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

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[E]very word [of the constitution] decides a question between power and liberty.
—James Madison, *The National Gazette*, January 19, 1792

Constitutionalism is enjoying yet another renaissance, this time in the context of supernational institutions. Barring a few holdouts, most observers believe that the answer to the question popular during the late 1990s—is constitutionalism possible beyond the nation-state?—ought to be in the affirmative. At the very least, it has become *de rigueur* to reach for constitutional language when considering post-national legal entities so long as they bear some resemblance to formal features we associate with constitutionalism. Never mind that these entities (variously taxonomized as regimes, systems, institutions, orders, processes, and so on) have little in common with each other. International institutions ranging from the UN to the WTO, IMF, and ICSID, human rights regimes including the UDHR and the ECHR, juridical constructs such as *jus cogens*, transnational contract law, and treaties from the Vienna Convention on the Law of Treaties to the New York Convention on the Enforcement of Foreign

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1 In this paper, I will use the term “supernational” to refer to institutions, norms, and processes that originate outside the remit of the nation-state. “Supernational” is meant as a general term and should not be confused with “supranational,” which implies that the nation-state is bound by an authority above itself. Genuinely supranational institutions are few and far between, and the EU’s first pillar institutions and procedures (such as legislation through qualified majority voting) remain its most emblematic referents. “Supernational” is also more general than “transnational,” which is most frequently used with regard to non-governmental processes operating through and across nation-state borders. Lastly, it is distinct from “international,” which is most apposite in the context of interactions between sovereign states and classic public law structures authorized by them.
Arbitral Awards have all been considered forms of constitutional order at one point or another. Is the house of constitutionalism great enough to accommodate all these mansions?

I will begin this paper by explaining why it is that we need a constitutional theory of international institutions in the first place. In response, I will point out a trend towards inflationary and indiscriminate use of constitutional terminology, and argue that this not only results in the loss of analytical precision, but threatens to erode the concept of constitutionalism itself. I will then propose the category of “functional constitutionalism” to characterize the kind of constitutional practice emerging at the level of functionally specialized institutions beyond the state. In developing this idea, I will draw on the development of the European legal order out of

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the 1957 Treaty of Rome. I will end the paper by pointing out the more general uses of this category and the way in which it can help us refurbish the idea of constitutionalism in line with new forms of political ordering beyond the state while serving as a valuable critical tool with which to evaluate the latter.

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

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

Constitutional theory has become a particularly crowded conceptual terrain in our collective endeavor to make sense of newly emerging political and economic institutions beyond the state. Puzzlingly, however, mainstream responses to the question of whether and to what extent constitutionalism remains practicable in the postnational context tend to adopt a uniform argumentative tack, notwithstanding disagreements about whether that question ought to be answered in the affirmative. In a recent work, Jeffrey Dunoff and Joel Trachtman have aptly called this pervasive methodology the “check list approach”: authors tend to posit a set of legal and institutional criteria as being central to constitutionalism, and proceed to analyze the extent to which existing postnational regimes approximate those criteria. The most frequently cited signs of constitutionalism include the hierarchical organization of norms, authority to produce

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binding rules, direct effect, dispute resolution mechanisms that take on judicial review functions, and channels of democratic authorization. The idea is that institutions which approximate the features we associate with constitutional orders must be considered in constitutional terms. To borrow Alec Stone Sweet’s colorful metaphor, “if it looks, walks, and quacks like a duck, then it is probably a duck.”

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

Unfortunately, however, easy resort to constitutional terminology has some adverse consequences for constitutional theory. For one thing, it can result in dignifying every legal and quasi-legal entity with the constitutional label. Indeed, much academic writing has been devoted to teasing out the various ways in which the UN, the WTO, the ECHR, transnational contract law, etc. are constitutionalized. As a result, constitutionalism has been undergoing what Giovanni Sartori, in a seminal APSR article, referred to as “concept stretching.” According to Sartori, “the net result of conceptual straining is that our gains in extensional coverage tend to be matched by losses in connotative precision.” That is, the attempt to expand indefinitely the

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6 Ibid, 1035
scope of things to which a concept applies comes at the expense of analytical exactness and clarity.

Given the special purchase of the idea of constitutionalism in modern democracies, however, a glut of poorly conceptualized academic work may turn out to be the least of our worries. The real danger is that our collective conceptual profligacy is in the process of devaluing constitutionalism as an evaluative category. Since the late 18th century, constitutionalism has emerged as the authoritative placeholder of normative principles central to our understanding of what makes political institutions legitimate and worthwhile. The erosion of constitutional vocabulary through overuse therefore limits our ability to understand, assess, design, and redesign the institutions which govern us.

