Revolutions, real contradictions, and the method of resolving them: The relationship between the Court of Justice of the European Union and the German Federal Constitutional Court

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[Dies] hebt diese Widersprüche nicht auf, schafft aber die Form, worin sie sich bewegen können. Dies ist überhaupt die Methode, wodurch sich wirkliche Widersprüche lösen.

[This] does not resolve these contradictions, but it does provide the form in which they may move around. Such is generally the method how real contradictions resolve themselves.

Karl Marx, Das Kapital[1]

The German Federal Constitutional Court's (FCC) PSPP *ruling has met with criticism of unprecedented fierceness: its doctrine, its politics, and its authors have been attacked and ridiculed. While I agree that the ruling has its weaknesses, I also believe that many reactions to it, including the commentary by Basedow* et al., *are flawed. They frame the* PSPP *ruling as an abrupt break in time—a revolutionary narrative of old and new, with the decision splitting history into before and after. This frame alters the meaning of what happened. It throws the FCC alone into the spotlight, keeps other actors and narratives connected with them in the shadow, places a huge burden of legitimacy on the FCC, and makes the ruling appear not merely as bad law, but as a political action in the guise of law. I argue that none of this does justice to the ruling or to the politics behind it. This begs the deeper question of why the ruling has elicited such Mosaic wrath. My answer is that courts read "their" political communities rather than merely legal texts—they link law to imaginations of self-government and popular sovereignty. In this social practice, the FCC operates at the thicker end of constitutionalism, with a surplus of authority, legitimacy, and, ultimately, political identity, as compared to the Court of Justice of the European Union, which labors at the thinner end of constitutionalism*

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1 Karl Marx, Das Kapital: Kritik der politischen Ökonomie 118 (1867) (translation by author).

and must view the FCC, like many commentators do, as an idolater. This, rather than doctrine or politics, is where the "real contradiction" lies. There is no resolving this contradiction through law or institution-building. But the preliminary ruling procedure under Art. 267 of the Treaty on the Functioning of the European Union does provide a form for it to move around and resolve itself.

1. Introduction

The German Federal Constitutional Court's (FCC) ruling on the Court of Justice of the European Union's (CJEU) *Weiss* decision (the "*PSPP* ruling")[2] has met with precious little support from academic commentators. I am trying to put both the *PSPP* ruling and the reactions to it in perspective, but I am not writing an apology for a court that did everything right and is now surprised at what hits it. When the arguably most influential national constitutional court in the European Union calls a decision by the CJEU "simply not comprehensible" and "arbitrary from an objective perspective," and openly disregards the supremacy of EU law, it is a safe bet to assume it knew exactly what it was doing and what was coming.

What was coming was a spectacle of wrath of Moses-like dimensions from the moment the FCC's then President Andreas Voßkuhle started reading the decision into live TV cameras. Most commentators found the FCC worshipping the golden calf of national sovereignty and felt angry. The article by twenty-five authors and co-signees is a damning piece of court-bashing, but it is by far not the worst.[3] Others tried to make the judgment sound outright scandalous in that they wrote of their heavy hearts, used seething or condescending language, and attacked, personally and unabashedly, Andreas Voßkuhle and judge-rapporteur Peter M. Huber, resurrecting what Joseph H.H. Weiler had once called the "Pescatore School":

> [W]hen I say "Judge" Pescatore I refer here not to his appointment on the European Court of Justice, but to the Old Testament angry Judge, who judged all of us by our fidelity to the faith of European Integration. . . . The Pescatore School is probably the most important and influential school till this day in the field of European Law. . . . It is based on a simple (and oft simplistic) teleology in which European Integration is good. . . . There are heroes and villains. The ECJ is saintly; the Member States . . . are villainous.[4]

[2] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, *translation at* https://bit.ly/3qMoBcj [hereinafter *PSPP*].

[3] Jürgen Basedow *et al.*, *European Integration: Quo Vadis? A Critical Commentary on the* PSPP *Judgment of the German Federal Constitutional Court of 5 May 2020*, 19 Int'l J. Const. L. 188 (2021). Twenty-five is an astonishing number, which at first glance makes the article look like either a contribution to the journal *Nature* or a petition against further pay cuts in the humanities, and therefore like something that professes an objective truth or like a moral outcry—either way, something that wants to impress by the strength of numbers. The numbers are less impressive geographically; the co-signees represent mostly the German-speaking part of Europe and, to a lesser extent, Brussels. Generally, I am with James Boyd White: "The great contribution of the judicial mind is not the vote . . .": James Boyd White, Justice as Translation 91 (1990).

[4] Joseph H.H. Weiler, *Hjalte Rasmussen: Nemo propheta in patria sua*, *in* Europe: The New Legal Realism xiii, xiii (Henning Koch *et al.* eds., 2010).

In the Holy Scripture, we know who the saint is and who the villain is at the foot of Mount Sinai (and even then Moses prayed for God to stay his wrath).[5] In Karlsruhe, we cannot be quite so sure. I do agree with the twenty-five, and with much of the commentary, on a number of observations; of others, I am skeptical.

I agree that the *PSPP* ruling is a head-on affront to the European Union's zeal for uniformity, in more than one respect. EU law supremacy prevents Member States from acting unilaterally to diminish the impact of EU law on their territories. Were national law able to determine that some matters are too important to be subject to EU law supremacy, the consequence would be a considerable variation in ambit and effect of EU law. Supremacy minimizes the scope for violating EU law with impunity. To ignore this fact, as the FCC did, means not merely endangering the uniform application of EU law across the European Union but also imperiling the EU's constitutional architecture as a community of law distinct from classic international law. I also agree that the FCC has jeopardized the "keystone"[6] of the European Union's system of remedies, namely the preliminary reference procedure. As the most important channel of communication between national courts and the CJEU, Article 267 of the Treaty on the Functioning of the European Union (TFEU) holds out the promise of uniformity by locating authority in the voice of the CJEU.[7] The Court itself insists that the procedure has "the object of securing uniform interpretation of EU law . . . thereby serving to ensure its consistency, its full effect and its autonomy."[8] While this is an exaggeration—no legal order spread across such a diversity of history, tradition, culture, politics, and economy can be the same everywhere[9]—even relative sameness affords a much firmer legal structure than international law. Aggressively setting aside *Weiss*,[10] the FCC snubs the binding nature of preliminary rulings and undermines the CJEU's authority in difficult times. That is not a good precedent for future use (although Hungary and Poland do not need any prompting from the FCC to do what they do).[11] Finally, I agree this may not be the happiest of constellations to make a judicial statement about competence control. The ECB is not under the FCC's jurisdiction (and had declined to appear before it); enforcing the judgment was therefore hugely complicated; and *Weiss* was not nearly as terrible as the FCC makes it out to be.

[5] Michelangelo's statue of Moses (*c.*1513–15; San Pietro in Vincoli, Rome) is therefore not smashing any tablets, but is seated and frozen still. The classical text is, of course, Sigmund Freud, *The Moses of Michelangelo*, *in* 13 The Standard Edition of the Complete Psychological Works 211, 213–9 (James Strachey trans., The Hogarth Press, 1955). For a terrific contextualization, *see* Joseph Vogl, On Tarrying (Helmut Müller-Sievers trans., Seagull Books, 2011). Such suspension between perplexity and the desire to understand—which is different from indolence, idleness, or indecisiveness—surely is helpful for academics who suspect idolatry.

[6] Opinion 2/13, EU Accession to ECHR, ECLI:EU:C:2014:2454, ¶ 176 (Dec. 18, 2014).

[7] Consolidated Version of the Treaty on the Functioning of the European Union, June 7, 2016, 2016 O.J. (C 202) 47 [hereinafter TFEU].

[8] Opinion 2/13, EU Accession to ECHR, *supra* note 6, ¶ 176.

[9] Stephen Weatherill, Law and Values in the European Union 155 (2016).

[10] Case C-493/17, Weiss, ECLI:EU:C:2018:1000 (Dec. 11, 2018).

[11] Andreas Voßkuhle, *Applaus von der falschen Seite* [*Applause from the Wrong Side*], *in* Festschrift Mirosław Wyrzykowski (Jakub Urbanik & Adam Bodnar eds., forthcoming 2021) (on file with author).

On other issues I am less certain; I am not even sure there is a golden calf. A lot, it seems to me, depends on the framing. The framing of many comments, including the one by the twenty-five authors and co-signees, is not an entirely fair representation of what happened.

2. Framing the *PSPP* ruling

Court opinions deal with reporting, history, interpretation, deduction, and persuasion. A court draws these elements into a single whole and, if successful, provides us with a coherent, persuasive account, presenting the outcome as a successful resolution of the problem. Of course, none of this is objective, not even the facts; they make sense only as they are placed in a context that tells us what sort of case we are faced with.[12] Academic critique offers alternative contexts and frames the case differently.

It is safe to say that the FCC has not been entirely successful in persuading many people. Alternative accounts, including that by Basedow *et al.*, have been more successful. They describe the *PSPP* ruling as the first time the FCC blows up the supremacy of EU law, bites rather than barks, or sets off a nuclear device. While these metaphors are not wrong per se, they are a way of strategically framing the decision so that people are prompted to think in particular, desired ways about the *PSPP* ruling. The frame is that of an abrupt break in time[13]—a revolutionary narrative of old and new, a thunderbolt decision splitting history into before and after. This frame has consequences that reflect on, and alter, the meaning of what happened. It has a temporal shape that places a huge burden of legitimation on the FCC (Section 3). It also throws the FCC alone into the spotlight, while removing other actors and narratives connected with them into the shadow (Section 4). Since the image of revolution evokes transgression, the frame puts the FCC's law-breaking center stage (Section 5). Finally, rather than being merely bad law, the *PSPP* ruling appears to be political action in the guise of law, because revolutionary action is never legal; only political action can do away with law. The politics behind the pretend-law is to replace European views and interests with German ones. The *PSPP* ruling, in this frame, redraws the relevant political community (Section 6).

Paradoxically, while the revolutionary frame privileges a narrative of categorical difference in form (mostly temporal and figurative), it conceals a categorical difference in substance. Analyzing the content of the FCC's and CJEU's statements only takes us so far. When we look only to what the Courts say, as any black-letter law approach does, we neglect to look at who is speaking. While both Courts speak the language of law, the authority of law is not independent from its author. At the thicker end of constitutionalism—one associated with political identity—we imagine the popular sovereign to be the author of the law, and the courts to be speaking in their name. That is what makes the law, and the courts, "ours." At the thinner end of constitutionalism, we do not

[12] Paul W. Kahn, Making the Case: The Art of the Judicial Opinion 18–45 (2016).

[13] I will leave an investigation into the semantics of extreme violence for another time.

imagine the popular sovereign, but experts of function and interests. Authority and legitimacy are quite different here (even if their words are identical), as is the question of whether, and how, we hold ourselves accountable. It is here where the deepest, and arguably "real," contradiction is. That contradiction, however, never truly surfaces in Basedow *et al.*'s commentary on the *PSPP* ruling. I will try and bring out the "real contradiction" as I go over the four aspects of framing the *PSPP* ruling, and will increasingly focus on how that makes the *PSPP* ruling, maybe not a good decision, at least a legitimate one, in that it provides the form in which the "real contradictions" may move around.

