In recent years, much of the debate on the nature of the European legal order has focused on the idea of constitutional pluralism.\(^1\) The claim that the European legal order is characterized by constitutional pluralism builds on two insights: On the one hand, European law cannot plausibly be portrayed, it is argued, as a mere subordinate part of the several national legal systems of the member states, as law that has validity within a national legal order only insofar as it has been explicitly incorporated and that is subject to national constitutional limitations. The treaties, as a result of a series of landmark decisions of the ECJ, are now widely recognized among practitioners of European law as an independent source of law, and the regulations and directives enacted under the powers conferred in the treaties are taken to have supremacy over national law and direct effect within national legal systems. At the same time, however, it would be equally implausible to hold that all national law is derived from European law. National legal systems continue to operate with their own standards of legal validity and do not acknowledge a dependence of national law on a European Grundnorm.

Defenders of constitutional pluralism argue that, as a result, any monist perspective on the relation between European law and the law of the member-states, i.e. any perspective that imposes a simple hierarchy between the two and tries to derive the validity of the lower from the higher, must fail to be true to the facts on a descriptive level. Rather, there are several, mutually independent legal systems in Europe that are not hierarchically ordered, though of course they must frequently interact. This interaction should take place in a spirit of mutual recognition of the autonomy and the legitimacy of the different standpoints defined by the different legal systems, to avoid conflict and attempts at domination. The doctrine of constitutional pluralism, its defenders suggest, will foster mutual respect and help avoid conflict, while the doctrine of monism, which establishes unity through claims of hierarchy and subordination, is portrayed as a danger to the smooth interaction of European legal systems. Constitutional pluralism, its defenders argue, ought to be welcomed as a superior alternative to constitutional monism, and not as an intermediate stage in the development towards a reconstructed monism on the supra-national level.

Discussions of constitutional pluralism frequently rely on ideas drawn from the legal theory of Hans Kelsen. But there is considerable confusion as to how Kelsen’s theory of legal system is to be applied to the European case. It might appear obvious that Kelsen’s views conflict with the idea of constitutional pluralism. Kelsen defended the radically monist view that legal cognition must conceive of all valid law as belonging to one and the same legal system, on pain of falling into logical inconsistency. And Kelsen’s monism has indeed been invoked to defend monist conceptions of law in Europe that either try to derive national law from European law or the other way around. However, some authors have claimed that Kelsen’s legal monism might be flexible enough to accommodate constitutional pluralism by offering a number of alternative and

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equally viable possible interpretations of the unity of European law. A somewhat similar interpretation was supported by the late Neil MacCormick, who suggested that the different legal orders in Europe might be seen as instantiating a “pluralism under international law”, which MacCormick took to be one particular form of Kelsenian monism. MacCormick’s suggestion has found a warm reception, but some commentators challenge his claim that pluralism under international law is a form of legal monism.

The aim of this paper is to clear up some of the confusion concerning the application of Kelsen’s theory of legal system to the relation between European law and the law of the member states. My conclusions will be supportive of MacCormick’s view that Kelsen’s monism, in the form of pluralism under international law, can accommodate the phenomena that are usually taken to support constitutional pluralism. Though this result is not original, I hope my argument for it will help achieve a deeper understanding of the position. MacCormick introduces pluralism under international law somewhat tentatively, as one among several descriptive possibilities for conceiving of European legal order. I will argue that pluralism under international law is not merely a descriptively adequate but also a normatively superior perspective on European legal order that should be preferred to all forms of radical constitutional pluralism.

I. Kelsen’s Legal Monism: A Brief Overview

Before we start our discussion of the application of Kelsen’s theory of legal system to European law, a brief introduction to Kelsen’s legal monism is in order. Kelsen’s legal monism consists in the following claim:

LM: For any two norms, n1 and n2, if both are to be regarded as legally valid, then both must belong to the same legal system.

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For example, if one wanted to claim that there are valid German laws and valid French laws, one is committed, under LM, to the view that both the German laws and the French laws must form part of the same legal system. To give another example: If one wanted to hold that there are both valid norms of German law and valid norms of international law, then one is committed to the view, according to LM, that both the German laws and the international laws belong to the same legal system. In short, there can only ever be one legal system in the whole world. Legal pluralism can be defined, by contrast, as the view that it is possible for two norms that do not belong to the same legal system to both be legally valid. Hence, legal pluralism is open to the possibility of the joint existence of several legal systems.

To fully explicate LM, it is necessary to give an account of what it means for two norms to belong to the same legal system. According to Kelsen, two norms n1 and n2 belong to the same legal system if and only if both n1 and n2 derive from the same basic norm through an unbroken chain of validity. To illustrate this criterion, Kelsen asks how we would explain the legal validity of a particular exercise of public power:

“Tracing the various norms of a legal system back to a basic norm is a matter of showing that particular norm was created in accordance with the basic norm. For example, one may ask why a certain coercive act is a legal act and thus belongs to a certain legal system – the coercive act of incarceration, say, whereby one human being deprives another of liberty. The answer is that this act was prescribed by a certain individual norm, a judicial decision. Suppose one asks further why this individual norm is valid, indeed, why it is valid as a component of a certain legal system. The answer is that this individual norm was issued in accordance with the criminal code. And if one asks about the basis of the validity of the criminal code, one arrives at the state constitution, according to whose provisions the criminal code was enacted by the competent authorities in a constitutionally prescribed procedure.”

Kelsen holds, in other words, that the validity of any legal norm must derive from the validity of some higher legal norm that authorized its creation. As a result, the legal system is structured hierarchically into different levels or layers of norms. The norms on

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7 Kelsen, *Introduction to the Problems of Legal Theory* (n. 2 above) 57.
any given level of the hierarchy are validated by the norms on the level above, while they in turn validate the norms on the level below.

