In the Anglo-American tradition, but certainly also beyond, constitutionalism is often associated with safeguarding a broad sphere of individual liberty against encroachment by public power. In his seventeenth-century manifesto against tyranny, John Locke famously depicted the sovereign as a fearsome lion, far more powerful than the petty varmints it was meant to control, and therefore ever-ready to devour them. Liberals continue to prize resilient institutional structures that conquer the authoritarian odds. Being constantly on guard against “the encroaching spirit of power,” they rejoice whenever sovereign power is “effectually restrained from passing the limits assigned to it.” In this sense, the purest function of a liberal constitution is thought to be bridling the sovereign’s prerogatives, firmly delineating the sphere of individual liberty in respect of which the state and its organs “shall make no law.”

This limited government paradigm of constitutionalism has been challenged not only by those who highlight constitutionalism’s republican pedigree in the Roman and Florentine traditions, but also from a rival liberal perspective that highlights constitutionalism’s role in building power. Stephen Holmes has argued that many of the earliest instances of legal limits on

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1 Parts of this essay draw on the material first presented in Turkuler Isiksel, *Europe’s Functional Constitution. A Theory of Constitutionalism beyond the State* (Oxford University Press, 2016), esp. Ch. 2 and Conclusion. I am thankful to Sam Issacharoff for several discussions that helped me develop the arguments presented here.
2 John Locke, *Second Treatise of Government*, ch.7, para.93
4 Madison, “Federalist No. 48.”
sovereign power can be understood as “enabling devices.” For instance, the *leges imperii* of early modern monarchies bound absolutist rulers to respect the right of succession, barred them from appointing their successors, charged them with safeguarding the territorial integrity of the realm, and ruled out arbitrary transfers of territory. When observed, such ‘laws of rule’ helped to ensure the permanence of monarchical power even where they seemingly limited its scope. Although different institutional mechanisms may have the same effect, the fixity of constitutional rules can lend stability to a political system, enable credible commitment, provide a coordination device, and discourage political actors and institutions from tampering with rules for short-term advantage.

In all of these respects, the logic of constitutional rule is not purely Lockean. It is also Hobbesian, even if Hobbes’s authoritarian reputation makes this an odd proposition at first blush. Indeed, nobody relishes demonstrating the impossibility of constraining the sovereign by laws quite as much as the Beast of Malmesbury. To take one emblematic passage: “The sovereign of a commonwealth, be it an assembly, or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleases, free himself from that subjection by repealing those laws that trouble him, and making of new, and consequently he was free before.” And the coup de grâce: “he that can bind can release; and therefore he that is bounded to himself only, is not bound.”

Clearly, this view is incompatible with constitutional rule as the establishment of legal constraints on sovereign power. But constraining power is not the constitution’s only role. In fact, its eponymous role is constituting power. Before you can tame your Leviathan, Hobbes would remind us, you must call it into being. In what we might term their licensing role, constitutions establish judicial, legislative, and executive powers; allocate competences between different levels and units of government; provide for the common defense against domestic and foreign threats, the administration of public order, the encouragement and regulation of economic activity, and the collection of revenue for the public purse. In other words, as the basic law of the land, the constitution is in charge of guiding the complex system of institutions, offices, and procedures that deliver the public goods for the sake of which civil association exists. Hence, constitutions are as often valued or criticized with reference to their conduciveness to expeditious decision-making, competent administration, and the efficient provision of public goods, as they are on the basis of such principles as individual liberty, collective self-rule, equality, or justice. Like the proverbial fish that asks “what the hell is water?”, we may frequently forget to account for the licensing function of the constitution because it is so ubiquitous.

What liberal scholars like Holmes have shown is that even constitutional rules that have a manifestly Lockean character can nonetheless perform the Hobbesian function of empowering the sovereign. More importantly for our purposes, they have demonstrated that the licensing and

