

The Politics of Form in European Constitutionalism

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Markus W. GEHRING, *Europe's Second Constitution* (Cambridge University Press 2020)
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EUROPE, DÉBUT DE SIÈCLE

The first two decades of the twenty-first century have ushered upon Europe a seemingly unending string of existential crises. From financial meltdowns to mass migration, from a pandemic and the impending climate catastrophe to the war in Ukraine, the EU has been facing pressures at a pace and on a scale far beyond what it had experienced during its not-entirely-uneventful past. The typical observer of European integration will likely conclude that, despite missteps and failures, the EU has managed not to succumb under the weight of these challenges. A sense of pragmatism and possibility, born in part out of pure despair, has driven its more successful policies and legal innovations. A modicum of institutional imagination was on display during the financial crisis when new mechanisms were created outside the Treaty's formal architecture but not entirely beyond its constitutional purview. While the EU asylum system tragically collapsed during the 2015 refugee crisis, enough of a basic framework remained in place to handle, a few years later, the influx of Ukrainians fleeing their Golgotha. During the sad, protracted Brexit episode, the EU withstood London's fraught attempts to break the united front of its member states. Nor have the EU's institutions failed, despite some heart-stopping missteps, the task of setting up relief during the Covid public health emergency. The voice from Luxembourg, however tardy and dim, could be heard as the EU's eastern lands saw

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authoritarianism rise again from ashes. Even dusty common defence plans are being retrieved in response to the war in Ukraine.

This constitutionalism of limping-along is vintage EU. It captures the normative drive of a process that is halting but still moving, never reliably on time yet infused with a faint but detectable sense of purpose. It is the inexhaustible fiction, the constitutional equivalent of the practice, common in EU political negotiations, of stopping the clock at midnight as the parties keep hashing out compromises into the wee hours of the morning. Despite its improbable trajectory and Byzantine complexities, despite centrifugal forces that threaten its integrity and survival, the EU constitutional edifice remains fragile but not structurally compromised. It remains standing, which alone makes it a sight to behold.

To most commentators, this is what the outcome of Europe's postwar integration-by-law project looks like in its current, Lisbon embodiment. But move just a little to one side and, indulging a counterfactual, look anew at this cathedral. Suppose that Jacques Chirac, breaking with a tradition of French Fifth Republic presidents miscalculating their political fortunes, had resisted the urge to call a chance referendum for the ratification of the Treaty establishing a Constitution for Europe. Suppose further that, in keeping with its centuries-old constitutional tradition, the Dutch government had kept the ratification decision of the said document with the legislature or that, though at this point the counterfactual admittedly stretches belief, the Dutch Parliament had voted to ratify the Constitutional Treaty despite the negative outcome of the (non-binding) popular referendum. The Constitutional Treaty would thus have passed votes in the *Assemblée nationale* and in *Staten-Generaal* as well as elsewhere in the member states. Ratified nationally and boosted, no counterfactuals here, by a resounding majority in the European Parliament's consultative vote, the Constitutional Treaty had been ratified and come into effect.

In that scenario, it would have been not the Lisbon halfway house but a shiny Constitutional Treaty – lofty preamble, anthem and all – standing ready to absorb the perma-crisis shocks of the twenty-first century. The EU's resilience and successes would then have been attributed to its newly revamped constitutional foundations. Far less room, in that alternative history, for the familiar talk about quick institutional fixes, unavoidable incrementalism and the frustrating need for ever more carefully fine-tuned EU versus national interest across policy areas. What a sight worth beholding, that new European Union. A radical political project that had finally begotten the constitutional form it had long coveted and, perhaps, deserved.

Compare the EU's road not taken with the real-life collapse of the Constitutional Treaty and, adding insult to injury, the growing disavowal of the very ideal upon which that project of European unity rested. Add to all this the shocks of history – global markets, imperial ambitions, public health

challenges and the bare-knuckle politics of natural resources – and the Union’s predicament of having to limp along in this political topography comes into sharper focus. Some will use the occasion to wax lyrical about the EU’s unfulfilled vocation. But the jurist must not. Using the broken pieces, she must use her dexterity with formal legal argument to create a space where imagination and political will could rekindle renewal at whatever point in the nebulous future the stars of history come again, fleetingly, into proper alignment.

This task may seem thankless, and to some extent it is, except that by now it has become the familiar predicament of the European jurist. For what was the early age of EU constitutionalism if not an attempt to gather the pieces left in the Treaty of Rome by the collapse of earlier, bolder plans for political integration? Making the best of the hand they were dealt, the earlier generations of jurists used legal technique to add a constitutional gloss to Rome’s internal market narrative. Here, as elsewhere in history, their gloss superseded the original text. And if Pescatore or Donner had the vision and skill to build the deep structure of European constitutionalism on facts such as the import of glue, electricity bills and the like, then today’s jurists can continue their legacy under more stirring circumstances.

