Does the Court of Justice own the Treaties? Interpretative pluralism as a solution to over-constitutionalisation

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Abstract
It is often assumed that Court of Justice interpretations of EU law are definitive and binding. However, this conflicts with conventional ideas about the *trias politica*, as well as with the principle of conferral, and rests on no more than the Court’s own assertion. It also has harmful policy consequences, forcing national courts into constitutional resistance and, in claiming to fix the meaning of the Treaties, smothering Union politics. Interpretative pluralism, by contrast, insists on the possibility of diverging interpretations. That allows for wider participation in the construction of EU law, while retaining the integrity of Union law through commitment to shared texts and a balance of power between institutions. Institutional disagreements are reframed, not as conflicts between legal orders, but as conflicts about the meaning of a shared one. This approach is more profoundly integrative than the Court’s top-down approach, and also allows for greater diversity and experiment.

1 | TOO MUCH CONSTITUTION, OR TOO LITTLE DEBATE?

When a rule is constitutionalised, ownership of that rule is usually thought to rest with the constitutional court. If the rule expresses a policy choice which is too contingent and political to belong properly to a court, then this judicialisation of what belongs in the representative sphere may be described as ‘over-constitutionalisation’. This is how Dieter Grimm has recently and powerfully described the situation within the EU, referring to the remarkable breadth and impact of the EU Treaties, whose content appears to be determined exclusively by the European Court of Justice (ECJ), when, he suggests, much of that content is ordinary and contestable enough that it ought to be part of democratic politics.¹

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¹D. Grimm, ‘The Democratic Costs of Constitutionalisation: The European Case’ (2015) 21 European Law Journal, 460. See, also, M.P. Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2007) 1 European Journal of Legal Studies, 137.

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If the problem is over-constitutionalisation, then the answer must be de-constitutionalisation. He suggests that laws which do not truly belong to the highest and least contested normative cadre should be removed from the Treaties, and instead adopted via secondary legislation. That would allow the EU legislature to define and revise them to reflect the views of the people, potentially enhancing the democracy and legitimacy of the European project.

This article offers another view. The broad constitutionalisation of EU policies is certainly a feature of the EU. However, the idea that this creates a democratic problem rests on the presumption that ‘fixing’ the text in some way ‘fixes’ its meaning—that only a rewrite can change the constitution. That in turn rests on the presumption that a constitutional text definitively means whatever the constitutional court says it does. It will be argued below that in the EU context this is wrong. It is not plausible to understand the ECJ as having definitive interpretative authority over EU law. Both national courts and legislatures and the EU legislature are in a position to legitimately challenge its interpretations and put forward differing ones. Politics can enter via a contest, or dialogue, over meaning.

Further, it will be suggested that the resulting interpretative pluralism—as Richard Stith has called it—is a more constructive and democratic approach than either the existing state of affairs or de-constitutionalisation. Unlike the current dominance of the Court, interpretative pluralism allows change and participation in the shaping of EU policies. However, unlike de-constitutionalisation, it respects the normative core of European integration, without which the project becomes incoherent and directionless—merely integration for its own sake. Interpretative pluralism accepts and emphasises the fundamental principles to which Member States have agreed, but allows many voices, from the representative to the constitutional, to participate in determining what these mean.

2 | THE LIMITED INTERNALISATION OF EU LAW

EU law faces many challenges. This article focuses on one: it is insufficiently internalised by the Member States. Thus states typically engage—at best—in what Conant has called contained compliance, following the narrowest possible interpretation of a rule or judgment, but not seeking to embed the underlying principle further within their legal system. An immediate functional explanation can be found in the costs, threats and disruption brought by EU norms, which Member States seek to resist, expressing a natural status quo bias. More profoundly, Hirschl has suggested that there is a wider, even global, trend of resistance to supranational constitutionalism, and he places national resistance to the Court of Justice and EU law in the context of a movement towards what he calls ‘deference to local authority’. The local, the national, is fighting back, in law as in politics.

In national courtrooms, the immediate drivers of such resistance may be located in several factors. First, EU law is perceived as ‘other’—as strange, sometimes hard to understand, and as separate from national law. As such, judges may seek to exclude or ignore it wherever they can. They are not motivated to engage, since such engagement disrupts what they know and have learnt. Second, EU law is often perceived to take insufficient account of local interests and particularities and to deny the expression of local values. It is thought to strain the fabric of society by challenging its cultural norms, institutions and even its procedural and constitutional principles—legal certainty, for example. Acting on these perceptions may then be justified by a perception that EU law is less legitimate, because of weaker democratic credentials, and, for legal actors, because of perceived activism by the Court of Justice, which is primarily responsible for much of that law.

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2F.W. Scharpf, ‘De-constitutionalisation and Majority Rule: A Democratic Vision for Europe’ (2017) 23 European Law Journal, 315.
3R. Stith, ‘Securing the Rule of Law through Interpretative Pluralism: An Argument from Comparative Law’ (2008) 35 Hastings Constitutional Law Quarterly, 401.
4L. Conant, Justice Contained: Law and Politics in the European Union (Cornell University Press, 2002).
5R. Hirschl, ‘Opting-out of “Global Constitutionalism”’ (2018) 12 Law and Ethics of Human Rights, 1.
6E.g., Case 302/86, Commission v. Denmark, ECLI:EU:C:1988:421 (Recycling); Case 90/86, Zoni, ECLI:EU:C:1988:403 (Pasta); Case C-159/90, Grogan, ECLI:EU:C:1991:378 (Abortion); Case C-148/02, García Avello, ECLI:EU:C:2003:539 (Naming of children); Case C-144/04, Mangold, ECLI:EU:C:2005:709 (Legal certainty); Case C-341/05, Laval, ECLI:EU:C:2007:809 (Right to strike).
This resistance creates a problem for the working of EU law and for the wellbeing of Europeans. EU law consists to a large extent of highly open norms, which are intended to stimulate a reorientation of Member States towards openness, while still allowing them to protect essential interests and values. The benefits which it hopes to bring to Europeans are not the result of specific rules or decisions, but of a highly generalised transformation, in which various values and principles, substantive and procedural, are fully integrated into Member State legal systems. When Member States and their courts react defensively to EU law, they impede this process, preventing EU law from achieving its potential.

This diagnosis is of course contestable and incomplete. However, it is taken here as a starting point, and the purpose of this article is to offer a solution. If one thinks that Europe would benefit from a richer internalisation of EU law by Member States, how could that be achieved? The article suggests that interpretative pluralism, by giving a dignified and meaningful role to national actors in the shaping of EU law, would contribute. The contrast is with binding, effectively monopolistic, interpretation by the Court of Justice, in which national legal actors are reduced to the role of its executive arm.

A traditional response would be that the Court’s ability to impose its understanding of EU law on all others is essential to ensure the uniformity of that law, and its effectiveness, to guarantee the meaningfulness of the rights it contains, and precisely to overcome the resistance which may exist at national level. A strong centre is vital because of the weak periphery. This article, by contrast, suggests that the strong centre helps create that peripheral weakness. Command alienates. Trust engages. The failure of EU law to date is partly a failure of trust.

This is not to say that interpretative pluralism solves Europe’s problems. It is simply a way of approaching laws. It may be that the substantive problems of interrelationship between neighbouring states are not amenable to merely legal solution, or not by the laws contained in the Treaties. The suggestion here is more limited: in as much as EU law is capable of making a constructive contribution to the wellbeing of Europeans, that potential is likely to be better realised if it is used creatively, thoughtfully, reflexively and experimentally, and this is more achievable in a situation of interpretative pluralism. Interpretative pluralism does not turn EU law into a magic answer, but provides the conditions for its optimal use. Whether that is enough, time will tell.

