

## On the (De-)Fragmentation of Statehood in Europe: Reflections on Ernst-Wolfgang Böckenförde's Work on European Integration

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### Abstract

It has become a standard critique of European integration that the upward transfer of sovereignty in market-related matters leads to the fragmentation of statehood between the supranational, European level and the largely incapacitated nation-states that retain jurisdiction over social and distributive policies. My article takes up this critique in the elaborate version of one of Germany's leading post-war constitutional theorists, Ernst-Wolfgang Böckenförde, whose approach has been influential in how German constitutionalism relates to the project of European unification. In this account, vertical integration uses law to sever economics from democratic politics, fragments the concern for the common good of citizens and undermines the unity of statehood. I contrast this account to instances of horizontal fragmentation of statehood, such as those underway in member-states such as Hungary or Poland where the nation state's constitutional structures are coming undone at the hands of authoritarian populists. The European Union's role of defending the rule of law within its constitutive states seeks to restore their normative integrity and, as such, is best understood as a role of vertical *de-fragmentation* of political and constitutional transformations at the domestic level. The question if statehood can be established at the European level gains greater urgency and complexity in light of these developments.

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## A. Introduction

There is a headwind, Ernst-Wolfgang Böckenförde noted, blowing from Europe's direction toward its nation-states. Writing in 1998, he saw it as a "gentle—though steady—breeze,"<sup>1</sup> one of many zephyrs to test the "durable façade" of democracy and statehood throughout history. Yet, converging currents of globalization and individualization could turn that wind into a storm. In keen anticipation of such developments, many scholars have sought to reconfigure constitutionalism away from its nineteenth and twentieth century fixation on the state.<sup>2</sup> Not Böckenförde. The state, he insists, must be defended. It is the state that "realizes and secures fundamental purposes of human life: external peace, security of life and of the law, freedom, the possibility of well-being and of culture."<sup>3</sup> By positioning itself between powerful non-state actors and self-governing citizens, the state creates spaces of human interaction in which individuals can share meaning with "full freedom and distinctiveness."<sup>4</sup> A sense of powerless, even existential angst, engulfs individuals when their state is no longer able to "address and find binding solutions to the problems of human coexistence."<sup>5</sup> It would be faulty determinism, Böckenförde believes, to see as inevitable the predicament of the coming of Europeanization, globalization, and individuation as well as their ravaging effect on the common good of political communities. These forces may indeed converge, but they are fundamentally political, not natural, phenomena. As such, their origins can be traced to the source of all things political, that is, to states themselves.

Böckenförde's reference to states and statehood is generic, suggesting an underlying political vision that is neither reactionary nor necessarily retrograde. He submits to the formal logic of his argument by acknowledging that the state *qua* structure of unified authority could be either the nation-state or, conceivably, a more encompassing unit if the

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<sup>1</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 325 (Mirjam Künkler & Tine Stein eds., 2017) [hereinafter BÖCKENFÖRDE].

<sup>2</sup> For the most elaborate version of this approach, see GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* (2012).

<sup>3</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The State as an Ethical State*, in CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 1, at 92.

<sup>4</sup> *Id.* at 94. For an analysis of the role of the state along similar lines, see TONY JUDT, *ILL FARES THE LAND 190–97* (2010) (arguing that the state remains necessary to protect individuals and democratic processes from the influence of supranational actors such as banks or corporations).

<sup>5</sup> BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, *supra* note 1, at 336 ("[T]he national state no longer has sovereignty over currency, capital allocations, business locations, and over national economies as such" is that "the experience of powerlessness will spread among the citizens, and their image of the state, the foundation of their willingness to integrate and participate, will start to teeter.").

entire European political community organized itself to form a state.<sup>6</sup> But because Böckenförde sees democracy as a particular form of organizing statehood,<sup>7</sup> the state designates here a specific kind of political organization where the people as the ultimate sovereigns rule themselves collectively, though indirectly, through a complex set of coercive laws and institutions. Democratic legitimacy is the normative stamp that marks these laws and institutional structures as the ones that the people have freely given to themselves, and are not the expression of alien will.<sup>8</sup> Exactly what democratic legitimacy requires of the overall institutional structure depends on specific interpretations of legitimacy and democracy. It may include features such as responsiveness of institutions to the demands of a self-governing citizenry, or, in different conceptions, certain substantive safeguards that take the form of rights protections. Specifically, in post-war Europe, democratic welfare states have been sites of unprecedented normative accomplishments, in large part because they have entrenched and institutionalized an understanding that ties together freedom and equality without sacrificing core elements of either normative imperative.<sup>9</sup> To inquire, as Böckenförde does, if statehood can be established at the European level, is to ask if this particular kind of democratic state, with its legitimacy thresholds and normative makeup, can be located at the supranational level. Given the state of affairs in Europe, the choice between different levels of statehood is not just a matter of philosophical speculation; it is, Böckenförde insists, a “very urgent” political question.<sup>10</sup>

Böckenförde offers a comprehensive and uncompromising account of what a European state would entail. At the institutional level, an entirely new institutional structure—one

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<sup>6</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *Which Path is Europe Taking?*, in CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 1, at 360. (“If the European Community wants to become a political union, it must be given a deliberately federal structure in its design and decision-making. In its organization, too, it must present itself as a union of peoples; the federal element must prevail against the state element.”).

<sup>7</sup> BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, *supra* note 1, at 329.

<sup>8</sup> See generally, HANS Kelsen, THE ESSENCE AND VALUE OF DEMOCRACY 27–34 (Nadia Urbinati & Carlo Invernizzi Accetti eds., 2013).

<sup>9</sup> See, e.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 418 (William Rehg trans., 1996) (arguing that, according to this conception, “no one [can be] free as long as the freedom of one person must be purchased with another’s oppression”).

<sup>10</sup> BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, *supra* note 1, at 340 (“[A] second—and very urgent—question: can statehood today still be established and prevail on the level of the nation state, or only on a larger level, for example, that of Europe?”). That acknowledgment, irrespective of implications, should not be derided. See Vlad Perju, *Dual Sovereignty in Europe? A Critique of Habermas’s Defense of the Nation-State*, 53 TEX. J. INT’L L. (forthcoming 2018) (critiquing Habermas for assuming that only nation-states can be constitutional states and for not entertaining the possibility that a European supranational state could be imagined and designed to have those characteristics).

that would be deliberately federative—is necessary. Merely tinkering with the existing institutional framework by, for example, superimposing new functions, would be insufficient to change the spirit of these institutions—which for the past decades have been administrative-bureaucratic in spirit.<sup>11</sup> A consciousness of togetherness and commonality, to which Böckenförde refers as “us-consciousness,”<sup>12</sup> must provide the social basis for the new institutions. Through public education and a careful curation of the public sphere, the institutions of the state, if properly constructed, could aid in the development of that shared consciousness. But it would be an “illusion”<sup>13</sup> to think that states can integrate society through power and coercion. Rather, social integration requires deeper roots such as in religion or common cultural heritage, which have a “unity-creating function [that] then devolves upon the state.”<sup>14</sup> Only on such a relatively homogeneous social basis could any state, including presumably a European supranational one, be founded.<sup>15</sup>

Whatever one’s views about the specifics of the project of European statehood may be, it is undeniably that the implementation of the project is a daunting task. Indeed, Böckenförde’s diagnosis of the current state of European integration makes that task so demanding that one questions its viability in political-historical terms. What forces could trigger such large-scale European federalization and, at the same time, be sufficiently long-lasting to see that institutional project through? Why and how could national institutional structures and an entrenched national elite support such a project, if, as is likely, they would stand to lose power and influence under a radically reconfigured European Union? Even assuming general agreement over a federal direction for Europe, how could such an agreement translate into support for a specific institutional project on a continent that is

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<sup>11</sup> BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 360.

The organizing idea of a federal political union needs its own institutions and forms within which this idea can take on concrete shape. If it is merely superimposed upon the existing institutions shaped according to the administrative-bureaucratic model of the European Economic Community, it cannot change their “spirit”; in that case what was practiced and rehearsed for forty years will remain dominant.

<sup>12</sup> BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, *supra* note 1, at 330.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 337.

<sup>15</sup> There has been a vibrant debate as to whether the unity of the people presupposes homogeneity. In their editorial notes, Mirjam Künkler and Tine Stein emphasize the difference between Carl Schmitt’s substantial/substantive homogeneity and Böckenförde’s relative homogeneity. See BÖCKENFÖRDE, *The Concept of the Political: A Key to Understanding Carl Schmitt’s Constitutional Theory*, in CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 1, at 75 n. 5.

still marked by deep political divisions, and in an era when institutional imagination seems to have dried up? Specifically, through what mechanisms could citizens exert pressure on their representatives toward federalization, assuming that is what “the European Community wants,”<sup>16</sup> given the myriad distortions of the European public spheres? Relatedly, how can Europe reverse-engineer the impact of over half a century of market integration on its social texture and culture? And, finally, how likely is it that Europe’s diverse citizenry could coagulate into the relatively homogeneous social group whose unity-creating function would then support the structure of supranational public institutions?

These may be political questions, but it would be a mistake to dismiss them as exogenous to a normative inquiry. If the project of European statehood is not viable in any of its imaginable futures, then the very choice between national and supranational statehood that Böckenförde posits turns out not to be much of a choice after all. Indeed, Böckenförde seems altogether too keen to concede that, “if democracy is not to be lost,” further-reaching supranational integration must for now be put “on hold.”<sup>17</sup> And putting European integration on hold is itself a political project. “If statehood is to be preserved,” he writes, “countermeasures . . . seem imperative, namely in the form of a struggle to reestablish the primacy of politics within a controllable sphere”<sup>18</sup>—the sphere, that is, of the nation state.

