

SAFEGUARDING DEMOCRACY INSIDE THE EU

BRUSSELS AND THE FUTURE OF LIBERAL ORDER

Jan-Werner Müller

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EXECUTIVE SUMMARY

Recent illiberal turns in Hungary and Romania have prompted the question what, if anything, the EU could and should do to protect liberal democracy within member states. This paper discusses four principled concerns about democracy-saving EU interventions in member states: that an institution that is itself largely undemocratic cannot credibly protect democracy; that there are in fact no common European standards that could be used to determine whether a member state is departing from a shared European understanding of democracy; that interventions are per se illiberal; and, finally, that only small states will be subject to intervention, a form of EU hypocrisy that delegitimizes Brussels both in the states concerned and possibly across the EU as a whole. This paper counters all these concerns and argues that, ultimately, the problem

with intervention is not to be found on a theoretical normative level, but on a practical plane. As of now, the EU lacks a tool-kit to intervene effectively in member states; whatever it has recently used by way of sticks and carrots can seem arbitrary or opportunistic. This paper concludes by making a number of modest proposals as to how this situation might be remedied. In particular, it suggests the creation of an expert body, tentatively called the “Copenhagen Commission,” which continuously assesses democracy and the rule of law within member states. Such an institution ought to be authorized to conduct its own investigations, to raise the alarm about turns to illiberalism — and to impose a very limited range of sanctions. The existing mechanisms should stay in place, but ideally would be complemented with the possibility of entirely excluding a state from the EU.

1 INTRODUCTION

*In the nightmare of the dark
All the dogs of Europe bark,
And the living nations wait,
Each sequestered in its hate;*

*Intellectual disgrace
Stares from every human face,
And the seas of pity lie
Locked and frozen in each eye.*

From W. H. Auden, “In Memory of W. B. Yeats”

If a people — especially one whose freedom has not yet become prescriptive — does not value it sufficiently to fight for it, and maintain it against any force which can be mustered within the country, even by those who have the command of the public revenue, it is only a question in how few years or months that people will be enslaved. Either the government which it has given to itself, or some military leader or knot of conspirators who contrive to subvert the government, will speedily put an end to all popular institutions: unless indeed it suits their convenience better to leave them standing, and be content with reducing them to mere forms; for, unless the spirit of liberty is strong in a people, those who have the executive in their hands easily work any institutions to the purposes of despotism.

From J. S. Mill, “A Few Words on Non-Intervention”

Are there limits to political change within the European Union? Or, put less abstractly, what if a member state appears to be on a path toward a regime that is no longer recognizable as a form of liberal democracy? Put even more bluntly, could there be a dictatorship inside the EU? If such a specter appeared, should Brussels somehow step in to save or, for that matter, revive democracy? Or would this constitute an illegitimate form of meddling in the domestic affairs of countries that, after all, have delegated specific powers to Europe — and *not* empowered Brussels to be a policeman safeguarding liberal democracy across the European continent, or even just to lecture Europeans from Lapland to Lampedusa on how popular rule is correctly understood? All these are no longer theoretical questions: recent developments in Hungary and Romania have put such challenges squarely on the agenda of European politics — even if concerns about a possible slide

toward illiberalism in both countries have been largely overshadowed by the euro crisis.

I argue that it is legitimate for Brussels to interfere in individual member states for the purpose of protecting liberal democracy. Four common concerns about such interventions are largely misplaced.

- First, the criticism that they are hypocritical because the Union is itself not democratic and therefore in no position credibly to act as the guardian of democracy on the continent.
- Second, the worry that there is no single, fully agreed model of European liberal democracy that could be used as a template to decide whether countries are departing from shared “European Standard” (there might often be talk of such standards, but effectively, so critics would claim, they don’t exist).

- Third, the concern that such interventions themselves are in and of themselves paternalistic and, ultimately, illiberal.
- Finally, the charge that only smaller, relatively powerless member states would ever be subject to interference from Brussels (in a sense, then, this criticism also comes down to a suspicion of hypocrisy).

These are not unreasonable concerns. But one can counter them and, in the process, develop a set of criteria as to when and how European intervention is justified. In fact, the real problem arises not at a relatively abstract theoretical level, but when it comes to policy instruments and concrete political strategies. To say it outright: as of now, the EU has no convincing tool kit to deal with situations that probably not many Eurocrats — or, for that matter, European elites more broadly — ever foresaw. Brussels, as well as national capitals,

seemed to have assumed that the consolidation of liberal democracies in the run-up to EU accession was irreversible. Once inside the club, so the rather complacent reasoning seemed to go, young democracies would count their blessings and never look back (or, for that matter, sideways and forward to illiberal forms of statecraft).

To be sure, the repertoire of legal and political instruments the EU has at its disposal at the moment to exert pressure on member states might occasionally work — but it can also appear arbitrary and opportunistic. I propose extending this repertoire as well as the creation of a new kind of democracy watchdog — tentatively called the “Copenhagen Commission” — that can raise a Europe-wide alarm about deteriorations in the rule of law and democracy. Such a body also ought to be able to trigger a limited set of “smart sanctions.”

2 SUPRANATIONAL DEMOCRACY-PROTECTION: THE STORY SO FAR

A cliché of our time holds that “identity-creation” requires an “Other,” that is to say: an enemy, or, at the very least, someone who clearly is “not us.” If that is correct, the EU should have found its identity in early 2000, when Europe’s Other appeared — not for the first time in 20th century European history — in the form of a charismatic Austrian: Jörg Haider. The inclusion of Haider’s populist right-wing Freedom Party in the government prompted the then EU members — minus Austria, obviously — to take “sanctions” against Vienna: for instance, they vowed not to promote Austrian candidates for positions in international organizations.

Yet what came to be known as the Haider Affair in some ways deeply traumatized European elites: the (for the most part symbolic) sanctions looked somewhat ridiculous; fear mounted that there might be a nationalist backlash in Austria; most important, in the end, a group of three “wise men” chosen by Brussels certified in an official report that there was nothing wrong with the Austrian government (even if there remained concerns about the FPÖ).¹ Europe had its fingers burnt, or so many people think today.

More than a decade later, the question of how, if at all, to protect democracies inside the EU is back on the agenda. Two countries in particular have given rise to concern in Brussels: Hungary and Romania.²

¹ Martti Ahtisaari, Jochen Frowein, and Marcelino Orejta, “Report on the Austrian Government’s Commitment to the Common European Values, in particular concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPÖ (The Wise Men Report),” in *International Legal Materials*, vol. 40 (2001), 102-23.

² On Hungary, see the special section on Hungary’s illiberal turn in the *Journal of Democracy*, vol. 23, no. 3 (2012), the collection edited by Gábor Attila Tóth, *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (Budapest: CEU Press, 2012), Pierre Verluise, “UE-Hongrie V. Orban: vers la rupture?,” *diploweb.com*, December 2, 2012, available online at [http://www.diploweb.com/UE-Hongrie-V-Orban-vers-la-](http://www.diploweb.com/UE-Hongrie-V-Orban-vers-la-rupture.html)

To recap very briefly, in Hungary, a right-wing populist party, Fidesz, came to power with a two-thirds majority in parliament in April 2010. The Fidesz government under Viktor Orbán announced a new “system of national cooperation,” passed a draconian media law that was widely criticized —

[rupture.html](http://www.diploweb.com/UE-Hongrie-V-Orban-vers-la-rupture.html) [last accessed January 25, 2013], and, for further historical background, my “Longing for Greater Hungary,” *London Review of Books*, vol. 34, no. 12 (2012), as well as Paul Lendvai, *Hungary: Between Democracy and Authoritarianism* (New York: Columbia UP, 2012). On Romania, see Vladimir Tismaneanu, “Democracy on the Brink: A Coup Attempt Fails in Romania,” in *World Affairs* (January/February 2013), 83-7, and, for the larger background, Tom Gallagher, *Theft of a Nation: Romania Since Communism* (London: Hurst, 2005), but also Daniel Barbu, *Die abwesende Republik*, trans. Larisa Schippel (Berlin: Frank & Timme, 2009). See also the European Commission’s latest report on Romania at <http://static.euractiv.com/sites/all/euractiv/files/CVM%20Romania%20political.pdf> [last accessed January 7, 2013], which highlights a range of serious problems that have no equivalent in Hungary. In general, it needs to be pointed out that Hungary by 2010 was widely considered a consolidated democracy, whereas Romania continued to suffer from a number of deep problems, from corruption to a tendency to play fast and loose with the constitutional framework, and easily escalating conflicts among the political elite (observers have spoken of “triage democratization,” where urgent problems are — sometimes — addressed, but where there is little systematic state-building and entrenchment of the rule of law. See Ronald F. King and Paul E. Sum (eds.), *Romania under Basescu: Aspirations, Achievements, and Frustrations during His First Presidential Term* (Lanham: Lexington Books, 2011). Moreover, observers have credibly shown that accession for Romania meant an immediate deterioration in elite political practices, as well as efforts at state-building and the rule of law — a phenomenon Venelin Ganey has termed “post-accession political hooliganism” (see Venelin I. Ganey, “Post-Accession Hooliganism: Democratic Governance in Bulgaria and Romania after 2007,” in *East European Politics and Societies and Cultures*, vol. 27 [2013], 1-19). Nothing similar occurred in Hungary, although there, at least since 2002, one of the major political players denied the legitimacy of its main opponents. (After his election loss in 2002 Orbán declared that the nation itself cannot be in opposition.) In that sense, in both countries the promise of 1989 remains unfulfilled: a liberal-democratic political system that allows for civilized conflict within a shared constitutional framework that all major actors regard as legitimate (and where the main political actors regard each other as legitimate).