The article has four steps. First, it begins by critiquing monopolistic interpretation, and showing it is far less obvious and principled than is generally assumed. Second, it looks at the policy reasons why it is often considered essential, and argues that these are based on wishful thinking: monopolistic interpretation is not capable of achieving its own goals. Third, the idea of interpretative pluralism is explained, its working and its relationship to other pluralisms. Fourth, it is argued that interpretative pluralism would be a more stable and constructive approach to EU law, helping overcome the problem of resistance outlined above.

3 | A CRITIQUE OF MONOPOLISTIC INTERPRETATION

3.1 | We all agree on one thing ...

There is a remarkable consensus that the Court owns the Treaties. Certainly it takes that view. Even while it may at times leave considerable space to national courts, it does so as a matter of noblesse oblige, and is quite clear that its own interpretations, which extend to the level of detail that it itself finds appropriate, are defective. This is also the view found in the practice and philosophy of the other EU institutions. Yet the consensus on this point is equally strong among scholars, even critical ones. While they critique the Court’s more grandiose claims, or its activism or

7Case C-446/98, Fazenda Pubblica, ECLI:EU:C:2000:691; Case 69/85, Wünsche, ECLI:EU:C:1986:104; Case C-445/05, Haderer, ECLI:EU:C:2007:344; Case C-52/76, Luigi Benedetti v. Munari Fili s.a.s., ECLI:EU:C:1977:16; M. Broberg and N. Fenger, Preliminary References to the European Court of Justice (Oxford University Press, 2010), at 441–443.

8Ibid. But see,e.g., Case C-14/09, Genc, ECLI:EU:C:2016:247; G. Davies, ‘Brexit and the Free Movement of Persons: A Plea for National Legal Assertiveness’ (2016) 41 European Law Review, 925.

9G. Davies, ‘The European Union Legislature as an Agent of the European Court of Justice’ (2016) 54 Journal of Common Market Studies, 846.
excessive power, they do not challenge its interpretative monopoly, accepting its definitions of the Treaty as legal facts, even if undesirable ones. As a result, solutions to judicial overreach are sought either in Treaty change, institutional change, or in external norms, such as national constitutions. There is no suggestion—with the exception of a very few scholars, whose thoughts have not yet shaped the mainstream—that EU law itself might allow other courts or legislatures to offer alternative approaches, and to reshape what the Court has crafted.

Even Schilling, who first argued that national supreme courts should treat Court rulings as advisory and should ‘auto-interpret’ the Treaties, ultimately derived his argument from national constitutional powers, and saw his main point as establishing the subordination of the Treaties to national constitutions. The point of interpretative pluralism is precisely to avoid this hierarchy, and to suggest how EU law can be contained without being subordinated. Instead of taking sides in the debate about the order of texts, it seeks to make that debate moot.

Most importantly, the constitutionally-based approach is the one taken by national supreme courts. They, most notably the German Federal Constitutional Court (FCC), have long set limits to the effects of EU law in their jurisdictions, but have done this by reference to fundamental constitutional norms, which they will not allow to be compromised. Several such courts, including the FCC, have said that if EU law were to cross certain red lines, they would declare it inapplicable in their jurisdictions. There is a trend, visible in the FCC’s Outright Monetary Transactions (OMT) reference and in the Danish Ajos judgment, to engage in serious discussion of the meaning of EU law, but ultimately to root that discussion in constitutional authority, and the policing of constitutional limits.

This constitutional limits approach creates a systemic conflict where one need not exist. For the Treaties themselves will not cross any red lines—they are far too open. If that point were to come, it would be because of the way they are interpreted by the Court of Justice. National supreme courts might therefore say that if such interpretations were to conflict with fundamental constitutional norms, they would consider that they must be bad interpretations, and would interpret the Treaty text differently. Instead of essentialising disagreements between courts into conflicts between texts—constitutions or legal orders—those disagreements could be understood as being about those texts.

Instead, in their decision that if EU law goes too far the only resort is to not apply it, they endorse the view that EU law is whatever the Court of Justice says it is. They take a passive, hand-off, approach to shaping that law, in which their role is not to interpret the Treaty—to participate in its interpretation—but merely to apply the interpretations of the Court, or, in extremis, not apply them. Within the sphere of EU law, the national supreme courts have self-defined themselves not as judges, but as clerks with a conscience.

One might cynically speculate that the one thing uniting all constitutional courts, however much they bicker about their relative dominance, is the desire to preserve the status of their profession. In suggesting that the Treaties

10J.H.H. Weiler and U. Haltern, ‘The Autonomy of the Community Legal Order—Through the Looking Glass’ (1996) 37 Harvard International Law Journal, 411.
11A. von Bogdandy and S. Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) 48 Common Market Law Review, 1417. Or in leaving the EU: R. Daniel Kelemen, ‘On the Unsustainability of Constitutional Pluralism’ (2016) 23 Maastricht Journal of European and Comparative Law, 136.
12R. Stith, above, n. 3, at 401; M. Goldoni, ‘The Pluralist Turn and its Political Discontents’, in J. Přibáň (ed.), The Self-Constitution of European Society (Routledge, 2016), 116.
13T. Schilling, ‘The Autonomy of the Community Legal Order: An Analysis of Possible Foundations’ (1996) 37 Harvard International Law Journal, 389; T. Schilling, ‘Rejoiner: The Autonomy of the Community Legal Order. In Particular, the Kompetenz-Kompetenz of the ECJ’, in T. Schilling, J.H.H. Weiler and U.R. Haltern ‘Who in the Law is the Ultimate Judicial Umpire of European Community Competences? The Schilling-Weiler/Halterm Debate’ (1996) Jean Monnet Working Paper 10/96.
14P. Craig, ‘The ECJ and Ultra Vires Action: A Conceptual Analysis’ (2011) 48 Common Market Law Review, 395.
15J. Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’ (2008) 14 European Law Journal, 389, 397–403; M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 European Law Journal, 262, 263–6; A. Albi, ‘Supremacy of EC Law in the New Member States’ (2007) 3 European Journal of Constitutional Law, 25.
16BVerfG, Order of the Second Senate of 14 January 2014, 2 BvR 2728/13; Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v. The estate left by A.
17Similarly, C. Kaupa, The Pluralist Character of the European Economic Constitution (Hart, 2016).
belong to the Court of Justice, national constitutional courts reinforce the idea that their own constitutions belong to them. This agreed allocation of walled-off jurisdictions could be described in economic terms as a cartel. Less provocatively, the doctrinal perspective from which constitutional courts see themselves as guardians, and ultimate interpreters, of their own constitution leads easily to an assumption that the Court has this role in relation to the Treaties. It then follows that their own role is limited to determining the constitutional openings through which that EU law may enter. An idealised image of the national constitutional order is projected onto the EU.

However, whatever the origins of the national attitude, the question remains whether this identity of texts with courts is really plausible. The assumption that the Treaties are what the Court says they are is so universal that it is barely questioned. Yet examination reveals it has no serious basis other than the claims of the Court itself—but then they would say that, wouldn’t they?¹⁸ Once we reject circular reasoning—what Alexander and Schauer call the ‘shoe-string argument’¹⁹—it turns out that the Court is an emperor with no clothes.

### 3.2 | Co-interpretation

In the United States many scholars adhere to a doctrine that goes by the name of departmentalism or co-interpretation of the constitution.²⁰ There are variations within this, but the essential idea is that the constitutional interpretations of the Supreme Court are not the only legitimate ones, and the President and legislature have the right to put forward and pursue alternative ones. How much substance this ‘right’ has is highly dependent on the dynamics of the legal system, as if the Supreme Court simply annihilates all actions based on diverging interpretations, the theory will be utopian at best. Hence partly it is a theory of deference—a normative suggestion that both the Supreme Court and the law-makers should show a degree of respect for each other’s interpretative choices. However, the scope of judicial review is not infinite, so it is also a theory about how political organs should behave in situations where the Supreme Court cannot control them. Should they imagine it as their guide, or should they approach the constitution autonomously?

