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EDITORIAL COMMENTS

Union membership in times of crisis

The crisis currently afflicting Europe is profound and multifaceted. It affects the economic stability, political dynamics, and moral setting of many Member States; but it also calls for a reflection on the very meaning of membership in a common enterprise. It is worth recalling that European integration is first and foremost a project aimed at establishing a "special type of relationship between States"[1] based on a rejection of the diplomatic system invented in 17th century Europe that governed the relations between Nation-States previously. Whereas the classic system, based on diplomacy, saw international society as a collection of sovereign and independent powers, the law of integration views European society as a collective of sovereign yet interdependent Member States. It does not challenge the existence of sovereign States as such, but it does make their existence subject to co-existence. As provided by former Article 1(3) TEU, "The Union's task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples". To that end, it relies principally on the setting up of a common framework of action – the EU institutional and legal framework.

We are now experiencing the development of a set of relations that deal with the objectives or the values of the Union, and yet seek to distance themselves from its common framework. This is by no means a new phenomenon, as demonstrated by the oft-cited example of the Schengen system of cooperation on the gradual abolition of checks at the common borders established in 1985. Other, more widespread, forms of cooperation taking place outside the EU legal framework but involving all Member States have long since been developed under the form of "acts of the representatives of the governments of the Member States within the Council".[2] A parallel relational space has

1. Pescatore, *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Leiden, Sijthoff, 1974), Preface.

2. See already on this practice Bebr, "Acts of Representatives of the Governments of the Member States" and Pescatore, "Remarques sur la nature juridique des 'décisions des représentants des Etats membres réunis au sein du Conseil'", (1966) SEW, at 529 and 579. See also more recently the Decision of the Heads of State or Government of the 27 Member States of the European Union of 18–19 June 2009 on the concerns of the Irish people on the Treaty of Lisbon, meeting not within the Council but within the European Council. This Decision was

developed which questions the structural principles of Union law.[3] In recent times, however, the phenomenon has changed in scope. In the wake of the euro crisis we can observe the conclusion of treaties among the Member States (EFSF, ESM, Fiscal Compact and the forthcoming agreement on the Single Resolution Fund[4]) impacting on the system of competences and the institutional balance set out in the EU treaties. The phenomenon goes beyond the scope of the management of the euro crisis, as evidenced by the recent Agreement on a Unified Patent Court.[5] Disputes between Member States have also come to the forefront of the European agenda due to their interference with the common, founding values of the Union. Examples include the dispute between Hungary and Slovakia on the status of the Hungarian community in Slovakia, the dispute between France and Romania on the question of the Roma population, and the revival in 2013 of the dispute between UK and Spain on the status of the territory of Gibraltar. Finally, the 2014 referendum on Scottish independence – and the echoes of the Scottish debate in Catalunya – shed light on the intricate relationships between political communities within a Member State. All of these developments question the foundations, composition and boundaries of the European Union.

It is within this context that the recently published book by Luuk van Middelaar, *The Passage to Europe. How a Continent Became a Union*, is to be situated.[6] Its main thrust is to emphasize the existence of an original sphere of joint action on the part of Member States, that operates outside the Union's institutional framework. Van Middelaar calls this space the "intermediate sphere", as it occupies a place between the internal sphere of the EU institutions and the external sphere of the sovereign States. It is not to be

converted into a Protocol annexed to the EU treaties on the occasion of the signature of the Treaty concerning the accession of Croatia to the EU (O.J. 2013, L 60/131).

3. This concerns first of all the "constitutional guarantee" (the ECJ's expression in Case C-584/10 P, *Commission* v. *Kadi,* judgment of 18 July 2013, nyr, para 66) consisting of the judicial review of the lawfulness of EU measures. As stated elsewhere by the Court, "acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court" (Case C-181/91, *Parliament* v. *Council and Commission,* [1993] ECR I-3685, para 12).

4. See Decision of the representatives of the euro area Member States meeting within the Council of the European Union of 18 Dec. 2013 and Terms of reference concerning the intergovernmental agreement on the Single Resolution Fund (Council of the EU, EF 280, ECOFIN 1185, 20 Dec. 2013).