3. Framing time

The temporality of the *PSPP* ruling, if cast in a revolutionary frame, is that of an extraordinary event that redefines the future by breaking with the meanings of the past. "Before" seems fundamentally different from "after." The difference between old and new is categorical, rather than a question of crawling up and down a scale of options. Rejecting the legitimizing narratives of the past, the new will have to justify itself as legitimate, which is a big onus.[14] If the FCC is indeed engaged in its own legal revolution, it will need to justify the European post-supremacy world it has created. This is much harder to do than to argue that it merely did what it had been doing all along, only a little bit louder. It is not hard to predict it will fail, especially if the supposedly new is, in this frame, not new at all, but an expression of an older consciousness: the FCC's revolution is, in fact, the reactionary restoration of a pre-integration, nationalist, and sovereignty-beset order. The temporal frame, therefore, denies the FCC almost all paths towards legitimizing the *PSPP* ruling.

This strategy succeeds only if it manages to disconnect the *PSPP* ruling from a string of preceding decisions. Only if we are convinced that the *PSPP* ruling is novel rather than part of a trajectory within the existing order, we will ask for a novel narrative persuasive enough to legitimize discarding the old order. Therefore, this frame places the *PSPP* ruling alone under the microscope, where it does not share scrutiny with the vectors that have long pointed towards it and helped to bring it about. The frame creates deliberate absences relating to both the past (Section 3.1) and the future (Section 3.2), which inform our understanding of the *PSPP* ruling.

3.1. Blurring the past

One of the most conspicuous absences is the extensive web of national court reactions to the CJEU's claim of unconditional EU law primacy. That claim dates back to *Internationale Handelsgesellschaft*.[15] Even with the rise of the Area of Freedom, Security

[14] We know such revolutionary narratives not just from politics but also from intellectual history, above all from Hans Blumenberg's attacks on perennial speculative philosophies of history. Of course, Blumenberg's work is also a lesson in constructing narratives of legitimacy. *See* Hans Blumenberg, The Legitimacy of the Modern Age (Robert M. Wallace trans., MIT Press, 1983).

[15] Case 11/70, Internationale Handelsgesellschaft, 1970 E.C.R. 1125.

and Justice and with the ever-widening scope of EU competences, the CJEU has refused to make any structural revisions but continues to revere its own history and iron-clad logic of EU law coherence.[16] National courts, however, have never accepted absolute authority of EU law at face value. Doctrinally, their acceptance is conditioned on their own constitutional authority. From the Member State courts' perspective, supremacy is the consequence not of EU law but of national law opening up to EU law. Politically, national courts' acceptance is also informed by the sense that there is a certain selfishness, or even arrogance, on the side of the CJEU to so eagerly promote uniformity, effectivity, and coherence of EU law at the possible expense of national constitutional values.[17] The FCC's case law has come to epitomize the limits set by national courts, which are rooted in the protection of fundamental rights, of Member State competences (*ultra-vires* review), and of inviolable core contents of the German Constitution (Grundgesetz, GG) (identity review). These limits have been in place for a long time; it is merely the outcome in each particular case that has kept the peace. But, of course, one may wonder how long we may look to particular cases and trust the outcome will always be the same—all the more so if there has been growing evidence to the contrary.

And there has, unrelated to the roughhousing over ECB competence control and not just from the Danish and the Czech courts.[18] A growing number of decisions have squarely placed the CJEU in very uncomfortable take-it-or-leave-it situations (with the *Taricco* saga,[19] often held up as a shining example of how the FCC should have done it, being a case in point). The FCC did, too. Take, for instance, the way it applied its identity review in a case concerning the European Arrest Warrant (the "*EAW* ruling"). Dissatisfied with the somewhat brash *Melloni* judgment, it held that EU law supremacy is limited by certain provisions of the German Constitution (those mentioned in the "eternity clause,"[20] human dignity among them) and that, contrary to *Melloni*, this national standard applies irrespective of whether primacy, unity, or effectiveness of EU law is affected.[21] Therefore, "the principle of mutual trust that governs extraditions within Europe is limited by human dignity [as] guaranteed under [the German Constitution]," [22] and the German human dignity clause had, according to the FCC, indeed been violated by a national court applying EU law. Everything pointed to an

[16] Case C-399/11, Melloni, ECLI:EU:C:2013:107 (Feb. 26, 2013).

[17] Weatherill, *supra* note 9, at 163.

[18] *See* Højesteret afgørelse af 06.12.2016 [Decision of the Supreme Court of Dec. 6, 2016], No. 15/2014 (*Dansk Industri acting for Ajos*) (Den.); Nález Ústavního soudu ze dne 31.01.2012 (ÚS) [Decision of the Constitutional Court of Jan. 31, 2012], sp.zn. Pl. ÚS 5/12, (*Landtová*) (Czech).

[19] Case C-105/14, Taricco, ECLI:EU:2015:555 (Sept. 8, 2015); Corte cost., 26 gennaio 2017, n. 24, Foro it. 2017, II, 394 (It.); Case C-42/17, M.A.S. and M.B., ECLI:EU:2017:936 (Dec. 5, 2017) [hereinafter *Taricco II*]. *Cf.* Basedow *et al.*, *supra* note 3, at 204–5.

[20] Grundgesetz [GG] [Basic Law], art. 79(3), *translation at* www.gesetze-im-internet.de/englisch_gg/index.html.

[21] *See* Case C-399/11, Melloni, ECLI:EU:C:2013:107 (Feb. 26, 2013); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2735/14, Dec. 15, 2015, *translation at* https://bit.ly/3pjj9xd [hereinafter *EAW*].

[22] *EAW*, 2 BvR 2735/14, ¶ 83.

outcome just like the *PSPP* ruling. However, the FCC then argued that its findings were not just dictated by the German Constitution but also by a "correct" interpretation of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR),[23] on which the FCC then lectured the CJEU and which, miraculously, coincided precisely with what the German Constitution demanded. Therefore, the FCC concluded, its decision did not violate EU law supremacy. The CJEU, it ruled, would without a shred of a doubt have come to the same conclusion (although, of course, in *Melloni* the CJEU had said nothing of the kind), which was why this was an *acte clair* and the FCC did not have to ask the CJEU for a preliminary ruling.

The only reason no Moses came down the mountain to smash the tablets of law was this stunning, and somewhat hilarious, act of counterfactual judicial ventriloquism.[24] The CJEU quickly followed the FCC's interpretation only a few weeks later.[25] Its motive is less hilarious. If it had not played ball, it would have triggered the full brunt of the FCC's identity review. The CJEU had little choice in the matter, forced into a thorny take-it-or-leave-it situation by the FCC.

There is no categorical difference between the *EAW* ruling and the *PSPP* ruling. Substantially, both attack supremacy. Institutionally, both undermine the CJEU, one by privileging the FCC's interpretation of EU law and forcing it onto the CJEU; the other by privileging the FCC's interpretation of EU law and discounting the CJEU's. Both are equally dismissive of CJEU judgments, rebuffing the European Court in different ways. The *EAW* ruling's "no need for limiting the precedence of application of the Framework Decision" trope[26] is no more than an illusionist's trick we see through (and are meant to see through). The only difference, then, is style: where the *EAW* ruling is implicit, the *PSPP* ruling is explicit; where the *EAW* ruling uses ventriloquism, plus a thinly veiled threat of future identity review, the *PSPP* ruling uses the "objectively arbitrary" verdict; where the *EAW* ruling is unbelievably cheeky, the *PSPP* ruling is tough talk. The present post-*PSPP* ruling world, then, does not look fundamentally different from the past pre-*PSPP* ruling world.

One might respond that this is cold comfort: it only means that the golden calf has been worshipped all along. However, the act of worshipping the golden calf "all along" makes you wonder whether there is a monotheistic order at all. At any rate, in the present context, it does mean that there is no break with the meanings of the past. With the *PSPP* ruling, the FCC has done little more than to simply crawl up a few notches—namely in terms of style—on the scale of possible reactions to contentious CJEU judgments.

There is ample proof in the *PSPP* ruling—and in interviews the then FCC President and the judge-rapporteur gave right after the judgment[27]—that the FCC simply wanted

[23] *See* Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

[24] I am borrowing this wonderful expression from Antoine Vauchez, Brokering Europe 124 (2015).

[25] Joined Cases C-404/15 & C-659/15 PPU, Aranyosi and Căldăraru, ECLI:EU:C:2016:198 (Apr. 5, 2016).

[26] *EAW*, 2 BvR 2735/14, ¶ 84.

[27] Giovanni di Lorenzo & Heinrich Wefing, *Erfolg ist eher kalt* [*Success Tends to Be Cold: Interview with President Andreas Voßkuhle*], Die Zeit, May 14, 2020, at 6; Wolfgang Janisch & Stefan Kornelius, *Spieler auf Augenhöhe* [*Players on an Equal Footing: Interview with Judge Peter M. Huber*], Süddeutsche Zeitung, May 13, 2020, at 5; Reinhard Müller, *Das EZB-Urteil war zwingend* [*The Judgment Was Imperative: Interview with Judge Peter M. Huber*], Frankfurter Allgemeine Zeitung, May 13, 2020, at 2.

to turn up the volume on competence control just a notch. Perhaps the clearest one is what Basedow *et al*. label "limited practical impact"[28] and what many commentators have criticized as a judgment that, having made a big production of competence control, ends not with a bang but with a whimper. All the FCC asked for, really, was for the ECB to put forward arguments substantiating its view that the program is proportionate. Peter Huber, the reporting judge, called this result a "homeopathic message,"[29] and who would disagree? Rather than view the decision's limited impact as evidence that the FCC was on an ill-defined quest that leads to virtually nothing except extreme backlash, I suggest we trust the FCC set up such a weak outcome on purpose *in order to* make compliance easy and painless. As if by a sleight of hand, the *ultra-vires* verdict relating to the ECB disappears as soon as we have the ECB's substantiation. The ECB waves a magic wand (which is surely made of plastic, judging from the ECB documents the German government has received within the three-months grace period[30]) and we are left wondering if there ever really was an *ultra-vires* verdict at all.

In other words, not only is pre-*PSPP* ruling national court jurisprudence less EU law-compliant than the revolutionary framing suggests, but the present state of affairs is also more EU law-compliant than the revolutionary framing suggests. Pre- and post-*PSPP* ruling orders are just inches apart. And the difference largely boils down to style—instead of being cheeky, the FCC uses tough talk (which has earned the FCC much criticism, but which, we should bear in mind, is nothing more than an attempt to clear the extremely high hurdles the FCC had itself set up in its integration-friendly *Honeywell* judgment[31]). The consequence is that the hurdle to legitimizing the *PSPP* ruling is considerably lower than the revolutionary frame suggests. We should ask if the circumstances justify the difference in style. To ask, instead, whether the circumstances justify a judicial revolution, as Basedow *et al*. and many other commentators do, is to load the dice.

3.2. Blurring the future

Framing the *PSPP* ruling as revolution points to a second conspicuous absence. The FCC has repeatedly and at length asserted the exceptional nature of its review. It has embedded its *ultra-vires* review in a framework of integration-friendly statements deferential to the CJEU, and promised to limit its interventions to only rare circumstances. It has expressed commitment to uniform application: "Uniform application of its law is of central importance for the success of the European Union . . . . Without ensuring uniform application and effectiveness of its law, it would not be able to continue to exist as a legal community."[32] It has also agreed with *Foto Frost*: "If any Member State

[28] Basedow *et al*., *supra* note 3, at 205.

[29] Janisch & Kornelius, *supra* note 27, at 5.

[30] *See* Antrag zum Urteil des Bundesverfassungsgerichts zum Anleihekaufprogramm PSPP der Europäischen Zentralbank [German Parliament, Motion on the Judgment of the Federal Constitutional Court on the European Central Bank's Asset Purchase Programme PSPP], Deutscher Bundestag: Drucksache [BT-Drs.] 19/20621 (June 1, 2020), 1.