The attraction of this second view is that it avoids tyranny.²¹ If a supreme court interpretation binds all other courts and organs of government at all times then that court is truly above the law. The balance of powers between legislature, executive and judiciary which most states take so seriously in their constitutional design is essentially undone—one of these can, at last, dominate the others.²² Stith rather pithily quotes Lincoln’s inaugural address²³:

> [i]f the policy of the Government is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers.

Taking that balance of power seriously entails an Escher-like arrangement, in which each arm of government is both above and below the others. The constitutional court needs to exercise its constraining powers, but these powers also need to be limited: no organ must be able to ignore the others, nor dominate them. If this seems unsatisfactorily unresolved to the legal mind, it is because it is constitutional law: the place where the legal meets meta-legal norms. It is the privilege of administrative law to aspire to complete coherence and order. Constitutional law must, of

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¹⁸L. Alexander and F. Schauer, ‘Defending Judicial Supremacy’ (2000) 17 Constitutional Commentary, 455.

¹⁹Ibid.

²⁰D.E. Johnson, ‘Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?’ (2004) 67 Law and Contemporary Problems, 105; W.F. Murphy, ‘Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter’ (1986) 48 The Review of Politics, 401; E. Gant, ‘Judicial Supremacy and Nonjudicial Interpretation of the Constitution’ (1997) 24 Hastings Constitutional Law Quarterly, 359; M. Tushnet, ‘Marbury v Madison Around the World’ (2004) 71 Tennessee Law Review, 251.

²¹R. Stith, above, n. 3, at 401.

²²Ibid.

²³Abraham Lincoln, First Inaugural Address (4 March 1861), in Abraham Lincoln: Speeches And Writings, 1859–1865, at 221 (Don E. Fehrenbacher, ed., Library of America, 1989), quoted in Stith, above, n. 3, at 411.
necessity, live with unresolved power relationships if it is to respect constitutional values.24 This much, EU lawyers know from the pluralists.

In practice, national systems often reflect this, whether or not their formal doctrines acknowledge it explicitly. Constitutional law textbooks may sometimes paint a picture of a simple legal pyramid, but the reality is that there are various ways in which a system may allow for challenges to the authority of the constitutional court, or create loci where its authority does not reach.25 Such challenges may come from parallel courts, such as supreme civil courts, but they may also come from below: not all higher court doctrine is cut-and-pasted into the practice of lower courts, and constitutional courts are compelled, in practice, to take account of the reactions which their decisions invoke.26 A general may lead, but he typically remains an effective leader by staying in touch with the mood of his troops. Power and subordination are not different roles, but different faces: the will enslaves and liberates at once.

Yet what above all rescues national legal orders from judicial tyranny is self-restraint and consensus. Imperfect governance may still be adequate governance—perhaps even optimal governance—if the actors play their roles with responsibility and respect. National supreme courts typically do not use constitutional provisions to suppress politics because they lack the formal legal capacity, but because they choose not to. They are accepted as legitimate by the public not because they are perfectly constrained within unbreachable limits, but because they are trusted.

This shows the particular problems of treating the ECJ as the final and definitive interpreter of the Treaties. Because of the nature of the EU as a new, somewhat shallowly rooted and functionally designed legal construction, the mitigating features of the more organic national community are not present—the lacunae in jurisdiction, the parallel courts, the social consensus which feeds through into judicial choices, and above all, the public acceptance of an established status quo. EU law is not embedded, with the result that giving the ECJ powers formally equivalent to those of a national constitutional court does not create the same consequences.

This is even more so because of the scope of EU law. While national parliaments are also constrained by constitutional rulings, this rarely excludes politics to a serious extent because of the distinctively limited nature of the constitutional. However, within the EU the constitution is the Treaties, and so the constitutional is co-extensive with the socio-economic. Grimm’s solution is to de-constitutionalise27: to move policies out of primary law and into secondary. However, this replaces judicial centralisation with political centralisation, which is at least as problematic from the national perspective. It also fundamentally changes the nature of the EU, from a functional organisation into a regulatory forum whose purposes are self-determined. For those not willing to take that integrative step, the constitutionalisation of policy goals is unavoidable: they are definitional of what the EU is. What is then needed to prevent judicial tyranny by the ECJ are mechanisms for coexistence and participation within the sphere of the constitutional. EU law must be embedded too, but in a way taking account of its distinctive design.

3.3 The conferral/autonomy tension

Then there is the principle of conferral. This principle, that the EU only has those powers that have been conferred upon it by the Treaties, is one of its foundation stones, not just because it determines many aspects of the EU’s functioning, but because it is what prevents the states from being extinguished by the creature they have made. Conferral is central to the EU’s legal order, and to its legitimacy.

24M. Dani, ‘National Constitutional Courts in Supranational Litigation: A Contextual Analysis’ (2017) 23 European Law Journal, 189; M. Kumm, ‘Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called’ (2006) 54 American Journal of Comparative Law, 505; M.P. Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker (ed.), Sovereignty in Transition (Hart, 2003), 501–537.

25See discussion in Stith, above, n. 3. Also A. Hofmann, ‘Resistance against the Court of Justice of the EU’, iCourts Working Paper no. 121 (2018).

26W.F. Murphy, ‘Lower Court Checks on Supreme Court Power’ (1959) 53 The American Political Science Review, 1017.

27Grimm, above, n. 1.
It is a logical corollary of conferral that the EU cannot determine its own powers.\textsuperscript{28} For if I have only the powers given to me by my mistress, but I, not she, have the authority to decide what she has given, then in practice my powers are not her gift any more, but are my own choice. The hierarchy is reversed.

If the Court of Justice can determine, bindingly and definitively, the meaning of the Treaty, this reversal is precisely what occurs. The EU becomes able to determine its own powers—it acquires Kompetenz-Kompetenz. It makes no difference that it is just one institution, the Court of Justice, which controls the determination, for that institution is part of the EU and as subject to conferral as the others—the principle governs the Union as a whole.\textsuperscript{29}

The Court’s claim that it has such interpretative authority therefore amounts to a claim that it can overrule Article 5 TEU, containing the conferral principle. There seems no good reason to agree with this remarkable point of view, unless one is pre-committed to the idea that the power of constitutional courts is indeed unlimited.

This tension between conferral and the ‘autonomy’ of EU law—meaning the capacity of the EU to self-define—has been widely noted in the past, but responses have focused on external policing of EU competences, rather than internal ones. If one sees conferral as creating a trilemma in which primacy, direct effect and autonomous interpretation cannot all three exist at once, then it is one of the first two that is invariably the preferred sacrifice.\textsuperscript{30} Hence the FCC uses the conferral argument as an additional justification for its use of the German constitution to set limits to EU law, and many scholars have agreed that the primacy of EU law should not (always) extend to national constitutions, for the same reason.\textsuperscript{31} Similarly, when direct effect was introduced by the Court of Justice, one of the concerns was that it would upset the ‘economy’ of the Treaties, changing the power relationship built into them.\textsuperscript{32}

Yet while managing primacy and/or direct effect can provide effective means to contain EU law’s effects, these techniques achieve that goal by asserting national legal limits. In taking this approach they seem to accept, even assume, the delinquency of EU law itself: that without non-EU legal constraints it will violate its own core principle, and that there is no rule or principle within the EU legal system itself that works against this. This seems a very unhappy, and unlikely, interpretation of EU law. Surely a legal text should not be read to contradict its own terms, and certainly not to violate its most basic norms?