5. The entry into force of this Agreement, signed by 25 Member States on 19 Feb. 2013, conditions the application of the EU Regulation of 17 Dec. 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection which is now challenged by Spain before the Court (pending Case C-146/13).

6. Originally published in 2009 in Dutch as *De passage naar Europa, Geschiedenis van een begin*. See further the book review in this issue by Azoulai and Jaeger, 311–313.

reduced to "European political cooperation" – the foreign policy coordination that once followed and supported the work conducted within the institutional sphere of the EU. This intermediate sphere is pervasive and independent – and, in his view, it contains the "true Europe". According to Van Middelaar, Europe is not in Brussels, embodied by the European institutions and their agents. Europe has exited from the EU framework; it is an "ensemble of States", a club of Member States bound by "fortune" and events rather than treaties and rules. Van Middelaar also rejects the idea of a collection of isolated sovereign States which cooperate in matters of mutual interest. He argues that the distinction between supranationalism and intergovernmentalism is an "empty distinction". The Member States are bound together and as a self-organized club they take responsibilities. It is this entity – the "circle of members" – that most legitimately can be said to speak "on behalf of Europe". The strength of this circle relies on "the political fact of membership". To be a member of the Union is not conceived of as a legal operation whereby States confer extensive powers on the European institutions and make use of these institutions to advance the objectives they have in common. Union membership is a political fact: it consists of establishing special ties with other political communities and is demonstrated by an ability to react together to unexpected occurrences. Both the complex conditions of our time and the message conveyed by Van Middelaar's book should make us reflect further on the question of Union membership.

The idea of a common framework

A basic principle in the EU is that membership of the Union should always prevail over the reciprocal relations between the Member States. Already in 1974, Pescatore identified the essence of supranationality in an "idea of order determined by the existence of common values and interests".[7] This principle is made explicit in Article 49 TEU, which in turn refers to the values listed in Article 2 TEU. Accession to the Union is predicated on the recognition of liberal and democratic values. But the idea of an order continues to operate beyond accession and regulates the relationship between States within the Union. It materializes through three types of legal doctrine, as has been evident in the case law.

The first of these doctrines is institutional. Action by the Member States is enclosed within an institutional framework made up of procedures, rights and obligations. In *Defrenne II*, the Court made clear that the EC Treaty can only be modified by means of the amendment procedure provided by the Treaty.[8]

7. Pescatore, op. cit. *supra* note 1.
8. Case 43/75, *Defrenne* v. *Sabena,* [1976] ECR 455, para 58.

The Member States cannot rely on their sovereign power to evade the constraints laid down in the treaties. This protection extends to the legislative, administrative and judicial procedures provided for in the treaties. As a result, action can no longer be taken unilaterally by the Member States; decisions must be adopted "within the Community system which is designed to guarantee that the general interest of the Community is protected"[9] – or, more explicitly in the original French version of the judgment, decisions must be adopted "dans le cadre de l'ordre communautaire", which might be literally translated as "within the framework of the Community order". Action may be taken either within the Council, through the Commission or the Parliament, or by recourse to judicial remedies. In other words, *Van Gend en Loos* and *Costa* v. *ENEL* cannot be dissociated from Joined Cases 90 & 91/63, *Commission* v. *Luxembourg and Belgium*: the founding treaties are not limited to establishing a new legal order governing the powers, rights and obligations of its subjects; they establish a framework which governs the "necessary procedures" for exercising these powers as well as for "taking cognizance of and penalizing any breach" of them.[10]

This institutional doctrine does not stop here, however. It involves a certain conception of the institutions. EU institutions are not "common organs" in the hands of a group of States to be used to further their interests, as suggested by a contractual view of international organizations, such as first developed by Anzilotti.[11] The Court has been firmly opposed to this view, and particularly as far as the Council is concerned. That body should not be understood in purely intergovernmental terms, as a forum where each Member State defends its interests.[12] The power vested in the Union is conferred "not on the Member States acting together, but on the Council in its capacity as a Community institution", meaning it enjoys a certain autonomy of action and must be capable of promoting its own ends.[13]

