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NON-DEMOCRATIC CONSTITUTIONALISM IN THE EUROPEAN UNION

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Constitutionalism has long been a byword for legitimate government. Recently, however, legal scholars and political theorists have begun attending to the ways in which constitutional rule can fail to realize (or actively hinder) the lofty ideals with which it is traditionally associated.[1] This paper is a comment on the important but, as I argue, contingent relationship between constitutionalism and one of these lofty ideals, namely democracy. A legal system can be configured on a constitutional footing, and still thwart democratic rule to a far more systematic extent than the occasional "counter-majoritarian difficulty."[2] I analyze the European Union as an example of non-democratic constitutionalism, and suggest that other international regimes share similar features. In doing so, I also address the long-standing debate concerning whether constitutionalism can be adapted to international institutions, and if so, what form it might take.

I will begin the paper by asking whether non-democratic constitutionalism warrants a special conceptual and empirical category at all (i). I will argue that while there is a latent tension between constitutional rule and democracy, democratic constitutionalism is not only possible and desirable, but also accurately describes many existing constitutional systems. Constitutionalism is not, however, *necessarily* democratic (ii). After outlining the key features that distinguish non-democratic constitutionalism, I will illustrate them with reference to the European Union's supranational institutions. In a nutshell, even though the EU has the dominant institutional components of a constitutional regime (iii), its normative claim to constitutional authority is functionalist (i.e. justified with regard to technocratic competence) rather than democratic in nature (iv). That substitution, I argue, is unstable and inadequate (v): in the absence of circuits of democratic legitimation, long-term failures of technocratic competence (such as the ongoing trials of the currency union) fundamentally undermine the EU's constitutional legitimacy. For those who regard the EU as a regional idiosyncrasy, the paper concludes with a brief consideration of how other international institutions (particularly economic ones) replicate some features of its non-democratic constitutionalism (vi).

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[1] Alexander Somek, "Authoritarian Constitutionalism: Austrian constitutional doctrine 1933 to 1938 and its legacy," in Christian Joerges & Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe* (Oxford: Hart, 2003); Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (New York: Cambridge University Press, 2013); Turkuler Isiksel, "Between Text and Context: Turkey's tradition of authoritarian constitutionalism," *International Journal of Constitutional Law* 11:3 (July 2013), pp.702-26. On the role of judicial review in authoritarian contexts, see Tamir Moustafa and Tom Ginsburg, "Introduction: The Functions of Courts in Authoritarian Politics," in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008)

[2] Bickel coined this felicitous phrase to refer specifically to the democratic legitimacy of judicial review. I use it more broadly to characterize the apparent constraints constitutional norms place on popular will. Alexander Bickel, *The Least Dangerous Branch? The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986)

i. How democratic is constitutionalism anyway?

The negative phrase "non-democratic constitutionalism" implies that the norm is democratic constitutionalism, and that the non-democratic variant is an anomaly. The first analytical move, then, should be to ask whether *normal* constitutionalism is really all that democratic (and, by implication, whether non-democratic constitutionalism is all that different, qualitatively, from run-of-the-mill constitutionalism). Constitutionalism, understood in its modern sense[3] as the practice of conditioning the ordinary exercise of public power in accordance with a change-resistant legal framework,[4] presents a famous democratic problem. By entrenching rules concerning the operations of political institutions, so goes the conventional wisdom, constitutions constrain the ability of democratic publics to collectively govern themselves.[5] By definition, then, constitutionalism disables elected institutions from making decisions that contradict the terms of the constitution unless they resort to the special and often extraordinarily onerous procedures required to alter those terms. If laws are legitimate to the extent that they are author(iz)ed by those whom they govern, any attempt to bridle the people's will is potentially heteronomous. Whenever popular will frequently chafes against

[3] Montesquieu was one of the last modern thinkers to use the term "constitutions" in its ancient sense. When he referred, for instance, to the "monarchical constitution," he had in mind the institutional, demographic, and ethical structure of a regime conceived as an organic whole, much like Aristotle's use of the term *politeia* (for instance, see his description of the "fundamental constitution" of England at Part II, Book 11, Ch.6 of *The Spirit of the Laws*.) When the American founders drew inspiration from Montesquieu in drafting their own constitution, they understood that term already in its modern sense as the legal framework of political authority. This is not to say that Montesquieu does not have a conception of constitutionalism in its modern sense. He reserves the term "*lois fondamentales*" to denote durable ("*fixe*") norms that structure political authority above and beyond the will of contingent office-holders. For instance, what distinguishes monarchy from despotism is that "monarchical government is that in which one alone governs, but by fixed and established laws; whereas, in despotic government, one alone, without law and without rule, draws everything along by his will and his caprices." Monarchy is constitutional (in the modern sense), whereas despotism is not. See Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, trans. and ed. Anne M. Cohler, Basia C. Miller & Harold S. Stone (Cambridge: Cambridge University Press, [1748, 1758] 1989), Part I, Book 2, Ch. 1, 10.

[4] In this paper, I use constitutionalism in its more narrow sense of adherence to one or more constitutional documents that are entrenched (i.e. change-resistant) and stand in a relationship of hierarchy to ordinary political acts and legislation, though my argument is compatible with a broader reading as well: "We find constitutionalism in place wherever there are legally established ways of constraining the will of the powerful, even if the constraints are not recorded in a formal constitution." Philip Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 173. In fact, many of the legally established constraints that the EU places on the exercise of public power by member states are recorded not in a formal constitution, but in a series of treaties. See (iii) below.

[5] To be sure, the existence of a constitutional document is no guarantee that the regime is constitutional; that is to say, that relevant political actors and institutions regularly abide by its terms in their exercise of public power. For a more detailed explanation of what constitutional discipline entails, see Isiksel, "Between Text and Context: Turkey's tradition of authoritarian constitutionalism," 703-704

constitutional rules, the latter are democratically suspect, and stand in need of a legitimizing rationale.

Contemporary constitutional theorists from John Hart Ely to Jurgen Habermas, Philip Pettit, James Tully, and Bruce Ackerman have sought ways to defuse this apparent contradiction. In particular, they have contended, in various ways, that constitutional rule is supported by a compelling democratic rationale.[6] On this view, far from being an impermissible curb on popular will, the relatively fixed nature of constitutional norms facilitates the exercise of collective self-legislation. The constitution provides the stable rules that are necessary, in the first place, to identify the popular sovereign (who *is* "the people"?), and in the second, to allow it to express its will through legislation. Democracy is inconceivable without a framework of rules and procedures by which citizens collectively govern themselves, and it is the constitution's task to supply these norms as well as the terms of their revision. The latter faculty is particularly important: constitutionalism is compatible with democracy insofar as it makes all laws, including itself, subject to revision in accordance with popular will.

For thinkers who seek to reconcile constitutionalism with democratic autonomy, the key feature that makes constitutional norms compatible with democratic self-rule is their reflexive nature. Fixed norms do not only impose bulwarks on popular will. They are just as likely to lock in hegemonic structures as they are to protect freedoms.[7] This makes them suspect from a democratic point of view. For instance, Tully argues that constitutional entrenchment is justified only insofar as it is necessary to enable citizens to participate equally the exercise of public power.[8] Challenging the conventional theory and practice of constitutionalism as resting on a set of immutable norms, Tully's account of "democratic constitutionalism" emphasizes the need to keep constitutional norms "open to deliberation and amendment *en passant* (not all at once)."[9] The constitution's self-reflexivity enables citizens to contest those aspects of the constitutional framework that they perceive to be unjust. As soon as the constitution begins to exert a foreclosing effect on the range and audibility of arguments that may be raised by citizens, Tully argues, it loses its quality as the catalyst for dialogue, reciprocity, and mutual respect, and becomes an "imperial yoke" that hegemonizes rather than liberates.[10]

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[6] John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Bruce Ackerman, *We The People. Foundations* (Cambridge, MA: Belknap Press, 1991); Jürgen Habermas, *Between Facts and Norms* (Cambridge, MA: MIT Press, 1996); Pettit, *Republicanism*, ch.6; James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995); See also, Frank Michelman, "Law's Republic", *Yale Law Journal*, vol.97 (1988), no.8, pp.1493-1537; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007)