The reason why this delinquency is accepted is because it is taken as self-evident that as a matter of EU law, the Court of Justice has the definitive word on what EU law is: the interpretative autonomy of EU law is beyond question. It is time to ask why one might think that this is the case. The answer cannot be ‘because the Court says so’—even though it does—for that is begging the question.\textsuperscript{33}

\section{The Reasons Given for Monopolistic Interpretation}

Arguments for the definitive and binding nature of ECJ interpretations of EU law are almost invariably of two kinds. One is that this definitiveness follows from the text of the Treaties. The other is that it is essential to guarantee the uniformity and effectiveness of EU law.

\begin{itemize}
  \item \textsuperscript{28} G. Beck, ‘The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor’ (2011) 17 European Law Journal, 470; Cf. Kelemen, above, n. 11, arguing that the argument does not hold as long as it is possible to leave the EU. Cf. M.A. Wilkinson, ‘Constitutional Pluralism: Chronicle of a Death Foretold?’ (2017) 23 European Law Journal, 213; Lisbon judgment of the BvG, 2 BvE, 2/08, 30 June 2009; Honeywell judgment of the BvG, 2 BvR 2661/06, 6 July 2010.
  \item \textsuperscript{29} Schilling, ‘Rejoinder’ above, n. 13.
  \item \textsuperscript{30} R. Stith and J.H.H. Weiler, ‘Can Treaty Law be Supreme, Directly Effective and Autonomous—All at the Same Time?’ (2002) 34 NYU Journal of International Law and Politics, 729.
  \item \textsuperscript{31} Beck, above, n. 28; Schilling ‘The Autonomy’, above, n. 13.
  \item \textsuperscript{32} M. Rasmussen, ‘How to Enforce European Law? A New History of the Battle over the Direct Effect of Directives, 1958–1987’ (2017) 23 European Law Journal, 290.
  \item \textsuperscript{33} The \textit{petitio principii}, See Alexander and Schauer, above, n. 18.
\end{itemize}
4.1 | Textual support for monopolistic interpretation

The textual support is actually rather limited. Article 19 TEU provides that the Court will ensure that ‘the law is observed’, which certainly implies an authoritative role, but stops short of spelling out Kompetenz-Kompetenz. In any case, this sentence in Article 19, in its Treaty context, is introductory rather than an autonomous rule. It is clearly intended to present and describe the general function of the Court, which later articles will then spell out. It is thus in Article 267 TFEU, the lex specialis on the preliminary reference procedure, that we would expect to find the relevant provisions on the nature and status of the Court’s answers to a reference. However, that article just tells us that the Court can provide rulings in response to a request from a national court.

It is often assumed that such a ruling must be binding, but the general practice in European legal systems is that one court does not formally bind another: judges take a risk if they do not listen to higher courts, but formally they are independent. That is perhaps different in the common law, but the common law is only a marginal part of the Union.

Moreover, if rulings bind in all circumstances, that makes Article 267 quite difficult to understand. For while most judges are free to choose whether to refer a question, final courts are compelled to. They must never decide a substantive point of EU law without first asking the Court. If the answer they receive is formally binding then the consequence is that national final courts may never engage in any autonomous interpretation of EU law. They may certainly suggest an interpretation in their reference, but if the Court disagrees then they must meekly accept the correction. This does not make such a suggestion particularly attractive—for a court to express a view and then have it ignored undermines its status. If rulings are to be binding, then Article 267 apparently envisages that EU law questions will pass through national final courts without touching the sides, shooting straight up to Luxembourg.

That is hardly a sustainable model of legal integration. It infantilises and humiliates final courts, with the well-known consequence that they tend to do their best to ignore Article 267 and simply fail to refer. Faced with the choice between being excluded from an important part of their own legal system or breaking the letter of the law, they choose the latter. Surely a plausible interpretation of the Treaty would not present them with this choice? If EU law aims to become a part of the legal heritage of Europeans, and a part of the law of the Member States, as the Court rightly says that it does, then it must have a place for the courts of those states within itself, and not seek to exclude or subordinate them. It is a cliché that Article 267 creates a nominally cooperative relationship between courts rather than a hierarchical one. Perhaps it should be read in that light. Binding rulings are a subversion of this idea.

Given that it is national final courts which engage most with national constitutional norms, it should be precisely their task to achieve the integration of the national constitution and the EU Treaties. It still makes sense that they are compelled to ask the Court for its interpretation of the Treaty, because it is their partner in the construction of the EU legal order, and the adjudicator of direct actions, and the court with the best view of the EU as a whole, and so they urgently need to know what it thinks. There is an imperative EU and national interest in communication between

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34. Above, n. 7.
35. M. Lasser, ‘Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court’, Jean Monnet Working Paper 1/03 (2003); Stith, above, n. 3.
36. The underlying question here is ‘what is law?’ In most EU Member States, the law is primarily the written text. That is not to deny the relationships of power, influence and doctrine between different tribunals, but these are nevertheless different from the relationship between judge and rule.
37. Article 267 TFEU, third paragraph. See also Case C-238/81, CILFIT, ECLI:EU:C:1982:335. See also Advocate-General’s Opinion in C-338/95, Wiener S.I. GmbH v. Hauptzollamt Emmerich, ECLI:EU:C:1997:552.
38. See Case C-346/93, Kleinwort Benson, ECLI:EU:C:1995:17, Advocate-General at paras. 23–24.
39. M. Claes, ‘Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure’ (2015) 16 German Law Journal, 1331.
40. Case 26/92, Van Gend en Loos, ECLI:EU:C:1963:1.
41. E.g., Case C-14/09, Genc, ECLI:EU:C:2010:57; A. Dashwood, M. Dougan, B.J. Rodger, E. Spaventa and D. Wyatt, Wyatt and Dashwood’s European Union Law (Hart, 6th edn, 2011), at 216.
these courts, which Article 267 reflects. But ultimately it is the national court who must decide the case, in its specific national context, and they are right to at least consider whether a different interpretation is better, more coherent, or perhaps constitutionally necessary. This is surely in the spirit of Article 4 TEU, which requires the Union to respect national identities as embodied in their constitution. Such respect means that it is not always constitutions which must bend to fit the Treaties, but sometimes, as a matter of EU law itself, the other way around.

4.2 | The fear of fragmentation

The most voiced argument for the Court’s authority is the fear of fragmentation.\(^{42}\) If national courts, or even just national supreme courts, can diverge from its interpretations then they will do so, and they will entrench their own understandings of EU law in their Member States. These will differ, so that EU law will cease to be uniform, and they will give too much weight to national concerns, so that EU law will cease to be effective. The whole thing will fall apart.

These concerns deserve to be taken seriously. Without a sufficient degree of uniformity, the political bargain underlying the EU falls apart, for it is based on enforceable reciprocity of obligations.\(^{43}\) The open nature of EU law means that it is vulnerable to serious emasculation in national hands, and in particular its specifically European purpose may be lost from view. Moreover, if the rights which EU law gives to individuals are weakened, then public support may be reduced—although, to be fair, it may well be increased, since those rights are mostly for migrants.\(^{44}\) More practically, those for whom EU law frames or enables their business activities may have a strong interest in a strictly uniform understanding of it, and find that its added value is diminished if it becomes just an umbrella concept for diverse national readings. Finally, one may argue that a politically and socially loose confederation such as the Member States of the EU needs a strong binding centre to counter its natural tendency to fragment—decentralised pluralism works where societies are otherwise bound together, as within a state, but in the EU, it is the law that must do much of that binding.