SEEKING EUROPE’S SECOND CONSTITUTION

I read Markus Gehring’s search for *Europe’s Second Constitution* as an undertaking of this sort.¹ Although published in 2020, the book is steeped, as its author confesses, a decade and a half earlier in the Constitutional Treaty moment of European integration. It reflects that moment’s roaring promise followed by its crashing demise and, finally, recalibration of need and possibility through checking the EU’s core constitutional features against its limitations and shortcomings. The result is a wide-ranging book, lucid and erudite, less combative in style than in substance and yet, more often than not, a refreshing departure from the barren conventionality of EU constitutional scholarship.

Professor Gehring sees the EU as a federal entity, a ‘constitutional polity that is subject to constitutional development’ (25). While there might have been a time when approaching the EU as an unidentified political object was plausible, such label would now be indefensible. ‘There is,’ he writes, ‘a clear tendency, over the last forty years [*sic*], away from intergovernmental structures and towards federalism’ (31). The federal entity lens dispels many criticisms of the EU. Gehring catalogues these critiques (no common political community, flawed political representation, *Kompetenz-kompetenz*) along three dimensions of constitutionalism: *demos* (the creation or existence of a people’s bond and sense of togetherness upon which is premised the idea of democratic self-government); *civitas* (the EU’s

¹M. Gehring, *Europe’s Second Constitution* (Cambridge University Press 2020).

institutional architecture and the principles that shape the functions of its political institutions), and *ius* (the European legal order, understood to include both the core tenets of EU constitutionalism as well as complex matters of jurisdictional organisation). A comparative analysis places the EU on these three dimensions alongside other federations – prominently though not exclusively the US, Germany, even Switzerland – which experienced at their formative stages crises comparable to the EU's. The conclusion is that Europe's 'path towards federalism is not unique' (46). Nor, however, is that path entirely set. Comparative study reveals some significant obstacles to further constitutionalisation of the EU, ranging from judicial selection to challenges of multilingual working environments to the fragmented structure of EU elections. Gehring finds common roots to these obstacles in an underdeveloped public space for debate and political will-formation in the EU. The Union's future depends on the creation of such spaces through constitutionalisation processes, he argues, although formal processes of Treaty-making or remaking through amendment seem unfeasible. Searching for a solution, Gehring turns, counterintuitively to say the least, to the dialogue between the European Court of Justice and national courts. He sees that dialogue as apt to create structures of empowerment 'for the benefit of Europe and its people (...)' from whence Europe's future constitution might emerge.

It is worth dwelling first on the matter of formal versus informal constitutional change. The fact, if fact it is, that formal change is unfeasible presents a non-trivial challenge to Professor Gehring's quest. Europe's Second Constitution must presumably be written and, as such, must be enacted through formal constitution/treaty-making procedures. Surely neither tacit acceptance nor some other form of *ex post* acquiescence would do. Half a billion EU subjects would not, and should not, submit to a new law, constitutional to boot, in whose making they had no direct or indirect say. Already defective in its pedigree, the EU's democratic deficit would plough new depths if the making of the novel constitutional order lacked citizen participation. How could the enactment of new terms of collective self-government not endanger the free and equal status of European citizens if they lacked opportunities for meaningful participation in its enactment? The existence of such opportunities, in ways consistent with guarantees of non-discrimination of the kind the EU claims to offer to its citizens, seems to depend on formalised processes of constitution-making. But if political circumstances doom all prospects of formal changes, then constitution-making processes of the kind that guarantee fair and meaningful citizen involvement are also impossible. Much is on the line if one abandons hope for formal constitutional change.

Gehring must and does have an answer (of sorts) to this challenge. Relying heavily on Bruce Ackerman's theory of constitutional moments in the United

States,² he questions the connection between citizen participation and formal constitutional change. Not all forms of citizen participation need to be aimed, at least initially, towards formal constitutional change. Sometimes popular participation reflects the sovereign's direct engagement in acts of special, higher law-making outside formal structures of constitutional change. While such informal law-making does not necessarily rule out future formal changes, a dynamic approach to constitutional development shows the people themselves capable of overcoming political stalemate. For all its ambiguities, and there are plenty,³ Ackerman's model has at least a scintilla of jurisprudential appeal for projects such as the EU's. In this 'elite project' (50), EU citizens remain disconnected from their supranational polity. They lack opportunities for robust debate that can galvanise political action and wherein pan-European policy compromises can be forged. The EU's current 'conglomeration of national public spheres' is hardly conducive to 'mutual understandings or compromises' (246). The creation of a public sphere, Gehring posits, would create the conditions in which European citizens could engage in higher law-making leading, possibly, to a new constitution for Europe.

It thus seems critical to ask how a robust European public sphere could come about. Perhaps a black – or, as Ivan Karstev nicely calls it, – a 'grey'⁴ swan event, say a pandemic or a war, could galvanise the European public and create the conditions for structural change.⁵ But Gehring's constitutionalist mindset has little conceptual room for external triggers. His aim is to see if the existing EU constitutional order has within itself the resources to bring about a pan-European, vibrant public sphere. His answer is affirmative; his method is 'further constitutionalisation'. Rejecting the loud chants that the EU is over-constitutionalised, the book makes an argument in favour of placing constitutional form both front and centre in any next-stage constitutional processes. Put differently, constitutional form is intrinsic to the explanatory processes that seek to illuminate and further

²See B. Ackerman, *We the People: Foundations* (Harvard University Press 1993).