Sanctions against Austria are today often seen as a failure.

Fidesz was pursuing a strategy of systematically occupying the state, so that the party might lose an election, but never lose power.

by the OSCE, among others³ — and, in the spring of 2011, rammed through a new constitution that was deeply nationalist and undermined checks and balances (and which was also widely criticized internationally, for instance by the Venice Commission).⁴ In addition, Fidesz packed the constitutional court and, in general, kept appointing loyal followers to what were meant to be non-partisan institutions, often for unusually long terms (sometimes for more than two parliamentary cycles). Observers held that Fidesz was pursuing a strategy of systematically occupying the state, so that the party might occasionally lose an election, but never lose power. Critics even began to speak of “Putinization” or “Lukashenko lite.”⁵

In Romania the attack on the rule of law happened much more quickly. In the summer of 2012, a nominally social democratic-liberal coalition (to be sure: these labels have limited meaning

in Romanian politics⁶) sought to impeach the nominally conservative-liberal president, Traian Băsescu (who was accused of overstepping the constitutional limits to his powers; one attempt to impeach him, based on similar charges, had already failed in 2007). To that effect, it disempowered the constitutional court in addition to passing a number of emergency decrees that were clearly aimed at ensuring only one possible outcome for the referendum on the president’s impeachment. In particular, the threshold of participation for a referendum to be valid was lowered. The government led by Victor Ponta also removed the heads of the two houses of parliament and deposed the “Advocate of the People” (the ombudsman) — the former initiative insured that one of Ponta’s allies would become acting president while Băsescu was suspended; the latter helped to get rid of the one actor who could have taken the emergency decrees to the constitutional court.⁷

In both Hungary and Romania, the EU intervened in a substantial (and controversial) manner. The Commission criticized Hungary’s media law, which was eventually changed — although it is debatable whether it does not in many ways retain its illiberal character. Hungary was also investigated for failing to implement EU law — in particular, there were concerns about the independence of the central bank, of the judiciary, and of the data protection ombudsman — and, in the end, the European Commission took Hungary to the European Court of Justice. Again, the results so far have been somewhat mixed: Budapest complied with some of the demands to ensure central bank

³ A timeline of the development of the media law as well as an extensive assessment of the Hungarian government’s claims that all its elements have parallels elsewhere in democracies, can be found on the website of the Central European University’s Center for Media and Communications Studies: <http://cmcs.ceu.hu/> [last accessed January 7, 2013].

⁴ See the criticism of the new constitution by the Venice Commission: [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf) [last accessed January 7, 2013].

⁵ These rather under-theorized terms (to put it politely) point to a very real difficulty in conceptualizing regimes like Putin’s and Lukashenko’s. “Illiberal democracy” appears too weak, dictatorship too strong. At the same time, the core characteristics of these regimes are not really much disputed: virtually complete centralization of power; abuse of the rule of law to weaken opposition forces, and also the removal of all legal checks on centralized power; almost complete control of the media; a tendency to keep speaking the language of democracy (think of the development of the concept of “sovereign democracy” under Putin). It is debatable whether the price of oil should play a role in characterizations of these regimes — for surely neither of them could have been as relatively stable as they have been without the boom in oil prices. See also Ivan Krastev and Stephen Holmes, “An Autopsy of Managed Democracy,” in *Journal of Democracy*, vol. 23 (2012), 33-45

⁶ Herta Müller spoke of “die sogenannte sozialdemokratische Regierung in Bukarest.” See “Ich habe die Sprache gegessen,” in *Der Spiegel*, August 27, 2012.

⁷ For an account (and an opinion of the legality of the measures), see the Venice Commission’s Opinion on Romania from August 18, 2012, available online at <http://www.venice.coe.int/docs/2012/CDL-AD%282012%29026-e.pdf> [last accessed January 7, 2013].

independence (knowing fully that the president of the bank is set to retire in April 2013 and can then be replaced by someone more to the government's liking); the European Court ruled on at least one occasion against Hungary and held that the drastic lowering of the retirement age for judges to 62 violated European law — but the judges have yet to be reinstated.

In July 2012, the Commission called on Romania — once declared “the EU's true test case” by Tony Judt⁸ — to take back some proposed changes to the rules for referenda on the president, which the government did (and which decisively contributed to the failure of the impeachment process). Even though 88.5 percent of voters turned out to be in favor of removing Băsescu, the critical threshold of participation (50 percent plus one vote), which Ponta had tried to lower, was not reached.⁹ After some attempts by the government to change the number of eligible voters retroactively in order to get the desired outcome after all, and some reluctance to accept a ruling by the constitutional court that the referendum was indeed valid, Băsescu was reinstated. Since his resounding election victory in December 2012, Ponta on one hand agreed to a truce with a much weakened Băsescu (thereby seemingly bringing what has often been called “the war of the two palaces” — that of president and prime minister — to an end). On the

⁸ Though only partly because it might prove the ultimate challenge for Europeanization in the sense of democratization through membership, as some might have thought. Rather, Judt argued that “Romania is peripheral, and the rest of Europe stands to gain little from its presence in the union. Left outside it would be an embarrassment, but hardly a threat. But for just this reason Romania is the EU's true test case.” Tony Judt, *Reappraisals: Reflections on the Forgotten Twentieth Century* (New York: Penguin, 2009), 263.

⁹ “Der unermüdlich Kampf der Kleptokraten,” in *Frankfurter Allgemeine Zeitung*, August 28, 2012, available online at <http://www.faz.net/aktuell/politik/ausland/rumaenien-der-unermuedliche-kampf-der-kleptokraten-11870946.html> [last accessed January 24, 2013]

other hand, there have been reports of Ponta trying to put together a two-thirds majority in parliament in order to change the constitution. If that is indeed the plan, Ponta might have learnt from his neighbor to the west: rather than relying on ad hoc measures, rather than being “impatient” (Ponta on Ponta), the government should implement long-term institutional changes.¹⁰ Even if Ponta belongs to a different party-political family — he seems to prove a good pupil of Orbán: entrenching highly partisan preferences legally is far smarter than what observers of the Romanian scene sometimes called Ponta's “parliamentary putsch.”¹¹

¹⁰ See “Clear victory, uncertain future,” on *The Economist's* “Eastern Approaches” blog, December 10, 2012, available at <http://www.economist.com/blogs/easternapproaches/2012/12/romanian-politics-0> [last accessed January 7, 2013]; Karl-Peter Schwarz, “Doppelzüngig,” in *Frankfurter Allgemeine Zeitung*, December 10, 2012, available online at <http://www.faz.net/aktuell/politik/ausland/victor-ponta-doppelzuengig-11989098.html> [last accessed January 7, 2013]. To be sure, Băsescu also violated democratic principles by hinting initially that he might suggest a prime minister other than Ponta, despite the latter's clear victory in the elections. Of course, a semi-presidential system like Romania's is more likely to generate conflicts of this kind in the first place.

¹¹ As Müller put it dramatically: “Denen ist das Land scheißegal. Ungarn war ein Lehrstück, die haben sich angesehen, wie man dort die Demokratie aushebelt. Es macht einem Angst, dass es so junge Leute sind. Victor Ponta, der neue Ministerpräsident, ist 39. Aber auch er ist noch von Ceaușescu sozialisiert. Seine Doktorarbeit ist in weiten Teilen ein Plagiat, zudem hat er sich noch mit einem erfundenen Universitätsabschluss geschmückt. Betrug gehört zum Selbstverständnis.” (“They don't give a shit about the country. Hungary was an instructive example, they looked at how democracy was disabled there. It's frightening that it's such young people. Victor Ponta, the new prime minister, is 39 years old. But even he was still socialized by Ceaușescu. His doctoral dissertation is in large parts plagiarized, in addition he has adorned himself with an invented university degree. Fraud belongs to his self-understanding.”) See “Ich habe die Sprache gegessen.” The parallel has been suggested in an interview to Ponta himself. He either failed to get the point or, more likely, decided not to engage with it: “Question: Il y a un point commun entre vous et votre homologue hongrois Viktor Orban: une façon de brutaliser les institutions.” — “Answer: Ma malchance est que mon prénom est Victor. Avec tout le respect que j'ai pour lui, nos

Ponta might have learned from Orbán: rather than relying on ad hoc measures, rather than being “impatient” (Ponta on Ponta), the party should entrench its preferences in a new constitution.