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7 Holmes, *Passions and Constraint* 7
8 Holmes, *Passions and Constraint*, 106-7
limiting logics of constitutional rule often converge when it comes to fiscal matters. On this view, constitutional rules that govern private property, monetary policy, public revenue, expenditure or debt should not be understood solely as fetters on sovereign power. For instance, in their well-known study of the Glorious Revolution, North and Weingast argue that institutional reforms that curbed the monarch’s ability to expropriate his subjects (including the transfer of power over taxation to a permanent parliament and the reinforcement of the independence of common law courts) served to augment rather than diminish the fiscal capacity of the sovereign.\(^\text{11}\) Similarly, Hilton Root’s study of 18\(^\text{th}\) century France suggests that monarchs “expanded the privileges and protected the property belonging to… constituted bodies” such as village communities, guilds, and provincial estates, which were among its major creditors.\(^\text{12}\) These indirectly limited the sovereign’s ability to repudiate its debts, as a consequence of which the monarchy secured access to bigger loans at lower interest. These early or proto-constitutional mechanisms address the paradox of commitment whereby “the ability to commit often… expands one’s opportunity set, whereas the capacity to exercise discretion… reduces it.”\(^\text{13}\) The absence of limits on the sovereign’s authority poses an obstacle to the effective exercise of its power. Conversely, once credibly established, such limits can enhance sovereign power in the long term, such as by improving the sovereign’s creditworthiness. In other words, if all goes well, the Hobbesian and Lockean logics of constitutional rule can run together.

The EU’s system of functional constitutionalism

It is easy to situate the EU in this matrix. Although the Lockean aspiration of disciplining sovereign power has made limited progress in respect of the external aspect of sovereignty, the EU represents a singular triumph for law in the international realm. In the endlessly chanted incantation of Van Gend en Loos, supranational institutions represent “a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals.”\(^\text{14}\) On this view, the EU applies the constitutional idea of “garantisme” to the relations among states, ensuring that they adhere to a “fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a ‘limited government.’”\(^\text{15}\) According to many observers, the EU complements domestic constitutionalism by constraining the arbitrary exercise of power among states, expanding the scope of moral concern beyond the national group,\(^\text{16}\) and establishing a deliberative community.

\(^\text{11}\) North and Weingast, “Constitutions and Commitment” 816-7
\(^\text{12}\) Root, “Tying the king’s hands” 251. Also, North, “Institutions and Credible Commitment” 14-15
\(^\text{14}\) Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1, emphasis added.
among its member states. Jürgen Habermas has characterized the EU’s success in bringing its member states under a supranational legal system as a “further stage in civilizing state power.”

But European integration is not simply, or even primarily, about limiting power. In fact, it should be understood first and foremost as a power-building exercise. Although there has always been heated debate over the factors that explain each twist in the windy path of European integration, competing research programs tend to agree that integration responds to policy challenges which member states cannot, or can no longer, effectively tackle on their own. Member states have delegated power to supranational institutions in order to enhance “legitimacy in functional, political and administrative terms.” To be sure, the fact that states would benefit from cooperation says very little about whether they will be able to do so.

As Jeremy Bentham quipped, “hunger is not bread.” Problems of collective action or social cooperation do not automatically generate their own solutions. In particular, interstate cooperation is conditional,