The claim that the validity of any legal norm must derive from the validity of some higher legal norm is based on two considerations. First, since we cannot derive ought from is, the validity of a legal norm, which determines that certain actions ought or ought not to be performed, cannot be based on social facts. It can only be based on another, higher norm. Second, since the material content of positive law depends on human decision, subordinate legal norms – in contrast to subordinate moral norms that follow from the content of supreme moral principles – cannot be derived, at least not fully, from the material content of higher level legal norms. Hence, the validation of legal norms on any given level of legal system by the legal norms on the level above must take a peculiar form: The legal norms on any given level are valid not because their content is fully determined by higher level legal norms but rather because the higher level norms authorized their enactment. Hence, we arrive at the principle that the validity of any legal norm must derive from the validity of some higher legal norm that authorized its enactment or creation.\(^8\)

Of course, the attempt to explain the validity of a particular norm by recourse to higher level norms that, directly or indirectly, authorized its enactment must come to an end somewhere. If our attempt to explain the validity of a particular norm-enactment by recourse to authorizing higher-level norms is to be any good, it must not end in an infinite regress of authorizing norms. There must be an ultimate norm that validates all other legal norms, by authorizing their enactment and providing them with normative force. Since we cannot derive ought from is, this ultimate norm, the basic norm, cannot be based on social fact, like Hart’s rule of recognition. Kelsen claims that it must be presupposed by the jurist as a condition of the possibility of legal cognition, which is essentially normative. If a jurist claims that, according to the law, one ought to do as the

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\(^8\) Consequently, Kelsen concludes ibid. 112: “Two complexes of norms, apparently different, form a unified system if one complex (or system) proves to be subordinate to the other because the basis of its validity – and so, its (relative) basic norm, the basic determinant of its creation – is found in the other system, that is, in a norm of the other system.”
legislator, acting under a constitution authorizing his legislative activity, has required he makes the assumption that …

“What is to be valid as norm is whatever the framers of the first constitution have expressed as their will – this is the basic presupposition of all cognition of the legal system resting on this constitution. Coercion is to be applied under certain conditions and in a certain way, namely, as determined by the framers of the first constitution or by the authorities to whom they have delegated appropriate powers – this is the schematic formulation of the basic norm of a legal system (a single-state legal system, which is our sole concern here.)”

We now have a fuller answer to the question of what it means for two norms to belong to the same legal system. Two norms belong to the same legal system if and only if the enactment of both norms was authorized, directly or indirectly, by the same basic norm. Both norms must be connected to the same basic norm through an unbroken chain of validity or series of properly authorized enactments. Legal monism, the claim that all legally valid norms must belong to the same legal system, can now be reformulated as the claim that all legally valid norms must be derived from one and the same basic norm.

If, to return to our earlier example, we want to hold that there are both valid German laws and valid French laws, we are committed, according to Kelsen, to the claim that the enactment of all valid German laws and the enactment of all valid French law must have been authorized by one and the same basic norm. Note that there are different possibilities for interpreting this claim. A German lawyer might take the view that all valid law is derived from a basic norm that gives normative force to the decisions of the framers of the first German constitution. In that case, for French laws (or norms of international law) to be regarded as valid, they would have to be recognized as valid, for certain purposes, by German authorities acting under the German constitution and its basic norm. Valid French laws and valid German laws (and valid norms of international law) would both belong to the German legal system. Of course, this perspective of national monism could also take its start from the French constitution. But there is a fundamentally different way of conceiving of both French and German law as part of the

9 Ibid. 57.
same legal system. Kelsen holds that it is possible to conceive of international law as higher-level law authorizing both German and French law (and other national legal orders). Under this perspective of international monism, norms of French law and norms of German law would belong to the same legal system in virtue of being derived from a basic norm of international law without being derived from each other (in whatever direction).

To be sure, legal monism is a rather counter-intuitive doctrine. Institutionalist critics are likely to complain that there must be more than one legal system in the world. We normally assume, after all, that every independent state, endowed with its own legislature and courts, runs its own legal system. So it seems that there must be at least as many legal systems as independent states, and perhaps more. What are Kelsen’s reasons for making the surprising and seemingly implausible claim that all valid law must belong to the same legal system?

Kelsen’s basic argument for legal monism is not an empirical argument. Rather, Kelsen claims that legal monism is a necessary presupposition of legal cognition. As I already intimated, legal cognition, in Kelsen’s view, is essentially normative cognition. Legal cognition asks what we, as addressees of the law, ought to do or ought not to do. This question would be not be answerable, and legal cognition would therefore be impossible, if the law made conflicting requirements on the behaviour of its addressees. Imagine that there are two norms, n1 and n2, both regarded as valid and that n2 makes it a duty to perform an action a that n2 requires the same addressees to refrain from performing. In that case, legal cognition would be unable to provide a logically consistent description of the law, and it would, as a result, be unable to tell an addressee of the law whether he (or she) ought to perform action a or whether she ought to refrain from performing a. If legal cognition is to be possible, Kelsen concludes, we must assume that

10 See ibid. 113-22.
the law can be given a logically consistent description and, consequently, that it cannot make conflicting requirements on our behaviour. We must hold that it is impossible for two legal norms that raise contradictory demands to be jointly valid. There must either be a way to show that the conflict is a mere appearance, or one of the two norms must be discarded as invalid.\textsuperscript{12}

Kelsen’s legal monism offers a straightforward way to achieve legal consistency. The hierarchical structure of the Kelsenian legal system will sort out any apparent conflict by invalidating any purported legal norm on a lower level of the systemic hierarchy which conflicts with any norm on a higher level. Any purported legal norm on a lower level that conflicts with a norm on a higher level must be a norm whose creation was not, in fact, authorized by higher-level norms, and it must therefore be invalid, at least as long as we assume that conformity to the procedural and material constraints imposed by higher-level norms is a condition of the valid exercise of legal authority on a lower level of the legal hierarchy. For this resolution to the problem of normative conflict to work, all valid legal norms must belong to the same legal system, to ensure that any two norms that might conflict can be ranked against each other. Legal monism, thus, assures the principle of non-contradiction that is a necessary presupposition of legal cognition. As a result, legal monism is itself a condition of the possibility of meaningful legal cognition.

