Reviewing Gunnar Beck’s 2012 analysis of the legal reasoning of the European Court of Justice (ECJ) in 2014, I cannot but be struck by an immediate question: when is a book at its most relevant? Is it most timely when the world it is describing is whole and safe? Or, by contrast, is it most illuminating when that world has fractured and broken? The unforeseen events of financial crisis and sovereign debt crisis have overtaken Beck’s analysis, and most particularly have undone his core, careful and insightful conclusion – although never explicitly stated – that the ECJ is not the activist Court proposed by so very many Europeanists, and is, instead, a Court constrained both by (flexible) structures of legal argumentation and by the (fluctuating) social and political context within which it operates. Post Pringle, and the cunningly-crafted assault on the quality of its (defective) legal reasoning that has now been launched by the German Constitutional Court (the Federal Constitutional Court) (FCC), even Gunnar Beck must now concede that the ECJ is a Court that has lost its legal way; is a Court that has strained the structures of legal reasoning to breaking point.

Yet, this is far from saying that The Legal Reasoning of the Court of Justice of the EU is a failed and outdated book. Quite the opposite: the book is now vital reading for a very particular reason. The case of Pringle and, in particular, the ECJ’s extraordinary and anti-legal corruption of the language of the TFEU, has largely been greeted in European circles in, if not glowing, at least positive terms. By the same token, the FCC’s counterattack, its political-legal manipulation of the preliminary reference procedure in order to challenge the actions of the ECJ, has been decried as a perverse assertion of German constitutional sovereignty above the supremacy of European law. The vital point for Europeanists is one that the ECJ has saved the Euro, and thus the EU, both through its purposive and anti-literal transformation of Article 125 TFEU into a general rather than specific basis for fiscal transfers within the EU, and through its glossing over of the illegal actions of the European Central Bank (ECB) in secondary bond markets. The moment of crisis, of danger to European integration was palpable, and Europe was saved by ‘judicial restraint’, or the preparedness of the Court not to apply the law ‘on the books’.

This particular analysis is currently dominant in European circles and, to a certain degree at least, can be understood – in political terms – as a part of a general normative mission to sustain the European project. Yet, what cannot but and must disappoint is the loss of the far longer and deeper mission to secure the EU through the transcendental quality of its law. Here Gunnar Beck’s lengthy analysis is crucial. Why, we must immediately ask ourselves, is it so important to Beck that the reasoning of the ECJ cannot be simply accepted as being ‘activist’ in character? Why is it so important to Beck that the legal reasoning of the ECJ can be described as being broadly in line with and comparable to the reasoning of national constitutional courts? The answer to this question can be found in Beck’s assertion of the ‘reckonability’ rather than ‘predictability’ of ECJ jurisprudence, or in his care to

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7 Gunnar Beck, The Legal Reasoning of the Court of Justice of the EU (Hart Publishing 2012) 3.
distinguish his ‘heuristic’ analysis of legal reasoning from more ‘scientific’ approaches to the application of the law by the Courts.\(^8\)

Once upon a time, continental jurisprudence was astounded by the disrespectful irony of an upstart jurist who mocked the seamless web of law proposed by Frederich Carl von Savigny; was shocked by a parvenu who pointed to the absurdity of a posited heaven of law, wherein each act of judicial application of norms laid down in the new legal codes of the post-Napoleonic era might be traced back with absolute certainty, and norm for hierarchical norm, to a perfect and all-encompassing framework of instantiated legal meaning mandated by the (legislative) law-giving processes of newly-emerging Republics. However, von Jhering’s then revolutionary suggestion that the new legal God of THE CODE could not hope to apply coherently to each emerging legal situation, such that Courts should be prepared to adapt their codes to the needs of real disputes through the medium of legal analogy, did not at core dispute the legitimacy of a modern formal law mandated and thus pre-empted by legislative process. Instead, it was left to the twentieth century sociologist, Max Weber, to point to the radical disjunction and tension between a legitimacy of law furnished by the legal-internal act of formal interpretation of norms (legal certainty) and a broader social legitimacy which the law can only establish where it can also – and far beyond legislative process – adapt formal legal application to the demands of an emerging social and political reality (justice).