The second doctrine concerns the nature of legality in the EU. It asserts that the EU legal order does not allow for mechanisms of reciprocity. The Member States cannot unilaterally adopt corrective or retaliatory measures to compensate for other Member States' failure to comply with the treaties, or to deter them from doing so.[14] Nor does the failure of another Member State or an EU institution constitute an excuse for not fulfilling a Member State's own

9. Case 232/78, *Commission* v. *France,* [1979] ECR 2729, para 7.

10. Joined Cases 90 & 91/63, *Commission* v. *Luxembourg and Belgium,* [1964] ECR 961.

11. Anzilotti, *Cours de droit international*, vol. 1 (Sirey, Paris 1929). See recently Santulli, "Retour à la théorie de l'organe commun", 113 *Revue Générale de Droit International Public* (2012), 565.

12. Case C-63/90, *Portugal and Spain* v. *Council,* [1992] ECR I-5073, para 53.

13. Case 38/69, *Commission* v. *Italy,* [1970] ECR 47, para 10.

14. Case 232/78, *Commission* v. *France,* [1979] ECR 2729, para 9.

obligations arising from the treaties.[15] As the Court famously stated in *Van Gend en Loos*, "the Treaty is more than an agreement which merely creates mutual obligations between the contracting parties".[16] It gives rise to an objective legality to which all institutional players are uniformly bound. Such objectivication informs the system of infringement proceedings and State liability, both of which are aimed at ensuring the full effectiveness of EU rules. In this context, any attempt to resurrect the intersubjective mechanisms enshrined in international law is bound to fail.[17]

The third doctrine is more ethical than legal in nature. It refers to the Union as a special ethos: Member States are bound to adopt a certain attitude towards the other actors. Reflected in Article 4(3) TEU, it mainly consists of a principle of sincere cooperation, full mutual respect, and a duty of mutual assistance. It also means that Member States must have due regard to the Union system as a whole. This means, for instance, that the governments of the Member States acting jointly outside the EU institutional framework are obliged to respect the power of the European Parliament to determine its internal organization and, more broadly, the proper functioning of the institutional system.[18] Even more striking is the fact that when acting within their sphere of "reserved powers", Member States are obliged to "cooperate in a spirit of loyalty" and abide by the most fundamental rules of the treaties. This is justified by "the solidarity which is at the basis of … the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty [now Article 4(3) TEU]".[19] This reference to the Community as a whole clearly suggests the existence of a collectivity which goes beyond the collection of States and is more than the sum of its parts. The power of each Member State is not denied, but it is to be exercised in consideration of the global system in which it is bound up and to which it owes a duty of care.[20]

Let us not develop this any further. It is enough to understand that membership has a very special meaning within the European Union. Not by chance, this meaning has been forcefully promoted by the Court in the field of external relations. It is there that the tension between independence and coexistence between the States, and with the European institutions, is at its most acute. The Court has worked out a vision of the Union as a "unified

15. Case 146/89, *Commission* v. *UK,* [1991] ECR I-3533, para 47.

16. Case 26/62, *Van Gend en Loos,* [1963] ECR 1.

17. Such is however the effort carried out by Simma in "Self-contained Regimes", 16 NYIL (1985), 111; Simma and Pulkowski, "Of Planets and the universe: Self-contained regimes in international law", 17 EJIL (2006), 483.

18. Case 230/81, *Luxembourg* v. *Parliament* [1983] ECR 255, para 37.

19. Cases 6/69 & 11/69, *Commission* v. *France* [1969] ECR 523, para 16.

20. Halberstam, "Of power and responsibility: The political morality of federal systems", 90 *Virginia Law Review* (2004), 731.

system" where the individual interests of the Member States are integrated into the framework of a common action embodied by the EU institutions.[21] However, this vision has proved difficult to live up to. The increasing overlap of the Union's and the Member States' external competences and the extension of the use of mixed agreements have rather blurred the distinction between Union action and Member State action. In this area, the development of the sphere of Member States' "joint action" outside the EU institutional framework raises fresh legal issues that have yet to be settled by the Court.[22]

Avoidance

The Union is tied to a certain form of institutional and legal culture. What is this culture worth? It minimizes conflicts between Member States, it ensures that all the stakeholders have a distinctive voice, it ensures that the main institutional players remain interconnected, it ensures the equality of Member States before EU law or at least mitigates the imbalances of power, it protects mutual trust within the Union, it fosters balanced behaviour on the part of the actors and helps identify common interests. However, in order for this to work, certain basic conditions must be met: the Member States must have trust in the EU institutional machinery and its effectiveness; their domestic administrations and institutions must be in some way committed to a certain idea of European unity; and there must exist a certain homogeneity in terms of political cultures, administrative structures, moral standards and economic development.