The first part of this article examines Böckenförde’s account of the nature of European integration, specifically his claim that the disconnection between economic and political integration has led to the fragmentation of concern for the common good. Because the axis of this fragmentation is national-supranational, I refer to this as vertical fragmentation (Part B). In the second half of the article, I ask how this account can apply to instances of *horizontal* fragmentation underway within member-states whose constitutional structures are coming undone at the hands of freely elected authoritarian populists. In Part C, I argue that, to the extent the European Union can and should protect the rule of law within its

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<sup>16</sup> BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 360.

<sup>17</sup> *Id.*

Needless to say, as long as this process of forming a people or a nation of Europeans is under way and still in its infancy, and the ‘sense of belonging’ is thus still missing with a view to Europe, it is futile to put forth designs and constructions of ‘democratic constitution’ of Europe; rather, one should put a further-reaching political integration on hold for now. If democracy is not to be lost, that integration can proceed only by ‘keeping pace’ with a willingness of the people to seek and demand responsibility for the common good not only from the nation state and its government, but also and especially within Europe.

<sup>18</sup> BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, *supra* note 1, at 340.

constitutive states, and thus help to preserve their normative integrity, its role is better understood as one of vertical *de-fragmentation* of political and constitutional transformations within nation-states.

## B. Supranational Integration and Vertical Fragmentation

### *I. The Age of Inauthenticity*

Writing as one of Germany's leading post-war constitutional theorists, Ernst-Wolfgang Böckenförde offers an account of European integration that is characteristically insightful, if somewhat conventional in its main inflections. He portrays integration as a radical project that rejected the logic of organizationally structured cooperation in favor of supranational integration through institutions independent of national governments, endowed with their own sovereign powers and capable of making decisions binding on the member states.<sup>19</sup> No political project of such boldness can become viable unless historical circumstances allow the underlying vision to galvanize into action. Post-war Europe harbored an environment that made the black swan moment possible. Unsurprisingly, the moment was short-lived, and already by the mid-1950s, the resounding defeat of the European Defense Community signaled that member states would use national interest as a Procrustean bed to limit deeper unification. A fundamental shift occurred in European integration at that moment, and thus the age of "inauthenticity"<sup>20</sup> was born.

The defining characteristic of that age, which Böckenförde sees as continuing to this day, is that political unification takes on an exclusive economic-functional cast. While advocates of unification do not relinquish their political goal, their vocabulary and mindset become morphed into a market-centered model. That model had its undeniable successes.<sup>21</sup> But, as Böckenförde points out, their price has been a functional-economic mindset that tilted European integration decisively in the direction of the market. This, in turn, legitimized a politics of expertise that empowered the Brussels bureaucracy without imposing

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<sup>19</sup> BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 344. For an early study, and to this day unmatched, of European legal integration, see PIERRE PESCATORE, *THE LAW OF INTEGRATION* 26 (1974).

<sup>20</sup> BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 357. Böckenförde takes this concept from Rudolf G. Adam. *See id.*, at 357 n. 49. While he mentions this concept only once, I give it greater weight in this section because I believe it captures well Böckenförde's view of the tension between economic integration and political unification. *See, e.g., id.* at 357:

What is really wanted is a political integration, but officially one has chosen the indirect path via economic integration and is banking on an "inherent constraint" that this integration is supposed to give rise to . . . the architects of Maastricht put the horse before the cart by conceding to monetary fusion precedence over political unification.

<sup>21</sup> *Id.* at 350.

meaningful constrains. It further made it exceedingly difficult even to envision, let alone enact, institutional reforms that could make supranational institutional arrangements more representative, and, through such representative institutions, enable the peoples of Europe to carve out a specific political identity that they could and would share.<sup>22</sup> Instead, the political discourse was straightjacketed, and with few marginal exceptions in the large scheme of European politics,<sup>23</sup> the ever self-calculating political leaders rarely felt comfortable speaking the language of political unification. In retrospect, even the accomplishments of Europe's economic integration seem unsustainable without a radical rearrangement of the background institutional structure. An example as good as any concerns the European Parliament, which, despite the exponential increase in its powers over time, has hardly seen an uptick in its social legitimacy. The explanation, Böckenförde finds, is structural, namely that the Parliament still "cannot represent a people that does not yet exist."<sup>24</sup> "A shared consciousness [must develop] in the sense of a cultural and political identity of the Europeans" that will reveal awareness of their "unity and distinctiveness,"<sup>25</sup> yet the political institutions indispensable for its formation could not be brought into existence under the dominance of market forces.

Until, and unless, such developments occur, the corrosive effect of the fragmentation of politics between a supranational market and the domestic governance of welfare states will only deepen. In Böckenförde's account, vertical fragmentation reflects the breakdown of political unity as the inevitable effect of transferring to the European level competencies over economic policy, specifically in the area of the four fundamental freedoms—goods, persons, services and capital—uncoupled from responsibility for social and distributive policies, which remains allocated to the (now incapacitated) Member states. The capitalist industrial society is no longer integrated into the social state, but rather is placed at the supranational level, which, without any regulatory competence of its own in areas such as employment and distributive social policy, emancipates the supranational market from the social market economy.<sup>26</sup> Solidarity cannot be transnationalized without supranational

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<sup>22</sup> See BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, *supra* note 1, at 329 (arguing that "democracy always refers to a particular group of people who are united into an entity, not to humanity as such").

<sup>23</sup> See, e.g., Joschka Fischer, *From Confederacy to Federation: Thoughts on the finality of European integration*, (May 12, 2000), <http://ec.europa.eu/dorie/fileDownload.do?docId=192161&cardId=192161>; GUY VERHOFSTADT, *EUROPE'S LAST CHANCE: WHY THE EUROPEAN STATES MUST FORM A MORE PERFECT UNION* (2017).

<sup>24</sup> BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 359 ("[T]he European Parliament cannot represent what does not exist: The European people; and it cannot mirror something that does not (yet) exist: A European political public that takes shape beyond national boundaries around the decisive questions of European politics.").

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 351. For a view similar in this respect, see HABERMAS, *supra* note 9, at 502 (characterizing the present European political sphere as fragmented and discussing the importance and likelihood of creating "an obligation towards the European common good" in order to achieve transnational unification).

political institutions, and, without solidarity, there can be no Europe-wide social policies. In Böckenförde's view, European integration, understood first and foremost as economic integration, has boxed itself into its current predicament and must, until authenticity is restored, be put on hold.

## *II. Fragmentation Vistas*

For a better grasp of the case for fragmentation, let us first turn to one of its main causes: The transparency costs associated with the coexistence of different levels of government.<sup>27</sup> Part of Böckenförde's concerns about the dual European structure is that multiple levels of government obscure the relations of authority and responsibility for the common good. Because Europe's citizens do not follow the minutiae of the complex allocation of competencies, they mistakenly continue to hold their national governments responsible for the totality of their circumstances.<sup>28</sup> As far as public officials—national or European—are concerned, there is no common standpoint from which they can think about their undivided responsibility toward citizens, because these officials inhabit an expanded and compartmentalized political space. The phenomenon of Europeanization fragments the concern for the common good vertically, between the national and supranational levels. This fragmentation has corrosive effects on the unity of statehood. Transparency in the allocation of decision-making is a dimension of the intelligibility of the construction of the public space. It is, in this view, a feature whose absence affects the possibility of political self-government, most immediately at the national level where current political circumstances allow this possibility to actualize.

There is, however, something quite striking about Böckenförde's approach to fragmentation. Too much seems to rest on it. The stakes are oddly eschewed when transparency in the allocation of competencies engages the very possibility of self-government. To be sure, allocative matters are deeply consequential. But the vertical allocation of competencies is a well-known feature of all federal systems. In fact, any state structure, including non-federative ones, that recognizes some degree of decentralization in the allocation of decision-making authority must be able to handle these matters on a routine basis. Perhaps anticipating this objection, Böckenförde points out that his concerns about the allocation of competencies cannot be allayed by "point[ing] to the distribution of

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<sup>27</sup> BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, supra note 1, at 341 ("[G]iven the separation of the EC competencies from the power of the state, without the European Communities in turn constituting a political union comparable to a federal entity, the question about the fragmentation of statehood arises most urgently."). For a recent study of the allocation of competencies within the EU, see THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION (Loïc Azoulay ed., 2014).

<sup>28</sup> Conversely, to citizens, the decisions made by the EU "appear as something distant and foreign that is imposed upon them, not as something that emanates from them." BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, supra note 1, at 341.



competencies in a federal state.”<sup>29</sup> Why not? Because, he argues, “[t]he difference lies in the fact that in the federal state the centralized state and the member states are combined into the political unity of an overarching state, the federal state.”<sup>30</sup> And, at this moment in time, “such a political unity is lacking between the EC and the member states.”<sup>31</sup>

Before getting to the merits of how an economically integrated Europe would be best described politically and constitutionally, it is worth noting how these background assumptions about the nature of European integration inform the approach to fragmentation. The challenges of allocating decision-making between different levels of government are not, in theory, insurmountable. But, according to Böckenförde, the EU at this moment in its historical development is simply not yet the kind of polity to which such known solutions can apply. Were the EU already a polity of that type, disputes over the vertical allocation of competencies between levels of government would not have fragmented the concern for the common good. In such a case, the EU would have been just like any other federal structure, where such disputes routinely arise but, also routinely, are solved by institutions—usually courts—that authoritatively settle disagreements among institutional actors about the internal organization of the state. These institutions exercise a form of hierarchical authority whose integrative dimension reflects and reinforces the overall institutional unity of the state, including, in Böckenförde’s parlance, a shared political consciousness of the citizenry.