[7] Melissa Schwartzberg, *Democracy and Legal Change* (New York: Cambridge University Press, 2007)

[8] Tully, *Strange Multiplicity*, 5

[9] James Tully, "The unfreedom of the moderns in comparison to their ideals of constitutional democracy," *The Modern Law Review*, vol. 65 (2002), no.2, pp.204-228, 217

[10] ibid, 5

Similarly, Richard Bellamy distinguishes between "political constitutionalism" and "legal constitutionalism," namely the understanding of constitutional norms as "superior to and independent on democracy."[11] In Bellamy's view, the legalistic conception (which he understands as centering on individual rights) hinders the ability of a people to "continuously reconstitute themselves and democracy through normal politics."[12] By contrast, political conception views the constitution as the handmaiden of democracy, "a procedure for resolving disagreements about the nature and implications of democratic values" in light of principles of equal concern, respect, and non-domination.[13] Given ineradicable and fundamental conflicts over the "substantive goods" that a democratic society must achieve, Bellamy reasons, the only way to realize values of equal concern, respect, and non-domination is to give the widest berth possible to fair and inclusive institutions of democratic decision-making, rather than elevate substantive commitments above the realm of political contestation.

It is possible to cite other members of the family of democratic constitutionalists, but Tully and Bellamy's respective reconstructions of the relationship between democracy and constitutionalism suffice to illustrate a key point, which is that the twin logics of fixity (entrenchment) and reflexivity (democratic revisability) that define constitutionalism can be mutually reinforcing. Tracing the constitution's authority to the will of the popular sovereign helps to justify the procedural and substantive constraints placed by constitutional norms on ordinary politics.[14] For instance, the possibility of constitutional amendment through democratic mobilization (the logic of reflexivity) ensures that entrenched norms such as individual rights accord with what a particular society at a particular time considers to be the fundamental and imprescriptible rights of its members. Conversely, fixed constitutional rules that designate who the *demos* is and how its will can be expressed convert the amorphous mass into a sovereign and autonomous collective agent. It seems neither possible to fix the content of entrenched norms for all time, nor to wholly emancipate the popular sovereign from norms resistant to its will.[15]

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[11] Bellamy, *Political Constitutionalism*, 3

[12] ibid, 136

[13] ibid, 4

[14] Ackerman, *We the People. Foundations*. Others reject this common characterization of constitutional rules as constraints on political power as simplistic, construing them as commitment devices that *enable* and *facilitate* the exercise of legitimate political authority. See Stephen Holmes, *Passions and Constraint* (Chicago, IL: University of Chicago Press, 1995)

[15] Jürgen Habermas similarly interprets the purported paradox of constitutionalism as a virtuous tension that enables public and private autonomy. Habermas presents the dilemma between fixity and reflexivity as an expression of the irreducible duality of the citizen's status as simultaneously the author and addressee of the laws. On the one hand, the constitution identifies and lends recognition to the popular sovereign *qua* sovereign, and sets out the principles and procedures through which citizens' deliberations will be translated into law (public autonomy). At the same time, this institutionalization of public autonomy relies on a prior recognition of the status of individuals as legal subjects and bearers of inalienable rights (private autonomy). Without substantive background principles concerning the equal respect due to individuals, it is impossible to put democratic self-legislation into practice, and indeed, to explain why it is a meaningful practice in the first place. In contradistinction to liberal conceptions that incorporate vestiges of natural law to justify the primacy

What is traditionally considered constitutionalism's fraught hesitation between enabling and limiting popular sovereignty is in fact its distinguishing characteristic. The tension exists, but adept institutional design can make it virtuous rather than vicious.

In fact, debates over the paradox or purported incompatibility between constitutional rule and democracy seem academic when we turn to "really existing" constitutional systems. Most functional constitutional systems espouse a confident commitment to democratic rule (however imperfectly they may realize that commitment in practice).[16] Similarly, most democratic systems are ordered around a framework of entrenched norms, whether or not they are enshrined in an eponymous constitutional document. Stated audaciously: constitutionalism's democracy problem may be more problematic in theory than it is in practice.

The foregoing is by way of making the fairly uncontroversial point that constitutionalism can, without self-contradiction, be reconciled with democracy. However, I intend to show that this alliance is merely contingent, and not inherent to constitutionalism as such. I wish to make this point by advancing a theory of non-democratic constitutionalism, and showing it at work. Let me begin by sketching what non-democratic constitutionalism entails.

I understand non-democratic constitutionalism to refer to a political regime that espouses many of the recognizable features of constitutional rule (such as a hierarchy of legal norms with entrenched norms at its apex, judicial review, justiciable individual rights, and public institutions empowered to make binding norms) but whose normative priorities do not include democratic self-rule. The lack of a commitment to democracy is made conspicuous, first, by the silence of the constitutional document(s) on the question of popular sovereignty. A non-democratic constitution does not appeal to "We the People of South Africa" to ground its authority, or engage in such illocutionary acts as, "the German people, in the exercise of their constituent power, have adopted this Basic Law." While such rhetoric is neither a necessary nor a sufficient element of democratic

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of basic rights, Habermas construes the private autonomy of individuals (which finds expression in basic rights of non-interference) as a presupposition and a product of democratic sovereignty. Thus, in his view, democracy and the rule of law are yoked together in an irreducible "internal relation." The constitution translates this linkage into institutional arrangements that reflect both commitments. See especially, Habermas, *Between Facts and Norms*; also, Jürgen Habermas, "On the Internal Relation between the Rule of Law and Democracy," *European Journal of Philosophy*, vol.3 (1995), no.1, pp.12-20, at 17; "The European Nation-State: On the Past and Future of Sovereignty and Citizenship" in *The Inclusion of the Other* (MIT Press: 1998).

[16] In considering the tension-ridden relationship between two bedrock commitments of American constitutional argument, Frank Michelman describes these as, on the one hand, the aspiration that the people should be "governed by themselves collectively," and on the other, that they should be "governed by laws and not men." In relieving this tension, he borrows Robert Cover's idea of jurisgenerative politics, whereby political deliberation by citizens acting in concert is "capable of imbuing its legislative product with a 'sense of validity'," and of defusing the arbitrariness associated with government "by men." See Michelman, "Law's Republic," at 1501-2.

constitutionalism, it is a fair indicator of what we might call the ethos of the constitutional regime.

Second, beyond the rhetoric of the constitutional document, a non-democratic constitutional system lacks comprehensive institutional circuits of democratic self-rule. Neither ordinary legislation nor constitutional revision is tied to participatory institutions and rules of popular opinion- and will-formation. At the institutional level, this means that there is significant attenuation between citizens on the one hand, and legislative and administrative institutions, on the other. It also means, third, that constitutional norms that govern public institutions are not open to revision, renegotiation, or reinterpretation through popular mobilization. They are so deeply entrenched as to be almost wholly resistant to democratic will.

Let me further flesh out this concept by noting an important distinction. Non-democratic constitutionalism is not necessarily authoritarian or illiberal, and vice versa. I understand illiberal / authoritarian constitutionalism to refer to a political system that adheres meticulously to a constitutional framework whose terms are directly hostile to individual liberty. It differs from garden-variety authoritarianism because institutions and office-holders still respect a higher law framework and exercise constitutional discipline, even if their doing so results in a far narrower scope for individual rights than a recognizably liberal regime would allow. A constitution that authorizes the extensive use of emergency powers, for instance, or one that prioritizes public order and security over the protection of basic individual rights, greatly restricts the scope of such rights, or comprehensively exempts public institutions such as the security forces from judicial scrutiny would fall in this category.[17] Not all non-democratic constitutionalism is authoritarian, and not all authoritarian constitutionalism is non-democratic. The European Union, my major example in this paper, is an example of non-democratic constitutionalism that is nevertheless recognizably liberal.[18] Conversely, under its current constitution, Turkey is an example of a nominally democratic (or, at least, electoral) system of authoritarian constitutionalism. At the risk of losing the reader in overwrought distinctions, I emphasize difference between *non-democratic* and *authoritarian* uses of constitutionalism because they illustrate the range of teleologies—the cardinal values and objectives—that can animate different constitutional systems. To the extent that we can discern such a teleology at all, the constitution can be a good guide.[19]

[17] Isiksel, "Between Text and Context: Turkey's tradition of authoritarian constitutionalism"
[18] A "decent hierarchical regime" of the Rawlsian kind might also fit within the typology of a non-authoritarian but non-democratic constitutional system. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2001), Part II, §8
[19] Montesquieu knows best.

ii. Can we call it constitutionalism if it's not democratic?