19 The empirical literature is conventionally grouped along two major camps, neofunctionalism and intergovernmentalism, with a number of conciliatory approaches in between, most notably, that of multilevel governance. Although the common ground between these approaches can often be quite extensive, the most important point of divergence regards the agents that each theory privileges as motor of integration. While intergovernmentalists explain the success of integration with reference to the preferences of member states, their relative bargaining power, and their willingness to accept limitations on their sovereignty, neofunctionalist theories tend to highlight the cooperative interaction between sub- and supranational agents and norms, including national courts, litigants, interest groups, and supranational actors such as the Commission, Central Bank, and the Court of Justice in extending the initial concessions made by states in directions neither foreseen nor approved by them. Under both accounts, however, the capacity to govern increases as a result of integration: either accruing to the states themselves (under the intergovernmentalist account) or strengthening sub- and supranational authorities at the expense of states (under the neofunctionalist account). See especially, Stanley Hoffman, “Obstinate or Obsolete: The Fate of the Nation State and the Case of Western Europe” (1966) 95 Daedalus 862; Alan Milward, European Rescue of the Nation-State (Routledge 1992); Geoffrey Garrett and Barry R WeINGAST, Ideas, Interests and Institutions: Constructing the EC’s Internal Market (University of California Center for German and European Studies 1991); Andrew Moravcsik, “Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach” (1993) 31 JCMS 473; Geoffrey Garrett, “The Politics of Legal Integration in the European Union” (1995) 49 International Organization 171; Andrew Moravcsik, The Choice for Europe. Social Purpose and State Power from Messina to Maastricht (Cornell University Press 1998). Mainstays of the neofunctionalist camp include Ernest B Haas, The Uniting of Europe (first published 1968, University of Notre Dame Press 2004); Philippe C Schmitter “Three Neo-Functional Hypotheses about International Integration” (1969) 23 International Organization 161; Anne-Marie Burley and Walter Mattli, “Europe Before the Court” (1993) 47 International Organization 41; Wayne Sandholz and Alec Stone Sweet (eds), European Integration and Supranational Governance (Oxford University Press 1998); Alec Stone Sweet, Wayne Sandholtz, and Neil Fligstein (eds), The Institutionalization of Europe (Oxford University Press 2001); A. Stone Sweet, The Judicial Construction of Europe (Oxford University Press 2004). On multilevel governance, see especially: Gary Marks, Liesbet Hooghe, and Kermit Blank, “European Integration from the 1980s: State-Centric v. Multi-level Governance” (1996) 34 JCMS 341; Liesbet Hooghe and Gary Marks, Multi-level Governance and European Integration (Rowman & Littlefield 2001).
21 As Keohane puts it, “It is the combination of the potential value of agreements and the difficulty of making them that renders international regimes significant. In order to cooperate in world politics on more than a sporadic basis, human beings have to use institutions.” Robert O Keohane, “International Institutions: Two Approaches” (1988) 32 International Studies Quarterly 379, 386.
22 Jeremy Bentham, “Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution” [c. 1791]
among other things, on resolving the problem of credible commitment. In the absence of coercive enforcement, states are motivated to avoid the steps they must take in order to satisfy the terms of international cooperation. The European integration process has required member states to take costly actions such as lifting barriers to the cross-border movement of factors of production and dismantling measures that advantage domestic producers or otherwise burden commercial mobility.

In other words, international cooperation is beset by the same “paradox of omnipotence” that bedeviled absolutist monarchs in the fiscal domain: the lack of constraints on sovereign power can get in the way of exercising that power effectively. The EU responds to this problem—at least in part—by providing a commitment device. The story of Ulysses tying himself to the mast of his ship to avoid future temptation by the sirens, invoked by Jon Elster as a metaphor for constitutional constraint, is also an apposite metaphor for supranational governance. Since the collective “self” of a sovereign state is polyecephalous and multigenerational, it faces that many more temptations to renego on commitments. Delegating competence over the making, monitoring, and enforcement of policies to an authority beyond their immediate control enables member states not only to make their commitments credible to one another and to third parties, but also to follow through on them in practice. Furthermore, it helps to “insulate policymaking from partisanship and short-term electioneering.” In fact, the European Commission and the Court of Justice habitually invoke this functionalist rationale when their decisions contradict the express preferences of the member states.

In light of these considerations, I have developed the term “functional constitutionalism” to characterize the European Union’s legal system. My use of this phrase does not imply that the EU is the functional equivalent of a constitutional system in the sense of resolving the kinds of problems traditionally addressed by constitutional mechanisms. I claim both more and less than this. On the one hand, the EU is not merely analogous to a constitutional regime; it is a particular kind of constitutional regime insofar as it constitutes an autonomous node of authority at the supranational level and is equipped with the institutional trappings of constitutional rule.

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other hand, I wish to systematically highlight three features that distinguish the EU’s system of constitutionalism from conventional paradigms tailored to the domestic context. First, the EU’s scope of authority is functionally delimited rather than comprehensive. It lacks the pervasive claim of validity associated with a traditional constitutional order, which leaves “no space for proprietors of public power outside the constitution.” Although “neither [EU] Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter” consisting of the treaties, the EU’s authority binds member states and their citizens only within a functionally delineated domain. Put differently, the EU’s constitutional system is distinctive insofar as it acknowledges that it is situated within a composite constitutional context that comprises plural, independently valid nodes of authority, and concedes the primacy of other legal systems in matters that fall outside of its scope of authority (though not always graciously!). Second, whereas constitutional norms are usually expected to be substantively open-ended, EU law is substantively elaborate in the way of ordinary legislation, but entrenched in the manner of constitutional norms. Third, as I argued above, the EU’s authority rests primarily on a claim to govern effectively, meaning that its mode of legitimacy is functionalist rather than democratic or rights-based. Taken together, these features distinguish the EU’s constitutional system from the conventional models (most notably the democratic and rights-based ones) that constitutional theory makes available with reference to the domestic context.