 Needless to say, this argument is not likely to convince all doubters of the truth of legal monism, and I will have to say more, in the course of this paper, on where I think it goes wrong and on how it might be repaired. For now, it is necessary to discuss one rather obvious challenge to legal monism that Kelsen himself explicitly acknowledges and tries to disarm.\textsuperscript{13} A critic of legal monism will claim that the possibility of normative conflict between different legal orders is simply an undeniable fact. It might be argued, for instance, that one cannot reasonably deny that it is possible for a law that is treated as perfectly valid and that is routinely applied and enforced by all relevant legal authorities

\textsuperscript{12} See Kelsen, \textit{Introduction to the Problems of Legal Theory} (n. 2 above) 111-12. 
\textsuperscript{13} See ibid. 71-75; 117-19.
within some state to conflict with a valid norm of international law. To deny such possibility of conflict, as Kelsen would appear to acknowledge, would either force us to deny the validity of a national norm that conflicts with international law, though it is properly authorized by the national constitution and treated as valid by all relevant agents within the national legal order, or else to deny the validity of an international norm should it conflict with national law, even if it is valid under the sources of international law and recognized to be so by the international community or its larger part. But either option seems equally unattractive. To deny validity to the national law does not do justice to the facts, while it would be normatively undesirable to deny that international law could ever impose obligations on a state against its own will.

Given this dilemma, would it not be better simply to admit the possibility of legal conflict? The law in the abstract, one might go on to argue, does not make any demands. All demands made by the law are demands made by particular legal orders and their particular authorities. Assume that the law of legal order o1 requires us to act in a way prohibited by order o2. It is simply wrong to claim, one might argue, that there is a logical inconsistency here that vitiates the possibility of coherent description of the law. True, according to order o1 we ought to behave in a way prohibited by order o2, and vice versa. But there is no logical contradiction between the proposition that we ought to perform action \textit{a according to o1} and the proposition that we ought to abstain from performing a \textit{according to o2}, just as there is no logical contradiction between the proposition that your mother wants you to do your homework and the proposition that your father wants you to mow the lawn instead. Of course, it might be impossible for you to obey both your mother and your father. But this simply means that the principle that one should obey one’s parents isn’t going to tell you, in case your father tells you to do one thing and your mother tells you to do another, what you ought to do. You will have to choose whether to obey your mother or your father on grounds that go beyond the principle of obedience to your parents.

Similarly for the law: it might be impossible to comply with the demands of both o1 and o2. But this simply means that the principle that one ought to do what the law
demands won’t always answer the question what ought to be done, all things considered. In a situation where o1 and o2 make demands that cannot both be obeyed, we may have to choose whether to obey o1 or to obey o2. And this choice must be taken on moral or political grounds that go beyond mere respect for law. Legal pluralism, the view that both o1 and o2 are independent legal systems, at least has the virtue of acknowledging such limits of law. Pluralism does not pretend that any conflict between two legal orders must itself have a legal solution. That perspective might well help to think more clearly about what is morally and politically at stake in situations of conflict.14

Needless to say, once the possibility of legal conflict is admitted, on the grounds just outlined, Kelsen’s argument for legal monism collapses. The argument claims that monism is a condition of the possibility of coherent juristic description of the law. But if the acknowledgement of the possibility of legally irresolvable practical conflict between the demands of different legal orders does not undercut the possibility of coherent description, we can no longer defend legal monism as a necessary precondition of legal cognition.

Kelsen’s develops a partial response to this challenge in his analysis of the relationship between national and international law. He acknowledges the phenomena that are said to constitute examples of legal conflict. But he tries to show that these phenomena can be given a monist interpretation. At the same time, Kelsen exploits the challenge against monism to build an argument against national monism and for international monism. In contrast to international monism, national monism must deny the phenomena that seem to support legal pluralism. Given that the appearance of a possibility of legal conflict cannot be denied, international monism shows itself to be more descriptively adequate (and not just more normatively attractive) than national monism.15

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15 See Kelsen, *Introduction to the Problems of Legal Theory* (n. 2 above) 107-25.
Let me try to illustrate these points with reference to an imaginary example of conflict between national and international law. Assume that two countries have been at war, and a treaty of peace between them is now concluded. One of the provisions of the treaty requires each signatory to either prosecute those of its own soldiers accused by the other side of war crimes or else to extradite them to the other signatory. Not long after the treaty has been signed and ratified by both states, an election in one of the two countries leads to a win of the previous opposition which rejects the prosecution or extradition-clause of the treaty. The new parliamentary majority quickly enacts a law that shields all former soldiers from prosecution for war crimes and that makes it illegal to extradite them. Under the state’s constitutional law, the national judiciary and executive are not permitted to implement treaty-provisions unless they have been incorporated into national law through parliamentary legislation. And, given the principle *lex posterior derogat priori*, the new law is regarded as a valid legislative repeal of the previous ratification of the treaty’s prosecution or extradition-clause. Hence, the national judicial and executive organs now take the view that the law requires them not to prosecute or extradite the accused soldiers. Representatives of the other signatory-state, however, point out that the obligation under international law to prosecute or extradite still exists, notwithstanding the internal repeal of the relevant clause of the treaty. What is more, they announce that their government will take itself to be justified to engage in reprisals if the treaty is not honoured. This scenario seems to constitute a clear-cut instance of a conflict of valid norms. There is an international norm that requires prosecution or extradition, and a national law that prohibits both.

It seems at first glance that if we adopted either variant of Kelsenian monism, national or international, to deal with the scenario, we would be forced to embrace altogether implausible accounts of the legal situation. A Kelsenian national monist would have to deny that there is still an international obligation to prosecute or extradite after the internal repeal. After all, he will hold that the existence of obligations under international law is in all cases dependent on a national law that incorporates the relevant international norm and makes it binding for the state’s organs. But this, as Kelsen himself is at pains to point out, is just another way of denying the existence of international
obligations altogether. It is to claim, in effect, that international law could never bind a state against its own will. This position, Kelsen claims, is “the standpoint of the primitive man, who, with utmost presumption, acknowledges as a legal community only his own community.” A Kelsenian international monist, by contrast, would presumably have to argue that the national law that prohibits prosecution or extradition is not a valid law, since it conflicts with international law. This conception avoids the position of the primitive man, but it has little descriptive plausibility, given that the national law meets all national criteria of validity and is in fact applied and executed by the state’s organs. If we want to acknowledge the validity of both the international and the conflicting national norm, we are forced, or so it seems, to adopt legal pluralism.

In Kelsen’s view, however, we are moving a little too quickly now. While Kelsen agrees that national monism would imply a wholesale denial of the possibility of objective international obligations binding states against their will, and that it should be rejected for that reason, he argues that international monism has more resources to accommodate the phenomena that give rise to the appearance of conflict than we have so far recognized. According to Kelsen, the claim that the national law that repeals the prosecution or extradition-clause is a valid law is not incompatible with international monism or with the continuing existence of an international obligation to prosecute or extradite.