I began the paper with a challenge: that all constitutionalism involves an abrogation of democratic self-rule, and therefore that the qualifier "non-democratic" is redundant. In response, I rehearsed the fairly common argument that although there is a tension between constitutional and democratic rule, constitutionalism is a useful (and perhaps indispensable) vehicle for realizing popular participation in lawmaking. A converse objection may be that non-democratic constitutionalism entails a contradiction in terms. Some would argue not only that democratic constitutionalism is the most desirable kind of constitutionalism there is, but also that we can speak of constitutional rule only in the context of democratic government. On this view, constitutionalism is not defined by any formalistic criteria (such as the adherence of public power to a framework of higher legal norms, judicial review, the protection of individual rights, or the separation of powers). Instead, some thinkers build the principle of democracy into the very definition of constitutionalism. To take one example, Dieter Grimm, a former Justice of the German Federal Constitutional Court argues that "it is inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people."[20]

One version of this argument privileges democratic pedigree as the distinguishing mark of a constitutional regime properly so-called. In other words, a constitutional system can only result from an exertion of popular will that constitutes, in the performative sense, comprehensive political authority from scratch. Although a constitution drafted through a fully democratic, fully participatory process is a fine ideal, as an empirical matter, it is a criterion that few existing constitutional orders can meet. Popular foundings are a useful fiction for reconciling constitutional precommitment with democratic autonomy; otherwise, constitutions create *demoi* more often than *demoi* create constitutions. More fundamentally, it is not clear that the democratic quality of a constitution hinges on whether it was drafted and ratified through processes involving high levels of popular participation (such as referenda, constituent assemblies, social mobilization, revolutionary upheavals, and the like). A constitutional regime imposed by a foreign power can evolve into democratic constitutionalism if it puts into place effective mechanisms of democratic government, sets forth meaningful procedures of constitutional amendment, and garners popular allegiance and assent (the *Grundgesetz* is a good example). The participatory quality of the institutions set into motion by the constitution is a more lasting guarantee of democratic legitimacy than the origins of the constitutional document itself. Conversely, the non-democratic quality of a constitutional system does not simply come down to the pedigree of the constitutional document itself, but is a far more comprehensive, systemic attribute.

[20] Dieter Grimm, "Treaty or constitution? The legal basis of the European Union after Maastricht," in in Erik Oddvar Eriksen, John Erik Fossum, and Augustin Jose Menendez (eds), *Developing a Constitution for Europe* (New York: Routledge, 2004), at 75

More broadly, although constitutionalism *can* be understood as an opportune framework for realizing the democratic ideal, this link is a contingent rather than intrinsic one. Pared down to the essentials, constitutionalism need not be democratic. As Neil MacCormick argues,

> A constitution in [its] empowering function always and necessarily imposes conditions on the powers it confers. For the constitution, however skeletal, is always 'above' the powers it confers. Constitutionalism *as a minimal virtue* involves duly respecting the conditional quality of powers conferred in this way and involves observing faithfully the (interpreted) conditions of the respective agencies' empowerment.[21]

MacCormick's use of the word "minimal" is key: constitutional mechanisms themselves may in fact be imbued with a far deeper series of meanings, aspirations, and virtues. Particular constitutional norms may safeguard individual rights against the tyrannical use of power, enable democratic self-rule, guarantee basic conditions of equality, pluralism, and social justice. A constitutional system as a whole may enshrine a kaleidoscope of political values, including democracy, autonomy, justice, equality, solidarity, and the like. None of these, however, defines a characteristic that is exclusive or immanent to constitutionalism; rather, each has a normative kernel that is analytically distinct from constitutional rule *simpliciter*. MacCormick's point is that constitutionalism, as distinct from the various political ideals written into constitutions, is defined by an intrinsic mechanism that both commissions political power *and* patrols the terms of its exercise by means of higher law. By implication, it is possible to imagine mechanisms of constitutional commitment being deployed towards a wide range of *teloi*, some of which may be only tangentially related to the ideal of democratic self-rule.

Furthermore, the fact that modern democracy requires a constitutional framework to function does not mean that constitutional systems properly so-called are necessarily democratic. The appeal to popular will is a strong legitimating device for the extraordinary authority of constitutional norms, but it is not the only possible one. Consider how we appeal to values besides democracy to justify counter-majoritarian institutions. Central banks, electoral and campaign finance commissions, intelligence agencies, specialized administrative and regulatory bodies such as the Food and Drug Administration or the Securities and Exchanges Commission are all powerful institutions whose independence from democratic control is justified with reference to the need for technical expertise, professionalism, or autonomy from partisan influence.[22] Just as the attenuation of democratic control over these institutions is justified with reference to some other anticipated *telos, t*he distinguishing element of non-democratic constitutionalism is

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[21] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 103, emphasis added

[22] Giandomenico Majone, "From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance," *Journal of Public Policy*, Vol.17, No.2, 1997, pp.139-167. For an attempt to rework the classical separation of powers doctrine with modern bureaucratic institutions in mind, see Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review*, vol.113 (2000), no.3, pp.633-729

that it cites a legitimating objective or narrative other than that of democratic self-rule.

iii. The EU as a constitutional system

Why consider the EU in constitutional terms at all? Although the 1957 Treaty Establishing the European Economic Community was an agreement among sovereign states, over the first few decades of its existence, it developed the recognizable characteristics of a constitutional system.[23] As Joseph Weiler put it,

> The constitutional thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a Treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law.[24]

Most versions of the "constitutional thesis" depict the European Court of Justice (recently renamed the Court of Justice of the European Union, or CJEU) as the leading engine of European integration in the legal sphere.[25] Through its far-reaching interpretation of the relatively sparse and skeletal provisions of the Treaty of Rome, the Court shepherded disparate national legal orders under a dense canopy of supranational legal norms. This canopy is held up by three 'pillars' that are central to the constitutional thesis. The first of these is the doctrine of the supremacy of EU law. In a series of landmark rulings beginning with *Costa* v. *ENEL* in 1964,[26] the Court proclaimed that European Community (EC) law took precedence over the laws of member states in the event of a conflict. According to the Court, even in the event of a conflict between a member state's constitutional provisions and a piece of European law, the latter must prevail.[27]

Through the piecemeal and sometimes grudging acceptance of the supremacy doctrine by national courts, this supranational legal order has gradually taken shape as a new legal hierarchy, integrating EC norms into the legal systems of member states.[28] Under the preliminary reference procedure of the Treaty,[29] national courts

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[23] The Treaty of Rome has been amended many times, and has been officially renamed the "Treaty on the Functioning of the European Union" (TFEU) in 2009. For reasons of historical accuracy, I mostly refer to the EC Treaty or Treaty of Rome in this paper.

[24] J.H.H. Weiler, "The Reformation of European Constitutionalism," *Journal of Common Market Studies*, vol.35 (1997), no.1, pp.97-131, at 97

[25] Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004); Susanne K. Schmidt and R. Daniel Kelemen, *The Power of the European Court of Justice* (London: Routledge, 2013).

[26] Case 6/64, *Flaminio Costa v. E.N.E.L.* [1964] ECR 585

[27] Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA* [1978] ECR 629; Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433

[28] For authoritative accounts of this process, see Joseph Weiler, "The community System: the dual character of supranationalism," *Yearbook of European Law*, vol.1 (1981), pp.268-306; Karen Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001); Stone Sweet, *The Judicial Construction of Europe*.