EU intervention in both Hungary and Romania has met with fierce criticism — and not just in the two countries concerned. In fact, a clear left-right split across Europe emerged among critics of the actions of the Commission: British Eurosceptics

vues sont totalement différentes. Je suis le premier leader roumain à ne pas avoir de passé dans le communisme. J'espère représenter la fin de la période de transition postcommuniste. Je veux rendre les institutions au contrôle populaire, et pas les brutaliser.” (“Question: You and your pendant Viktor Orban have something in common: a way of brutalizing the institutions. Answer: It is my misfortune that my first name is Victor. With all the respect I have for him, our views are completely different. I am the first Romanian leader without any past under communism. I hope to represent the end of the postcommunist transition period. I want to put the institutions under popular control, not to brutalize them.”) See “L’agressivité de nos luttes politiques a surpris la Commission et les Européens,” in *Le Monde*, September 18, 2012, available online at http://www.lemonde.fr/europe/article/2012/09/18/roumanie-l-agressivite-de-nos-luttes-politiques-a-surpris-les-europeens_1761835_3214.html [last accessed January 7, 2013].

no less than German conservatives emphasized the importance of nation-state sovereignty (and the harm done to national pride by supposedly heavy-handed EU interventions); on the left, there was less principled opposition to interference from Brussels as such, but a widespread sense that the Commission ultimately cares only about economics, or, put more precisely, safeguarding neoliberal understandings of the role of central banks, the interests of multinational companies, and fiscal austerity.

Clearly, there is a need for more systematic thought about the legitimacy of such interventions. EU law provides some guidelines, of course, but it is noticeable that much of the public argument about intervention from Brussels has been conducted less in the idiom of jurisprudence than in the language of democratic theory. So what can and what cannot be justified here in the name of democracy?

3 FOUR CONCERNS

The first standard charge against the EU protecting democracy is that the Union itself is not democratic — hence Brussels is fundamentally hypocritical in speaking out for and in the name of values to which it does not adhere itself.¹² This charge misses the point that the Union derives its legitimacy not from being a continent-wide democracy (at least at this point in time). Rather, it is legitimate because national parliaments have freely voted to bind themselves and follow European rules.¹³ In the euro crisis, this logic of self-binding is clearly under attack — markets have not found the model of rules and sanctions credible. But with the single market, it has worked well for decades. Nobody is complaining that Brussels is taking member state governments to court for violating competition rules, for instance.¹⁴

One might still object that the parallel between interventions to safeguard the single market and interventions to protect democracy is misplaced. Are the purity of beer and the length of cucumbers not a categorically different matter than the shape and form of national political institutions? Is European integration not predicated on the fact that member states remain both “masters of the treaties” and, in many clearly demarcated areas, masters of their own political fate? Or, taking a different line of attack: is the European Union not meant to be irreducibly *pluralist* in character? Is the spirit of its laws, so to speak, not something

that can best be described as a matter of mutual recognition and mutual accommodation, where conflicts are resolved by trying to normatively relativize oneself and open oneself to the point of view of the other, to find higher common ground and shared terms to address disputes — and never through just bowing to commands from above, so to speak? Less abstractly, does not the Lisbon Treaty (which is now simply *the* Treaty on European Union) itself enshrine the very principle that the Union ought to respect the national identities of the member states? And, on a less legalistic note again, did not Europe’s most powerful politician once appear in front of the European Parliament to declare that the “soul of Europe” was “tolerance”?¹⁵

In response, a more specific argument about the meanings (and legitimacy) of European integration as a political project to safeguard democracy needs to be advanced. After all, one of the explicit goals of European enlargement to the East was to consolidate liberal democracies (or, in the case of Romania, complete the transition to liberal democracy in the first place). Governments in turn sought to lock themselves into Europe so as to prevent “backsliding”¹⁶; it was like Ulysses binding himself to the mast in order to resist the siren songs of illiberal and antidemocratic demagogues in the future.¹⁷ Hence neither Hungarian Prime

The Union derives its legitimacy not from being a continent-wide democracy.

¹² To be sure, this is not a claim one hears from many EU specialists — but it is one that is almost immediately aired in public discussions and, for what it’s worth, in online commentary.

¹³ For an elaboration of this point see Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (New York: Oxford UP, 2010).

¹⁴ To be sure, self-binding is not the only source of legitimacy. This is not the moment to enter into a debate about the “democratic deficit,” but even the most hardened critics of the EU would concede that democratically elected governments, national parliaments, and the European Parliament all have meaningful roles in European decision-making.

¹⁵ http://www.eu2007.de/en/News/Speeches_Interviews/January/Rede_Bundeskanzlerin2.html (last accessed September 24, 2007).

¹⁶ This has become a widespread term, without its users necessarily being aware of its origins in religious contexts. I shall avoid it for the remainder of this paper.

¹⁷ This thought has come under much criticism recently — including by Jon Elster who made it influential in the first place. While one can indeed question the notion of “self-binding,” the case under discussion here is actually a matter of “wanting to be bound by others” — and clearly renouncing the power to unbind oneself, short of jumping the (EU) ship altogether. See the chapter “Ulysses Unbound: Constitutions as Constraints,” in *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (New York: Cambridge

Distrust of unrestrained popular sovereignty, or even unconstrained parliamentary sovereignty, is in the very DNA of post-war European politics.

Minister Viktor Orbán nor Romania's Victor Ponta are right to accuse Brussels of Euro-colonialism. Orbán, comparing the EU to Turks, Habsburgs, and Russians — all former oppressors of the freedom-loving Magyars — complains that “they are trying to tell us how to live.” In fact, “they” are only reminding the Hungarians and Romanians how they wanted to live when they joined the Union in 2004 and 2007 respectively.¹⁸

But, one might object, do Europeans really agree on how they want to live, politically, beyond bromides about democracy and the rule of law? Is the devil not obviously in the details? The concern here is that there are in fact no shared European standards of liberal democracy. Yes, there is a single *market*, but no single model of liberal democracy — and therefore all efforts to protect democracy in Europe are somewhat arbitrary. This is where a more historical argument comes in. I believe it can be shown that the whole direction of political development in post-war Europe has been toward delegating power to unelected institutions, such as constitutional courts.¹⁹ And that development was based on specific lessons that Europeans — rightly or wrongly — drew from the political catastrophes of midcentury. The architects of the post-war West European order viewed the ideal of popular sovereignty with a great deal of distrust. After all, how could one trust peoples who had brought

fascists to power or extensively collaborated with fascist occupiers?²⁰ Less obviously, elites also had deep reservations about the idea of parliamentary sovereignty. After all, had not legitimate representative assemblies handed all power over to Hitler and to Marshal Pétain, the leader of Vichy France, in 1933 and 1940 respectively?²¹ Hence parliaments in post-war Europe were systematically weakened, checks and balances were strengthened, and non-elected institutions (again, constitutional courts are the prime example) were tasked not just with defending individual rights, but with democracy as a whole.²² In short, distrust of unrestrained popular sovereignty, or even unconstrained *parliamentary* sovereignty (what a German constitutional lawyer once called “parliamentary absolutism”) are, so to speak, in the very DNA of post-war European politics.²³ And it is fair to say that these underlying principles of what I have elsewhere called “constrained democracy” were almost always adopted when countries were able to shake off dictatorships and turned to liberal democracy in the last third of the 20th century: first

UP, 2000), 88-174; for the original theory, see Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge, 1979).

¹⁸ Put in republican language: the EU is interfering to track the avowed interests of the citizens of the member state concerned; it is authorized (or “licensed”) to interfere. See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford UP, 1997).

¹⁹ I have made this argument at greater length in *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (London: Yale UP, 2011). See also Peter L. Lindseth, “The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920-1950s,” in *Yale Law Journal*, vol. 113 (2004), 1341-1415.

²⁰ This was the core of the case for judicial review in these countries. There were no proven democratic institutions and there were good reasons to believe that many citizens would not take individual rights seriously. Cf. Jeremy Waldron, “The Core of the Case Against Judicial Review,” in *Yale Law Journal*, vol. 115(2006), 1346-1406.

²¹ See also Ivan Ermakoff, *Ruling Oneself Out: A Theory of Collective Abdication* (Durham: Duke UP, 2008).

²² One might add that dignity — and not freedom — is the master value of post-war constitutions.

²³ Of course, this is another way of saying that while there are indeed “constitutional pluralism” and “constitutional tolerance” in the EU (and while both of these have an important normative dimension), both are still constrained — a fact which every accession process makes clear. See Neil Walker, “The Idea of Constitutional Pluralism,” in *Modern Law Review*, vol. 65 (2002), 317-59 and J. H. H. Weiler, “Federalism Without Constitutionalism: Europe's *Sonderweg*,” in Kalypso Nicolaïdis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford UP, 2001), 54-70.

on the Iberian peninsula in the 1970s, and then in Central and Eastern Europe after 1989.

Less obviously, European integration was part and parcel of this comprehensive attempt to constrain the popular will: it added supranational constraints to national ones.²⁴ (Which is not to say that this entire process was master-minded by anyone, or came about seamlessly. Of course, the outcomes were contingent and had to do with who prevailed in particular political struggles — a point that is particularly clear in the case of individual rights protection, a role for which national courts and the European Court of Justice were competing.)