International monism, to recapitulate, is the view that all valid laws must form part of the international legal system, i.e. they must all derive from the basic norm of international law. National legal orders, according to international monism, are to be regarded as subordinate parts of the international legal system.

Note that, for this position to even get off the ground, one needs some kind of story about how national legal norms derive from a basic norm of international law. To

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16 See ibid. 114-17.
17 Ibid. 114. Kelsen’s observation in 1932 that this is “a view that has not been fully overcome even today” (ibid.) still holds true. See for example Eric Posner, *The Perils of Global Legalism* (Chicago: University of Chicago Press, 2009).
offer such a story, it is plainly not enough simply to claim that international law is higher than national law in the sense that it prevails in case of conflict. Remember that what it means, according to Kelsen, for lower-level norms to derive from higher-level legal norms is for the latter to have authorized the enactment of the former. To say that international law is higher than national law, in the sense that it cannot be invalidated by national law, does not yet explain how international law can be said to have authorized the creation of national law. To answer this question, Kelsen invokes the principle of effectiveness, which he takes to be a general norm of customary international law. The principle of effectiveness states, roughly, that a community that exercises successful de facto control over a given territory is to be recognized as a state, endowed with the authority to create a legal order for those living within the relevant territory. A successful revolution that replaces an old constitution with a new, through extra-constitutional means, may appear as a completely new legal beginning from a national perspective. But for the Kelsenian international lawyer, revolutionary success is a legal condition for the legitimate exercise of legal authority within a given territory. From the point of view of international law, then, it is international law that empowers states to create their own legal order.18

Of course, international monism’s claim that all national law is authorized by international law goes along with a claim to international law’s hierarchical superiority. If the state’s authority is derived from a norm of customary international law, then general norms of customary international law must be higher than any legal norm created by a state. One particularly important general norm of customary international law is the norm pacta sunt servanda, which allows states to create particular international legal norms through mutual agreement. If pacta sunt servanda, as a norm of customary international law, is higher than any national legal norm, the name must hold for the particular international legal norms which it validates. Hence, international monism implies that treaty-based obligations that are valid under international law cannot be invalidated by any national law. It seems, then, that we are still facing an impasse: the content of the national law that repeals the prosecution or extradition-clause in our example conflicts

18 See Kelsen, Introduction to the Problems of Legal Theory (n. 2 above) 61-62, 120-22.
with the content of a higher, international norm. So how can it be the case that international monism does not force us to deny the validity of the national law?

The answer to this question, for Kelsen, flows from the fact that international law is a primitive legal system. To start with, international law is primitive insofar as it does not provide centralized and institutionalized mechanisms of legislation, adjudication and enforcement. Much like individuals in a Lockean state of nature, states have to interpret international law for themselves, unless they voluntarily submit to arbitration or international adjudication, and they have to enforce the law by resort to legal self-help in the form of reprisals, sanctions, or war. International law is primitive in a second, closely related respect. Norms of international law typically do not have direct effect in national legal orders as they are incompletely specified. A norm of international law imposes obligations on states, but it does not typically determine how a state is to discharge its international obligations. Rather, international law leaves it to the state legal order to determine which of its authorities is responsible for implementing international norms to which it might be subject. The most important consequence of the incomplete specification of international norms is that the responsibility for a violation of an international norm falls on the violating state as a whole, not on particular individuals within that state. Another state whose rights under international law have been violated is entitled to hold the violating community collectively responsible and to resort to reprisals or war to punish the violation of its rights.¹⁹

The national law that internally repeals the prosecution or extradition-clause undoubtedly constitutes a violation of international law. But this does not entail, according to Kelsen, that it is legally invalid. Though it violates international law, the law is authorized by the principle of effectiveness and thus binds the national judiciary and executive. The violation of international law merely entails, in Kelsen’s view, that the other signatory-state is permitted, under international law, to hold the offending state collectively responsible and impose a sanction on that state. There is no logical inconsistency between the proposition that other signatory is legally permitted to use

¹⁹ See ibid. 108-11.
force against the state that violated the treaty and the proposition that that state’s organs
are legally prohibited from prosecuting or extraditing the accused war criminals. What
is more, the situation does not give rise to practical inconsistency. Imagine you are a legal
official in the offending state that enacted the law repealing the prosecution or extradition
clause. It is perfectly possible for you to take the view that your own state has a valid
international duty to prosecute or extradite, and that it is rightly subject to an international
sanction in case of violation of that obligation, and to hold, at the same time, that you are
not legally permitted to prosecute or to judge fellow citizens accused of war crimes.
Due to the primitive nature of international law, however, the two conflicting norms do
not impose contradictory demands on the behaviour of any particular human agent. There
is no individual addressee of the law who is subject to two legal requirements that cannot
both be obeyed.

Note that this description of the normative situation is able to maintain the claim
that international law is hierarchically higher than national law. According to
international monism, international obligations cannot be abrogated by national law. This
aspect of monism is preserved insofar as the other signatory state is still taken to be
legally entitled to insist on the international obligation, though it has been internally
repealed. National monism is considerably less plausible than international monism
because it is forced to deny, in contrast to international monism, that the international
norm and the national law can be jointly valid. If international norms must be
incorporated into national law by national legislation to be valid, they cannot continue to
be valid in the face of later national laws that repeal the original incorporation.
International monism, in other words, can accommodate the appearance of legal conflict
that seems to force us into pluralism, while national monism cannot.

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20 See ibid. 117-19.
21 Note one interesting implication of this possibility: It would clearly be wrong to infer a state’s non-
recognition of an international obligation from the fact that its legal officials refuse to implement it. And
even if a state’s legal officials indeed refused to recognize an international obligation, that refusal would
not automatically entail that international monism must be wrong. The international monist interpretation
of the legal situation will remain available as long as members of the international community by and large
acknowledge pacta sunt servanda as a valid norm of customary international law and mostly conform to it.
The empirical observation that states tend not to recognize international law as the basis of the state’s legal
authority, therefore, does not suffice to show that international monism is untenable.
Needless to say, it has not yet been shown that Kelsen’s argument for international monism is an altogether satisfactory answer to the pluralist challenge. But Kelsen’s reply at least establishes that there is a coherent monist interpretation of the phenomena to which legal pluralists appeal to make their case. Kelsen’s internationalism can accommodate the possibility of a national norm that constitutes a violation of an international norm within the bounds of a monist perspective. The truth of legal pluralism, therefore, does not automatically follow from the observation that there are or that there could be valid national laws that violate international law, or from the observation that international law needs to recognized by national legal authorities and to be incorporated into national law to bind national legal officials. Monism, however implausible at first glance, is at least a possible theory of global legal order. Whether it is also possible theory of European legal order remains to be seen.