³Are changes through higher law-making as entrenched as formal constitutional changes? Is constitutional structure ever the object of higher law-making? Most importantly, when – if ever – it is legitimate to bypass formal mechanisms of constitutional change? The gravitational pull of Bruce Ackerman's early work, centred on the tensions between a citizenry committed to the project of self-government and an ossified and unresponsive US constitutional order, has left little room for reflecting about the normative concerns. For an attempt to do just that, see A. Arato, 'Carl Schmitt and the Revival of the Doctrine of the Constituent Power in the United States', 21 *Cardozo Law Review* (2000) p. 1739.

⁴I. Karstev, *Is It Tomorrow Yet?* (Allen Lane 2020) p. 3 (describing grey swans as events that are predictable but unthinkable).

⁵The war in Ukraine comes to mind to today's reader. But it helps to recall that opposition to the Iraq war was also thought to create a European public sphere. See J. Habermas, 'February 15, or What Binds Europeans', in J. Habermas, *The Divided West* (Polity Press 2006) p. 39-48.

expand the constitutional nature of the EU. Placing the EU within its *genus proximum* (federal entities) opens up vast possibilities for comparative analysis, which alone can differentiate the EU's illusory shortcomings from its real weaknesses.

Having laid the groundwork for shuttering the theoretical orthodoxy that adorns the mainstream critique, the book reaches a turning point. But it fails to turn. Instead of breaking free, the book accepts the glorification of judicial dialogue as essential to European constitutionalism, it accepts constitutional pluralism as compatible with the federal entity conception of the EU, and, despite its stated intensions, it ends up endorsing a version of Karlsruhe's skewed and self-serving conception of the demos. These are not the strongest foundations on which to build Europe's Second Constitution. Gehring's call for 'a little more courage, more nuanced conceptions of federalism and a stronger commitment to establishing the preconditions necessary for Europe's constitutional moment' (278) suggests a need for more radical reforms.

FORMA CIVITATIS

Unlike most mainstream EU constitutional scholarship, which extols pluralism, polyarchy, and other forms of multi-level governance, Gehring's analysis revels in what one might call austere linearity. At its heart is a simple claim about the nature of the EU as a 'constitutional polity that is subject to constitutional development' (25). The EU's *forma civitatis* is a federal entity. More specifically, it is a federal entity engaged in a complex process of constitutional development toward a federation.

By itself, this is hardly a novel claim. What is novel is how the book unapologetically takes this conception of constitutional form as its starting point. Typically, constitutional scholars tend to conclude, rather than start, with a view of the EU's constitution form. In fact, reading Gehring on this point, I was reminded of James Naysmith, an influential mid-nineteenth century astronomer remembered nowadays for having photographed the moon the way he imagined it. Rather than set his telescope to the moon and take mediocre pictures, like his fellow astronomers, Naysmith sketched and photographed clay models of what he thought the moon looked like. Gehring's positing the EU as a federal entity is akin to a clay model. Many will feel compelled to question its veracity. Would it not be preferable to see the EU as a polity in the process of becoming something entirely new, an experiment in governance reflecting its *sui generis* political form? Gehring, refreshingly, says no. The EU's nature is not *sui generis*. It is a federal entity, or a federation-to-be.⁶ How can one tell? Call the process of elucidating political form

⁶Is seems a fair question if 'entity' means 'state'. Gehring tries to steer away from that explicit connection, presumably for fears of being dragged into debates such as A. Moravcsik, 'The European Constitutional Settlement', *The World Economy* (2008) p. 157.

a version of rational equilibrium. First comes the positing of a political form, say, federal entity, as a rebuttable presumption or working hypothesis. Then comes a check of how much that connection illuminates. While the match form-substance-practice might be imperfect, the real question is whether it is good enough. Or, to put this in a jurisprudentially more resonant fashion, does this conception of political form fit and justify the practice of European constitutionalism?

One should not gloss over this framing of the constitutional analysis and rush instead to check the goods it delivers. The framing is noteworthy regardless of one's quibbles with this or that detail of the analysis. I mentioned above a tendency of contemporary scholarship to arrive at, rather start from, considerations of political form. But that is not quite accurate. Far more common nowadays is to ignore matters of constitutional form altogether. Since debates about the nature of the EU tend to arouse disagreement of the seemingly unsolvable kind, EU constitutional theorists for the most part bracket away such abstractions. Professor Gehring rightly takes exception. Understanding the EU as a federal entity in a process of constitutional development is an – perhaps *the* – essential step in EU constitutional analysis. Most federations experience early on crises similar to the EU, which they perceive as existential because the developing federal entity has a limited ability to absorb political and economic shocks before reaching sufficiently high levels of integration. During early development, it is common for the units that form the federation to make claims to autonomy or influence that complicate the absorption of external shocks. It orients constitutional analysis that the EU is a federal as compared to some other type of entity.

