belongs to no one.<sup>18</sup>

Those who find themselves reconciled with the post-democratic turn in contemporary political discourse should surely at least want to consider the question whether post-democratic forms of government will be able to inherit democracy’s watershed legacy, namely, its legacy of *guarding the opening that it did not create and sustaining the experience of an irreducible difference beyond the mere difference of opinions*. The question that one must ask here is whether post-democratic forms of government do not inevitably return to surreptitious closures or occupations of the empty space of power. Let us unpack this question by returning to the thought that we have begun to explore with recourse to Habermas. And let us continue this exploration against the background of Lefort’s analysis of the unique difference that democracy sustains. What does it mean, against this background, to act decisively and creatively in ways that can break the paralysis of a particular epoch of politics? What does this Lefortian analysis imply for any attempt to overcome, to say it again in the words of Christodoulidis, “the crisis that has hollowed out the political imaginary of the age”? Perhaps more precisely, what does Lefort’s analysis imply for the need to overcome the crisis that reveals itself as the “hollowed out political imagery of an age”? What does it mean for the Habermasian call for a release from the mindless

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<sup>17</sup> Claude Lefort, “Permanence of the Theological-Political” in Hent de Vries and Lawrence Sullivan (eds) *Political Theologies* (New York: Fordham University Press), 157. The French text – “Permanence du théologico-politique?” in *Essais sur le politique* (Paris: Editions du Seuil, 1986), 287 – reads: “Que la société humaine n’ait une ouverture sur elle-même que prise dans une ouverture qu’elle ne fait pas, cela, justement, toute religion le dit, chacune à sa manière, de même que la philosophie, et avant elle, quoique dans un langage que celle-ci ne peut faire sien . . . Or, ce que la pensée philosophique veut préserver, c’est l’expérience d’une différence qui, par-delà celle des opinions . . . n’est pas à la disposition des hommes.”

<sup>18</sup> Lefort, “Permanence of the Theological-Political,” 159. The French – “Permanence du théologico-politique?,” 291 – reads: “[D]e tous les régimes que nous nous connaissons, [la démocratie] est le seul dans lequel soit aménagée une représentation du pouvoir qui atteste qu’il est un *lieu vide*.” Cf. also Claude Lefort, *L’invention Démocratique: Les Limites de la Domination Totalitaire* (Paris: Fayard, Artheme, Librairie, 1994), 92: “[L]’image de la souveraineté populaire se joint celle d’un lieu vide, impossible à occuper.”

incrementalism and technocratic tinkering with which Europe has substituted political imagination?

The clues that issue from Lefort's analysis are these:

- a) If it is political power or a powerful political imagination that is evidently lacking in Europe's mindless incrementalism, it is because this mindless incrementalism is exactly also that which insulates itself – by sustaining an unfaltering auto-poiesis<sup>19</sup> – from the source of all power and all political imagination, namely: from the empty space of power; from the opening that it did not create; from the irreducible difference (call it potentiality if you wish) that exceeds and sustains all differences of opinion.
- b) The observation under a) contains a paradox. The mindless incrementalist insulation from the opening and difference that it did not create does not guard or sustain this opening or difference. Mindless incrementalism does not constitute a “modest” or “cautious” respect for the empty space of power, as it might want to claim in self-defence against a bolder politics. By insulating itself from this empty space it for all practical purposes erases that space and effectively puts itself in its place. The insulation of mindless incrementalism from the empty space of power becomes total – it becomes the only register – by wiping out the empty space – the opening and original difference – of power. Mindless incrementalism or technocratic tinkering may be feeble, powerless and hopeless, but it presents itself effectively as the only option.<sup>20</sup> Powerless incrementalism does not sustain the empty space of power, it obliterates it.
- c) It follows from b) that the empty space of power can only be sustained by sustaining a relation to it. If some society is to hold itself in the “opening that it did