[31] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2661/06, July 6, 2010, *translation at* https://bit.ly/367BfLa.

[32] *EAW*, 2 BvR 2735/14, ¶ 37.

could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardize its uniform application."[33] Conflicts arise only "exceptionally," "rarely," in "narrowly defined conditions," and are subject to "strict requirements."[34] Remaining tensions "must be resolved in a cooperative manner, in keeping with the spirit of European integration, and mitigated through mutual respect and understanding."[35] *Ultra-vires* review "must be exercised with restraint," CJEU methods "cannot and need not completely correspond to" FCC methods, and the CJEU must be "granted a certain margin of error."[36] It is "not for the [FCC] to substitute the CJEU's interpretation with its own," and the FCC "must respect the decision of the CJEU even when it adopts a view against which weighty arguments could be made."[37] The FCC is acutely aware that its judicial review of EU legal acts poses a serious threat to European integration, which would implode if the FCC went ahead and nullified EU law at will. The Court has therefore in the past predominantly exercised its review in a guarded way, and has promised to continue doing so in the future. Many commentators, Basedow *et al.* included, seem to take these statements for empty rhetoric, for they either overtly dismiss them, or disregard them altogether. However, it does make a difference to our understanding of the case and its consequences whether the Court is lukewarm in its commitment to European integration or intends to help advance it. To denude the decision of the FCC's commitment to European integration is to decontextualize it and make it sound more threatening to the future of European integration.

The revolutionary framing, then, suggests a past that is radically different from the post-*PSPP* ruling world and imagines a future in which the FCC is on a war path with European integration. Neither trajectory is entirely correct. The *PSPP* ruling is no judicial revolution that ruptures the timeline; and even if it were, such a rupture would be considered a rare exception. The *PSPP* ruling does not break with the meanings of the past and does not redefine the future. In this light, the onus to legitimize the supposedly new is not all that high.

4. Framing actors

Casting the *PSPP* ruling in terms of a revolutionary act not only insulates the judgment on the timeline even while, in reality, the judgment is part of a well-known vector on a familiar trajectory. Such a framing also insulates the FCC as the only actor that matters, whereas in reality it is one of many actors in a complex choreography. This framing sets the stage for a one-dimensional villain whom we watch delivering a loud and mean soliloquy. We know the ECB and the CJEU are right outside the spotlight, as are other players—in fact, a whole intricate machinery of interwoven

[33] *PSPP,* 2 BvR 859/15, ¶ 111. *See also* Case 214/85, Foto-Frost, 1987 E.C.R. 4199.
[34] *EAW*, 2 BvR 2735/14; *PSPP*, 2 BvR 859/15.
[35] *PSPP*, 2 BvR 859/15, ¶ 111.
[36] *Id.* ¶ 112.
[37] *Id.* ¶ 112.

political actors, narratives, and themes. But we cannot take our eyes off the villain, mesmerized and upset as we are by the FCC's vulgar performance. Other actors therefore do not quite come into the foreground, and we cannot be sure what role they play. Mostly, we imagine them as victims of the only actor we can see. I am trying to bring the ECB (Section 4.1), the CJEU (Section 4.2), and some of the narratives associated with them—above all competence creep (Section 4.3) and policymaking through independent actors (Section 4.4)—back into the foreground.

My argument is not that the ECB or the CJEU should replace the FCC as the main actors on the stage: I am not looking to shift blame. Nor do I think that the FCC had no other choice but to take a highly confrontational and risky course. However, the FCC's decision did involve other actors and was embedded in a contentious environment of policy choices, allocation of competences, channels of democratic decision-making, and beliefs about legitimacy. Trying to understand the *PSPP* ruling without them is like trying to understand the worship of the golden calf without acknowledging that the Israelites, at that moment, were a little like us—lost in the desert, haplessly wandering around, wondering what is taking Moses so long, where their God is, and if He even cares.

4.1. Obscuring the ECB

Neither the ECB nor the CJEU fit the role of the victim, of course. The ECB has emerged from the financial crisis as an institutional winner. Aside from its mandate to conduct the stabilization policy as part of its monetary policy function, it has taken on responsibility for the European System Risk Board and has become the central supervisory authority of the Single Supervisory Mechanism (SSM).[38] The ECB also conducts conditional fiscal policy, for example by providing liquidity to struggling banking systems. There are overlaps and conflicts between monetary policy, macro-prudential oversight, and banking supervision. More significantly, the ECB interprets its mandate, which is already very broad, extensively. In practice, the ECB seems to aim at ensuring the continued existence of the Euro area. Its monetary policy in recent years has hardly been in sync with the general economic environment. The ECB has upheld its extremely expansive monetary policy even though the economy in the entire Euro area had developed significantly above potential over several quarters (until the COVID-19 pandemic hit). There never was much cause for concern over impending deflation. Committed to meeting, "whatever it takes," the inflation target of close to 2% (which it had set itself), the ECB increasingly left the impression that it was pursuing goals it would not name. Suspicions arose that a secondary objective—namely, lowering the refinancing costs for Euro area member states—had actually become the main objective of the ECB's

[38] Regulation 1092/2010 of the European Parliament and the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, 2010 O.J. (L 331) 1, amended by Regulation 2019/2176 of the European Parliament and the Council of 18 December 2019, 2019 O.J. (L 334) 146; Council Regulation 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 2013 O.J. (L 287) 63 [hereinafter SSM Regulation].

monetary policy. The FCC is not alone in regarding this as shattering the ECB's mandate limits. Mandate limits legitimize independence; it is therefore not surprising that the ECB's mandate has turned into a political relationship with Euro area member states and the EU, which, in turn, has the potential of undermining the maintenance of price stability, the Bank's primary objective. For the Member States, this is, of course, also a problem of competences.

4.2. Obscuring the CJEU

The CJEU, for its part, has never been a reliable guardian of Member State competences. It is no secret that there is a distinct suspicion of EU institutions playing fast and loose with the principle of conferral, and that in practice there is a self-extension of EU competences, which leads to a competence creep.[39] Judicial control is famously scant, probably due to a structural bias that seems to disqualify the CJEU from dealing with competence cases fairly.[40] In its relationship with the ECB—whose independence means it is free to act as it pleases within the limits of its mandate—the CJEU has protected this freedom much more effectively than the limits of the mandate. In its relationship with the FCC, the CJEU has repeatedly rebuffed the German Court's demand for stricter scrutiny. The FCC had issued its first warning when it asked for a preliminary ruling in *OMT Referral* (the FCC's first ever reference under Article 267 TFEU).[41] When the CJEU, in *Gauweiler*, did not react as hoped, the FCC in the *OMT Judgment* accepted the CJEU ruling but not without some reservations.[42] When the FCC issued its second reference in the *PSPP* ruling, the CJEU should have been warned. Instead, in *Weiss*, it did not seriously engage with the FCC's worries, and exercised another feeble review of the ECB's conduct.

4.3. Obscuring the narrative of competence creep

We should also have an understanding of the general narrative of which the *PSPP* ruling is just one scene, namely the competence saga. The European Union does what it does because all Member States, unanimously, by ratifying the Founding Treaties, have agreed to authorize its action. Should EU institutions stray outside their Treaty mandate, their actions would lack legitimate authority and rob Member States of regulatory autonomy. This is of the highest political and constitutional significance. Politically, it appears as if there "simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community,"[43] which leaves Member States

[39] Mark A. Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14 J. Pub. Pol'y 95 (1994); Stephen Weatherill, *Competence Creep and Competence Control*, 23 Y.B. Eur. L. 1 (2004).

[40] Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 Common Mkt. L. Rev. 63 (2006).

[41] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2728/13, Jan. 14, 2014, *translation at* https://bit.ly/2MbK1kA [hereinafter *OMT Referral*].

[42] C-62/14, Gauweiler, ECLI:C:2015:400 (June 16, 2015); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2728/13, June 21, 2016, *translation at* https://bit.ly/2MsTX9D.

[43] As early as 1990, *see* Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 Am. J. Comp. L. 205, 220 (1990).

increasingly frustrated with their shrinking regulatory ambit. With the expansion of EU reach into ever more politically sensitive areas, the Member States' permissive consensus has faded. The CJEU is deeply involved in this political struggle. With growing divisions between EU lawmakers and the ensuing gridlock, space opens up for the CJEU to pursue its integration goals. Many worry this may threaten the maintenance of a politically acceptable balance between European Union competences and national competences. Constitutionally, the erosion of the principle of conferral subverts the EU's foundation, which is the consensual but limited grant of competence by the Member States.[44] In other words, while the *PSPP* ruling appears to target a very specific problem, which many believe to be ill-chosen, in fact it is part of an ongoing, epic battle for nothing less than the control Member States exercise over both the integration process and their own self-governance. It is not just about power, but about democracy and legitimacy.

4.4. Obscuring the narrative of policymaking through independent actors

Democracy and legitimacy are central themes in another, even broader political narrative that informs the *PSPP* ruling, which is about independent EU bodies involved in policymaking with highly political outcomes. There are countless examples, from EU agencies to the ECB and the CJEU, with the European Commission being perhaps best-known. Many of these institutions enjoy a degree of autonomy that is deemed vital to securing progress by cutting through partisan state interests. However, sailing under the radar of accountability and achieving integration "by stealth"[45] poses a problem of democracy. While in the early years, it may have been possible, even prudent, to rely on expertise and law as the linchpin of integration, today, the European Union navigates in a sea of highly salient political issues, wearing the paradigms of managerial and legal legitimacy thin. The search for a richer imagination of the political has yielded a cautious democratic restructuring of the constitutional architecture. Over time, many structures of oversight, control, justification, and legitimation within the EU's executive order have become increasingly democratic, with both the European Parliament (EP) and national institutions playing important roles.

The two notable exceptions, however, are the CJEU and the ECB. Both enjoy, and must enjoy, a large degree of independence (and it was Germany, of course, who insisted the ECB should follow the Bundesbank model). Independence per se is not the problem: to a great extent, all courts and independent central banks lack democratic accountability. The problem, in the case of both the CJEU and the ECB, is that they lack the social embeddedness enjoyed by other courts or other monetary authorities.

[44] Case 26/62, van Gend en Loos, 1963 E.C.R. 1; Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585, 593: "Member States have limited their sovereign rights, albeit within limited fields." The Court, moving with the times, revised this observation in 1991 to Member States having "limited their sovereign rights, in ever wider fields": *see* Opinion 1/91, EEA I, 1991 E.C.R. I-6079, ¶ 21.

[45] Giandomenico Majone, Dilemmas of European Integration 143 (2005).

The ECB—itself subject to remarkably few checks and balances, as compared to other independent EU institutions[46]—cannot tap into reservoirs of social meaning, such as collective memories of hyperinflation, in the same way the Bundesbank can in order to shore up legitimacy.[47] In contrast to its national counterparts, the CJEU is not subject to the same kind of political pressure by governments or parliaments (which is difficult to build due to the diversity of national interests) or societal pressure (which is largely non-existent, because there simply is hardly any European public).