To be sure, this particular choice of a framework raises important questions. How viable is comparing the political integration of nation-states with political, social and economic systems as complex as those of post-war Western Europe with the integration of the American colonies or the German Länder? Wouldn't the experience of multinational empires, the Habsburg being the most relevant in this context, be more illuminating than comparing state structures?⁷ Does not an exclusive focus on federations obscure elements in the developments of unitary states that would, in relevant aspects, be just as useful to understanding the possibilities for further constitutionalisation of the EU? Still, notwithstanding these complexities, there is undeniable usefulness to the comparative federal method, especially in what it reveals about the 'history of ideas about constitutionalization' (48).

Gehring's account leaves out much about this history of ideas, and in particular about the complex evolution of federal relations and regulatory architecture. His focus, as we shall see, is largely on the interaction between centre and periphery

⁷O. Beaud, 'Federation and Empire: About a Conceptual Distinction of Political Forms', 16 *International Journal of Constitutional Law (I-COJ)* (2018) p. 1199.

courts within the EU. '[O]nly very rarely', he writes, 'does European constitutionalization scholarship also consider Member State jurisprudence, which constitutes a key part of this book' (34). By itself, this is a striking claim. Judicial dialogue is certainly central to EU scholarship. There remain, of course, aspects of that interaction insufficiently explored, for instance the implementation of preliminary references in national legal systems. But Gehring himself does not take up these or similar questions. The national cases mentioned in the book are, with a few notable exceptions, the familiar cases one encounters in EU constitutional scholarship, ranging from *Solange*⁸ to the *Lisbon*⁹ judgment and through more recent supremacy cases from the Czech Republic and Denmark. There is no big discovery or dramatic expansion of the set of legal materials upon which a new constitutional theory can rest.¹⁰

I do not mean this as a criticism. On the contrary, it seems to me especially important that this book's approach to constitutional form in the EU is not based on unearthing some obscure case or doctrine but rather on legal materials that are available for all to see. There is no rabbit pulled out of a hat, no doctrinal statements heretofore ignored that suddenly can illuminate some crucial aspect of the legal nature of the EU. Such cases may be out there, lying in wait.¹¹ But unearthing them is not this book's aim. The analysis here is built around materials that, to the diligent student of European integration, ought to be largely familiar. It is important, and a part of this book's implicit message, that an understanding of the EU's *forma civitatis* and of the path to further constitutionalisation derive from an interpretation openly accessible to all.

DIMENSIONS OF (EUROPEAN) CONSTITUTIONALISM

From this starting point and with this method, Gehring probes the deep structure of European constitutionalism. Since that structure is forged in the interaction between centre (EU) and periphery (national) courts, jurists sitting in the latter fora, assisted on occasion by the legal commentariat, have marshalled challenges to further constitutionalising the EU. These challenges, or obstacles, concern three dimensions of constitutionalisation: *demos*, *civitas*, *ius*.

⁸BVerfG 29 May 1974, 37 BVerfGE 271, *Solange I*.

⁹BVerfGE 30 June 2009, 2 BvE 2/08, *Lisbon*.

¹⁰A table of cases is, however, helpfully included at the start of the book. It lists cases catalogued by topic.

¹¹For a contribution in this genre, see W. Phelan, 'Supremacy, Direct Effect, and "Dairy Products" in the Early History of European Law', 14 *International Journal of Constitutional Law (I-CON)* (2016) p. 6.

On the *demos* front, put forth obsessively by the German Constitutional Court, Gehring traces the familiar critique that further transfer of competencies to the supranational level is hindered by a lack of a robust EU *demos* to ‘an impoverished understanding of the nature of federalism’ (63). The experience of other federations, from Canada to the US and Germany, shows the formation of identity at the federal level to be a non-linear and complex process. To demonstrate that such process is already underway in the EU, Gehring references *Rottman*,¹² *Zambrano*,¹³ and *Martinez Sala*¹⁴ alongside other examples from the European Court of Justice jurisprudence of citizenship. At first glance, it may seem curious to give a doctrinal answer to what is, in essence, a sociological challenge. But that answer is perhaps appropriate since the challenge itself is presented in an exclusively doctrinal cast. From *Solange I* through *Maastricht*¹⁵ and *Lisbon*, the German Constitutional Court supports its no-European *demos* jurisprudence with little beyond armchair sociology and a constitutional theory steeped in ethnos-lined German political obsessions. Gehring repays with the same coin. The jurisprudence of the European Court of Justice reveals that ‘full homogeneity is a misconception’, that a modern conception of *demos* is compatible with heterogeneity and with a plurality of identities in federal systems. Conversely, a missing homogenous *demos* is not the reason why the EU lacks, as Gehring agrees that it does, a robust public sphere. To suggest otherwise shows ‘an impoverished understanding of the EU in federal terms’ by the German Constitutional Court.¹⁶

A similar impoverished understanding is on display in the *civitas* obstacles to EU constitutionalisation. The much lamented lack of EU-wide political parties is in fact a common feature of federations, many of which have different parties operating in different regions (115).

The lack of EU-wide political parties and unitary elections for the European Parliament are also unexceptional. ‘Unitary elections,’ Gehring writes, ‘are not actually a design feature of federal entities’ (105). Even so, federative structures often evolve, in time, towards greater centralisation. Gehring sees evidence for a

¹²ECJ 2 March 2010, Case C-135/08, *Janko Rottman v Freistaat Bayern*.