To be sure, all political systems rely to some extent on a functionalist claim of justification (though the EU does so disproportionately). As Alfred Stepan points out, the effective governance justification is particularly prominent in “coming-together federations” in which “previously sovereign polities agree to give up part of their sovereignty in order to pool their resources to increase their collective security and to achieve other goals, including economic ones.” In his emblematic defense of the proposed US Constitution, Alexander Hamilton emphasizes “[t]he utility of the Union to your political prosperity,” “the insufficiency of the present confederation to preserve that Union,” and “the necessity of a government at least equally energetic with the one proposed.” This parallel was noted by none other than Altiero Spinelli, one of the seminal figures of the European integration process: “when it comes to the

34 Seminally, see Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (Oxford University Press 1999)
supranational unification of certain aspects of political life,” Spinelli observed in 1957, “one cannot fail to take into account the American model, because the logic of the American system is the very logic of political power building.”

As these examples suggest, functionalist justifications make reference to specific teloi to be achieved, such as internal and external security, public order, large markets, or territorial expansion. In the EU’s case, the telos is that of economic union, understood in the broad sense of a single market complemented by a supranational monetary and regulatory apparatus. The 1957 Treaty of Rome aimed to create a shared economic space capable of generating prosperity and, ultimately, peaceful order among European nation-states. Guided by “the principle of an open market economy with free competition, favoring an efficient allocation of resources,” the EU has been tasked with, inter alia, “establishing [and] ensuring the functioning of the internal market,” understood as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured,” coordinating member states’ economic policies, and defining and implementing a monetary policy with the cardinal aim of price stability. Although the EU has amassed a formidable portfolio of policy competences over time, “[t]he enhanced effectiveness generated by the supranational regulation of transnational economic exchange,” not to mention the benefits of a competitive, integrated, and expanding market in goods, services, capital, and labor, “represents an important legitimizing function of supranationalism.”

Member states have delegated extensive powers to the EU in order to reap the efficiency gains of an integrated and competitive market, respond to the pressures of global economic interdependence, project their collective clout abroad, and coordinate labor, consumer, and other regulatory standards. Where this institutional framework lends itself to cooperation in areas such as security or environmental protection, these issues have been added to the EU’s portfolio. However, the EU derives its normative claim to authority “not from any strong popular backing, but primarily from the economic credibility it claims to generate.” The term “functional constitutionalism” captures the EU’s character as a political system that is justified overwhelmingly with reference to producing public goods that states acting alone cannot guarantee, as distinct from one that is guided by ideals such as democratic self-rule, individual liberty, national destiny, religious salvation, etc.

To be sure, democratic embellishments to its façade have softened the functionalist mainstays of the EU’s constitutional structure over time. For instance, the Treaty on European Union

40 On the economic focus of EU law, see, among others, Miguel Poiares Maduro, We the Court: The European Court of Justice and the European Economic Constitution (Hart Publishing, 1998); Christian Joerges and Michelle Everson, “Law, Economics and Politics in the Constitutionalization of Europe” in Erik Oddvar Eriksen, John Erik Fossum, and Augustin Jose Menendez (eds), Developing a Constitution for Europe (Routledge 2004).
41 Art 120 TFEU.
42 Art 26(1-2) TFEU.
43 Art 119(1) TFEU.
44 Art 127(1) TFEU.
proclaims that the Union is “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities [. . .].” However, the EU lacks the institutional structure required to realize these lofty aspirations. To appreciate this point, compare the EU’s extensive powers of oversight over member states in the fiscal domain with the weakness of the remedies available to redress grave violations of Art 2 principles. When member states run unacceptable budget deficits and levels of public debt, they are subjected to the rigors of the excessive deficit procedure (EDP), which allows, inter alia, for the Council to prescribe measures for reducing it within a given period. Where a member state fails to follow the Council’s recommendations, the Council can take drastic measures including urging the European Investment Bank to restrict lending to the member state in question, requiring the state to make a deposit with the Union for a period of time, and fining the member state. Since 2004, the EDP has been invoked against all but two EU member states, and has more often than not been faithfully implemented by the states concerned.