Of course, history is not destiny and its supposed lessons do not automatically generate legitimacy. But it seems a reasonable presumption that radical, sudden departures from this post-war model of politics require special justifications. This thought applies to Hungary, for instance, where the constitutional court and, in general, the independent institutions to which Hungary committed after 1989 are being systematically weakened. But it does not apply straightforwardly to a country like Britain, where *de facto* constraints on — in theory unlimited — parliamentary sovereignty have had a more informal character, at least up until recently.²⁵ To put it bluntly, there the people are more likely to trust themselves, instead of empowering unelected institutions

²⁴ One might ask in what way, then, “constrained democracy” differs from “guided” or “defective” democracy. The answer is that in the former, genuine changes in who holds power is possible and that all constraints are ultimately justified with regard to strengthening democracy. In the latter, no real change is allowed.

²⁵ Clearly, the picture has changed somewhat with the Human Rights Act of 1998 — though it is worth noting that recently the adherence of the U.K. to the European Convention on Human Rights has been highly contested. It is not a fanciful scenario at this point that the country will reverse course and create a new “bill of rights,” which *de facto* uncouples the U.K. from supranational European rights protection.

nationally or supranationally — which goes a long way in explaining Euroscepticism (or outright rejection of EU membership) in countries like the U.K., Switzerland, and Norway (which boasts the oldest single-document democratic constitution in Europe). Such states are more likely to believe in a national “democratic override” of supranational decisions (whether legal or political). On the other hand, the post-authoritarian countries on the continent precisely have wanted supranational overrides of peoples who do not trust themselves.²⁶

Still, one might point out that, while European nation-states arrived at similar templates for what I have elsewhere called “constrained democracy,” the fact remains that they ultimately did so themselves — and attempts by Brussels now to preserve these arrangements for them are *per se* illiberal and paternalistic. Put simply, we should not help peoples who cannot help themselves, and we should not protect peoples from their own governments, short of extreme circumstances (above all, genocide). This concern, reasonable and “classically liberal” as it sounds, overlooks two important points: first, in an EU context, remaining neutral is not itself neutral, so to speak. Both the European Commission and the European Court of Justice are, after all, authorized (and specifically tasked) with being “guardians of the treaties” — and effectively condoning their violation or, in general,

²⁶ Which is not to say that the “democratic override” — or, put differently: supranational constitutionalism *à la carte* — is a plausible idea either in regard to the ECHR or the ECJ, as, for instance, the president of the ECHR made more than clear: “I believe it would be totally destructive of the system if one was to have any kind of system of democratic override: that is, that members of the national parliaments, the parliamentary assembly of the Council of Europe or, indeed, the committee of ministers could simply say: ‘This is a decision we don’t like and we are not going to implement it.’” See “Bratza bemused by U.K.’s disdain for Strasbourg,” in *The Guardian*, January 30, 2012, available online at <http://www.guardian.co.uk/law/2012/jan/31/joshua-rozenberg-interviews-nicolas-bratza> [last accessed January 25, 2013].

European integration was part and parcel of this comprehensive attempt to constrain the popular will. It added supranational constraints to national ones.

Every European citizen has an interest in not being faced with an illiberal member state in the EU. After all, that state will make decisions in the European Council and therefore, at least in an indirect way, govern the lives of all citizens.

a significant deterioration in domestic political institutions is likely to have effects outside the state immediately concerned. It sets a precedent and it could prove a contagion. Thus *all* member states have an interest in the Commission enforcing the commitments member states voluntarily made in the past.

Apart from such pragmatic concerns about illiberal contagions, there is also a more principled argument, which is rarely advanced in debates about democracy-safeguarding EU interventions, but which constitutes the core of any normative case for such interventions. *Every* European citizen has an interest in not being faced with an illiberal member state in the EU. After all, that state will make decisions in the European Council and therefore, at least in an indirect way, govern the lives of *all* citizens. Strictly speaking, there are no purely internal affairs in EU member states; all EU citizens are affected by developments in a particular member state. It might be true that there are far-away countries containing people about whom we know nothing — but as long as they are in the EU, they concern us.²⁷ This fact of interdependence (and the fact that, as of now, the EU seems unable to internalize the externalities of member state behavior) has recently been brought home to Europeans by the euro crisis, but it has mostly been interpreted in financial and economic

²⁷ Which is not to say that the all-affected principle is easy to make sense of in practice; for some of the difficulties surrounding an idea that seems intuitively so plausible, see Robert E. Goodin, “Enfranchising All Affected Interests and its Alternatives,” in *Philosophy and Public Affairs*, vol. 35 (2007), 40-68. To be sure, effects of the EU and EU member states do not stop at the borders of the EU — but the fact that the EU is a clearly demarcated political community does mitigate the problems associated with the all-affected principle somewhat. Put differently, one can operationalize the concept in the context under consideration here without having to claim that the principle in general is the answer to the democratic boundary-problem.

terms. However, there is freely chosen *political* interdependence, too.²⁸

These considerations underline that the intuitively plausible liberal notion that we should not intervene in countries to promote political principles in which local people appear to have no interest or which they seem willing to abandon cannot be applied to the EU. Inside the Union, there are pre-existing commitments by all states; inside the EU, there is political interdependence among both states and citizens. Needless to say, if a member state no longer believes in those commitments or, for that matter, wants to disentangle itself from other member states (and other European citizens), so be it. But that decision in itself has to be made in some sort of recognizably democratic way. Put simply, a full-fledged dictatorship should leave the EU, no matter what its own citizens may want (to the extent that this can at all be ascertained). But a democratic state that wants to leave still has an interest in democratic institutions staying intact — and therefore in Brussels reinforcing such institutions even in the case where the ultimate, democratic decision is one for exit (“demexit,” to coin a phrase).

All very well in theory, critics might say, but what about the danger that calls for intervention become the stuff of symbolic politics, or the danger that only *small* (and *newer*) member states will ever be picked on? This is a common interpretation of what happened when Haider’s party came to power in Austria. Leaders like France’s Jacques Chirac and Germany’s Gerhard Schröder — unable to do anything about Jean-Marie Le Pen’s National Front or the neo-Nazi NPD at home, respectively — could moralize about small countries at no cost

²⁸ This is a different point than the more general right for democracy-saving interventions promoted by Gregory H. Fox and Georg Nolte, “Intolerant Democracies,” *Harvard International Law Journal* vol. 36 (1995), 1-70.

internationally, or so it seemed, while also scoring some points against their domestic opponents.²⁹ Meanwhile, nobody ever dared to touch Silvio Berlusconi's Italy, no matter how much political bunga-bunga was going on. Powerful member states — and especially founding member states of the EU — appeared to be above the law.

It would be futile to deny that political power will play a role in whether and how EU interventions might happen. Some European states carry more weight than others, the Commission has its own political interests, of course, and domestic politics can never be neatly kept out of supranational decision-making. Still, it would be a mistake to conclude from a comparison between the cases of Italy, Austria, Hungary, and Romania that only weaker and newer member states get picked on. For there are important differences here; teasing them out can also point us to convincing criteria as to what would make EU interventions legitimate.

The problem with the Haider Affair was partly that sanctions were imposed *before* the new government had taken any significant actions. To be sure, one can try to justify sanctions as essentially warning shots. But in Austria, they appeared more like expressions of displeasure with Haider's past pronouncements (on Hitler's employment policies, for instance) than as principled objections to what the new government actually sought to do. This is a marked contrast with the cases of Hungary and Romania: in both countries governments had a clear track record. What they were doing also had

²⁹ See also Michael Merlingen, Cas Mudde, and Ulrich Sedelmeier, "The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria," in *Journal of Common Market Studies*, vol. 39 (2001), 59-77. Perhaps not so surprisingly, the evidence suggests that both domestic party-political incentives and an ideational environment favorable to human rights protection had to come together to motivate sanctions.

a systematically illiberal character and could not be excused as a one-off mistake.

Second, there is a significant difference between Berlusconi's Italy and the two states further east. True, the *Cavaliere* also tried to remove checks and balances and would have wanted to stay in power more or less permanently (and therefore also out of prison).³⁰ But the opposition, despite its generally sorry state, remained just about strong enough to resist major constitutional recrafting. Throughout his time in office, Berlusconi was constrained by the fact that he headed coalition, not single-party, governments; the media was not completely dominated by Berlusconi's own empire, contrary to what outside commentators sometimes claimed; the judiciary kept putting up a fight; and various Italian presidents — Giorgio Napolitano in particular — would block Berlusconi's plans (for instance, to appoint allies — even his personal lawyer — to particular ministries, or to hold new elections).³¹ He also lost popular referenda, especially the 2006 constitutional one, which would have introduced far-reaching changes (and strengthened the office of the prime minister in particular).³² In short, there were reasonable grounds for thinking that the situation would over time self-correct through internal political struggle. Here outside intervention might easily seem illegitimate. It could look like Brussels picking a winner in a domestic

³⁰ To be sure, Berlusconi's style of governing — to the extent that he actually governed — was highly personalistic and plebiscitarian. It involved less a comprehensive restructuring of the state than the creation of a court of devoted followers. See Maurizio Viroli, *The Liberty of Servants: Berlusconi's Italy*, trans. Anthony Shugaar (Princeton: Princeton UP, 2011).