¹³ECJ 8 March 2011, Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi*.

¹⁴ECJ 12 May 1998, Case C-85/96, *Maria Martínez Sala v Freistaat Bayern*.

¹⁵BVerfGE 12 October 1993, 89 BVerfGE 155, *Maastricht*.

¹⁶And, Gehring adds, to a lesser extent, by the European courts. The latter presumably has to do with EU constitutional doctrines that impose strict hierarchies with the EU at the top, in disregard of the dialogical nature of the relation between the centre and the peripheries. A less direct explanation, but which has important implications in terms of dialogue, has to do with the style of the ECJ's judgments. It is hardly conducive to dialogue that the ECJ still disallows separate opinions. Gehring touches (too) briefly on this issue. See Gehring, *supra* n. 1, p. 288. For an analysis of the impact of style on the substance of reasoning of the ECJ, see V. Perju, ‘Reason and Authority in the European Court of Justice’, 49 *Virginia Journal of International Law* (2009) p. 307.

push in both directions, in the sense of the centre's deference to member states but also, through recent judgments of the European Court of Justice such as *Spain v UK*¹⁷ or *Eman*,¹⁸ through a requirement that member states observe some core EU law principles in their electoral processes (111). Gehring sees the dialogue between the centre court and national courts as one that is 'slowing advancing our notion of European *civitas*' (114). A 'better understanding of the federal nature of EU elections' (112) can speed up that process.

On the legislative front, Gehring sees the evolution of the European Parliament to be well within the spectrum of institutional models of political representation in federations.¹⁹ It is true that, to this day, the European Parliament remains excluded from important areas of policy, including trade policy, financial policy and others. But this hardly justifies the holding of the German Constitutional Court that the domestic 5% hurdle does not apply in the elections for the European Parliament. Karlsruhe's reasoning is that, since the European Parliament has a limited legislative role, its functioning would be impeded by fragmentation of the kind that the 5% threshold is meant to prevent with respect to domestic legislatures. Such a reasoning, Gehring notes, 'displays [the German Court's] impoverished understanding of the constitutional role of the Parliament' (139), in contrast to the English and the Irish High Courts that have shown a 'clear understanding' of the European Parliament's role.

KNOWLEDGE AND POLITICS

There is something striking about the exhortation that a better understanding of the EU's federative nature will smooth the way to further constitutionalisation and, through it, to a revamped constitutional future. Periphery courts, Gehring writes, 'do not fully appreciate either the constitutional nature of federations or the lived experiences of federalism in other jurisdictions' (9). Their misconceptions become self-fulfilling prophecies insofar as initially false obstacles to constitutionalisation end up distorting the dialogical interaction between centre and periphery and thus undermining, as real obstacles would, the success of the process of constitutionalisation.

Grant for now Gehring's claim that the existence of Europe's second constitution depends on freeing the process of constitutionalisation of obstacles rooted in

¹⁷ECJ 12 September 2006, Case C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*.

¹⁸ECJ 23 September 2004 and 18 March 2005, Case C-300/04, *M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag*.

¹⁹The example of the German Bundesrat is discussed on this point : see Gehring, *supra* n. 1, p. 132-133.

failures to understand the nature of the EU. This problem would seem to call for better explanations of the nature and features of the federal EU, for only such a process can clear misunderstandings. The task at hand is to help national courts and their epistemic communities to gain a better view of the EU. Such a superior view results from the choice of a perspective different from the perspectives that national courts had relied on previously. But why, one might ask, should national courts change their perspective, or the lens through which they approach the EU? One possible answer is that the new perspective, which is thoroughly influenced by comparative federalism, offers a more comprehensive, accurate and all-around superior understanding of the EU. Approaching the EU through this new lens reveals, for instance, a wider range of institutional possibilities than perfectionist accounts, stuck in ossified and unimaginative patterns, typically do. What previously might have been perceived as weaknesses, flaws or shortcomings appear in this new light as steps in the development of typical federative structures.

Still, why would national courts or other critics dispense with their existing perspective and instead shift to an understanding of the EU as a federal entity engaged in a dynamic process of becoming a more developed and stable federation? The mere fact that this different perspective is available is in itself hardly a sufficient reason, unless one can show what commits national courts to at least a thorough consideration of that alternative view. We see now some inherent difficulties in this framing of the issue. The challenge of clearing misunderstandings seems itself based on a misunderstanding of its own. For it rests on the assumption of a certain distance between the object to be understood and the process by which such understanding can be acquired. In this view, the EU is endowed with a nature that can be understood – or misunderstood – by the interpreter depending on the interpreter's choice of theoretical lens. The wrong lens results in a misunderstanding. But if it turned out that the distance between the interpreter, as either a centre or periphery judge, and the EU is more compact than this view allows, then an argument grounded solely on the nature of the EU is unlikely, in our case, to sway national courts *qua* interpreters of the nature of the EU. Rather than convincing them that an interpretation of the EU as a federal entity is available, in the abstract, they would still need a reason or some additional motive as to why they themselves should assume or accept that interpretation as their own. That additional argument is not descriptive and the process by which it can be advocated is not explanatory. The argument is, rather, normative. The choice for that normative position is guided by a process of justification, that is, by an intervention through reason-giving in a context itself not detached or separated from considerations of power.²⁰

²⁰It is particularly surprising that Gehring does not take account of the political factor, especially since he (rightly) berates EU scholarship for being blind to the political dimension: *see* Gehring, *supra* n. 1, p. 52.