Yet, both the ECB and the CJEU are extremely powerful and influential political actors. Their interventions in the political process are the most vigorous when the political channels are blocked. The ECB has created a crypto-fiscal union through the backdoor of monetary-crisis management precisely at a time when the political main entrance to a European fiscal union was welded shut. The CJEU's interventions at times of political blockage are too many to name. One famous example is the way it came up with its doctrines of precedence and direct applicability, and created a European rule of law, precisely at a time when the retention of the veto in the Council and the Luxembourg Accord logjam paralyzed political decision-making.[48] Another famous example is the CJEU's case law on mutual recognition as a reaction to harmonization legislation falling through again and again, thus helping the Common Market to materialize.[49]

It is this problem the FCC has set its sights on, taking on both the CJEU and the ECB. Why now? After all, the EU strategy of using independent actors has been very successful, and the FCC has had no objections up to now. The difference is that before, a democratic consensus defined the overall direction and the general objective. Member States were, for instance, in agreement about the need for a rule of law and about the importance of the Common Market, even though they could not entirely agree on the path to get there. That agreement legitimated turning a blind eye to the processes leading to them. At the time of the *PSPP* ruling, however, no consensus on the general objective had emerged. Whether the European Union should be a fiscal union, with joint liability for the issue of Eurobond shares and fiscal federalism transfers, was hotly

[46] For example, members of the ECB Executive Board are appointed for a non-renewable term of eight years, while members of the European Commission or the CJEU serve renewable terms of five and six years, respectively. This gives the ECB an additional layer of political insulation. Even as a financial supervisor under the SSM Regulation (*supra* note 38), the ECB brings a high degree of autonomy to its role, unlike financial supervisors worldwide which routinely face political interference. *See* Marc Quintyn *et al.*, *The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors* (IMF Working Paper No. 07/25, 2007); Phoebus Athanassiou, *Financial Sector Supervisors' Accountability: A European Perspective* (ECB Legal Working Paper Series No. 12, 2011). Even where accountability interactions exist, such as between the ECB and the EP under the SSM, the ECB is able to silence contestation on many politically salient issues: *see* Adina Maricut-Akbik, *Contesting the ECB in Banking Supervision*, 58 J. Common Mkt. Stud. 1199 (2020).

[47] Amy Verdun & Thomas Christiansen, *Policies, Institutions and the Euro*, *in* After the Euro 162 (Colin Crouch ed., 2000); Dermot Hodson, *The European Central Bank*, *in* The Institutions of the European Union 213 (Dermot Hodson & John Peterson eds., 4th ed. 2017).

[48] Jospeh H.H. Weiler, *The Community Legal System: The Dual Character of Supranationalism*, 1 Y.B. Eur. L. 267 (1981).

[49] Case 120/78, Cassis de Dijon, 1979 E.C.R. 649.

contested. The *PSPP* ruling does not take this question entirely out of the hands of the unelected policymakers at the ECB. But it does bring the rationale of their decisions on economic and fiscal policy out into the open.[50] When it comes to the rule of law, this is indeed a homeopathic remedy. In terms of European democracy, however, it is much more than that—perhaps a stepping stone towards a stronger democratic legitimacy of the European Union as a whole.

Given the contested nature of the substantive policy issues behind it, it can hardly be surprising that the *PSPP* ruling had few supporters. EU players were outraged by the attack on supremacy. Courts of Member States other than Germany, while sympathetic towards the competence issue, did not care for the "German savers" the FCC seemed to protect.[51] The German Government and Parliament had little interest in seeing the debate on fiscal union shoved back into the political limelight, given the rift between north and south and the ruptures within the Economic and Monetary Union (EMU) architecture. It must have been easier to let the ECB do its work silently and *not* explain to a divided German population, with the right-wing nationalist Alternative for Germany (AfD) party gaining in strength, what needs to be done fiscally. Alas, shortly after the *PSPP* ruling, Chancellor Merkel and President Macron revealed their plan for a recovery fund to move the Euro zone closer to a fiscal union; in July 2020, the European Council forcefully agreed. Of course, the breakthrough was a response to the COVID-19 pandemic. But the FCC too must have felt vindicated.

5. Framing law

Casting the *PSPP* ruling as revolution highlights a theme that is ubiquitous among commentators, that is, violations of the law. This represents an organic, indeed inescapable, nexus. Revolution is not bound to any fixed procedures or rules. No legal order can set the limits on the form, method, or outcome of revolutionary action. Construction and destruction are inseparable moments in the revolution: to create, one must first destroy. Transgression, therefore, is a core element in a revolution. Framing the *PSPP* ruling as a revolution means putting law-breaking center stage. And that is, indeed, what commentators, calling the FCC a "rogue court," claim happened: the FCC is said to have violated the German Constitution (Section 5.1), the supremacy principle (Section 5.2), the legal difference between proportionality and conferred power (Section 5.3), and its duty to make another referral (Section 5.4).

5.1. Violating the German Constitution

The FCC admitted the case on the basis of a wide interpretation of the German Constitution. Article 38(1) GG guarantees the right to vote in parliamentary elections, and the German Court, in long-settled jurisprudence, has read it as an individual right to democratic self-determination. The FCC has applied this right to matters of

[50] Teresa Violante, *Bring Back the Politics*, 21 Ger. L.J. 1045 (2020).
[51] *PSPP*, 2 BvR 859/15, ¶ 173.

European integration and used it to award standing in *ultra-vires* review cases. The FCC has uncoupled the use of the individual right from individual grievance, opening the floodgates to anyone's constitutional complaint against acts by EU institutions.

I agree with Basedow *et al*. that this is not a good thing. First, the Court weakens itself. Normally, it draws legitimacy from protecting *individual* freedoms. Once it detaches its jurisprudence from that reference point, its legitimacy suffers—which was widely visible in the reactions to this case. Second, it underestimates the political process and overestimates itself as a public forum. There may once have been good reasons for the Court to compensate for political deficits. Prior to the rise of AfD, Germany's political parties were of one mind when it came to European integration: the conservative Christian Democrats out of their vigorous commitment to Western Alliance, the Social Democrats out of their international tradition, the Liberals out of their belief in market freedom, and the Greens out of their deep suspicion of all matters national. This "Ceauşescu-like" majority in Parliament[52] was clearly at odds with the ambivalence in the wider population, which felt a critical voice missing. The judge-rapporteur of the *PSPP* ruling, in a scholarly article, wrote of a "compensation function,"[53] and other FCC members, in their dissent to *OMT Referral*, hinted that this is still driving the German Court. It is time to phase out this "anomaly of questionable democratic character."[54]

Here my agreement with Basedow *et al*. ends. The FCC does no more than other constitutional courts of stature, which is to define the ambit of their own jurisdiction, and thus the scope of their control. This is why standing to sue has been famously called one of the "most amorphous concepts in the entire domain of public law."[55] Contrary to what Basedow *et al*. suggest, there is nothing sinister (there are no "other considerations," such as a nationalist notion of democracy[56]) or even unconstitutional about it. It is too easy to maintain that the FCC's decade-long jurisprudence on standing "can hardly be reconciled"[57] with the wording of the German Constitution. Of course, the German Court is bound by the law. But the only law that binds it is the one that appears through the Court's own voice. Outside Court opinion, there simply is no stance of law by which to evaluate the Court. We stand either within the judicial world or outside of it. When we stand within it, we measure one opinion by the other, and hold the Court up to itself as its own standard. Constitutional lawyers take off wherever the Court stops (which brings us back to Section 3, where I described

[52] Joseph H.H. Weiler, *Essential (and Would-Be Essential) Jurisprudence of the European Court of Justice*, *in* The Future of the European Judicial System in a Comparative Perspective 118 (Ingolf Pernice *et al*. eds., 2006).

[53] Peter M. Huber, *in* Kommentar zum Grundgesetz [Commentary on the German Basic Law] art. 19(4) GG, ¶ 352 (Hermann von Mangoldt *et al*. eds., 7th ed. 2018).

[54] *OMT Referral*, 2 BvR 2728/13, ¶ 28 (Lübbe-Wolff, J., dissenting). The FCC, however, is moving in the opposite direction, *see* its decision on the Unified Patent Court (UPC) Agreement: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 739/17, Feb. 13, 2020, *translation at* https://bit.ly/3twCcH9.

[55] *Hearing Before the Subcommittee on Constitutional Rights of the Comm. on the Judiciary*, 89th Cong., Sess. 2, 498 (1966) (statement of Paul A. Freund) (U.S.).

[56] Basedow *et al*., *supra* note 3, at 196.

[57] *Id.* at 197.

attempts to disconnect the *PSPP* ruling from its own past). When we stand outside the scope of judicial opinion, we can evaluate law by the standards of justice or democracy. That, however, is not a matter of legal wording.[58] The FCC's politics of standing in matters of European integration is, I believe, unfortunate, but it is not unconstitutional.

5.2. Violating the supremacy of EU law

The *PSPP* ruling does, of course, look a lot like a blatant violation of the principle of supremacy as understood by the CJEU (and as confirmed by Declaration 17[59]). It seems no less obvious that it flies in the face of EU Treaty objectives, above all the principle of uniform application, which is the rock upon which the CJEU has staked its claim. Much commentary stops here and concludes that any national court refusing to accept the rules set out by the CJEU places its Member State in breach of EU law obligations.

First, while Declaration 17 enhances the CJEU's authority by signaling that the Court has the support of Member State governments, this authority is not identical with the authority of a Treaty norm providing for supremacy. Following the demise of the Constitutional Treaty, which contained such a provision, it was seen as too ambitious and deliberately not included in the Lisbon Treaty.[60] The Declaration 17 context is therefore one of downgraded endorsement, which in turn is not unrelated to the national courts' refusal to accept the CJEU's claim at face value.

Second, national courts have for a very long time refused to accept that EU law can found its own authority. In their eyes, the basis for the EU legal order and its features is not the EU's "special and original nature," as the CJEU famously put it,[61] a claim that must remind the FCC of the Baron Münchhausen's claim that he had pulled himself out of the swamp by his bootstraps.[62] Rather, the ultimate source of legal authority is the national constitution. There is therefore something deeply irreconcilable at the heart of the relationship between legal orders, and of the juridical dispute. The question where the ultimate source of legal authority lies is neither marginal nor purely theoretical. It is not simply about what provision overrides what other provision, or about redistribution of institutional power between the European Union and the Member States. And it is not about whether the FCC is committed to European integration or not; it is committed, which is precisely why it exercises its review cautiously (see Section 3.2.). The irreconcilability lies in a constitutional conflict about collective values and, as I shall argue (Section 6), about *whose* collective values will prevail. This is where the "real contradictions" begin. They fuel the judicial conflict and they need to frame the discussion about it.

[58] Paul W. Kahn, The Reign of Law 170–171 (1997).

[59] Declaration 17 concerning primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, May 9, 2008, 2008 O.J. (C 115) 344.

[60] Treaty establishing a Constitution for Europe, art. I-6, Dec. 16, 2004, 2004 O.J. (C 310) 1.

[61] Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585, 594.

[62] Bruno de Witte, *Direct Effect, Primacy, and the Nature of the Union Legal Order*, *in* The Evolution of EU Law 323 (Paul Craig & Gráinne de Búrca eds., 2d ed., 2011).

Third, even a doctrinal reading of supremacy is more complicated than many commentators seem to believe. Higher-ranking EU norms can trump lower-ranking national norms only within the ambit of competences conferred upon the European Union. Supremacy always includes a determination of the *boundary* between legal orders, which is increasingly uncertain and contested. The tiebreaker in this *non sequitur* is not substantive, but merely institutional, in nature, and hinges upon claims about who decides. That is a huge burden to place on a small provision. I do not see how we can escape the need to contextualize black-letter law here, since the allocation of judicial power is about, well, power, which spirals further into discourses about legitimacy and imagination.