The claim that the EU lacks the feature of integrative hierarchy seems, at least at first blush, difficult to reconcile with the doctrines of European constitutionalism. More than six decades ago, the European Court of Justice held that the Treaty of Rome created a new legal order that was autonomous from national law, and under which its signatory states limited their sovereign rights.<sup>32</sup> Unlike with international norms, whose implementation into domestic law depends on the mechanisms prescribed by the constitutional rules of

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<sup>29</sup> BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 352.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1. André Donner, former president of the European Court of Justice, captures this well:

[T]he Treaties themselves and the rapidly growing system of Community regulations are to be considered as rules of law having effect not only between states and the institutions but also between private persons and public authorities, in a way that confers rights and legal claims that should be protected by the courts, then, and only then, will the Communities obtain the solidity necessary to give them the stature of a legal order.

A. M. DONNER, *ROLE OF THE LAWYER IN THE EUROPEAN COMMUNITIES* 82 (1968).

each system, the decision regarding the effect of European norms in domestic law is centralized in Luxembourg for all the member states.<sup>33</sup> The court held that European legislation automatically becomes part of domestic law upon enactment, or when the term of implementation has expired.<sup>34</sup> What made that a “leap into the unknown,”<sup>35</sup> as Pierre Pescatore called it, was not that the European legal system was a system unlike any other, but just the opposite—namely, that its features resembled those of other legal systems. Therein lies the radicalism of the European constitutional project. A sketch of the rest of the normative architecture of European constitutionalism, albeit without coloring nuance, strengthens this case. EU law gives individuals rights that can be enforced in national courts in specific, though broadly construed, circumstances.<sup>36</sup> Furthermore, and importantly, in the event of a conflict, EU law norms prevail by virtue of their pedigree and therefore irrespective of where the domestic norms fit within the hierarchy of domestic norms.<sup>37</sup> National judges are under a duty to give effect to the primacy of EU law by setting aside any norm of national law that violates either a Treaty or legislation of European institutions.<sup>38</sup> In principle, this secondary rule of legal hierarchy applies not only in a clash between national constitutions and the constitutive Treaties, whose texts were signed and ratified by all the member states, but also between the former and ordinary legislation enacted by the European supranational political institutions.<sup>39</sup> National judges have the authority and duty, acting as European courts,<sup>40</sup> to refuse to apply—that is, to “set aside”<sup>41</sup>—national law even in circumstances when they lack such power under national law.<sup>42</sup> These orders, which oftentimes empowered lower national judges, brought clarity and structure to the national judges’ obligation of referral, required that courses of action make available effective remedies, demanded specific interpretations of national law,<sup>43</sup> the

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<sup>33</sup> Case 26/62, *Van Gend en Loos*, 1963 E.C.R. 1.

<sup>34</sup> Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337.

<sup>35</sup> See Pescatore, *supra* note 19, at 26. Pescatore argues further that “[w]e are experiencing the beginning of a process which undermines categories of thought which have been settled for centuries, overturns deeply-rooted political ideologies and strikes at powerfully organized interests.” *Id.* at 43.

<sup>36</sup> Case 26/62, *Van Gend en Loos*, 1963 E.C.R. 1; Case 43/75, *Defrenne v. Sabena* (No. 2), 1976 E.C.R. 455.

<sup>37</sup> *Id.*

<sup>38</sup> Case 6/64 *Flaminio Costa v. ENEL*, 1964 E.C.R. 585.

<sup>39</sup> *Id.*

<sup>40</sup> Case T-51/89, *Tetra Pak Rausing SA v. Comm’n*, 1990 E.C.R. II-309, para. 42 (“[W]hen applying [Community law], the national courts are acting as Community courts of general jurisdiction.”).

<sup>41</sup> Case 106/77, *Italian Minister of Finance v. Simmenthal*, 1978 E.C.R. 629.

<sup>42</sup> *Id.*

<sup>43</sup> Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135.

duty to treat Community law as law in the same way that national law was law,<sup>44</sup> the duty to make interim relief available,<sup>45</sup> and the duty to guarantee the integrity of the EU process by raising *sua sponte* questions of European law,<sup>46</sup> among others. Furthermore, because the Treaty constitutes an independent source of law, the European Court centralized the authority to interpret its meaning and to invalidate secondary legislation that violates the Treaty. While the European Court does not decide cases arising under national law, national courts are obligated to apply EU law or to consult the European court whenever its interpretation is in doubt. The Court would later accept the corollary of this approach, namely that Member states can be held liable in tort under EU law for their courts' failure to engage in mandatory consultations through preliminary references to Luxembourg.<sup>47</sup>

The rules just described are formal legal doctrines that pertain directly to legal hierarchy and unity. Unconstrained by the demands of democratic legitimation, these doctrines can and, Böckenförde argues, have become tools in the fragmentation of the concern for the common good. The supremacy of EU law gives the commandments of the supranational market the necessary legal force to prevail over national legislation where the competence and responsibility for economic policy, labor market policy, and distributive social policy remain located.<sup>48</sup> At the same time, however, these are constitutional doctrines that pertain to hierarchical unity. And that feature might be particularly relevant here because the cause of inauthenticity in European integration, as Böckenförde constructs it, was the pursuit of a project of political unity in the exclusive guise of economic integration. How, then, do these constitutional doctrines, and the forms of discourse they have engendered, fit in this picture? On the one hand, these doctrines evidently cannot make a claim to the political discourse wholesale. It would take a particular type of dystopian formalist to equate the law in the European books with political reality. On the other hand, these doctrines are not some insignificant leaflet either. They define constitutional structure and are thus arguably a significant part of political discourse that takes place within that structure, including reflexively about possible changes to the structure itself. If an underlying vision of constitutional-political unity remains encased in the doctrines of European constitutionalism, albeit in formal terms, that seems consequential for understanding both the nature of the European Union as it currently exists as well as the option and prospect of European statehood.

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<sup>44</sup> Case 179/84, *Bozzetti v. Invernizzi*, 1985 E.C.R. 2301.

<sup>45</sup> Case C-213/89, *The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433.

<sup>46</sup> *Id.*

<sup>47</sup> Case C-224/01, *Köbler v. Austria*, 2003 E.C.R. I-10239.

<sup>48</sup> BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 351.

### III. Questioning Hierarchy

A seasoned scholar of European integration might find overly simplistic my above recitation of European constitutional doctrine. The mere restatement of the doctrine would be gullible if it endorsed the European Court of Justice's self-interested standpoint, which unsurprisingly portrays the hierarchical relationship between European law and national law as top-down and unidirectional. But that perspective shuns the myriad complexities of how national legal systems have been relating to EU law for over half a century. Under an alternative and supposedly more complex view, when national legal orders have accepted the ECJ's claims to supremacy, they have done so conditionally and subject to a wide range of assumptions that dilute and ultimately undermine the substance of those claims.<sup>49</sup> Specifically, the effect of conditional acceptance has been the creation of a bi-directional—as opposed to top-down, unilateral and federal-like— model of constitutional authority in the Union. In this view, “the [ECJ's] perspective constitutes only one part of the supremacy story. Ultimately, the acceptance and application of the primacy of EU law are dependent on the Member States.”<sup>50</sup> Thus, a full and accurate understanding of the legal relation between the EU and its member states requires supplementing the ECJ's perspective on the doctrine of supremacy with the counter-claims of national courts, developed in the process of responding and processing the constitutional claims of the EU. The national perspective is not merely ornamental, but constitutive of the claim to supremacy. Hierarchy in the EU is, thus, “necessarily bidirectional.”<sup>51</sup> The nature of the EU supranational order is *sui generis* and lacks a top-down structure of hierarchical authority.

Note that, from the perspective of vertical fragmentation that Böckenförde theorizes, one effect of conceptualizing supranational integration as compatible with the Westphalian system of nation-state, as this pluralist school of European constitutionalism does,<sup>52</sup> is to protect the space of democratic self-government. When the dictates of the market take the form of European legislation and, through the doctrine of supremacy, seek to trump the social protections that nation-states have in place, constitutional heteronomy enables national legal orders to immunize from supranational interference the democratic choices that people have made within the only political space where processes of collective self-government are as yet available to them. This democracy-protecting implication of the claim from heteronomy is normatively continuous with an approach like Böckenförde's. If

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<sup>49</sup> See, e.g., Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1436 (2011).

<sup>50</sup> EU LAW: TEXTS, CASES AND MATERIALS 267 (Peter Craig & Gráinne de Búrca eds., 6th ed. 2015).

<sup>51</sup> J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L & BUS. 354, 374 (1996–1997) (describing “the flow of authority in the EU [as] bidirectional”).

<sup>52</sup> KLEMEN JAKLIČ, CONSTITUTIONAL PLURALISM IN THE EU 3 (2013) (describing constitutional pluralism as the dominant approach in European constitutionalism).

European supremacy is bi-directional, then national legal orders can calibrate their response to the claims of European constitutionalism in ways that influence the pace and trajectory of European integration. If it turns out that, as Böckenförde argues, the effect of Europeanization in its current institutional form and in confluence with globalization and individuation is to fragment the concern for the common good and undermine the possibility of democratic self-government, then national democracies can protect themselves by recalibrating the process of Europeanization from within, so to speak. The project of salvaging democracy requires that European integration be put on hold, and the conceptual opening that constitutional heteronomy creates provides the space for that holding action.

