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Constitutionalism as Limitation and License

Crisis Governance in the European Union

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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.[1] Liberals have since prized resilient institutional structures that conquer the authoritarian odds. Being constantly on guard against "the encroaching spirit of power,"[2] they rejoice whenever sovereign power is "effectually restrained from passing the limits assigned to it."[3] 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,[4] but also from a rival *liberal* perspective that highlights constitutionalism's role in building power.[5] Stephen Holmes has argued that many

[*] Parts of this chapter draw on the material first presented in Turkuler Isiksel, *Europe's Functional Constitution. A Theory of Constitutionalism beyond the State* (Oxford: 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.

[1] John Locke, *Second Treatise of Government*, ch.7, para.93.

[2] James Madison, "Federalist No. 48" in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Ian Shapiro ed., New Haven CT: Yale University Press, 2009).

[3] Madison, "Federalist No. 48."

[4] J. G. A. Pocock, *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition* (Princeton NJ: Princeton University Press, 1975); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999).

[5] Douglass C. North, "Institutions and Credible Commitment" (1993) 149 *Journal of Institutional and Theoretical Economics* 11; Douglass C. North and Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-century England" (1989) 49 *Journal of Economic History* 803; Hilton Root, "Tying the King's Hands" (1989) 1 *Rationality and Society* 240; Francis Sejersted, "Democracy and the rule of law: some historical experiences of contradictions in the striving for good government," in J. Elster and R. Slagstad (eds),

of the earliest instances of legal limits on sovereign power can be understood as "enabling devices."[6] 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.[7] 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,[8] 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 laying bare the aporias of legally constraining the sovereign 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."[9]

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.[10] 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

Constitutionalism and Democracy (Cambridge: Cambridge University Press, 1988); Stephen Holmes, *Passions and Constraint* (Chicago, IL: University of Chicago Press, 1995); Samuel Issacharoff, "The enabling role of democratic constitutionalism: fixed rules and some implications for contested presidential elections" (2002) 81 *Texas Law Review* 1985–2012.

6 Holmes, *Passions and Constraint* 7.

7 Holmes, *Passions and Constraint* 106–7.

8 Russell Hardin, "Why a Constitution?" in Bernard Grofman and Donald Wittman (eds), *The Federalist Papers and the New Institutionalism* (New York: Agathon Press, 1989).

9 Thomas Hobbes, *Leviathan* (first published 1651, Richard Tuck ed., Cambridge: Cambridge University Press, 1996), Ch. XXVI, 184.

10 Although I focus on constitutionalism in this essay, scholars of democracy have also noted the importance of state capacity as a necessary (though not sufficient) prerequisite for democratic rule. See Charles Tilly, *Democracy* (Cambridge: Cambridge University Press, 2007), 15–21, 58.

land, the constitution guides 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.

As Ferejohn and Posner observe in their respective contributions to this volume, Locke himself acknowledged that a system of limited government must allow sufficient leeway for public power to address existential threats to that system. But the point I wish to underscore is that even constitutional rules that act as immediate fetters on public power can nonetheless perform the Hobbesian function of empowering the sovereign in the long run.[11] More importantly for our purposes, the limiting and licensing logics of constitutional rule tend to dovetail when it comes to provisions governing private property, monetary policy, public revenue, expenditure or debt. 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 the wealth of 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.[12] Similarly, Hilton Root's study of eighteenth-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.[13] These indirectly limited the sovereign's ability to repudiate its debts, as a consequence of which the state 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."[14] 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.

[11] Holmes, *Passions and Constraint*

[12] North and Weingast, "Constitutions and Commitment" 816–17.

[13] Root, "Tying the king's hands" 251. Also, North, "Institutions and Credible Commitment" 14–15.

[14] 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), 246.

I. THE EU'S SYSTEM OF FUNCTIONAL CONSTITUTIONALISM

While the Lockean project of constraining sovereign power is often successfully realized in the domestic realm, sovereignty as it is exercised in the international realm is subject to few such constraints. In this respect the EU represents a notable exception. 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."[15] The EU applies the constitutional idea of "*garantisme*" to 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.'"[16] 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,[17] and establishing a deliberative community among its member states.[18] 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."[19]

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 the course of European integration, competing research programs tend to agree that integration responds to policy challenges that member states cannot, or can no longer, effectively tackle on their own.[20] Member states have delegated power to

[15] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, emphasis added.

[16] Giovanni Sartori, "Constitutionalism: A Preliminary Discussion" (1962) 56 *American Political Science Review* 853, 855.

