

On Europe's functional constitutionalism Towards a constitutional theory of specialized international regimes

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Constitutionalism is enjoying yet another renaissance, this time in the context of supranational institutions.¹ Many observers believe that the answer to the question popular during the late 1990s—is constitutionalism possible beyond the nation-state?—ought to be in the affirmative. It has become *de rigueur* to reach for constitutional language when considering postnational legal entities so long as they bear some resemblance to formal features we associate with constitutional rule. Never mind that these entities (variously taxonomized as regimes, systems, institutions, orders, processes, and so on) have little in common with each other. International institutions ranging from the UN to the WTO, NAFTA, IMF, and ICSID, human rights regimes including the UDHR and the ECHR, juridical constructs such as *jus cogens*, transnational contract law, and treaties from the Vienna Convention on the Law of Treaties to the New York Convention on the Enforcement of Foreign Arbitral Awards have all been considered forms of constitutional order at one point or another.² Is the house of constitutionalism great enough to accommodate all these mansions?

I will begin this article by explaining why we might need a constitutional theory of institutions beyond the state. In response, I will point out a trend towards inflationary and indiscriminate use of constitutional terminology, and argue that this not only results in the loss of analytical precision, but threatens to erode the concept of constitutionalism itself. I will then propose the category of “functional constitutionalism” to characterize the kind of constitutional practice emerging at the level of functionally specialized institutions beyond the state. In developing this idea, I will draw on the development of the European legal order out of the 1957 Treaty of Rome.³ I will conclude by pointing out the more general uses of this category. Specifically, I will argue that the idea of functional constitutionalism is well suited to characterizing new forms of political ordering beyond the state, and provides a valuable critical tool with which to evaluate these.

i. Constitutionalism beyond the state and the perils of conceptual profligacy

All around us, political processes that escape the nation-state's frame of reference are challenging our conceptual orthodoxies and normative intuitions. At its best, social science treats the new world of politics beyond the nation-state as an opportunity for analytical creativity and renewed critical rigor. In more equivocal instances, we paper over unknowns with fuzzy neologisms (‘governance’ is a ubiquitous favorite) or wheel out concepts formulated in entirely different contexts.

Constitutional theory has become a particularly crowded conceptual terrain in our collective endeavor to make sense of newly emerging political and economic institutions beyond the state. Puzzlingly, however, mainstream responses to the question of whether and to what extent constitutionalism remains practicable in the postnational context tend to adopt a uniform argumentative tack, notwithstanding persistent disagreements about whether that question

ought to be answered in the affirmative. In a recent work, Jeffrey Dunoff and Joel Trachtman have aptly called this pervasive methodology the “check list approach”:⁴ observers tend to posit a set of legal and institutional criteria as being central to constitutionalism, and proceed to analyze the extent to which existing postnational regimes approximate those criteria. The most frequently cited signs of constitutionalism include the hierarchical organization of norms, the authority to produce binding rules, direct applicability, binding mechanisms of dispute resolution, systems of precedent, schedules of fundamental rights, and rudimentary channels of democratic accountability. In a nutshell, the claim is that institutions which replicate the features we associate with constitutional orders must be considered in constitutional terms. To borrow Alec Stone Sweet’s colorful metaphor, “if it looks, walks, and quacks like a duck, then it is probably a duck.”⁵

More often than not, scholars opt for minimalist constitutional criteria, which lead more easily to the conclusion that a given international regime is in the process of ‘constitutionalization,’ or, less often, already constitutionalized. Because more and more supranational regimes issue norms that bind their member states, incorporate compulsory mechanisms of dispute settlement, or give rise to justiciable rights for individuals, the checklist approach yields as many positive results (“yes, it is constitutionalized”) as we are willing to allow. The more we relax the criteria, the more numerous the constitutionalized regimes we see.

The academic excitement over the purported constitutionalization of international law has been accompanied by the emergence of a near-consensus among scholars of European law concerning the *de facto* constitutional status of the European Union.⁶ Nonetheless, the pervasiveness of constitutionalizing analysis in the academic context is puzzlingly at odds with the dismal failure of the European Union’s attempt to stage a Philadelphian “constitutional moment” in the early 2000s. Why insist on constitutional language in our research if we can’t make it stick in the ‘real world’? I believe that legal and political theory’s passion for constitutional discourse has to do with the prospect of epistemic empowerment vis-à-vis the historically dominant (neo-) realist paradigm in international relations, according to which only sovereign states and their capacity to exert violent force “matter.”⁷ The language of constitutionalism offers traction for normative theory and legal scholarship in an area of human activity where their insights have traditionally been dismissed as trivial at best, and dangerous at worst.⁸ Over the last two decades, the normative disciplines have used the theme of constitutionalism beyond the state to push back against the realist orthodoxy that the law, either as a factual or normative category, has little to contribute to the investigation of politics among states. Scholars of these disciplines argue that legal obligations and juridical modes of argument not only influence state “behavior,” but also help to reconfigure the unquestioned categories (such as interests, security, or power) on which traditional international relations scholarship is built.⁹ From this perspective, the terminological shift in favor of constitutionalism is symptomatic of an attempt by political and legal theorists to conquer new territory in a disciplinary turf war.

Unfortunately, however, easy resort to constitutional terminology has some adverse consequences for constitutional theory itself. For one thing, it can result in dignifying every legal and quasi-legal entity in the supranational context with the constitutional label. As a result, the idea of constitutionalism is being subjected to what Giovanni Sartori has referred to as “concept stretching.”¹⁰ According to Sartori, “the net result of conceptual straining is that our gains in extensional coverage tend to be matched by losses in connotative precision.”¹¹ That is, the attempt to indefinitely expand the scope of applicability of a concept comes at the expense of analytical exactness and clarity.

Given the special purchase of the idea of constitutionalism in modern democracies, however, a glut of poorly conceptualized academic work may turn out to be the least of our worries. The real danger is that our collective conceptual profligacy is in the process of devaluing constitutionalism as a crucial evaluative category in modern political discourse. Since the late eighteenth century, constitutionalism has emerged as the authoritative placeholder of normative principles central to our understanding of what makes public institutions legitimate. It is not simply a mode of political ordering but a repository of political ideals. The erosion of constitutional vocabulary through overuse therefore limits our ability to understand, assess, design, and redesign the institutions which govern us.

Should these considerations lead us to raise the threshold at which we consider new legal regimes to be properly constitutionalized? That is, should we counteract terminological laxity by adopting a more stringent checklist of constitutional features? This has been the preferred response of a number of strong democratic constitutionalists, who argue that a simple agglomeration of ‘constitutional-oid’ characteristics such as direct effect, supremacy, and judicial review cannot amount to constitutionalism.¹² In a celebrated 1995 essay,¹³ German Federal Constitutional Court Justice Dieter Grimm outlined this position in response to the debate about the European Union’s constitutional prospects. He insisted that the EU’s advanced legal structure did not have freestanding constitutional status because it had never been authorized by a European *demos*. In Grimm’s view, “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,”¹⁴ which can never be the case with a treaty system, no matter how constitution-like its formal characteristics. Grimm argued that because Europe’s democratic publics can only make their mark on the EU’s founding treaties indirectly, that is to say, through their national executives and legislatures, this crucial element of democratic authorization is missing from the supranational context.