These days, none of these conditions can be taken for granted. The national governments are not willing to accept new transfers of powers to the EU institutions, in particular when it comes to sensitive matters involving large financial commitments. The decrease in trust and harmony, in a context of increased economic and political interdependence, may explain the development of both cooperation and disputes between Member States at the margins of the EU framework. What is gained from this phenomenon and what does it force us to lose? Let us take two examples recently brought before the Court and drawn from these two relational contexts (cooperation and disputes).

21. This vision emerged clearly in Case 22/70, *ERTA,* [1971] ECR 263 and continues through a different form in Case C-246/07, *Commission* v. *Sweden ("PFOS")* [2010] ECR I-3317.

22. The Court may have the opportunity to address some of these issues in two of the many cases recently brought by the Commission before it in this area: Case C-28/12, *Commission* v. *Council* on signing of an air services agreement with the United States and Case C-114/12, *Commission* v. *Council* on participation in negotiation of a broadcasting Convention, both pending.

The first case, between Hungary and Slovakia, concerned the latter's refusal to allow entry into its territory of the Hungarian President, who sought to participate in a commemoration organized by the Hungarian community living in Slovakia.[23] It is widely accepted that "the general relationship between the European nations continues to be governed by general international law".[24] Accordingly, outside the EU framework, the Member States continue to live under the regime of general international law. Such is the position of the Commission in this case: the right to control the access of a foreign Head of State to the national territory is regulated by international law and under that law the entry of a foreign Head of State is a question of a State's reserved competence. The Court is however more ambivalent, as reflected in its language. On the one hand, it finds that the fact that a Union citizen is performing the duties of a Head of State is such as to justify a limitation "on the exercise of the right of free movement" conferred by Article 21 TFEU, suggesting that EU law is applicable. On the other hand, the Court poses the question whether this factual situation "is liable to constitute a limitation, on the basis of international law, on the application of the right of free movement conferred [by EU law]", suggesting that EU law is not applicable. Either way, the reasoning of the Court in this case is far too simplistic. The Court asserts that because the situation is governed by international law, in particular the law governing diplomatic relations, EU law has no bite. This statement is not convincing and is in contradiction of a consistent line of case law.[25] It is clear that the Court was reluctant to engage in what it perceived as a highly sensitive political question. Advocate General Bot timidly argued that the commitment of Member States to maintain good-neighbourly relations is "consubstantial with their decision to join the Union", and may therefore be covered by EU law and in particular the principle of loyal cooperation. Indeed, isn't it so that any serious conflict between Member States, and especially about questions relating to the protection of minorities and mutual respect, is likely to disturb the proper functioning of the Union? The ambivalent language of the Court may conceal a degree of hesitation. But, in any case, it is a missed opportunity to begin the construction of a proper regime of mutual membership within the Union.

23. Case C-364/10, *Hungary* v. *Slovakia*, judgment of 16 Oct. 2012, nyr; see further annotation by Rossi, 50 CML Rev. (2013). 1451–1466.

24. Application instituting proceedings in the ICJ, *Jurisdictional Immunities of the States (Germany* v. *Italy)* para 6.

25. Case C-246/89, *Commission* v. *UK*, [1991] ECR I-4585; Case C-369/90, *Micheletti*, [1992] ECR; C-135/08, *Rottmann*, [2010] ECR.

