# The transformation of the euro: law, contract, solidarity

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# 8 Conclusion

## Preserving the Contract in an emergency

### 1 The euro's rescue, the Court and legal justification

The ambition of this study has been to read the legal change experienced in the currency union due to the debt crisis through the lens of solidarity. To make this possible it has widened its focus beyond the law to the fundamental joint commitment underlying the Union, which it termed, in a reference to the notion of social contract discussed in chapter 1,[1] the 'Founding Contract'. It has shown that the crisis has led to a profound upgrade of this Contract, characterised by a widening of the currency union's conception of stability. Whereas in its original form, analysed in chapter 3, the set-up of the euro attributed prime importance to the goal of price stability, it has evolved into one that also has great concern for financial stability.

It now remains to bring back these findings to the level of case law and the position of the Court in relation to this change in the Contract. That is the mission of this conclusion, which consequently both synthesizes the findings of this study and adds an important final element to them. It conducts its mission, first, by distinguishing between the political and legal dimension of changes to the Contract during an emergency. Then, with a focus on the legal dimension, it considers the implications of solidarity, and one of its legal offshoots, loyalty, for the constitutional actors faced with such change. Finally, it examines how the Court should deal with these implications in cases like *Pringle* and *Gauweiler*.

Let us return to the words of Chancellor Merkel, cited at the very beginning of this study.[2] Was her appeal before the *Bundestag* in May 2010 to the 'unbreakable solidarity' states had to display to avert 'risks to the currency union at large' merely political rhetoric? A simple trick to assemble support for assistance for Greece? No. Of course, she had to convince parliamentarians of the need for assistance. Yet her words carried a meaning that reached far beyond the practical necessities of that debate. They referred to the solidarity that ties the member states together and that has driven a fundamental transformation of the currency union, characterised by a widening of its stability

1 See text to n 114 (ch 1).
2 See text to n 1 (prologue).

conception. In fact, the debate in the *Bundestag* itself formed part of that solidarity as it was bound up with the meeting of the heads of state and government of 11 February 2010 and their commitment to safeguard financial stability at all cost. With that commitment political leaders initiated a change of the Founding Contract between their states, a change that was necessary to preserve the euro. The positive solidarity they displayed through their assistance operations was therefore not only of a factual nature, inspired by the desire to safeguard their self-interest; it was deeply *normative* as they were under a political obligation to show it. This normativity to their assistance operations also made it possible for the European Central Bank to carry out purchases of government bonds of a nature and on a scale unthought-of.

Because of these actions, and within little more than two years from the moment national leaders concluded their commitment, the currency union's set-up came to differ fundamentally from that put in place by the Treaty of Maastricht. Only part of that difference found its way into the law, which reflected – and to some extent still reflects – a stability conception from the past. When the Court had to pronounce on the currency union's transformation in *Pringle* and *Gauweiler*, it therefore had to take great pains to reconcile the change in the Contract with the law. With its reading of the no-bailout clause in *Pringle* it even overstretched its interpretive power, as chapter 7 explained.[3] Many scholars have nonetheless approved of that judgment by pointing out the Court's predicament. A negative ruling, they argue, was simply not an option, given its devastating consequences for the single currency and the Union at large.[4] *Fiat iustitia, et pereat mundus* – Let justice be done, though the world perish – was not something to go by.[5]

This is undoubtedly true. It may even be sufficient to justify the Court's ruling from an extra-legal perspective. As a legal justification, however, it cannot suffice. This is not to say that there is no place for 'consequentialist'

3 See text to n 96ff (ch 7).

4 Particularly telling is Crhis Koedooder, 'The *Pringle* Judgment: Economic and/or Monetary Policy?' (2013-2014) 37 Fordham Int'l LJ 111, 145, according to whom in *Pringle* 'the Court had to choose between putting the stability of the euro area at risk….and reducing Article 136(3) TFEU to an essentially superfluous provision' and that 'Given the circumstances sacrificing Article 136(3) TFEU was the only reasonable option'. Others, including the author of the present study, have also stressed the practical necessity of a positive ruling and/or the 'unsurprising' outcome in both cases. See eg Vestert Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2013) 14 GLJ 113, 127; Paul Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology' (2013) 20 MJ 3, 3; Bruno De Witte and Thomas Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the Union legal order: *Pringle*' (2013) 50 CML Rev 805, 805.

5 See also Luuk van Middelaar, 'De Europese Unie en de gebeurtenissenpolitiek' (Inaugural Lecture Leiden University, 23 September 2016) 10. There are even those claiming that the Court rather did the opposite. See eg Christian Joerges, '*Pereat Iustitia, Fiat Mundus*: What is Left of the European Economic Constitution after the *Gauweiler* Litigation?' (2016) 23 MJ 99.

considerations in legal reasoning.[6] As Neil MacCormick stresses, judges do, and should, 'consider and evaluate the consequences of various alternative rulings open to them' when applying and interpreting the law.[7] But to make their reasoning legally sound they also have to show that it is 'consistent' with 'the already existing body of rules',[8] and in line with the broader principles that bestow it with (a degree of) 'coherence'.[9]

Can the Court's approval of the euro's rescue also benefit from such a legal justification? This study argues that it can, based on the nature and quality of the Union's constitution.[10] Clearly, the academic debate on how to read this constitution is still in its infancy compared to most of its national counterparts whose understanding often rests on greater consensus. For a long time to come, it will need to benefit from historic events like the debt crisis which help to understand the Union's deeper constitutional structures. This study therefore does not claim a monopoly on wisdom when it comes to the constitution of the Union. Its concluding reflections aim at the role solidarity plays in the powers enjoyed under the constitution by political leaders to preserve their Founding Contract in an emergency.

## 2 EMERGENCY AND CONSTITUTION

Günter Frankenberg has argued that if one had to compare the Union with the western 'archetypes of constitutions' – the 'political manifesto', the 'contract', the 'programme' and the 'statute' – it would be with the constitutional contract.[11] Two such contracts can be distinguished.[12] One the one hand, there is the 'organisational contract'.[13] It typically regulates how the government functions by demarcating the powers of its 'central public authority' and those of its 'constituent' parts, and in so doing organizes the (legal) bond between them.[14] An example is the Articles of Confederation of 1781 constitut-

6 Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 108-119, 129-151.
7 MacCormick (n 6) 129.
8 MacCormick (n 6) 196-197. For his treatment of the 'requirement of consistency' see 119-128, 195-228.
9 MacCormick (n 6) 119-128, 152-194.
10 For a negative answer to this question see Gunnar Beck, 'The Court of Justice, the *Bundesverfassungsgericht* and Legal Reasoning during the Euro Crisis: The Rule of Law as a Fair-Weather Phenomenon' (2014) 20 European Public Law 539, 561: 'Law is law not least because anything does *not* go. Where constitutions and treaties, despite their often high level of generality and abstraction, lay down clear objectives and precise constraints on political action, as the EU Treaties evidently do in relation to the conduct of monetary and economic policy….they constrain, or should constrain, the range of permissible political options'.
11 Günter Frankenberg, 'The Return of the Contract: Problems and Pitfalls of European Constitutionalism' (2000) 6 ELJ 257, 258, 260.
12 Frankenberg (n 11) 259.
13 Frankenberg (n 11) 259.
14 Frankenberg (n 11) 258-260.