Should these considerations lead us to raise the threshold at which we consider new legal regimes to be properly constitutionalized? That is, should we counteract the problem by adopting a more stringent checklist of constitutional features? This has been the response preferred by a number of strong democratic constitutionalists, who insist that a simple agglomeration of ‘constitutional-oid’ characteristics such as direct effect, supremacy, and judicial review cannot amount to constitutionalism. In a celebrated 1995 article, Dieter Grimm outlined this position with regard to the then popular debate about the European Union’s constitutional prospects. He insisted that the EU’s advanced legal structure fell short of constitutional criteria because it had never been authorized by a European demos. In Grimm’s view, “it is inherent in a constitution in

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the full sense of the term that it goes back to an act taken by or at least attributed to the people;”\(^9\)
which can never be the case with a system founded through international treaties, no matter how
constitution-like its formal characteristics. In the absence of a *pouvoir constituant*, it is
impossible to speak of constituted power. With regard to the EU, Grimm argued that because
Europe’s democratic publics make their mark on founding treaties indirectly their national
executives and legislatures, the crucial component of democratic authorization is absent. More
broadly speaking, Grimm’s response fits within a statist argument concerning the
indispensability of the sovereign state framework for the meaningful practice of
constitutionalism.

Grimm is probably right to doubt that his popular sovereigntist understanding of
constitutionalism can ever be transferred wholesale to the world of deeply legalized
supernational institutions with functionally limited competences. However, a more radical
implication (and one which Grimm never explicitly acknowledges) is that refusing to consider
the constitutional credentials of treaty-based regimes that cannot lay claim to democratic
legitimation rules out the possibility of a postnational constitutionalism altogether. Disquietingly,
to deny that constitutionalism can have any purchase beyond the state is to throw the baby out
with the bathwater: an inflexible insistence on a thick notion of constitutionalism (especially one
which insists on strong popular authorization) may doom constitutionalism itself to
obsolescence. This is a conclusion that few would be willing to countenance given the central
importance of constitutional modes of political ordering in late modern societies.

Let us sum up the drawbacks of the checklist approach. First, it would appear that more
and less demanding uses of the checklist approach lead to the same conclusion: they both throw

\(^9\) Dieter Grimm, “Treaty or constitution? The legal basis of the European Union after Maastricht,” in Erik Oddvar
Eriksen, John Erik Fossum, and Augustin Jose Menendez (eds), *Developing a Constitution for Europe* (New York:
Routledge, 2004), at 75
into doubt the continued relevance of constitutionalism beyond the state. Second and more
important, the checklist approach appears to thwart any sort of general agreement about whether
a given regime is constitutional, because it amounts to arguing from definitional fiat. The debate
hinges not on what postnational constitutionalism might look like, but on essentialist and static
definitions of constitutionalism is or does. The problem is that what constitutions were or what
they did within the context of the nation-state will not necessarily be what they do (or should do)
in the supranational context. As a result, delegating the verdict about the possibility or
desirability of postnational constitutionalism to criteria inherited from the nation-state context
not only leads observers to speak past one another, but it also naturalizes existing forms of
constitutionalism, thereby sweeping under the rug the necessity of rethinking the concept itself.
Last, and perhaps most important, this approach obscures the distinctive and normatively salient
aspects of postnational modes of political organization. In other words, the current debate often
fails to live up to a challenge of “translation”:10 in using constitutional indices inherited from the
nation-state context, we neglect the need to reimagine the idea of constitutionalism.

The multiplication of sites of politics beyond the state presents a bi-directional challenge
not just for constitutional theory but for social science in general: on the one hand, conceptual
categories carefully tailored to the nation-state, such constitutionalism, need to be translated11
into institutional contexts where assumptions of territorial boundedness, concentrated political
authority, and cultural homogeneity no longer obtain. On the other hand, the essential normative
qualities which make these categories worth preserving in the first place must not be lost in
translation. Just because political power has “gone transnational” does not mean it has dissipated;

10 Neil Walker, “Postnational constitutionalism and the problem of translation” in Joseph Weiler and Marlene Wind
(eds), European Constitutionalism beyond the State (Cambridge, Cambridge UP, 2003). Also, Michael Zürn,
“Globalizing interests: an introduction,” in Michael Zürn and Gregor Walter (eds), Globalizing Interests. Pressure
11 ibid
rather, we must insist on the same sophisticated benchmarks of political legitimacy to which we
subject national institutions *wherever* political power is exercised.

A more promising alternative response to the checklist approach would be to undertake
conceptual readjustment and normative critique simultaneously. Thus, on the one hand, we must
be sensitive to constitutionalism’s critical force insofar as it distils key principles about political
legitimacy and provides a way of placing these at the center of political order. The attempt to
reduce constitutionalism to a series of legal and institutional features sidelines the essential
normative content which gives constitutionalism its distinctiveness as a political idea and ideal.
Once constitutionalism is evacuated of its legitimizing functions, we lose the normative
substance which makes it a category worth carrying over to non-state entities. In other words, the
problem of adapting constitutionalism to non-state entities and the analytical creativity which
this task requires should not come at the cost of losing the valuable inheritance of constitutional
theory as developed in the nation-state context. To dispense altogether with these principles and
to attempt to theorize the postnational condition from scratch would be to reinvent the proverbial
wheel.

On the other hand, insisting on an all-too demanding normative standard of
constitutionalism (for instance, one which rests on grand constitutional moments of the
Philadelphia variety) may largely close off the possibility of recovering constitutionalism outside
the context of the nation-state altogether. Hence, it is necessary to reformulate the concept in a
way that takes account of the legal and institutional possibilities (and limitations) of regimes
beyond the state. Consequently, the most persuasive way of assessing the prospects of
postnational constitutionalism is to undertake a reciprocal readjustment of existing constitutional
practices beyond the state on the one hand, and conventional constitutional expectations on the other.