Let us now turn to *Pringle,* concerning the validity of the Treaty establishing a European Stability Mechanism (ESM),[26] a remarkably ambivalent ruling. It has been rightly noted that the practice of a number of Member States acting outside the EU legal framework and making use of the EU institutions for this purpose is not a new one and, indeed, has been accepted by the Court in two previous judgments.[27] There are however two essential differences between the context of those judgments and the *Pringle* case. First of all, the ESM mechanism has as its objective the "safeguard of the euro area as a whole" – which itself is considered to be a central piece in the furtherance of the integration project or, in the words of the Court itself, as part of "the general interest of the Union". Secondly, the validity of the mechanism is made subject to a "duty to comply with European Union law", meaning that the operation of the mechanism is subject to strict conditionality, itself substantiated by the measures of budgetary discipline adopted by the Union.[28] This results in a twofold paradox. In a domain essential for the attainment of the Union's objectives, the Member States are allowed to act outside the EU framework and enjoy a large degree of autonomy. However, at the same time, this autonomy may only be exercised within strict substantive limits. Moreover, what is particularly striking is the apparent ease with which the Court accepts the use of the EU institutions in a context which is profoundly adverse to the development of the institutional culture of the EU. As Craig's thorough and perceptive analysis demonstrates, the whole decision "is premised on the implicit assumption that compatibility with the Lisbon Treaty 'means' only substantive and not decisional compatibility".[29] In other words, the Court failed to defend the normative assumptions underpinning the institutional culture of the EU, the protection from the imbalances of power and the protection from insulated minorities or rigid majorities.[30] What is left

26. Case C-370/12, *Pringle,* judgment of 27 Nov. 2012, nyr; see further annotation by T. Beukers and B. de Witte, 50 CML Rev. (2013), 805–848.

27. Case C-181 & 248/91, *Parliament* v. *Council & Parliament* v. *Commission* [1993] ECR; Case C-316/91, *Parliament* v. *Council*, [1994] ECR. See Peers, "Towards a new form of EU law?: The use of EU Institutions outside the EU Legal Framework", 9 EuConst (2013), 37.

28. Following a different path, the German Federal Constitutional Court has made the constitutionality of the ESM Treaty subject to respect of the objective of prices stability: 2BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12), paras. 203–206.

29. Craig, "*Pringle* and use of EU Institutions outside the EU Legal Framework: Foundations, procedure and substance", 9 EuConst (2013), 273.

30. See Dawson and F. de Witte, "Constitutional balance in the EU after the euro-Crisis", (2013) MLR, 817.

of the Union is a body of disciplinary rules. As a result, mutual trust and mutual respect are placed at risk.[31]

What is striking is that the problems confronting the Court in this context are very close to those with which we are familiar in the EU context, and yet they lead, in the rulings of the Court, to a retreat from the structural principles of EU law, forcing us to reflect on the value and the meaning of Union membership.

Union membership and mutual trust

What should be the response to these new challenges? One possible response is the option recently proposed by the Spinelli group,[32] which involves the reintegration of all relationships established outside the treaties within the EU institutional framework. This, however, seems both unrealistic and unhelpful in the present context. Indeed, it may encourage Member States to develop forms of intergovernmental relations within the EU framework. Already such a development can be discerned in the new "Union method" advocated by Angela Merkel, which rejects the Community method and instead favours the advent of "coordinated action in a spirit of solidarity".[33] The EU institutional framework is only one of the many institutional orders which exist in Europe. This plurality must be accepted. However, we may first consider the establishment of a clear order of priority. Before undertaking any action falling within the scope of EU competence or interfering with its objectives or values, the availability of the EU as a forum should be thoroughly considered.[34] More importantly, relations that develop outside the EU institutional framework and may affect the Union's objectives or values should not be left completely unregulated. They may legitimately be governed by EU law as part of its regime of membership.

Absent a strong sense of trust in the EU institutional mechanisms, membership relies almost entirely on the trust that Member States and their peoples place in each other. The Union is keen to incorporate within its mechanisms a conclusive presumption of mutual trust between Member

31. See also Poiares Maduro, "A new governance for the European Union and the euro: Democracy and justice" *RSCAS Policy Paper,* European University Institute 2012/11.

32. The Spinelli Group, *A Fundamental Law of the European Union* (Verlag Bertelsmann Stiftung, 2013).

33. Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 Nov. 2010 (available online).