³¹ I am grateful to Giovanni Capoccia and Gianfranco Pasquino for information and views on this matter. See also "The Future of Western Liberal Order: The Case of Italy," *Transatlantic Academy Paper Series*, January 2013, available at http://www.transatlanticacademy.org/sites/default/files/publications/PasquinoEtAl_Italy_Jan13_web_Final.pdf [last accessed February 11, 2013].

³² Nadia Urbinati, *Prima e Dopo* (Rome: Donzelli, 2011).

There are important differences between Berlusconi's Italy and Hungary as well as Romania.

fight for power. It would also cut short what one might call a “democratic learning process,” thereby preventing the proper development of a democratic political culture (though one could of course reasonably ask whether Italians should not have figured out by the end of Berlusconi’s second stint in office at the very latest that the *Cavaliere’s* statecraft was somewhat deficient).³³

All this is no more than restating an old point, a point familiar from John Stuart Mill’s writings

³³ See also Peter Niesen, “Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties,” in Shlomo Avineri and Zeev Sternhell (eds.), *Europe’s Century of Discontent: The Legacies of Fascism, Nazism, and Communism*, (Jerusalem: Magnes Press, 2003), 249-68.

in the middle of the 19th century. Ideally peoples struggle for freedom and democracies (and preserve their democracies) themselves.³⁴ As Mill put it in his *A Few Words on Non-Intervention*, “the only test ... of a people’s having become fit for popular institutions is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labor and danger for their liberation.”³⁵

³⁴ Certainly, this argument could be reformulated with reference to the concept of subsidiarity.

³⁵ Quoted by Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1992), 88.

4 FOUR CRITERIA

The responses fashioned to four eminently reasonable concerns also indirectly yield a set of criteria as to when there is a presumption in favor of EU interventions being legitimate. First, a member state government needs to have a *track record* of violating shared political principles. There is no case for pre-emptive action. That track record should also show a government's general conduct and specific policies to have a *systematic nature*: one-off violations might be deeply problematic, but they should be seen in context. In other words, there is a place — in fact, a need — for political judgment here. Second, intervention is about enforcing commitments that were entered into voluntarily in the past. If there is reasonable hope that such commitments can, in the end, mostly be enforced internally, intervention should wait. Third, there is no single, rigid template for understanding democracy in a European context. However, there are shared understandings that have evolved historically. Sudden departures from them put the burden of justification on the governments deciding in favour of such departures.

It needs to be underlined that *all* member states and *all* European citizens have an interest in enforcing liberal-democratic commitments. Their expressions of interest and concerns cannot be dismissed with the claim that they constitute a meddling in internal affairs. However, having said that, member state governments and citizens do owe each other *respect* across the Union. In particular, nuances in political language and tone matter when it comes to talking about members of the “European family” (which can be no less dysfunctional and unhappy in its own way than any other family). On one hand, criticism from the outside should never be suspect just because it comes from the outside

— as I have been arguing, EU citizens share one political space and ought to make it their business what others in that space do. But neither European politicians nor European intellectuals should generalize about, for instance, “the Hungarians,” as opposed to a particular government. And Brussels should never treat member states as if they were like unruly or immature children who are a bit slow in getting liberal democracy. The EU experience as lived can be very different from the textbook account of “transitions to democracy,” where peace, prosperity, and political happiness reign ever after. In Hungary, for instance, accession in 2004 was already the moment of bust after the boom, when companies were moving still further east in search of tax breaks and cheap labor. No wonder, then, that liberal political languages are today widely discredited. “Liberalization” is identified as the imposition of neoliberal economic policies by elites that are protected by “Europe” (and can always escape to Europe, that is, a cushy EU or multinational business job).³⁶ Less obviously, there is a strong sense in the country that time and again the West has raised high moral and political expectations — only to leave the Magyars in the lurch when it truly mattered (the failed liberal revolution of 1848/49, 1945, and, of course, above all, 1956). The point is not that such sentiments — “the EU is only about capitalism” or “the West is always hypocritical” — need to be accepted at face value, but there ought to be an awareness of them. And both European rhetoric and conduct ought to be sensitive to them.

³⁶ See Umut Korkut, *Liberalization Challenges in Hungary: Elitism, Progressivism, and Populism* (New York: Palgrave, 2012).

Brussels should never treat member states as if they were unruly or immature children who are a bit slow in getting liberal democracy.

5 THREE STRATEGIES — AND THEIR LIMITS

Legitimacy and having appropriate policy instruments at hand is not the same thing. In this section, I would like briefly to inspect the EU's existing tool-kit, when the challenge consists in safeguarding democracy in member states. I shall conclude that even where the tools seem to fit the task, so to speak, they are either unusable because of political reasons (something that, to be sure, could change over time) or have other drawbacks (mostly to do with the time it might take to apply them).

The Politics of Article 7

As is well known, Article 7 of the Treaty on the European Union allows for the suspension of membership rights for states persistently violating basic European values. The idea for such an article had in fact been pushed by two paragons of Western European democracy, Italy and Austria, in the run-up to enlargement, clearly out of a fear of what those uncouth Eastern Europeans might do (the irony being that sanctions — though not under Article 7 — were first applied against Austria in 2000).³⁷ After the Haider Affair, an intermediate step was introduced to allow the EU to send a strong signal that there exists a “clear risk of a serious breach by a member state of the values referred to in Article 2” (that is, “respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities”). In other words, the Union opted for a strategy that allowed for step-by-step escalation, instead of having only the choice of immediately confronting a government with the charge that it is, in fact, in violation of shared European values.

However, even with this differentiated approach, there is today a sense that Article 7 as a whole

somehow constitutes a “nuclear option,” as the president of the European Commission recently put it.³⁸ In other words, it is unusable,³⁹ and is nothing more than what a British legal scholar has called an “empty gesture.”⁴⁰ Countries, it seems, are simply too concerned that sanctions might also be applied against them one day. And since Article 7 is obviously a political, not a judicial, process that makes national executives the decisive actors, there is no reason to think that their inherent “sensitivity about sovereignty” (Mattias Kumm) will not always make them extremely reluctant to take sanctions against one of their own.⁴¹ In fact, the very idea of sanctions goes against what might be called a whole EU ethos of compromise, mutual accommodation, and mutual trust, as well as deference toward national understandings of political values — the kind of EU self-understanding that celebrates

Article 7 is widely considered unusable.

³⁸ This sense was echoed by the German foreign minister, who called Article 7 “die große Keule” [the big cudgel]. See Guido Westerwelle, “Europas Werte verteidigen!,” in *Frankfurter Allgemeine Zeitung*, September 5, 2012.

³⁹ The point was explicitly conceded by the president of the European Commission in his 2012 State of the Union address. As Barroso put it, “in recent months we have seen threats to the legal and democratic fabric in some of our European states. The European Parliament and the Commission were the first to raise the alarm and played the decisive role in seeing these worrying developments brought into check.” He went on to claim that “these situations also revealed limits of our institutional arrangements. We need a better developed set of instruments— not just the alternative between the ‘soft power’ of political persuasion and the ‘nuclear option’ of article 7 of the Treaty.” At the time of writing no “better developed set of instruments” had been presented by the European Commission.

⁴⁰ Andrew Williams, “The indifferent gesture: Article 7 TEU, the Fundamental Rights Agency, and the U.K.’s invasion of Iraq,” in *European Law Review*, vol. 31 (2006), 3-27.

⁴¹ Of course, this problem has been even further exacerbated by the rise of what Jürgen Habermas, following Stefan Oeter, has called “executive federalism” in the EU — the process that has systematically sidelined the European Commission, the European Parliament, and the national legislatures. See Jürgen Habermas, *Zur Verfassung Europas* (Berlin Suhrkamp, 2011).

³⁷ Wojciech Sadurski, “Adding Bite to the Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider,” in *Columbia Journal of European Law*, vol. 16 (2009), 385-426.

Nowadays, attempts to undermine democracy and the rule of law are not likely to be undertaken with reference to the great advantages of authoritarian governance, or by invoking precedents of authoritarian, let alone totalitarian, regimes in the 20th century.

diversity and pluralism and that is summed up in declarations that the soul of Europe is tolerance.