[29] Ex-Art 177 EC (now Art 267 TFEU)

are empowered (and courts of last instance are required) to refer questions about the application of EC/EU law to the Court. Over time, they have been directed by the CJEU to disregard *any* national legislation that comes into conflict with EU norms. This carefully constructed system of judicial review the second constitutional feature of the EU legal order. Accordingly, the CJEU has not only co-opted national courts into a European judiciary with a supranational court as its primary guide,[30] but has also given ordinary national courts powers of judicial review normally reserved for constitutional courts, thus revising the domestic constitutional systems of member states in areas touched by EU law.[31] Moreover, because it is their own courts rather than a distant supranational body ordering member states to fulfill their supranational obligations, supranational law has enjoyed remarkably uniform application domestically.

The third pillar of the EU's constitutional system is the doctrine of "direct effect." In 1963, the Court of Justice ruled that certain provisions of the Treaty of Rome give rise to individual rights that could be relied on by individual litigants before national courts.[32] In the ensuing decades, the Court gradually expanded the remit of the doctrine of the direct effect of European law by finding more and more Treaty provisions and directives as capable of giving rise to individual rights. Consequently, member state nationals became the holders of rights originating exclusively from EU law. The vast majority of these rights relate to cross-border economic activity, and the most litigated among them remain those known under European law as "fundamental freedoms," namely, the freedoms of movement of persons, services, goods, and capital. To the extent that the EU legal order regards individuals as its legal subjects and gives rise to rights that they may claim before national courts, triggering judicial review of national law, it transcends the conventional paradigm of international law and mirrors domestic constitutional orders.[33]

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[30] Stone Sweet, *Judicial Construction of Europe;* Anne-Marie Burley and Walter Mattli, "Europe before the Court," *International Organization*, vol. 47 (1993), no.1, pp. 41-76. See also their more detailed account of the motives underlying the national courts' cooperation with the ECJ in Water Mattli and Anne-Marie Slaughter, *Constructing the European Community Legal System from the Ground up* (Florence: EUI Working Paper RSC, 1996). See also, Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (New York: St. Martin's Press, [1994] 1998).

[31] Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," *American Journal of International Law*, Vo.75 (1981), pp.1-27, 13; Stone Sweet, *Judicial Construction of Europe*; Mitchel de S. –O. –l'E Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford: Oxford University Press, 2004), 225; Miguel Poiares Maduro, "Sovereignty in Europe: The European Court of Justice and the creation of a European political community," in Mary L. Volcansek & John F. Stack, Jr. (eds), *Courts Crossing Borders: Blurring the Lines of Sovereignty* (Durham, NC: Carolina Academic Press, 2005)

[32] According to the ECJ, Treaty provision must be "clear," "unconditional," must give rise to "a negative obligation" on the part of states and not be dependent on implementing measures in order to qualify for direct effect. Case 26/62, *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1. The Court later relaxed these criteria in Case 43/75 *Defrenne* v. *SABENA* [1976] ECR 455

[33] Pierre Pescatore, "The Doctrine of 'Direct Effect': An infant disease of Community law," *European Law Review*, vol.8 (1983), pp. 155-177, 158; Joseph Weiler, "The Transformation of Europe," *Yale Law Journal*, vol.100 (1991), pp. 2403-2483.

In 1986, the European Court of Justice carried the European legal order's three decades of development to its high water mark by calling the Treaty of Rome the "constitutional charter" of the European Community.[34] It argued that "The European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[35] The Court's logic echoes MacCormick's minimalist understanding of constitutionalism as defined by an adherence to constitutional norms, that is, as the principle that no crevice of public power should be exempt from the comprehensive sweep of constitutional scrutiny.[36] In a formulation it has regularly repeated in its case law since its *Les Verts* ruling, the Court held that "the EC Treaty [establishes] *a complete system of legal remedies* and procedures designed to enable the Court of Justice to review the legality of acts of the institutions."[37] Accordingly, the Court reasoned that the authority of the EC legal order, within the areas defined by the treaties, is seamless and pervasive as it would be under a domestic constitutional regime.

Although some commentators had considered European Community law in constitutional terms up to that point, the ECJ's *Les Verts* decision made constitutional language all but unavoidable discussions of the nature of the European commonwealth.[38] Since then, much of the critical debate over the nature and trajectory of European integration has taken place within the discursive parameters of constitutionalism, even when observers contest the appropriateness of this terminology in the supranational context. The partially autonomous nature of EU law is bolstered by the interpretive authority of the ECJ and the constitutional self-understanding that prevails within an EU-wide epistemic community of jurists.

As degrees of constitutional entrenchment go, the EU's supranational constitutional system is unusually hardy. Any change in treaty norms (i.e. supranational constitutional norms) requires unanimous approval and ratification by 28 member states, and although the 2009 Treaty of Lisbon has introduced simplified revision procedures, these still require a unanimous Council vote and approval by the European Parliament. The revision of existing regulations and directives (i.e. ordinary supranational norms) likewise requires securing either a qualified majority or unanimity among all member states representatives in the Council. If member states disagree with the Court's interpretations of the Treaties or ordinary EU legislation, they must pursue the same arduous legislative or treaty amendment routes.

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[34] Case 294/83 *Partie Ecologiste 'Les Verts' v. Parliament* [1986], ECR 1339
[35] ibid, para. 23
[36] The rule of law is, in essence, what Neil MacCormick calls the "minimal virtue" of constitutionalism, discussed earlier. MacCormick, *Questioning Sovereignty,* 103
[37] *Les Verts*, para.23
[38] I follow Neil MacCormick in using this phrase. MacCormick, *Questioning Sovereignty.*

The features I have so far outlined are the EU's most robust constitutional elements. Because it operates through a comprehensive and deeply entrenched legal framework, the EU cannot accurately be characterized as a mere emanation of the will of member states *qua* principals. EU law actively shapes the domestic and international policy options available to member states, and has profoundly altered their constitutional systems.[39] European integration has accomplished its billing by creating a normative framework that welds together supranational, national, and sub-national tiers of decision-making. This adds to the scale of the constitutional transformation in question: the European Union is not a self-contained and distinct polity; rather, it is a composite polity that is embedded *within* member states as much as it is *above* them. In sum, not only does the EU possess many of the institutional features associated with constitutionalism, but it has also effected profound constitutional transformations within its member states. For all of these reasons, it makes sense to consider it under the rubric of constitutionalism.

iv. The EU as a system of non-democratic constitutionalism

But hark! According to many dominant theories of constitutional rule, the entrenched status of constitutional norms can be only be justified with reference to their role in enabling the exercise of democratic self-rule.[40] Although the EU borrows the legal and institutional machinery of constitutionalism, its constitutional features have not been designed to facilitate democratic self-rule, nor do they do so in any incidental way. In fact, the EU's constitutional features (particularly, the entrenched status of supranational law vis-à-vis member state laws) do the

[39] To point out some well-known examples: In the *Simmenthal II* case of 1978, the ECJ authorized lower courts to invalidate domestic statute in the event of a conflict with European law, thereby overriding the Italian Constitution's prohibition against judicial review by lower courts. See Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA* [1978] ECR 629. In its 1996 *Factortame* judgment, the ECJ arguably went further. As Mitchell Lasser describes it, the ECJ held that "the 'full, effective judicial protection' of Community rights justifies overriding the most basic premises of national constitutional law and separation powers doctrine: it requires Member State courts to overturn national legislation that is incompatible with – and therefore represents an 'obstacle' to – Community law, *even in those legal systems that do not grant such powers of review to their judiciaries*." (Lasser, *Judicial Deliberations*, at 225; Joined cases C-46/93 and 48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport* [1996] ECR I-1029, para.33) The British House of Lords, which had sent the original reference to the ECJ, accepted that the UK's membership in the EC necessitated the recognition of the supremacy of EC law, which in turn required curtailing the implied repeal (*lex posterior*) doctrine which had hitherto been the cornerstone of the British system of parliamentary sovereignty. See House of Lords, *Factortame Ltd. and others* v. *Secretary of State for Transport* [1991] 1 AC 603. Also see Miguel Poiares Maduro, "The importance of being called a constitution: Constitutional authority and the authority of constitutionalism," *International Journal of Constitutional Law*, vol.3 (2005), no.3, pp.332-356, at 339-340