In stark contrast, the Council has never exercised a similar supervisory role over violations of liberal and democratic principles by a member state. The most serious institutional mechanism available to the EU for addressing threats to domestic constitutional democracy, namely the Article 7 procedure that allows the Council to suspend the voting rights of a member state in the event of a “serious and persistent breach” of the standards enumerated in Article 2, has never been utilized. In fact, it is widely regarded as unusable. The “pre-Article 7” procedure, which requires a four-fifths majority in the Council to establish a “clear risk” of a serious breach of democratic principles on the part of a member state, has also never been invoked, and not for lack of such risks. Finally, the Council recently rejected a rule of law monitoring mechanism proposed by the Commission, and instead adopted a much looser, intergovernmental dialogue framework.

As the EDP procedure shows, the EU is highly effective in exerting pressure on member states in what both sides consider to be the EU’s central areas of competence, namely that of enforcing discipline in the economic and fiscal realm. The EU’s lack of comparable clout in safeguarding Art 2 principles underlines that neither side considers these to be among the EU’s actionable priorities. In other words, the contrast between enforcement in the fiscal domain and enforcement of the constitutional principles enumerated in Art 2 comes down to the functionalist basis of the EU’s authority, which undermines the credibility of its claim to exercise political and constitutional oversight over member states. Having configured the EU as a framework of economic prosperity, member states do not expect normative backtalk—let alone disciplinary

47 Art 2 TEU.
49 Art 126 (6) and (7) TFEU
50 Art 126 (11) TFEU
51 An up-to-date tabulation of EDP procedures applied against each member state along with the relevant legal documents is available at http://ec.europa.eu/economy_finance/economic_governance/sgp/corrective_arm/index_en.htm
52 Sedelmeier, “Anchoring Democracy from Above?” 108
action—concerning the health of their political systems (even though they are willing to go along when such prescriptions pertain to their economic health). In fact, matters of domestic constitutional integrity are deliberately excluded from the EU’s scope of competence by Art 4(2) of TEU, which provides that “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” What the treaty giveth with Art 2, it taketh away with Art 4(2).

**It’s only parchment**

I have so far argued that the EU’s competence in the fiscal domain illustrates the ways in which constitutionalism can be understood not merely as a device for limiting public power, but also for amplifying it. However, financial crises strain such harmony as exists between the Hobbesian and Lockean logics of constitutional rule. We might understand a crisis as a severe shock that disrupts the exercise of public authority in an essential domain such as finance, public health, national security, or domestic order, and which has reverberations across society as a whole. Crises demand the mobilization of such resources as only the sovereign can command, but constitutional rules may put those resources out of reach at critical times. If the Lockean logic prevails, the restraints that ordinarily keep the fearsome lion from preying on lesser varmints may prevent it from mounting an effective response to the challenge at hand. If the Hobbesian logic prevails and the fetters are loosed, the discretionary exercise of power may do greater harm to the basic framework of constitutional rule in the long run than the crisis would.

The financial and sovereign debt crisis that cast its pall on the EU from 2009 onwards illustrates this bifurcation. Since its inception, the lopsided design of Europe’s Economic and Monetary Union (EMU) has meant that while monetary policy was a supranational matter, fiscal policy rested with member states, who pledged to observe the targets enumerated in the Stability and

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54 In order to talk coherently about financial crises and liberal constitutions, one needs a theory of crisis and a theory of constitutionalism, and to simultaneously evaluate each in light of the other. A more rigorous study would attend to the concept of crisis first, perhaps considering whether the crisis is endogenous or exogenous to the constitutional framework. For Marxists, who usually get first dibs on crisis theory, any such correlation is spurious: liberal constitutions have no causal force of their own, but merely reflect the capitalist mode of production that sustains them. Crises are endemic to the structural features of capitalism; elements of the superstructure such as constitutional rules have little explanatory power. Institutionals, on the other hand, might tell a more interesting story, even if “in the very long run almost everything is endogenous.” (Duncan Snidal, “Endogeneous Actors, Heterogeneity, and Institutions,” in Robert O. Keohane and Elinor Ostrom (eds), *Local Commons and Global Interdependence* (Sage 1995), 55) In the shorter run, a crisis may be the result of an extraneous shock (the Lehman Brothers collapse sending the Eurozone into a tailspin), or it may result from, or get exacerbated by, features of the constitutional order, such as the design flaws of the EMU. Broadly speaking, constitutional systems that amplify global economic interdependence by delegating powers to supranational entities, facilitating capital mobility across borders, and curtailing the scope of national regulation may create additional vulnerabilities.