[17] E.g. Miguel Poiares Maduro, "Sovereignty in Europe: The European Court of Justice and the Creation of a European Political Community" in Mary L. Volcansek and John F. Stack Jr. (eds), *Courts Crossing Borders: Blurring the Lines of Sovereignty* (Carolina Academic Press, 2005).

[18] Christian Joerges and Jurgen Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology" (1997) 3 *European Law Journal* 273, 294.

[19] Jürgen Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity Press, 2012) 45.

[20] 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 the 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,

supranational institutions to enhance "legitimacy in functional, political and administrative terms."[21] 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."[22] Problems of collective action or social cooperation do not automatically generate their own solutions. In particular, interstate cooperation is conditional on, among other things, resolving the problem of credible commitment. In the absence of coercive enforcement, states are motivated to avoid the steps they must take to satisfy the terms of international cooperation.[23] 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.[24] The EU responds to this problem – at least in part – by providing a commitment device.[25] The story of Ulysses tying himself to the mast of his ship to avoid future temptation by the sirens, invoked by Jon Elster as an allegory for

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* (Abingdon: 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* (Ithaca, NY: Cornell University Press, 1998). Mainstays of the neofunctionalist camp include Ernest B. Haas, *The Uniting of Europe* (University of Notre Dame Press, 2004 [1968]); 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 Sandholtz and Alec Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford: Oxford University Press, 1998); Alec Stone Sweet, Wayne Sandholtz, and Neil Fligstein (eds), *The Institutionalization of Europe* (Oxford: Oxford University Press, 2001); A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: 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] Anand Menon and Stephen Weatherill, "Transnational Legitimacy in a Globalising World: How the European Union Rescues its States" (2008) 31 *West European Politics* 397, 398.

[22] Jeremy Bentham, "Anarchical Fallacies; being an examination of the *Declaration of Rights* issued during the French Revolution" [c. 1791].

[23] Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984), 11. For a classic account of this problem in the international security context, see Robert Jervis, "Cooperation Under the Security Dilemma" (1978) 30 *World Politics* 167.

[24] David S. Law, "The Paradox of Omnipotence: Courts, Constitutions, and Commitments" (2003) 40 *Georgia Law Review* 407.

[25] Moravcsik, *The Choice for Europe* 73.

constitutional constraint, is also an apposite metaphor for supranational governance.[26] Since the collective "self" of a sovereign state is polycephalous and multigenerational, it faces many more temptations to renege on commitments.[27] 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.[28] Furthermore, it helps to "insulate policy-making from partisanship and short-term electioneering."[29] In fact, the European Commission and the European Court of Justice habitually invoke this functionalist rationale when their decisions contradict the expressed preferences of the member states.[30]

Elsewhere, I have developed the term "functional constitutionalism" to characterize the European Union's legal system.[31] In using this phrase, I do not mean 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. On the 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."[32] While typical federal systems also allocate competences between constituent units and the central authority, the federal constitution is usually the

[26] Jon Elster, *Ulysses and the Sirens. Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1984). Elster himself later observed the limitations of the self-binding analogy with respect to constitutional constraints, in *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraint* (Cambridge: Cambridge University Press, 2000), 91–5.

[27] Jervis, "Cooperation Under the Security Dilemma" 168.

[28] Robert Axelrod and Robert O. Keohane, "Achieving Cooperation Under Anarchy: Strategies and Institutions" (1985) 38 *World Politics* 226, 250. The distinction between credible or persuasive and effective commitments draws on Law, "The Paradox of Omnipotence."

[29] Christopher J. Bickerton, *European Integration: From Nation-States to Member States* (Oxford: Oxford University Press, 2012), 14.

[30] For an analysis of pragmatic appeals to the effectiveness and uniformity of Community law at the Court of Justice, see Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford: Oxford University Press, 2004), ch. 4.

[31] See especially, Isiksel, *Europe's Functional Constitution*, ch.2

[32] 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* (Abingdon: Routledge, 2004), 72; Frank I. Michelman, "What do Constitutions Do that Statutes 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).

authoritative basis for this allocation. By contrast, the EU's constitutional norms enjoy no such primacy vis-à-vis the constitutional norms of member states. Or, more accurately, such claims to primacy (periodically raised by member states and by the EU's judiciary) are fundamentally contested. Broadly speaking, while "neither [EU] Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter" consisting of the founding treaties,[33] the EU's authority binds member states and their citizens only within a functionally delineated domain (whose contours are undoubtedly fuzzy). Such a constitutional system is distinctive because it eschews any conventional sovereignty claim, acknowledges its place within a composite constitutional context, and concedes the primacy of other legal systems in matters that fall outside of its scope of authority (though not always graciously!).[34] Second, whereas constitutional norms are usually expected to be open-ended,[35] EU law is substantively elaborate in the way of ordinary legislation, but entrenched in the manner of constitutional norms.[36] 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.[37] 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.[38]

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."[39] In his emblematic defense of the proposed US constitution, Alexander Hamilton emphasizes "The 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

[33] 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 para. 281.