A vision such as this has traditionally driven the Court, and motivated its robust approach to the obligations on national courts, and its far-reaching creativity regarding the basic applicatory principles of EU law: supremacy, direct effect and procedural obligations were invented so that the law would make a difference and Europe would be built.\(^{45}\) It is not necessary to argue here that this was wrong: interpretative pluralism, with its emphasis on feedback and responsiveness, implies a dynamic view of the law,\(^{46}\) from which it follows that different approaches may be appropriate at different times. The Court’s approach has been weak on legal principle, but strong on integrative telos, and in the early postwar days of integration, it may well have been quite defensible to prioritise substantive integration—peace, prosperity and security—above legal niceties or local autonomy. Indeed, it can be argued that this opposition did not then exist, for the most relevant principles of law cannot be read outside of their historical context. The law was read as it made sense then.

But now? The suggestion here is not that the concerns for unity are no longer important. Certainly they are, and in some ways more than ever, as Member States and their courts become more assertive and more aware of their conflicting interests. However, this changing context calls for a rethink of how the concerns can be met: what should unity of law mean today, and how can we achieve that? The claim is that monopolistic interpretation cannot do what

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\(^{42}\)K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford University Press, 2014), at 245.

\(^{43}\)W. Phelan, *In Place of Inter-State Retaliation: The European Union’s Rejection of WTO-Style Trade Sanctions and Trade Remedies* (Oxford University Press, 2015).

\(^{44}\)See, e.g., M. Blauberger, A. Heindlmaier, D. Kramer, D.S. Martinsen, A. Schenk, J.S. Thierry and B. Werner, ‘ECJ Judges Read the Morning Papers: Explaining the Turnaround of European Citizenship Jurisprudence’ (2018) 25 *Journal of European Public Policy*, 1422.

\(^{45}\)A.T. Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’, (2009) 29 *Oxford Journal of Legal Studies*, 549.

\(^{46}\)V. Schmidt, ‘Discursive Institutionalism: The Explanatory Power of Ideas and Discourses’ (2008) 11 *Annual Review of Political Science*, 303.
is needed: it cannot achieve its own goals. It is no longer fit for purpose, for in a context of diversity and resistance, its ability to shape a uniform and binding whole is very limited.47

As Alter and others noted, in the early days the Court’s doctrines were successful partly because they liberated lower national courts from unattractive national rules and hierarchies, and offered them exciting opportunities, and they embraced this.48 Yet if EU law is now no longer experienced as empowering—at least not by everyone—but instead as constraining, rigid, disruptive and sometimes unreasonable, then a different technique may be required. Weiler argued that an additional reason for acceptance was the ‘pull of formalism’—the inclination of judges to accept higher authority where it was at least prima facie textually defensible. Yet he predicted that as the Court itself came to be seen as activist rather than formalist, this argument for following it would be weakened, and its relationship with national courts would be challenged.49

The Court has always been aware of its need to cultivate this relationship, since the success of its law depends on national court support, which can be bought but not demanded.50 It is quite compatible with this spirit to suggest that the price may have changed. In the phase Alter speaks about, loyalty was bought by giving powers to reshape national law. Now the price of that loyalty may be a voice in shaping EU law too.

Concretely, the crux is that while the Court can command obedience, it cannot compel it. For national courts can choose whether to refer. Even, in practice, supreme courts can make that choice, as the tools to compel them are limited, if not entirely absent.51 If the national legal system is hostile towards EU law, then giving the Court more formal authority does not subdue that hostility. Rather, it channels it into another mode of expression. If the Court pretends to command, national courts and administrations may simply turn away, quietly excluding EU law, and the Court, from their procedures and trials.52 EU law may be ignored, marginalised or used badly, and all the risks which central judicial power is intended to reduce may be realised.

By contrast, if the Court is required to persuade, national courts may challenge it and disagree, but in doing so they may come to see EU law as their own, and embed its ideas more widely, thoroughly and robustly within their national law.53 The legal framework that Member States share may be extended and strengthened, even if this is done by allowing interpretative texture to emerge in the cloth from which it is made.

The question is thus not whether a degree of uniformity and coherence is necessary for EU law, but which techniques are more likely to achieve that: the top-down, command and control monopoly interpretation, or the more participatory, shared ownership of interpretative pluralism.54 A part of that question is what uniform, coherent law entails in the EU context. These matters will be returned to below.

5 AN ALTERNATIVE APPROACH: THE PRACTICE OF INTERPRETATIVE PLURALISM

The essence of interpretative pluralism is on the one hand common subordination to a shared text, but on the other an assertion of a decentral right to interpret it. What makes this potentially workable is the existence of forces which

47J.H.H. Weiler, ‘A Quiet Revolution: The European Court of Justice and its Interlocutors’ (1994) 26 Comparative Political Studies, 510.
48K. Alter, ‘The European Court’s Political Power’ (1996) 19 West European Politics, 458; Weiler, above, n. 47. For references to others taking this view, see J. Golub (1996) ‘The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice’ (1996) 19 West European Politics, 360.
49Weiler, above, n. 47.
50Ibid.
51B. Beutler, ‘State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?’ (2009) 46 Common Market Law Review, 773; Z. Varga, ‘National Remedies in the Case of Violation of EU Law by Member State Courts’ (2017) 54 Common Market Law Review, 51.
52Hofmann, above, n. 25.
53See J. Habermas, ‘Some Comments on “Interpretative Pluralism”’ (2003) 16 Ratio Juris, 187.
54See Weiler’s remarks on the importance of ‘autonomy’ in Stith and Weiler, above, n. 30. See also Tushnet, above, n. 20, at 273.
pull both centrifugally and centripetally. While diverse judges, legal traditions and national circumstances may tend to lead to divergence, the possibility of enforcement actions by the Commission, and the presence of decisions by the Court of Justice and other national courts—even if not binding—provide a pull towards a common understanding.

5.1 Subordination to the constitution—not to the Court

If the Court is not to be the sole owner of the Treaties, then other bodies will have to step up and claim their share. Both legislatures and courts should see the Treaty texts as laws which bind them, and which they must seek to understand and interpret.

For legislatures, particularly that of the EU, this means pushing back against the understandings of the Court. The Court has provided an enormous body of interpretative judgments, particularly on aspects of the internal market, and one of the tragedies of the EU is that the Commission, Council and Parliament have confined themselves to following in its path. They codify its judgments into legislation—or sometimes they do not—but there is a complete absence of any autonomous vision of what it means to have free movement or undistorted competition or a Single Market. This is despite the fact that these are evidently and inherently ambiguous and political concepts, open to multiple readings. The Court’s interpretations are generally defensible, certainly in their context, but they are not the only possible ones, and there is an urgent need for a political understanding of all these ideas. The Court is asked to take decisions in very specific situations, and because of this, and its institutional nature, it cannot be expected to engage in a wider-ranging review of what a commitment to removing borders actually means. That is the task of the legislature, in which it has, until now, spectacularly failed.

Surely, there may be a fear that if legislation diverges an inch from the definitions given by the Court it will be annulled. There is some precedent for this fear. Yet if legislative choices are clearly the product of serious debate, and have at least some intellectual coherence, there is always the possibility that the Court will show a degree of deference. It is often credited with being a politically sensitive organ: it seems defeatist to assume without trying that it will never acknowledge a political interpretation of inherently political and contestable powers.

Similarly, national courts should consider themselves bound by the texts of EU law, but not by the decisions of the Court. However, that does not mean that these decisions should not be taken seriously. The Court is best placed to understand the distinctively European nature of EU rules, and its understandings should be given the same deference that would normally be given to higher national courts interpreting national law. A deviation from the Court’s view should be the exception, and would typically be justified by some specific feature of the national context which made that interpretation unworkable or unacceptable.

This is not a million miles from the current situation, in which the Court claims authority to interpret the law but allows national courts discretion in applying it—they rule on the facts, and on the conclusion of mixed norms such as proportionality. However, the distinction between interpretation and application is clumsy.