Certainly, this project of conceptual renovation can only be the subject of a larger, lasting cooperative effort. In this paper, I will point towards one possible response to this challenge by developing the idea of “functional constitutionalism.” I will use this concept to capture a distinct manner of constitutional practice that is crystallizing in the context of functionally specialized super-national institutions which no longer operate in the manner of conventional public international law. My goal is to create an analytically sound subcategory within constitutionalism that is, on the one hand, sensitive enough to detect the development of constitutional characteristics in legal regimes beyond the state. On the other hand, however, I hope to formulate the idea of functional constitutionalism such that it leaves room for critique and is sensitive to the shortcomings of postnational constitutional regimes in terms of inclusion, justice, and democratic legitimation.

In what follows, I will briefly distinguish two roles that constitutions fulfill, which I will call the normative and the functional. I will then argue that through the jurisprudence of the European Court of Justice and frequent cooperation by national courts, the 1957 Treaty of Rome establishing the European Community has evolved into a kind of constitutionalism configured on an exclusively functional footing. However, I will make this argument with the caveat that since the entry into force of the Maastricht Treaty in 1993, and with the transition from European Community to Union, the functional constitution has been undergoing a process of transformation. It is evolving into something much more reminiscent of constitutionalism proper. As a consequence, this paper is not meant to be an au courant account of constitutionalism in the
EU; rather, it is meant to introduce a new category into the inventory of constitutional theory and to suggest that it may be of use elsewhere, too.

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

The idea of a “functional constitutionalism” originates in the observation that constitutions tend to two roles simultaneously. The first is that of creating and organizing public power. The second is that of organizing public power in accordance with a series of political principles citizens hold dear. To put the distinction another way, on the one hand, constitutions order the business of governing, map the functions of political institutions, and more generally, enable the exercise of political authority. On the other hand, they act as the lynchpin of weighty normative commitments on which citizens understand their union to rest. Because the cogency of functional constitutionalism as a conceptual tool hinges on the distinction between constitutional rules that can be traced directly to normative commitments on the one hand, and those that are primarily about making government more effective on the other, I will take the time to briefly expand on this distinction before looking at the European legal order.

In its normative role, the constitution anchors political authority in principles about what makes that authority legitimate. Political theorists have variously thought of this aspect of the constitution as a repository of common principles and long-term goals, a shared medium of debate and communication akin to language, an agreed-upon manner of reasoning about public questions, or a powerful recourse against perceived acts of domination or exclusion. A strong normative anchor means that the constitution will provide a resource for diverse causes in a wide range of struggles: it can serve as a defensive mantle donned to reclaim one’s voice in political community, as the touchstone for unfulfilled aspirations during moments of political stasis, or a
baseline consensus to fall back on in times of division and conflict. Nor is the normative meaning of the constitution necessarily or immutably written into its text; rather, it results from the debates, contestations and reappropriations constantly waged under its terms and which sediment over time into a series of understood (but not necessarily agreed upon) meanings.\footnote{This idea of the constitution as an object of constant renegotiation is inspired by Seyla Benhabib’s theory of democratic iterations, as well as Jim Tully’s theory of the constitution as both an object and a tool of societal dialogue and inclusion. See Seyla Benhabib, \textit{Another Cosmopolitanism} (Oxford: Oxford University Press, 2006), at 49; James Tully, \textit{Strange Multiplicity: Constitutionalism in an age of diversity} (Cambridge: Cambridge University Press, 1995).}

In what I will refer to as its functional role, by contrast, the constitution translates the normative expectations built into it into \textit{government}: a living, breathing system populated by posts, institutions, and rules that produces the steady output of laws that are necessary to deliver the public goods for the sake of which the polity exists. For instance, the constitution divides labor (and power) among legislative, executive, and judicial branches of government, spreads competences over local, regional, national, and increasingly, supernational, tiers of government, sets out the procedures through which offices will be filled, laws issued, rights and duties balanced, political grievances registered. In doing so, the constitution must be conducive to the pursuit, in Jon Elster’s words, of “the goal of efficient decision-making, unencumbered, if necessary, both by popular participation and by constitutional constraints”\footnote{Jon Elster and Rune Slagstad (eds), \textit{Constitutionalism and Democracy} (Cambridge: Cambridge University Press, 1988), at 1.} such as those guaranteeing individual rights, the rule of law, and so on. In other words, constitutions aren’t only there to make public power \textit{legitimate}, they are also supposed to make it \textit{effective}.

To be sure, an effective government \textit{is}, in a very general sense, also a criterion of legitimacy and thereby also a normative commitment. For instance, it would be beside the point to speak of the legitimacy of a “failed state.” However, governments may deliver some public goods effectively without living up to the standards of political legitimacy inscribed into the
constitution: it is possible to imagine an autocratic state with a prosperous economy, sound military defenses, a well-run civil service, safe streets, and clean sidewalks. In other words, we can imagine a dissociation between the two logics which the constitution is meant to navigate, one pragmatic and related to the effectiveness of political acts; the other normative and related to the legitimacy of political acts. The constitution must manage two equally important tasks which do not always pull in the same direction: it must ensure not only that political institutions fulfill the greater and smaller chores of government, but also that they do so in a way that is just, equitable, respectful of human dignity, and conducive to the autonomy of each citizen.