Broadly speaking, Grimm’s position implies the conclusion that the sovereign state framework is indispensable for the meaningful practice of constitutionalism.¹⁵ On the one hand, Grimm is right to doubt that his popular sovereigntist understanding of constitutionalism can be transferred wholesale to the world of deeply legalized supranational institutions with functionally limited competences.¹⁶ On the other hand, a more radical implication of this argument—not explicitly acknowledged by Grimm himself—is that by refusing to consider the constitutional credentials of treaty-based regimes that cannot lay claim to democratic legitimation, we seem to rule out the possibility of postnational applications of constitutionalism. And yet, to deny that constitutionalism can have any purchase beyond the state is to throw the baby out with the bathwater: an inflexible insistence on a thick notion of constitutionalism (especially one which insists on a moment of popular authorization) may doom constitutionalism itself to irrelevance. As Udo di Fabio, another Justice of the German Constitutional Court put it in relation to the EU’s constitutional debate, “those who insist only on [categories based upon the closed nation-state] squander the opportunity to anchor the *telos* of the Union more strongly than ever in the values of Western constitutional culture.”¹⁷

Let us sum up the drawbacks of the checklist approach. First, it would appear that more and less demanding uses of this approach lead to the same conclusion: they both cast into doubt the continued relevance of constitutionalism beyond the state. Either we must tolerate the indefinite conceptual erosion of constitutionalism and its gradual reduction to a series of formalistic criteria, or we must confine its applicability to the historically contingent and increasingly beleaguered nation-state form. Second and more important, the checklist approach thwarts any sort of general agreement about whether a given regime is constitutional, because it amounts to arguing from definitional fiat. The resulting debate

hinges not on what postnational constitutionalism might look like, but on essentialist and static definitions of what constitutionalism is or does. The problem is that what constitutions *are* or what they *do* within the context of the nation-state will not necessarily be what they do (or should do) beyond that context. Delegating the verdict about the possibility or desirability of postnational constitutionalism to statist criteria not only leads observers to speak past one another, it also naturalizes existing forms of constitutionalism as the only kinds of constitutional practice imaginable. Last, and perhaps most important, this approach obscures the distinctive and normatively salient aspects of postnational modes of political organization, their promises as well as their drawbacks. In sum, the current debate often fails to live up to what Neil Walker has termed the challenge of “translation”:¹⁸ in using constitutional indices inherited from the nation-state context, we neglect the pressing need to reimagine the idea of constitutionalism.

The multiplication of sites of politics beyond the state presents a bi-directional challenge not just for constitutional theory but for social science in general: on the one hand, conceptual categories carefully tailored to the nation-state, such as constitutionalism, sovereignty, or citizenship, need to be translated into institutional contexts where assumptions of territorial boundedness, concentrated political authority, and cultural homogeneity no longer obtain. On the other hand, the essential normative qualities which make these categories worth preserving in the first place must not be lost in translation. Just because political power has ‘gone transnational’ does not mean it has dissipated; rather, we must insist on the same sophisticated standards of political legitimacy to which we hold national institutions *wherever* political power is exercised.

A more promising alternative to the checklist approach would be to undertake conceptual readjustment and normative critique simultaneously. Thus, on the one hand, we must be sensitive to constitutionalism’s critical force insofar as it distils key principles about political legitimacy and provides a way of placing these at the center of political order. The attempt to reduce constitutionalism to a series of legal and institutional features sidelines the essential normative content which gives constitutionalism its distinctiveness as a political idea and ideal. Once constitutionalism is deprived of its role as the legitimating framework of public power, we lose the normative substance which makes it a category worth preserving in the postnational context. In other words, the problem of adapting constitutionalism to non-state entities and the analytical creativity that this task requires should not come at the expense of the valuable inheritance of constitutional theory.

On the other hand, clinging to an all-too demanding normative standard of constitutionalism (for instance, one which rests on grand constitutional foundations of the Philadelphian variety) may close off the possibility of recovering constitutionalism outside the context of the nation-state altogether. Consequently, the most useful way of assessing the prospects of postnational constitutionalism is to undertake a reciprocal readjustment of existing constitutional practices beyond the state on the one hand, and conventional constitutional expectations on the other.

Certainly, this project of conceptual renovation can only be the subject of a larger, lasting effort by epistemic communities of scholars, jurists, and citizens. In this paper, I will point towards one possible response to this challenge by developing the idea of “functional constitutionalism.” I will use this concept to capture a distinct manner of constitutional practice that is emerging in the context of functionally specialized supranational institutions which no longer operate in the manner of conventional public international law. My goal is to create an analytically sound subcategory within constitutionalism that is, on the one hand, sensitive enough to detect the development of constitutional characteristics in legal regimes

beyond the state. On the other hand, however, I hope to formulate the idea of functional constitutionalism such that it is sensitive to the shortcomings of postnational constitutional regimes in terms of inclusion, justice, and democratic legitimation.

In what follows, I will briefly distinguish two roles that constitutions fulfill, which I will call the normative and the functional. I will then argue that through the jurisprudence of the European Court of Justice and the cooperation of national courts, the 1957 Treaty establishing the European Economic Community gradually evolved into a constitutional system configured on a non-comprehensive, partially autonomous, and functionalist footing. I will argue that during the period up to the signing of the Maastricht Treaty in 1992, Europe's legal order is best understood as one of "functional constitutionalism."¹⁹ By contrast, Maastricht and subsequent treaties have broadened the EU's political horizons beyond the market-building project. As a consequence, I do not claim that the model of functional constitutionalism provides an exhaustive characterization of the European legal order as it currently stands. Rather than give an *au courant* account of Europe's supranational constitutionalism, this paper aims to introduce a new category into the vocabulary of constitutional theory and to suggest that it may be of use elsewhere, too.

ii. The constitution's twin roles: legitimacy and effectiveness

The idea of a purely functional constitutionalism originates in the observation that constitutions have two simultaneous roles. The first is that of creating and organizing public power. The second is that of organizing public power in accordance with a series of weighty normative commitments on which citizens understand their union to rest. To put the distinction another way, on the one hand, constitutions order the business of governing, map the functions of political institutions, and enable the exercise of political authority more generally. On the other hand, they anchor political authority in principles about what makes that authority legitimate, including but not limited to liberty, equality, justice, and democracy. Political theorists have variously thought of this aspect of the constitution as a repository of common principles and long-term goals, a shared medium of debate and communication akin to language, an agreed-upon manner of reasoning about public questions, or a powerful recourse against perceived acts of domination or exclusion. In its normative role, the constitution should be able to provide resources for diverse causes in a wide range of struggles: it might serve as a defensive mantle donned to reclaim one's voice against exclusionary practices, as the touchstone for unfulfilled aspirations during moments of political stasis, or a baseline consensus on which to fall back in times of division and conflict. Nor is the normative meaning of the constitution necessarily or immutably written into its text; rather, it results from the debates, contestations and reappropriations constantly waged under its terms and which sediment over time into a series of reciprocally intelligible (but not necessarily agreed upon) meanings.²⁰

In what I will refer to as its functional role, by contrast, the constitution translates the normative expectations built into it into *government*: a living, breathing system populated by posts, institutions, and rules that produces the steady output of laws that are necessary to deliver the public goods for the sake of which the polity exists. For instance, the constitution might divide labor (and power) among legislative, executive, and judicial branches, spread competences over local, regional, national, and (often) supranational tiers of government, set out the procedures through which offices will be filled, laws issued, rights and duties balanced, political grievances registered. In so doing, the constitution must be conducive to the pursuit, in Jon Elster's words, of "the goal of efficient decision-making, unencumbered,

if necessary, both by popular participation and by constitutional constraints”²¹ such as those guaranteeing individual rights, the rule of law, and so on. In sum, constitutions are not only intended to make public power *legitimate*, they are also supposed to make it *effective*.