II. Kelsen’s Legal Monism and European Legal Order

Let us now try our hand at applying legal monism in the description of European law. As Catherine Richmond has pointed out, any attempt to do so must take into account the complexities that arise from the fact that we are no longer trying to understand the relationship between two levels of law (international law and national law) but rather that between three different legal orders (international law, national law, EU law).\textsuperscript{22} To offer a monist interpretation of the relationships of international law, national law, and EU law, one must show how all three legal orders form part of one and the same, hierarchically structured legal system, i.e. how the norms of all three legal orders derive from the same basic norm.

From a purely combinatorial point of view, there are nine different possible constructions of European law. The basic norm of the legal system must either be a norm of international Law (IL), a norm of national law (NL), or a norm of EU law (EUL). In

\textsuperscript{22} See Richmond, “Preserving the Identity Crisis” (n. 4 above).
other words, our construction must either treat international law or national law or EU law as highest-level law. Within each of these three basic constructions, there are three ways to flesh out the dependence of the other two legal orders on the legal order that is given highest status. For example, if we hold that EUL is the highest-level law, and that the basic norm of the legal system is a norm of EUL, we can either construct the legal system as one in which NL derives from EUL and IL from NL (EUL-NL-IL) or as one in which IL derives from EUL and NL from IL (EUL-IL-NL). A third possibility is that both NL and IL derive from EUL but not from one another (EUL-NL/IL), just like national legal orders, in Kelsen’s international monism, all derive from IL, via the principle of effectiveness, but not from one another. If we treat a norm of IL or NL as our basic norm, we will in both cases arrive at three analogous possibilities.

In what follows, I will discuss the different combinatorial possibilities for the construction of European law just outlined. Previous attempts to offer Kelsenian interpretations of European law have, in my view, either gone wrong, or they have been much too permissive. Ines Weyland, for instance, claims that Kelsenian monism, if applied to European legal order, either leads to European monism (i.e. a construction that starts from a European basic norm) or to national monism. But, as I will show, both European monism and national monism are not available in a Kelsenian interpretation of European law. Catherine Richmond has, by contrast, argued that several of the combinatorial options are more or less equally viable Kelsenian interpretations of European law, so that Kelsen’s theory of legal system, since it gives us a choice between different perspectives of legal construction, is really equivalent to legal pluralism. This view is likewise mistaken. In truth, only one of the nine combinatorial possibilities is a plausible Kelsenian interpretation of European law, namely the construction that MacCormick called ‘pluralism under international law’.

**National Monisms (NL-IL-EUL, NL-EUL-IL, or NL-IL/EUL):** National monism as an interpretation of European law is subject to the same weakness that led

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23 See Weyland, “The Application of Kelsen’s Theory of Legal System to European Community Law” (n. 3 above) 26-36.
24 See Richmond, “Preserving the Identity Crisis” (n. 4 above).
Kelsen to question national monism as an interpretation of the relation between national and international law. To start with, all three combinatorially possible national monist interpretations of European law imply that international law derives from national law. Hence, they are all incapable of conceiving of genuine obligations under international law that bind states even against their will. If that is a good enough reason to reject national monism as an interpretation of the relation of national law to international law, it should be a good enough reason to reject a national monist interpretation of European law, before we have even begun to look at the European implications of national monism.

What is more, all national monist interpretations would seem to carry the implication that EUL cannot bind member states against their own will. From a national monist perspective, EUL that conflicts with NL would have to be regarded as invalid or non-existing (for the same reasons that block national monism from acknowledging the validity or existence of norms of international law that are violated by norms of national law). It should be obvious that this restraint makes it very difficult, to say the least, to conceive of the EU as a legally co-ordinated commonwealth comprising several member states of equal legal standing. Hence, national monism does not offer an interpretation of European law that is plausible enough to be taken seriously.

**European Monisms (EUL-NL-IL, EUL-IL-NL, or EUL-IL/NL):** All three European monist constructions are as implausible as the national monist constructions. All three options claim that IL is derived from EUL. And the problem with this claim is obvious. There just is no remotely plausible story as to how IL might derive from EUL. One might try to argue, perhaps, that EUL has supremacy over IL, in the sense that norms of IL that conflict with EUL will lack validity from the EUL-perspective. But even if this claim can somehow be defended, we still need a further explanation of how all valid norms of IL, all those that don’t conflict with EUL, derive from EUL. Remember that a norm n1 is said to derive from another norm n2 if and only if n2 authorized the enactment of n1. It is rather hard to see how the enactment of all norms of IL that don’t conflict with

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25 I am adopting this description of the EU from MacCormick, *Questioning Sovereignty* (n. 5 above) 137-43.
EUL could be said to have been authorized by EUL. Why, for instance, should the validity of a treaty between Brazil and Argentina derive from EUL?

Note that national monism, though it is undoubtedly flawed, does not have the same problem. National monism does have a story as to how IL derives from NL. According to the national monist, all valid law derives from national legislation, and the internal process of ratification and incorporation is therefore the only way in which IL (or, for that matter, the NL of other states) could have acquired validity. One might argue that this claim is as ridiculous as the idea that all IL derives from EUL. This is of course true, in a sense. But there is nevertheless an important difference between the two cases. As Kelsen points out, national monism is the legal theory of the Westphalian sovereign state that claims a monopoly of legislative authority within a certain territory. For those who live within the territory of a Westphalian sovereign, national monism might appear to make a certain sense, since any law not recognized by their own legislator will never have any practical relevance for how they ought to govern their affairs, unless they venture into foreign territory. Clearly, EUL does not raise a monopolistic claim of this sort for the territory of all member states; however we may have to understand the claim that EUL is an autonomous legal order endowed with supremacy and direct effect. The claim that IL derives from EUL must therefore be false.