True, some of the constraints on Article 7 might be very contingent. They could change over time, especially if democracy and the rule of law were attacked both more swiftly and more openly than they have been in the cases of Hungary and Romania (imagine a scenario where Victor Ponta had not — at least officially — backed down so quickly over the summer of 2012). Still, a clear-eyed assessment of the limits of Article 7 has to reckon with the fact that nowadays attempts to undermine democracy and the rule of law are not likely to be undertaken with reference to the great advantages of authoritarian governance, or by invoking precedents of authoritarian, let alone totalitarian, regimes in the 20th century. This is a problem familiar from debates about “militant democracy” within democratic states. Just think of the controversial (and difficult to prove requirement) for party bans in what is undoubtedly the most famous example of militant democracy in post-war Europe, the German *wehrhafte* or *streitbare Demokratie*: parties have not only to indicate some general hostility to the liberal democratic order, they also have to exhibit what the German Constitutional Court has called an “actively fighting, aggressive attitude.”⁴² Member state governments, it seems reasonable to assume, would always seek to claim that they are engaged in a legitimate political struggle *within* the parameters of liberal democracy, and that they are simply pursuing somewhat different values than other member states (or that they are in fact close to some member states in terms of values and simply the victim of a partisan or ideological campaign of some other member states). This

⁴² For an extended discussion of the dilemmas associated with militant democracy, see my “Militant Democracy,” in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford UP, 2012), 1253-69.

was clearly Orbán’s strategy, when he explained to a German newspaper in March 2012 that the problem consisted simply of the fact that the Western European Left did not like his advocacy of national pride, Christianity and family values.⁴³ In other words, this was not about institutions and norms, it was a European-wide *Kulturkampf*, where one side was pretending to speak in the name of Europe and malign the other side as undemocratic. The references to “values” in Article 7 and in European debates more widely can in fact encourage such a reading. After all, one ought to be able to ascertain whether law has been broken or not and whether common principles are adhered to. Whether we ultimately really “share values” seems a much more subjective matter to verify.⁴⁴ It doesn’t help that the post-war understanding of democracy I discussed further above is not in any way legally codified. Its invocation could certainly serve to make a case for the use of Article 7, but it is not in any clear sense contained in Article 7 itself — or in Article 2, for that

⁴³ “Viktor Orbán im Gespräch: ‘Es gibt ein verborgenes Europa,’” in *Frankfurter Allgemeine Zeitung*, March 4, 2012, at <http://www.faz.net/aktuell/politik/europaeische-union/viktor-orban-im-gespraech-es-gibt-ein-verborgenes-europa-11671291.html> [last accessed October 1, 2012]. A basic insight of the democratization literature is that subnational authoritarianism in a democracy is threatened by a nationalization of political conflict (see Edward L. Gibson, “Boundary Control: Subnational Authoritarianism in Democratic Countries,” in *World Politics*, vol. 58 [2005], 101-32). At the same time, weaker parties to a conflict generally have an interest in “socializing” or, in this case, Europeanizing a conflict — an argument going all the way back to Schattschneider. Hence Orbán’s calculation might be that going *mano-a-mano* with the Commission in isolation is in fact a losing proposition, whereas igniting a European *Kulturkampf* — which reframes the conflict as one of moral and cultural, not legal and political, values — is very risky, but could turn out to be a winning strategy (Not least because it calls the impartiality of official guardians of the treaties into question. After all, they might just be strongholds of radical, secular European left-wingers).

⁴⁴ For critiques along these lines see also Robert Spaemann, “Europa ist kein Werteverbund,” in *Cicero* (April 2004) and Carl Schmitt, *Die Tyrannei der Werte* (Berlin Duncker & Humblot 2011).

matter. So what options are there other than vague talk about values?

Civis Europeus Sum

As an alternative to Article 7, a number of legal scholars have proposed that national courts, drawing on the jurisprudence of the European Court of Justice, should protect the fundamental rights of member state nationals as EU citizens (all nationals of EU member states automatically hold the status of EU citizens — a fact that most Europeans are blissfully unaware of, alas).⁴⁵ As long as member state institutions can perform the function of guaranteeing what these scholars have called “the essence” of fundamental rights as set out in the European Charter of Fundamental Rights, there is no such role for either national courts or the European Court for protecting the specific status of men and women as *Union citizens*. But if such institutions are hijacked by an illiberal government, Union citizens can turn to *national* courts and, ultimately, the European Court, to safeguard what the Court itself has called the “substance” of Union citizenship — or so a proposal by a group of scholars led by the German legal theorist Armin von Bogdandy suggests.

This is a clever thought. It counters the concern about a potential flood of rights claims by European citizens, once the separation of EU law and member state law in general has been breached, by reversing the famous *Solange* (“as long as”) decision of the German Constitutional Court. (Karlsruhe had held that it would not review rights protection at the European level *as long as* such rights protection could be presumed to be comparable to that at the German national level.) At the same time, the

⁴⁵ Armin von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, and Maja Smrkolj, “Reverse Solange — Protecting the Essence of Fundamental Rights against EU Member States,” in *Common Market Law Review*, vol. 49 (2012), 489-520.

proposal aims not merely to bring in the European Court, but to strengthen *national* liberal checks and balances in times of political crisis.⁴⁶ It reinforces the basic insight that the EU cannot function without well-ordered liberal democratic states, that, as Advocate General Miguel Poiares Maduro put it once, “respect for fundamental rights is intrinsic in the EU legal order and ... without it, common action by and for the peoples of Europe would be unworthy and unfeasible.”⁴⁷ Not least, it underlines what Europeans have in common — the status of Union citizenship. It also goes to the heart of the normative matter. At issue is the violation of fundamental rights through illiberal or outright undemocratic governments. Unlike with infringement proceedings initiated by the European Commission, where the charges might fail truly to take account of the threats to the rule of law and democracy, such an approach allows a direct engagement with a member state’s violations of

⁴⁶ I leave aside here the possibility of a stronger role for the European Court for Human Rights. The latter has become more and more involved in effectively judging the quality of national democracies. If the relationship between the EU and the ECHR becomes even tighter, one could also imagine a stronger role for Strasbourg in democracy-protection. I am grateful to Wojciech Sadurski and Peter Niesen on this point.

⁴⁷ *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni*, European Court of Justice, Opinion of Advocate General Poiares Maduro, Case C-380/05 (2007), available online at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=62786&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&id=661182>. One might distinguish here between fundamental rights as means of polity-building and fundamental rights as means to ensure the functioning of an entity like the EU. The latter is in theory a more modest approach and easier to justify as a version of “reverse Solange,” but in practice it might still have the effect of polity-building and the virtually unlimited empowerment of federal or quasi-federal institutions — just think of the American Commerce Clause. The example of the United States in general would seem to suggest that explicit protections of democracy at state level — the republican clause — has hardly been a tool for federal-state-building — the imperative to protect citizenship has been much more important. I am grateful to Mattias Kumm and Miguel Maduro for discussions on this point.

This is an ingenious attempt to protect member state nationals in their capacity as EU citizens from their own governments.

A government determined to undermine democracy and the rule of law might not be much impressed by rulings from Luxembourg.

European norms, as expressed in individual rights for European citizens.⁴⁸

As said above, this is a clever thought. Yet the thought is too clever by half in the eyes of critics who think that all member state governments would be very reluctant to even come close to the possibility of the Court empowering itself systematically to review the rule of law within member states. After all, there had been extensive discussions of involving the European Court in deciding on sanctions against member states, when the idea of Article 7 was debated in the late 1990s and early 2000s — and such a role was in the end clearly rejected by member states (which, not surprisingly, sought to make the Council the central actor).⁴⁹

There is also a more fundamental question of how much political weight EU citizenship can bear. After all, EU citizenship has not been the result of a political process or, put more dramatically, it has not been the outcome of a real struggle for citizenship rights. Citizenship was granted from above and extended by the European Court in way that could well be labeled “constitutional paternalism.”⁵⁰ One also has to wonder whether

⁴⁸ Think of the Commission taking Hungary to the Court for age discrimination, after the Hungarian government drastically lowered the retirement age for judges. Of course, age discrimination is at issue — but here infringement proceedings are at best a very indirect way of getting at the real threat, a systematic undermining of the independence of the judiciary, since Fidesz can now staff the judiciary with its own appointees.

⁴⁹ Sadurski, “Adding Bite to the Bark,” 394.

⁵⁰ See also the comments on the “Heidelberg proposal” by Anna Katharina Mangold, “Rescue package for fundamental rights,” online available at <http://www.verfassungsblog.de/en/rescue-package-for-fundamental-rights-comments-by-anna-katharina-mangold/#.UKZVILLSzxs> and Michaela Hailbronner, “Rescue package for fundamental rights,” available online at <http://www.verfassungsblog.de/rescue-package-for-fundamental-rights-comments-by-michaela-hailbronner/#.UKZeJLLSzsx>. I borrow the term “constitutional paternalism”

concepts like “the substance” of EU citizenship can be sufficiently (and consensually) specified: the vagueness of value talk might just be replicated on another level.

Then there is also the banal fact that, whether on a national or European level, judicial proceedings take a fair amount of time (and the related concern that, like the ECHR, the Court might soon be overwhelmed with case load). And realistically speaking, a government determined to undermine democracy and the rule of law might not be much impressed by rulings from Luxembourg anyway.

Finally, there is the worry that a legal response to an essentially *political* challenge will not do; that one should not rely on legalism — single citizens enforcing European norms through court cases — instead of invoking a common, public European purpose; that at issue are whole political systems (and, in Montesquieu’s language, their “spirit”), not just isolated individual rights; that we need more *Europolitics* instead of yet more *Eurolegalism*.⁵¹

The Politicization of Europe, the Europeanization of Politics

But then what would a properly political response look like? It has often been said that the euro crisis has brought about the politicization of Europe, and that it is now time for the Europeanization of politics. People across the continent have woken up to the fact that what happens elsewhere in Europe has a direct impact on their lives, Brussels is not just some technocratic machine that produces decisions best for all. What we need is a European party system, so that different options for Europe’s

from Paulina Ochoa Espejo, *The Time of the Popular Sovereignty: Process and the Democratic State* (University Park, PA: Penn State University Press, 2011)

⁵¹ R. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge, Mass.: Harvard UP, 2011)

future can be debated and voted on across the continent.