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<sup>19</sup> Cf. Brunkhorst, *Das doppelte Gesicht Europas*, 133: “Die politische Klasse hat von Luhmann gelernt. [Sie] hat gelernt, daß man das Funktionssystem der Politik am sichersten gegen seine bürgerschaftliche Umwelt abgrenzt, wenn man den Menschen draußen im Lande gar nichts sagt und *white noise* mit *white noise* beantwortet. Der Sicherheitsgürtel aus Talkshows, Nachrichtensendungen, Internetportalen und Printmedien, der sich um das politisch-ökonomische System gelegt hat, singt das immer gleiche Lied der Wettbewerbsfähigkeit und der notwendigen Strukturreform, das alle Nachrichten übertönt, die vom Anstieg der griechischen Kindersterblichkeit und der Drogentoten um vierzig Prozent seit Beginn der Austeritätspolitik berichten.” Consider also Nils Minkmar's recent assessment of Angela Merkel's politics in an interview with Thomas Piketty: “[D]ie deutsche Bundeskanzlerin [denkt nicht so], in Dingen, die man tun, und in Schritten, die man gehen muss. Sie verdankt ihren Erfolg dem Nichtstun, dem Nichtssagen und der dilatorischen Politik, dem Aufschieben. Sie möchte gern im Amt bleiben, und das kann man am besten, wenn man möglichst wenig macht.” Piketty's response offered the same assessment of Francois Hollande: [Er ist] Meister der verbalen Pirouette, der es versteht, im Moment rhetorisch gut dazustehen, aber zwischen den Dingen und den Worten längst keinen Unterschied mehr zu erkennen vermag” Cf. Nils Minkmar, “Zu Besuch bei Thomas Piketty, Der neue Star der Intellektuellenszene *Frankfurter Allgemeine Zeitung*, 8 May 2014, <http://www.faz.net/aktuell/feuilleton/zu-besuch-bei-thomas-piketty-der-neue-star-der-intellektuellenszene-12927888.html>. If this is the state to which executive sovereignty has regressed in Europe, it is also no wonder that judiciaries have deemed it necessary to take over the reigns of government. They may well have reckoned that someone has to do it.

<sup>20</sup> Brunkhorst has a lot to say about this “no alternative” discourse that has come to paralyze political imagination in our time. Cf. Brunkhorst, *Das doppelte Gesicht Europas*, 138–141.



not create,” if it is to sustain the irreducible difference from which its different opinions or options derive their chance, their possibility, and indeed their potential power, it needs to sustain some relation to this opening and difference. This opening or difference has to have some bearing on it. Constitutional sovereignty, the sovereignty that truly constitutes, is that which sustains this bearing. Constitutional sovereignty is the sovereignty that constitutes a society by holding it in its opening.

- d) The constitutional sovereignty at issue in c) can only be a constitutional democratic sovereignty, for only a democratic sovereignty, claims Lefort, sustains its own opening by keeping the space of power empty. A democratic society may not move towards any occupation or appropriation of its opening. It can only *receive* its possibility of existence (with a certain relief and gratitude and wonder). It cannot command or control it, for instance by presenting itself, however modestly, as the only option. If democracy is the one political regime that sustains the empty space of power, it cannot move to fill and close off that space without deserting its democratic credentials.
- e) Two relations to the possibility of existence that a society cannot create but can always only receive are possible: A religious or political-theological relation that indeed occupies and appropriates the possibility of its existence (and becomes total and/or totalitarian in the process), on the one hand, and a democratic relation that sustains a certain bearing to its possibility of existence without moving to appropriate, possess, or occupy it.

In the last contribution to this volume, I engage with the two possible relations distinguished under e) in terms of a distinction between economies of sacrifice (the religious or political theological relation) and economies of the gift (the democratic relation). It is a good question whether economies of gift and sacrifice can be distinguished as firmly as I am distinguishing them here. My essay is duly aware of the entanglement of gift and sacrifice in social economies, but I nevertheless offer a close reading of Marcel Mauss' *Essai sur le don* that explores the possibility of a precarious but significant distinction between gift and sacrifice. The essay exchanges the “spatial” Lefortian terminology that I have elaborated above for a more temporal register (which I believe is also evident in Lefort when one reads him carefully). The opening in which a society holds itself, but which it cannot create, thereby becomes *the event*, the opening of a time or an epoch with its unique possibilities of existence and its unique possibilities of political difference. The event is unfathomable, it cannot be known or understood. It is always accompanied by the out-dated hermeneutics of an earlier epoch. But the event can be navigated and even solicited by non-hermeneutic practices. Of these non-hermeneutic practices, exchanges of gifts and rituals of sacrifice are anthropologically speaking the best-known examples. The “meaning” of these practices, if they have “meaning,” exceeds human understanding and knowledge. All we really know of them is the fact that they solicit and give time (the gift), or refuse to do so (sacrifice). And it is from this vantage point that I ultimately approach the failure of Europeans to give themselves a federal constitution. The question that I pose is this one: Have Europeans failed to give themselves a constitution because of a fear of giving, a fear of giving that has particularly manifested itself, in recent times, as the fear of bringing gifts to the Greeks?