[40] An exception to democratic constitutionalism is what Ackerman calls "rights foundationalism," namely the view that constitutionalism is primarily about the protection of inalienable individual rights, and that constitutional devices such as the separation of powers, checks and balances, and substantive limitations on public power are all legitimated by this objective. I leave aside the rights-based theory of constitutionalism in this paper. Ackerman, *We The People. Foundations*, 10-13

opposite, i.e. they *disable* democratic control over certain areas of policy-making. Furthermore, the EU actively saps domestic democratic autonomy from its member states. European integration has "de-parliamentarized" decision-making by removing policy competences from national legislatures and transferring them to non-elected executive institutions such as the Council and the Commission.[41] To be sure, this is not a matter of supranational institutions hoodwinking member states into giving up their democratic autonomy; ultimately, member states have given their formal consent to the diminution of national parliamentary authority. Nonetheless, the EU achieves its objectives (particularly those related to economic prosperity) at the cost of massive democratic attenuation and administrative centralization. In what follows, I will briefly illustrate the weak and *ad hoc* nature of the EU's mechanisms of democratic control, particularly compared to representative democratic institutions at the domestic level.

Perhaps the most obvious reason why the EU is a form of non-democratic constitutionalism is that it is founded on a series of international agreements rather than a popular "constitutional moment," a democratic act of self-founding.[42] The decision to establish supranational institutions was not made directly by an ostensible European people; rather, it was made by their respective governments.[43] Much like an administrative agency, the EU is an exercise in constituted, not constitutive, power.[44] Still, I argued earlier that the pedigree of constitutional norms (whether or not they are the products of democratic mobilization and participation) ought not to be the determining criterion in whether we consider a constitutional system to be democratic. The more essential criteria are whether democratic self-rule constitutes the primary legitimizing narrative of the constitution's authority in a particular system, and whether the system comprises effective institutions of democratic self-government, including those of constitutional revision. The EU markedly fails to meet these criteria, and does so by design. It removes important policy decisions from the reach of domestic majorities in order to produce the long-term benefits of cooperation among member states. In what follows, I will show that although the EU features various avenues of citizen participation, these fall far short of compensating for the loss of democratic control at the national level. Attempts to transfer those mechanisms to the supranational level founder on the familiar issues of size, diversity, and the absence of a European public sphere, and raise important problems of their own.[45]

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[41] As I explain below, even though cabinet-level representatives who comprise the Council have been individually elected in their own countries, the Council is not an elected institution as such, since it is neither voted in nor can be sacked by a European electorate.

[42] Ackerman, *We The People. Foundations*.

[43] Ackerman's model of "dualist democracy" distinguishes between "two different decision that may be made in a democracy": "the first is a decision by the American people; the second, by their government." Ackerman, *We The People. Foundations*, 6.

[44] Peter L. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010), 11, 49-51.

[45] For classic accounts, see Robert A. Dahl, "Can international organizations be democratic? A skeptic's view," in Ian Shapiro and Casiano Hacker-Cordón (New York: Cambridge University Press, 1999); Dieter Grimm, "Does Europe Need a Constitution?" *European Law Journal* 1 (1995): 282-302.

The EC/EU has been grappling with the challenge of democratic legitimation for the greater part of its existence, with the search for creative institutional responses to it acquiring greater urgency since the 1990s.[46] Since 2009, the Treaty on European Union features new "provisions on democratic principles," which affirm "the right [of every citizen] to participate in the democratic life of the Union," emphasize that "citizens are directly represented at Union level in the European Parliament," and recognize the role of political parties as "expressing the will of citizens of the Union."[47] Title II confers duties on the part of Union institutions to "give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" and to maintain "dialogue with representative associations and civil society."[48] However, the current configuration of the EU's decision-making mechanisms can at best only partially realize these democratic commitments.

Famously, although supranational decision-making has representative democratic elements, the EU looks nothing like a parliamentary democracy. Its primary legislative organ, the Council, is not a directly elected parliament, but an intergovernmental body that comprises cabinet-level representatives of member states' executives. Although the Council often shares legislative authority with the European Parliament, the votes wielded by member state ministers carry the greatest weight in determining the Union's policy output. To the extent that the Council can be said to represent the popular will, it does so in an indirect way. As members of the executive branch in their respective states, these officials are accountable to domestic electorates in ways that depend on each state's constitutional system. Typically, citizens vote for parliamentary representatives, who vote to form a national government that will represent their national preferences in EU meetings. Furthermore, not all of the work of the Council is done at the ministerial-level meetings: much of its legislative tasks are performed by a Committee of Permanent Representatives (COREPER) comprised of member state

[46] Few other EU-related themes have received more attention in the past two decades than the EU's so-called "democracy deficit." Seminal interventions include David Beetham and Christopher Lord, *Legitimacy and the European Union* (New York: Longman, 1998); Phillippe Schmitter, *How to Democratize the EU—and why bother?* (Lanham, MD: Rowman and Littlefield, 2000); Larry Siedentop, *Democracy in Europe* (New York: Columbia University Press, 2001); Richard Bellamy and Alex Warleigh (eds), *Citizenship and Governance in the European Union* (New York: Continuum, 2001); Erik Oddvar Eriksen and John Erik Fossum (eds), *Democracy in the European Union: Democracy through deliberation?* (New York: Routledge, 2000); Jurgen Habermas, *The Inclusion of the Other* (Cambridge: MIT Press, 1998); Simon Hix, *What's wrong with the European Union and how to fix it* (Cambridge: Polity, 2008); Beate Kohler-Koch and Berthold Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Lanham, MD: Rowman & Littlefield, 2007). Skeptical perspectives include Andrew Moravcsik, "In defence of the 'democratic deficit': Reassessing legitimacy in the European Union," *Journal of Common Market Studies*, Vol.40 (2002), No.4, 603-24; Giandomenico Majone, "Europe's 'Democratic Deficit': The question of standards," *European Law Journal,* Vol.4, (1998) No.1, pp.5-28

[47] Art.s 10-11 TEU.

[48] Art.s 10-11 TEU.

ambassadors, who in turn are assisted by "working groups" composed of national civil servants. Decision-making at the Council is at least twice, but often three or four degrees removed from electoral accountability.
Nonetheless, some observers underline the Council's role as a democratizing element of EU decision-making. Most EU rules that are reputed to come from faceless bureaucrats in Brussels are approved (at least in outline) by democratically elected cabinet members from each member state or by their duly appointed representatives.[49] These officials are subject to strict accountability mechanisms domestically. Furthermore, the Council acts under onerous voting rules that are meant to improve the democratic legitimacy of decisions: any proposed legislation must clear the hurdle of a supermajority or unanimity. However, unlike directly elected legislatures that approximate the distribution of political views across the full political spectrum, attenuated representation at the Council filters out domestic opposition concerning EU matters. In casting their state's votes, each representative can only represent one view as *the* national view, thereby editing out the plurality of views espoused by their respective electorates. Furthermore, entrusting supranational legislative functions to members of domestic cabinets shifts the overall balance of powers in the composite system of European governance in favor of the executive branch.