ing the United States of America through which the participating states entered into 'a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare'.[15]

On the other hand, there is the 'social contract'.[16] This contract not only organizes its participating entities but also turns them into a unified whole, giving rise to a joint intention or, in the words of Rousseau, 'a general will'.[17] This focus on the 'legitimacy of political authority', as Frankenberg calls it, is less discernible in organisational contracts, which rather 'presuppose' and build on the legitimacy generated by 'membership' *within* the contracting entities.[18]

Between these two 'contractual models', the Union is most easily equated to the organizational one, even though its two basic Treaties distinguish it from the standard, singular version.[19] The Treaties govern the division of responsibilities between the Union and the member states, thereby restraining the political authority that can be exercised by the former, whilst leaving the states 'intact' as legally separate entities.[20] One could argue that many legal scholars who accept that the Union has a constitutional nature but also maintain that it is still largely an international legal construct originating from its participating states,[21] implicitly subscribe to that view.[22] Yet, whereas the Union undoubtedly has these organisational features, its constitutional nature

15 Art 3 of the Articles of Confederation. For a comparison between the Union and the US Confederation see Armin Cuyvers, 'The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World' (2013) 19 ELJ 711.

16 Frankenberg (n 11) 259.

17 Frankenberg (n 11) 259. On Rousseau and the notion of 'general will' see text to n 150 (ch 1).

18 Frankenberg (n 11) 259-260.

19 Frankenberg (n 11) 260, 266. For a different view, arguing that the Treaties should not be seen as amounting to a fully-fledged constitution because it cannot be traced 'back to a European people' see Dieter Grimm, 'Does Europe Need a Constitution' (1995) 1 ELJ 282, 290-291. For the counterargument that 'true constitutions' do not necessarily have to be grounded in an 'act of the people' see Paul Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 ELJ 125, 136-139.

20 Frankenberg (n 11) 259-260.

21 See eg Alan Dashwood, 'States in the European Union' (1998) 23 EL Rev 201; Alan Dashwood, 'The Relationship Between the Member States and the European Union/European Community' 41 CML Rev 355; Robert Schütze, 'On "Federal Ground": The European Union as an International Phenomenon' (2009) 46 CML Rev 1069; Bruno De Witte, 'The European Union as an international legal experiment' in Gráinne de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 19ff. Note that such scholars would not necessarily agree on the precise definition or characteristics of the Union's constitutional nature or how to label it (eg a 'constitutional order of states' (Dashwood/De Witte), a 'federation of sovereign states' (Dashwood), a 'federation of states' (Schütze)).

22 For a different view see eg Hauke Brunkhorst, 'Constituent Power and Constitutionalization in Europe' (2016) 14 ICON 680, 691: '[F]rom the very outset the European Union was not founded as an international association of states. On the contrary, it was founded as a community of peoples who legitimated the project of European unification directly and democratically through their combined, albeit still national, constitutional powers'.

reaches beyond that of the organisational contract. It also possesses the unifying quality associated with the social contract.[23] As argued in chapter 2,[24] by signing and ratifying the Union Treaties the member states jointly committed themselves to uphold them. That commitment cannot be reduced to their individual intentions but belongs to them *as a body*. This shows *that* and *how* constituent power (still) lies with the states.[25] To put it in popular terms: the Union's constitutional architecture does not stem from a 'We, the People' but a 'We, the States.'[26] One may disagree with the presence of such a '*pouvoir constituant sans peuple*' from a normative point of view,[27] even argue that the Union's constitutional set-up is in need of change,[28] yet it is what characterises the Union at present and this has, and should have, consequences for its constitutional actors, including the Court, when faced with a crisis of unprecedented proportions. The question of course then becomes what these consequences are.

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23 For a different view see Frankenberg (n 11) 259 who argues that the social contract (always) needs to be 'taken as a metaphorical description of ... the transformation of the "society of individuals" into a body politic', whereas organizational contracts are 'a matter of fact'. See also Christoph Möllers, 'Pouvoir Constituant, Constitution, Constitutionalisation' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009) 176 (arguing that constitutional treaties cannot (also) be social contracts, as they 'do not represent a theoretical construction for justifying public power'). For the contrary view, supporting the argument of a social contract between the member states see Ton van den Brink and Jan Willem Casper van Rossem, 'Sovereignty, Stability and Solidarity: Conflicting and Converging Principles and the Shaping of Economic Governance in the European Union' (UCD Working Papers in Law Criminology and Socio-Legal Studies No 4, 2014) 12.

24 See text to n 80 and n 98 (ch 2).

25 See also Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 102.

26 Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (YUP 2013) 214-215. This is not to say that the Union's constituent basis cannot change. The Constitution for Europe, for example, stated in Article I-1: 'Reflecting the will of *the citizens* and *the States* of Europe…' (emphasis added). The Lisbon Treaty, however, left out this change, as a result of which the Union's constituent basis still rests solely with the member states. See also WT Eijsbouts: 'Wir Sind Das Volk: Notes about the Notion of "The People" as Occasioned by the *Lissabon-Urteil*' (2010) 6 EuConst 199, 200 (fn 1).

27 Möllers (n 23) 186. For the view that goes beyond such normative objections, arguing that the Union does not 'possess a *pounvoir constituant*' as constituent power is not located in a European people, see Miguel Poiares Maduro, 'The importance of being called a constitution: Constitutional authority and the authority of constitutionalism' (2005) 3 Int J Const Law 332, 352.

28 For more general calls for change of the Union's architecture in light of its years of crises see eg Sacha Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers' (2015) Oxf J Leg Stud 55; Fritz W Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 ELJ 384; Mark Dawson and Floris De Witte, 'From Balance to Conflict: A New Constitution for the EU' (2016) 22 ELJ 204.

In trying to understand a historic event that challenges a system's ordinary functioning, grounded in day-to-day practice, it is tempting to take refuge in extremes. Telling is the revival of the ideas about the state of exception of Carl Schmitt, the legal philosopher notorious for his engagement with national socialism in Nazi-Germany, among lawyers analysing the debt crisis.[29] This study does not follow their course. Still, it is worthwhile to reflect on Schmitt's work in some detail as it helps to convey this study's own position and argument.