On a deeper level, however, Böckenförde's approach is incompatible with the pluralist school. That school of constitutional interpretation has welcomed the conceptual opening as the byproduct of the clash between conflicting claims of constitutional authority (national and supranational). Its proponents have theorized the clash as not only the key to understanding the European legal space, but also a feature of constitutionalism more generally.<sup>53</sup> Constitutionalism becomes, in the pluralist approach, a space for negotiation among competing institutional settings as to which of them shows greater fidelity to higher constitutional principles. Institutional claims must be constantly validated; their authority cannot be taken for granted and needs to be justified.<sup>54</sup> No institutional setting can claim a monopoly over those underlying principles, which supersede any predetermined framework, national or supranational. We see how, in this approach, European integration does not threaten nation-states as sites of political and social organization that internalize over time and through supranational socialization, an ethics of mutual accommodation and tolerance.<sup>55</sup> That ethics expresses itself in the coexistence, within the same constitutional space, of competing claims of supremacy.

Böckenförde's constitutional theory is incompatible with the pluralist perspective I have just described. His conceptualization of unitary sovereignty and its connection to the political community's self-sustaining wholeness<sup>56</sup> commit him to the view that bi-

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<sup>53</sup> Miguel Maduro, *Europe and the Constitution: What If This Is as Good as It Gets?*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 74–102 (J.H.H. Weiler & Marlene Wind eds., 2003).

<sup>54</sup> Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?*, 36 COMMON MKT. L. REV. 351 (1999).

<sup>55</sup> J.H.H. Weiler, *In Defense of the Status Quo: Europe's Constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7–26 (J.H.H. Weiler & Marlene Wind eds., 2003).

<sup>56</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory*, in CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 1, at 74 ("Sovereignty cannot be limited by law or become dispensable without the state ceasing to exist as a self-sustaining political unity."). Like Schmitt, and like Bodin and Hobbes previously, Böckenförde sees all forms of fragmentation as a threat to political unity. For a historical account that shows how Hobbes and Bodin sought to counter theories of split sovereignty, see generally DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT (2016).

directionality is itself a source of fragmentation of constitutional authority and thus a threat to statehood. The institutional unity of the state should reflect the unity of the people; conceptually, it makes any form of breakdown incompatible with the idea of unity. Leaving competing claims of authority unresolved undermines the monopoly of decision-making and, with it, the unitary political basis upon which legality itself is premised. While there may be moments in the development of any legal system that might look like expressions of heterarchy, on reflection these moments are fleeting instances of as-yet-unresolved structural conflict. Fragmentation and heterarchy cannot become a permanent state without undermining stability and order—that is, without recreating a pre-political space where agents have both an incentive and the opportunity to impose their will to power on others.

Here we see Böckenförde's complex relation to what I have called the bi-directionality theory. On the one hand, bi-directionality opens up the normative European legal space and restores the legitimacy of the national perspective within European constitutionalism. On the other hand, bi-directionality leads to an ill-advised celebration of the clash among competing claims to authority as the mark of a new model of constitutionalism. Instead, from a Böckenfördian perspective, the coexistence of competing claims is corrosive and must be urgently resolved. A choice between competing claims of authority is thus not only possible but necessary. Böckenförde's own preference, given the weight he ascribes to democratic self-government and his interpretation of the state of European integration, is for the primacy of the nation-state. But, conceptually speaking, any of the two possible choices—that is, for national statehood or for European statehood—would mark a return to hierarchy, structure, and indeed to the unity that, in this view, characterizes constitutionalism properly so called.

Resting the analysis on this point suggests that the very choice between the national and the supranational is a given. It would seem to be a coincidence that Böckenförde's project of salvaging democracy could benefit from the pluralist opening of the normative space within European constitutionalism. The pluralists extoll —mistakenly, in Böckenförde's view— the fragmentation that their opening creates. Rather, that conceptual opening generated by the clash of claims to authority is a problem whose solution must be guided by the imperative of preserving the space for and institutions of collective self-government. But, and this is the critical point, without that opening, the choice between the national and the supranational would not present itself and, without that choice, democratic self-government at the national level would be at the mercy of globalized markets. What, then, created that conceptual opening within the framework of European constitutionalism and made Böckenförde's option for democracy at the national level possible within that framework?

Any possibility of coincidence dissipates when one traces the origins of the choice between the national and the supranational to the counterclaims of constitutional supremacy that national legal orders of the EU member states. It was, of course, the German Constitutional

Court, prominently among all national apex courts, that conditioned its acceptance of EU supremacy on the protection of fundamental rights at the supranational level.<sup>57</sup> The later and all-important *Maastricht* decision, where the Karlsruhe Court interpreted the nature of the European legal order in an international key, epitomizes the national counterclaims.<sup>58</sup> In that decision, the German judges interpreted the Treaty of Maastricht as establishing a community of States whose identity ought to be respected and autonomy guaranteed, as is the case in any international organization—“and not with membership in a single European State.”<sup>59</sup> Their conclusion, replete with international law lingo, was that, within the European project, Germany maintains “its status as a sovereign State in its own right as well as the status of sovereign equality with other States in the sense of Art. 2, sub-para 1 of the UN Charter of June 26, 1945.”<sup>60</sup> States are and—importantly—will remain the main actors in the process of integration—an unsurprising conclusion, given this classic international framework, but a striking one if one reasons from the Maastricht Treaty’s reference to the peoples of Europe and the decades-long and consistent jurisprudence of the European Court of Justice that the European legal order is autonomous and different in nature from international law. The holding that German law retained jurisdiction over EU legislation that was enacted *ultra vires* follows directly from that framework that demanded the continuity of the German state and its own processes of self-government.<sup>61</sup>

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<sup>57</sup> Yet, the *Solange* challenge was not as far-reaching as many scholars have portrayed, since the German judges accepted some core building blocks of European constitutionalism, including the claim that the constitutive Treaty is an independent source of law, that it has created its own legal order, and that the European legal order was autonomous from domestic law. See generally Vlad Perju, *On Uses and Misuses of Human Rights in European Constitutionalism*, in HUMAN RIGHTS, LEGITIMACY, AND A WORLD IN DISORDER (Silja Voeneke & Gerald L. Neuman eds., forthcoming 2018).

<sup>58</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 12, 1993, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 [hereinafter *Maastricht Decision*].

The Maastricht Treaty constitutes an agreement under international law establishing a compound of States of the Member States which is oriented towards further development. The inter-governmental community is dependent upon the Treaty continually being revitalized by the Member States; the fulfillment and development of the Treaty must ensure from the will of the contracting parties.

<sup>59</sup> *Id.* at 16.

<sup>60</sup> *Id.* at 21. Christian Calliess refers to this approach, which the German Constitutional Court will continue to pursue in its Lisbon judgment, as “almost tragic” because, in taking the international law perspective, “the Court is adopting a restrictive democratic approach towards the very organization which—contrary to classic institutional organizations like the UN and the WTO—actually has a parliament that is directly elected by its citizens and has far-reaching decision-making and control powers.” See Christian Calliess, *The Future of the Eurozone and the Role of the German Federal Constitutional Court*, 31 Y.B. EU L. 402, 406 (2012).

<sup>61</sup> *Maastricht Decision* at 19:

If too many functions and powers were placed in the hands of the European inter-governmental community, democracy on the level of

It does not take long to note the overlap of core aspects of Böckenförde's approach to European integration with the constitutional vision that underpins the *Maastricht* decision, in which he sat as a member of the Court. When asking what "a democratic structure of the European Community would look like," he argues that it is not a matter of transferring "concrete historical manifestations" from the national to the supranational level; rather, democracy "has to be thought anew with a thought toward the special conditions under which authority is grounded and exercised at the international level."<sup>62</sup> The reference to the international level here is less important than the reference to the specifically European level, though the former indicates the underlying vision. I believe Böckenförde's view of the special conditions of the European project is more significant. "One can get close to them," he argues, "if one recognizes that the European Union, also on the level of integration of the EC, is a community of nations and nation states."<sup>63</sup> A commitment to respect the identity of its member states is one of the implications that follow from that view of the nature of the European Union.

I return to the issue of identity below.<sup>64</sup> Noteworthy for now is Böckenförde's interpretation of the nature of the European Union through an internationalist lens as a union of nations and, especially, nation-states—much like an international organization. That interpretation implicitly rejects the established jurisprudence of the European Court of Justice, which, as presented above, consistently rejected that interpretation of the nature of the Treaties. Now, it is perhaps possible to argue that Böckenförde subsumes the co-existence of the national and supranational levels, from a normative standpoint, to the central normative issue of democratic legitimacy. Still, this would be a strikingly depoliticized and unrecognizable interpretation of European integration, whose development over time has been nothing if not a constant battle between political forces, including constitutional or apex courts, some of which pushed for greater supranational integration and others opposed it and correspondingly sought to keep nation-states in a position of control.<sup>65</sup> Assessed against the background of that protracted political battle, Böckenförde's interpretation of the European Union as an international organization takes sides in this debate and is far from being a neutral or scientific description. This vindicates,

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individual states would be weakened to such an extent that the parliaments of the Member States would no longer be able to convey adequately that legitimation of the sovereign powers exercised by the Union.

<sup>62</sup> BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 358.

<sup>63</sup> *Id.*

<sup>64</sup> See *Infra* Part C.IV.

<sup>65</sup> G. Federico Mancini, *Europe: The Case for Statehood*, 4 EUR. L.J. 29, 31 (1994) ("[T]he closer the Union moved toward statehood, the greater the resistance to the attainment of this goal becomes.").



I believe, Ronald Dworkin's adamant plea that, in law, one searches in vain for an Archimedean standpoint from which to describe something without at the same time also engaging in a process of interpretation. Through interpretation, one is taking sides in normative debates, whether one is willing to acknowledge it or not.<sup>66</sup> "Descriptions" of the nature of the European Union are no exception.