To be sure, effective government *is*, in a very general sense, also a criterion of legitimacy and thereby also a normative commitment. Nevertheless, it is possible to draw an analytical distinction between two logics which the constitution is meant to navigate, the one pragmatic and related to the effectiveness of political acts, and the other normative and related to the legitimacy of political acts. Put differently, the constitution must bring together two equally important vectors which do not always point in the same direction: it must ensure not only that political institutions fulfill the greater and smaller chores of government, but also that they do so in a way that is just, equitable, respectful of human dignity, and conducive to the autonomy of each citizen.

There are three important points to note about this analytical distinction. First, I do not mean to argue that a constitution is either a necessary or sufficient condition in bringing about governmental effectiveness *or* political legitimacy. Rather, my point is that *these* are the principal tasks with which the constitution is charged, whatever institutional or structural factors may be needed to produce the outcomes in question.

Second, *all* constitutional rules are normative in the sense of being prescriptive. Whether a constitutional rule helps to increase the effectiveness of political power or protects human dignity, all constitutional rules are commands and thus intended to shape the behavior of those subject to them. In this general sense, the term “normative” tracks the constitution’s character as law. Here, by contrast, I use the term “normative” in a more specific sense, that is, to track a constitutional commitment’s claim to legitimacy rather than mere legality. Thus, we can distinguish the normative dimension of constitutional commitments by assessing the immediacy of their connection to ideals of freedom, equality, justice, solidarity, and so on; that is to say, on the basis of their intrinsic value. By contrast, where constitutional commitments are valued for their ability to make public institutions more competent, more effective, or more powerful in the long-term, I will emphasize their pragmatic character.

Third, all constitutions encompass some combination of *both* logics, the normative and the pragmatic. As Stephen Holmes has observed, many constitutional norms that expand and protect the liberties of citizens also help to stabilize political power.²² The separation of powers doctrine provides an excellent illustration of this duality. On the one hand, thinkers such as Locke and Montesquieu have considered the separation of powers to be an indispensable condition of liberty. Similarly, political revolutions from the English (1688) to the French to the American have invoked it as an institutional principle.²³ Combining the power over making laws with that of applying them was considered dangerous on the grounds that it would deprive laws of their generality, publicity, and impartiality, reducing lawmaking to sovereign whim. At the same time, however, Holmes points out that the separation of powers helps promote “governmental maneuverability”:²⁴ the separation of powers is not only a guarantor of liberty, but also “a form of the division of labor, permitting—in some cases—a more efficient distribution and organization of governmental functions. Specialization improves everyone’s performance.”²⁵ For instance, such a division of labor “can disentangle overlapping jurisdictions, sort out unclear chains of command, and help overcome a paralyzing confusion of functions.”²⁶

Even though individual rights are more usually imagined as normative commitments that hold calculations of expediency in check, they too have a part to play in shoring up governmental effectiveness. The freedom of conscience is a perfect example of this dual logic because, to quote Holmes again, “[n]ot merely does it shelter the private sphere

from unwanted incursions, it also unburdens the public sphere of irresolvable problems.”²⁷ When public institutions take sides in fundamentally incommensurable disputes such as confessional ones, this not only threatens the liberty of those who profess a different faith, but corrodes the authority of government. Representative democratic institutions similarly fulfill a dual function: although they are most frequently justified with reference to enabling the exercise of public autonomy by citizens, they also serve to pacify political disputes, promote competition among policy ideas, and render public power more adaptable.²⁸

Some early instances of constitutional rule are useful for illustrating the role of constitutional commitment in augmenting rather than limiting the power of the sovereign. Long before the American Founding and the French Revolution redefined the constitution as the instrument of *legitimate* political rule, proto-constitutional constraints on the authority of purportedly absolutist monarchs often had the consequence of making the latter’s power more *effective*.²⁹ For instance, according to Holmes, the “*leges imperii*” of absolutist rule bound the monarch to respect the right of succession so that he could not appoint a successor and was obliged to safeguard the territorial integrity of the realm. By limiting the power of any one monarch, laws concerning sovereign authority ensured the permanence of monarchical power itself.³⁰ Similarly, Francis Sejersted observes that sovereigns who adhered to legal constraints on their scope of authority were paradoxically more assured of the durability of their acts than a despot whose power was circumscribed by his own mortality.³¹ To use a distinction made by Stephen Krasner, legal constraints enabled absolutist monarchs to cash in some of their *de jure* authority for *de facto* control, that is, the ability to govern effectively.³²

This strategic role of constitutional constraint makes sense as a response to the paradox of commitment, whereby “the ability to commit often . . . expands one’s opportunity set, whereas the capacity to exercise discretion . . . reduces it.”³³ Thus, in the early modern instance, the absence of limits on the sovereign’s authority poses an obstacle to the effective exercise of sovereign power. Conversely, by curtailing its prerogative in the short term, the sovereign could secure greater political power in the longer term. For instance, as Hilton Root has shown with regard to 18th century France, the monarch could increase his creditworthiness and secure access to loans provided that he could credibly repudiate his claim to be above the law, particularly the obligation to repay his debts.³⁴ Put differently, accepting limits to his fiscal discretion enabled the king to reassure lenders that they would not be expropriated, making them more willing to lend. An excellent way of realizing this self-limitation was the guarantee of individual property rights which, in Holmes’s words, were often “created and maintained by the state to promote the goals of the state.”³⁵ Douglass North and Barry Weingast’s classic study on the Glorious Revolution of 1688 tells a similar story of constitutional transformation in England.³⁶ Accordingly, the rapacious policies of taxation pursued by the Crown during the first half of the seventeenth century precipitated the overthrow of James II and the introduction of a series of mechanisms for constraining the power of the monarch.³⁷ Although these numerous institutional checks limited the power of the monarch to tax his subjects, North and Weingast argue that rather than diminishing the Crown’s solvency, these limitations increased it in comparison to the beginning of the century when sovereign prerogative had been much more expansive.

As these examples show, whatever the reasons behind their initial adoption, many early instances of constitutional commitment served to “markedly increase [the sovereign’s] capacity to govern and to achieve his steady aims.”³⁸ Some of these limitations, such as guarantees against the expropriation of private wealth or edicts of religious toleration, created pockets of individual liberty that laid the foundations of modern catalogues of constitutional

rights. However, it is important to emphasize the pragmatic, power-enhancing role of such proto-constitutional innovations alongside their contemporary normative significance.

In what follows, I will show that the Treaty of Rome system which grounds the European Union's supranational legal framework is best understood with reference to the pragmatic role of constitutional commitment rather than an idealized Philadelphian narrative.³⁹ I will argue that in the first three decades of its development, the European legal order put into place a form of constitutional practice that jettisoned the normative content that defines constitutional discourse today. Europe's functional constitutionalism is mostly about *building power*, and only incidentally about any foundational principles of political legitimacy. Insofar as it exists to administer a series of market-related policies, the Treaty of Rome system represents a distinctive, pragmatic species of constitutionalism that is largely disconnected from the normative principles with which we traditionally associate constitutional rule. While the European legal order appropriated the legal and institutional machinery of constitutionalism from the 1960s onwards, including a hierarchy of laws, individual rights, and judicial review, each of these constitutional features has been marshaled and justified in terms of a distinctive logic of governmental effectiveness.

iii. On Europe's functional constitutionalism

Although the 1957 Treaty Establishing the European Economic Community originated as an agreement among sovereign states, over the first few decades of its existence, it evolved into a highly sophisticated legal order with a number of strikingly constitutional characteristics. Let us briefly recall the most important of these. First, in a series of landmark rulings beginning with *Costa v. ENEL* in 1964,⁴⁰ the ECJ proclaimed that Community law takes precedence over the laws of member states. Even in the event of a conflict between a member state's constitutional provisions and a piece of European law, the former must prevail according to the ECJ.⁴¹ Through the piecemeal and sometimes grudging acceptance of the supremacy doctrine by national courts, European law has acquired a complex structure that integrates supranational law into the legal systems of member states.⁴² Under the preliminary reference procedure of the Treaty, national courts are empowered to refer questions about the application of European law to the ECJ, and have been directed by the ECJ to disregard *any* national legislation that comes into conflict with European law. This means not only that the ECJ has co-opted national courts into a European judiciary with a supranational court at its center,⁴³ but it has also given ordinary national courts powers of judicial review normally reserved for constitutional courts, thus revising the domestic constitutional systems of member states.⁴⁴ Moreover, because it is their own courts rather than a distant supranational body ordering member states to fulfill their supranational obligations, European law has enjoyed remarkably consistent domestic application.

