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The European Union's Fantastical Constitution: a response to von Bogdandy and Spieker

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27 June 2025

A Response to von Bogdandy and Spieker

Somewhat counterintuitively, constitutional scholarship can be like writing fantasy novels. Within certain parameters, constitutional scholars can create their own expanded universe, proposing new constitutional realities and offering audacious suggestions for constitutional reform. But like fantasy writing, constitutional reasoning can become fantastical if the plot twists are too death-defying and the ground rules of the fantasy world broken too often. And just as fantasy fans might at that point say, “enough is enough, this is no longer true to the original story”, constitutional scholars should do the same.

In recent years, Armin von Bogdandy and Luke Dimitrios Spieker have proven to be among the most creative readers of the EU constitution. Their constitutional reasoning is thought-provoking and their proposals daring. Their work is used in our academic teaching and their policy courage has been appreciated by the EU institutions ([here](#)). Yet having followed their work closely, we feel it is no longer true to the original story: the narrative is no longer convincing, and the ground rules are too often broken. In fact, it seems to us that von Bogdandy and Spieker have become trapped in their own story, trying to create a constitutional universe that by now is fantastical.

Recently, von Bogdandy and Spieker decided to boldly go where not even they had dared to go before. To overcome the possible Hungarian veto on prolonging EU sanctions against Russia, they [propose](#) that the explicit requirement in Article 31(1) TEU for such decisions to be taken by the Council acting unanimously should be overcome on the basis of Article 2 TEU. In their view, a Hungarian veto against further sanctions would violate the value of solidarity and the Hungarian vote should therefore not count. In this post, we argue that this would launch us into a whole new, and in our view, dangerous galaxy.

The same framing, but disappearing standards

Not too long ago, but in a galaxy that now seems far, far away, von Bogdandy sowed the seeds of what has become his and also Spieker's value constitutionalism. Since then, their positions and standards have changed considerably, even if their writings suggest that they have developed a consistent line of thought. Their framing of the proposal to overcome the Hungarian veto is similar to earlier proposals. They argue that their reasoning is "within the limits of legal hermeneutics", that their proposal applies only in "exceptional circumstances" and that it is "narrow" in scope. Read their earlier work on Article 2 TEU, and you will find similar, if not identical language (see [here](#), [here](#), and [here](#), ch. 13). It might be an attempt to placate readers by trying to convince them that their interpretation of Article 2 TEU is not as egregious as it might appear. But if we dig a little deeper, we find that while their framing is mostly the same, the standards guiding the application of Article 2 TEU have become increasingly thin. Earlier standards, sometimes from only the year earlier, are often modified and negated, showing the fundamental instability in viewing the whole of EU constitutional law through a set of vague and malleable norms.

In fact, von Bogdandy has made a complete U-turn on Article 2 TEU's justiciability in the course of a little over a decade. In 2012, he argued against using Article 2 TEU as the basis for his *Reverse Solange* proposal because "values as such [have no] direct effect" ([here](#), p. 500). A decade later, when he tried to revamp *Reverse Solange* together with Spieker, Article 2 TEU suddenly could be the basis of their proposal. However, they argued that Article 2 TEU could be applied only "in combination with other Treaty provisions" ([here](#), p. 410). Now, a few years later, they both take the view that Article 2 TEU can be applied on its own, this time to nullify Council votes.

Also their view on *when* Article 2 TEU can be applied has changed dramatically. Previously, their position was that triggering Article 2 TEU would be permissible only in a situation of a systemic deficiency in the observance of EU values, that is, deficiencies that “affect the entire system (or an entire area of a system)” and that occur with “regularity and persistence” ([here](#), p. 281). This limitation has gone overboard. The fact that “the Russian war of aggression is ... an exceptional case” is for them now enough to apply Article 2 TEU. Von Bogdandy and Spieker say that the situation is exceptional because it may “result in military confrontation”, is an “existential threat”, and because “the Union’s values and peace are at stake”. Indeed, these are rather different levels of ‘exceptional’, but their definition is in any event broader than one that is limited to a systemic value deficiency.

Finally, not even a year ago, von Bogdandy advocated using Article 2 TEU to “align and reorganize the entirety of EU law”, but subject to one important limit: it could not produce an “interpretation contra legem”. In only six short months, this standard, too, has seemingly been forsaken. If using Article 2 TEU to overcome the *explicit* unanimity requirement in Article 31(1) TEU is not an interpretation contra legem, then we do not know what is.