### C. Horizontal Fragmentation and Vertical De-Fragmentation

In this Part, I aim to put Böckenförde's conception of European integration to the test by assessing it against political developments that he could not have addressed directly<sup>67</sup>—namely the normative transformations within nation-states that, after acceding to the EU, have rolled back the institutional structures of constitutional democracy. This authoritarian backsliding adds important complexity to European integration.<sup>68</sup> As presented above, Böckenförde sees the European supranational level primarily as the place from where market forces are unleashed upon the national welfare states and proceed to creatively destroy the underlying social bond. Yet recent developments, principally—though not exclusively<sup>69</sup>—in Eastern Europe, suggest the need for a more comprehensive framework not only for what the EU could or should become, but also of what the EU already is. They suggest that, rather than being the source of vertical fragmentation, the EU's role in this existential crisis can be one of vertical *defragmentation* of normative transformations within nation-states. I use defragmentation here in its usual meaning in computer science as the method for restoring unity or integrity of a hard drive.

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<sup>66</sup> See RONALD DWORKIN, *Hart's Postscript and the Point of Political Philosophy*, in JUSTICE IN ROBES 140–86 (2006).

<sup>67</sup> For a discussion of some related issues in the context of the crisis of West German democracy in the 1970s, in the aftermath of the Radicals Decree and the German Autumn, see BÖCKENFÖRDE, *The Exercise of State Authority in Extraordinary Circumstances*, in CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 1, at 108–32.

<sup>68</sup> For the alternative use, see Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEM. 1, 5–19 (2016).

<sup>69</sup> My examples in this Article are from Eastern Europe. It has been argued that populism comes in a variety of forms, only some of which steer politics into an authoritarian direction. See Bojan Bugarič & Alenka Kuhelj, *Varieties of Populism in Europe: Is the Rule of Law in Danger?*, 10 HAGUE J. RULE LAW 21–33 (2018) (distinguishing between populism in Hungary and Poland, which undermines the rule of law and democracy, and populism in Western Europe, whose civilizational emphasis does not, in the authors' view, pose existential threats to the essence of liberal democracy). For analyses of the political scene in some of the Western European countries, see Perry Anderson, *The Italian Disaster*, 36 LONDON REV. BOOKS 1, 3–16 (2014); Jan-Werner Müller, *Austria: The Lesson of the Far Right*, N.Y. REV. BOOKS (2016), <http://www.nybooks.com/daily/2016/07/25/austria-freedom-party-populism-lesson-far-right/>.

The following table might be useful in mapping different configurations:

	Fragmentation	De-Fragmentation
Horizontal	1	3
Vertical	2	4

Position 1 (horizontal fragmentation) represents typical instances of differences in the interpretation and application of EU law across national jurisdictions leading to the fragmentation of the European legal space. Either benign differences in the use of common concepts—“goods,” “worker,” “disability,” etc.—or, less benignly, failures to implement EU directives or national violations of EU law, are all sources of horizontal fragmentation. As the authoritative interpreter of the Treaty, the ECJ has monopolized the meaning of fundamental EU concepts and invoked the imperative of securing the effectiveness of EU law to reduce horizontal fragmentation. The causes of this type of fragmentation have also led to fragmentation of other types, namely political and ideological battles for the most part, or differences among constitutional traditions on occasion. The discourse of fragmentation itself has been political and, as I argue below, connected to a particular understanding of the demands of the market. Position 2 (vertical fragmentation) represents Böckenförde’s theorizing of the role—as opposed to the discourse—of the EU vis-à-vis member states in position number 2, through the fragmentation of the supranational market and national social distributive policies. The authoritarian backsliding, however, puts the EU in the different position of seeking to restore normative integrity within member states. That role (position 4) is one of vertical de-fragmentation, that is, of restoring unity within the normative software at the national and, indirectly, supranational levels.

### *I. Authoritarian Backsliding*

The details of the authoritarian backsliding in countries such as Hungary and Poland are sufficiently well documented, and they do not need to be recounted here at length.<sup>70</sup> In brief, despite hopes that European integration would keep the authoritarian demons at bay,<sup>71</sup> these demons are making a forceful comeback in countries where governments elected to office in free and at least moderately fair elections have put tremendous pressure on the institutional structures of their fledgling constitutional democracies with a goal toward neutralizing political resistance and gaining lasting and effective control over

<sup>70</sup> See generally R. Daniel Kelemen, *Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union*, 52 *GOV’T AND OPPOSITION* 211–38 (2017); Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* 3–47 (2017); Mark Dawson & Elise Muir, *Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law*, 14 *GERMAN L.J.* 1959–79 (2013).

<sup>71</sup> TONY JUDT, *A GRAND ILLUSION? AN ESSAY ON EUROPE* (1996).

the state. Their recognizable, age-old goal is to amass power and protect it from the mechanisms that, in a constitutional democracy, limit both its reach and consolidation in time. As a result, independent institutions—the judiciary as well as independent agencies—such as those overseeing the media, or even universities, have come under crushing political pressure. Important battles have been fought over constitutional amendments, electoral laws, lawmaking procedures, and changes to media protections. The scale of these political projects, the pace at which they unfold, and the complex ways in which they undermine existing constitutional arrangements from within pose important theoretical challenges to constitutional and political theory. The risk that other states—Romania being a perpetual candidate, Bulgaria farther along down this path than it is generally recognized, the Czech Republic and Slovakia with all the stars aligned for the backsliding to commence, focusing solely on the central and eastern flank of the EU—are one election cycle away, and sometimes less, from empowering populist forces with such a constitutional agenda makes these challenges urgent.

The fact that a constitutional democracy—especially one of recent pedigree such as the countries of Central and Eastern Europe—might experience authoritarian backsliding, is by itself unsurprising. There is no “absolute security,” Böckenförde wrote, “against the threat to freedom that results from human coexistence.”<sup>72</sup> For this reason, the institutions of constitutional democracies need to continuously ensure that the state’s authority is exercised not arbitrarily but according to the state’s fundamental purposes and “subject to regular processes as well as accountability and oversight.”<sup>73</sup> But when such developments do occur, they generate what one could call the *horizontal* fragmentation of the concern for the common good. In the particular case of the populist surge in Europe, authoritarian backsliding has involved the use of religion in a sectarian manner and the willful misrepresentation of a nation’s history in order to artificially realign social coherence with political self-interest. This manufactured homogeneity has threatened liberty and the political-liberal character of the state and the basis of its social unity.<sup>74</sup> As state policy, these political developments have eroded the values of pluralism and (relative) heterogeneity that, as Böckenförde argues, constitute the fundamentals of the liberal order.<sup>75</sup>

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<sup>72</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The State as an Ethical State*, in CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 1, at 92.

<sup>73</sup> *Id.*

<sup>74</sup> The debate around reasonable pluralism in democratic societies has been central to contemporary Anglo-American political thought. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993). Here, as elsewhere, Böckenförde engages neither that debate nor that philosophical tradition post-Hobbes.

<sup>75</sup> See ERNST-WOLFGANG BÖCKENFÖRDE, *The Concept of the Political: A Key to Understanding Carl Schmitt’s Constitutional Theory*, in CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 1, at 75 n. 5.

By introducing authoritarian backsliding in a way disconnected from the fragmentation that Böckenförde sees at the center of the relation between the supranational level and the nation-state, I seem to imply a sharp distinction between horizontal and vertical fragmentation. But perhaps one could argue, and some have indeed gestured in that direction,<sup>76</sup> that backsliding is inherently related to vertical fragmentation in precisely Böckenförde's sense. A strong version of this thesis sees the vertical fragmentation of the concern for the common good as one of the causes of the authoritarian backsliding that results in horizontal fragmentation. This might seem like a remote possibility given the relatively short time between EU accession, and the onset of the backsliding suggests that there has not been sufficient time for the fragmentation—as Böckenförde theorizes it—to take hold. But counting from the moment of accession might be unwarranted. It is worth recalling that, long before these states joined the EU, they had been under Brussels's command as to the structure of their economies. The implementation into their legal system of a massive *acquis communautaire*, and generally under oversight that left little to chance—or, for that matter, to their self-governing citizens—when it came to the organization of the state and the institutions of society. This degree of supranational command, according to this thesis, has kept democratic states weak by discouraging mechanisms of democratic responsiveness and instead leaving the collective future of self-governing people in the hands of elites who stood to benefit from implementing market commandments dictated by supranational institutions.

To evaluate this thesis, I note first that, given the extent of integration in Europe, the very distinction between national and supranational has taken on a new and diluted meaning. More specifically in the case at hand, EU membership has indeed enabled some of the proto-authoritarian governments to use reliable EU funds to mitigate the economic blow of their partisan domestic policies. But this is a far cry from placing supranational membership among the causes of the authoritarian policies. Before delving too deeply into historical counterfactuals, it remains unclear whether backsliding would not have happened—and perhaps a lot sooner—had it not been for the EU's role and influence.<sup>77</sup> The argument that the policies of austerity dictated from the EU have set in motion the authoritarian backsliding requires careful scrutiny. On one level, it is true that austerity measures have generated political upheaval at the national level. But that upheaval did not take an authoritarian cast in countries that were most affected—Greece and Ireland

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<sup>76</sup> See, e.g., Dani Rodrik, *Populism and the Economics of Globalization*, J. INT'L BUS. POL'Y (2018), [https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism\\_and\\_the\\_economics\\_of\\_globalization.pdf](https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism_and_the_economics_of_globalization.pdf). For the connection between Washington consensus and democratic consolidation in Eastern Europe, see generally Bojan Bugarič, *A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-between" Democracy and Authoritarianism*, 13 INT'L J. CONST. L. 219 (2015).