Back to the Greeks then, to the ancient *Danaoi* who gave Europe its spirit, and to a note on Greek tragedy. Christodoulidis writes:

If we go deeper into the architecture of tragedy, we see that it comes with certain givens. The first is that there *is* a divine will and a divine justice. And that Zeus, or the gods (plural), represents the unity of reference to that justice. In committing *hubris* the tragic hero is guilty of a substitution. The hero has generalised the partial, taken the fragment for the whole, and thus *claimed* to know what the gods willed on the basis of that generalised partiality. *Men occupy positions across the spectrum of the refracted will* and what has been refracted *cannot* be traced back to its underlying unity. Throughout each of the tragedies, Zeus remains silent. In his silence is assumed the balance of the contradictory elements of reality, and the holding together of the practical, the ethical, and the aesthetic, the *separation* of the unity of which will herald the birth of modern man. But in the ancient world these contradictory facets of what is constitutive of action – of *prattein orthos* – are *held together*. The point that the tragic poets made over and over again was that the divine will can only be represented at the level of its unity, not recollected through its fragments. And hubris is the assumption that is made by the tragic hero that his actions, the fragments, represent the unity.

Tragedy was evidently the ancient Greek way of thinking the thought that we have extracted above from Lefort's essay on the permanence of the political theological. And the Greeks appear to have thought this thought in an extraordinarily "democratic" way, this passage from Christodoulidis' essay would suggest. They appear to have grasped the need to sustain the empty space of power. Perhaps it is indeed for this reason that they invented democracy, for democracy is nothing more than a formal and modest procedure for *dealing* respectfully and carefully but also forcefully and imaginatively with the undecidable. These respectful dealings take the form of decisions, but they are not really that for they can always be reversed. At issue is much rather an assertive and creative but always temporal navigation of issues until they go away.

I will not tease out all the parallels here between the thought that Christodoulidis invites one to think with this passage and the thoughts that I have extracted above from the work of Lefort, for this would keep us too long. But the essential resonance is this one: The silence of Zeus opens up space and time. It creates an opening within which "the contradictory elements of reality" hang together, somehow. It is this opening that the political (*le politique*) does not and cannot create, but to which it must respond. No politics (*la politique*), that is, no particular course of action can occupy or appropriate this opening. It can only represent a part of it and for this reason is doomed to distort or upset the unknown and unknowable coherence of the whole. To aim to do so is hubris. It is disregard or disrespect for Zeus' refusal to speak.

A different practice must engage with and solicit this opening of existence, a practice that respects its irreducible secret. That practice, Hans Kelsen tells us with regard to modern constitutional democracy, must renounce all claims to revelations of truth.<sup>21</sup> Kelsen perhaps epitomises the birth of modern man, "the *separation* of the unity of the practical, the ethical, and the aesthetic." His "pure theory of law" would suggest that. But he surely shared with the ancient Greeks their respect for Zeus' refusal to speak. And he was in so many ways the forerunner of Lefort.<sup>22</sup> The sooner Europe can attain to the kind of democracy that Kelsen had in mind – the articulate navigation of undecidables through the democratic sustenance of majority-minority relations<sup>23</sup> – and the sooner its judiciaries would come to respect this navigation by

<sup>21</sup> Cf. Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Aalen: Scientia Verlag, 1981), 100–104; *Was ist Gerechtigkeit?* (Stuttgart: Reclam Philipp Jun, 2000), 49–50.

<sup>22</sup> Cf. Van der Walt, *The Horizontal Effect Revolution*, 315–323.

<sup>23</sup> Cf. Kelsen, *Vom Wesen und Wert der Demokratie*, 53, 57 f.

refraining from moving in to decide the undecidable themselves, the sooner might Europe attain to the federal constitution that it obviously needs. The authority of its laws will not indefinitely survive its current lack of sound legal foundation. Soon enough, and we may be closer to that day than we realise, only their coercion will stand. Only by *not* moving into and by *not* closing the breach of the opening in which Europe is held might Europeans come or continue to accept the imposition of laws of others on others as if those laws were the laws of everyone and therefore their own.