Consider these matters from the perspective of the German Constitutional Court. Gehring casts aspersions on what he sees as Karlsruhe's 'impoverished understanding' (99) of the EU as a federal entity. But it is not clear how to interpret his views. One would expect the jurists sitting on the well-respected apex court of one of the world's most complex and successful federative structures to be sufficiently well versed in matters of federalism. It thus seems peculiar to force upon them an explanation that would rectify their understanding of the nature of the EU. Perhaps the issue is not with understanding in the first place. Was the German Federal Constitutional Court's description of the EU as an international organisation in decisions such as *Maastricht* and *Lisbon* a matter of misunderstanding? Or was it rather the expression of a normative, thus political, choice to reject wholesale the decades-old jurisprudence of the European Court of Justice that had consistently held the EU not to be an international organisation, and by implication, not subject to national constitutional doctrines regarding the domestic effect of EU norms? Recall that *Maastricht* rejected not only the European Court of Justice's interpretation of the nature of the EU constitutional order. It also rejected the German Constitutional Court's own previous statements on this matter. In that previous interpretation, Karlsruhe had aligned itself with the doctrines developed by the European Court that the Treaty of Rome created a new legal order whose norms could, by judgment of one court sitting above all others, produce effect directly in the national legal system and take priority over domestic norms.²¹ From this perspective, it seems problematic to interpret the later shift as one of understanding. How convincing is it to describe *Maastricht* or *Lisbon* as misunderstandings of something that the German Court had previously understood? Instead, on display here is a jurisprudential shift by which the German Court updated its political and normative choices, all couched in legal doctrine, by departing from its previously held doctrines about the nature of the EU and the relation between domestic and European law. What explains the shift is an important and difficult question. Perhaps post-unification Germany was seeking to assert itself against what its elites perceived as an expansionist European constitutional project that, left to its own devices, could end up threatening the German court and Germany's dominion, or at least influence. Important for our purpose is that, by the updated choice, the German Court sought to protect itself from the risk of the EU continuing its development in the direction of a federation. It sought to stop or reverse that development.

And that is the central insight. The EU's march towards full-fledged federalism is hardly unstoppable. In political affairs, *pace* historical determinists, outcomes of

²¹See V. Perju, 'Against Bidimensional Supremacy in EU Constitutionalism', 21 *German Law Journal* (2020) p. 1006.

this nature are not foreordained. No logic of institutional development or law of history will carry the EU ineluctably in that direction. European integration will move in that direction if it is not stopped or impeded, that is, if along the way it finds the support of actors like the German Constitutional Court that have the means and capacity to derail that development. Aware of their power, these actors will not be swayed by an explanation that urges them to *understand* the EU's federal nature. It only emboldens the efforts of derailment to claim, as Gehring does, that 'Member State courts regularly contribute to our understanding of federalism within the European context' (299) or that the *Maastricht* decision 'highlight[s] different perceptions of federalism' of the German constitutional judges (299). *Maastricht* and its progenies do not exude a perception of EU federalism. Instead, they conceptualise the EU as an association of sovereign states (*Staatenverbund*) that remain autonomous, whose states retain control over the fundamental order and whose citizens remain subject to national democratic legitimation.²² This is not a perspective on federalism. It is, rather, the quintessence of European anti-federalism.

THE RETURN TO COURTS

If one harbours high, federal hopes for the EU's future, the existing Union is 'far from working to the best of its abilities' (23). Questions of reform and improvement become urgent. Following Ackerman, Gehring identifies 'adaptive mechanisms' (259) for constitutional transitions in Europe. After dismissing popular mobilisation as 'somewhat Panglossian'²³ and formal amendment as incremental and overly technocratic, Gehring turns to an 'under-explored' adaptive mechanism. That is the European Court of Justice and its case law, and specifically 'the process in which the European Court of Justice and the member state courts activate their dialogue of the courts for the benefit of Europe and its people (. . .)' (261). To be sure, the interplay between the centre and the periphery through courts, which has long been recognised as the engine of Europe's integration through law, has been the object of much scholarly attention. Perhaps the role of this interaction in the future of the Union has been insufficiently explored. And, one might add, for good reason. The EU's democratic deficit and the urgent need to connect supranational institutions with EU citizens suggest limiting or even removing courts as prime movers in the EU's next chapter of political integration. Gehring disagrees. He sees courts as playing a critical role. That is intriguing. If one believes, as he does, that courts are elitist institutions, how can they

²²Gehring, *supra* n. 1, p. 300 (citing the *Lisbon* decision of the German Constitutional Court).

²³Gehring, *supra* n. 1, p. 260.

remain relevant or even indispensable in building a future that brings the EU closer to its citizens?