<sup>77</sup> It makes for useful reading to see how, even before the authoritarian tempest arrived, wise and thoughtful thinkers predicted it. See AN UNCANNY ERA: CONVERSATIONS BETWEEN VÁCLAV HAVEL AND ADAM MICHNIK (Elzbieta Matynia trans., 2014) (identifying, in 2007, the dangers of future autocrats such as Viktor Orbán, Václav Klaus, Jarosław Kaczyński, and Viktor Yanukovich).

among them—though it thus far did in countries where the impact has been felt but was not significant (Hungary and Poland). Political scientists and theorists are at the early stages of processing these developments, and careful studies will likely unearth a complex dynamic instead of the unidirectional causality that underpins the strong thesis between vertical and horizontal fragmentation.

Note also that when the EU has been criticized for its role in the backsliding, it has typically been for its failure to uphold the rule of law more quickly and effectively. To give just one example, in over seven years of the systematic overhaul of the Hungarian state, the only definitive violation of European law has been found to be the forced retirement of the judges on the Hungarian Constitutional Court—an obvious political measure that was meant to allow the ruling party to capture the Court and that violated the EU prohibition of discrimination on the basis of age.<sup>78</sup> Even then, the ECJ's decision came too late for the forcibly-retired judges to be reinstated.<sup>79</sup> Perhaps this is an example of inauthenticity. Yet, that would bracket the European Commission's vocal advocacy against backsliding, although the Commission did not—until recently, and even then, haltingly<sup>80</sup>—use some of its most effective political and institutional means of intervention against Hungary.

Rather than pointing to some ideological affinity between the supranational institutions and national autocrats, understanding the EU's limited intervention requires asking what action can be taken and how to justify any such action. The reasons for the EU institutions' reluctance include the complex political situation—for instance, Hungary's votes within the EPP. But the availability and legitimacy of tools for intervention is equally if not more important in this context. Unlike previous constitutive Treaties, Lisbon does give doctrinal form to these commitments to freedom, the rule of law, solidarity, tolerance, and justice.<sup>81</sup> It also provides tools to use in situations where states violate their commitments, although these tools are almost exclusively political and thus subject to the overall political dynamic. The European Commission has developed mechanisms, such as the Rule-of-Law-

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<sup>78</sup> Case C-286/12, *Comm'n v. Hungary*, 2012 E.C.R. I-687.

<sup>79</sup> Gábor Halmai, *The Early Retirement Age of the Hungarian Judges*, in *EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE* (Fernanda Nicola & Bill Davis eds., 2017).

<sup>80</sup> See *infra* Part C.IV.

<sup>81</sup> Consolidated Version of the Treaty on European Union art. 2, Oct. 10, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU]:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Framework, to bring disobedient states into compliance.<sup>82</sup> These special mechanisms coexist alongside generally available tools, such as infringement actions through which the Commission,<sup>83</sup> acting *sua sponte* or pursuant to third party notifications, initiates political and possibly legal action against a member state alleged to have violated a Treaty obligation. But an unsettled core question concerns the normative basis for the EU's intervention in the constitutional affairs of its member states. What entitles the EU to apply political or legal pressure on its member states whose duly elected representatives have chosen to enact legislation that, in their judgment, falls within the mandate for which the self-governing citizens have elected them into office? This vertical de-fragmentation raises core questions about how to conceptualize the normative interface between the national and supranational legal orders in the EU.

## *II. Values and Self-Government*

I turn now to the question of what the EU can do about horizontal fragmentation and the legitimacy of its acts. On one level, the answer to the basis of the EU's intervention in domestic constitutional and political developments might seem deceptively straightforward. Article 2 TEU lists a set of values (including freedom, the rule of law, solidarity, tolerance, and justice) that all state members of the European Union must respect. At first blush, enforcement of the commitment to these values provides sufficient ground for supranational intervention. Yet, Böckenförde's work cautions against placing such weight on values.

Böckenförde draws a distinction between values as the foundation of a legal order—which he rejects—and values as part of the legal order—which he accepts.<sup>84</sup> The argument against using values to legitimize the foundation and the formative power of the law has three prongs. First, Böckenförde argues that while values can ground individual conduct within a legal order, they are ill-suited to ground the order itself because they rely on receding rational argumentation in the face of experience, emotion, and contemplation. Second, value-based grounding of law invites relativism and is ultimately irrational because issues such as ranking of (conflicting) values are *a priori* of the ethical world and therefore cannot provide the kind of foundation that the pacifying function of a legal system requires—namely universal validity, rational accessibility, and the fundamental possibility

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<sup>82</sup> See Communication from the Commission to the European Parliament and the Council: A new EU Framework to Strengthen the Rule of Law, COM/2014/0158, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0158&from=EN>.

<sup>83</sup> For systemic infringement, see Kim Lane Scheppele, *Enforcing the Basic Principles of EU Law through Systemic Infringement Actions*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION 105–32 (Carlos Closa & Dimitry Kochenov eds., 2016).

<sup>84</sup> See generally ERNST-WOLFGANG BÖCKENFÖRDE, *Critique of Value-based Grounding of Law*, in CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 1, at 217–34.

of rational communication.<sup>85</sup> Finally, and despite appearances to the contrary, reflection on values in the lifeworld is bound entirely to historical-cultural moments. This has the perverse effect of offering a “semblance of grounding”<sup>86</sup> that mistakenly renders the search for alternative grounds superfluous while at the same time “opening the floodgates” to the subjective views of legal actors about the interpretation and ranking of values. This interpretative process confers an aura of legitimacy to prevailing societal values which is indefensible in a pluralist society.

Böckenförde’s critique was intended for domestic contexts. When extended to the supranational context, the distinction between values as the foundation of a legal order and values as part of the legal interpretation appears less clear-cut than Böckenförde argues.

There are difficulties involved in transnationalizing Böckenförde’s critique of values. While the EU is a legal order, it is not immediately apparent that the critique of values holds at the supranational level. Provisions such as Article 2 identify values common to domestic constitutional orders within the European Union. That commonality can arguably count as evidence of the context-transcending aspect of those values and of their claim to transnational and arguably universal validity as a feature for their special protection.<sup>87</sup> From the internal point of view of European Union law, Article 2 TEU represents the overlapping normative core of municipal constitutional orders. Article 2 Europeanizes the “basic structure” of the constitutions of the EU Member States.

Still, there is more to Böckenförde’s fundamental objections to grounding law on values than this answer can address. Even conceding the plausibility of interpreting Art. 2 as Europeanizing the basic normative structure of national constitutions, the inevitability of conflicting interpretations of values between states and the EU creates difficult challenges. How a political community chooses to interpret abstract values, whether through its elected representatives or directly, is an indispensable dimension of its self-government. While abstract values might seem common, the specifics of their meaning are so central that the process of interpretation must itself remain within the realm of political self-determination. This suggests a procedural solution to the inevitable problem of interpretative conflict, in the form of deference to the level of government where processes of collective self-determination specify the meaning of abstract values. The question is, what is the direction of deference, and what, if any, are its limits?

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<sup>85</sup> *Id.* at 229.

<sup>86</sup> *Id.* at 232–33.

<sup>87</sup> See JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS (2012).

Böckenförde's constitutional theory suggests a plain and unsurprising answer to the first question. Given its current state of development, and specifically its failure to establish processes of democratic legitimation, the EU must defer to the member states. But does the reasoning behind the imperative of deference—democratic self-government—apply even when states have taken an authoritarian turn, and when that turn is seen as affirming the nation's project of self-government? In the Eastern European examples, the political majorities that carried out the transformative political and constitutional project have been voted into office in regularly held elections whose fairness has not been seriously contested. In Hungary, the Fidesz majority has also been returned into office even after the scale of the political project became apparent. Thus, if deference entails respect for a political community that governs itself through the institutions of a nation-state to define, through its internal processes, the implications of its commitment to abstract values in its own cultural context and specific historical moment, and if that meaning must remain open to revision as state institutions fulfill their duties of responsiveness vis-a-vis their citizenry, then the constitutional moment in Hungary and Poland deserves respect as an instance of political self-government.

The gravitational pull of the Böckenfördian idea of the state undercuts the possibility of a European standpoint from which to consider the internal disintegration of the common good. If the deference is owed to nation-states, then the values listed in Art. 2 are an instance of "bad abstraction"<sup>88</sup> that should not enable the European Union to undermine the freedom of self-governing political communities to define and live by the constitutional commitments they make to themselves. The European legal space must remain discontinuous in the sense that self-government requires that domestic jurisdictions ought to remain able to protect their autonomy and mechanisms of meaning-creation though a residual capacity of normative closure vis-a-vis the supranational legal order. The downside, however, is that the capacity for normative closure also immunizes the authoritarian turn.

### *III. The Search for Neutral Principles*

Assuming *arguendo* that Böckenförde's critique of values is sound and that grounding law on values inevitably leads to interpretative conflicts, the solution to these conflicts is interpretative deference. As we have seen, that deference itself is not grounded in values but in respect for self-determination of the kind that—in Böckenförde's account and considering the current state of European integration—is currently possible only at the national level. But consider again the question as it presents itself in the context of a member state of the European Union that has adopted measures that undermine the equal standing of its citizens and threaten the social bond. Suppose further that whatever

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<sup>88</sup> BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization, Europeanization, and Individualization*, *supra* note 1, at 337.



domestic safeguards the domestic constitutional order might have had in place could not be effectively deployed against these measures. Are there any limits to the degree of deference to which nation-states are entitled from the European Union?