Ever since the time of Weber, rarefied jurisprudence has accordingly concerned itself with the balancing act between formal and material law, between legal certainty and the provision by law of socially acceptable justice, and it is also here that we must place Beck. Gunnar Beck retains an air of formalism. He is concerned that law, to be law, must be distinguished from politics, and must be interpreted within identifiable legal topoi (literal, systemic and purposive arguments) common to all higher Courts.\(^9\) At the same time, however, Beck rejects modern theories of legal predictability and of the scientific nature of legal argumentation; in particular, those proposed by Robert Alexy.\(^10\) Law is applied in contexts of linguistic incompleteness and value pluralism. Law is also called upon to respond to changing social and political circumstance and if law is to be any law at all must also unfold itself within contexts that demand appropriate political and social meaning. Formal law is no law at all if it is not relevant or appropriate. Yet, even here, at its limits, law is reckonable, if not wholly predictable, as judicial law-giving is similarly constrained by legal-external ‘steadying’ factors,\(^11\) such as prevailing meta-goals (European integration), limiting realities (national constitutional sensibilities) or dominant political and social fashions (the individuality of human rights).

At one level, Beck’s identification of a ‘cumulative approach’ to legal reasoning within the ECJ justifies his conclusion that the Court is not an activist court, but is instead a Court whose actions can be heuristically reckoned, in line both with its core commitment to literal, systemic and purposive interpretation and its constrained response to legal uncertainty.\(^12\) At the same time, however, Beck’s description of the interpretative actions of the ECJ contains its own far deeper normative commitment to a transcendental value of law and adjudication per se, to an enduring legitimacy for law founded in a legal ability to manage the interface between formal and material justice, and to balance legal certainty against legal responsiveness.

At this point, I find myself, as a reviewer, at one conclusion and of one mind with Beck. Writing in 2007,\(^13\) and taking a far more sociological approach to acts of judicial interpretation, I too found that the ECJ was far from being an activist court. Instead, faced with the legal uncertainties of European treaties characterised only by their broadly open political goals, the Justices of the Court were, to me, masters of the legitimacy of European law, responding to the immediate need to constitute Europe through a certainty-giving legal formalism, balanced always by a responsively-legal materialism constrained, in my analysis, by a refined use of evidence-based and procedural legal methodology.

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8 ibid 17-43.
9 ibid 438.
10 ibid 18; cf ibid 318, where the analysis is far kinder to Neil McCormick, who finds his own place in Beck’s scheme of cumulative legal reasoning.
11 ibid 3.
12 ibid 318-434.
The analysis was similarly descriptive and normative. European law to count as law, rather than transient politics, must be reckonable, must respond to the demands of changing circumstance within Europe, but must do so within identifiable legal topoi and predictable extra-legal constraints.

My disappointment with European law came far earlier than Beck’s, and was occasioned by the Court’s now infamous Laval and Viking jurisprudence. And it is here, from the sociological perspective, that I would make my main criticism of Beck’s volume and overall approach. To wit: Beck wholly underestimates the impact of divergent economic interests upon value pluralism within the EU, and thus the durability of the ability of the ECJ to manage conflict between the social values encapsulated within national constitutional orders and the ‘communautaire’ – in impact, neo-liberal – orientation of the European legal order. Nevertheless, I share in Beck’s mission and deeper if unstated belief that European law, if it is to be recognised as a law at all, must take care not to succumb to unhappy circumstance and immediate political need. Beck’s is a volume that should and must be read by all European lawyers who must be warned that, where the ECJ has saved the euro at the cost of the loss of the legitimacy of European law, it has not saved the European project, but has instead placed its long term survival in doubt.

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14 Case C-341/05 Laval un Partneri [2007] ECR I-11767.
17 Beck (n7) 14.