[34] Seminally, see Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999).

[35] See, for instance, Geoffrey Brennan and James M. Buchanan, *The Reason of Rules. Constitutional Political Economy* (Cambridge: Cambridge University Press, 1985), 20; Dennis C. Mueller, *Constitutional Democracy* (Oxford: Oxford University Press, 1996), 62.

[36] Dieter Grimm, "The Democratic Costs of Constitutionalisation: The European Case" (2015) 21 *European Law Journal* 460.

[37] This quality is often termed "output legitimacy," following Fritz Scharpf's coinage. Fritz W. Scharpf, *Governing in Europe. Effective or Democratic?* (Oxford: Oxford University Press, 1999).

[38] For a more detailed defense of what I identify as the distinctive features of the EU's system of functional constitutionalism, see Isiksel (2016: 72–92).

[39] Alfred Stepan, "Federalism and Democracy: Beyond the US Model" (1999) 10 *Journal of Democracy* 19, 21.

with the one proposed."[40] 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 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."[41]

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 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.[42] Guided by "the principle of an open market economy with free competition, favoring an efficient allocation of resources,"[43] 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,"[44] coordinating member states' economic policies,[45] and defining and implementing a monetary policy with the cardinal aim of price stability.[46] Although the EU has amassed a formidable portfolio of policy competences over time, "The 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."[47] 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

[40] Alexander Hamilton, "Federalist No. 1" in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Ian Shapiro ed., New Haven CT: Yale University Press, 2009). On this rationale, see David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (University of Kansas Press, 2003).

[41] Altiero Spinelli, "The American Constitutional Model and Attempts at European Unification" (first published 1957) (2005) 47 *The Federalist* 115, www.thefederalist.eu/site/files/PDF/EN/2000/2005–2-EN.pdf.

[42] 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* (Oxford: 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* (Abingdon: Routledge, 2004).

[43] Art. 120 TFEU.

[44] Art. 26(1–2) TFEU.

[45] Art. 119(1) TFEU.

[46] Art. 127(1) TFEU.

[47] Menon and Weatherill, "Transnational Legitimacy in a Globalising World" 402.

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."[48] The term "functional constitutionalism" captures the EU's character as a political system that is justified overwhelmingly with reference to producing shared benefits that states acting alone cannot guarantee, as distinct from one that is guided by ideals such as democratic self-rule, individual liberty, national destiny, and religious salvation.

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 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."[49] 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 Article 2 principles.[50] 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.[51] 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.[52] 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.[53]

In stark contrast, the Council does not exercise 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 invoked. In fact, it is

[48] Michael A. Wilkinson, "The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union" (2013) 14 *German Law Journal* 527, 548.

[49] Art. 2 TEU.

[50] Ulrich Sedelmeier, "Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession" (2014) 52 (1) *Journal of Common Market Studies* 105–21.

[51] Art. 126(6) and (7) TFEU.

[52] Art. 126(11) TFEU.

[53] 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.

widely regarded as unusable.[54] 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.[55]

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 Article 2 principles underlines that neither side considers these to be among the EU's actionable priorities. In other words, the contrast between strong enforcement in the fiscal domain and weak enforcement of the constitutional principles enumerated in Article 2 exposes what I characterize as the functionalist basis of the EU's authority, which undermines the EU's credibility in exercising any kind of political and constitutional (as opposed to fiscal and technical) oversight over member states. Having configured the EU as a framework of economic prosperity, member states do not expect normative back-talk – let alone disciplinary 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 Article 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 Article 2, it taketh away with Article 4(2).

II. 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 can strain the accord 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.[56] As Posner

[54] Sedelmeier, "Anchoring Democracy from Above?" 108.

[55] Council of the European Union (2014) General Affairs Council Press Release 16936/14 EN, 16/12/2014, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/146348.pdf.

[56] In order to talk coherently about financial crises and liberal constitutions, one needs a crisis theory and a theory of constitutionalism. Although I concentrate on the latter theme, more rigorous study would give equal attention to the concept of crisis. In such a study, a key question to consider would be 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

and Rosen argue in this volume, 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.[57]

The financial and sovereign debt crisis that cast its pall on the EU from 2009 onwards illustrates this dilemma. 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 Growth Pact in lieu of endowing the EU with the fiscal capacity to match.[58] 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.[59] 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," was 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

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. Institutionalists, on the other hand, would tell a more nuanced 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 codify global economic interdependence by delegating powers to supranational entities, facilitating capital mobility across borders, or curtailing the scope of national regulation may create additional vulnerabilities.