55 This is the logic behind proposals for creating time-limited constitutional procedures for emergency rule. Locke himself believed that “prerogative power” was compatible with limited government. Locke, *Second Treatise*, chap. XIV. Also see Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Transaction Publishers, 2002 [1948]); Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2006).
Growth Pact in lieu of endowing the EU with the fiscal capacity to match.\textsuperscript{56} The escalation of the global financial crisis into a sovereign debt crisis in many euro area states was attributed partly to the incomplete architecture of the EMU.\textsuperscript{57} To make up for what was lacking from the original constitutional design, member states scrambled to establish new financial assistance and oversight facilities. The Treaty on Stability, Coordination, and Governance (TSCG), together with a series of secondary legislation known as the ‘six-pack’ and the ‘two-pack,’ were intended to consolidate fiscal coordination and monitoring and further tighten existing constraints on domestic budgets and macroeconomic policy. Supervisory measures such as the EDP and participation in the European Semester have corralled member states into a tight zone of budgetary discipline, forcing them to pare down public spending, and with it, the social protections they afford their citizens.\textsuperscript{58} In an audacious flouting of national constitutional autonomy, the TSCG obligates member states to implement balanced budget rules “through provisions of binding force and permanent character, preferably constitutional,”\textsuperscript{59} demanding not only tighter fiscal discipline but its constitutional entrenchment.\textsuperscript{60} Although each of these measures can be understood as instantiating the principle of limited government in the fiscal domain, the expected payoff in the name of which they are adopted is not so much greater individual liberty (as it would be in a Lockean scheme) as more effective exercise of public power in the economic realm.

Furthermore, the fact that some of the pragmatic fixes adopted by member states in response to the euro crisis circumvent the EU’s own legislative and constitutional procedures lends further credence to my proposition that the logic of licensing power has prevailed over that of limiting it. For instance, the TSCG was framed as an international agreement rather than as an EU legislation in part because this was “a less contestable route” by which to mandate the adoption of balanced budget rules in domestic law that “would at the very least run counter to the very discretion which directives are supposed to afford Member States.”\textsuperscript{61} In another creative move, euro area member states chose to rout emergency funds destined for Ireland, Greece, and Portugal through a private corporation created for the purpose, the European Financial Stability Facility (EFSF). This ad hoc remedy has since been subsumed under the European Stability Mechanism (ESM), which has greater capacity to provide financial assistance to states but took the form of a separate international treaty, since “the EU itself was not empowered to establish

\textsuperscript{57} Fritz W Scharpf, “No Exit from the Euro-Rescuing Trap?” MPIfG Discussion Paper No. 14/4 (Max-Planck-Institut für Gesellschaftsforschung 2014) 5; Martin Feldstein, “EMU and International Conflict” (1997) 76 \textit{Foreign Affairs} 60
\textsuperscript{59} Treaty on Stability, Coordination, and Governance, art 3(2).
such a stability mechanism.”

When called upon to rule on the compatibility of these measures with the EU treaties, including constitutional limits on the powers of EU institutions, the Court of Justice bent the knee before the pragmatic imperatives motivating the crisis response.

Meanwhile, new configurations of bureaucrats, government ministers, and international institutions took charge of a slate of decisions that concern domestic revenue and expenditure, emergency funding, and banking regulation, in some instances marginalizing the EU’s constitutionally mandated decision-making structure. ECOFIN and the Eurogroup emerged from the crisis with a remarkable degree of autonomy, acting in the manner of an *imperium-in-imperio* within the Council. Under the ominous epithet of “the Troika,” the ECB, International Monetary Fund, and the European Commission are in charge of administering memorandums of understanding that codify, down to the minute detail, structural reforms that cash-strapped member states must adopt in exchange for much-needed financial assistance. Since these fiscal roadmaps are adopted pursuant to the ESM, which formally exists outside the EU’s constitutional framework, they are not subject to all of the procedural constraints and accountability mechanisms afforded by the latter. These new configurations of power tend also to sideline the European Parliament in its hard-won status as co-legislator and undermine its effectiveness as an institutional actor.