One part of the answer is that (centre) courts play a critical and perhaps indispensable role in empowering EU citizens. European Court of Justice doctrine has long placed individual empowerment at the core of EU constitutionalism. This is the familiar idea of the private attorney general, starting from *Van Gend en Loos*²⁴ through *Francovich*²⁵ to *Köbler*²⁶ and beyond. There is something here of the romance of EU constitutionalism, the partnership of the supranational union with individuals who, endowed with new rights ‘that become part of their legal heritage’,²⁷ set out to seek justice and fight discrimination in national courts.

There is enough in the history of European integration to support this idealism. But there is also more than enough to show some of its limitations. From the perspective of EU law, individuals had long been not persons but businesses that used supranational law to set aside national social welfare rules. The distributive effects of EU law as well as the interaction between market and state play a strikingly marginal role in Gehring’s study. Another limit has to do with access to courts. Centre courts consistently denied standing to individuals. The only path for non-privileged applicants has been, and remains, the preliminary reference mechanism. That model worked so long as national judges availed themselves of the opportunity to send preliminary references, and followed through with the answers from Luxembourg either of their own volition or under the threat of the Commission’s infringement actions. But preliminary references are far less protective than direct actions. Preliminary references capture only a thin slice of all violations of EU law. Moreover, the duty of national apex courts to send preliminary references is easily evaded. The infringement path has not been viable because of its highly political nature and also because it offers no remedy for individual harm resulting from discriminatory action.²⁸ It is high time for a shift to constitutional review where EU individuals can directly challenge a national law before European courts.²⁹ While such a direct model would change drastically the

²⁴ECJ 5 February 1963, Case C-26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*.

²⁵ECJ 19 November 1991, Case C-6/90 19, *Francovich v Italy*.

²⁶ECJ 30 September 2003, Case C-224/01, *Köbler v Republik Österreich*.

²⁷*Van Gend en Loos*, *supra* n. 24.

²⁸In recent times, these challenges have become even greater. As the independence of national judiciaries came under pressure from populist/authoritarian governments, the Commission’s legal services went missing in action. See R.D. Kelemen and T. Pavone, ‘Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union’, available at <https://ssrn.com/abstract=3994918>, visited 11 August 2022.

²⁹Gehring supports this jurisdictional reform in the hope that it would help with the creation of the public sphere: see Gehring, *supra* n. 1, p. 272. See also J.B. Cruz, *What’s Left of the Law of Integration?: Decay and Resistance in European Union Law* (Oxford University Press 2018).

nature of the interaction between national and centre courts, the change would go in a federative direction. It would be, to use Gehring's framework, an essential component for further constitutionalisation of the EU.

THE MIRAGE OF JUDICIAL DIALOGUE

There is a second part of the answer to how courts are indispensable to the creation of a public sphere. This part revolves around the dialogue between centre and periphery courts. In keeping with EU constitutional theorising, Gehring sees judicial dialogue as an essential dimension of EU constitutionalism. At one level, this is unsurprising. This kind of interaction is implicit in preliminary references, which have long been the main engine for developing EU constitutional doctrine through an incrementalist, 'common law approach to constitutional thought' (7). Gehring's assumption is that legal doctrine (and text³⁰), shaped by and through dialogue, can remove obstacles that have impeded the creation of 'a common European public space for democratic deliberations' (11).

It helps to distinguish two elements of this path to constitutionalisation. The first is the capacity of legal doctrine to remove entrenched obstacles to constitutionalisation. The second is the role of judicial dialogue in that process. For Gehring these two elements are closely connected. Dialogue, in this view, is at the core of EU constitutionalism. In what follows, I suggest the contours of an alternative view of EU constitutionalism *sans* dialogue.

I have already expressed doubt about the claim that dialogue enriches constitutionalism by bringing forth different perceptions, or conceptions, of EU federalism. The example of the German Constitutional Court shows that, far from being pervaded by a Habermasian communicative ethos, interactions among courts, especially apex courts, can and have often been strategic through and through. Claiming, as the German Court did in the *Maastricht* decision, that the transfer of competencies to a democratically deficient EU erodes the national *demos* by limiting meaningful interaction within a national public sphere is a self-fulfilling prophecy that, in effect, deprives EU institutions of opportunities for democratisation. Claiming, as the same court did in its *Hurdle* judgment, that concerns about political fragmentation do not apply to the European Parliament because of its limited legislative role ends up reinforcing and undermining the Parliament's legislative functions. Finally, the *Lisbon* decision's imperative of protecting national identity through a ban on transfer of competencies in select policy areas cripples the EU from a development whose implications in

³⁰On occasion, constitutional doctrines become codified in the treaty: Gehring, *supra* n. 1, p. 270.

terms of democratic empowerment alone could justify precisely such supranational transfer of competencies.