The limited involvement of national parliaments in EU policy-making provides another attenuated channel of democratic legitimation. The treaties call for national parliaments to remain apprised of (and sometimes review) draft legislation at the EU level, discuss proposals for treaty revision, and establish inter-parliamentary dialogue with other member states and the EP.[50] In addition, national parliaments are expected to monitor the limits of the EU's competences and ensure the application of the principle of subsidiarity.[51] Although national parliaments' participation in EU politics (mostly in the form of holding national governments to account for the positions they adopt at Council meetings) has increased, however, most national parliaments do not make extensive use of existing channels of engagement with the EU.[52]

EU citizens do have a more direct channel to EU policy-making, and that is through their elected representatives in the European Parliament. Since 1979, citizens of

[49] Andrew Moravcsik, "In defence of the 'democratic deficit'"; Armin von Bogdandy, "A disputed idea becomes law: remarks on European democracy as a legal principle," in Kohler-Koch and Rittberger, *Debating the Democratic Legitimacy of the European Union.* Bogdandy describes the sharing of legislative power between the indirectly elected Council and the directly elected Parliament as "a principle of dual legitimacy." At pp.36-37
[50] Treaty on European Union Art 12(a), (d), and (f) respectively.
[51] Treaty on European Union, Art 12(b)
[52] For an overview of these reasons (including information problems, the fragmented nature of supranational decision-making, and domestic partisan dynamics) and a brief comparison across 15 member states, see Torbjörn Bergman, Wolfgang C. Müller, Kaare Strøm, and Magnus Blomgren, "Democratic delegation and accountability," in Kaare Strøm, Wolfgang C. Müller, and Torbjörn Bergman (eds), *Delegation and Accountability in Parliamentary Democracies* (New York: Oxford University Press, 2003), pp. 173-177.

member states have been able to vote for their representatives in the European Parliament. Originally designed as a consultative assembly composed of delegates of national parliaments, the EP has acquired an important share in the legislative process. For instance, the expansion of the "co-decision procedure" gives it a near-equal share in the legislative process as the Council. Furthermore, it has the authority to can sack the Commission, the EU's executive organ. Crucially, however, it has no power to appoint or dismiss the Council, the EU's primary legislative organ. Unlike a domestic legislative assembly, moreover, it does not have exclusive authority to make laws. Its limited share in decision-making means that even substantial electoral losses for incumbent MEPs are unlikely to affect the EU's overall political course. Parliament or no Parliament, the EU's current constitutional system ensures that there is no electoral route to alternation of power.[53]

Most observers agree that transforming the EU into a parliamentary system would raise bigger problems of legitimacy than it could resolve.[54] The primary attachment of European *demoi* to domestic parliaments, the desire on the part of member states to preserve the EU's prominent intergovernmental features, and the lack of an inclusive European public sphere diminish the feasibility and desirability of a supranational parliamentary system. For all of these reasons, the EU's constitutional structure bears little resemblance to democratic models of constitutional rule.

On one hand, the failure of the EU's existing participatory institutions to establish a strong, reciprocal relationship between citizens and supranational decision-making is, in part, a generic problem of postnational governance.[55] Like many international organizations, the EU encompasses a diverse array of member states, but unlike most others, it exercises extensive decision-making powers. Although the modern paradigm of representative democracy emerged in part as a response to the problem of size (modern democracies were much larger than their ancient counterparts),[56] the immense sprawl and dizzying diversity of the Union precludes any easy extrapolation of the traditional model.[57] Moreover, the specialized and complex nature of the tasks delegated to supranational institutions makes them unwieldy subjects of public debate and deliberation.

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[53] "there is no real sense in which the European political process allows the electorate 'to throw the scoundrels out,' to take what is often the only ultimate power left to the people, which is to replace one set of 'governors' by another." J.H.H. Weiler, Ulrich R. Haltern & Franz C. Mayer, "European democracy and its critique," *West European Politics*, vol.18 (1995), no.3, pp.4-39, at 8.

[54] For a critique, see Richard Bellamy and Dario Castiglione, "Legitimizing the Euro-polity and its regime: the normative turn in EU studies," *European Journal of Political Theory*, vol.2 (2003), no.1, pp.7-34, at 26

[55] Beth Simmons, "Globalization, Sovereignty, and Democracy," in Peter F. Nardulli (ed.), *International Perspectives on Contemporary Democracy* (Champaign, IL: University of Illinois Press, 2008); Eric Stein, "International integration and democracy: No love at first sight," *American Journal of International Law*, vol. 95 (2001), pp.489-534.

[56] In *Federalist* #10, James Madison famously addressed this problem with resort to (who else?) Montesquieu. The federal, representative republic would solve the problem of size that confronted popular government in populous polities.

[57] Dahl, "Can international organizations be democratic? A skeptic's view"

On the other hand, the EU's attenuation from democratic politics is not simply the product of a failure to adapt representative democracy to supranational institutions. It is, in large part, systemic and intentional. The design of its supranational institutions reveals a profound fear and distrust of democratic politics. Conceived with the devastation of the two world wars in mind, the politicians and civil servants behind the European integration project harbored deep suspicions towards nationalist mobilization, and viewed mass democracy as too easy to exploit in the service of protectionism, militarization, autarky, and belligerence. Instead, they envisioned a different sort of relationship between European institutions and citizens: Robert Marjolin, who was among the framers of the EEC and served as a member of the inaugural European Commission, argued that "a Community conscience, a common enthusiasm for Europe" would not look like traditional forms of political allegiance based on identity and attachment. It made sense, he argued, to hope "not for any abstract idea of Europe, but for a Europe which can find its justification in the improvement of the living conditions of its inhabitants."[58] Supranational institutions would quietly anchor themselves in citizens' hearts and minds by displaying technocratic virtues and by harnessing the energies of member states towards shared, pragmatic priorities.

Second, the EU's current institutional structure is the legacy of the failure of the grand federalist project of the European Defense and Political Communities (EDC and EPC), two ambitious projects scuttled in the early 1950s by the French National Assembly. Chastised by the realization that European nation-states, even after the devastating wars, continued to jealously guard their sovereignty, French statesmen Jean Monnet and Robert Schuman resorted to supranationalism (rather than federalism) as their Plan B:[59] because outright political union was intractably controversial, integration could only be pursued through mild and incremental concessions of sovereignty. Although the first installment of their plan, the European Coal and Steel Community founded in 1952, was hardly inspiring to ordinary citizens (Monnet conceded that "increased coal and steel production is not the basis of our civilization"),[60] it provided the pilot institutions for integration on a technocratic footing. The establishment of the European Economic Community broadened the mandate of those institutions to market integration as a whole. The assumption was that the prosperity generated by unhindered commerce would make integration more appealing to member states (and their electorates) without tripping sovereigntist alarm bells. Accordingly, the "Monnet method" that produced

[58] Cited in Willem Maas, *Creating European Citizens* (Lanham, MD: Rowman & Littlefield Publishers, 2007), 19-20

[59] As the founding father of European integration historiography, Ernst Haas, pointed out, the term "supranationalism" was itself a product of this strategy, coined to dispel the sovereign reservations associated with the term "federalism." Ernest B. Haas, *The Uniting of Europe* (Stanford: Stanford University Press, [1958] 1968),32

[60] Jean Monnet, Speech to the Common Assembly of the ECSC, Strasbourg, 12 January 1953 in Jean Monnet, *The United States of Europe Has Begun. The European Coal and Steel Community Speeches and Addresses 1952-1954* (Paris: 1955) University of Pittsburgh Archive of European Integration, microfiche, 17

the current EU is a *fait accompli* mode of political integration: member states' desire to maximize economic benefits would eventually bring them into a law-governed supranational order.[61] The supranational gambit was to take grand questions off the table until such a time as when they would be resolved seamlessly thanks to the relentless march of integration in other, less controversial policy areas.

Since their inception in the 1950s, therefore, the selling point of Europe's supranational institutions has been their purported ability to provide more effective policy results than member states acting alone. The scale and scope of the EU integration project, and the democratic attenuation it entails have been explained primarily with reference to the urgency policy problems which member states acting singly cannot, or can no longer, govern. The empirical literature tends to treat European integration as a power-building exercise that responds to "problems that can no longer be solved within the framework of nation-states or by the traditional method of agreements between sovereign states," including "the globalization of commerce and communication, of economic production and finance, of the spread of technology and weapons, and above all of ecological and military risks."[62] New enabling institutions are said to be necessary because each of these problems calls for solutions on a scale greater than the nation-state (or, at the very least, necessitates coordination on their part). Of the many public goods that we might expect of international institutions, the Treaty of Rome espoused one 'good' in particular, namely that of economic prosperity, to be achieved through the merging and joint regulation of national markets. Because the cardinal goal of market integration implicated so many other policy domains, member states gradually expanded the EC/EU's range of competences at the expense of domestic legislatures and executive organs. The promise of technocratic competence has been the justification behind this massive transfer of political authority.