According to Schmitt, it is during existential crises that the true significance of the *pouvoir constituant* is revealed. Central to his thought, Martin Loughlin explains, is the relation between 'state' and 'constitution'.[30] The state, Schmitt argues, 'is the political unity of the people'.[31] The people can possess constituent power,[32] which Schmitt defines as 'the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence'.[33] In so doing, it puts in place the constitution and institutionally shapes its own existence.[34] For Schmitt,

29 Of course, this is not to say that such scholars normatively subscribe to Schmitt's views about the state of exception or follow his analysis across the board. Jonathan White, for example, argues that there is not a single Schmittian 'sovereign' that takes a decision on the state of exception. Rather, Europe's 'emergency regime is a collaborative phenomenon, promoted by those with an interest in its production, and consolidated by those who lack the authority to revoke it or who actively give credence to the authority claims of others'. See Jonathan White, 'Emergency Europe' (2015) 63 Political Studies 300, 301. Christian Joerges also argues that Schmitt's legacy hangs as a 'shadow over Europe' while, similar to White, taking the view that Schmitt's single 'dictator has been replaced by technicity'. See Christian Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation' (2015) 15 GLJ 985, 1019. See also Michael A Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21 ELJ 313, 330; Michelle Everson, 'An Exercise in Legal Honesty: Rewriting the Court of Justice and the *Bundesverfassungsgericht*' (2015) 21 ELJ 474, 482-483.

30 Martin Loughlin, 'The concept of constituent power' (2014) 13 European Journal of Political Theory 218, 224.

31 Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr and ed, Duke University Press 2008) 59. Schmitt ultimately grounds that unity in his infamous 'friend-enemy' distinction. See Carl Schmitt, *The Concept of the Political* (George Schwab tr, University of Chicago Press 1996). For discussion see Ernst-Wolfgang Böckenförde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory' in David Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Duke University Press 1998) 37ff.

32 Schmitt, *Constitutional Theory* (n 31) 112, 125-128. See also Renato Cristi, 'Carl Schmitt on Sovereignty and Constituent Power' in David Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Duke University Press 1998) 188-189; Loughlin (n 30) 225.

33 Schmitt, *Constitutional Theory* (n 31) 125. Schmitt was therefore adamant on stressing the difference between a Roussseaudian 'social contract' and the act of constitution-making. The people as 'political unity' precedes this act. The social contract, turning the people into a unity, is therefore 'presupposed', and prior to, the exercise of 'constitution-making power'. See Schmitt, *Constitutional Theory* (n 31) 112. This study, on the contrary, maintains that the act of signing and ratifying the Treaties simultaneously turned the member states into a whole, a 'We'.

34 Loughlin (n 30) 224.

therefore, the authority of the constitution does not reside in a 'presupposed', ultimate '*Grundnorm*', as positivists like Kelsen argue.[35] It only possesses authority 'because it derives from a constitution-making capacity….and is established by the will of this constitution-making power'.[36] As Loughlin points out, Schmitt therefore considers it misplaced to say that the state 'has' a constitution.[37] To him, 'the state *is* constitution…'.[38]

Given that the constitution is ultimately in its nature political, one cannot, and should not, equate it with the positive rules set out in a document labelled 'Constitution'.[39] Usually, the difference between the two remains below the surface, yet in times of existential crises it shows up. 'Sovereign is he who decides on the exception', Schmitt argues.[40] What such an exception is and when it is present cannot be defined in advance through rules or legislation.[41] 'The precise details of an emergency cannot be anticipated', he reasons, 'nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated'.[42] It is in such a state of emergency that the significance of constituent power becomes visible.[43] It 'stands alongside and above every constitution derived from it' and can protect its political unity even if it takes a violation of constitutional rules.[44] Such transgressions do not lead to the demise of the constitution. More than that, they underscore its continuing authority.[45] An exception

35 Loughlin (n 30) 221-222, 224-225. See also Cristi (n 32) 188. For Kelsen's theory see Hans Kelsen, *Pure Theory of Law* (University of California Press 1967).

36 Schmitt, *Constitutional Theory* (n 31) 64.

37 Loughlin (n 30) 225.

38 Schmitt, *Constitutional Theory* (n 31) 60.

39 Loughlin (n 30) 224. According to Schmitt, *Constitutional Theory* (n 31) 75: 'A concept of the constitution is only possible when one distinguishes constitution and constitutional law'.

40 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr and ed, The University of Chicago Press 2005) 5 (footnote omitted).

41 Tracy B Strong, 'The Sovereign and the Exception: Carl Schmitt, Politics, Theology, and Leadership' in Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr and ed, The University of Chicago Press 2005) xiv.

42 Schmitt, *Political Theology* (n 40) 6-7.

43 Cristi (n 32) 189-191; Loughlin (n 30) 225-226.

44 Schmitt, *Constitutional Theory* (n 31) 80, 140.

45 Cristi (n 32) 191. According to Schmitt, *Political Theology* (n 40) 5, sovereignty is therefore a 'borderline concept' (*Grenzbegriff*). As Strong (n 41) xx-xxi explains, the concept 'thus looks in two directions, marking the line between that which is subject to law – where sovereignty reigns – and that which is not – potentially the space of the exception'. Schmitt is certainly not the only one to have characterised the state of exception as a borderline concept. According to Giorgio Agamben, for example, 'the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order'. See Georgio Agamben, *State of Exception* (The University of Chicago Press 2005) 23.

only exists by virtue of a rule, Schmitt argues.[46] 'It confirms not only the rule but also its existence, which derives only from the exception'.[47] The exception reveals 'the superiority of the existential element over the merely normative one'.[48]

Now, is there a need to follow Schmitt in his analysis of the relation between law and constituent power?[49] In other words: can the assistance operations of member states, at least until the insertion of Article 136(3) into the TFEU, only be justified by accepting that states, as *pouvoir constituant*, changed their Founding Contract to preserve their unity and in so doing justifiably acted outside the constraints of Union law? Such a move is unwarranted. To understand why requires putting the finger on the exact point on which Schmitt tries to counter legal positivist thinking. This is not that a sovereign has the capacity to put the law (temporarily) out of operation in an emergency. Positivists can accept that assertion by simply arguing that there may indeed be times in which a '*de facto* power' suspends the law.[50] What they will not subscribe to, however, is the proposition that such power has legal relevance.

The real point Schmitt is making, therefore, one of which he thinks bestows his ideas about the exception with legal significance, is that an ultimate sovereign decider is a *conditio sine qua non* for the '*legitimate* applicability' of the law.[51] But does it really? As Lars Vinx explains, in theory one can accept the assertion that a sovereign possessing the power to 'switch the law off' is a condition for the legitimate application of law.[52] It may be that such a power proves necessary to protect a group's unity in times when blind application of the law would lead to its demise.[53] Still, however, this does not show why the law should give up on its 'own claim to normative finality'.[54]

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46 Strong (n 41) xxi.

47 Schmitt, *Political Theology* (n 40) 15.

48 Schmitt, *Constitutional Theory* (n 31) 154. See also Cristi (n 32) 191; Loughlin (n 30) 226.

49 See also Kenneth Dyson, 'Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency' (2013) 35 Journal of European Integration 207, 221 who reflects on the debt crisis and argues that 'It is time….to put flesh on the normative basis for acting in supreme emergency'.