There are three important points to note about this analytical distinction. First, I do not mean to argue that a constitution is a necessary or sufficient condition in bringing about governmental effectiveness or political legitimacy. Those questions are best left to political scientists who ably pose them as testable empirical propositions. Rather, my point is that these are the principal tasks with which the constitution is charged, whatever other institutional or structural factors may be needed to produce these desirable outcomes.

Second, all constitutional rules are normative in the sense of prescribing certain courses of action. At this level of abstraction, it does not matter whether a constitutional rule helps to increase the effectiveness of political power or protects human dignity: constitutional rules are commands and thus intended to have normative effect on the behavior of those subject to them. This is not the sense in which I am using the term ‘normative’ in this paper. Rather, I am using it in a second, more specific sense which helps discern a contrast between two roles that constitutional rules play. Thus, constitutional rules can be said to have a normative dimension if they have their wellspring in ideals of freedom, equality, justice, solidarity, and so on, ideals which are valuable in themselves rather than because they are instrumental to reaching other
objectives. By contrast, constitutional norms are sometimes valued for their ability to make government more competent, more effective, or more powerful in the long-term.

Third, all domestic constitutions address some combination of both logics, the normative and the pragmatic. As Stephen Holmes argues, many constitutional norms which expand and protect the liberties of citizens also thereby serve to make government more stable.\textsuperscript{14} For instance, the separation of powers was considered to be an indispensable condition of liberty by thinkers from Locke to Montesquieu, and revolutions from the English (1688) to the French to the American invoked this demand.\textsuperscript{15} For instance, if the holder of executive powers acquired authority over dispensing justice, it could never be held to account for injustices committed against subjects. Similarly, under classical separation of powers doctrine, combining the power of making laws with that of applying them is considered dangerous since the law would cease to be general, public, and impartial, and degenerate into the mere whim of the sovereign. At the same time, however, Holmes points out that the separation of powers helps promote what he helpfully calls “governmental maneuverability.”\textsuperscript{16} Accordingly, it is useful to think of the separation of powers “as a form of the division of labor, permitting—in some cases—a more efficient distribution and organization of governmental functions. Specialization improves everyone’s performance.”\textsuperscript{17} Moreover, such a division of labor “can disentangle overlapping jurisdictions, sort out unclear chains of command, and help overcome a paralyzing confusion of functions.”\textsuperscript{18}

\textsuperscript{14} Stephen Holmes, \textit{Passions and Constraint} (Chicago: University of Chicago Press, 1995)
\textsuperscript{15} Any number of classic quotes could be summoned to make this point, but James Madison’s formulation is emblematic: “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, may justly be pronounced the very definition of tyranny.” \textit{The Federalist Papers}, no.47
\textsuperscript{16} Holmes, \textit{Passions and Constraint}, op.cit., 148
\textsuperscript{17} Ibid., 165
\textsuperscript{18} Ibid., 165
Even more counterintuitively, subjective rights too can help to shore up governmental effectiveness despite the fact that they are more usually imagined as bulwarks against public power. The freedom of conscience is an excellent example of this dual logic because, as Holmes writes, “[n]ot merely does it shelter the private sphere from unwanted incursions, it also unburdens the public sphere of irresolvable problems.”\(^{19}\) When public institutions take sides in fundamentally incommensurable confessional disputes, this not only threatens the liberty of those who profess a different faith, but can have a corrosive effect on the authority of government. Representative democratic institutions similarly fulfill a dual function: although they are most frequently justified with reference to realizing the public autonomy of citizens, giving them the opportunity to make the laws by which they live, they also serve to pacify political disputes, promote competition among policy ideas, and render public power more adaptable.\(^{20}\)

Although these examples show the dual logics of constitutionalism at work, Holmes and others have shown that the earliest instances of what we would recognize as constitutional norms had a predominantly pragmatic character insofar as they served to enhance, rather than limit, the power of the sovereign. Indeed, before the American Founding and the French Revolution gave a new meaning to the constitution as the instrument of legitimate political rule, absolutist monarchs resorted to proto-constitutional constraints on their power in order to make their political rule more effective. For instance, according to Holmes, the “leges imperii” of absolutist rule bound the monarch to respect the right of succession, such that he could not appoint a

\(^{19}\) Ibid., 208

successor and was obliged to safeguard the territorial integrity of the realm. By limiting the powers of any one monarch, these laws were meant to ensure the permanence of monarchical power.\(^\text{21}\) In a similar vein, Francis Sejersted observes that sovereigns who adhered to legal constraints on their scope of authority were paradoxically more assured of the durability of their acts than a despot whose power was circumscribed by his own mortality.\(^\text{22}\) To use a distinction made by Stephen Krasner, legal constraints we would identify as being of a constitutional nature enabled sovereigns to cash in some of their \textit{de jure} authority for \textit{de facto} control, that is, the ability to govern effectively.\(^\text{23}\)