As political scientists know well, cooperative international institutions are beset by problems of credibility, since every signatory state has short-term incentives to renege on its commitments. The range of decisions required over time to build an integrated European market, such as the lifting of protectionist restrictions and regulatory barriers and their replacement with common policies such as those of competition, environmental, consumer and labor standards, are those which states are motivated to shirk. Moreover, even when they refrain from cheating, informational asymmetries make it difficult for each state to gauge the extent to which its peers are abiding by the terms of the agreement. The behavior of market

[61] This combination of starry-eyed utopianism on the one hand and shrewd statesmanship on the other calls to mind the peculiar optimism of many eighteenth century philosophers concerning the providential force of commercial interdependence for pacifying international politics. Emblematic (though not unique) is Immanuel Kant's prediction that a cosmopolitan world order would eventually result from the unsocial sociability (cupidity, competitiveness, desire to dominate) of human beings *and* nations. Immanuel Kant, "Idea for a Universal History from a Cosmopolitan Point of View" [1784], in *Political Writings*, H.S. Reiss (ed.) (New York: Cambridge University Press, 1991), pp.44-45

[62] Habermas, "The European Nation-State," 106

actors, too, is affected by this problem: domestic firms might take international regulatory obligations less seriously, while foreign firms might be deterred from investment by the host state's propensity to cheat.[63] The lack of effective monitoring and enforcement mechanisms in many intergovernmental agreements exacerbates these problems.

Supranational institutions (operating under an entrenched supranational legal framework) provide a possible solution to each of these problems. They remove competence over the making, monitoring, and enforcement of policies related to the objects of cooperation from the purview of member states and transfer it to an authority beyond their immediate control. Like constitutional commitment, entrusting competences to a supranational authority can be likened to the story of Ulysses tying himself to the mast of his ship to avoid future temptation by the sirens.[64] Entrusting decision-making to supranational institutions narrows the discretion of domestic institutions, particularly democratically elected legislatures, and prevents even the broadest of national coalitions from overturning EU decisions. The only (legal) way to successfully revise major EU norms is to do so through the Council (which, depending on the particular decision rule, may require unanimity among 28 states), through litigation before the Court of Justice, or through treaty revision (which usually requires a unanimous decision by the 28 member states as well as domestic ratification). Thus entrenched against challenge by any single member state, a supranational legal framework prevents shifting domestic public opinion from scuttling long-term policy commitments. The extraordinary authority of supranational norms is thus justified with reference to the promise of more effective government. To some degree, therefore, the trade-off between democratic legitimacy and policy effectiveness is endemic to the EU's design and, as a consequence, so is the democratic deficit itself.[65]

Insofar as the EU's constitutional mechanisms are configured to administer a range of substantive policy goals, they amount to a non-democratic variant of constitutional practice I call "functional constitutionalism."[66] Functional

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[63] Giandomenico Majone, *The European Community: An 'Independent Fourth Branch of Government'?* EUI Working Paper SPS No.93/9 (Florence: European University Institute, 1993), 22

[64] The famous metaphor is Jon Elster's. See Jon Elster, *Ulysses and the Sirens. Studies in rationality and irrationality* (Cambridge: Cambridge University Press, 1984); Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (New York: Cambridge University Press, 2000).

[65] This trade-off is also familiar from the domestic context, given that constitutional democracies regularly entrust tasks that require long-term stability, technical expertise, principled commitments, and/or political neutrality to non-majoritarian institutions, such as central banks, electoral commissions, regulatory agencies, and constitutional courts. On this score, see Ackerman, "The New Separation of Powers"; Majone, "The Rise of the Regulatory State in Europe," 93; Moravcsik, "In defence of the 'democratic deficit'.

[66] The term "functional constitution" has been used by others, particularly in the German literature on European law. Hauke Brunkhorst, Udo di Fabio, and Christian Joerges cite the work of German jurist Hans Peter Ipsen on this score. See Hauke Brunkhorst, "The legitimation crisis of the European Union", *Constellations* 13 (2006): 165-180, at 167; Udo di Fabio, "A European Charter: Towards a

constitutionalism is sharply at odds with the democratic model insofar as its authority rests on the assumption that good government requires *curtailing* democratic autonomy. Member states delegate policy decisions to supranational institutions precisely to insulate them from the possibility of democratic reversal.[67] What legitimates these policy decisions (and the EU's authority to carry them out) is not so much the democratic nature of the processes through which they are determined as their purported benefits for all member state citizens. The EU's legitimacy rests on its claim to have superior "problem-solving"[68] or technocratic capacity, often referred to, following Fritz Scharpf's formulation, as "output legitimacy."[69] Thus, like domestic constitutional entrenchment, supranational law is meant to hold majorities at bay; unlike a democratic constitution, however, it does not claim to do so in the name of facilitating the democratic process itself. Rather, supranational law is geared towards what Ian Shapiro terms "superordinate goods," that is to say, policy outcomes such as economic productivity, employment, consumer welfare, and environmental protection.[70] By contrast, democratic legitimation figures as a "subordinate good" of supranational government, that is to say, a requirement to be met only insofar as it does not interfere with the attainment of superordinate goods.

v. Is non-democratic constitutionalism sustainable?

There is nothing inherently wrong with political institutions whose legitimacy is premised on effectively carrying out the tasks entrusted to them. In fact, as Thomas Hobbes emphasized, failure to deliver essential public policy goods will undermine the legitimacy of any political order, however lofty its aspirations. For its part, as long as the EU could deliver on its policy promises, it was able to get by on weak democratic engagement. However, "output legitimacy" is also a fickle and limiting mode of legitimation: as soon as supranational institutions are perceived as ill matched to the challenges that confront them, they forfeit their *raison d'être*. Since functional competence is the mainstay of the EU's claim to authority, grave failures of competence such as the meltdown of the single currency tend to throw it into periodic existential crises.

The entrenched status of supranational norms and institutions has played an exacerbating role in the EU's doubled-barreled crisis of democratic and technocratic legitimacy. Due to the EU's cumbersome mechanisms of decision-making and treaty-revision, any design flaws in European institutions are extremely difficult to correct

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Constitution for the Union," *Columbia Journal of European Law* 7 (2001): 159-172, at 164; Christian Joerges, "The Law in the Process of Constitutionalizing Europe" (Florence: EUI Working Paper, 2002).

[67] Majone, "Europe's 'Democratic Deficit'," pp.16-17

[68] Giandomenico Majone, *Dilemmas of European Integration. The ambiguities and pitfalls of integration by stealth* (Oxford: Oxford University Press, 2005), 38

[69] Fritz W. Scharpf, *Governing in Europe: Effective or Democratic?* (Oxford: Oxford University Press, 1999), also, "Problem Solving Effectiveness and Democratic Accountability in the EU," Political Science Series no.107 (Vienna: Institute for Advanced Studies, 2006)

[70] Ian Shapiro, *Democratic Justice* (New Haven, CT: Yale University Press, 1999), 23

in the face of shifting challenges. Without adequate mechanisms of democratic revision and contestation, the European edifice risks becoming ineffective as well as undemocratic, and thereby losing its tenuous claim to functional legitimacy. What ultimately endangers the long-term sustainability of the European project is not so much its technocratic shortcomings as its lack of democratic appeal. Contrary to the Monnetian expectation, economic interdependence and the expansion of supranational power *begs* the question of political integration rather than resolving it.

Even more importantly, the dominant problem-solving justification for European integration may thwart the prospects of building a European public sphere by simply denying the need for it. If all Europe brings are quantifiable gains in governmental 'performance'—assuming that that could be gauged—this lures us into a false impression that sustained citizen engagement with Europe is unnecessary. To pretend that all policy questions in the EU have ideologically neutral, Pareto-superior solutions is to deny the political nature of supranationalism and the consequent need for democratic resolution of conflicts. Put differently, the claim to technocratic competence disguises the pressing need for civic engagement to guide and sustain the European project over the long term.