As important, in 1963, the ECJ ruled that certain provisions of the Treaty of Rome gave rise to individual rights that could be relied on by individual litigants before national courts.⁴⁵ In the ensuing decades, the Court gradually expanded the remit of the direct effect doctrine by finding more and more Treaty provisions and directives as capable of giving rise to individual rights. Consequently, member state nationals (after the Treaty of Maastricht, Union citizens) became the holders of a series of rights originating exclusively from European 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.⁴⁶ Insofar as it regards individuals as its addressees and provides rights guarantees that they may claim

before domestic courts, the EU's legal order now transcends the conventional paradigm of international law and mirrors domestic constitutional orders.⁴⁷

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.⁴⁸ Although some academic commentators had considered the EC in constitutional terms prior to this pronouncement, the Court's *Les Verts* decision made constitutional language all but unavoidable in any inquiry into the nature of the European polity.⁴⁹

And yet, while the European legal order replicates many of the key institutional features we associate with constitutionalism, the fact that the whole system has been built to realize a specific policy end (that of market integration) makes this supranational form of constitutionalism highly distinctive. First, as most empirical accounts acknowledge, European integration represents an attempt to enhance the capacity of public institutions (whether at the subnational, national, or supranational levels) to tackle pressing policy challenges.⁵⁰ While there has always been heated debate over the actors, conditions, and mechanisms that predict the success or failure of regional integration,⁵¹ the European integration project is explained primarily with reference to cross-border policy issues which member states acting singly cannot, or can no longer, adequately address. In Jürgen Habermas's words, European integration 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."⁵² Because each of these problems calls for solutions on a scale greater than the nation-state, new institutional mechanisms must be improvised to make concerted action by states possible.

As scholars of international cooperation well know, however, sovereign states face important challenges in undertaking concerted action in pursuit of collective goods. Because each state will have short-term incentives to renege on their promises, long-term cooperation proves elusive in the absence of effective commitment and sanctioning mechanisms. The range of decisions required over time to attain the objective of an integrated multinational market on the scale of the European continent, such as the lifting of protectionist trade restrictions, the adoption of common regulatory policies including those regarding competition, environmental, consumer, and labor standards, are those which states are motivated to shirk. Supranational institutions (and in particular, supranational law) provide an answer to precisely this problem of commitment: if competence over the making and enforcement of decisions of this kind can be removed from the purview of member states and delegated to an authority beyond their immediate control, the policy continuity and monitoring necessary to attain the long-range objectives of integration can be brought within reach.

Thus, the delegation of competences to a new supranational authority can be viewed as another version of the story of Ulysses tying himself to the mast of his ship to avoid future temptation by the sirens.⁵³ By submitting to the authority of supranational institutions on some public policy issues, member states remove certain decisions from the realm of ordinary domestic politics in the name of an anticipated longer-term good, a practice that closely mirrors the mechanism of constitutional entrenchment. However, whereas many traditional instances of constitutional commitment (such as substantive rights norms) are directly traceable to fundamental ideas of human dignity and autonomy, supranational self-binding in the name of economic growth and competitiveness represents an instrumental deployment of constitutional mechanisms. At stake is the ability of public institutions to manage systemic

imperatives rather than the preservation of weighty normative principles. Here, the proto-constitutional mechanisms used by early modern sovereigns provide an apposite parallel: just as the monarch had short term incentives to default on his debts or overtax his wealthy subjects, and sought to reassure lenders by narrowing his own discretion to expropriate them, in the European context, surrendering power over the adoption, monitoring, and enforcement of policies to a supranational body is meant to prevent shifting majorities in respective member states from scuttling the collective endeavor. The unlimited discretion of the sovereign state gets in the way of its exercising its power effectively, and the relinquishment of authority over certain competences to supranational institutions provides an effective way for states to signal the credibility of their long-term commitments to their peers.⁵⁴

The term “functional” captures two important characteristics of this particular application of constitutional mechanisms at the supranational level: first, the European Union issues norms which govern a loosely defined but functionally delimited sphere of public policy. In this respect, it is similar to other supranational institutions and regimes that have been characterized in constitutional terms. However, functional specialization is a feature which state-based paradigms of constitutionalism are ill equipped to capture. For one thing, within the statist framework, it is assumed that *all* exercises of public power have to filter through the mesh of domestic constitutional validity. As Dieter Grimm puts it, “[t]here is no space for proprietors of public power outside the constitution.”⁵⁵ By contrast, the European legal order dispenses with the assumption of comprehensiveness that is traditionally associated with constitutionalism (what Frank Michelman has called the constitution’s “pervasive” quality).⁵⁶ Rather, its legal order is based on the recognition that other constitutional orders will be responsible for sectors of public authority that fall outside its remit. In this sense, functional constitutionalism describes a compartmentalization of policy making into differentiated zones of constitutional validity.⁵⁷ This distinguishing feature of Europe’s supranational legal order is deftly captured by John McCormick’s term “*Sektoralstaat*,” which understands “the EU [as] a qualitatively different and new form of polity” in comparison to the law-governed liberal state (*Rechtsstaat*) of the early 20th century and the corporatist welfare state (*Sozialstaat*) of the postwar period.⁵⁸ Overseen by a functionally specialized constitutional order, the *Sektoralstaat* represents a new technology of governance where public power is increasingly splintered into specialized sectors (such as competition, free movement, regulatory harmonization) that operate according to autonomous logics and in relative isolation from domestic democratic or constitutional scrutiny.

Secondly, the qualifier “functional” refers to the fact that the European legal order is framed by a narrowly defined *telos*, a feature which stands in stark contrast with the open-ended configuration of traditional constitutions. Whereas constitutional norms usually set out the fundamental procedural and substantive norms that will govern the future selection of public ends through democratic processes, with as little prejudice to the outcomes of those processes as possible, supranational law exists to implement a set of already-settled, substantive policy objectives. Thus, the European legal order scrambles the analytical distinction between what Dennis Mueller calls “constitutional choice” and “everyday political choice”:⁵⁹ rather than provide the framework through which ordinary political questions will be deliberated, negotiated, and resolved, the European legal order resorts to constitutional entrenchment in order to administer policy choices already agreed to by member states.