Stories can develop and context can change, but so many plot twists and such disregard for original rules and standards would likely be too much even for fans of fantasy. As the world of constitutional law offers clearer guardrails than the world of fantasy, they should certainly be too much for us constitutional lawyers. The picture emerging from the scholarship of von Bogdandy and Spieker is one of an ever-expanding universe of Article 2 TEU guided by ever-fewer standards.

Political decision-making as Article 2 TEU’s new galaxy

The substantive argument concerns the relationship between Art. 2 and membership in the EU’s political institutions. As Spieker and von Bogdandy point out, a long line of literature has argued that membership of the EU implies certain duties that Member States carry when participating in political institutions (e.g., [here](#) and [here](#)). An undemocratic Hungary is not just an issue for Hungary but for the *whole Union* because it is participating in common decision-making. This then justifies certain measures of general application to be applied against that state under Art. 7(2) such as suspension from voting. It follows from this argument that a particularly authoritarian state violating Art. 2 values should be excluded from voting in general (for a given period or in a given area): a procedure that Art. 7 *explicitly provides for*.

What does not follow is the idea advanced by Spieker and von Bogdandy that voting can be *singularly* suspended. It does not follow that we can simply wait and see which particular votes the majority (or the Presidency) in the Council likes (or finds inconsistent with Article 2 TEU) and which it does not, suspending only the latter. Quite apart from the fact that their proposal does not follow the explicit procedure Art. 7 lays out for such cases, if a Member State is in systematic breach of Art. 2 values, surely that pollutes the things it *does* vote for as much as the things it *does not*. *Either* the presence of a Member

State undermines the Council's legitimacy to an intolerable degree *or* it does not (but that is a systemic determination, not one that hangs on one particular vote, as the drafters of Art. 7 well understood). Here we already see the strains of an argument that is built for rule of law and democratic erosion being used in core substantive areas of EU policy (perhaps the most radical departure from their earlier work on Article 2 TEU).

The same difficulty of legally transplanting arguments away from the rule of law context applies to a second dramatic departure of Spieker and von Bogdandy from earlier arguments, namely their use of Art. 2 not to review existing legal acts but to amend the procedure by which they were adopted. Here, it is important to distinguish between two different sorts of rules, both of which are plentiful within the Treaty. One is substantive rules – what someone like HLA Hart would call primary rules. Internal market standards and even arguably Art. 2 standards are like this: rules of conduct. The second type is decision rules. For many issues of importance we say: we don't know how this rule applies in a concrete case, or we are likely to disagree, so we establish a decision-making procedure to decide (for Hart, these are secondary rules). Often, we modify the procedure to make it harder or easier depending on the interests at stake (in CFSP, we make it particularly hard because the Treaty makes an explicit decision to protect national sovereignty). This second type of rules is particularly important under conditions of political liberalism: they are precisely what allows states with different priorities, cultures, and interests to co-exist. In our view, it is one thing to use Art. 2 to nullify rules of conduct. It is another to use it to nullify decision rules, which are precisely about allowing space for negotiation and bargaining, prior to a rule of conduct being adopted at all.

Ironically, von Bogdandy and Spieker's proposal precisely demonstrates the need for clear decision rules. Who decides which votes are consistent with the values in Article 2 TEU and which are not? Von Bogdandy and Spieker argue that this requires "political agreement among Member States", by which they mean a qualified majority. But why would the Council put it to a vote if voting against is a breach of Article 2 TEU? And what if no qualified majority of member states favours nullifying the votes that breach Article 2 TEU? Does the vote then count because the right decision rule was used (rendering their proposal unresponsive to the demands of Article 2 TEU), or should another decision rule be found that would allow the Council to nullify not only the votes of the Member States breaching Article 2 TEU but also the votes of the Member States unwilling to sanction their colleagues? There simply is no end to this. It does not even work to say that the votes that violate Article 2 TEU should not be counted, because even this decision must be taken on the basis of some procedure. In simple terms, the magic wand of Art. 2 faces new (in our view impossible) challenges when applied to the context of political decision-making.

The illiberal implications of overcoming Hungary's veto

The previous section already offered a glimpse of the troubling implications of von Bogdandy and Spieker's proposal, but it's worth expanding on them. For a start, how do we avoid their proposal becoming a simple tool of majority rule, allowing Member States

to set aside votes they do not like? And how do we avoid that the proposal spills over to other policy areas and procedural rules? By the same logic, a simple majority of Member States could decide to abolish the qualified majority rule in another area by invoking Article 2 TEU. In other words, the proposal risks opening Pandora's Box without reflecting on its consequences (including how the CJEU could review a decision to nullify a vote by reference to Article 2 TEU).