50 Lars Vinx, 'Carl Schmitt's defence of sovereignty' in David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State* (CUP 2015) 105-106.

51 Vinx (n 50) 106. According to Schmitt, *Constitutional Theory* (n 31) 136: 'A constitution is legitimate not only as a factual condition. It is also recognized as a just order, when the power and authority of the constitution-making power, on whose decision it rests, is acknowledged'.

52 Vinx (n 50) 115-117.

53 Vinx (n 50) 116. This study therefore does not follow the view of those who argue that the law will always be capable of regulating and containing an emergency. For this view see eg David Dyzenhaus, 'The compulsion of legality' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2008) 33ff. For discussion of this 'legality model' see Karin Loevy, *Emergencies in Public Law* (CUP 2016) 28-32.

54 Vinx (n 50) 116.

Does this then mean that up until the entry into force of Article 136(3) TFEU political leaders were *only* exercising *de facto* power, lacking legal significance, and that the Court could not justifiably approve of the assistance operations implemented during that period due to their violation of the ban on bailout? This conclusion is not called for either. In this regard it serves to distinguish between the 'constitutional document' and the 'constitutional settlement'.[55] As Tom Eijsbouts, Thomas Beukers and Jan-Herman Reestman explain:

> 'Constitutional law is not the field of law concerning the formal Constitution only. It is the law springing from and concerning the wider constitutional settlement, the political constitution or the constitution with a "small c"…. Constitutional law thus depends, for its acknowledgement and for its development, on a wider-than-legal reality.'[56]

The initiation of the change in the Founding Contract by the leaders on 11 February 2010 was indeed a political act, an exercise of constitutional power outside the law. However, this exercise of political power to some extent *does* receive recognition in the law. To see why the focus needs to shift from rules to principles. Let us therefore turn to the manifestation of solidarity in the realm of principles, and discover how under the Union's constitutional constellation it enables as well as constrains the ability of political leaders to uphold their Contract in an emergency.

## 3 Solidarity, loyalty and the Contract

The debate about legal principles – i.e. what they are and how they function – is complex and this study has no intention to settle it. It only focuses on particular principles, those relating to obligation, and refrains from providing an exact definition.[57] One can say that compared to *rules* of obligation, *principles* usually prescribe fairly general actions and serve a wider variety of purposes.[58] To name but a few: they can be used as a tool for interpreting

55 WT Eijsbouts, T Beukers and J-H Reestman, 'Between the Constitutional Document and the Constitutional Settlement' (2014) 10 EuConst 375, 375.

56 Eijsbouts, Beukers and Reestman (n 55) 375-376. See also Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 Yale J Int'l L 289, 302-303.

57 Explaining that not all principles are norm setting in nature is Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale LJ 823, 834-836.

58 One can debate to what extent this 'criterion of generality' is correct. For the view that it is only 'relatively correct' see Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010) 60-61. According to Alexy (n 58) 47-48, one can indeed say that compared to rules principles are usually characterised by a greater generality, yet this is not what ultimately distinguishes the two. Instead, he qualifies principles as 'optimization requirements', contrary to rules which are 'always either fulfilled or not'. For a similar reasoning, though without character-

laws, amending laws, creating exceptions to them, introducing new rules, or even prescribing action in specific circumstances.[59]

Exceptions notwithstanding,[60] scholars take the view that Union law recognises a principle of solidarity. In line with Article 2 TEU, which lists solidarity as one of the Union's founding values, they posit solidarity as a value *in itself*, as a conception of 'the Good',[61] and argue that there is a legal principle that prescribes its protection. At a very general level, the principle demands the organisation of 'cohesion' and 'mutual assistance' in different policy areas.[62] Depending on the actors as well as the subject matter concerned, it translates into more specific requirements.[63] When it comes to Union citizens, it requires member states to extend the solidarity that sustains their welfare systems to citizens from other states exercising their (market) freedoms.[64] As the Court famously found in *Grzelczyk* and has repeated many times since, states need to show 'a certain degree of financial solidarity' with nationals of other states.[65]

As far as member states themselves are concerned, they too are required to mutually assist each other. In the area of migration and asylum law, for example, Articles 67(2) and 80 TFEU prescribe that policies in this area shall be governed by 'the principle of solidarity' between the states. In light of the

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ising principles as optimization requirements, see Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 24. For the view that it is absolutely correct, even though the precise distinction between rules and principles will always be 'one of degree' as there is no clear dividing line between 'specific' and 'unspecific' acts, see Raz (n 57) 838. See also Graham Hughes, 'Rules, Policy and Decision Making' (1967-1968) 77 Yale LJ 411, 419.

59 Raz (n 57) 839-841. For an analysis of the role of principles in the specific context of Union law see Takis Tridimas, *The General Principles of EU Law* (OUP 2006) 1-58.

60 See Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 35-41.

61 Alexy (n 58) 87.

62 Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009) 53-54.

63 For overviews of its application in different areas of Union law see Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP 2010); Stefan Kadelbach (ed), *Solidarität als Europäisches Rechtsprinzip?* (Nomos 2014); Michèle Knodt and Anne Tews (eds), *Solidarität in der EU* (Nomos 2014); Peter Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union' (2015) 34 YEL 257.

64 See Catherine Barnard, 'EU Citizenship and the Principle of Solidarity' in Eleanor Spaventa and Michael Dougan (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 157ff; Stefano Giubboni, 'A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP 2010) 166ff. For an overview of different 'norms' of transnational solidarity and how Union law relates them to national conceptions of justice underlying national welfare systems see Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015).

65 Case C-184/99 *Grzelzcyk* [2000] ECLI:EU:C:2001:458, para 44; Case C-209/03 *Bidar* [2005] ECLI:EU:C:2005:169, para 56; Case C-158/07 *Förster* [2008] ECLI:EU:C:2008:630, para 48; Case C-75/11 *Commission v Austria* [2012] ECLI:EU:C:2012:605, para 60; Case C-140/12 *Brey* [2013] ECLI:EU:C:2013:565, para 72.

current refugee crisis, many have argued that the Union's present asylum system falls short of the demands of this principle and have stressed the need for reform.[66]

And also in relation to the single currency, the principle of solidarity has made its entry. The amendment of the EFSM in August 2015, paving the way for its continued use as an assistance facility for the currency union alongside the ESM,[67] is motivated by the necessity to transpose the 'principle of solidarity between member states whose currency is the euro….to the financial assistance mechanism operated under Union law'.[68]

Even if one follows this line of reasoning and accepts that there is indeed a principle of solidarity that demands the organisation of cohesion and mutual assistance,[69] it cannot answer the question of concern to this study. The principle does not address the relation between the Founding Contract that binds the member states together and the law. It does not prescribe how to deal with the solidarity that exists independently from the law and that has driven a fundamental transformation of the currency union. This is not governed by the principle of solidarity, but by that of loyalty. Some have equated the two, arguing that the duty of loyalty constitutes the 'formal' or 'institutional' dimension of the principle of solidarity,[70] yet the Court has given a more refined analysis. Early on in its jurisprudence, in a case concerning balance of payments assistance (!), it stated that solidarity lies 'at the basis of the whole Community system in accordance with the undertaking in Article 5 of the Treaty'.[71]

How to understand that statement? The principle of loyal cooperation, now codified in Article 4(3) TEU, has had a great influence on the shaping of the Union's legal construction, and it still does. Called 'foundational' or 'system-

66 See eg Roland Bieber and Francesco Maiani, 'Sans solidarité point d'Union européenne' (2012) 48 RTD eur 295, 312-326; Jürgen Bast, 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law' (2016) 22 European Public Law 289; Esin Kücük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' (2016) 22 ELJ 448.