To say that the functional constitution’s narrowly teleological framework does not allow for the operation of democratic mechanisms of “opinion- and will-formation” is not to rehash the familiar critique of the EU’s gaping democracy deficit. Rather, it is to assert that at a more fundamental level, supranational governance is undertaken in order to foreclose and

circumvent democratic contestation vis-à-vis the policy outcomes enshrined in the founding treaties. As such, the idea of functional constitutionalism highlights the appropriation of constitutional machinery in isolation from its traditional normative underpinnings. Each constitutional feature of supranational law serves as a strategic tool for insulating a set of policy ends from being challenged through domestic political processes. As a result, the framework of the Treaty of Rome, including the limited contestatory mechanisms it puts into place, cannot be used to question or undermine the objective of market integration itself. Put differently, the primary role of the functional constitution is not to lay down the procedural and substantive preconditions of political legitimacy, but to oversee the effective implementation of a series of entrenched policy objectives.

iv. Functional constitutionalism beyond Europe

Today's European Union espouses a wide array of aspirations. Without addressing the thorny question of whether these aspirations can be matched by the EU's existing competences (let alone whether today's economically incapacitated Union has the strength or resolve to translate them into reality), we can nevertheless observe that the European legal order has evolved beyond the functional constitutionalism of the Treaty of Rome. Particularly over the past two decades, it has exceeded the narrow confines of the market-building blueprint and has acquired many important normative features. The 1992 Maastricht Treaty expanded the horizon of European supranationalism beyond economic integration towards more capacious political objectives, not least by introducing the status of Union citizenship and a modest number of attendant civil and political rights.⁶⁰ Art 6(1) of the Amsterdam Treaty declared the EU to be "founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law," recognizing that the European commonwealth had advanced to the point where standards of legitimacy normally applicable to fully-fledged polities were relevant.⁶¹ The Lisbon Treaty, which entered into force in December 2009, formally complements this framework with a Charter of Fundamental Rights, a document that far outshines most domestic bills of rights in terms of its scope and progressive quality. This caps off a decades-long process by which the ECJ has gradually expanded market freedoms derived from the Rome Treaty to protect interests other than the purely economic. For instance, in the 1970s the ECJ famously interpreted the Treaty's Art 119 (now Art 157) prohibition on wage discrimination on the basis of sex so widely as to require member states to correct some of the most pressing domestic labor market policies that discriminated against women.⁶² Through a similar process, the principle of non-discrimination on the basis of nationality, which was originally included in the EC Treaty to prevent states from privileging the economic interests of their own nationals came to provide the kernel for citizenship status.⁶³ In recent years, the ECJ has used its self-appointed fundamental rights mandate in a wide variety of causes ranging from the freedom of expression in Greece⁶⁴ to the rights of same sex partnership in Germany.⁶⁵ In the celebrated *Kadi* decision of 2008, the ECJ struck down a Community regulation implementing United Nations Security Council resolutions on terrorist blacklisting on the grounds that it violated the due process rights of individuals.⁶⁶ Each of these developments has inched the constitution of the market closer to a constitutionalism grounded in comprehensive principles of political legitimacy, however incomplete this process may still be. In sum, although we can describe the first few decades of its development using the category of functional constitutionalism, the legal order of the EU has evolved beyond this model.

Notwithstanding the gradual strengthening of the normative anchors of the European legal order, the functional mode of constitutionalism that lies at the core of the European legal order has not yet lost its relevance. Most pressingly, functional constitutionalism is a useful interpretive category for making sense of the EU's current economic predicament. Since the start of the sovereign debt crisis in 2009, the EU's crisis of democratic legitimacy has arguably been eclipsed by a crisis of technocratic competence in the economic sphere, whereby the ability of supranational institutions such as the European Central Bank, the European Commission, and the Council to remedy the economic instability threatening all member states has come under serious doubt. Europe's economy (not to mention monetary union) remains in jeopardy as long as existing supranational mechanisms are inadequate or otherwise unsuited to addressing the disparate economic and financial pressures affecting members of the euro zone. Elsewhere, critics charge that the current crisis compounds a decades-old process in which the market integration project has eroded rather than buttressed the already-endangered social welfare systems of member states.⁶⁷ The challenge of adjusting supranational institutions to changed circumstances throws into high relief the drawbacks of the inflexibility built into the functional constitution. Because the functional constitution has been entrenched in terms of its narrowly teleological orientation, the flaws in its original design (most notably its market liberalization bias) are all but impossible to correct in the light of the contemporary challenges faced by European welfare states. The "one-way ratchet" of the functional constitution is in sharp contrast with the reflexive mechanisms built into constitutions in the domestic context, which allow for the possibility of contesting, revising, and correcting nearly all constitutional commitments.⁶⁸ Lacking comparable mechanisms of democratic revision and contestation emphasized in classical constitutional theory, Europe's functional constitution risks becoming ineffective as well as undemocratic, and thereby losing its tenuous claim to outcome-based legitimacy.⁶⁹

Further afield, the category of functional constitutionalism is highly relevant in the context of other supranational regimes whose constitution-like features scholars have been increasingly keen to document.⁷⁰ Here, functional constitutionalism offers a remedy to the problem of concept stretching which I identified earlier as affecting the academic debate in this area. As a conceptual category designed to capture the constitutional aspects of new functionally specialized and partially autonomous regimes, functional constitutionalism is intended to backstop our collective slide towards a wholly diluted understanding of constitutionalism. Moreover, it offers a way of addressing the powerful normative objections raised by Philip Alston, Robert Howse, Kalypso Nicolaidis and others against the hegemonic use of constitutionalizing discourse with reference to the WTO and other supranational economic institutions.⁷¹ These scholars argue that the use of constitutional terminology in such contexts hides an attempt to throw the whitewash of political legitimacy over the largely unaccountable, lopsided and inequitable institutions of global trade. The mere act of christening an organization "constitutional" serves to inure it against democratic contestation and revision.⁷²

Used as a critical term, functional constitutionalism flags just such a disconnect between constitutional mechanisms on the one hand, and the normative principles which lend them their value within liberal democratic societies on the other hand. It clarifies the new uses towards which constitutional mechanisms are being marshaled in the supranational realm, and highlights the fact that these new uses are fundamentally different from the meaning with which the American and French Revolutions, as well as newer constitutional movements such as those in India, South Africa, Egypt, and elsewhere have vested the idea of constitutionalism. Stripped of its role as the guardian of foundational political values,

constitutionalism becomes merely a clever device for making credible commitments, available for deployment in the service of any policy aim, however divisive or partial. As an idea that captures this sea change, functional constitutionalism can help crystallize our normative response to the powers accumulated by norm-producing institutions beyond the state.

Even more fundamentally, the idea of functional constitutionalism can shed light on our intuitions about constitutional theory. On a traditional understanding, constitutional constraints earn their claim to authority insofar as they ground the exercise of public power in a series of weighty political principles. The emergence of a purely instrumental constitutionalism shows that we cannot take this link for granted: the normative dimension which makes constitutionalism an enduring and inspiring mode of political ordering can disappear from view and we must be able to tell when this has happened. Such cases should not prompt us to simply ignore the constitutional claims of the laws or institutions in question; rather, our awareness of the distinctiveness of a purely pragmatic constitutional practice can help us in critiquing legal regimes whose normative grounding is weak or non-existent.

NOTES

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1. In this paper, I will use the term "supernational" to refer to institutions, norms, and processes that exist in the realm beyond nation-state in the broadest sense. "Supernational" is meant as a general term and should not be confused with "supranational," which implies that the entity in question exists in a superordinate hierarchical relationship vis-à-vis states. Genuinely supranational institutions are few and far between. The most advanced examples of a supranational mode of decision-making are found within the European Union's institutional framework (such as legislation through qualified majority voting), although not all decision-making in the European Union is of a supranational nature. "Supernational" is also more general than "transnational," which is most frequently used with regard to non-governmental interactions through and across state borders. Lastly, it is distinct from "international," which is most apposite in the context of interactions between sovereign states and classic public law structures authorized by them.