It is against this background that I find assertions that the FCC "explicitly sets aside these fundamental principles"[63] of supremacy and CJEU monopoly true and at the same time airy and cheap. They are like shooting fish in a barrel. We cannot stop here without wondering why it is that national courts, including the FCC, are so insistent in their refusal to accept supremacy without reservations, and how that plays to our understanding of European legal obligations. If Karen Alter, writing shortly after the FCC's *Maastricht* decision,[64] was right in maintaining that "the Court of Justice can say whatever it wants, the real question is why anyone would follow,"[65] national court decisions are neither mere technical details nor mere cogs in hierarchical legal machinery. Rather, they are, as Stephen Weatherill has it, "the very lifeblood of the EU's operating system."[66] This must surely have repercussions for what counts as a legal command in the European Union. Law in a hybrid legal space—where different layers of constitutionalism press against one another, where different legal and political visions collide, where bounded historical narratives bump against unbounded functionalism, and where strong courts read different meanings into the same words—is not the same thing as law in a nation-state. Rather than viewing the contentious margins of EU law from the perspective of the receiver of commands (which is a technical form of obedience), we, as academics, may want to approach them from the perspective of the persons charged with making decisions. The technical and moral problems they are confronted with are not framed in terms of obedience, but in terms of making appropriate choices. Law is a complex authoritative communication carrying information about specific interpretative communities, values, and social goals.[67] Instead of asking rhetorically whether EU law takes precedence over national law and going from there,[68] we should ask whether, at this time and with regard to this particular matter at hand, there were good reasons for compromising supremacy,

[63] Basedow *et al.*, *supra* note 3, at 193.

[64] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155.

[65] Karen Alter, The European Court's Political Power 93 (2009).

[66] Weatherill, *supra* note 9, at 229.

[67] This is, of course, the classical New Haven School approach. *See, e.g.*, W. Michael Reisman, *The View From the New Haven School of International Law*, 86 Proc. Am. Soc'y Int'l L. 118 (1992).

[68] Which is what Basedow *et al.* do, for instance by claiming that "subsequently, however, the FCC disregards its own premises" (Basedow *et al.*, *supra* note 3, at 192). I do not believe it did, which is why there is no

jeopardizing uniform application, and putting pressure on judicial collaboration. To answer that question, supremacy is not something that can be squeezed into a simple yes/no version of legality, and certainly not into a purely doctrinal reading. Rather, it denotes a scale running from unity to diversity, and a successful answer will have to find a point on that scale where the problem at hand may, all things considered, be resolved, with all interests that seek recognition being recognized as far as possible. That answer will, of course, depend on many things. Most of them are not black and white and may defy the ostentatious self-certainty with which many commentators write.

5.3. Violating the difference between proportionality and conferral

Commentators are baffled by the FCC's use of proportionality,[69] both doctrinally and politically. Doctrinally, the FCC seems to confuse the existence of competences with the exercise of competences. Article 5(1) of the Treaty on European Union (TEU) distinguishes between conferral, which governs the question of whether there is an EU competence, and proportionality, which governs the question of how competences are to be used.[70] Clearly, there is a difference between *ultra-vires* acts and simply unlawful acts. The FCC, however, lumps the two together. Politically, this raises concerns about the future conduct of the FCC. The German Court might use its newly found tool to put itself in the shoes of a European Union Supreme Court, reviewing the proportionality of all sorts of EU acts.[71]

I agree with both concerns. And yet, the FCC touches upon a painful subject, namely competence creep (see Section 4.3). Its causes are varied, and some of them are Member State-made.[72] But the biggest problem is that, while in principle the European Union operates within the confines of the principle of conferral, in practice, the robust and open-handed reading of competence grants leads to a self-extension of EU competences. The European Commission, profiting from the lack of red lines in the Treaties, proposes legislation that makes the most of bare-bones EU competences, and the European Council and the EP accept the generous fleshing-out of Treaty articles. Article 4(1) TEU (which states that "competences not conferred upon the Union in the Treaties remain with the Member States," and which is repeated almost word for word in the second sentence of Article 5(2) TEU) is not a convincing tool to delimitate powers as it fails to address the real problem. It tackles a situation in which EU institutions would simply grab competences the Member States did not confer upon them. Such a situation, however, never arises, and is not a problem. Rather, the

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reason either why the FCC should use *Egenberger* (Case C-414/16, ECLI:EU:C:2018:257 (Apr. 17, 2018)) to "clarify its view on the supremacy of EU law": Basedow *et al.*, *supra*, at 196. The FCC said exactly what it wanted to say.

69 Basedow *et al.*, *supra* note 3, at 198–201.

70 Consolidated Version of the Treaty on European Union, June 7, 2016, 2016 O.J. (C 202) 13 [hereinafter TEU].

71 *See, e.g.*, *Editorial Comments: Not Mastering the Treaties. The German Federal Constitutional Court's* PSPP *Judgment*, 57 Common Mkt. L. Rev. 965 (2020); Mattias Wendel, *Paradoxes of Ultra-Vires Review*, 21 Ger. L.J. 979 (2020).

72 Loïc Azoulai, The Question of Competence in the EU (2014).

problems are multiple: competence norms are often quite unclear and subversive (for instance, framed in terms of achieving certain objectives); EU institutions like to increase the scope of existing competences through broad interpretation and muscular use, either to address real transnational problems or to enhance their own power and status; EU institutions are able to do so because they enjoy a degree of separation from control through voters, public attention, or Member State institutions; and the CJEU is of no help in safeguarding Member State competences. The Treaty model is to set up a broad scope of EU competences (with no areas explicitly off-limits) and to place control over their exercise *within* the EU legal order. That control, however, is soft at best.

It is here that the FCC intervenes. The problem of competences is really a problem of how they are exercised; competence creep exists because of the way competences are used. In other words, while the FCC's use of doctrine is quite muddy in that it lumps together the existence and the exercise of competences, its grasp of the underlying problem is quite astute in that the existence and the exercise of competences *are*, in reality, lumped together. Proportionality review is, of course, a tool that would help a great deal. As a means to confine the intensity of EU intervention, it shares with subsidiarity the potential to preserve some degree of Member State autonomy. That potential, however, is largely untapped. Its judicial application by the CJEU betrays a reluctance to get involved, not dissimilar from—though slightly milder than—the Court's jurisprudence on subsidiarity.

None of this means the FCC should use this tool on a regular basis. It could—the doctrine is in place now, and that is worrisome. The FCC's deterrence fatigue, as Miguel Maduro called it,[73] may be an incentive for the German Court to take the reins on the competence question. Nothing, however, would be more destructive. The FCC, in its effort to protect German competences and constitutional values, would in effect be asserting a jurisdiction that would be felt far beyond German borders, and damage the very raison d'être of European integration (including the CJEU) in the process. That should be a reason for strong restraint.

This circles back to the FCC repeatedly insisting on the exceptional nature of its review (see Section 3.2). Can we trust it means what it says? On one hand, some commentators take their cue from the cavalier way the FCC clears the high *Honeywell* hurdle and pretends that *Weiss* is "not comprehensible," "arbitrary from an objective perspective," and "no longer tenable from a methodological perspective" (which of course it is not).[74] If this is how the FCC deals with high hurdles, we should have little confidence it will respect the "exceptional" nature of its proportionality review. On the other hand, Germany's political and constitutional commitment to European integration is beyond doubt, and it is inconceivable that the FCC would want to bring the house down. It is much more likely that the FCC found itself torn between its commitment to European integration and its reluctance to surrender constitutional authority, and tried to create an incentive for the CJEU to police the limits of competences

[73] Europagruppe Grüne, *Is EU Community Law in Jeopardy?*, YouTube (June 18, 2020), https://youtu.be/dxtMK3XaZlM.

[74] *PSPP*, 2 BvR 859/15, 2d syllabus, ¶¶ 116, 119.

better by turning up the volume. I trust the FCC will not want to displace the CJEU through routine proportionality review. But, of course, this is a matter of political faith, and we will have to keep a close watch. The fact that the Moseses have smashed their tablets to maximum public effect since May 2020 probably helps as a deterrence.

5.4. Violating the duty to make a second referral

Finally, many do not understand why the FCC did not simply request a second preliminary opinion from the CJEU.[75] A court that finds a CJEU judgment "simply not comprehensible" should have asked for further clarification and followed the Italian Corte Costituzionale's lead in being "self-confident" and "deferential" at the same time rather than violating Article 267 TFEU.[76]

I suspect there was very little the German judges did not comprehend, and even less they needed clarification for from Luxembourg. After all, following the *OMT Referral*, the *PSPP Referral* was the second time the FCC referred the same matter to the CJEU. The CJEU reacted to the FCC's concerns for the second time, confirming its prior jurisprudence. It is this jurisprudence the FCC considered as blatantly faulty. It believed that the CJEU had handed the ECB a carte blanche, and that it had acted recklessly irresponsibly. The FCC—clearly feeling its voice had fallen on deaf ears in *Gauweiler* and *Weiss*, and with little hope it would be different in another preliminary ruling—decided it was time to sound the alarm a little louder. The German Court understood *Weiss* very well; it just would not accept it without surrendering constitutional authority. Why would it want, or need, to make another referral?

There is a deeper structure to the critics' admonition that the FCC should have asked for yet another preliminary ruling. We uncover it when we cast judicial dialogue not in the doctrinal manner shaped by the CJEU's jurisprudence of hierarchy (which the FCC rejects, at least for fringe cases), but in a political manner, with both courts on equal footing. If we then go looking for the legitimacy of this admonition, we will discover a familiar pattern. The model of political legitimacy in much of liberal theory (not just Habermas's early work) is that of an everlasting conversation. Any effort to cut off the conversation—that is, to decide—may be viewed as a violent act of silencing.[77] Politics must always show itself open to debate, and to be political means to take on the burden of conversation, which in itself becomes a symbol of modern civilization: talk displaces force, conversation displaces the moment of decision. This model assumes that, if only the conversation continues, everyone will eventually come to see the truth of the matter. All participants will converge towards the same position, like in a scientific enterprise[78]—a position that holds out against all criticism and is best suited to resolving the problem at hand.[79] It is this idea of convergence that links politics to

[75] Basedow *et al.*, *supra* note 3, at 204–5.

[76] *Id.* at 204 referring to the *Taricco* saga, *supra* note 19.

[77] To state the obvious, critics of the *PSPP* ruling use this non-hierarchical model only with respect to national court decisions. When the CJEU decides (rather than national courts), critics remain comfortably within the doctrinal hierarchical model, thus loading the dice of legitimacy against national courts.

[78] Perhaps it is this scientific understanding that makes Basedow *et al.* (*supra* note 3) believe in strength in numbers.

[79] Paul W. Kahn, Political Theology: Four New Chapters on the Concept of Sovereignty 149–151 (2011).

law and to the ideal of the judicial process itself. If the rules of judicial process are re-conceived as structuring a conversation in which no one is silenced and all attempt to convince each other, there are no winners or losers (Basedow *et al*. speak of no one "losing face"[80]), for both sides converge at the end of the conversation.

Interpretation of facts and of texts does not, however, necessarily move towards unity rather than plurality. Sometimes, we face "real contradictions," and no amount of talk or good-faith application of reason can furnish the answer. Reason will not always work itself out through dialogue. In jurisprudence, a Dworkinian Hercules might be needed to push towards unity,[81] but that would also mean stripping the conversation of actual participants. Real people, and real courts, have real disagreements.[82]

The FCC and the CJEU disagree on the ambit and extent of the control over the ECB's conduct, but their real disagreement goes far deeper. When both courts, after two referrals and two preliminary opinions, became entrenched in their respective positions, the question of judicial power was on the table, which, in turn, was informed by "real contradictions." The courts circled around the question of the ultimate source of legal authority in the EU (Section 5.2). Here, reason does not work towards unity, and talk not towards convergence. Rather, this question filters deeper questions of political identity, political imagination, belonging, loyalty, and responsibility (Section 6). All these questions are beyond the reach of the law. Forcing the FCC to make another referral, or dragging it through infringement proceedings because it did not, will not get anyone closer to the answers.