34. Some inspiration could be drawn from the recent statement by the ECJ about the particular importance of the "condition of last resort" provided by Art. 20(2) TEU in relation to enhanced cooperation (Case C-274/11 & C-295/11, *Spain and Italy* v. *Council,* judgment of 16 April 2013, nyr).

States. The time is ripe to reverse the perspective. We must ask not whether mutual trust can be somehow assumed as and when Union law operates, but we should ask whether Union law is capable of generating the preconditions necessary to foster mutual trust. This requires first making sure that a certain convergence exists between, on the one hand, the fundamental values of Member States and the enforcement of those values by their administrative and judicial structures and, on the other, the foundational values of the Union. Such is the condition to ensure that Member States have mutual confidence in each other. "At issue is the *raison d'être* of the European Union".[35] The foreign ministers of Germany, the Netherlands, Denmark and Finland recently sent a joint letter to the President of the European Commission to call for a new mechanism of compliance when the fundamental values of the Union are at risk.[36] They suggest a normalization of the *droit de regard* in the internal affairs of another Member State, beyond the suspension procedure contained in Article 7 TEU and the exceptional arrangements made for Romania and Bulgaria.[37] This is because "our common values more than anything else are the glue which binds our nations together". This may be the first building block of a new regime of Union membership. This is by no means sufficient. A genuine regime of membership would continue with an extended obligation of loyal cooperation and due consideration, and minimum requirements concerning the balance of powers between the Member States collectively acting outside the EU institutional framework. If this will not solve the problem of trust, it may at least contribute to fostering a sense of collective responsibility.[38]

What we are witnessing is the birth of a distinctive form of legal discourse that departs from the traditional law of integration, but does so in a hesitant and rather fragmented way. It implies two main conceptual shifts. First, this discourse does not consider European integration as mainly consisting of a transfer of sovereign rights to supranational authorities in order to exercise

35. Joined Cases C-411 & 493/10, *N.S.* judgment of 21 Dec. 2011, nyr, para 83. See also Canor, "*My brother's keeper?* Horizontal *solange*: 'An ever closer *distrust* among the peoples of Europe'", 50 CML Rev. (2013), 369–382, 383.

36. <www.rtt.ro/en/scrisorea-prin-care-germania-finlanda-danemarca-si-olanda-solicita/?.

37. von Bogdandy and Ioannidis, "Systemic deficiency in the rule of law: What it is, what has been done, what can be done", 51 CML Rev., (2014), 59–96. See also the speech by the vice-president of the Commission Viviane Reding, "The EU and the Rule of Law – What next?", Centre for European Policy Studies, Brussels, 4 Sept. 2013 <europa.eu/rapid/press-release_SPEECH-13-677_en.htm>.

38. On this concept see Arendt, "Collective responsibility" in Bernauer (Ed.), *Amor Mundi. Explorations in the Faith and Thought of Hannah Arendt* (Nijhoff Publishers, Boston/Dordrecht, 1987), p. 43.

powers jointly.[39] Rather, it argues that the act of integrating is about showing commitment and loyalty to other Member States without exerting any pressure on them and without expecting from them immediate, short-term benefits. Second, this understanding does not consider EU law as being "addressed to Member States [alone] and not to their constituent entities".[40] Instead, it makes the case that not only States and State organs, but also their peoples and communities are involved in the European project. This resonates in a textual change introduced by the Lisbon Treaty: Article 1(3) TEU, focusing on the organization of Member States' relations, is substituted by Article 2 TEU that puts forward a model of "society of societies" heavily interconnected and relying on values.[41]

In *The Brothers Karamazov*, Dostoyevsky suggests that being truly part of the world means loving life itself more than the meaning of life and regardless of logic. In a similar if perhaps distant manner, belonging to the Union implies, before any acceptance of a set of objectives and policies, a commitment to join together, to establish special ties and to share a set of values.

39. See Opinion 1/09, *European and Community Patents Court,* [2011] ECR I-1137, para 65.

40. Case C-359/92, *Germany* v. *Council* [1994] ECR I-3681, para 38.

41. On the idea that interconnectedness is a precondition for mutual trust see Klingemann and Weldon, "A crisis of integration? The development of transnational dyadic trust in the European Union, 1954–2004", (2013) *European Journal of Political Research*, 457.