2. For a constitutionalizing perspective on the UN, see Bardo Fassbender, "The United Nations Charter as Constitution of the International Community," *Columbia Journal of Transnational Law* 36 (1998): 529–619; Bardo Fassbender, "Rediscovering a forgotten constitution: Notes on the place of the UN Charter in the international legal order," in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009). Compare with Michael Doyle's more circumspect assessment of a purported UN "constitution": "The UN Charter—A Global Constitution?" in the same volume.

A prolific literature addresses the WTO in constitutional terms. See the celebrated exchange between Petersmann and critics: Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration," *European Journal of International Law* 13 (2002), 621–650; Robert Howse, "From Politics to Technocracy – and back again: The fate of the multilateral trading regime," *American Journal of International Law* 96 (2002): 94–117; Robert Howse and Kalypso Nicolaidis, "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); Philip Alston, "Resisting the merger and acquisition of human rights by trade law: a reply to Petersmann," *European Journal of International Law* 13 (2002): 815–844; Steve Peers, "Fundamental Right or Political Whim? WTO Law and the European Court of Justice" in Grainne de Burca and Joanne Scott, *The EU and WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001). Also see Deborah Z. Cass, *The Constitutionalization of the World Trade Organization. Legitimacy, Democracy, and Community*

in the *International Trading System* (Oxford: Oxford University Press, 2005); Peter Holmes, "The WTO and the EU: Some Constitutional Comparisons" in Grainne de Burca and Joanne Scott (ed.s), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001).

On NAFTA's impending constitutional drift, see Ari Afilalo, "Constitutionalization through the back door: A European perspective on NAFTA's investment chapter," *NYU Journal of International Law and Politics* 34 (2001): 1–55; David Schneiderman, "Constitution or model treaty? Struggling over the interpretive authority of NAFTA," in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007).

On the IMF's "constitutional functions," see Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: University Press Fribourg Switzerland, 1991), at 64.

On the ECHR, see Alec Stone Sweet, "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court," *Yale Law School Faculty and Affiliate Scholarship Series* 71 (2009). Available at http://digitalcommons.law.yale.edu/fss_papers/71

For arguments about the constitutionalization of arbitration and transnational contract law, see the contributions in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009); Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier," *Yale Law School Faculty and Affiliate Scholarship Series* 69 (2010). Available at http://digitalcommons.law.yale.edu/fss_papers/69

3. The official name of the Treaty of Rome is the Treaty Establishing the European Economic Community. In the literature, it is most often referred to as the EC Treaty. With the entry into force of the Treaty of Lisbon in late 2009, the EC Treaty has been renamed "Treaty on the Functioning of the European Union." I began the project on Europe's "functional constitution" before this rechristening, although I am heartened to think that this coincidence might indicate the perspicacity of the phrase.

4. Jeffrey L. Dunoff and Joel P. Trachtman, "A Functional Approach to International Constitutionalization," in Dunoff and Trachtman, *Ruling the World?*, *supra* n.2, at 9.

5. Alec Stone Sweet, "Constitutionalism, Legal Pluralism, and International Regimes," *Indiana Journal of Global Legal Studies* 16 (2009): 621–645, at 642.

6. For two important arguments concerning why we should refrain from describing the EU's supranational legal order in constitutional terms, see Dieter Grimm, "Treaty or constitution? The legal basis of the European Union after Maastricht," in Erik Oddvar Eriksen, John Erik Fossum, and Augustin Jose Menendez (eds), *Developing a Constitution for Europe* (New York: Routledge, 2004) and Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010).

7. As Kenneth Waltz memorably put it: "National politics is the realm of authority, of administration, and of law. International politics is the realm of power, of struggle, and of accommodation." Kenneth Waltz, *Theory of International Politics* (McGraw-Hill, 1979), at 113.

8. The charge that normative language masks hegemonic ambition is captured in Carl Schmitt's statement, "whoever invokes humanity wants to cheat." See especially, Carl Schmitt, *Nomos of the Earth in the International Law of Jus Publicum Europaeum*, trans. G. L. Ulmen. (Telos Press, 2003 [1950]).

9. The constructivist revolution that began in international relations scholarship in the 1990s has greatly eroded the realist ontology that things like interests, security, or power exist in the world independently of the perspectives of the actors who imbue them with meaning. For some landmarks, see Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996); Peter A. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996); John Gerard Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge," *International Organization* 52 (1998) 855–885; Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

10. Giovanni Sartori, "Concept Misformation in Comparative Politics," *American Political Science Review* 64 (1970): 1033–1053.

11. *Ibid.*, 1035.

12. The notion of a constitution without constitutionalism is Joseph Weiler's. See his "European Neo-Constitutionalism: in Search of Foundations for the European Constitutional Order," in *Political Studies* 44 (1996): 517–533, at 518.

13. Dieter Grimm, "Does Europe Need a Constitution?" *European Law Journal* 1 (1995): 282–302. Also see Jürgen Habermas's equally well-known response in the same issue. Jürgen Habermas, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'" pp.303–307.

14. Dieter Grimm, "Treaty or constitution? The legal basis of the European Union after Maastricht," in Erik Oddvar op.cit. 2004), at 75.

15. That said, contrary to what is sometimes assumed, Grimm was not on the chamber that handed down the (in)famous *Brunner* decision in which the GFCC ruled on the constitutional and democratic limits

to European integration. See German Federal Constitutional Court, *Brunner v. the European Union Treaty*, 33 I.L.M. 388 [1994].

In fact, Grimm's viewpoint departs significantly from the assumption which characterized the *Brunner* decision that a pre-political, cohesive ethnonational identity forms the indispensable prerequisite of democratic *praxis*. Instead, Grimm draws on a Habermasian conception of democracy, arguing that "The people are certainly not some community whose unity and will are pre-given." Grimm's skepticism of the possibility of a democratic European public sphere hinges on the absence of a common language, since "[i]nformation and participation as basic conditions of democratic existence are mediated through" a shared language. For Grimm, the effort to create a unified European constitutional space in the absence of such a medium threatens to create a distant, centralized, elite-run racket. See Grimm, "Does Europe Need a Constitution?," *op.cit.*, at 293–5.

16. The concept of "legalization" has been developed systematically by Kenneth Abbott et al. See 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.

17. Udo di Fabio, "A European Charter: Towards a Constitution for the Union," *Columbia Journal of European Law* 7 (2001): 159–172, at 159.

18. Neil Walker, "Postnational constitutionalism and the problem of translation" in Joseph Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge, Cambridge University Press, 2003). Also, Michael Zürn, "Globalizing interests: an introduction," in Michael Zürn and Gregor Walter (eds), *Globalizing Interests. Pressure Groups and Denationalization* (Albany, NY: SUNY Press, 2005).

19. 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 especially, Hauke Brunkhorst, "The legitimation crisis of the European Union," *Constellations* 13 (2006): 165–180, at 167; Fabio, "A European Charter," *op.cit.*, at 164; Christian Joerges, "The Law in the Process of Constitutionalizing Europe" (Florence: EUI Working Paper, 2002).

Functional constitutionalism is not to be confused with "functionalism," an explanatory paradigm in social science which John Ruggie critically defines as "the belief that somehow specialized structures will evolve to perform new tasks or to fulfill new needs as these arise." (John Gerard Ruggie, "Collective Goods and Future International Collaboration," *American Political Science Review*, vol.66 (1972), no.3, pp.874–893, at 875) Whatever the relative merits and demerits of functionalism, the argument about functional constitutionalism is not a causal claim of this sort insofar as it does not enquire into the causal mechanisms behind the outcomes we observe in the supranational realm. Rather, it is an interpretive and normative argument that pinpoints the distinguishing features of a legal order that is binding on states and exhibits an array of familiar and novel constitutional features.