A similar problem arises with respect to the claim that NL derives from EUL, which is part of the first and the third European monist construction. There is no plausible story as to how all national law of member states could derive from EUL. Clearly, EUL is not what authorizes the enactment of national laws in those areas where member states still decide for themselves.26 Note that this observation does not conflict with the claim

26 MacCormick, *Beyond Sovereignty* (n. 5 above) at 117 gives further reasons for rejecting the claim that NL derives from EUL: “...the effective legislature for the Community is the Council of Ministers, whose members are identifiable only by reference to the place they hold according to state-systems of law. So Community powers of legal change and criteria of validity presuppose the validity of competences that are conferred by state-systems and not otherwise validated by EC law.” What is more: “…it is clear that institutions of state law look to the state legal order for confirmation of their competences. They do not treat this as contingent upon ulterior validation or legitimation by the Community.” The first of these two reasons comports with my own argument, the second, as MacCormick acknowledges, would be rejected by Kelsen. As we have seen above at n. 21, it is perfectly possible, according to Kelsen, to hold that NL derives from IL, even in case national authorities do not recognize NL to derive from IL.
that EUL enjoys supremacy over NL or with the doctrine of direct effect. Commentators sometimes wrongly assume that supremacy and direct effect, as well as the claim that EUL is an autonomous legal order, entail European monism. But this inference is evidently fallacious. In a Kelsenian framework, European monism is the claim that all NL derives from EUL, and this simply doesn’t follow from the view that EUL takes precedence over NL in cases of conflict and neither does it follow from the doctrine of direct effect or from the claim that EUL has its own sources. I conclude that none of the European monist constructions is plausible enough to be taken seriously as an interpretation of European law.

**International Monisms (IL-NL-EUL, IL-EUL-NL, or IL-EUL/NL):** The first two combinatorially possible constructions that start out from IL must be rejected for reasons that we have already discussed. The third option, by contrast, does not fail on Kelsenian grounds, and it is therefore the only possible Kelsenian construction of European law.

Let me start with the first possibility, which might be described as international monism with subordination of European law to national law (IL-NL-EUL). This view might be attractive for those who want to subject EUL to NL without having to embrace national monism. It is congenial to the idea, it seems, that EUL is simply a treaty-based regime under international law that is ultimately compatible with continuing national sovereignty. Though some defenders of this position appeal to Kelsen, the construction is actually incoherent from Kelsen’s point of view. The view acknowledges that NL is derived from IL, and thus it must fully own up to the implications of the hierarchical superiority of IL to NL to be coherent. As we have seen, the hierarchical superiority of IL to NL implies that general norms of customary international law are higher than all national law and that they cannot be abrogated by national law. If *pacta sunt servanda* is recognition of a higher legal authority, therefore, does not suffice to establish the non-existence of such an authority.

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27 See for example Eleftheriadis, “Pluralism and Integrity” (n. 6 above).
28 See Schilling, “The Autonomy of Community Legal Order” (n. 3 above) 391. Schilling’s view might be a form of international monism that derives EUL from IL, and not a form of national monism, as I claimed above in n. 3. Schilling holds that EUL is derived from IL, but he does not make it clear whether, in his view, IL derives from NL or NL from IL.
a norm of customary international law, it follows, as we have also seen, that particular contractual obligations of international law, though they can only be imposed on a state with its own consent, derive their validity from customary international law, since it is customary international law that authorizes their creation, that they are higher than national law, and that they cannot be abrogated by national law. If, finally, the validity of EUL is to be based on international treaty and thus on the principle *pacta sunt servanda*, it follows that it cannot be the case that the validity EUL derives from NL. Rather, we are committed to the view that EUL’s enactment is authorized by norms of customary public international law. Or in other words: If NL derives from IL, then so must EUL.

The second international monist construction claims that EUL is derived from IL, and NL from EUL. This view can be given short shrift, as it involves the claim that NL is derived from EUL. We have already seen why this claim makes no sense: EUL may have supremacy and direct effect, but it evidently doesn’t even claim to authorize the enactment of all NL.

We are thus left with one final possibility, an international monist construction according to which both NL and EUL derive directly from IL but not from one another. This, I take it, is what MacCormick referred to as ‘pluralism under international law.’ This construction is not afflicted by any of the problems that undermine the other constructions. Since it is a variant of international monism, it honours the objective validity of IL as well as of EUL, unlike national monism. At the same time, the view has coherent accounts of how NL and EUL derive from IL. NL derives from IL via the principle of effectiveness, and EUL derives from IL via *pacta sunt servanda*. To conclude: If we attend carefully to what is involved in the Kelsenian derivation of one norm or group of norms from another, and if we want to avoid denying the objective validity of IL and EUL, then pluralism under international law will be the only available

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29 See MacCormick, *Questioning Sovereignty* (n. 5 above) 113-21,
Kelsenian interpretation of European legal order (and, for that matter, of global legal order).\textsuperscript{30}

As MacCormick himself pointed out, ‘pluralism under international law’ is a somewhat misleading name. If pluralism is the view that there are several completely independent legal systems, then pluralism under international law is not a form of pluralism but of monism, as it claims that NL and EUL belong as subordinate parts to the international legal system.\textsuperscript{31} But MacCormick’s designation is nevertheless meaningful, since pluralism under international law is a form of monism that has the resources to accommodate the basic observations that motivate constitutional pluralism. According to pluralism under international law, EUL is not derived from NL, and NL not from EUL. This endows both with a relative independence from each other which allows us to make sense of the claim that EUL is an autonomous legal order without having to deny that NL is validated by sources that have nothing to do with EUL.

To test this claim, let us ask what we can make of the claim that EUL is an autonomous legal order that enjoys supremacy over NL and direct effect within the legal orders of the member states, while using pluralism under international law as our interpretive approach.

Pluralism under international law holds, as we have seen, that the validity of EUL derives from customary norms of public international law, in particular from \textit{pacta sunt servanda}. Since customary norms of IL are higher than all NL, so must be EUL, as a set of particular legal norms whose enactment took place under authorization from IL. The bindingness of obligations under EUL, in other words, doesn’t derive from NL, and norms of EUL therefore cannot be abrogated by NL. This much is simply a consequence of the fact that pluralism under international law is a form of international monism, which holds that all treaty-based obligations under IL enjoy supremacy over NL. This is at least

\textsuperscript{30} The reconciliation of Kelsen’s monism with legal pluralism offered in Richmond, “Preserving the Identity Crisis” (n. 4 above) therefore fails. Kelsen’s legal theory leaves us with no real choice of perspective once all the theory-internal factors that constrain the choice between different constructions are taken into account.