Fair enough. But one less desirable effect of such a Europeanization of politics has now become apparent: the conservative European People's Party has closed ranks around Orbán. On the other side of the political spectrum, Martin Schulz, president of the European Parliament and one of Orbán's most outspoken critics, has defended his fellow Social Democrat Ponta, at least initially.⁵² So it appears to be all party politics instead of an impartial protection of European standards.

But then again, this is perhaps just another way of saying that one cannot have it both ways. If politicization is the royal road to democratic legitimacy, then partisanship (and uncontrollable partisan political passions) is the risk that has to be run (and potentially the price that has to be paid). Democracy, unlike the rule of law, means uncertainty (nobody can know — or should know — in advance the outcome of elections, or political struggle more generally, within commonly accepted constraints in advance). So whereas courts and the Commission, *prima facie*, have some credible

claim to act as impartial guardians of democracy, supranational European democracy saving national democracy within member states is perhaps a riskier proposition, one that might or might not succeed in harnessing partisanship and political solidarity for democracy-protecting ends, one that might or might not lead to ambition counteracting ambition.

Put more concretely, the EPP, not to discredit itself by having a *de facto* proponent of illiberal or “managed” democracy in its midst, could put pressure on the Hungarian government. It could reinforce the sense that all party members are engaged in a collective, genuinely European political project, and that betraying that project has consequences. But of course that logic can also be reversed. Better to hush up a deviation from that project, better not to lose allies in power, and better not to go against the invocation of shared values such as Christianity and the nation. Alas, the more significant European party politics (and the European Parliament) becomes — the more likely that a supranational *Fraktionsdisziplin* will prevail, as well as what one might imagine as a kind of horse trading or mutual back-scratching (to employ the not always terribly appealing metaphors associated with the U.S. Congress): if you leave Hungary alone, we leave Romania alone — those sorts of deals.

Now, none of the strategies discussed here is obviously completely wrong-headed or necessarily ineffective. Moreover, it ought to be emphasized that the news is not all bad, when one looks back over the EU's engagement with Hungary and Romania in 2011 and 2012. After all, the Commission was accepted as an authoritative voice in democracy-protection, even if both Orbán and Ponta said one thing to the Commission, and then

Whereas courts and the Commission, prima facie, have some credible claim to act as impartial guardians of democracy, supranational European democracy saving national democracy within member states is perhaps a riskier proposition, one that might or might not succeed in harnessing partisanship and political solidarity for democracy-protecting ends, one that might or might not lead to ambition counteracting ambition.

⁵² Schulz initially talked about a political conflict of surprising intensity between two irreconcilable camps. Quoted in Matthias Krupa, “Ist Rumänien noch eine Demokratie?,” in *Die Zeit*, July 12, 2012. The Austrian Social Democrat (and leader of the socialists in the European Parliament) Hannes Swoboda criticized the Commission for being hypocritical and biased (toward the right); see his opinion piece “A Critique too far,” in *European Voice*, September 17, 2012, <http://www.europeanvoice.com/article/2012/september/a-critique-too-far/75152.aspx>. Finally: the Party of European Socialists moved its congress from Bucharest to Brussels, but without officially criticizing (let alone shaming) Ponta. In fact, officially, the request to move the congress came from Ponta himself, so as to save face. The real reason was, however, that it had become evident that many socialist leaders were reluctant to go to Romania and be seen at least indirectly to legitimate Ponta and his government. See “European Socialists’ congress may shun Romania,” at <http://www.euractiv.com/elections/pes-move-congress-away-bucharest-news-514516> [last accessed October 1, 2012].

Such sticks and carrots might be effective — but they are not always available.

said (and did) something else at home.⁵³ In other words, even the Commission’s adversaries did not simply claim that the Commission is only in charge of the internal market and should keep its hands off political questions. They accepted its legitimacy in judging the rule of law and democracy within member states. In the same vein, it is significant that Orbán went in front of the European Parliament and defended his record in the face of harsh criticisms, from Green and liberal politicians in particular. Not only did his appearance dignify the Parliament with an importance as an arena of European-wide debate that many other European heads of governments would probably not see, it also generated the hope that out of conflict could ultimately emerge more European cohesion.⁵⁴

⁵³ Although this kind of “double-talk” is of course not specific to the problems discussed in this essay: just think of what British politicians say in Brussels behind closed doors and what they say in Westminster.

⁵⁴ This is not to say that, therefore, more conflict is always better. In any case, “union” and “cohesion” are not first-order political values like liberty or democracy. See also Albert O. Hirschman, “Social Conflicts as Pillars of Democratic Market Society,” in *Political Theory*, vol. 22 (1994), 203-18.

Still, even if all might end well, all is not well. Ponta in particular did eventually signal a willingness to meet Brussels’ demands for upholding the rule of law and, at least on the surface, appeared much more accommodating than Orbán. So something seemed to have worked. But what actually worked was not something that the European Union can use as an all-purpose tool. Ponta might have relented — and this is a more speculative point — because at least indirectly the EU could use the threat of keeping Romania outside the passport-free Schengen group, which Romanians desperately want to join. Such sticks and carrots might be effective — but they are not always available (once you are in Schengen, you are in, and there is no easy way out), and they can look more like one-off blackmail. They might also lead to a highly fragmented, multispeed or even semi-integrated Europe, with a periphery permanently suffering political turmoil and legal uncertainty.

6 SOME MODEST PROPOSALS

How could the EU deal with challenges to liberal democracy more effectively while also not overstepping the limits of its legitimacy? Two temptations ought to be resisted in answering this question. On one hand, it will do no good to let the institutional imagination run wild, so to speak; on the other hand, it would also be a mistake to think entirely within what one takes to be the constraints of political feasibility at any given moment in time. A plausible answer here is neither one that gets highest marks in ingenious institutional engineering nor one that has the greatest chance of being acceptable to member states. Rather, we ought to ask again, with a bit more distance, what the theoretical and practical challenges are precisely. A plausible answer is one that best addresses these challenges.

The theoretical challenge, I would submit, is to locate an *agent of credible legal-political judgment*. Technical-legal judgment in and of itself (supposing one could successfully isolate such a thing), is insufficient, for reasons mentioned a number of times in this paper. We are dealing with challenges that will require some understanding of context, some sense of proportion, and, not least, some meaningful capacity for comparison of what is actually happening within different political systems (as opposed to the claims about what is happening within these systems by local elites).⁵⁵ A simple check-list, as so often used in the EU accession process (“Do the judiciary’s offices have computers? Check.”), will not do. Somebody needs to see and understand the whole picture.⁵⁶ On the

other hand, judgments cannot be — and certainly cannot be seen as — partisan.

On a practical level, a clear challenge has been that authority in the EU remains highly diffuse and fragmented; there is not much by way of a consciousness of common European political space (let alone a shared public sphere where substantive arguments could be debated seriously across borders); it can be hard to get and direct something like common political attention. More particularly, there is as of now no clear legal or political actor charged with pushing a red button first, so to speak, in order to alarm others about a potential deterioration in democracy and the rule of law inside a member state.

What follows, then, from framing the problem this way? First of all, it seems to me that Article 7 ought to be left in place, but it also ought to be extended. There might arise situations where democracy is not just slowly undermined or partially dismantled, but where the entire edifice of democratic institutions is blown up or comes crashing down, so to speak (think of a military coup). However, in such an extreme case, the Union ought actually to have the option of expelling a member state completely. As is well known, under the Treaty on European Union as it exists now, states may decide to leave voluntarily — but there is no legal mechanism for actually removing a country from the Union (and even voluntary exit would in all likelihood be a very drawn-out affair). True, these all might seem remote scenarios. But especially those who insist on the symbolic value

A simple check-list, as so often used in the EU accession process, will not do.

⁵⁵ Cf. Ronald Beiner, *Political Judgment* (New York: Routledge, 2010).

⁵⁶ See also Kalypsos Nicolaidis and Rachel Kleinfeld, *Rethinking Europe’s “Rule of Law” and Enlargement Agenda: The Fundamental Dilemma*, Sigma Paper 49/2012, and the acerbic, but entirely justified comment by Alina Mungiu-Pippidi on the Commission’s elaborate monitoring procedures depending upon an “overall ‘prescription mechanism’ according to which countries are evaluated by the number of measures adopted from detailed Commission ‘roadmaps’ rather than

by indicators measuring real changes on the ground. This is as if a doctor evaluated a patient by the number of prescribed medicines taken, rather than by measuring the patient’s fever to check on the effect of the medicines. Both the adequacy and the impact of such measures in each country were presumed rather than demonstrated.” See Alina Mungiu-Pippidi, “EU Accession is no ‘End of History,’” in *Journal of Democracy*, vol. 18 (2007), 8-16; here 15.