20. This idea of the constitution as an object of constant renegotiation is inspired by Seyla Benhabib's theory of democratic iterations, as well as James Tully's theory of the constitution as both an object and a tool of societal dialogue and inclusion. See Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006), at 49; James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995).

21. Jon Elster, "Introduction," in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988), at 1.

22. Stephen Holmes, *Passions and Constraint* (Chicago: University of Chicago Press, 1995).

23. Any number of classic quotes could be summoned to make this point, but James Madison's formulation is emblematic: "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, may justly be pronounced the very definition of tyranny." *The Federalist Papers*, no.47. Similarly, Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789 proclaimed that, "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution."

24. Holmes, *Passions and Constraint*, *op.cit.*, 148.

25. *Ibid.*, 165.

26. *Ibid.*, 165.

27. *Ibid.*, 208.

28. There is a large literature on the pragmatic virtues of electoral competition, but classic works which tackle it directly include Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row 1957); Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, intro. Tom Bottomore (London: Allen & Unwin, 1976), esp ch.XXI-XXII; Robert Dahl, *Polyarchy. Participation and Opposition* (New Haven: Yale University Press, 1971); Adam Przeworski, "Minimalist Conception of Democracy. A Defense" in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy's Value* (Cambridge: Cambridge University Press, 1999).

29. Jon Elster rightly warns against the functionalist fallacy in constitutional theory; that is to say, against deducing the intended purpose of constitutional norms from their resultant effects. There is an important distinction between, as he puts it, “whether existing [constitutional] provisions were established for the *purpose* of restricting the freedom of action of the individuals who voted for them” on the one hand, and “whether existing constitutional provisions as a matter of fact tend to have salutary restraining *effects* on a subset of the political actors, regardless of why and by whom the constraints were set up in the first place.” Jon Elster, *Ulysses Unbound* (New York: Cambridge University Press, 2000), at pp. 89–90.

30. Holmes, *Passions and Constraint*, op.cit., 106–7.

31. Francis Sejersted, “Democracy and the rule of law: some historical experiences of contradictions in the striving for good government,” in Elster and Slagstad (eds) *Constitutionalism and Democracy*, op.cit., at 144–149.

32. Stephen D. Krasner, *Sovereignty. Organized Hypocrisy* (Princeton University Press, 1999), 10.

33. Kenneth A. Shepsle, “Discretion, Institutions and the Problem of Government Commitment,” in Pierre Bordieu and James Coleman (eds), *Social Theory for a Changing Society* (New York: Russell Sage, 1991), at 246.

34. Hilton Root, “Tying the king’s hands,” *Rationality and Society* 1 (1989): 240–258; also, Douglass C. North, “Institutions and Credible Commitment,” *Journal of Institutional and Theoretical Economics* 149 (1991): 11–23, at 14–15.

35. Holmes, *Passions and Constraint*, op.cit., 102.

36. Douglass C. North and Barry R. Weingast, “Constitutions and Commitment: The evolution of institutions governing public choice in seventeenth-century England,” *Journal of Economic History* 49 (1989): 803–832.

37. These included a change in the subject of the sovereign from the king to the “king in parliament” (that is, the monarch governing jointly with parliament), the transfer of fiscal power to the latter, and the reestablishment of the independence and supremacy of the common law courts where claims of expropriation could be heard. See *Ibid*, 816–7.

38. Holmes, *Passions and Constraint*, op.cit., 111.

39. The Philadelphian parallel was abundantly invoked during the hopeful drafting phase of a Constitutional Treaty for the European Union, most notably by the President of the Convention himself. See Valéry Giscard d’Estaing, “The Henry Kissinger Lecture,” delivered at the Library of Congress, Washington, DC, 11 November 2003. Text available at <http://european-convention.eu.int/docs/speeches/7072.pdf>

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

41. 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.

42. For authoritative accounts of this process, see Karen Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001); Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004).

43. *Ibid*, also Anne-Marie Burley and Walter Mattli, “Europe before the Court,” *International Organization* 47 (1993): 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).

44. 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*, op.cit.; Mitchel de S. –O. –l’E Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford: Oxford University Press, 2004), 225.

45. According to the ECJ, Treaty provisions 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, choosing to give direct effect to the “principle” of equal pay for equal work contained in ex-Art 119 EC, which obligation was rather general, imprecise, and not necessarily “negative.” See Case 43/75 *Defrenne v. SABENA* [1976] ECR 455.

46. For a discussion of the normatively salient slippage between “fundamental rights” in the conventional sense and “fundamental freedoms” as transnational market freedoms, see N. Türküler Isiksel, “Fundamental Rights in the EU after *Kadi* and *Al Barakaat*,” *European Law Journal*, vol.16 (2010), no.5, pp.551–577.

47. Pierre Pescatore, “The Doctrine of ‘Direct Effect’: An infant disease of Community law,” *European Law Review* 8 (1983): 155–177, 158; Joseph Weiler, “The Transformation of Europe,” *Yale*

Law Journal 100 (1991): 2403–2483. Miguel Maduro calls this the process of “subjectivation” of the Treaties. See Miguel Poiares Maduro, *We The Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998), 9.

48. “[T]he European 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 whether the measures adopted by them are in conformity with the basic constitutional charter [*charte constitutionnelle*], the Treaty.” Case 294/83 *Partie Ecologiste ‘Les Verts’ v. Parliament* [1986], ECR 1339, para. 23 (emphasis added).

49. The most widely credited early appraisal of the Community legal order in constitutional terms is Stein, “Lawyers, Judges, and the Making of a Transnational Constitution,” op.cit. In 1980, Ami Barav considered the Treaty of Rome to be the “constitution” of the European Community. See Ami Barav, “The Judicial Power of the European Economic Community,” *Southern California Law Review*, vol.53 (1980), pp.461–525, at 466.

50. Historian Alan Milward famously argued that supranational delegation acts precisely to consolidate the nation-state’s governing capacity. Neofunctionalist theories generally disagree with this premise, arguing that governing capacity has seeped away from national to supranational institutions, particularly executive and judicial ones. We need not get into this enduring debate to observe that the aim of European integration has been to enhance governing capacity across the supranational, national, and sub-national levels more generally. See Alan Milward, *European Rescue of the Nation-state* (London: Routledge, 1992); also, Peter L Lindseth, “The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration since the 1950s,” *Loyola of Los Angeles Law Review* 37 (2003): 363–406.

51. The empirical literature is conventionally grouped along two major camps, neofunctionalism and intergovernmentalism. Although the arguments of these positions overlap more often than assumed, and although there is a kaleidoscopic range of variations and offshoots to each, the most important point of disagreement pertains to the agents which each theory pinpoints as driving the process of integration. While intergovernmentalists explain the success of integration with reference to the role of member states and their willingness to submit to limitations on their competences, neofunctionalist theories highlight the role of sub- and supranational agents and norms, including national courts, litigants, interest groups, and supranational institutions such as the Commission, Central Bank, and the European Court of Justice. Prominent intergovernmentalist accounts include Stanley Hoffman, “Obstinate or obsolete: The fate of the nation state and the case of Western Europe,” *Daedalus* 95 (1966): 862–915; Milward, *European Rescue of the Nation-state*, op.cit.; Andrew Moravcsik, *The Choice for Europe* (Ithaca: Cornell UP, 1998); Geoffrey Garrett, “The politics of legal integration in the European Union,” *International Organization* 49 (1995): 171–181. Representative neofunctionalist accounts include Ernest B. Haas, *The Uniting of Europe* (Stanford: Stanford University Press, [1958] 1968); David Mitrany, *A Working Peace System. An argument for the functional development of international organization* (Chicago: Quadrangle Books, [1943] 1966); Philippe C. Schmitter “Three Neo-Functional Hypotheses about International Integration,” *International Organization* 23 (1969): 161–166; Anne-Marie Burley and Walter Mattli, “Europe Before the Court,” *International Organization*, 47 (1993): 41–76; Alec Stone Sweet, Wayne Sandholtz, and Neil Fligstein, *The Institutionalization of Europe* (Oxford: Oxford University Press, 2001); Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004).