\textsuperscript{31} See MacCormick, Questioning Sovereignty (n. 5 above) 119.
part of what it means to say that EUL is an autonomous legal order. But of course, it cannot be the whole story. EUL differs from classical treaty-based regimes under international law insofar as the treaties constituted a supra-national legislator endowed with the authority to create legislative norms, and these norms enjoy not just supremacy over NL, in the sense of being on a higher level of legal hierarchy, but also direct effect within national legal orders. In other words, member states no longer have the freedom to determine how their obligations under EUL are to be internally implemented. Norms of EUL are not incomplete in the same way as classical norms of IL. EUL is a subordinate part of IL that, while it is a supra-national legal order, partially overcomes the primitive nature of IL. In Kelsenian terms, EUL enjoys a degree of centralization that is somewhere in between the high degree of centralization that characterizes the legal orders of the Westphalian sovereign nation state and the complete lack of centralization that characterizes classical public international law. This is the other part of what it means to say that EUL is an autonomous legal order.

However, the claim that EUL is an autonomous legal order, so understood, does not entail, as we have already seen, that NL derives from EUL. It does not force us to embrace European monism in whatever form. The reason for this is not that states refuse to recognize the supremacy of EUL or that states still claim that their own constitution is the ultimate source of all law applicable within their territory. Such reasons express a national monist perspective incompatible with pluralism under international law. The reason why pluralism under international doesn’t commit us to European monism, rather, is that there is no even remotely credible account of how the enactment of all NL could be said to have been authorized by EUL. According to pluralism under international law, NL is authorized by the principle of effectiveness, which is itself a norm of general customary public international law. EUL and NL, though they do not form complete legal systems, thus both enjoy a relative independence. EUL is not derived from NL and NL is not derived from EUL. This relative independence with EUL and NL enjoy as subordinate parts of international law might well be able to account satisfactorily for all or most of the phenomena that give plausibility to constitutional pluralism.
How does pluralism under international law deal with the problem of the possibility of conflict between EUL and NL? How would it adjudicate cases where national laws seem to constitute violations of norms of EUL? Recall how Kelsen tried to accommodate the possibility of valid national norms that conflict with international law in his general discussion of international monism. He argued that such norms are valid if they satisfy national criteria of validity, and yet constitute a violation of IL permitting the injured party to employ sanctions. But this accommodation of conflict was premised on the primitive character of international law, which ensured that the two conflicting norms do not make conflicting requirements on the behaviour of any particular agent. This way of accommodating conflict is not available in the EUL-context. Since norms of EUL have direct effect, a material conflict between a norm of EUL and a norm of NL will lead to conflicting requirements on the behaviour of particular agents, such as the national judges or administrators who are tasked with applying both EUL and NL. This is the kind of legal conflict that Kelsen’s legal monism, for reasons outlined above, cannot countenance. Pluralism under international law is therefore committed to the view that norms of NL whose content conflicts with norms of EUL altogether lack validity and it requires acceptance of this principle on the part of national authorities.

Note, however, that the direct implications of this claim for the jurisdictional conflicts (or potential jurisdictional conflicts) that haunt the relationship between the ECJ and national constitutional courts seem quite thin. Conflicts between the ECJ and national courts are likely to take the form of a dispute over the correct interpretation of the limits of EUL, and not the form of an open challenge to EUL supremacy. Any finding that a purported norm of EUL conflicts with a national constitutional norm, if it were ever to occur, would probably go along with the view that the impugned European decision was *ultra vires*. Such a line of argument needn’t question the supremacy and direct effect of EUL. The claim that NL that conflicts with EUL is invalid does not by itself answer the question who is to be the final judge of whether any particular norm of NL indeed conflicts with EUL. Kelsen would, in general, caution against confusing questions of jurisdiction with questions regarding the structure of legal system. In Kelsen’s view, a legal order does not have to have its own jurisdictional organs, endowed with
competence-competence or sovereignty, to be supreme. Public international law, according to international monism, is a legal order that enjoys supremacy over all NL, but it does not have a strong system of courts endowed with anything resembling competence-competence. If the Kelsenian claim of supremacy on behalf of IL is nevertheless credible, we should hold as well that the supremacy-claim on behalf of EUL does not by itself require endorsement of the view that the ECJ has jurisdictional competence-competence with respect to EUL. It would arguably be compatible with a system, however potentially inconvenient, where national courts take the final decision, for their own state, as to how to delimit EUL and NL.

What Kelsen would be concerned to maintain, however, is that the question whether a norm NL conflicts with EUL is always a legal question and always has a legal answer. It is therefore in principle fit to be decided by a court, and not to be regarded as a mere political question. This assumption is necessary if we want to maintain, with Neil MacCormick, that the EU is a legally constituted commonwealth. As I will argue by way of conclusion, pluralism under international law is attractive not least because it supports this assumption while constitutional pluralism does not.

**III. Coda: Why Monism?**

The argument so far does not amount to a full defence of Kelsen’s legal monism, either in general or with respect to the European context. What has been shown, I hope, is that legal monism is not as obviously implausible as one might think at first glance. Legal monism does not founder on the fact that there undoubtedly are national laws that violate international law. In the European context, legal monism does not imply European monism. Rather, it has the resources, in pluralism under international law, for a nuanced description of European legal order that can do justice to the (relative) autonomy of both EUL and NL. Monism, then, is at least a possible interpretation of global legal order and pluralism under international law is a possible interpretation of European legal order. But

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32 See ibid. 118-21.
this does not answer the question whether pluralism under international law is also a superior interpretation of European legal order, one that should be preferred to constitutional pluralism.

Kelsen himself would doubtless have argued that pluralism under international law is the only possible coherent interpretation of European legal order since he held that any coherent account of legal order must be monist. Legal cognition must comprehend all valid law as logically consistent, and this is only possible if all valid law is comprehended as part of one and the same hierarchically structured legal system. Though I cannot discuss the issue in detail here, I believe that this argument is unsound and that legal pluralists are right to reject it. It is certainly plausible to claim that it must be possible, if legal cognition is to be meaningful, to comprehend all laws that belong to one legal system as a consistent whole. It is also plausible to claim that if all valid laws are to form a consistent whole, they must all form part of the same legal system, since normative consistence among norms that appear to conflict can only be achieved through conflict-rules that stem from the hierarchical structure of a legal system to which both apparently conflicting norms belong. But it does not follow from these two plausible claims that all valid laws form a consistent whole and thus belong to one legal system.