67 See text to n 164 (ch 7).

68 Recital 4 Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) 407/2010 establishing a European financial stabilization mechanism [2015] L 210/1.

69 Note that in her View in *Pringle* AG Kokott did recognise a principle of solidarity, yet without reading into it a duty to grant assistance. See Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756, View of AG Kokott, para 143 (*Pringle*). See also text to n 89 (conclusion).

70 Christian Calliess, 'Das Europäische Solidaritätsprinzip und die Krise des Euro: Von der Rechtsgemeinschaft zur Solidaritätsgemeinschaft?' (Vortrag an der Humboldt-Universität zu Berlin, 18 January 2011) 15-16; Bieber and Maiani (n 66) 296-297.

71 Joined Cases 6/69 and 11/69, *Commission v France* [1969] ECLI:EU:C:1969:68, para 16. See also Epaminondas A Marias, 'Solidarity as an Objective of the European Union and the European Community' (1994) 21 LIEI 85, 94.

ic',[72] it has inspired other key principles and doctrines like supremacy,[73] effectiveness,[74] and pre-emption.[75] It can also impose obligations on states as well as Union institutions to act, or abstain from acting, in order to promote the 'Union interest',[76] at times even if such obligations have no basis in other provisions of Union law.[77] Armin Von Bogdandy has explained the principle's far-reaching potential by representing it as an instrument compensating for the lack of 'sanctioning power' at Union level.[78] 'Much of European law – namely all legal norms that represent, at their core, a communication between different public authorities – is not even symbolically sanctioned by possible coercion', he argues.[79] Hence the need for a principle like loyal cooperation, which establishes 'supplementary duties that secure the law's effectiveness and may solve conflicts'.[80] Unfortunately, this reasoning suffers from circularity as it tries to improve respect for the law through yet another legal principle, i.e. loyalty.

Allow this study now to put forward a different explanation, one that links the principle of loyalty to the Founding Contract that exists between the member states. Such an explanation also informs the Court's statement that the principle of loyalty is an expression of the solidarity at the basis of the Union. The Contract that underlies the Union makes the states *pouvoir constituant*, turns them into a unity and normatively obliges them to display solidarity by respecting their joint commitment to uphold the Treaties. As argued in chapter 2,[81] that commitment not only relates to the laws laid down in these Treaties but also to their object that these Treaties govern, the Union

72 Von Bogdandy (n 62) 21, 41-42 (listing it as a 'founding principle'); Tridimas (n 59) 4 (calling it a 'systemic principle').

73 Case 6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66: 'The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2)'. See also Eleftheria Neframi, 'The Duty of Loyalty: Rethinking its Scope Through its Application in the Field of EU External Relations' (2010) 47 CML Rev 323, 325-326; Klamert (n 60) 71-73.

74 See Case C-106/89 *Marleasing* [1990] ECLI:EU:C:1990:395, para 8 read in combination with Case C-397/01 *Pfeiffer* [2004] ECLI:EU:C:2004:584, para 114. See also John Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty' (1990) 27 CML Rev 645, 647-654; See also Neframi (n 73) 330-331.

75 Case 22/70 *Commission v Council* [1971] ECLI:EU:C:1971:32, paras 20-21. See also Neframi (n 73) 339-342.

76 For an exploration of the duty of loyalty and how it promotes the 'Union interest' see Klamert (n 60) 9-30.

77 See eg Case C-374/89 *Commission v Belgium* [1991] ECLI:EU:C:1991:60, paras 14-15; Case C-82/03 *Commission v Italy* [2004] ECLI:EU:C:2004:433, paras 15-18; Case C-217/88 *Commission v Germany* [1990] ECLI:EU:C:1990:290, para 33. On loyalty as an independent source of obligations see extensively Klamert (n 60) 234-241.

78 Von Bogdandy (n 62) 41.

79 Von Bogdandy (n 62) 41.

80 Von Bogdandy (n 62) 41.

81 See text to n 126 (ch 2).

itself. This is just as they have not only committed themselves to the law governing the single currency, but also to that currency as such. The many rules governing the cooperation between the member states and the institutions in pursuit of these objectives will never exhaust their full relationship.[82] The duty of loyalty, as an expression of basic solidarity, fills that regulatory gap by inspiring principles and establishing supplementary duties that ensure the law's effectiveness; it thus connects the law to the Contract that grounds it.

## 4 The Contract and the Court

When the Court has to rule on a measure that has proven essential to preserve the Founding Contract in an emergency, this study argues, it is under a duty of loyalty to abstain from disapproving it.[83] It owes that duty to the member states in their collective capacity, as the Union's constituent power. But how is that possible if the principle of loyal cooperation mainly governs the relationship between the institutions and states *singular*, that is: the interaction between these entities taking place once the Union is constituted? It is possible because the states as a *collective* not only play a role as *pouvoir constituant*, but also as *pouvoirs constitués*.[84] They are not only the Union's constituent power but, in their *executive* capacity, also exercise constituted power, especially in the European Council.[85] And when the crisis set in and exposed the flaws of the euro discussed in chapter 4, when the 'body politic' was threatened, responsibility to act fell on the political leaders assembled in this highest executive institution. They had to decide whether and how to preserve the political unity between the states they represented. Under the Union's constitutional constellation, characterised by its contractual nature, that power resides with them.[86] And as chapters 5 and 6 showed, they exercised that power on 11 February

82 See also Von Bogdandy (n 62) 41.

83 In *Gauweiler* AG Cruz Villalón states explicitly that the duty of loyal cooperation is also binding on the Court. See Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:400, Opinion of AG Cruz Villalón, para 64.

84 Van Middelaar, *The Passage* (n 26) 124-125. See also text to n 131 (ch 2). That the states as a collective also play a role at the level of constituted power is often missed. Christian Joerges, for example, argues that 'The European Council ... is anything but a unitary actor'. See Christian Joerges, 'Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration' (2014) 21 Constellations 249, 254.

85 See text to n 131 (ch 2).

86 In discussions of executive action during the crisis this is often overlooked. Indeed, executive measures are often, with little distinction, negatively portrayed as being exemplary of 'executive dominance'. See eg Deidre Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77 MLR 1; Mark Dawson and Floris De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 MLR 817, 834.