52. Jurgen Habermas, “The European Nation-State: On the Past and Future of Sovereignty and Citizenship” in *The Inclusion of the Other* (Cambridge, MA, MIT Press: 1998), 106.

53. Jon Elster uses this memorable metaphor (borrowed from Spinoza) to describe constitutional commitment, a category which I argue comprehends the current structure of supranational law in Europe. See Elster, *Ulysses Unbound*, op.cit.

54. Giandomenico Majone, “From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance,” *Journal of Public Policy* 17(1997): 139–167, 153.

55. Grimm, “Treaty or Constitution?” op.cit., at 72.

56. Frank I. Michelman, “What do constitutions do that statues don’t (legally speaking)?,” in Richard W. Bauman and Tzvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006).

57. Insofar as its authority follows the contours of a delimited sphere of competence, functional constitutionalism breaks up the rule of law into specialized segments. However, this does not mean that functional specialization among overlapping legal orders necessarily jeopardizes the rule of law: ideally, a well-worked out meta-constitutional system of norms, usages, and understandings can govern the relationship of the functional constitution to other constitutional orders (most notably, in the case of the EU, those of member states). Joseph Weiler has depicted the *modus vivendi* between the ECJ and national courts as a “constitutional conversation,” made fruitful by a reciprocal attitude of “constitutional tolerance.” For the former term, see J.H.H. Weiler, “European Neo-Constitutionalism: In search of foundations for the European

Constitutional order,” in Richard Bellamy and Dario Castiglione (eds), *Constitutionalism in Transformation* (Oxford: Blackwell, 1996), at 120. For the latter, see J.H.H. Weiler, “In defence of the status quo: Europe’s constitutional *Sonderweg*,” in J.H.H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), at 15.

Issues relating to the conflict and coexistence of differently configured constitutional orders are the subject of a growing literature on constitutional pluralism and will not be taken up here. See, in this connection, Miguel Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action,” in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003); Neil Walker, “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders,” *International Journal of Constitutional Law* 6 (2008): 373–396; also, “The idea of constitutional pluralism,” *Modern Law Review* 65 (2002): 317–359; Paul Schiff Berman, “Global Legal Pluralism,” *Southern California Law Review* 80 (2007) 1155–1237; Antje Wiener, “Contested Meanings of Norms: A Research Framework,” *Comparative European Politics* 5 (2007): 1–17; Nico Krisch, “The Pluralism of Global Administrative Law,” *European Journal of International Law* 17 (2006): 247–278; Rainer Nickel (ed.), *Conflict of Laws and Laws of Conflict in Europe and Beyond* (Antwerp: Intersentia, 2010); Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes,” *op.cit.*

58. John P. McCormick, *Weber, Habermas, and Transformations of the European State. Constitutional, social, and supranational democracy* (Cambridge: Cambridge University Press, 2007), 250.

59. Dennis C. Mueller, *Constitutional Democracy* (Oxford: Oxford University Press, 1996), at 62.

60. Most important among these are the electoral rights conferred by Article 20 (ex-Art 17) of the Treaty.

61. Consolidated versions of the Treaty on European Union and the Treaty Establishing the European Community [2006] *OJ C-321 E/1*.

62. In *Defrenne II*, the Court held that ex-Art 119 (now 157) EC “forms part of the social objectives of the Community which is not merely an economic union, but is at the same time intended . . . to ensure social progress and seek the constant improvement of the living and working conditions of their peoples.” Case 43/75 *Defrenne v. SABENA* [1976], ECR 455, para. 10. For an account of how this process has unfolded, see Rachel Cichowski, *European court and civil society: litigation, mobilization and governance* (Cambridge University Press, 2007), ch.3; Stone Sweet, *Judicial Construction of Europe*, *op.cit.*, ch.4.

63. Consider the expanding scope of the prohibition against discrimination on the grounds of nationality, and of conditions of access to social entitlements while exercising free movement rights. See, among others, Case 186/87 *Cowan v Le Trésor Public* [1989] ECR 195; Case C-85/96 *Maria Martinez Sala v Freistaat Bayern* [1996] ECR I-2694; *Bickel and Franz* C-274/96 [1998] ECR I-7637.

The market-based prohibition of discrimination on the basis of nationality was complemented by the Amsterdam Treaty’s comprehensive equal treatment mandate. This is now Art 19 of the Treaty on the Functioning of the European Union, which empowers the Union legislature to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Also see Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. For an overview of the EU’s accomplishments to date on this front, see Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford: Oxford University Press, 2002); Samantha Besson, “The European Union and Human Rights: Towards a Post-National Human Rights Institution?,” *Human Rights Law Review* 6 (2006): 323–360, at 350.

64. European Court of Justice Case C-260/89, *Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991], ECR I-02925.

65. European Court of Justice Case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008].

66. European Court of Justice, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] ECR I-6351.

67. For classic critiques of the solidarity-eroding effects of the project of market integration, see Fritz Scharpf, “Economic integration, democracy, and the welfare state,” *Journal of European Public Policy*, vol.4 (1997), no.1, pp. 18–36; Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999); Claus Offe, “The Democratic Welfare State. A European regime under the strain of European integration,” *Political Science Series no.68* (Vienna: Institute for Advanced Studies, 2000); Wolfgang Streeck, “Competitive Solidarity: Rethinking the ‘European Social Model,’” in Karl Hinrichs, Herbert Kitschelt and Helmut Wiesenthal (eds), *Kontingenz und Krise: Institutionenpolitik in kapitalistischen und postsozialistischen Gesellschaften. Claus Offe zu seinem 60. Geburtstag* (Frankfurt am Main: Campus, 2000); Alexander Somek, *Individualism. An Essay on the Authority of the European Union*

(Oxford: Oxford University Press, 2008); Augustín José Menéndez, "European Citizenship after *Martínez Sala* and *Baumbast*," RECON Online Working Paper 2009/05.

68. The apt metaphor of European law as a "one-way ratchet" is borrowed from Anne-Marie Burley and Walter Mattli, "Europe Before the Court," *International Organization*, Vol.47, No.1, 1993, pp. 41–76, at 60.

69. The notion of "outcome-based" or "output-oriented legitimacy" is developed in Fritz Scharpf's work. Especially see Fritz Scharpf, "Problem Solving Effectiveness and Democratic Accountability in the EU," IHS Political Science Series 2006, no.107. Available at: aei.pitt.edu/6097/1/pw_107.pdf

70. See n.2 *supra*.

71. Howse, "From Politics to Technocracy – and back again"; Howse and Nicolaïdis Nicolaïdis, "Legitimacy through 'Higher Law'?"; Alston, "Resisting the merger and acquisition of human rights by trade law," *supra* n.2.

72. Howse and Nicolaïdis, "Legitimacy through 'Higher Law'?" *op.cit.*, at 309.

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