6. Framing community

Casting the *PSPP* ruling as a revolution, on final analysis, does more than simply frame it as a breach of the law. Revolutionary action appears as an extraordinary political act: only action outside of law can do away with law. The paradigmatic revolutionary act is not law at all, not even bad law; it is political action that displaces law. The FCC appears less like a legal, and more like a political, actor who displaces the community of reference at the heart of European integration—an act akin to idolatry (Section 6.1). With the European displaced by the German, European integration's "real contradictions" are thrown into relief: a disconnect between authority and legitimacy, and the difference between the thicker and the thinner ends of constitutionalism (Section 6.2). These "real contradictions" resurface in what courts do. Courts read, not simply a legal text, but "their" own community beyond the text (Section 6.3). It is this dimension of the *PSPP* ruling—not the *words* spoken by the FCC, but the FCC's *act* of speaking—that lends it legitimacy (Section 6.4) and exposes the democratic difficulty of EU law supremacy (Section 6.5).

[80] Basedow *et al*., *supra* note 3, at 204.

[81] Dworkin refers to an imaginary judge, Hercules, who has perfect knowledge of principles and precedents, and who can therefore resolve competition between conflicting narratives. *See* Ronald Dworkin, Law's Empire 239 (1986).

[82] Kahn, *supra* note 79.

6.1. Committing political idolatry

The politics behind the *PSPP* ruling, according to its critics, is that the FCC is intervening from a purely German perspective, with German interests at heart. While it professes to act on behalf of the rule of law, it is really acting on behalf of the "German saver."[83] It replaces EU insights, balances, norms, interests, and institutions with German insights, balances, norms, and institutions, and thus takes a worm's-eye view of European integration. It even replaces an EU judgment with a German judgment. The FCC becomes a political actor outside the law who destroys the legal foundations in the name of parochial politics, not of law.

The *PSPP* ruling, then, is not simply about transgression against, or disobedience of, the law. Violations of the law, even grave ones, can be mundane, and are an ordinary potential of any member of a legal community. Even judges can get things wrong. In the *PSPP* ruling there is, however, some added value to the transgression which qualifies it as something that brings Moses down from the mountain. That added value is, of course, its idolatrous streak. The FCC appears as a worshipper of the golden calf of German sovereignty.[84]

It is this aspect of framing the *PSPP* ruling that explains both the severity of the criticism and the fact that critics somehow take it personally. Revisiting Weiler's description of the Pescatore School and its true faith in European integration,[85] one might say the FCC worships a different god. Worse, the idolater worships no god at all, since in the age of monotheism (and what else is supremacy and CJEU monopoly if not a metaphor for monotheism?) there can be only one God. The golden calf has no power; it is just a shiny idol. Reaching for the divine, the idolater reaches into utter emptiness. It is this emptiness that adds evil to transgression: if there is nothing, it is man himself who claims to be the source of the sacred. Trying to make his own god, man makes himself god.[86] This is what the FCC did by erasing the European frame of reference and replacing it with a German one. Since the German frame had no business being there at all, the FCC, in this frame, was not merely reaching for the wrong political community, but it accomplished nothing, except for its own self-elevation. Worshipping nothing at all, except themselves, it is no wonder Voßkuhle and Huber became the targets of personal attacks. Worse, the German political community, detached from the European political community and elevating itself above it, comes

[83] *See PSPP*, 2 BvR 859/15, ¶ 173. From less irate critics, this argument sometimes comes in technical procedural garb: national procedure necessarily limits the view of the national court, whereas the CJEU has a strong institutional advantage. While this formulation is less incendiary, it boils down to the same reproach: privileging Germany over the European Union, the FCC transposes the relevant political community at the heart of European integration, and thus reverses form and value of the integration process.

[84] Little wonder, then, that the FCC's own legal narrative—it is trying to motivate the CJEU to more and better jurisprudence in the field of competence control, which is vital to the EU's constitutional architecture—appears so implausible to many.

[85] Weiler, *supra* note 4.

[86] Paul W. Kahn, Out of Eden: Adam and Eve and the Problem of Evil 76–77 (2007).

with a dark history indeed. Again, no wonder that some comments reference national socialism.[87]

6.2. A tale of two communities

With the idolatry metaphor, we have clearly moved beyond dialogue—or at least beyond a dialogue headed for convergence—and into a constellation marked by "real contradictions." This has partly to do with the old question of ultimate authority in the European Union, but it goes deeper. Beyond authority and power lies the question of imagining communities and belonging to them. The legitimacy of authority and power depends on our imagination of political community and our loyalty to it. None of these can be decreed, as they, in turn, depend on experience and belief. We cannot reason our way into either.

It is a truism that the European Union and the nation-state are (and are meant to be) different forms of political community which command very different imaginations, beliefs, and loyalties. These differences color the legal imagination, too. It is only from a black-letter point of view that these communities look similar as communities of law: their foundational norms provide for democracy, equality, freedom, fundamental rights, the rule of law, and all the other normative values of late modernity.[88] Their institutions, while not the same, serve similar purposes; even their instruments for bringing individuals into the fabric of collective identity, like citizenship, seem alike. However, when we look beyond words and functions, as we must,[89] to the imagination that sustains polities and their laws, these communities are strikingly, even categorically, different.

The FCC operates on the thicker end of constitutionalism, where law and political identity are thoroughly connected and sustain each other. Here, law is a marker that points both to a political community's past and memory and to its future and hopes. The nation-state and its citizens constitute themselves in part through law—the legal imagination yields a political imagination (and vice versa). National law, and the constitutionalism it sustains, construct both polity and citizens. They are a structure of belief about the meaning of the polity and the self, and they have a richly textured cushion of cultural resources they can rely on in order to sustain these beliefs.[90] The

[87] Both the anger and the historical reference resurface regularly in comments on the FCC's jurisprudence on European integration. *See, e.g.*, Joseph H.H. Weiler, *Does Europe Need a Constitution?*, 1 Eur. L.J. 219 (1995); Michelle Everson & Christian Joerges, *Who Is the Guardian for Constitutionalism in Europe after the Financial Crisis?*, *in* Political Representation in the European Union 197 (Sandra Kröger ed., 2014); Franz C. Mayer, *To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's* ultra vires *Decision of May 5, 2020*, 21 Ger. L.J. 1116 (2020).

[88] This is what inspires Armin von Bogdandy to his "Prinzipienlehre." *See, e.g.*, Armin von Bogdandy, *A Disputed Idea Becomes Law: Remarks on European Democracy as a Legal Principle*, *in* Debating the Democratic Legitimacy of the European Union 33 (Beate Kohler-Koch & Berthold Rittberger eds., 2007), and my critique: Ulrich Haltern, *A Comment on von Bogdandy*, *supra*, at 45. "Constitutional Principles" also play a huge role in some strands of constitutional pluralism theory: *see, e.g.*, Mattias Kumm, *The Moral Point of Constitutional Pluralism*, *in* Philosophical Foundations of European Union Law 216 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

[89] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Felix Frankfurter, J., concurring): "It is an inadmissibly narrow conception of . . . constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."

[90] This cultural approach to symbolic meaning of law goes back to Ernst Cassirer, Clifford Geertz, Charles Taylor, and Michel Foucault and has been developed most forcefully by Paul W. Kahn: *see* Paul W. Kahn, Legitimacy and History: Self-Government in American Constitutional Theory (1992); Kahn, *supra* note 58;

political meanings they preserve, despite their universal formulation, are dependent on the particular history and collective experience of the political community. It is this particularity that lends authenticity to the constitution: it is laden with memory and myth, not just rationality; it is sovereign will, not just reason and interest. This is what makes it "ours." National law exerts tremendous normative pull, not because it rests on some foundational consensus or because it threatens with coercion, but because it expresses the will of the sovereign—it appears as the popular sovereign's footprint. In any democratic regime, the citizens themselves become part of that sovereign. It is here that law and sovereignty are linked: The sovereign people govern through the rule of law; and by following the law, citizens participate in popular sovereignty and achieve democratic self-government. As Paul Kahn explains, the maintenance project of law is a project of instantiation: the individual becomes a citizen and, ultimately, the sovereign.[91] Law, then, is not simply about the promise of order. It is about identity. As such, it is highly political in a constitutive sense, erotic, and dangerous.[92] And it is in the hands of the FCC.

The CJEU operates on the thinner end of constitutionalism. EU law lacks any erotic components that are constitutive of individual and collective identity in nation-states. It epitomizes the project of rule-based rationality. The European Union was not born from belief, visionary revolution, shared sacrifices, emotions, or love, but rather, very deliberately, from the spirit of reason. Building Europe upon emotional appeals to feelings of sharedness and community would necessarily be destined to fail.[93] Instead, European integration was conceived as a contract and as a project guided by enlightened rationality.[94] It turned from the imagination of sovereignty towards the imagination of the market, replacing sovereign will with a functional equivalent, money, which, as a divine term of equivalence, makes history and individuality disappear. Borders lost their existential meaning, and Europe was able to dream of a post-sovereign, perhaps post-political, community. However, economic integration has a cold heart and has left Europe's soul empty. Markets cannot tell us who we are as they operate through desires, which are mere placeholders. While their indifference was the perfect tool for working around the frictions and conflicts of a hyper-political nationalist past, it has kept the European Union from developing a political identity

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Paul W. Kahn, The Cultural Study of Law: Reconstructing Legal Scholarship (1999); Paul W. Kahn, Law and Love (2000); Paul W. Kahn, Putting Liberalism in Its Place (2005); Paul W. Kahn, *supra* note 86; Paul W. Kahn, Sacred Violence: Torture, Terror, and Sovereignty (2009); Kahn, *supra* note 79; Paul W. Kahn, Finding Ourselves at the Movies: Philosophy for a New Generation (2013); Kahn, *supra* note 12; Paul W. Kahn, Origins of Order: Project and System in the American Legal Imagination (2019).

91 *See supra* note 90.

92 Germany's political imagination is, of course, complicated: *see* Ulrich Haltern, *European Tourists of History and Imagination*, *in* Europe: The New Legal Realism, *supra* note 4, at 219; Ulrich Haltern, Was bedeutet Souveränität? [The Meaning of Sovereignty] (2007); Ulrich Haltern, Obamas politischer Körper [Obama's Political Body/Body Politic] (2009).

93 Joseph H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration*, *in* Philosophical Foundations of European Union Law, *supra* note 88, at 137, 147.

94 For wonderfully evocative accounts of the Union's dispiriting iconography, *see* Cris Shore, Building Europe (2000); Kathleen R. McNamara, The Politics of Everyday Europe (2015). For iconographic relevance to European law, *see* Ulrich Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 Eur. L.J. 14 (2003).

capable of sustaining its widening and deepening powers. This is a problem of social legitimacy as much as it is a problem of law. A European polity whose citizens "feel alienated from the Union's work"[95] has a manifest problem with social legitimacy. Social legitimacy is intricately linked to the European Union's legal texts: they were never good at constructing an imaginative fabric which would allow the European polity to inscribe its own identity into the identity of its citizens. EU texts constitute a common market which erases history, identity, and individuality. They do not constitute a collective self, and therefore fail to appear as authentically "ours." This is what the CJEU works with.