2010 by initiating a change in their Contract, and with it a transformation of the currency union.[87]

This study does not argue that the Court should agree to every aspect of this transformation, be it the extent to which the institutions can be involved in intergovernmental treaties or the respect for individuals' legitimate expectations and fundamental rights in the context of conditionality attached to assistance. Certainly not.[88] But when it comes to the most essential manifestations of this transformation – the display of positive solidarity by states and the bond buying action of the Bank – the main parameters of which leaders decided on, or approved of, at the height of the crisis, the Court is under a duty of loyalty to refrain from rendering a negative judgment. They concern the *basic capacity* of member states to preserve the Contract that ties them together and founds the Union. Denying them that capacity lies outside its authority. But if it lacks the power to decide negatively, does it have the power to judge?

Advocate General Kokott's view in *Pringle* sheds light on the way the Court has tried to discharge this duty. Kokott discussed the different possible interpretations of the no-bailout clause and recognised that a broad, purposive interpretation of the ban focusing on the objective of market discipline would rule out any assistance that allows the recipient state to discharge its commitments to its creditors; only a complete exclusion of such assistance would ensure that a state is disciplined by the markets and that they base their assessment of its 'creditworthiness' solely on its own 'financial capacity'.[89] To her, however, such an interpretation was unacceptable as 'basic structural principles of the Treaties' – 'sovereignty' and 'solidarity' – argued against it.[90] A broad interpretation, with little support in the ban's text, would excessively curb the sovereignty of member states by depriving them of 'the power to avert the bankruptcy' of a fellow state and the collapse of the currency union

87 See also Loevy (n 53) 281: 'What is typical to the operation of law in emergencies, as a regular legal and political field of governance, is that they raise opportunities for mobilization and norm making that may be normalized into the legal and political order'.

88 For a critical analysis of the Union's reaction to the crisis from the perspective of legal certainty and legitimate expectations see Martín Rodríguez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) 12 EuConst 265. For an analysis focusing specifically on the protection of fundamental rights in the context of the conditionality related to assistance operations see Claire Kilpatrick, 'Are the Bailouts Immune to EU Social challenge Because They Are not EU Law?' (2014) 10 EuConst 393. Recently, the Court has confirmed the potential to hold the Commission liable for fundamental rights violation in the context of intergovernmental assistance operations in Case C-8/15 P *Ledra* [2016] ECLI:EU:C:2016:701.

89 *Pringle* (n 69), View of AG Kokott, paras 126-135. On the possible different interpretations see text to n 55 (ch 7).

90 *Pringle* (n 69), View of AG Kokott, para 144.

at large.[91] It would likewise conflict with the concept of solidarity. Although member states are not under an obligation to grant assistance, Kokott reasoned, the fact that they would be free to support a third state but not a fellow member, even '*in a case of emergency*', would call into question 'the very purpose and objective of the Union'.[92] She therefore settled for a purely literal interpretation of Article 125 TFEU, only ruling out liability for, or the direct assumption of, a state's financial commitments.[93]

What Kokott essentially seemed to argue is that the interpretation of the no-bailout clause should be subject to principles so as to allow member states to grant assistance in an emergency and she identified these principles as 'sovereignty' and 'solidarity'.[94] Due to the fact, however, that she did not apply them to the Court itself, but rather to the no-bailout clause *in abstracto*, her literal reading of Article 125 TFEU would have allowed financial assistance in a great variety of situations, going far beyond the carefully circumscribed assistance possibility states had allowed for with their change in the Contract.[95] Yet, one could imagine going a step further and arguing that it is rather the Court itself that is under a duty of loyalty to use the interpretive space at its disposal in 'hard' cases,[96] allowing it to favour a certain reading of the law over others, in such a way that it can approve of the change in the Contract *as defined* by political leaders in an emergency.

Both in *Pringle* and in *Gauweiler* the Court *de facto* acted on that requirement. In *Pringle*, as chapter 7 showed, it employed a cumulative reading of the no-bailout clause that carefully replicated the terms of Article 136(3) TFEU and thereby approved of the ESM as well as all other intergovernmental assistance operations that had taken place since 11 February 2010. In *Gauweiler*, it similarly managed to declare the Bank's bond buying programme 'Outright Monetary Transactions' compatible with its mandate and the prohibition on monetary financing. While the Court approved of the change in the Contract, its reasoning in *Pringle* also exposed the inherent limitations of this approach.

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91 *Pringle* (n 69), View of AG Kokott, paras 137-141.

92 *Pringle* (n 69), View of AG Kokott, paras 142-143.

93 *Pringle* (n 69), View of AG Kokott, paras 113-125, 151.

94 For a different analysis of Kokott's View in light of the principles of sovereignty, solidarity and stability see Van den Brink and Van Rossem (n 23).

95 AG Kokott argued that even a mere literal interpretation of the no-bailout clause would keep in place its *effet utile*, meaning its disciplining functioning, as creditors of the recipient state could neither know for sure whether other states will indeed grant assistance, nor could they take for granted that this assistance will be used to pay off the debts owed to them. See *Pringle* (n 69), View of AG Kokott, paras 145-150. Even if that were true, however, this does not take away the fact that it would have allowed for assistance in a much greater variety of situations than Art 136(3) TFEU allows for. In fact, the latter would have limited the assistance possibilities for states in the currency union, whereas states with their own currency would have only been bound by the requirements flowing from Kokott's literal reading of the no-bailout clause.

96 On the distinction between 'clear' and 'hard' cases see text to n 3 (ch 7).

The argument that financial stability is an objective that has been pursued by the no-bailout clause since the very launch of the single currency overstretches the discretionary boundaries of its interpretative power. Some may disagree with this analysis and argue that it is possible to identify financial stability as an objective that has always inspired the ban on bailout.[97] However, unless one takes the view that Union law is fundamentally 'open' and receptive to any possible economic views or strategies,[98] one will agree on the principle that there are limits to the Court's interpretative discretion and consequently its ability to approve of changes in the Contract.

Ultimately, however, the real problem of the Court's approach does not reside in the practical constraints on its interpretive power. It goes deeper and touches on the constitutional division of powers.

The reference decision of the *Bundesverfassungsgericht* in *Gauweiler* helps to show why this is so. As chapter 7 demonstrated, in their request for a preliminary ruling the majority of judges in Karlsruhe made no secret of their strong objections to the Bank's bond programme. Yet, if it had been down to two judges – Gerhardt and Lübbe-Wolff – the case should never have been referred to Luxembourg. They opposed the view of the majority under which the German constitutional court is prepared to engage in *ultra vires* review. It can only carry out such a review of Union acts to the extent they 'provide the basis of actions taken by German authorities'.[99] Earlier in the crisis, this had been a reason to declare inadmissible a constitutional complaint against the Bank's first bond buying initiative, the 'Securities Markets Programme'.[100] But the majority now broadened the reach of the instrument, arguing that *ultra vires* applications could also be targeted at 'inactivity' of authorities, especially the *Bundestag* and the federal government.[101] Their responsibility for European integration requires that they do 'not remain passive' and 'not simply let a manifest or structurally significant usurpation of sovereign powers by

97 See in this regard Pieter-Augustijn Van Malleghem, '*Pringle*: A Paradigm Shift in the European Union's Monetary Constitution' (2013) 14 GLJ 141, 161-162 who argues that the Union faced a 'Schmittian *Ausnahmezustand*', but that the Court managed to deal with it as it 'elegantly interpreted the no-bailout clause'. See also Christian Kreuder-Sonnen, 'Global Exceptionalism and the Euro Crisis: Schmittian Challenges to Conflicts-Law Constitutionalism' in Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance* (Hart Publishing 2014) 75.