Do these judgments seek to foster dialogue? Their aim seems, rather, to prevent it. The creation of a robust European public sphere, through whatever means or mechanisms, is perceived – not incorrectly – as a threat to the constitutional autonomy and self-sufficiency of member states. An entire arsenal of doctrines and concepts has been mobilised post-Maastricht Treaty to preserve and prop up that national autonomy. Take the example of identity, which is surprisingly absent from Gehring's analysis, but has become central to the so-called dialogue between centre and periphery courts.³¹ Far from enhancing dialogue, national identity is often conceptualised as a prerequisite for it. And not any kind of prerequisite. In the hands of national courts, from Germany to Poland and Hungary, identity sets boundaries. It is the criterion for what can or cannot be part of EU competencies and, by rebound, of the dialogue of courts. Moreover, at least thus far, this form of boundary setting has been mostly immune from outside review. The dialogue among courts that has been taking shape on national/constitutional identity-centred terms has been a highly stylised and skewed form of communication. It is an obstacle, rather than the solution, to further constitutionalisation of the EU. One might have thought that a theory of supranational constitutionalisation such as Gehring's, steeped in comparative analysis, would seek to contain or stamp out this kind of identitarian doctrine.

Perhaps Gehring's high tolerance for strategic or non-communicative judicial communication is itself part of the comparative lesson. In federations, centre and periphery courts find themselves in constant dialogue. But consider the background presuppositions of that dialogue. In current EU law, theorised by constitutional pluralism, interactions among national and European courts as competing centres of power leave undecided the important matter of final legal authority. Now, it is not the actors themselves who leave that question open, as indeed each participant claims that power for itself. It is, in this view, in the nature of the EU constitutional order that it can operate without a hierarchical rule that would essentially adjudicate among competing claims to final authority. An alternative type of interaction to the legal relations that constitutional pluralism aims to theorise is hierarchical. This alternative view puts federal law above national or state law. Gehring acknowledges this much. True, the exact contours and implications of federal supremacy are 'arguably more difficult to explain' (164) and the

³¹Identity is not (entirely) novel. See B. De Witte, 'The Rhetorical Use of European and National Identity in the Political and Legal Discourse of the European Union', in T. Cottier and R. Liechti-McKee (eds.), *Die Schweiz und Europa. Wirtschaftliche Integration und institutionelle Abstinenz* (Vdf Hochschulverlag AG 2010) p. 51-62. But identity has certainly gained greater traction in recent years. See V. Perju, 'Identity Federalism in Europe and the United States', 53 *Vanderbilt Journal of Transnational Law* (2020) p. 208.

supremacy of federal law cannot simply be stated into existence but must rather be established in practice through a protracted and often non-linear process. Still, Gehring writes, the ‘necessity for supremacy’ (164) is a lesson of comparative federalism. At the same time, he states, ‘there remains a space for constitutional pluralism that should not be ignored’ (164).

I find Gehring to be equivocating between hierarchical and non-hierarchical models of constitutionalism. He seems to believe that the more uncompromising the European Court of Justice’s claims to supremacy, the more ‘respectful’ must that court be in relation to the laws of member states. Yet, most of his examples supposed to illustrate the ‘cooperation rather than domination’ (165) approach show an ever more assertive European Court of Justice, that claims for itself a supremacy power akin to all centres of established federal entities.³² As a matter of background normative presupposition, the question of hierarchy seems settled. But it is settled in precisely the inverse of the way that dialogue-infused constitutional pluralists advocate. That it, it is settled by the content-independent authority of the centre over the periphery. And that is what it means to see the EU as a federal entity. It means to accept *Costa* and reject *Maastricht*, to accept *Simmenthal* and reject the decisions of the Polish, Hungarian, Romanian constitutional courts that question the implications of the supremacy of EU law. This does, admittedly, require ‘a little more courage’ (278). But I take it to be precisely the kind of courage that Gehring encourages from his readers, that is, the courage to reject the view of the EU as *sui generis* and see it instead as a federal polity that is subject to constitutional development.

IN LIEU OF CONCLUSION

It is customary to think of democratic constitutionalism, national or supranational, in terms of its responsiveness to the demands of its self-governing citizenry. Much of the discussion above has involved the issue of how EU constitutionalism can enhance the responsiveness of supranational institutions to EU citizens, including through the creation of mechanisms of will-formation at the supranational level. Yet another dimension of constitutionalism, less obvious but just as important, is its capacity to absorb the shocks of historical events. How will the EU’s constitutional structures and discourse respond to the all-important Russian invasion of Ukraine on 24 February 2022? As the EU’s holiday from history has suddenly come to an end, it becomes an urgent matter how constitutional

³²For a recent study of the Romanian saga, see M. Moraru and R. Bercea, ‘The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, Case C-127/19, Case C-195/19, Case C-291/19, Case C-355/19 and C-397/19, *Asociația “Forumul Judecătorilor din România”*, and their follow-up at the national level’, 18 *EuConst* (2022) p. 82.

doctrine and structure will adapt to the new geostrategic realities. Perhaps this war will galvanise political and social forces to set in motion formal and informal mechanisms of constitutional change in the EU. If so, let us hope that the next constitution will strengthen the EU's federal features. For, as Gehring rightly implies, there is no other future for the EU. If Europe does not go in that direction, and if the existential challenges of the war now unfolding in Ukraine do materialise, then the EU will probably limp along for a little longer before coming to an inevitable halt. But, in that possible future, so changed will be the world in which the project of European integration ends with a whimper, not a bang, that its end will be the least of our worries.