While these very different communities work well together, there is also an obvious disconnect between authority and legitimacy. Functional demands have led to a delegation of regulatory powers to supranational institutions, but the experience of democratic self-government has remained stubbornly national.[96] It is this disconnect between authority and imagination that constitutes the "real contradiction."[97] The battle is not merely over authority and power, but over different forms of political imagination. Where one sees sovereignty, *pouvoir constituant*, and political identity, the other sees functionalism, governance networks, and the re-formation of boundaries in an environment of heterarchy and polycentricity. The political itself takes on different imaginative forms within a field of governance where thick constitutionalism teams up with a truncated, or "unresolved," form of hybrid constitutionalism.[98] The "real contradiction" then is that these are different forms of political belief—and different forms of belief tend to view each other as idolatrous.

I am of course not claiming that these "real contradictions" are either pre-political or carved in stone. While today the imaginative fabric of the European Union is not nearly as dense as that of a national political community, that does not mean it could never be. It could. Political communities are held together by a belief in webs of meaning, and those meanings change, sometimes in the twinkling of an eye. But I do not see any signs of that happening anytime soon, and there is no way of reasoning our way into a European political faith. An account of the state's grip on our imagination is no moral justification for that account. As a moralist, I may be dismayed by the tenacity of the national imagination which, to this day, is the source of political identity. But it is, for the moment, part of our condition, and unreasonable as it may be, it is not reason that constructs history.[99]

[95] *Commission White Paper on European Governance*, COM (2001) 482 final (July 25, 2001), at 5.

[96] *See, e.g.*, Peter L. Lindseth, *The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance*, *in* EU Law in Populist Times 505, 506 (Francesca Bignami ed., 2020).

[97] A classic statement is Weiler, *supra* note 87; for a recent one, *see, e.g.*, Lindseth, *supra* note 96.

[98] Neil Walker, *The European Union's Unresolved Constitution*, *in* The Oxford Handbook of Comparative Constitutional Law 1185 (Michel Rosenfeld & András Sajó eds., 2012).

[99] This is, perhaps, the problem of legal pluralism as a theoretical concept, which is under siege. While some authors take pains to disconnect the discussion of the *PSPP* ruling from the theory of pluralism (e.g. Wendel, *supra* note 71, at 982), it is not hard to see that the FCC's real-life attack on supremacy does to legal pluralism theory what the Trump Government's real-life alternative facts and blatant lies in politics did to deconstructionist theory. Pluralist writers therefore resort to desperate measures to salvage their theory, by arguing, for instance, that human dignity is its core. *See, e.g.*, Matej Avbelj, *Constitutional Pluralism and Authoritarianism*, 21 Ger. L.J. 1023 (2020). That may be so, but it is not going to help much:

6.3. Reading communities in courts

Just as a black-letter point of view has trouble seeing the different worlds of law and constitutionalism, it also has difficulty in recognizing how they play out in court and turn into "real contradictions." Why should this battle surface in a judicial dialogue between the CJEU and the FCC, and why should it be truly fundamental? Even if national courts were right, and the ultimate source of legal authority were national constitutions, why couldn't they simply step up their integration game, and interpret national constitutions a little more in the light of EU law? Why shouldn't they trust the much better-placed CJEU to use the legal material in place—fundamental rights, the subsidiarity and proportionality principles, competence catalogues, democracy clauses, and other value statements in the Treaties—and cooperate with the Court to the greatest extent possible to make multilevel constitutionalism a just and law-based foundation of a composite European polity? And shouldn't this be true *especially* if they are committed to European integration, as the FCC is, and know about the destructiveness of unilateral judicial interventions, as the FCC does?

These questions make sense if we see judges as specialists in the science of law—experts in a form of reasoning, which is proportionality review. Once we do that, we look exclusively to what the courts say and not to who they are. We analyze the content of their speech rather than who actually speaks. We see the words—often identical in both constitutional worlds: human dignity, freedom, democracy, equality, the rule of law, etc.—but we ignore the source. By confusing the *what* and the *who*, we confuse, as Paul Kahn points out, two analytical categories—justice and legitimacy.[100] It is a matter of justice to work out the reason of law within the political. It is a matter of legitimacy, however, who says so. We argue endlessly over the rule the opinion puts forth, and we ask if it is just or efficient: Is the tax too high? Is the speed limit too low? To ask these questions, we do not need to know the author or origin of the rule. This is the black-letter law approach to legal texts. But even when we believe the rule falls short of being just, we think it legitimate and let it guide our conduct. The reason is, of course, that we believe we are governed by rules that are not only just but also our own.[101]

The rules are our own when we hold ourselves accountable. We do so by construing ourselves as the authors of those rules. Authorship matters if we understand it not in the sense of drafting but as a social practice of assuming accountability.[102] Let us for a second go back to the analogy with religious belief. When I, as a Christian (rather than a student of religion), read the Bible and ask who its author is, I do not inquire about its human drafter but about God. When I, as a citizen (rather than a legal scholar), read the constitution and ask who its author is, I do not inquire about the drafting convention but about the popular sovereign. In both cases, I look through the text right

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We also know that "truth" is a complex concept, but this knowledge is buried under the garbage dumped by Trumpism. My point is that in a European Union with "real contradictions," legal pluralism is all we have, never mind what its moral or normative core is.

[100] Kahn, *supra* note 12, at 49.

[101] *Id.*

[102] In this sense, authorship is less about writing than about reading. *Id.* at 50.

to its imagined source. The meaning of the text is not independent of the source, and of my belief in that source. To deny the authorship of God, or of the popular sovereign, removes the surplus of authority that comes with the text. Constitutions declare things in the name of "We the People," or of "the German People." The "we" includes us as members of the popular sovereign, who spans generations, constructs democracy as self-government (rather than government by long-dead people), and lends us collective and individual identity. We become both readers and authors: reading, we acknowledge authorship. It is "our" text.

No text alone can carry such a complex and counterintuitive social practice. It needs to be embedded in corresponding historical narratives, ideologies, organizations, and political rituals. An important part of that context is the judicial opinion, which contributes to the social practice of acknowledging self-authorship in law. The judicial opinion does not claim the authority to make law, but to make clear what it already is; it represents the written text of the law.[103] It invites us to stand with the court and look at the constitution the way the court looks at it. The judicial opinion is most successful when it makes itself transparent to the constitutional text. It has authority insofar as it makes the underlying law, authored by ourselves, visible. Reading the constitution as it was authored by us, the court relies on the narratives, ideologies, organizations, and rituals of the polity. "[The Court] reads the polity through the Constitution"; it reads us, rather than a text.[104]

This, then, is possibly the deepest level of "real contradictions." To say "the law is the law is the law" is just as incorrect as to say "opinion is opinion is opinion." Meaning depends on imagined authorship just as much as on doctrinal content. Linking a legal text to the popular sovereign as its author—to "us"—makes it legitimate because it marks the law as democratic and, ultimately, as "ours." A court opinion participates in this connection in that it makes itself transparent to the legal text which, in turn, is "us" governing ourselves. Denying the people's authorship does not otherwise leave the legal text, or its interpreter, alone.

6.4. Linking the FCC's voice to popular sovereignty

The FCC's *PSPP* ruling, not the CJEU's *Weiss* judgment, makes this imaginative connection to the people's self-authorship. It is no accident that the FCC speaks "in the name of the people," whereas the CJEU just speaks. The former is no glossy embellishment; the latter is no inadvertent oversight. Rather, the FCC shows its voice to be identical with that of the German Constitution's author—the popular sovereign, and ultimately, us. We are not bound by the rule of dead men who drafted the Constitution, and we are not bound by the FCC's judges either. The rule of law is coextensive with the rule of the people. The belief in our membership in a popular sovereign—who lends us, as citizens, a collective identity, who spoke the state into existence, and who speaks now a judicial opinion—is at the foundation of the tenacious grip of the nation-state

[103] *Id.* at 69.

[104] Kahn, Putting Liberalism In Its Place, *supra* note 90, at 258.

on our political imagination. There is nothing natural or even pre-political about it—it is, rather, a matter of belief in meanings that are sustained by rituals, memories, and judicial opinions.

The CJEU, in contrast, speaks in no one's name, because there simply is no plausible European popular sovereign and, hence, no self-authorship. Of course, the perspective of self-authorship is not the only framework from within which we understand institutions or democracy—we can count votes and analyze ideological or institutional interests. But the legitimacy of legal interpretation hinges upon the belief that "[l]aw does not happen to us; rather, collectively we do it to and for ourselves. Absent this belief, we cannot imagine how the rule of law and the rule of the people coincide."[105] Unsurprisingly, this belief is much less robust in transnational law than in national law. The legitimacy of transnational law is the rationality of the rule, not its origin.[106] The experience of international law over the last century, and the fact that it has been out of sync with politics, testifies to the irreducible quality of political meanings which attach to belief in membership. The CJEU cannot insulate itself from such experience because "[t]he life of the law has not been logic; it has been experience."[107] EU law's experience is that of legitimization by contract rather than public will; its foundations are "contractual and textual rather than spiritual," writes Andrew Williams, and adds that they "are not premised on a system of governance by, for and of the people."[108]

For the most part, none of this matters in the ordinary course of events. First, Member State constitutions declare European integration to be part of their constitutional identities. Second, the form of the preliminary reference procedure guarantees that it is the national court who renders the final judgment. EU law, as interpreted by the CJEU, is spoken through the mouth of the national judiciary. CJEU decisions therefore partake in what Joseph Weiler has called a "habit of obedience,"[109] and what I have described as a belief that the rule is "our own." This belief has spilled into all CJEU legal procedures. Our ordinary legal experience, therefore, is that the law is, indeed, "the law is the law is the law," regardless of its origin.

However, the belief that EU law is "our own" is tested when national constitutional courts, in extraordinary circumstances, choose to measure it against national constitutional law. This is the moment where daily habits of obedience are thrown into

[105] Kahn, *supra* note 12, at 176.

[106] Transnational law therefore uses principle-based modes of justification. If states agree to recognize fundamental rights, the justification for such a provision is a principle of human dignity. If they agree on environmental protection, the justification is a principle of stewardship for future generations. If they agree on primacy of Union law and CJEU monopoly, the justification is a principle of uniform application. However, principle-based legal claims have made little contact with much of the world, with some moderate exceptions in areas whose internal logic views borders *per se* as unwelcome interventions. *See, e.g.*, Anu Bradford, The Brussels Effect (2020) (case studies on markets, information technologies, health, environment).

[107] Oliver Wendell Holmes, The Common Law 1 (1881).

[108] Andrew Williams, The Ethos of Europe 188 (2010).

[109] Joseph H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 Comp. Pol. Stud. 510 (1994).

doubt, where ordinary legal experience ends, and where the practice of reading political community through law resurfaces. European integration then ceases to appear like one heterarchical network; rather, national community is pitted against European community, thick constitutionalism against thin constitutionalism, and identity against rationality. An EU law procedural norm empowering the CJEU and its supremacy claim is just not robust enough to resolve this standoff.

6.5. The democratic difficulty of supremacy

We might label this as the democratic difficulty of EU law supremacy. Supremacy privileges a voice which, while important to most of us, holds little sway over our political imagination, and appears, to most, inauthentic. To silence the voice, which, while speaking from a worm's-eye perspective, appears as authentically "ours," would hurt the integration project by robbing it of its imagined authenticity. When we turn from black-letter law to contextual analysis, we see one consistent element in the experience of law's life: thick constitutional orders resist constitutional domination by thinner constitutional orders, and it is their own privilege to streamline judicial voices into strict hierarchy. A manifest example is the US position vis-à-vis international law, which makes perfectly clear that, when push comes to shove, the latter is not in the position to override the authentic self-authorship of American law.[110] Most nation-states, including Germany,[111] agree. They do because democratic self-government is both, belonging in the world of the political, and self-authorship of rules in the world of the law.