98 See in this respect Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart Publishing 2016), especially ch 5.

99 BVerfG, 2 BvR 2728/13 of 14 January 2014, para 23 (BVerfG *OMT reference decision*).

100 BVerfG, 2 BvR 987/10 of 7 September 2011, para 116 (BVerfG *Greek Loan Facility and EFSF*).

101 See extensively Dietrick Murswiek, 'ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order From 14 January 2014' (2014) 15 GLJ 147, 156-157; Matthias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10 EuConst 263, 280-284.

European Union organs take place'.[102] They are therefore under the duty to 'actively deal with the question of how the distribution of powers entailed in the treaties can be restored….and which options they want to use to pursue this goal'.[103]

For judges Gerhardt and Lübbe-Wolff this was an unacceptable intrusion into the realm of politics. As the German court cannot specify what kind of actions parliament and government should have taken if it had finally decided that the bond purchases were in violation of Union law – an exit from the monetary union, a change of the Treaties, the reversal of the respective act or perhaps only a parliamentary debate? – it should have refrained from 'dealing with the substance' altogether.[104] In fact, as judge Gerhardt pointed out, government and parliament had dealt with the bond purchases precisely by not opposing them. That should not be seen as inactivity, but as political approval of a measure crucial for the single currency's survival.[105]

Judge Lübbe-Wolff went on to express her desire for a political question doctrine, so far unknown in German law.[106] Under that doctrine, certain cases require exemption from judicial review because of their inherently political character and 'constitutional affiliation to other branches of the government'.[107] 'In an effort to secure the rule of law', Lübbe-Wolff argued, 'a court may happen to exceed judicial competence'.[108]

Lübbe-Wolff's wise words are not only relevant for Karlsruhe. They are equally pertinent to the European Court. Its judges are well aware of the need to draw a 'line between law and politics', not least for securing their own legitimacy,[109] yet until now it does not have a political question doctrine. In the United States courts do. More than 200 years ago, in the famous case of *Marbury v. Madison*, the Supreme Court already stated that 'It is emphatically the province and duty of the Judicial Department to say what the law is',[110] but that 'Questions, in their nature political or which are by the Constitution and laws, submitted to the Executive, can never be made in this court'.[111]

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102 BVerfG *OMT reference decision* (n 99) paras 46-54.
103 BVerfG *OMT reference decision* (n 99) para 53.
104 BVerfG *OMT reference decision* (n 99), Diss Opinion of Judge Lübbe-Wolff, paras 9, 11-27.
105 BVerfG *OMT reference decision* (n 99), Diss Opinion of Judge Gerhardt, paras 22-23.
106 BVerfG *OMT reference decision* (n 99), Diss Opinion of Judge Lübbe-Wolff, paras 4-10.
107 Elad Gil, 'Judicial Answer to Political Question: The Political Question Doctrine in the United States and Israel' (2014) 23 Boston University Public Interest LJ 245, 248.
108 BVerfG *OMT reference decision* (n 99), Diss Opinion of Judge Lübbe-Wolff, para 2.
109 Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and the Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 13 (and more generally 17-40).
110 *Marbury v Madison*, 5 US 1 Cranch 137 (1803) 177 (*Marbury v Madison*).
111 *Marbury v Madison* (n 110) 170.

The modern, detailed doctrine was introduced much later, in *Baker v. Carr*.[112] There, the Supreme Court identified several features that may turn a question inherently political, each of which separately suffices to render a case 'non-justiciable'.[113] They may do so not just on 'prudential grounds', which may lead a court to shy away from review to protect its own legitimacy,[114] but out of respect for the 'prerogatives' of other branches of government.[115]

Under the political question doctrine that respect is due because of the inherent link between the separation of powers and what the common law tradition calls 'the principle of sovereign immunity'.[116] That principle is characterised as 'a vestige of English feudalism according to which each Lord could be summoned only in the court of a higher noble', as a result of which the King was 'beyond suit' given his position at the apex of the feudal structure.[117] The operation of the principle and its significance for this study can probably be best illustrated by means of a very old case from 1460 concerning King Henry VI.[118] In that case Richard, Duke of York, presented to parliament a petition that he was entitled to 'the Crown'.[119] The Lords then informed King Henry, who ordered them to put together a defence.[120] This the Lords did, and they subsequently sought legal guidance from the judges of the King.[121] But the judges withheld their support, not simply because they could not issue advice in a case that they might have to rule on at some future point in time,[122] but also because if things went that far they would have to decline jurisdiction as the case was 'so high, and touched the Kings high estate and regalie, which is above the lawe and passed ther lernyng'.[123] As a commentator notes, the judges 'faced a double bind: they could not rule for Richard

112 *Baker v Carr* 369 US 186 (1962) (*Baker v Carr*). For a discussion of the development of the doctrine in US law over time see Tara Leigh Grove, 'The Lost History of the Political Question Doctrine' (2015) 90 NYU L Rev 1908.

113 Gil (n 107) 259.

114 Gil (n 107) 250-251.

115 Notes, 'Political Questions, Sovereign Rights, and Sovereign Immunity' (2016) 130 Harv L Rev 723, 736. The (anonymous) author explains (at p 724-726, 733) that it has been questioned whether 'prudential reasons' are still valid grounds for declaring a case to involve a political question in light of recent case law of the Supreme Court (see *Zivotofsky v Clinton* 132 S Ct 1421 (2012)). However, the possibility to hold that a case involves a political question due to 'the prerogatives' of other branches of government and the court's consequent lack of jurisdiction in any case still stands.

116 Harvard Law Review Notes (n 115) 736.

117 Harvard Law Review Notes (n 115) 736 (reference omitted).

118 For discussions of the case see Melville Fuller Weston, 'Political Questions' (1924-1925) 38 Harv L Rev 296, 302-304; Harvard Law Review Notes (n 115) 736-737.