Any such limits would have to place the EU's authority to intervene on neutral grounds, that is on grounds whose legitimacy member states cannot reasonably reject.<sup>89</sup> States cannot reject intervention on grounds that unquestionably demonstrate respect for EU institutions for domestic processes of self-government. For instance, justifying EU intervention on specific interpretations about the meaning of a value is not a neutral ground, because member states are entitled to deference with regard to the interpretation of those values. This poses a challenge because, as Böckenförde correctly sees, virtually all legal problems have a value dimension which can be specified and made the object of interpretative disagreement. The only solution to this conundrum is to identify situations when meaning has been already settled at the national level but the state has acted in violation of its own interpretative processes, either in specific cases, or by undermining institutions such as courts that play a central role in those processes.

This, I believe, describes quite accurately the pattern of the EU's intervention in Romania in 2012 and currently in Poland. In both cases, political branches failed to comply with the constitutional court's authoritative interpretation of the meaning of the constitution and sought to limit the independence and authority of the judicial system that produced that authoritative interpretation. Political majorities tried to avoid the effect of the decisions of the Constitutional Court by prohibiting their timely publication in the official state journal. In Romania, the executive openly threatened to disobey unfavorable decisions that derailed its attempt to unseat the President.<sup>90</sup> In Poland, the majority sought to pack the constitutional court with loyal judges. In both countries, the political majority moved to drastically limit the jurisdiction of the constitutional court through legislation that the court itself later struck down as unconstitutional. Attacks on the separation of powers and the independence of the judiciary provided the "neutral principles" on which EU institutions could base their intervention. In Romania's case, the existence of a Mechanism of Cooperation and Verification set in place at the time of the country's accession to the EU in 2007 provided the structure for the formal intervention as well as the framework for exerting informal pressure. Without such a mechanism, the response in Poland's case has been the Rule-of-Law framework that the European Commission had created recently.<sup>91</sup>

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<sup>89</sup> I mean neutrality in the well-established meaning of Herbert Wechsler. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>90</sup> See generally Vlad Perju, *The Romanian Double Executive and the 2012 Constitutional Crisis*, 13 INT'L J. CONST. L. 246 (2015).

<sup>91</sup> For details, see EUR. COMM'N, *Commission Opinion on The Rule of Law in Poland and The Rule of Law Framework: Questions & Answers* (June 1, 2016), [http://europa.eu/rapid/press-release\\_MEMO-16-2017\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm).

By contrast, the Hungarian experience did not afford comparable neutral grounds on which European institutions could intervene. The reason was not that the Fidesz government left the Constitutional Court alone. On the contrary, the government packed the Court with supportive judges, forced the unfriendly ones to retire, and altered the Court's jurisdiction—all part of a successful effort to neutralize the Court. But the difference was that some of these and many other measures were introduced by way of constitutional amendment. A solid parliamentary majority allowed Fidesz to amend the constitution and eventually replace it with a new constitution, which in turn was later amended. European officials criticized Hungary's constitutional effervescence but, at least according to this normative reconstruction, lacked the grounds from which to take measures comparable to those the EU would later adopt against Poland or Romania.<sup>92</sup>

So, it seems that this neutral ground fits and justifies the pattern of the EU's intervention in the context of an authoritarian turn at the national level. And yet, this account is in tension with other parts of Böckenförde's constitutional theory. The relevant distinction in the EU's pattern of intervention tracks not the severity of the measures that undermine the unity of the state, as much as it is connected to contingent criteria such as the size of a parliamentary majority or the specific constitutional amendment procedures. The Hungarian constitution is much easier to amend than the Romanian constitution, which calls for a referendum, and comparatively easier than the Polish constitution.<sup>93</sup> The election returns gave Fidesz a super-majority in Parliament, which it exploited with dizzying effectiveness. But ascribing theoretical relevance to that fact and to these distinctions places the state under the constitution, a view that Böckenförde has opposed.

Perhaps, however, Böckenförde's theories can be used to show that Hungary's constitutional transformations reveal Fidesz's effectiveness in undermining the ethical state and ought not to be recognized as the ground for treating Hungary more—rather than less— leniently. The difficulty here is that Böckenförde's theory removes any standpoint from which to make this argument. Our question is whether the European Union can legitimately intervene from the supranational level when domestic safeguards have failed to bar or contain an authoritarian turn. A legitimate intervention marks a limitation of the deference to which nation-states are entitled. Yet, if anything, a wholesale constitutional transformation such as Hungary's heightens the deference to which, according to Böckenförde, a political community is entitled in the immediate aftermath of engaging in constitution-making, one of the most consequential exercises of self-government.

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<sup>92</sup> One exception is the judgment on the retirement of judges. See Case C-286/12. *Comm'n v. Hungary*, 2012 E.C.R. 687.

<sup>93</sup> Under the new, 2013 Hungarian constitution, the procedure is laid down in Article S. See *Tekst Konstytucji Rzeczypospolitej Polskiej ogłoszono w Dz.U. 1997, NR 78 poz. 483, art. 235; art. 151, Const. Ro., para. 3.*

#### IV. National Identity: Doctrine and Politics

If the European Union is a community of nations and nation-states, as Böckenförde argues, it follows both that the Union must find ways to bring European politics closer to the peoples of Europe (the “community” aspect) and the Union must respect the identity of the component member states.<sup>94</sup> But, as the recent history of European integration shows, specific interpretations of national identity can create a tension between these two directions.

Starting with the Treaty of Maastricht,<sup>95</sup> the constitutive treaties of the European Union have committed supranational institutions to respecting the national identity of its constitutive member states.<sup>96</sup> The early guarantee was general, leaving the meaning of national identity open to interpretation while connecting it firmly to the protection of processes of collective self-determination.<sup>97</sup> A crucial development occurred when the national identity clause was revised in the Amsterdam Treaty, which detached identity from democracy. Article 6(3) mentioned only that “The Union shall respect the national identities of its Member States”, thus presumably opening up the possibility that identity would have a broader meaning than the processes of self-government.<sup>98</sup> This essentially unmoored identity from democracy, and made the door at first ajar<sup>99</sup> and, post-Lisbon,

<sup>94</sup> BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 358.

<sup>95</sup> Art. F(1) TEU of the Maastricht Treaty (“The Union shall respect the national identities of its member states.”).

<sup>96</sup> Article 4(2) TFEU states that:

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

<sup>97</sup> One assumes this explains in good part Böckenförde’s support for that commitment. BÖCKENFÖRDE, *Which Path is Europe Taking?*, *supra* note 1, at 358. Constitutional identity represents a distinctively German approach in origins (“identitätsbestimmende Staatsaufgaben”), mentioned in *passim* as early as *Solange I* and more heavily relied upon more in the *Lisbon* decision. See generally Monika Polzin, *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law*, 14 INT’L J. CONST. L. 411 (2016).

<sup>98</sup> Article F(1) TEU of the Maastricht Treaty was later replaced by Article 6(3) TEU of the Amsterdam Treaty. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam] (“The Union shall respect the national identities of its Member States.”).

<sup>99</sup> The preamble of the Charter of Fundamental Rights of the European Union reads: “[N]ational identities of the Member States and the organization of their public authorities at national, regional and local levels.” Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 02, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>.

wide open to new and expansive interpretations of identity. Indeed, in the Treaty of Lisbon, identity receives greater specification. Article 4(2) TFEU commits the Union to respect the national identity of the member states “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security.” This specification led scholars to describe identity as “an important qualification of the rule on the primacy of EU law, and a modification of the case law under *Costa v. ENEL*,”<sup>100</sup> and thus “a strong re-affirmation of the non-federal structure of the European Union.”<sup>101</sup> Because the European Union continues to fall short of a deliberately federative design even under the general Lisbon framework, and because a common political consciousness that binds together the people of Europe remains missing, one can assume that this more specific protection of identity would, in the abstract, win Böckenförde’s approval. He might, however, be less approving of a shift, which is not entirely surprising, in the interpretation of national identity from the paradigm of self-government to one that makes values central to the meaning of identity. The value-centered conception of identity opens up the constitutional space to interpretative claims that are difficult to adjudicate.

Looking back at the past decade or so, it seems fair to conclude that the identity guarantee has put national constitutional courts in an interesting position. On the one hand, the guarantee offers them the opportunity to distill the normative core of their legal order and, by shielding it from supranational encroachment, to expand their influence and power vis-à-vis the European Union. On the other hand, courts have often struggled to identify that normative core while maintaining a patina of credibility. The elements that, until recently, national courts have subsumed under the rubric of identity are sometimes banal and common. There is a long list of usual suspects—such as the protection of democracy and fundamental rights—that are always defined at a strategically high level of abstraction.<sup>102</sup> The Italian Constitutional Court, for instance, has mentioned the “fundamental principles of our constitutional order or the inalienable human rights.”<sup>103</sup> Not to be outdone, the Czech Constitutional Court singled out the “foundations of state sovereignty or the essential attributes of democracy or the rule of law.”<sup>104</sup> Other

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<sup>100</sup> Leonard F.M. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 *UTRECHT L. REV.* 36, 48 (2010) (remarking that “the provision of Article 4(2) EU forms an important qualification of the rule on the primacy of EU law, and a modification of the case law under *Costa v. ENEL*”).

<sup>101</sup> Bruno De Witte, *The Question of Treaty Architecture: From the “Spinelli Draft” to the Lisbon Treaty*, in *EU FEDERALISM AND CONSTITUTIONALISM—THE LEGACY OF ALTIERO SPINELLI* (A. Glencross & A. Trechsel eds., 2010).