55Davies, above, n. 9.
56Case C-236/09, Association Belge des Consommateurs Test-Achats v. Conseil des ministres, ECLI:EU:C:2011:100; Case C-376/98, Germany v. Parliament and Council (Tobacco Advertising), ECLI:EU:C:2000:544. P. Syrpis, ‘The Relationship between Primary and Secondary Law in the EU’ (2015) 52 Common Market Law Review, 461.
57M. Dawson, ‘How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice’ (2014) 20 European Law Journal, 430; M. Dawson, ‘Constitutional Dialogue between Courts and Legislatures in the European Union: Prospects and Limits’ (2013) 19 European Public Law, 2. See Tushnet, above, n. 20, at 266–267 on democratic experimentalist judicial review.
58O. Larsson and D. Naurin, ‘Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU’ (2016) 70 International Organization, 377.
59G. Davies, ‘The Division of Powers between the European Court of Justice and National Courts’ (2004) The Constitutionalism Web-Papers p0014, University of Hamburg, Faculty for Economics and Social Sciences, Department of Social Sciences, Institute of Political Science. Available at https://ideas.repec.org/p/erp/conweb/p0014.html.
inconsistently applied, and at root incoherent: each application is an interpretation. The meaning of law lies in its consequences.

Interpretative pluralism does not seek to divide the functions of the courts into interpretative (legislative) and applicatory, but accepts the undeniable truth that their roles overlap. The Court, on a reference, should give, within the limits of its knowledge, its view on the case—as, in practice, it does. The national court would then normally concur, particularly on the specifically European elements where the Court is the greatest authority. If, however, it felt compelled to a different conclusion, it would explain why; identifying the misunderstandings of the national context, the unacceptable and unjust consequences, or the incoherencies in the reasoning which lead it to disagree with the Court’s view.

That would not be done lightly. In highlighting disagreement, the national judge opens the way to a Commission enforcement action. If the national decision is well reasoned, particularly if it is based on the facts and context, the Commission and Court might accept that it is right. Yet if not, the Member State could be called to account. Formally, that might not be something that judges would admit as an influencing factor, but in practice judges will not seek out interpretations which lead to structural conflicts unless they feel truly compelled—if only because it increases the chance that their decision is overruled on national appeal. Indeed, there is even the possibility that their decision might form the basis of an action for damages against their state, in which a colleague national judge would have to consider the rightfulness of their view.

Certainly, all this can lead to impasse and conflict and courts pitted against each other. Yet that is in the nature of legal systems—there are often long-standing and frustrating divergences between courts at different levels, or in different regions, or branches of the judiciary. However, the involvement of multiple courts, because of the many venues in which a question of law can be approached—the reference, the enforcement action, the action for damages, national appeals—also creates a pressure for judges to take into account other views, and to converge towards a consensus. Alternatively, where such a consensus cannot be reached, it pressures judges to create techniques to address this, legal methods to accommodate diversity, ‘margins of appreciation’.

All this assumes, admittedly, that judges take the views of their colleagues seriously, and seek to promote coherence where they can. If that is plausible, then interpretative pluralism, in the spirit of discursive institutionalism, becomes a method for facilitating constructive change.

A number of concrete issues remain. For example, which courts, precisely, should have the power to diverge from Court interpretations? A minimalist approach might be to say that only constitutional courts could do this. However, the reasons why the Court cannot formally bind with its interpretations apply generally, and the policy goal of encouraging internalisation of EU law points in the same direction. While some Member State may have a legal culture or doctrine in which lower courts rarely diverge from higher interpretations, interpretative pluralism as a feature of EU law should not be confined to apex courts.

A more challenging question is what happens if it goes too far? The abstract suggestion of judicial reasonableness above may not be a full answer to those concerned with specific situations. For example, what if national courts began to read the Treaties so that they no longer overruled conflicting ordinary national law, or if they began to read equality so restrictively that foreign citizens were excluded from most rights because they could not be compared with nationals, and different cases should be treated differently—what then?

Drawing on the arguments made earlier in this article; first, one should note that these problems are not unique to interpretative pluralism. Anecdotally, it is widely accepted that there are many courts and cases in Europe where EU law is misapplied or not applied, so that direct effect and supremacy are de facto ignored. The tempting error is to think that if a doctrine of compulsion exists at EU level, this automatically achieves results at national level. Once one accepts that this is not the case, and that national courts always have to be persuaded, the risks of interpretative pluralism simply become the risks of supranational law.

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60Ibid.

61V. Schmidt, ‘Discursive Institutionalism: The Explanatory Power of Ideas and Discourses’ (2008) 11 Annual Review of Political Science, 303; Habermas, above, n. 53.
Second, if a judge produces a radical interpretation, how likely is this to survive within the domestic legal system? If other judges do accept the supremacy of EU law or a relatively conventional approach to equality, then the mechanisms of appeal, damages and judicial self-respect will exert considerable pressure. It is not unimaginable that a certain regional court radically excludes foreigners, despite the position of other courts in that state, but it is unlikely that this would be sustainable in the long run, and the specific contribution of interpretative pluralism is that if consensus is finally achieved, it would be the result of meaningful internal legal discussion—and be more entrenched in national law than if communication was purely from above to below.

Third: how much uniformity do we need? The idea, for example, of earned citizenship is now well established in EU law. The outsider is different from the insider, and does have to accumulate their rights gradually. Certainly this is controversial, but the idea of equality is not a transparent one, nor an easy one to implement, and, when considering the rights of the migrant in a Member State, it is hard to find a good path between over-simplification and over-complexity. As well as this, welfare states and facilities vary radically from state to state, as does the structure of law and entitlements, so that possibilities for public support are hugely different according to where one is. Is it then so problematic if there are variations in how equality is understood, given that there are variations in rights anyway?

Of course, at the political level particularly, that lack of trust is sometimes tempting. However, interpretative pluralism is in one sense more demanding than its alternative. For while it allows more autonomy in using EU law, it does not allow its rejection. Because EU law may be read so that it does not violate core values, those values do not justify its exclusion. Constitutional supremacy is rejected in favour of accommodation between the constitution and the Treaties. Challenges to EU law are channelled away from rejection of EU rules towards interpretations of those rules which meet a particular agenda. That can seem threatening to the integrity of the rule and the idea it embodies. However, in containing opposing views within a common frame, it also opens a path to their reconciliation.

5.2 Multiple constitutions, and multiple interpretations of the constitution

Interpretative pluralism is an alternative to constitutional pluralism. Constitutional pluralism seeks to mediate and explain the relationship between EU law and national constitutional orders. However, in seeking to bridge the void, it proclaims the void: constitutional pluralism theories are premised on the separateness of the two legal orders, on their ability to self-define: that degree of autonomy is what makes the theories necessary. Consistent with this perspective, theories of constitutional pluralism contain nothing which questions the Court’s view of EU law as a form of applicable foreign law—something to be used and applied nationally, but whose nature and content is, for the national judge, an externally imposed given. Constitutional pluralism focuses on how each court should approach its own

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62 E. Spaventa, ‘Earned Citizenship—Understanding Union Citizenship through its Scope’, in D. Kochenov (ed.), EU Citizenship and Federalism: The Role of Rights (Cambridge University Press, 2017), 204–225; D. Kramer, ‘Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed’ (2016) 18 Cambridge Yearbook of European Legal Studies, 270.

63 G. Davies, ‘Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency’, College of Europe Research Papers in Law No. 2/2016.