In each of these respects, the euro crisis forced the EU to choose between the viability of the EMU on the one hand, and the constitutional principles that the EU and its member states affirm, on the other. The measures taken in response to it prioritize the functional imperative of keeping monetary union afloat at the cost of stretching or skirting the norms and procedures codified by the treaties. In other words, the problem goes beyond the standard democratic reproach against the EU’s technocratic system; more fundamentally, the measures arguably strain the EU’s own criteria of legal validity. According to Christian Joerges, “[t]he practice of European crisis policy, which is seeking refuge in a [sic] technocratic expertise and political bargaining, disregards Europe’s commitments to democracy and the rule of law.” Others have argued that the EU’s crisis response inaugurates “a foundational period of a new mode of European integration.” In Müller’s view, the EU’s dramatic intervention in member states’ social and

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64 Though Fabbrini notes that disputes arising under the ESM Treaty are subject to the CJEU’s jurisdiction. Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press, 2016) 7

65 Craig, “Economic Governance and the Euro Crisis” 26


political systems (such as by forcing Greece to “renegotiate [its] basic social contract”) represents not just a quantitative but a “qualitative” break from the EU’s limited constitutional role of “constraining democracy” within member states and securing their “liberal-democratic arrangements.”

Others have gone further, glimpsing the specter of authoritarian thinkers such as Carl Schmitt in the EU’s crisis response, and describing the outcome as a form of “post-democratic executive federalism,” “authoritarian liberalism,” or “executive emergency constitutionalism” designed to “minimize public debate and to avoid the ordinary filters of the democratic constitutional state.” On each of these accounts, the crisis response prioritized functional imperatives at the expense of legal limitations, tipping the balance of economic union away from a Lockean system of constitutional checks towards a Hobbesian one of arbitrary power.

Although these observers are right to be critical, I maintain that the EU’s crisis response mechanisms do not so much represent a radical break with its constitutional system as they throw into high relief the profound functionalist reflex already built into it. Whereas democratic legitimacy demands that citizens be able to recognize their political institutions as representative of their values and interests, a functionalist polity acquires its legitimacy from realizing the cardinal objective(s) it has been commissioned to pursue. This monomaniacal pursuit need not become pathological until it comes into serious conflict with other important values. The euro crisis generated precisely such a conflict. The fact that the EU has so far saved the euro at the cost of other principles such as the rule of law, democracy, and solidarity between member states simply reflects its configuration as a system of functional constitutionalism. In a stark acknowledgment of this ordering of values, a 2012 report on the Future of Europe, signed by foreign ministers of eleven Eurozone countries, held that “[s]trengthening the Economic and Monetary Union has absolute priority” and called for a dramatically strengthened framework of economic union among member states, including supranational oversight of member states’ budgets, banking supervision, and the mutualization of sovereign risk. The declaration also proclaimed that “[t]he Euro has profound economic advantages and is the most powerful symbol of European integration,” confirming not only the pragmatic importance of the single currency but giving it pride of place among the EU’s constitutional values.

From its inception, EMU ratcheted up the functionalist logic of the market integration project, not only by ensconcing member states in a system of fiscal discipline, but also by intensifying their interdependence. Up to that point, even persistent failures by member states to observe the rules of the single market would not seriously endanger the stability of the errant member state, much less threaten the viability of the Union as a whole. By contrast, delegating control over monetary policy has made the health and stability of the euro an existential matter for all.

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70 For an overview of recent commentary summoning Schmitt’s ghost, see Joerges, “Law and Politics in Europe’s Crisis” 253–55.
72 Wilkinson, “The Specter of Authoritarian Liberalism”
73 Chiti, Menendez, and Teixeira, “The European Rescue of the European Union” 417.
74 Future of Europe Group comprising the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal, and Spain, Final Report of the Future of Europe Group (September 17, 2012) 1.
75 Future of Europe Group, Final Report, emphasis added.
other words, EMU created an extensive community of fate, without, however, establishing the fiscal, social, and political infrastructure necessary for fairly allocating its risks, burdens, and benefits. Under intense strain, singular regard for the survival of economic and monetary union has led the EU and its member states to abandon some of the constitutional means by which they have pursued that aim.