I argued earlier that the grand strategy espoused by the founders of the EC was to delegate the important choice of supranational political institutions to the force of economic necessity. In seeking to insulate the European project from the vicissitudes of democratic politics, however, the Monnet method of incremental integration has only managed to postpone the inevitable reintrusion of politics into the supranational scene in embittered and disaffected form. Having been kept out of the decisions that drove ever-closer union, national democratic politics has resurfaced as dismissive euroskepticism, virulent xenophobia, resentful populism, and reactionary resistance. The present cul-de-sac of "European integration by stealth"[71] shows that technocracy is not a sustainable alternative to democratic legitimacy. Where we try to dismantle or attenuate democratic politics, we are prone to bearing the cost of anti-democratic politics. Politics itself, however, does not go away. The past two decades have posed the question of the Union's *finalité politique* with increasing urgency, underscoring that this question cannot be answered by the immanent logic of market building.

Given the systemic nature of the EU's legitimation problems, the changes put into place since the 1990s, including the expansion of the powers of the EP and of national parliaments, while remarkable, are inadequate to the task of placing the EU's constitutional order on a democratic footing. Most of these democratic enhancements have been just that: they paper over the yawning political deficiencies of a vast administrative and legal apparatus. They do not alter the deep structure of the supranational constitutional system, which is fundamentally non-democratic and functionalist.

[71] Majone, *Dilemmas of European Integration*

vi. Non-democratic constitutionalism beyond the EU

I have so far argued that the EU is a constitutional system that lacks the democratic rationale that we tend to associate with constitutional rule. I have also argued that the EU's alternative, technocratic mode of legitimation is an inadequate basis for supranational constitutional authority.

As contemporary international institutions strain the classical paradigm of public international law, many scholars have resorted to a constitutional frame of analysis to describe the distinctive characteristics of regimes such as the WTO, UN, NAFTA, *lex mercatoria*, bilateral investment treaties, among others. Even political scientists, who tend to understate the significance of international law, have come to emphasize the constitution-like characteristics of many international institutions.[72] In particular, economic institutions such as NAFTA and WTO have functionally specialized but flexible legal mandates, and like the EU, some of them marshal constitutional mechanisms such as compulsory dispute settlement and private rights of action in order to hold states to their treaty commitments. To take one well-known example, since its establishment pursuant to the 1995 Uruguay Round, the Appellate Body of the WTO has taken shape as the authoritative interpreter of the multilateral trade regime and exercises a *de facto* judicial review function.[73] Its decisions, like those of the CJEU, are virtually impossible to overturn without revising the treaty and affect the choices open to domestic policy-makers in the long term.[74] Thanks in part to compulsory dispute settlement, the WTO, like the EU, amounts to an "arrangement that precommits economic policy to a fixed set of rules rather than leaving the government free to adopt any economic policy it wishes,"[75] mirroring constitutional entrenchment in the conventional sense. Moreover, the WTO's dispute settlement mechanism is regularly called on to decide questions relating to the environment, labor standards, consumer protection, public health, and areas of human rights, going far beyond the specialized domain of international trade.[76]

Although the WTO does not allow private parties to sue states, other regimes such as bilateral investment treaties, NAFTA and similar regional free trade agreements,

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[72] For instance, see Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, "Legalization and World Politics," *International Organization*, vol.54 (2000), no.3, pp.385-399; as well as Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization," *International Organization*, vol.54 (2000), no.3, pp.400-419

[73] Lawrence R. Helfer, "Constitutional Analogies in the International Legal System," *Loyola of Los Angeles Law Review*, vol.37 (2003), pp.193-238

[74] Gregory Shaffer, "Developing country use of the WTO dispute settlement system: Why it matters, the barriers posed," in James C. Hartigan (ed) *Frontiers of Economics and Globalization*, Vol.6 (2009), pp.167-190

[75] Peter Holmes, "The WTO and the EU: Some Constitutional Comparisons," in Grainne de Burca and Joanne Scott, *The EU and WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001), 60

[76] Trade lawyers call this the "linkages" or "trade and …" debate. See David W. Leebron, "Linkages," *American Journal of International Law*, vol.96 (2002), no.1, pp.5-21

and some specialized regimes such as the Energy Charter Treaty afford some form of legal right of action for non-state actors.[77] Just as private litigation in the EU created a "decentralized enforcement mechanism" by which affected individuals and firms used domestic courts to enforce the treaty obligations of member states,[78] litigation widens the constituency of international law and redefines and expands the scope of states' obligations.[79] It also translates the mutual obligations of states into rights owed to private economic actors (mostly, transnational corporations). For example, the so-called national treatment principle enshrined in NAFTA Art 1102, which obliges states to apply the same standards of treatment to investors from other member states as domestic investors, has been interpreted as a subjective right to non-discrimination on the basis of nationality. As investor-state litigation proceeds apace, the scope of private economic rights grows wider at the expense of democratic autonomy in the domestic context.

Like the process of European integration, the "legalization"[80] and entrenchment of global economic regimes also has domestic constitutional implications. The higher norms that condition the exercise of domestic public authority are no longer limited to those written into the constitutions of sovereign states, but include international norms such as those found in trade and investment regimes, as interpreted by transnational dispute settlement mechanisms.[81] Constitutionalism itself is therefore no longer confined to fixed and self-contained political communities, but is instead functionally fragmented and distributed across multiple levels of governance.

In sum, institutions designed to foster economic cooperation among sovereign states are borrowing mechanisms of constitutional governance, including rights

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[77] There is a large literature tracing the parallels between the EC/EU and other economic organizations. See Robert Howse and Kalypso Nicolaïdis, "Legitimacy through 'Higher Law'? Why constitutionalizing the WTO is a step too far", in Thomas Cottier and Petros C. Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and lessons for the WTO* (Ann Arbor: University of Michigan Press, 2003). Also, Deborah Z. Cass, *The Constitutionalization of the World Trade Organization. Legitimacy, Democracy, and Community in the International Trading System* (Oxford: Oxford University Press, 2005); as well as the contributions in de Búrca and Scott, *The EU and the WTO*; as well as contributions in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009). For a skeptical view, see José E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences," *Texas International Law Journal*, vol.38 (2003), no.3, pp.405-444

[78] Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004), at 69. See also, Karen Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press, 2001); R. Daniel Kelemen, *Eurolegalism: The transformation of law and regulation in the European Union* (Cambridge, MA: Harvard University Press, 2011), ch.3.

[79] The "feedback effect" of judicialization is theorized in Alec Stone Sweet, *Governing with Judges* (New York: Oxford University Press, 2000). See also Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier," Yale Law School Faculty and Affiliate Scholarship Series, 2010 no.69, available at http://digitalcommons.law.yale.edu/fss papers/69

[80] Goldstein et al., "Legalization and World Politics"

[81] William Burke-White and Andreas von Staden, "Private litigation in a public law sphere: The standard of review in investor-state arbitrations," *Yale Journal of International Law*, vol.35 (2010), pp.283-346, 289

adjudication, judicial review, and entrenchment. However, whereas domestic constitutional norms derive their legitimacy from being negotiated, established, and revisable through democratic processes, international institutions are several degrees removed from democratic control. Similarly, whereas these mechanisms are defensible in the domestic context as aiding democratic self-rule, international institutions serve to insulate substantive policy ends from democratic control. On the one hand, this is part of their very purpose: they hold states to their commitments to enable cooperation. On the other hand, the shift towards a constitutional mode of governance in international context removes momentous policy decisions from the scope of democratic decision-making and empowers a new set of institutions and actors at the expense of citizens. The EU is an extreme example in this regard, but the normative issues raised by its system of non-democratic constitutionalism are by no means idiosyncratic. Most importantly, the EU shows that while it is possible to apply features of constitutional rule to international institutions, constitutionalism in that context is likely to be non-democratic. Put differently, it is likely to lack one of the essential characteristics that make constitutionalism a desirable form of political ordering in the first place.