64 N. Walker, ‘Constitutional Pluralism Revisited’ (2016) 22 European Law Journal, 333.

65 See M. Goldoni, ‘Constitutional Pluralism and the Question of the European Common Good’ (2012) 18 European Law Journal, 38; See, also, M. Prek and S. Lefèvre, ‘The EU Courts as “National” Courts: National Law in the EU Judicial Process’ (2017) 54 Common Market Law Review, 369.
legal order in the light of the other—using ideas such as tolerance, openness and constitutionalism—but does not rethink that concept of ‘own’.

Interpretative pluralism, by contrast, is more integrative and less hierarchical. It explores the consequences of treating EU law as part of the national legal order, and accepts the institutional corollary that it can then be interpreted by national courts. This is the integrative part—EU law is no longer foreign. The consequence, however, is that judicial disagreements take place within a different frame. Instead of sketching the hard boundaries of their own legal domains, courts are insisting on the limits of their understanding of a common domain. Principled disagreements about concrete situations are transformed from conflicts between texts, into contests about the meaning of a shared text. Systemic opposition is reframed as differences between institutions; interpretative pluralism de-escalates.67 This is where its less hierarchical aspect lies. It denies the need for a choice between legal orders, or even the legitimacy of such a choice. By contrast, the starting point of interpretative pluralism is that both EU law and the constitution bind, for evidently both do. Both are—if the national court accepts direct effect, as they now do—part of the national legal order. The task of the national court is therefore to read them so that they fit.

This is hardly difficult. Both constitutions and the Treaties are full of ambiguities and open norms, as well as implicit meta-principles that can be used to smooth over rough edges and resolve difficulties. Even where there are tensions, there is no need to bring in the sledgehammer of hierarchy. There are other intellectual tools available to bring antithetical ideas within a coherent whole. One may think of free speech and privacy, which obviously pull in different directions. Neither is ‘higher’ in the European Convention of Human Rights, but in each situation the facts and the context determine which carries more weight in that case.68 Understanding the constitution and the Treaties as part of a constitutional whole, judges may use the values implicit within them to decide where the balancing point in a specific case lies.

The functional difference between this practice and the current one in national supreme courts is that interpretative pluralism compels those courts to think about the Treaty texts. The FCC has provided us with some hundreds of paragraphs on the circumstances under which the Treaty should be excluded from German law on constitutional grounds, and, to be fair, quite some paragraphs on what the constitution means in the light of EU membership. Until recently, it devoted hardly any space to the elephant in the courtroom: the question of what the Treaty should mean, in the light of the constitution. What are free movement, or the powers of the European Parliament, or the scope of the Charter, to be, if they are to fit German constitutional values? Under what circumstances would the FCC consider an interpretation by the Court unacceptable, and adopt a differing one?

5.3 | Ajos and the OMT reference

Recent supreme court case law seems to show steps towards a more active engagement with EU law. The Ajos judgment of the Danish Supreme Court and the OMT reference of the FCC both show considerable engagement with the substance of EU law, particularly the latter, which has an extensive section entitled ‘interpretation of EU law’.69 It offers exactly the kind of autonomous understanding of EU law on its own terms that is advocated here, and in the quality of its engagement with EU law it is unique. It may be that national supreme courts will emerge as interpreters of EU law, and these are their first steps.

66Walker, above, n. 65. M.P. Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker, Sovereignty in Transition (Hart, 2003), 501; J.H.H. Weiler, ‘Federalism without Constitutionalism: Europe’s Sonderweg’, in K. Nicolaides and R. Howse (eds.), The Federal Vision (Oxford University Press, 2001) 54; M. Kumm, ‘The Moral Point of Constitutional Pluralism’, in J. Dickson and P. Eleftheriadis (eds.), Philosophical Foundations of European Union Law (Oxford University Press, 2012) 216; A. Bobic, ‘Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice’ (2017) 18 German Law Journal, 1395.

67See, especially, here J. Komarek, ‘The Institutional Dimension of Constitutional Pluralism’, in M. Avbelj and J. Komarek (eds.), Constitutional Pluralism in Europe and Beyond (Hart, 2010), 231.

68Couderc and Hachette Filipacchi Associés v. France, App no. 40454/07 (ECtHR, 10 November 2015).

69BVerfG, Order of the Second Senate of 14 January 2014, 2 BvR 2728/13, paras. 55–100.
Yet it is important to appreciate the limits of those steps too. Both of these judgments are rooted in constitutional law. The Danish one is quite explicit about the division of legal worlds: the Court can say what EU law is, but the Danish court will then decide whether the Danish constitution allows that interpretation in. The FCC is, as one would expect, less direct, but still makes no bones that its authority to interpret EU law is constitutionally based, and the purpose of its consideration of EU law is to safeguard constitutional limits. It is still policing, rather than participating.

That might seem a rather academic point. As long as there is a substantive interpretation involved, then that creates the possibility of serious dialogue between courts, and movement towards shared understandings. What does the reason for this interpretation matter?

It matters for two reasons. For one, the constitutional approach is limits-based. It says ‘beyond this, we will not go’. That is different from full engagement with the best and most plausible reading of EU law. In an ultra vires case such as OMT, this may not matter so much: it is difficult to see how the FCC could have said ‘we will apply this in Germany, but in this particular way’. The circumstances pushed them towards accepting or rejecting. Yet in other cases, such as free movement law or equality law, there is more room for actually applying a different interpretation, or for nuancing the approach taken by the Court. Where a substantive field of EU law is being applied, rather than an EU Act being assessed for legality, interpretative pluralism demands the possibility of more than outer-limit policing.

Secondly, a constitutional approach encourages insularity. When a national court interprets EU law, they are required to read it both as EU law and as national law. The national concerns and constitutional norms are relevant, but so is the specifically EU nature of the rule. What is missing from both the Danish and German judgments is a sense that the EU rules in question need to be looked at from other perspectives than the Danish and German. This arises because both courts were exclusively concerned with protecting their own constitutions. While the German court has in the past engaged in an extensive abstract consideration of the need to read the constitution in the light of EU membership, it showed itself unable to do that in practice. It did not manage to develop a constitutional frame which allowed EU law to be read as EU law. As a result, the judgment is a relatively dogmatic assertion of a particular, locally popular, reading of a rule created by treaty between multiple states, without any awareness of the other plausible understandings that other signatories may have, and no creative or constructive thinking about how these can be reconciled and the standard of reconciliation or review that should be required. The point is thus not that the FCC’s interpretation is obviously ‘wrong’ or ridiculous but that it is, given the European nature of the rule in question, insufficiently reasoned. Despite the length of the discussion, this is not a court doing EU law.

6 | THE MERITS OF INTERPRETATIVE PLURALISM

Interpretative pluralism is above all a technique of inclusion. It seeks to encourage national actors to regard EU law not as imposed or outside law, but as their own. It does this by giving them the authority which corresponds to this—the authority to interpret it—even if, just as with national law, the realities of power mean that this cannot be exercised without recognition of the corresponding interpretations of others.

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70Case no. 15/2014, Dansk Industri (DI) acting for Ajos A/S v. The estate left by A. See informal translation at: http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%202014.pdf at 45.
71M. Kumm, ‘Rebel Without a Good Cause: Karlsruhe’s Misguided Attempt to Draw the CJEU into a Game of “Chicken” and What the CJEU Might do About It’ (2014) 15 German Law Journal, 203.
72See Hofmann, above, n. 25; Davies, above, n. 8.
73Kumm, above, n. 71.
74C. Gerner-Beuerle, E. Küçük and E. Schuster, ‘Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial’ (2014) 15 German Law Journal, 281; J. Bast, ‘Don’t Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court’s Ultra Vires Review’ (2014) 15 German Law Journal, 167; M. Goldmann, ‘Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review’ (2014) 15 German Law Journal, 266.
75Bast, ibid.
The gain is in integration. EU law is rich in potentially transformative norms, most obviously non-discrimination in all its contexts, but also, where it speaks of fundamental rights, mutual recognition, the relationship of family members, Union citizenship, of fair competition and of fair procedure, it expresses ideas which could help states change themselves—or indeed, reaffirm themselves. To realise that potential, states must feel able to pick up the conceptual tools which the EU lays at their feet.