119 Harvard Law Review Notes (n 115) 736-737. See also Fuller Weston (n 118) 302.

120 Harvard Law Review Notes (n 115) 737. See also Fuller Weston (n 118) 302-303.

121 Harvard Law Review Notes (n 115) 737. See also Fuller Weston (n 118) 303.

122 Harvard Law Review Notes (n 115) 737. See also Fuller Weston (n 118) 303.

123 Quoted in Eugene Wambaugh, *A Selection of Cases on Constitutional Law* (HUP 1915) 2-3 (as cited in Fuller Weston (n 118) 303).

without ousting the source of their own authority, but if they could rule only one way, *they were not a real tribunal at all*'.[124]

Under modern liberal constitutions there is no longer a single 'nucleus of sovereignty' as was the case with the ancient kings.[125] Indeed, the sovereign has delegated and divided its power over the different branches of government. This is no different for the Union, where the member states, as *pouvoir constituant*, have bestowed different institutions with legislative, executive and judicial powers. Yet, the political question doctrine requires that certain decisions be exempted from judicial review as the Union's constituent power has entrusted them to one of the political branches and the Court is not in a position to question them without exceeding its authority.

In this regard, two of the grounds mentioned by the Supreme Court in *Baker v. Carr* that may render a matter inherently political deserve a special mention. Although under the American doctrine each of them may apply separately, it is in their combination that their true relevance for this study resides. The first concerns a 'textually demonstrable constitutional commitment of the issue to a coordinate political department'.[126] The second an 'unusual need for unquestioning adherence to a political decision already made'.[127] Together, they show why the change in the Union's Founding Contract that national leaders initiated on 11 February 2010 concerns a political question. The decision to safeguard a basic capacity to preserve the Union during an emergency lies with its highest political leaders, assembled in the European Council. It may not do so because of a textually demonstrable constitutional commitment, even though Article 15(1) TEU mandates the European Council to 'provide the necessary impetus' for the Union's development, yet it surely results from the Union's overall constitutional architecture, based as it is on contract. It was for political leaders to decide whether and how to preserve the unity between their states, and thereby the Union itself, during a crisis of unprecedented proportions.

When the leaders exercised this power on 11 February 2010 they mobilized their political authority in support of the rescue of the euro.[128] Questioning the use of this power lies beyond the reach of the Court, or any other institution for that matter, and the authority they possess themselves. Indeed, the

124 Harvard Law Review Notes (n 115) 737 (emphasis added, footnotes omitted).
125 Harvard Law Review Notes (n 115) 738.
126 *Baker v Carr* (n 112) 217.
127 *Baker v Carr* (n 112) 217.
128 On the difference between *legal* and *political* authority and the fact that the authority exercised by political leaders at the beginning of the debt crisis was political in nature see WT Eijsbouts, 'De Governance Driehoek: Accountability, Legitimiteit en Transparantie' (Working Paper March 2017).

only actors capable of doing so are the member states in their *full* capacity.[129] At the level of constituted power, it is for political leaders to safeguard a basic capacity to preserve the Union by initiating a change of its Founding Contract. Such a change is only complete, however, once it has been approved by the member states acting in full. In the debt crisis, the interval between initiation and completion was often short due to the resort to instruments outside the Union legal order. Between the initiation of the change in the Contract in February 2010 and its first approval by the member states in full through the establishment of the 'European Financial Stability Facility', for example, lie only a few months. Nonetheless, one can imagine that under different circumstances the period between initiation and completion would take considerably longer. In such cases any changes in the Founding Contract initiated by the leaders are provisionally effective at the level of constituted power, where loyalty requires other institutions to respect it and give it expression in legal instruments.[130] Yet, they are only complete once they have been approved by the Union's constituent power, the member states acting in their full capacity, for example at the time of amendment of the Union Treaties.[131]

Now, suppose the Court had indeed decided to abstain from adjudicating on the essential manifestations of the change in the Founding Contract, the assistance granted to distressed states and the bond buying action of the Bank. What if it had declared inadmissible *Pringle* except for those aspects relating to the use of institutions and *Gauweiler* in its entirety? Would that have heralded the demise of its authority, its subjection to the executive branch of government? No. The Court may not be able to review how leaders have safeguarded their basic capacity to preserve the Union during an emergency,[132] but it does control the question of when a case, and which aspects of it, qualifies as a political question.[133] On any future occasion, it would be for the Court to determine whether a political decision is necessary to

129 On the difference between states acting in their *executive* and *full* capacity see text to n 131 (ch 2).

130 Examples of such instruments during the debt crisis are the establishment of the European Financial Stability Mechanism on the basis of Art 122(2) TFEU and the bond buying programmes of the ECB.

131 Such approval can be given tacitly, for example when a change in the Contract initiated by political leaders is not denied or contested by the member states at the time of Treaty amendment.

132 For a discussion of (extra-legal) normative controls on the exercise of emergency powers even when courts stay silent see Mark Tushnet, 'The political constitution of emergency powers: some conceptual issues' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2008) 145ff.

133 See also Harvard Law Review Notes (n 115) 738 where it is explained that the political question doctrine is 'the *limiting principle* of judicial review. Whereas the courts might decide whether the political branches have exceeded their constitutional roles, they cannot mistake a lack of *wisdom* for a lack of *power*'.

preserve the Contract that underlies the Union and demands its adherence. In that respect, it would still be the Court that decides.[134]

The Court has played a great role in the integration of Europe. It has been instrumental in the construction of the Union, and it still is. But some decisions lie outside its reach. The substantive constitutional change by the currency union is one of them. Never before did the Union experience a crisis so existential as the one by which it was struck in early 2010. It confronted political leaders with the Founding Contract between their states. That Contract not only commits them to the law of the Union, it commits them to uphold the Union *itself*. On 11 February 2010 the leaders decided to respect this latter, most basic commitment. They initiated a change in their Contract, a display of solidarity as fundamental as it can be, and thereby set in motion a profound transformation of the currency union. That change in the Contract is an act the Court cannot disapprove.

What does this tell us about the Union? Does it guarantee that Greece will stay a member of the currency union? That the euro itself will survive? No. It tells us that at the most difficult moments in time, when the Union's Founding Contract is at stake, political leaders possess the power to preserve it, a political power which receives recognition in the law. The debt crisis revealed that power for the first time, yet its significance far exceeds the realm of money and finance. Recently, on 25 March 2017, the leaders of 27 member states convened in Rome to celebrate the 60th anniversary of the Treaty on the European Economic Community and to reflect on the future of the Union post Brexit. The occasion served to renew their 'wedding vows' and reaffirm the Contract that ties their states together and commits them to the Union. They pledged 'to make the European Union stronger and more resilient, through ever greater unity and solidarity…'.[135] With an unpredictable American president in the West, Russian hostility in the East, and severe instability at the southern border, the second time they will have to decide whether to use their power to uphold that Contract may come sooner rather than later.

134 Leigh Grove (n 112) 1970-1973. For a critical view on the capacity and consequences of courts controlling (*ex post*) emergency powers see Bruce Ackerman, 'The Emergency Constitution' (2003-2004) 113 Yale LJ 1029, 1041-1045. For a more general discussion of the influence of *ex ante* uncertainty about *ex post* control on the exercise of power during an emergency see Oren Gross, 'Extra-legality and the ethic of political responsibility' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2008) 71-81.

135 The Rome Declaration, 25 March 2017.