57 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* (New Haven, CT: Yale University Press, 2006).

58 Barry Eichengreen, "European Monetary Integration with Benefit of Hindsight" (2012) 50 (1) *Journal of Common Market Studies* 123–36.

59 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 *Foreign Affairs* 60.

it, the social protections they afford their citizens.[60] 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*,"[61] demanding not only tighter fiscal discipline but its constitutional entrenchment.[62] 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 greater individual liberty (as it would be in a Lockean scheme) but more effective exercise of public power in the economic realm. (Of course, whether or not they successfully generate that payoff is a different question.)

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."[63] In another creative move, euro area member states chose to route 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 such a stability mechanism."[64] 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.[65]

[60] Dorte Sindbjerg Martinsen and Hans Vollaard, "Implementing Social Europe in Times of Crises: Re-established Boundaries of Welfare?" (2014) 37 *West European Politics* 677; Caroline de la Porte and David Natali, "Altered Europeanisation of Pension Reform in the Context of the Great Recession: Denmark and Italy Compared" (2014) 37 *West European Politics* 732; OECD Directorate for Employment, Labour, and Social Affairs, "Social Expenditure Update" (November 2014), www.oecd.org/els/soc/OECD2014-Social-Expenditure-Update-Nov2014-8pages.pdf.

[61] Treaty on Stability, Coordination, and Governance, Art. 3(2).

[62] Kenneth Armstrong, "The New Governance of EU Fiscal Discipline" (2013) 38 *European Law Review* 601.

[63] Kenneth A. Armstrong, "Differentiated Economic Governance and the Reshaping of Dominium Law," in *The Constitutionalization of European Budgetary Constraints* 70.

[64] Paul Craig, "Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications," in Maurice Adams, Federico Fabbrini, and Pierre Larouche (eds.), *The Constitutionalization of European Budgetary Constraints* (Oxford: Hart Publishing, 2014), 25.

[65] Case C-370/12 *Thomas Pringle* v. *the Government of Ireland, Ireland, and the Attorney General* [2012] ECLI:EU:C:2012:756. For an analysis of the predictable outcome of this decision, see Paul Craig, "*Pringle*: Legal Reasoning, Text, Purpose, and Teleology" (2013) 20 *Maastricht Journal of European and Comparative Law* 3.

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 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,[66] they are not subject to all of the procedural constraints and accountability mechanisms afforded by the latter.[67] 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.[68]

As Ferejohn and Posner note in their respective chapters, crises generate two types of systemic danger: first, the immediate danger that the crisis might overwhelm the political system; and second, the indirect danger that the crisis *response* might undermine the liberal constitutional order. The eurozone crisis was no exception, insofar as it forced the EU to choose between the survival of the EMU on the one hand (the immediate risk), and the constitutional principles that the EU and its member states affirm (the indirect risk), on the other. Accordingly, while some critics have challenged the EU's crisis response for failing to meet the first challenge, others have condemned it for "disregard[ing] Europe's commitments to democracy and the rule of law."[69] In Müller's view, the EU's dramatic intervention in member states' social and 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."[70] Others have gone further, glimpsing the specter of authoritarian thinkers such as Carl

[66] Although as Fabbrini notes, 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: Oxford University Press, 2016), 7.

[67] Craig, "Economic Governance and the Euro Crisis" 26.

[68] Sergio Fabbrini, "Executive Power in the European Union: The Implications of the Euro Crisis," Paper presented at the EU Studies Association 14th Biennial Conference, Boston, March 5–7, 2015, 12.

[69] Christian Joerges, "Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration" (2014) 21 *Constellations* 249, 255. Also see Edoardo Chiti, Agustín José Menéndez, and Pedro Gustavo Teixeira, "The European Rescue of the European Union" in Edoardo Chiti, Agustín José Menéndez, and Pedro Gustavo Teixeira (eds.), *The European Rescue of the European Union? The Existential Crisis of the European Political Project* (ARENA Report No. 3/12; RECON Report No. 19, 2012) 392.

[70] Jan-Werner Müller, "Beyond Militant Democracy?" (2012) *New Left Review* 39, 44.