<sup>102</sup> von Bogdandy & Schill, *supra* note 49, at 1436.

<sup>103</sup> *Id.*

<sup>104</sup> 8.3.2006 (ÚS) [Decision of the Constitutional Court of March 8, 2006], Case Pl. 50/04 (Czech); 3.5.2006 (ÚS) [Decision of the Constitutional Court of May 3, 2006] Case Pl. 66/04.

candidates include the principle of certainty or the general principles of non-discrimination, principle of proportionality, or the obligation to give reasons.<sup>105</sup> Given the generality of these principles, all of which are present in both the European and the domestic (*all* the domestic) legal orders, it seems that their specific interpretation in a given jurisdiction is part of that jurisdiction's identity. This is identity as turf.

The most substantive and elaborate answer comes, unsurprisingly, from the German Constitutional Court. In its *Lisbon* judgment, the German Court offered detailed specifications on what areas of social and political life ought to be preserved for the German *demos*. The specification should be read through the prism of the German Court's interpretation of Article 79 (3) of the Basic Law as preventing German authorities from a supranational transfer of powers that undermined self-government and thus democracy. The view of the German Constitutional Court in the *Lisbon* judgment is that, unlike states in a federation, the member states of the EU remain sovereign and in control of the association they have formed. This view has direct implications for the nature of the European legal order, which is "derived," rather than autonomous in the full-blown way that the *Costa* jurisprudence envisions (and as the German Constitutional Court itself accepted in the *Solange* cases). Against this background, the list of areas "particularly sensitive for the ability of a constitutional state to democratically shape itself" include decisions about criminal law, war and peace, fiscal policy and, importantly, the social welfare state.<sup>106</sup>

The approach of the German Constitutional Court has been, in this case as in past cases, relatively benign to the extent that the Court "always barks but never bites."<sup>107</sup> Nevertheless, the constitutional courts of Central and Eastern European countries have drawn inspiration from the German approach without sharing the restraint of the Karlsruhe judges. In a much-discussed case involving the EU decision to transfer over 1000

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<sup>105</sup> For a detailed study, see von Bogdandy & Schill, *supra* note 49.

<sup>106</sup> The full list includes:

[D]ecisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5).

Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], June 30, 2009, 2 BvE 2/08, para. 252.

<sup>107</sup> Christoph U. Schmid, *All Bark and No Bite: Notes on the Federal Constitutional Court's "Banana Decision,"* 7 EUR. L.J. 95–113 (2001).

asylum seekers from Italy and Greece to Hungary, the Hungarian Constitutional Court invoked German constitutional law<sup>108</sup> to anoint itself competent to review that EU legislation does not violate the fundamental rights guaranteed under the Hungarian constitution, that the joint exercising of a competence shall not violate Hungary's sovereignty (sovereignty control). Alternatively, it shall not lead to the violation of constitutional self-identity (identity control).<sup>109</sup> The Court's analysis included a presumption that Hungary maintained its sovereignty after joining the EU. The Hungarian Court listed a few values as instances of what constitutes its constitutional identity; these values included the accomplishments of Hungary's historical constitution as mentioned in the preamble to the recently enacted Fundamental Law. Importantly, this list is illustrative only as the Court leaves the list of what constitutional identity entails open and subject to revision in future cases. Given the authoritarian turn currently underway in Hungary, it is unsurprising that the ruling party will likely use the country's constitutional judges to defy EU law and resist political pressure from the EU's political institutions. More surprising is that the concept of constitutional identity is so malleable as to allow the Hungarian court, as well as other national constitutional courts engaged in comparable projects,<sup>110</sup> the liberty to redefine the terms of the interaction between the national and supranational levels.

The challenge that this turn to identity poses to European integration is apparent for all to see. Yet, arguably, European constitutionalism need not stand by and watch Europe's normative collapse. Through its inclusion into the Treaty, the concept of national identity has become a concept of EU law. As such, the concept needs to be interpreted. It is true that, thus far, the ECJ has adopted a pragmatic, case-based approach to the definition of national identity. Its relevant doctrines include cases about surnames deriving from the law on the abolition of nobility, and amounts to a limitation of the freedom of movement justified on grounds of national constitutional identity;<sup>111</sup> upholding a national interpretation of human dignity;<sup>112</sup> holding that a national language constitutes "a

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<sup>108</sup> See Alkotmánybíróság (AB) (Constitutional Court) Nov. 30, 2016, 22/2016 (XII.5) (Hung.), [http://hunconcourt.hu/letoltesek/en\\_22\\_2016.pdf](http://hunconcourt.hu/letoltesek/en_22_2016.pdf). For analysis, see Katalin Kelemen, *The Hungarian Constitutional Court and the Concept of National Constitutional Identity*, 15–16 IANUS—DIRITTO E FINANZA 23, 30–32 (2017).

<sup>109</sup> For an early analysis and critique, see Gábor Halmai, *The Hungarian Constitutional Court and Constitutional Identity*, VERFASSUNGSBLOG (Jan. 1, 2017), <http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>.

<sup>110</sup> See Kriszta Kovacs, *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East and Central European Courts*, 18 GERMAN L.J. 1703 (2017).

<sup>111</sup> Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, 2010 E.C.R. I-13693.

<sup>112</sup> Case C-36/02 Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9609.

constitutional asset which preserves the nation's identity;<sup>113</sup> freedom of assembly and expression;<sup>114</sup> media diversity;<sup>115</sup> and protection of minors.<sup>116</sup> All these cases involve some situation of deferral of EU law to national law, mostly on some cultural grounds.<sup>117</sup> The ECJ has been reluctant to accept the plea to recognize as a matter of doctrine EU law's commitment to national individuality.<sup>118</sup> But, and this is the important point, as the ultimate interpreter of the European legal order, the ECJ can contain and control the effect of national identity by centralizing its meaning. While recent case-law of the German Constitutional Court suggests that tensions would inevitably ensue,<sup>119</sup> the ECJ's position would be strongly supported by the much tested argument that the effectiveness of EU Law would be imperiled if the European normative space became fragmented, if each member state were allowed to hide behind its national identity in order to selectively apply EU law, the Luxembourg judges could set out to define a range of acceptable meanings of the concept of national identity. The ECJ is well versed in this technique, and has applied it countless times throughout its jurisprudence—think, for instance, of the meaning of “worker,”<sup>120</sup> “disability,”<sup>121</sup> or “public service”<sup>122</sup>—in order to homogenize the European legal space.

Note that this strategy for containing the perverse use of the national identity guarantee relies on the integrative function of supremacy of EU law. And Böckenförde's concerns

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<sup>113</sup> Case C-391/09, *Malgozata Runevič-Vardyn and Lukasz Pawel Wardyn v. Vilniaus miesto savivaldybes administracija and Others*, 2011 E.C.R. I-3787.

<sup>114</sup> Case C-112/00, *Schmidberger v. Austria*, 2003 E.C.R. I-5659.

<sup>115</sup> Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und -vertriebs GmbH v. Heinrich Bauer Verlag*, 1997 E.C.R. I-3689.

<sup>116</sup> Case C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 2008 E.C.R. I-00505.

<sup>117</sup> Scholars have argued that constitutional identity in fact re-packages the court's long-time jurisprudence of exceptions to the freedom of movement. See Theodore Konstantinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order Within the Framework of National Constitutional Settlement*, 13 *CAMBRIDGE Y.B. OF EUR. LEGAL STUD.* 195 (2011).

<sup>118</sup> See Opinion of AG Maduro in Case C-160/03, *Spain v. Eurojust*, 2005 E.C.R. I-2077; Opinion of AG Maduro in Case C-213/07, *Michaniki*, 2008 E.C.R. I-10999, para. 31.

<sup>119</sup> In the *Gauweiler* order for reference, the German Constitutional Court pointed out the tensions between the conception of national identity under the Article 4(2) TEU and the broader protection for national constitutional identity under the German constitution. For an illuminating analysis, see Monica Claes & Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, 16 *GERMAN L.J.* 917, 938–41 (2015).

<sup>120</sup> Case 75/63 *Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, 1964 E.C.R. 177.

<sup>121</sup> Case C-13/05 *Chacón Navas v. Eurest Colectividades SA*, 2006 E.C.R. I-6467.

<sup>122</sup> Case 152/73 *Giovanni Maria Sotgiu v. Deutsche Bundespost*, 1974 E.C.R. 153.

about the lack of democratic legitimacy at the European level would presumably be activated. The lack of a democratic pedigree of the European law is more fundamental than the possibly beneficial effects of its application. Put differently, while the erosion of the rule of law within the EU member states is unacceptable from a Böckenfördian perspective, supranational intervention to redress that erosion is equally—and perhaps even more—unacceptable, given the lack of democratic legitimation, at least at this moment, at the European level. Yet, respecting the national identity of member states in such cases undermines the equally important project of building a European community by bringing European politics closer to the peoples of Europe.

#### **D. Conclusion**

In this Article, I have contrasted the vertical fragmentation that Böckenförde associates with the division of authority between the national and supranational levels of government on the one hand, with the horizontal fragmentation that results from the authoritarian backsliding within EU member states on the other. With the former, the EU's own democratic deficit makes the supranational level the very source of fragmentation of the concern for the common good, whereas with the latter the EU plays the different role of protecting the rule of law and the possibility of national self-determination from sustained political attacks. Because EU institutions seek to preserve the constitutional and normative integrity of nation-states, I have identified that second role as one of vertical defragmentation. There are obvious tensions between these two roles, and the question of which if any best captures the current and possible trajectories of European integration remains to be resolved. The solution to Böckenförde's query between national and supranational statehood might turn, to an extent that even he might find surprising, on the answer to that question.