At the root of this strategic use of constitutional mechanisms is the problem known to political scientists as the paradox of commitment. Constitutional constraints are guided by the idea that “the ability to commit often… expands one’s opportunity set, whereas the capacity to exercise discretion… reduces it.”\(^\text{24}\) Thus, in the early modern instance, the absence of limits to the sovereign’s authority was itself an obstacle to the sovereign’s exercising its power effectively. For instance, as Hilton Root has shown with regard to 18\(^{\text{th}}\) century France, the monarch could increase his creditworthiness and secure access to loans only by repudiating his claim to be above the law, particularly the obligation to repay his debts.\(^\text{25}\) In order to reassure lenders that they would not be expropriated, the king accepted limits on his fiscal discretion. The property rights of subjects were one way of realizing this self-limitation, “created and maintained

\(^{21}\) Holmes, \textit{Passions and Constraint}, op.cit., 106-7
by the state to promote the goals of the state.”

Douglass North and Barry Weingast’s classic study on the Glorious Revolution of 1688 tells a similar story of constitutional transformation in England. Accordingly, the rapacious policies of taxation and expropriation pursued by the Crown during the first half of the 17th century precipitated the overthrow of James II and the introduction of a series of mechanisms for constraining the power of the monarch. These included a change in the subject of the sovereign from the king to the “king in parliament” (that is, the monarch governing jointly with a permanent parliament), the transfer of fiscal power to the latter, and the reestablishment of the independence and supremacy of the common law courts where claims of expropriation could be heard. North and Weingast argue that although each of these institutional mechanisms limited the power of the monarch to tax his subjects, they increased rather than diminished the Crown’s solvency in comparison to the beginning of the 17th century.

In each of these examples, the sovereign gains the capacity to wield greater political power in the longer term by curtailing its prerogative in the short term. Thus, many manifestations of constitutionalism in the germ had little to do with disabling government to increase individual liberty; rather, they were intended to “markedly increase [the sovereign’s] capacity to govern and to achieve his steady aims.” Although constitutional constraints on the power of the absolutist ruler often resulted in pockets of individual liberty, such as property rights and the freedom of conscience, these constraints themselves often issued from imperatives of power, not liberty.

26 Holmes, Passions and Constraint, op.cit., 102
28 Ibid, 816-7
29 Holmes, Passions and Constraint, op.cit., 111
In what follows, I will show that the Treaty of Rome system is best understood with reference to this neglected chapter in the history of constitutionalism rather than the more frequently invoked Philadelphian narrative.\textsuperscript{30} I will argue that in the first three decades of its development, the European legal order put in place a form of constitutional practice which jettisoned the normative element found in conventional constitutional orders. To echo James Madison’s words with which I opened this essay, Europe’s functional constitutionalism is mostly about \textit{building power}, and only incidentally about liberty or any other foundational principles of political legitimacy. Insofar as it exists to administer a series of market-related policies, the European legal order represents a distinctive, pragmatic species of constitutionalism that is largely disconnected from the normative meanings in terms of which political theorists (and citizens) conventionally understand constitutions. While the European legal order appropriated the legal and institutional machinery of constitutionalism from the 1960s onwards, including a hierarchy of laws, individual rights, and judicial review, each of these constitutional features was marshaled in the service of a single good: that of governmental effectiveness.

\textbf{iii. On Europe’s functional constitutionalism}

Although the Treaty of Rome is technically an agreement among sovereign states, over the first few decades of its existence, it evolved into a highly sophisticated legal order with a number of strikingly constitutional characteristics. Let us briefly recall the most important of these features. First, in a series of landmark rulings beginning with \textit{Costa v. ENEL} in 1964,\textsuperscript{31} the

\textsuperscript{30} The Philadelphian parallel was abundantly drawn during the hopeful stages of drafting a constitution for the European Union, most notably by the President of the Convention himself. See Valéry Giscard D’Estaing, “The Henry Kissinger Lecture,” delivered at the Library of Congress, Washington, DC, 11 November 2003. Text available at \url{http://european-convention.eu.int/docs/speeches/7072.pdf}

\textsuperscript{31} Case 6/64, \textit{Flaminio Costa v. E.N.E.L.} [1964] ECR 585
ECJ proclaimed that Community law takes precedence over the laws of member states. Even in the event of a conflict between a member state’s constitutional provisions and a piece of European law, the former must prevail according to the ECJ. Through the piecemeal and sometimes grudging acceptance of the supremacy doctrine by national courts, the European legal order has gradually taken shape as a new legal hierarchy, integrating the laws of the Community into the legal systems of member states. Under the Art 234 preliminary reference procedure, national courts are empowered to refer questions about the application of European law to the ECJ, and have been directed by the ECJ to disregard any national legislation that comes into conflict with European law. This means not only that the ECJ has co-opted national courts into a new European judiciary with a supranational court at its apex, but it has also given ordinary national courts powers of judicial review normally reserved for constitutional courts, thus revising the domestic constitutional systems of member states. Moreover, because it is their own courts rather than a distant supranational body ordering member states to fulfill their supranational obligations, European law has enjoyed remarkably uniform application domestically.