A pluralist perspective that holds that two contradictory laws can both be valid if they belong to two different legal systems is not ruled out, as Kelsen claims, by the demand for mere descriptive coherence. There is no logical contradiction between the proposition that according to norm n1 belonging to legal system s1 one ought to perform a and the proposition that according to norm n1 belonging to legal system s2 one ought to refrain from performing a. To be sure, if your are faced with a conflict of this sort, and find yourself in a situation where both legal system address their claims to you, there will be no clear answer as to what the law, in the abstract, requires you to do. It all depends, the legal pluralist will argue, on whether we are talking about the law of s1 or the law of s2, and the choice as to which system’s claims to follow may turn out to be a political or moral choice not itself determined by law.

33 See Kelsen, *Introduction to the Problems of Legal Theory* (n. 2 above) 111-12.
This suggests that Kelsen’s demand to understand all valid laws as forming a consistent whole is ultimately a normative demand that cannot be defended on purely descriptive grounds. In a legal monist framework, in contrast to a pluralist framework, the law never runs out and one will never find oneself in a situation of conflict between laws that has no legal solution. Since all laws are understood as belonging to the same system, any apparent conflict can be resolved on a legal basis. A defence of the view that pluralism under international law is superior to constitutional pluralisms, as an interpretation of European legal order, might therefore build on the claim that it would be desirable to conceive of all legal conflict within the European context as having a legal solution. Let me conclude by trying to briefly outline two reasons for that claim.

Constitutional pluralists take pride in having overcome the classical, national-monist paradigm of sovereignty. But it seems at times as though constitutional pluralism merely transfers the self-referentiality and monological nature of traditional sovereignty from the Westphalian state to the several autonomous legal systems that are said to exist in the European and global legal environment. To be sure, constitutional pluralists emphasize the claim that the several autonomous legal systems should recognize each other’s existence, be mindful of each other’s claims, and engage in a mutual dialogue to avoid open conflict. However, it is not always easy to see how such moral exhortations differ from the normative expectations that sovereign Westphalian states would have directed towards each other, or to understand why their acceptance on the part of important agents in the several legal systems should be taken to constitute a European legal order, as opposed to a new space for diplomacy. It has been remarked that constitutional pluralism doesn’t really have much to say, beyond insisting on good

manners on all sides, as to how one would have to decide cases of serious legal conflict in Europe.\textsuperscript{37} This is not surprising, given that constitutional pluralism is seems committed to the view, at the end of the day, that inter-systemic conflicts have no legal resolution. It is doubtful, therefore, whether constitutional pluralism can conceive of Europe as a legally constituted commonwealth.

The attractiveness of constitutional pluralism rests to a large extent on the belief that pluralism is the only available alternative to a conception of legal system that sees all law as the product of a unitary sovereign who occupies the highest rank in a simple hierarchy of command and obedience. Monism is implicitly associated with this idea of sovereignty and, as a result, is thought to be inherently incapable of doing justice to the undeniable fact of the relative autonomy of national and European law. The argument of this paper has established that these assumptions are flawed. Kelsen’s monism claims that the legal system has a hierarchical structure. But this structure has nothing to do with the traditional doctrine of sovereignty and it does not contain, on any of its levels, any agent or institution who, like a Westphalian sovereign, monopolizes all legal and legislative authority. Kelsen’s monism, as pluralism under international law, is perfectly capable of accommodating the relative autonomy of NL and EUL, even while conceiving of both as parts of one and the same international legal system. It is a much better template for thinking legal unity without political sovereignty than constitutional pluralism.\textsuperscript{38}

Pluralism under international law, to come to the second reason, may turn out to form a better basis for European democracy than (radical) constitutional pluralism. Democracy presupposes a legally-constituted \textit{demos}. The successful exercise of equal rights of political participation on the part of all who are affected by some political decision clearly requires legal codification. But if all proper law is intra-systemic, as legal pluralists seem to suggest, then all democratic decision-taking must also be intra-systemic. And if all democratic decision-taking is intra-systemic, it follows that none of

\textsuperscript{37} See MacCormick, Questioning Sovereignty (n. 5 above) 119; Menéndez, “Is European Union Law a Pluralist Legal Order” (n. 35 above) 292-94.
\textsuperscript{38} Some key elements of Kelsen’s approach, such as the combination of legal unity with institutional plurality, have recently been defended as part of the theory of constitutional synthesis. See Menéndez and Fossum, \textit{The Constitution’s Gift} (n. 35 above).
the potential inter-systemic conflicts that the several autonomous legal systems in the European environment might run into will be open to settlement through a democratic decision of all those affected by the results. Of course, the adoption of pluralism under international law does not by itself ensure that conflicts between NL and EUL will be settled democratically. However, its conception of Europe as a legally constituted commonwealth is at least a necessary condition of the democratic settlement of conflicts between NL and EUL.

A second reason to think that pluralism under international law is more conducive to European democracy relates to the possible future of the European commonwealth. Imagine the EU, without acquiring any new competences, was to be transformed into a parliamentary democracy, with the European parliament acting as the European legislator. Even after such a democratic reform of European legislation, there would still be conflicts over how to delimit the competence of the European and the respective national legislatures. According to pluralism under international law, these conflicts have a legal solution that allows us to decide on legal grounds which legislature (and thus which *demos*) is competent to decide. It is hard to see, by contrast, how multi-level democracy could work under the pluralist assumption that intra-systemic conflicts have no legal resolution. In that case, there could be no constitutional basis for assigning decisions to the competent *demos*. Conflicts of competence could only be settled in a purely political way that would inevitably have a tendency to turn into a contest for sovereignty between the EU and the member states.

These normative arguments for pluralism under international law undoubtedly need a lot more development. It should have become clear, though, that constitutional pluralism is not the only game in town. The move beyond sovereign state in European constitutional theory need not take the form of constitutional pluralism, and there are serious reasons to think that it should not.