Post-democratic forms of government do not offer this promise for they surreptitiously move into the breach, however modestly and incrementally. Under guise of cautious and modest incrementalism, they prepare the way for a neo-imperial or neo-feudal Europe in which a certain manner of occupying space will always have been decided in advance and in which no one of sound judgement will be able to sustain the imaginative transposition of empirical heteronomy to conceptual autonomy for which democracy allows.

Exchanges of gifts and rituals of sacrifice have, as long as human memory goes back in time, marked the extra-normative practices of constitutional sovereignty through which, and during which, mortals sought to endure and navigate the silence of Zeus. That is why George Bataille and Jean-Luc Nancy respectively identify gift and sacrifice as the hallmarks of sovereignty.<sup>24</sup> The choice between them, if there is such a choice, still appears to dictate the kinds of constitutional sovereignty that one can expect in Europe. Europeans currently find themselves in the grips of an unforgiving economy of sacrifice. The sanctified divine order that this economy of sacrifice serves and sustains is ordo-liberal. Ordo-liberalism – “die freie, natürliche, gottgewollte Ordnung,” as Walter Eucken put it<sup>25</sup> – will always have moved into the

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<sup>24</sup> Cf. George Bataille, *Sur Nietzsche in Œuvres complètes – VI – la somme athéologique – tome II* (Paris: Gallimard, 1973); Nancy, *Le Sens du Monde* (Galilée, 1993), 141. I return to Nancy in my contribution to this volume. Suffice it to observe here with regard to Bataille two essential points. The first point concerns his Nietzschean understanding of sovereignty. For Bataille, reading Nietzsche, sovereignty concerned the willingness of the self to give itself to its history without slavish concerns with self-preservation. The second point concerns the way Bataille ultimately blurs, and perhaps even erases, the boundary between gift and sacrifice. Habermas, we know, has many reservations with regard to this kind of thinking. Cf. *Der philosophische Diskurs der Moderne*, 248–278. There are good reasons for these reservations. One of them concerns – very precisely – the second point raised here regarding the erasure of the boundary between gift and sacrifice. Bataille’s understanding of the sovereign gift relies, alongside Nietzsche, fundamentally on Mauss’ *Essai sur le don*. However, his interest in the *Essai sur le don* lies not with the reciprocity that the gift economy brings about (giving and receiving), but with the peculiar aberration of the gift economy that gave rise to the potlatch. As Habermas notes well (at 269), the potlatch concerned a display of sovereign superiority in which the sustenance of reciprocity no longer played a role. A close reading of Mauss’ essay allows one to identify this loss of the dimension of reciprocity that occurs in the potlatch as the key moment in the blurring or erasure of the boundary between gift and sacrifice. Sacrifice no longer concerns the reciprocity that results from the gift economy, but the direct offering of the gift to the gods by destroying its material value. This is one of the key points that I draw from a close reading of Mauss in my contribution to this volume. This point should nevertheless not move one to simply dismiss Bataille’s concept of the sovereign gift of the self to its own fate or history, for this fate or history can indeed come to turn on taking the risks required for restoring genuine reciprocity. Habermas’ concern with overcoming the “mindless incrementalism” and “cowardice” of the European political elite may well lead him closer to this thinking than he may want to concede. For the common root of both mindless incrementalism and cowardice is the fearful obsession with systemic self-preservation, that is, the fear of losing the self through which the self is lost in any case, and dismally so on top of it. This is of course also the root of the blabbering autopoiesis of Europe’s career politicians, pointed out in footnote 19 above. “Mindless incrementalism,” “cowardice,” “autopoietic career politics” – voilà, the key terms of the dismal demise of real constitutional sovereignty in Europe today.

<sup>25</sup> Walter Eucken, *Grundsätze der Wirtschaftspolitik* (Tübingen: Mohr Siebeck, 1952), as cited by Philip Manow, “Ordoliberalismus als ökonomische Ordnungstheologie,” *Leviathan* 29, no. 2 (2001): 188.

breach long before any decision is taken. Only incremental and technocratic tinkering remains possible and “required” in the wake of this fatal intrusion.

This is the form that Lefort’s “permanence of the theologico-political” has taken today. And this is how constitutional law came to be reduced to or replaced by competition law in Europe. The sooner the economy of the gift and the graciousness and decency and imaginative resourcefulness of this economy return to them, the sooner might Europeans come to give themselves, in sovereign fashion, a real constitution. This, in any case, for what it is still worth in a context of advanced incremental closure, is what I argue in my contribution to this volume of essays.