Underlying this is a view of the EU not as an end, but as a means, as what one might call, in fashionable words, a disruptive technology. Its value lies in what it leads to, rather than what it prohibits or requires. Yet of course the two overlap. There will be no long-term transformation without rules that are accepted and take effect. Interpretative pluralism contributes to this in two ways. First, by involving national actors it helps makes those rules better. Second, in suggesting that meaningful legal unity does not preclude different interpretations, it offers an approach to the most fundamental European tension, between sameness and difference, which is more hopeful than the backward-looking ideational sterility of interpretative *dirigisme*.

6.1 | Improving law through dialogue

Interpretative pluralism promotes a judicial and legislative dialogue about what EU law means. It encourages courts to understand each other’s perspectives, informing each other and responding. National courts become more European as they take responsibility over rules whose European origin is something they have to take into account. The Court in turn becomes more responsive to national concerns and understandings, and is able to interpret the Treaties with a better understanding of what those interpretations mean in practice.

This communication is precisely what is required at the current troubled stage of integration. Controversial concepts such as free movement and shared markets need filling in, to take account of the concerns they raise, and that task will have to involve both courts and legislatures if justice is to be done to the politics of the concepts as well as their legal and conferred nature. A one-court monologue on these existentially important terms is not only threatening to legitimacy, but cannot contain a sufficient richness of ideas, nor take account of the diversity of these and the many decentral concerns. Making EU law into *good* law requires wider participation.

De-constitutionalisation, by contrast, is centralising. Rewriting the Treaties to give a greater role to the legislature in defining and shaping policy does nothing for national courts or parliaments. It simply replaces central judicial control by central political control—probably a recipe for even more competence creep. The exclusion of politics at a national level by the spread of EU law, and the tensions between constitutional orders and ever-closer integration, are not just ignored, but probably exacerbated.

De-constitutionalisation thus continues the alienating top-down traditions of the EU by other means. That stands in the way of integration. For EU law to do its work of transforming Member States it must be accepted and adopted by legal actors within them—they must take it to heart. The effectiveness challenge facing EU law is not how to control national actors, but how to motivate them. A central interpretative monopoly, either political or judicial, is an obstacle to this.

76See n. 53 supra.
77See D. Kostakopoulou, ‘European Union Citizenship: Writing the Future’ (2007) 13 European Law Journal, 623.
78Goldoni, above, n. 66; P. Kirchhof, ‘The Balance of Powers between National and European Institutions’ (1999) 5 European Law Journal, 225; M.P Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2007) 1 European Journal of Legal Studies, 137; Tushnet, above, n. 20 at 263.
79F.W. Scharpf, ‘De-constitutionalisation and Majority Rule: A Democratic Vision for Europe’ (2017) 23 European Law Journal, 315; Grimm, above, n. 1.
80S. Weatherill, ‘Competence Creep and Competence Control’ (2004) 23 Yearbook of European Law, 1.
81S. Delavalle, “‘Top-down’ vs. ‘Bottom-up’: A Dichotomy of Paradigms for the Legitimation of Public Power in the EU’ (2017) 9 Perspectives on Federalism, 18.
6.2 | United in diversity

There would of course be differences. Interpretative pluralism entails interpretative difference. This is one of the strengths of the idea. The idea of the uniformity of EU law, so privileged within its doctrine, is little more than a slogan when one remembers that the impact of a rule depends on its context. Member States are so legally, economically, institutionally and socially different that substantive equality of law must entail, to a certain extent, the possibility of applying uniform rules in different ways. Since the primary function of courts is to settle disputes, this is how their interpretation primarily works: through application. Interpretative flexibility is thus what enables, rather than undermines, serious equality.

The challenges that diversity raises are to do with degree. Some flexibility of interpretation, most could agree, would be fair and beneficial. Too much divergence, most could agree, would create political tensions. There are, however, factors that work against extreme divergence. Firstly, the text to be applied is the same in all courts. In the continental European tradition of law this is an important element of uniform law. Divergences of interpretation between different courts, and different branches and levels of the legal system, are in fact quite a common phenomenon in all legal systems, and it would be unreasonable to let their possibility induce panic in the EU context. Secondly, there are centripetal as well as centrifugal forces. A (supreme) court which begs to differ from the Court of Justice runs the risk that its state will face a direct action in Luxembourg as a result. It also runs the risk that other domestic courts will disagree with it, creating internal tensions. Unless one thinks that judges are predisposed to irresponsibility, there is no reason to expect divergence to happen lightly or to an extreme extent.

What interpretative pluralism does is create a dynamic system in which each institution can pull in a certain direction, but powerful forces also pull institutions towards the consensus. It is loyal to the idea of a balance of power, to the essential principle of non-domination. One could perhaps theorise the institutional whole which results as a network court with the Court of Justice at the centre.

7 | CONCLUSION

The top-down model of integration which the Court promotes is starting to look archaic. It is alienating, and stands in the way of wider involvement in shaping the EU. On the one hand, it forces national courts into strategies of resistance, creating hostility and impeding genuine internalisation of EU legal norms. On the other, it excludes politics by insisting that so many decisions are essentially judicial, when the value-balancing and policy choices involved are so obviously and archetypically suited for the political arena.

The underlying tension here is between the role of the Court and the role of the law: the more dominant the former, the more the latter is diminished. Interpretative pluralism seeks to reprioritise the agreement embodied in the Treaties, rather than the institutions around it. It puts forward the idea of the text as the law, and a shared search

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82 P. Legrand, ‘The Impossibility of Legal Transplants’ (1997) 4 Maastricht Journal of European and Comparative Law, 111.
83 Wilkinson, above, n. 28, at 220.
84 G. Davies, ‘Abstractness and Concreteness in the Preliminary Reference Procedure’, in N. Nic Shuibhne (ed.), Regulating the Internal Market (Edward Elgar, 2006), 210.
85 N. Nic Shuibhne, ‘Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law’ (2009) 34 European Law Review, 230; G. Martinico, ‘Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?’ Tilburg Institute of Comparative and Transnational Law Working Paper No. 2009/10.
86 Lasser, above, n. 35.
87 Articles 258–269 TFEU.
88 See, e.g., D. Pollard, ‘The Conseil d’Etat is European—Official’ (1990) 15 European Law Review, 267; J. Komárek, ‘Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires’ (2012) 8 European Constitutional Law Review, 323.
for its meaning as a way of constructing Europe. Loyalty to the Treaties then lies in genuine commitment to what they say, not in subservience to their court. If this leads to different understandings of the law existing side-by-side, then that is not a bug, but a feature.

The Court can take us in this direction, and it should, but like all courts it is path-dependent, and is deeply invested in its own position as a traditional apex court. That may once have made sense, and has achieved much. Without its empire-building instincts the EU might have been little more than a regional WTO-plus. Yet at the current stage of integration a different approach is needed, that allows EU law to deepen its roots in the Member States: a top-heavy plant is vulnerable to stormy times.

It is, therefore, above all for other institutions to summon their powers of initiative and claim a role. EU law would better reflect the preferences and values of Europeans if both legislatures and courts stopped thinking that the choice was between subservience to the Court or rejection of the Treaties. They should take the responsibility attached to their roles, and interpret the laws which they are required to use. For a national constitutional court to look at the Treaties through their constitutional lens and then say ‘we'll take EU law as long as it fits’ is a failure of responsibility. Their task is to make it fit.

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