Schmitt in the EU's crisis response,[71] and describing the outcome as a form of "post-democratic executive federalism,"[72] "authoritarian liberalism,"[73] or "executive emergency constitutionalism" designed to "minimize public debate and to avoid the ordinary filters of the democratic constitutional state."[74] 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 in favor of 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 represent a radical break with its constitutional system as much 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, the primary source of legitimation for a functionalist polity is its ability to consistently realize the objectives it has been established to pursue. As I observed at the start of this essay, the legitimacy of *all* constitutional regimes hinges to some extent on their ability to effectively provide certain essential public goods. What distinguishes a system of functional constitutionalism (and marks its key weakness) is its relatively rigid orientation towards a specific goal (such as economic and monetary union). Of course, the pursuit of this goal need not become pathological as long as it does not come into serious conflict with other important values and ends. While democratic and rights-based constitutional regimes possess mechanisms for adjudicating these conflicts and recalibrating existing trade-offs between values and ends, functional constitutionalism behaves as a one-way ratchet.

The EU's response to the euro crisis, which generated a serious conflict between competing constitutional values, illustrates this ratchet effect. The fact that the EU has so far managed to save 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 "Strengthening the Economic and Monetary Union has absolute priority"[75] 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 "The Euro has profound

[71] For an overview of recent commentary summoning Schmitt's ghost, see Joerges, "Law and Politics in Europe's Crisis" 253–5.

[72] Jürgen Habermas, *The Crisis of the European Union: A Response*, trans. Ciaran Cronin (Cambridge: Polity, 2012) 12.

[73] Wilkinson, "The Specter of Authoritarian Liberalism."

[74] Chiti, Menendez, and Teixeira, "The European Rescue of the European Union" 417.

[75] 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.

economic advantages and is *the most powerful symbol* of European integration,"[76] 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. In 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."[77] 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.[78] 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.[79] Guided once more by its solicitude for the successful realization of the EU's *telos*, the CJEU affirmed the legality of OMT.[80] However, the CJEU's own status as an institutional guardian of purposive integration serves only to heighten the tension between respect for constitutional constraints on public power and the EU's single-minded fealty to the substantive goals entrusted to it.

[76] Future of Europe Group, *Final Report*, emphasis added.

[77] Mario Draghi, speech at the Global Investment Conference in London, July 26, 2012, www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

[78] Samuel Dahan, Olivier Fuchs, and Marie-Laure Layus, "*Whatever It Takes?* Regarding the *OMT* Ruling of the German Federal Constitutional Court" (2015) 18 *Journal of International Economic Law* 137.

[79] Bundesverfassungsgericht Case No. 2 BvR 2728/13 *OMT* Judgment 14 January 2014.

[80] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* ECLI:EU:C:2015:400.

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."[81] 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.[82]

Still, these irregularities have to some extent been camouflaged by the pliability of the EU's constitutional settlement. In the end, the dynamism inherent in the project of ever-closer union defies constitutional limitation, indicating that the polity (and not just the legal order that undergirds it) is fundamentally incomplete. One may bemoan the EU's lack of a *finalité politique*[83] or celebrate it as a utopian commitment to perfectibility,[84] 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, insofar as the EU's response to the financial crisis pushed European integration further along its particular path, it serves as a reminder that not all crises lead to revolutionary rupture. Circumstances impelled member states to take 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 the establishment of the Single Supervisory and Resolution Mechanisms that effectuate a banking union.[85] 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 used that capacity to double down on a disciplinary mode of economic governance, ensnaring member states in a protracted austerity zone. The ambitious new fiscal facilities could have been used to reinforce threadbare

[81] MacCormick, *Questioning Sovereignty* 103.
[82] Madison, Federalist No. 48.
[83] Joschka Fischer, "From Confederacy to Federation: Thoughts on the Finality of European Integration." Speech delivered at Humboldt University in Berlin, May 12, 2000.
[84] Zenon Bañkowski and Emilios Christodoulidis, "The European Union as an Essentially Contested Project" (1998)4(4) *European Law Journal* 341–54.
[85] Damian Chalmers, Markus Jachtenfuchs, and Christian Joerges, "The Retransformation of Europe," in Damian Chalmers, Markus Jachtenfuchs, and Christian Joerges (eds.), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge: Cambridge University Press, 2016), 3.

social welfare provisions in troubled member states and to compensate those who have lost out as a result of economic competition instead of being dispensed as loans to service public debt obligations. In other words, the impetus towards greater fiscal centralization could have helped to fulfill the original promise the founders of European integration made to citizens, namely "the constant improvement of the living and working conditions of their peoples."[86] Perhaps that will take a bigger crisis – if it doesn't bring down the EU first.

[86] Preamble, *Treaty of Rome* [1957]; Preamble, *Treaty on the Functioning of the European Union* [2007].