During one of the frantic moments of the crisis, ECB President Mario Draghi encapsulated this contradiction in a single, now famous sentence: “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro.” With Machiavellian bravado, he added, “And believe me, it will be enough.” Could the ECB stay within its constitutional mandate and do whatever was necessary? Or would the adage—necessitas non habet legem—prevail? Shortly after Draghi’s statement, the ECB unveiled the controversial Outright Monetary Transactions (OMT) program, which would enable it to purchase sovereign bonds issued by eurozone states on the secondary market. The program was meant primarily to reassure lenders. However, critics, among them the German Federal Constitutional Court, have charged that the program exceeds the ECB’s mandate by enabling it to act as a de facto lender of last resort. Guided once more by its solicitude for the successful realization of the EU’s telos, the CJEU affirmed the legality of OMT. However, the CJEU’s own status as an institutional guardian of purposive integration serves only to heighten the tension between respect for constitutionally constraints on public power and the EU’s single-minded fealty to the substantive goals entrusted to it.

In sum, the euro crisis has exacerbated the tension endemic to functional constitutionalism, bringing purpose into conflict with the finite conditions of legal validity that constitutional rule demands. In Neil MacCormick’s astute formulation, “Constitutionalism as a minimal virtue involves duly respecting the conditional quality of powers conferred . . . and involves observing faithfully the (interpreted) conditions of the respective agencies’ empowerment.” The functional imperative of keeping the euro afloat has been pursued at the cost of circumventing the grant of powers in the EU’s constitutional settlement and disregarding their conditional quality. Just as the profligate is wont to exclaim, “money is only paper!”, fiscal crises expose the vulnerability of parchment barriers.

Still, these irregularities have to some extent been camouflaged by the pliability of the EU’s constitutional settlement by comparison to most domestic constitutional systems. In the end, the dynamism inherent in the project of ever-closer union defies constitutional limitation. One may bemoan the EU’s lack of a finalité politique or celebrate it as a utopian commitment to

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78 Bundesverfassungsgericht Case No 2 BvR 2728/13 OMT Judgment 14 January 2014.
79 Case C-62/14 Gauweiler and Others v Deutscher Bundestag ECLI:EU:C:2015:400.
80 MacCormick, Questioning Sovereignty 103.
81 Madison, Federalist No. 48
82 Joschka Fischer, “From Confederacy to Federation: Thoughts on the Finality of European Integration.” Speech delivered at Humboldt University in Berlin, May 12, 2000
perfectibility, but either way the unfinished quality of the European ‘project’ makes for an uneasy setting for constitutional rule. Perhaps the provisional nature of its institutional architecture better equips the EU to absorb the pressure of crises. Attributed to Winston Churchill (though probably apocryphally), “never let a good crisis go to waste” might as well be the EU’s credo.

Finally, the EU’s response to the financial crisis is a reminder that crises need not lead to revolutionary rupture. Like previous occasions (e.g. the empty chair crisis), the fiscal and sovereign debt crisis ended up advancing European integration along its particular path rather than forcing a break along that path. The crisis response consisted of steps that were politically unfeasible when the EMU was negotiated, including the transformation of the ECB into a de facto lender of last resort, the inauguration of a €700 billion bailout fund to underwrite member state finances, and of the Single Supervisory and Resolution Mechanisms that effectuate a banking union. One may lament that although the EU acquired a significant new fiscal capacity as a result of the crisis (most notably in the form of the ESM), it doubled down on a disciplinary mode of economic governance that ensnares member states in a protracted austerity zone. Rather than providing loans to be used to service public debt obligations, its ambitious new fiscal facilities could have been directed towards reinforcing threadbare social welfare provisions in troubled member states and reintegrating groups all across the EU who have lost out as a result of economic competition. In other words, the impetus towards greater fiscal centralization could have helped to fulfil the original promise of the founders of European integration to citizens: effectuating “the constant improvement of the living and working conditions of their peoples.” Perhaps that will take a bigger crisis—if it doesn’t bring down the EU first.

85 Preamble, Treaty of Rome [1957]; Preamble, Treaty on the Functioning of the European Union [2007]