33 For authoritative accounts of this process, see Karen Alter, Establishing the Supremacy of European Law (Oxford University Press, 2001); Alec Stone Sweet, The Judicial Construction of Europe (Oxford University Press, 2004).
As important, in 1963, the ECJ ruled that certain provisions of the Treaty of Rome gave rise to individual rights that could be relied on by individual litigants before national courts. In the ensuing decades, the Court gradually expanded the remit of the doctrine of the direct effect of European law by finding more and more Treaty provisions and directives as capable of giving rise to individual rights. Consequently, member state nationals (after the Treaty of Maastricht, Union citizens) became the holders of a series of rights originating exclusively from European law. The vast majority of these rights relate to cross-border economic activity, and the most litigated among them remain those known under European law as “fundamental freedoms,” namely, the freedoms of movement of workers and of establishment in another state, and the rights to free circulation of goods, services, and capital. As a consequence, the EU’s legal order now transcends the conventional paradigm of international law and mirrors domestic constitutional orders insofar as it regards individuals as its legal subjects or addressees and gives rise to rights which individuals may claim before national courts.

In 1986, the European Court of Justice carried the European legal order’s three decades of development to its high water mark by calling the Treaty of Rome the “constitutional charter” of the European Community. Although some academic commentators had considered the EC in constitutional terms prior to this pronouncement, the Court’s *Les Verts* decision made

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36 According to the ECJ, Treaty provision must be “clear,” “unconditional,” must give rise to “a negative obligation” on the part of states and not be dependent on implementing measures in order to qualify for direct effect. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963], ECR 1. The Court later relaxed these criteria, choosing to give direct effect to the “principle” of equal pay for equal work contained in Art 119 EC (now Art 141), which obligation was rather general, imprecise, and not necessarily “negative.” See Case 43/75 *Defrenne v. SABENA* [1976] ECR 455.


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constitutional language all but unavoidable to any inquiry into the nature of the European
commonwealth.\footnote{39}{“European commonwealth” is one of the late Neil MacCormick’s many felicitous phrases. See Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (Oxford: Oxford University Press, 1999)}

And yet, while the European legal order replicates many of the key institutional features we associate with constitutionalism, the fact that the whole system has been built to fulfill an immediate policy end (that of market integration) makes this supranational form of constitutionalism highly distinctive. For one thing, the empirical literature almost uniformly treats European integration as a story of power-building. While there has always been heated debate over the actors, conditions, and mechanisms which predict the success or failure of supranational institutions,\footnote{40}{The empirical literature is conventionally grouped along two major camps, neofunctionalism and intergovernmentalism. Although the arguments of these positions overlap more often than assumed, and although there is a kaleidoscopic range of variations and offshoots to each, the most important point of disagreement pertains to the agents which each theory pinpoints as driving the process of integration. While intergovernmentalists explain the success of integration with reference to the role of member states and their willingness to submit to limitations on their competences, neofunctionalist theories highlight the role of sub- and supranational agents and norms, including national courts, litigants, interest groups, and supranational institutions such as the Commission, Central Bank, and the European Court of Justice. Prominent intergovernmentalist accounts include Stanley Hoffman, “Obstinate or obsolete: The fate of the nation state and the case of Western Europe,” Daedalus, vol.95 (1966), no.3, pp. 862-915; Alan Milward, European Rescue of the Nation-state (London: Routledge, 1992); Andrew Moravcsik, The Choice for Europe (Ithaca: Cornell UP, 1998); Geoffrey Garrett, “The politics of legal integration in the European Union,” International Organization, Vol.49 (1995), No.1, pp.171-181. Representative neofunctionalist accounts include Ernest B. Haas, The Uniting of Europe (Stanford: Stanford University Press, [1958] 1968); David Moriaty, A Working Peace System. An argument for the functional development of international organization (Chicago: Quadrangle Books, [1943] 1966); Philippe C. Schmitter “Three Neo-Functional Hypotheses about International Integration,” International Organization, vol.23 (1969), no.1, pp.161-166; Anne-Marie Burley and Walter Mattli, “Europe Before the Court,” International Organization, Vol.47 (1993), No.1, pp. 41-76; Alec Stone Sweet, Wayne Sandholtz, and Neil Fligstein, The Institutionalization of Europe (Oxford: Oxford University Press, 2001); Alec Stone Sweet, The Judicial Construction of Europe (Oxford: Oxford University Press, 2004).} the existence of those institutions is explained primarily with reference to policy problems which member states acting singly cannot, or can no longer, govern. In Jürgen Habermas’s words, European integration responds to “problems that can no longer be solved within the framework of nation-states or by the traditional method of agreements between sovereign states,” including “the globalization of commerce and communication, of economic production and finance, of the spread of technology and weapons,
and above all of ecological and military risks.⁴¹ Because each of these problems calls for solutions on a scale greater than the nation-state, new institutional mechanisms must be improvised to make concerted action by states possible.

As political scientists know well, however, it is not easy for autonomous agents, particularly sovereign states, to undertake concerted action in pursuit of a collective good. Because each agent taken singly will have short-term incentives to renege on their commitments, long-term cooperation proves elusive. The range of decisions required over time to attain the objective of an integrated European market, such as the lifting of protectionist trade restrictions, the adoption of common regulatory policies including those regarding competition, environmental, consumer, and labor standards, are those which states are motivated to shirk. Supranational institutions and supranational law in particular provide an answer to precisely this problem: if competence over the making and enforcement of decisions of this kind could be removed from the purview of member states and delegated to an authority beyond their immediate control, the policy continuity and monitoring necessary to attain the long-range objectives of integration would be brought within reach.