It is a measure of the Member States' deep political and legal commitment to European integration that the democratic difficulty rears up only in exceptionally rare instances. The *PSPP* ruling is a reminder that ultimately there remains a "real contradiction" at the heart of European governance, which will not go away anytime soon. It will resurface in domestic courts from time to time, as an occasional hiccup that seems, from a black-letter law perspective, illegal and driven by parochial political interests. But that is just the point. It is precisely the worm's-eye view that makes these voices legitimate. What they say may be parochial, it may even be wrong. But since domestic courts read "our" communities—dense political communities thick with belonging, loyalty, and memory—their voices appear as "our" voices. Their mistakes are "our" mistakes and we will not deny these voices our loyalty. No principle of supremacy, no need for uniform application will change that. The *PSPP* ruling is neither a thunderbolt nor a revolution. It simply condenses and accentuates what has been there all along, beneath the surface of daily collaboration. That surface has led many to gloss over the contradiction at the core of integration, which, it turns out, is "real."

[110] Paul W. Kahn, *American Exceptionalism, Popular Sovereignty, and the Rule of Law*, *in* American Exceptionalism and Human Rights 198 (Michael Ignatieff ed., 2014).

[111] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvL 1/12, Dec. 15, 2015, *translation at* https://bit.ly/36k5OgK.

7. Conclusion: Now what?

To acknowledge the "real contradiction" in European integration's DNA is, I believe, a huge step towards acknowledging that the *PSPP* ruling is no simple aberration that might be remedied by either applying the "right" law or building the "right" institutions.

To apply the right law is, of course, to start infringement proceedings against Germany. Judging from the CJEU's near-autistic soliloquy as a reaction to the *PSPP* ruling,[112] and from Advocate General Tanchev's predictable remarks in the same vein in a case responding to a request for a preliminary ruling from the Polish Supreme Administrative Court,[113] I believe hardly anyone doubts such proceedings would be successful, in the sense that the Commission would win. I also believe that they would be spectacularly unsuccessful in the sense that, legally, literally nothing would be gained, while politically, much would be lost. Legally, the FCC will not, and cannot, abandon its decade-long jurisprudence which locates the source of ultimate legal authority in the German Constitution. Infringement proceedings would merely crank up the heat in a conflict that has no legal solution. Politically, the European Union would engage in "'As if' constitutionalism":[114] EU law likes to pretend it operates at the thicker end of constitutionalism; EU politics likes to pretend it operates within an environment of dense political community. Such claims regularly backfire in a million ways,[115] and they would here, too. Putting on the pretense of thick constitutionalism is not just awkward, it makes people angry. That anger often produces the argument that "we" should not be governed by "them." It is a crude, albeit not entirely misguided, version of the impression that in instances of "real contradictions," thin constitutionalism should not replace thick constitutionalism, and that if it did, that would amount to a denial of democratic self-government.[116]

[112] CJEU, Press Release No. 58/20, Press release following the judgment of the German Constitutional Court of 5 May 2020 (May 8, 2020).

[113] Case C-824/18, A.B., ECLI:EU:C:2020:1053, ¶¶ 79–84 (Dec. 17, 2020) (Tanchev, A.-G.).

[114] The term is Peter Lindseth's; *see* his *The Perils of "As If" European Constitutionalism*, 22 Eur. L.J. 696 (2016).

[115] Politically, for example, the symbols of thick political community, such as flag and anthem, are wooden and awkward. Political processes enjoy less attention and legitimacy. Constitutionalist rhetoric in the Treaties gets sunk by referendums. Legally, for instance, despite its decade-long attempts, the CJEU has failed to convince EU citizens that their status is "fundamental" in any politically meaningful sense. Since *van Gend en Loos* (Case 26/62, 1963 E.C.R. 1), the CJEU has also been laboring under a dark cloud: by pushing EU law into the limelight, it has also brought the European lawmaking process into the limelight, which has always had trouble to fully sustain the legitimacy needed: *see* Joseph H.H. Weiler, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12 Int'l J. Const. L. 94 (2014). The resulting deficiency of democratic legitimacy loops back to the law itself, and to the court that uses such law. It further imperils the EU's claim to thick constitutionalism, which is only convincing when EU law is posited against even thinner versions of constitutionalism, such as the ECHR or international law.

[116] The CJEU is no stranger to this feeling. As soon as the ECtHR pretends the ECHR is, constitutionally, on the same page as Union law, the CJEU lashes out at what it perceives as hubris. *See* Opinion 2/13, EU Accession to ECHR, ECLI:EU:C:2014:2454 (Dec. 18, 2014).

To build the right institutions is, of course, to install a new mixed chamber at the CJEU.[117] The "real contradiction," however, is not a question of authority and power—if it were, allocating authority and power to a new chamber would make sense. Rather, it is a question of democratic self-government of the political community as imagination, not as doctrine or function. There is no decreeing community, just as there is no middle ground when it comes to authenticity and belonging. Proponents of such a chamber hope (among other things) for shared interpretations that might square the circle, explain conundrums, and solve dilemmas. Alas, interpretation is not disconnected from imagining sources and authorship. Like faith, imagination grounds interpretation. It provides a foundation for interpretation that the text itself cannot supply. Different imaginations spawn different interpretations. To return, one last time, to the analogy of religious belief, Jews and Christians may read the same words in the Old Testament, but their forms of belief remain radically different. The same applies here. There is no unified reading of European and constitutional texts, and hence there can be no Dworkinian Hercules, not even in a new CJEU chamber. The "real contradiction" would, I believe, reappear in domestic constitutional courts regardless of such a chamber.

What, then? With no legal or institutional solution, is Europe lost to the whims of unstoppable rogue courts? Yes and no. The "real contradiction" will not go away; this is the half-empty glass. But, as Marx says, it will resolve itself if it has a form in which it may move around. That form, of course, is already there. We can see it unfold right in front of our eyes. It is the judicial dialogue under Article 267 TFEU, with the CJEU reading the European polity, and Member State constitutional courts reading their national polities; this is the half-full glass. The dialogue is far from broken down; on the contrary, in almost every single case the CJEU and national constitutional courts agree—sometimes grudgingly, but mostly as a matter of course. I have no doubt that national courts, including the FCC, will continue to follow the CJEU almost invariably, since they have an intrinsic interest in the success of European integration. This, after all, is part and parcel of their "reading the polity through the Constitution": they are reading their states *as Member States* which are, politically and legally, deeply committed to European integration. This is why I trust the FCC to sincerely mean, and do, what it promises to do with its many tropes of "exception" (see Section 3.2).

There will, however, always be the rare exceptional case of particular importance to Member State courts where they will push back against the CJEU, and put aside its judgments as "incomprehensible," "objectively arbitrary," and "no longer tenable from a methodological perspective." This is what happened with the *PSPP* ruling. The FCC has turned from passive-aggressive to aggressive (which is a matter of style, see Section 3.1) and spoke out a bit louder. It has pushed back, as it should. Obviously, it has chosen an unfortunate constellation, and has muddled its doctrine. But it has also

[117] Joseph H.H. Weiler & Daniel Sarmiento, *The EU Judiciary After* Weiss*: Proposing A New Mixed Chamber of the Court of Justice*, EU Law Live (June 1, 2020), https://bit.ly/3t6EkoQ; Joseph H.H. Weiler & Daniel Sarmiento, *The EU Judiciary After* Weiss*: Proposing A New Mixed Chamber of the Court of Justice. A Reply to Our Critics*, EU Law Live (June 6, 2020), https://bit.ly/3qUGXYK.

put its finger on serious problems. Self-extension of EU competences and unchecked ECB conduct are critical challenges to both EU law and politics, not unlike the lack of European Union fundamental rights protection in the 1960s, and the scant protection of individual rights in European Arrest Warrant affairs a few years ago. In such cases, push-back from national courts may not be a bad thing—despite the fact that it constitutes a huge risk for uniform application, and therefore for the success of European integration. It is this obvious risk which will make sure that Member State courts—who are committed to European integration—will not push back often. They will only if there is a real problem that justifies bringing up the "real contradiction," and if both courts have become entrenched in their respective positions. In those rare cases, Member State courts want more than to play second fiddle in a hierarchical relationship (which is never a great basis for a meaningful dialogue), and their strength is the thick, identity-based end of constitutionalism of the polity they read.

If I am correct, and there is no legal or institutional solution except for a form that allows those rare dissents to move around, then such dissents need space rather than an immediate resolution. Take the *PSPP* ruling: it is out there, and if we take many commentators at their word, a nuclear device has gone off with immense damage done. And yet here we are; European integration has not gone up in flames. The *PSPP* ruling is just sitting there, just like *Ajos* and *Landtová* before, with no meaningful corrosive effect. We cannot be absolutely sure what other constitutional courts, and the FCC itself, are planning to make of the *PSPP* ruling in the future. But neither the Czech Republic nor Denmark have turned into legally or politically unreliable Member States threatening to tear the EU asunder. There was no domino effect with domestic courts rebelling there, or elsewhere. To be sure, after the *PSPP* ruling there has been a flurry of political initiatives to deal with the fallout (which has all but vanished, see Section 2.1), and there is a huge scholarly debate. The decision itself seems strangely insulated from affecting anything else, just like those that came before it. One of the reasons will be that no one in their right mind would want to do away with the primacy of EU law. Everyone including the FCC knows that "[u]niform application of its law is of central importance for the success of the European Union . . . . Without ensuring uniform application and effectiveness of its law, it would not be able to continue to exist as a legal community."[118] All courts therefore agree that the "interpretation and application of EU law, including the determination of the applicable methodological standards, primarily falls to the CJEU, which in Art. 19(1) second sentence TEU is called upon to ensure that the law is observed when interpreting and applying the Treaties."[119]

We cannot know in advance what exactly will trigger national constitutional courts to attack primacy. It may happen when they believe the legal positions are entrenched and when they believe they are facing a problem serious enough to threaten uniform application. The FCC's *Honeywell* doctrine, for instance, is not a detailed map of the constitutional landscape; it is merely a code for the FCC's determination to restrain itself and to grant the CJEU much latitude. I doubt there can be any legal doctrine

[118] *EAW*, 2 BvR 2735/14, ¶ 37.
[119] *PSPP*, 2 BvR 859/15, ¶ 112.

that gives us more certainty than that. The deepest beliefs about what makes our community, and what makes us citizens, are volatile and dependent on context; there is always more to us than we can say. The law cannot hold and contain that knowledge. It may pretend it can, and that to win the constitutional claim is to win the political dispute. History, however, has taught us again and again that winning the legal battle is not always the end. If that is true, then it is naïve to believe that law could actually settle disputes that are important enough for the CJEU to become entrenched in its position and for national courts to contest that position. The appropriate place for such a dispute is the political arena. With respect to the *PSPP* ruling, the law has reached its limit, and the issue must play itself out in the political arena; however, for the moment, it seems to have been put to rest. All the hidden narratives and interests are now out in the open; a new fiscal union, backed by democratic legitimacy, is under way; and both courts had made their voices heard loud and clear. Indeed, it seems that somehow—against the background of the continuing hum of ongoing integration—the air has been cleared.

If it turns out, however, that "real contradiction" becomes a code for the habitual rejection of EU law in all matters that count, and that push-back legitimacy serves as an excuse for a Europhobe power grab, then national courts are misreading their political communities, and consequently their constitutions. (If they grab power and do *not* misread their polities in the process, European integration has a much bigger problem than merely a legal one, which cannot be solved by the courts, either.) I promise I will then join the twenty-five as their twenty-sixth co-signee, if they let me.