This is compounded by the fact that the values in Article 2 TEU can mean many different things. In other words, the deciding party can conceptualise these values exactly as it suits their interest. For example, the value of solidarity can encompass solidarity among national citizens, among member states, and among EU citizens. In [Commission v Malta](#), the Court mentioned all three conceptions in the span of six paragraphs (paras 96-101) seemingly without being aware of these differences. It shows that EU values, especially when loosely used, can be used by EU institutions that dislike a certain Member State to cancel its policies or, in the present case, nullify its votes. And von Bogdandy and Spieker use the term solidarity very loosely. They do not say what solidarity entails, what it requires, and why it would be breached. They merely say that we are dealing with an exceptional situation and that an obstruction of a decision in the Council therefore violates solidarity. This is nothing more than saying that in exceptional situations, the minority must agree with the majority. Since many situations in today's world are exceptional, or at least highly worrying, the proposal places minorities in the EU's decision-making in a perilous position vis-à-vis the majority view.

The proposal thereby undermines its very purpose. Von Bogdandy and Spieker seek to safeguard the EU's "agency", but they do so by thwarting the institutional trust that is at the basis of agency. Unanimity rules are designed to protect minorities (even repugnant minorities) and recognize that EU decision-making in a given field requires a high threshold of justification. Policy differences should be overcome through bargaining. Bargaining allowed previous sanctions to be passed (i.e., the proposal has no obvious factual basis: we have had a long line of successful sanctions packages against Russia). What is more, the Treaties regulate and even modify the bargaining process. Think of enhanced cooperation, which can be adopted "as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole" (Art. 20(3) TEU). But why bother with bargaining or the relevant rule when the minority voice can simply be disregarded? A rule that was created to find a compromise must now be interpreted to sideline those states that disagree with the majority. And that under the banner of solidarity. In reality, the proposal is deeply illiberal: it undermines the spirit of consensus and compromise that is the very basis of inter-governmental institutions. Trust among Member States will be eroded if decision-making rules that are designed to settle disagreements can be ignored precisely when serious disagreements arise.

Finally, the proposal reflects a problematic pattern in EU legal scholarship of scholars coming up with proposals to protect EU values that are in direct contravention of basic tenets of the rule of law (for criticism, see [here](#)). Von Bogdandy and Spieker are usually serious in their commitment to the rule of law, but this proposal is quite obviously contrary

to it. This is all the more surprising since von Bogdandy took the view in 2024 that the rule of law “takes primacy over the other principles of Article 2 TEU” ([here](#), p. 114). Now, a year later, he and Spieker let solidarity trump the rule of law. As a result, they not only apply inconsistent standards, but possibly also double ones. What would they say if Hungary proposed to override decision rules in the Hungarian constitution by reference to its values? Now they are proposing that the EU do precisely that!

Expanding the universe beyond Hungary

It can be easy to sympathize with those who propose ignoring the preferences of a “bad” minority. One can hardly have anything but antipathy for the Hungarian government and its stance on the Russian invasion of Ukraine. The basic requirement of scientific universalization, however, requires us to imagine what von Bogdandy and Spieker’s proposal would look like in other cases. Perhaps we should bring their case a little closer to home: Germany. The ICC has issued [arrest warrants](#) for a number of Israeli leaders; at the same time, the Israeli government awaits the ruling of an [ICJ judgment](#) regarding breaches of the genocide convention. The leaders of France, Canada and the UK recently issued a statement criticizing human rights violations within Gaza, with the [UK government](#) announcing sanctions against two far-right ministers in the Israeli government. Within the Union, the EEAS has noted “[indications](#)” that Israel is in breach of international law, raising the question as to whether the EU’s trade agreements with Israel ought to be suspended. Germany (together with Hungary, among others) has been opposed even to this investigation. Let us cast our minds into the future: what if another Foreign Affairs Council were to propose sanctions against Israel, either analogous to those of the UK or more far-reaching? Perhaps any future German vote obstructing EU action should be set aside because the situation in Gaza is exceptional (which is an understatement) and because such a vote is a grave breach of Article 2 TEU, especially of the values of human dignity and human rights. We would find this example equally unconstitutional but entirely consistent with the vision that von Bogdandy and Spieker set out. We wonder if this is really the expanded universe in which these authors wish to live.

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