Thus, the delegation of competences to a new supranational authority is another version of the story of Ulysses tying himself to the mast of his ship to avoid future temptation by the sirens. By committing to the authority of supranational institutions in certain issue areas, member states remove certain decisions from the purview of ordinary legislative politics in the name of an anticipated longer-term good, a practice which closely mirrors constitutional entrenchment of rights norms, for example. However, whereas the entrenchment of rights is directly traceable to ideas of human dignity and autonomy, supranational self-binding in the name of economic

growth and competitiveness represents an instrumental deployment of constitutional mechanisms. A more apposite parallel is self-binding by the absolutist sovereign: as with the monarch, the unlimited discretion of the sovereign state gets in the way of its exercising its power effectively. By contrast, the relinquishment of authority over certain competences to supranational institutions provides an effective way for states to signal the credibility of their long-term commitments to their peers. Just as the monarch had short term incentives to default on his debts or overtax his nobles, and sought to reassure them by narrowing his own discretion, surrendering power over the adoption, monitoring, and enforcement of policies to a supranational body is meant to prevent shifting majorities in respective member states from scuttling the collective endeavor.

The term “functional” captures two distinctive characteristics of this particular use of constitutional mechanisms: first, the European legal order (along with many of the supranational institutions and regimes considered nowadays in constitutional terms) is functionally specialized, in that it issues norms which govern a functionally delimited sphere of public policy. This is a characteristic which traditional paradigms of constitutionalism are ill-equipped to capture. For one thing, within the conventional framework, it is assumed that all exercises of public power have to filter through the mesh of constitutional validity: as Dieter Grimm puts it, “[t]here is no space for proprietors of public power outside the constitution.” By contrast, the functional constitution drops this assumption of comprehensiveness (or what Frank Michelman has called the constitution’s “pervasive” quality), appropriating only a functionally delimited sphere of

43 Grimm, “Treaty or Constitution?” op.cit., at 72
44 Frank I. Michelman, “What do constitutions do that statues don’t (legally speaking)?”, in Richard W. Bauman and Tzvi Kahana (eds), The Least Examined Branch: The Role of Legislatures in the Constitutional State (Cambridge: Cambridge University Press, 2006)
competence with the understanding that other constitutional orders are responsible for other arenas of public decision-making. It thus renounces the claim to comprehensive validity traditionally associated with constitutionalism, and breaks up the rule of law into specialized segments. This does not mean that functional specialization thereby necessarily jeopardizes the rule of law: ideally, a well-worked out meta-constitutional system of norms, usages, and understandings can govern the relationship of the functional constitution to other constitutional orders (for instance, those of member states). Issues relating to the conflict and coexistence of differently configured constitutional orders are the subject of a growing literature on constitutional pluralism and will not be taken up here.45

Second and more important, the qualifier “functional” refers to an instrumentalist veer in the path of constitutionalism. More specifically, it denotes the divestment of constitutional mechanisms from their traditional normative underpinnings. Within the nation-state framework, constitutions supply the normative parameters by which future political questions will be decided by citizens. By contrast, constitutional entrenchment at the supranational level serves as a strategic tool for isolating a delimited set of policy ends from being challenged further down the line. Thus, the framework of the Treaty of Rome, including the limited democratic channels which it opens up for citizens, cannot be used to question or undermine the objective of market integration itself. That substantive goal is presupposed in the founding document of this constitutional order and closed to further contestation under its terms. Citizens may debate and vote on the merits of market integration within their domestic political systems, but it is

inconceivable for Community organs themselves to reverse or significantly revise the Treaty’s objectives. Put differently, the supranational constitution’s primary objective is not to lay down the procedural and substantive preconditions of political legitimacy, but to oversee the effective implementation of policies already settled policies. In the supranational context, constitutionalism has been reduced to a mechanism of self-commitment and governmental effectiveness: an apparently constitutional order missing its normative anchors.

iv. Functional constitutionalism beyond Europe

When considered in relation to the wide palette of competences and aspirations espoused by today’s European Union, my picture of a narrowly pragmatic, market-oriented constitutionalism gives off an anachronistic flavor. Without a doubt, the European legal order has evolved beyond the functional constitutionalism of the Treaty of Rome. Particularly in the past two decades, it has acquired many of the features associated with the normative dimension of constitutionalism identified at the outset of this essay. The 1992 Maastricht Treaty expanded the horizon of European supranationalism beyond market integration towards more capacious political objectives, not least by introducing the status of Union citizenship and a modest number of attendant civil and political rights. The Lisbon Treaty, which entered into force in December 2009, incorporates a Charter of Fundamental Rights which far outshines most domestic bills of rights in terms of its scope and progressive quality. Moreover, the ECJ has widened many of the