The Commission might begin to monitor the state of the rule of law in all member states consistently and continuously.

of something like Article 7 — by which they might actually mean something not just symbolic at all, namely its importance as a form of *deterrence* — ought to be sympathetic to including the option of complete removal.⁵⁷

A difficulty with the existing harsher sanctions envisaged in Article 7 is, of course, that it requires agreement among all member states (and even the preventive option still requires four-fifths of the members of the Council). So short of extremely dramatic deteriorations in the rule of law and democracy, the EU ought to have tools available that exert pressure on member states, but whose employment does not require a lengthy process of finding agreement among all or a large majority of member states. One suggestion would be that the Commission begins to monitor the state of the rule of law (essentially, the quality of the systems of justice) in all member states consistently and continuously.⁵⁸ It is important that such monitoring be done uniformly in all countries. While there are of course precedents in singling out individual countries for surveillance (Romania, Bulgaria), it simply sends the wrong signal to target only some countries, if there is no evidence for singling them out. Such a “universalist” surveillance, an institutionalized blanket suspicion, if you wish, also effectively counters the rhetoric — amply used by member of the current Hungarian governing party — that some Europeans are treated as “second-class

⁵⁷ It is not that the possibility of complete exclusion has never been discussed in the preparation of various treaty revisions. But the option of exclusion has been rejected because, as the report of a Reflection Group appointed by the European Council put it, “this would call into question the irreversibility of membership [in] the Union.” See Sadurski, “Adding Bite to the Bark,” 390.

⁵⁸ A suggestion that has in fact been made by Commissioner Viviane Reding recently. See “EU keen to rank justice in member states,” in *EU Observer*, September 13, 2012, at <http://euobserver.com/justice/117535> [last accessed September 27, 2012]. Others have launched the idea of an annual democratic audit of the member states (and perhaps of the EU as a whole).

citizens,” or that there is a two-tier Europe, where some are trusted and some are not.

However, one might question whether the Commission can really be what I called above a credible agent of legal-political judgment. To be sure, the Commission is acquiring new powers in supervising and potentially changing the budgets of eurozone member states. But many — possibly all — proposals to increase the legitimacy of the Commission (seen as a necessary complement to such newly acquired authority) contain the suggestion essentially to *politicize* the Commission: ideas to elect the president directly or to make the Commissioners into a kind of politically uniform cabinet government all would render the body more partisan — *on purpose*.⁵⁹ And such partisanship makes the Commission much less credible as an agent of legal-political judgment.⁶⁰

An alternative to the Commission undertaking such a task itself would be to delegate it to another institution, such as the Fundamental Rights Agency,⁶¹ or perhaps an entirely new institution

⁵⁹ Not that the Commission today is truly “apolitical” — but the fiction that Commissioners upon taking office lose their party-political identities does have some disciplining effect, I would submit. In the scenario envisaged by proponents of the Commission as *de facto* (and possibly even in name) a European government, the whole point is that the body would be — and ought to be — visibly partisan.

⁶⁰ There is also the less obvious point that every harsh criticism of a newer member state can be seen to fall back on the Commission itself — did they not do the proper work before recommending admission? See in this context also Tom Gallagher, *Romania and the European Union: How the Weak Vanquished the Strong* (Manchester: Manchester UP, 2009).

⁶¹ As suggested by the liberal MEP Alexander Graf Lambsdorff in his piece “Zwei Premiers führen die EU an der Nase herum,” available online at <http://www.cicero.de/weltbuehne/ungarn-rumaenien-ponta-orban-zwei-premiers-fuehren-die-eu-der-nase-herum/52076>. As Lambsdorff rightly points out, the mandate of the FRA would have to be significantly amended — as, one might add, would have to be its culture. At least for the moment it has gained a reputation of being over-sensitive to member state executives.

that could credibly act as a guardian of what one might call Europe's *acquis normatif*.⁶² One could think of something like a "Copenhagen Commission" (as a reminder of the "Copenhagen criteria"⁶³), analogous to the Venice Commission, though with an even stronger emphasis on democracy and the overall quality of a political system — an agency, in other words, with a mandate to offer comprehensive and consistent political judgments.⁶⁴ The hope is also that such an agency can become sufficiently visible so as to effectively raise an alarm across whatever there is by way of a common European political space.

However, the real question is of course: *and then what?* What if a country seems systematically to undermine the rule of law and restrict democracy? My suggestion is that an agency ought to be empowered to investigate the situation and then trigger a mechanism that sends a clear signal (not just words), but far short of the measures envisaged in Article 7. Following the advice of the Copenhagen Commission, the European Commission should be required to cut funds for state capital expenditure, for instance, or impose significant fines.⁶⁵ Especially the former might

⁶² One might be tempted to think of decentralizing such an agency: having ombudsmen or something analogous to discrimination agencies in each country — the obvious counter-argument being that such actors and agencies would likely be subject to national capture.

⁶³ The Copenhagen criteria can be found here: http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_de.htm

⁶⁴ I am indebted to Rui Tavares for discussions on this point.

⁶⁵ A major problem here is of course that such measures tend to punish populations, and not governments. The present Hungarian government has already made it clear that fines will be passed on to all citizens, clearly hoping that such "democracy taxes" will increase resentment vis-à-vis Brussels. This danger is also acute if one thinks of cutting EU cohesion funds — such cuts would clearly hurt those who are already poor. Less obviously, countries suffering from deficiencies in the rule of law already cannot absorb much of such funds — so this kind of sanction might not hurt as much as one might

prove to be effective, if the EU budget as such were to be significantly increased in future years (a measure also included in many proposals to tackle the euro crisis).⁶⁶ Moreover, cuts of EU-specific funds would also reinforce the message that a country undermining the rule of law is doing something that concerns the Union as a whole — and that the response is a genuinely European one. Surely, the Haider Affair taught the lesson that sanctions should not give the impression that individual nation-states are lining up against — or, put more drastically, *ganging up on* — an EU member state. Action of this kind — whether by the European Commission or the Copenhagen Commission as envisaged here — would make it impossible for a country to try to divide other member states, or play them off against each other, or peel off more powerful countries from a coalition of the sanctioning, so to speak.

At the same time, all the existing tools remain at the disposal of the relevant actors. Member states could vote on Article 7; the Commission could take a member state to the European Court of Justice; the Court can try to protect the substance of EU citizenship; and politicians can have a serious word with one of their peers in another member state, if they feel that the State in question is leaving the broad European road of liberal democracy.

think by just looking at the gross numbers. I am particularly indebted to Kim Scheppele for discussions on this point.

⁶⁶ The recent final report of the "Future of Europe Group" also demanded a "new, lighter mechanism" for the Commission, but did not propose to empower the Commission itself to impose sanctions. It claimed, "The possibilities to ensure respect for the fundamental values under Article 2 of the TEU should be strengthened. To this end, a new, light mechanism should be introduced enabling the Commission to draw up a report in the case of concrete evidence of violations of the values under Article 2 of the TEU and to make recommendations or refer the matter to the Council. It should only be triggered by an apparent breach in a member state of fundamental values or principles, like the rule of law."

The hope is that such a democracy-safeguarding agency can become sufficiently visible so as effectively to raise an alarm across whatever there is by way of a common European political space.

Now, none of the above means that some of the pluralist principles and practices in the EU have become irrelevant (or were a fiction all along). All the relevant actors can also retain something like a margin of appreciation to account for national idiosyncrasies. They can in the first instance suggest to an offending government to take

seriously the idea of informal peer review and try to negotiate disputes away, etc. However, what the above also suggests is that it cannot be pluralism all the way down. As one political community, the EU has outer and inner boundaries. Where liberal democracy and the rule of law cease to function, there Europe ends.

6 CONCLUDING THOUGHTS

As Wojciech Sadurski has pointed out, sanctions against member states and, ultimately, the possibility of excluding a member state from the Union touch on the question of the finality of the EU and the question whether it is in fact a complete and coherent legal order.⁶⁷ They also — yet again — force us to confront the issue of whether there is such a thing as final authority at all in the Union, and, in an even more Schmittian vein, the question of whether an ongoing “project” whose institutions translate all conflicts into matters of economics or ethics can ultimately even be called “political.”⁶⁸

⁶⁷ Sadurski, “Adding Bite to the Bark.”

⁶⁸ Questions that are not exclusive to the EU, of course: see Daniel Halberstam, “Constitutional Hierarchy: The Centrality of Conflict in the European Union and the United States,” in Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (New York: Cambridge UP, 2009), 326-55. Schmitt’s thought on liberalism translating all conflicts into questions of ethics (which can reasonably be discussed and adjudicated by courts) or questions of economics (which can be subject to bargaining and negotiations among organized interests) can be found in Carl Schmitt, *The Concept of the*

This essay has not even begun to engage with these larger questions. It has, however, made the case for the legitimacy of EU sanctions from the point of view of democratic theory. It has also argued that — as of now — the EU has no coherent set of legal and policy instruments to address challenges to democracy and the rule of law within member states. Given how much member states have resisted the idea of empowering the Commission or the Court to form comprehensive judgments on the quality of democracy and the rule of law within member states, it is of course by no means clear whether the proposals suggested in this essay have any chance of being adopted. But arguably, in the wake of Brussels’ conflicts with Budapest and Bucharest, there is now at least a consciousness of what these challenges might mean, in the way that there wasn’t during the times when everybody — or so it seemed — was fond of telling a fairy tale that ended with accession, and political happiness ever after.

Political, trans. George Schwab (Chicago: The University of Chicago Press, 2007).

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