46 Alan Milward famously argued that supranational delegation acts precisely to consolidate the nation-state’s governing capacity. Neofunctionalist theories generally disagree with this premise, arguing that governing capacity has passed to supranational institutions, particularly executive and judicial ones. We need not get into this enduring debate to observe that the aim of European integration has been to enhance governing capacity across the supranational, national, and sub-national levels more generally. See Alan Milward, European Rescue of the Nation-state, op.cit.; also, Peter L Lindseth, “The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration since the 1950s,” Loyola of Los Angeles Law Review, vol.37, no.2, Fall 2003, pp.363-406

47 Most important among these are the electoral rights conferred by Article 18 of the Treaty.
market-related individual entitlements derived from the Treaties to cover claimants other than market actors. For instance, the principle of non-discrimination on the basis of nationality, which was included in the Treaty of Rome in order to prevent states from privileging the economic interests of their own nationals and giving them a competitive advantage in the domestic market has evolved into a citizenship entitlement,\(^{48}\) and has been complemented by the Amsterdam Treaty’s comprehensive equal treatment mandate.\(^{49}\) As early as the 1970s, the ECJ interpreted the Rome Treaty’s prohibition on wage discrimination on the basis of sex so widely as to force member states to correct virtually all labor market policies that discriminated against women.\(^{50}\) More recently, it has been using its self-appointed fundamental rights mandate in a wide variety of causes ranging from the freedom of expression in Greece\(^{51}\) to the rights of same sex partnership in Germany.\(^{52}\) In the celebrated Kadi decision of 2008, the ECJ spectacularly struck down a regulation implementing United Nations Security Council resolutions on terrorist

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\(^{49}\) See Art 19 of the Treaty on the Functioning of the European Union, which provides that:

> Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.


\(^{50}\) In Defrenne II, the Court held that Art 119 (now 141) EC “forms part of the social objectives of the Community which is not merely an economic union, but is at the same time intended… to ensure social progress and seek the constant improvement of the living and working conditions of their peoples.” Case 43/75 Defrenne v. SABENA [1976], ECR 455, para. 10


\(^{51}\) Case C-260/89, Eliniki Radiofonia Tiléorassi AE v. Dimotiki Etaírìa Plíroforíssis kai Sotírìos Kouvelas [1991], ECR I-02925

\(^{52}\) Case C-267/06 Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen [2008]
blacklisting on the grounds that it violated the due process rights of individuals. Each of these developments has inched the constitution of the market closer to a constitutionalism grounded in comprehensive principles of political legitimacy, however incomplete this process may still be.

In sum, although we can describe the first few decades of its development using the category of functional constitutionalism, the legal order of the EU has evolved beyond this model.

The possibilities and limitations of a transition from functional constitutionalism towards a more strongly anchored normative constitutionalism deserve to be elaborated further, although I cannot give a full account of this transition here. I will defer this task until another occasion, and address one further question, namely, if the EU has outgrown its own functional constitution, what then is the value added of this concept?

As I mentioned at the outset, much academic ink is being expended over the emerging constitution-like features of supranational legal regimes. As an analytical sub-category, functional constitutionalism proposes a remedy to the Sartorian problem I identified earlier. It is specially tailored to capture the constitutional aspects of new regimes while backstopping our collective slide towards a wholly diluted understanding of what constitutionalism means.

Secondly, it offers a way of addressing a powerful normative objection raised by Philip Alston, Robert Howse, Kalypso Nicolaïdis, and others against the use of constitutionalizing discourse with reference to the WTO and similar regimes. In their view, constitutional descriptions in such contexts serve a hegemonic function insofar as they throw the whitewash of political legitimacy on the largely unaccountable, lopsided and inequitable institutions of global

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54 Howse, “From Politics to Technocracy – and back again.” Howse and Nicolaïdis, “Legitimacy through ‘Higher Law’?” Alston, “Resisting the merger and acquisition of human rights by trade law,” supra n.2
trade. The mere act of christening an organization as “constitutional” serves to insulate them from the realm of legitimate democratic contestation and revision.\textsuperscript{55}

Used as a critical term, functional constitutionalism can help crystallize our normative response to the powers accumulated by norm-producing institutions beyond the state. It flags the unmooring of constitutional mechanisms from the goals and principles which lend them their value within liberal democratic societies. It clarifies the new uses towards which constitutional mechanisms are being marshaled in the supernational realm, and highlights the fact that these new uses are fundamentally different from the meaning with which the American and French revolutions vested the idea of constitutionalism, and have little to do with the hopes of newer constitutional democracies such as India, South Africa, the Czech Republic, or Israel. Stripped of its role as the guardian of foundational political values, constitutionalism becomes a clever piece of institutional machinery that can be placed at the service of any policy aim, however disputed.

More broadly, the idea of functional constitutionalism can help shed light on our intuitions about constitutional theory. On a traditional understanding, constitutional constraints earn their claim to authority insofar as they are able to realize a series of very weighty political principles. The emergence of a purely instrumental constitutionalism shows that we cannot take this connection for granted: the normative dimension which makes constitutionalism an enduring and inspiring mode of political ordering can become dislodged, and we must be able to tell when this has happened. Such cases should not prompt us to deny that the laws or institutions in question are of a constitutional nature; rather, our awareness of the distinctiveness of pragmatic constitutional practice can help us in critiquing legal regimes whose normative grounding is weak or non-existent.

\textsuperscript{55} ibid