THE CONSTITUTION'S GIFT

JOHN ERIK FOSSUM AND
AGUSTÍN JOSÉ MENÉNDEZ

A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION

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John Erik Fossum
and Agustín José Menéndez

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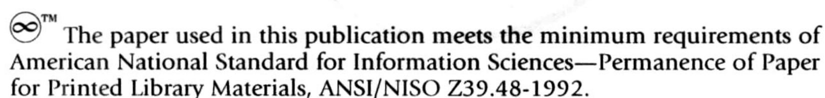

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To Ewelyn
To Elena Sullivan and
Long John Silver

Acknowledgments

This book is the product of European integration. It was sparked by the recognition that the complex and contested European integration process represents a major intellectual challenge for democratic and constitutional theory. Such a major transformation requires revisiting core concepts, theories, and received wisdom. An important theoretical challenge is to clarify what can safely be retained, what requires revising, and what intellectual innovation is required. The book is therefore the product of a long-time pursuit. It has clearly been facilitated by the various ways in which the European and Canadian processes of constitutional introspection have furnished us with intellectual arenas and meeting places of vital importance to the development of the arguments that inform the book. But every book is a collective effort.

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Introduction

The European Enigma

The European Union is a puzzling political animal. In particular, it is far from obvious (1) what kind of political community it is (is it an international organization, a state in the making, or a radically new type of polity?), (2) what kind of norms underpin its actual functioning (does the Union have a constitution? If so, what are its contents and how was it established?), and (3) by what form of legitimacy should it be assessed (should it be assessed with reference to democratic standards? If so, is the Union's democratic legitimacy direct, or is it derived from the member states? If not, what standards of legitimacy other than democracy are at work here?). These are the puzzles that bemuse students and observers of the Union; they distinguish the European Union as a political actor and Community law as a means of solving disputes and coordinating action at the continental level. Let us consider these puzzles in some more detail.

WHAT KIND OF POLITY?

The most basic question we may ask about any political community, namely what kind of polity or political system the European Union is, has no ready-made answer. We know that the United Nations is an international organization and that Japan is a state, but what is the European Union?[1] If we look at the many depictions of the European Union that are bandied about, it comes across as the chameleon of the political world. It has variously been depicted as a special form of international organization,[2] as a fledgling or a quasifederal state,[3] as a European empire,[4] and as a new—sui generis—political entity[5] (whether cast as a supranational

government, a system of transnational governance, or a regional cosmopolitan entity). As is the case with the United Nations, or for that matter the World Trade Organization, the European Union was established through what were, formally speaking, international treaties. To this day, the Union retains a formal institutional structure and a decision-making procedure with clear traits of international diplomacy. As is the case with the G-8 summits, hordes of journalists (in the thousands) travel to cover the European Council summits where the heads of states and governments from the Union's member states meet at regular intervals to stake out the Union's development. At the same time, and more in line with the United States or Japan, the European Union has a major impact on the daily lives of European citizens. The EU establishes much of the basic regulatory framework of social interaction. A large number of new laws that take effect in all the member states are essentially shaped at the European, not the national, level of government.[6] European laws and decisions make up much of the stuff of Europeans' "kitchen table" conversations on issues of great concern to them, from unemployment levels to mortgage rates (and these days, even salaries, as wage cuts are implemented in the name of saving the euro!) and from climate change to national security. Similarly, the European Union speaks and negotiates on behalf of European citizens to the rest of the world. There is a "Mrs. Europe" in foreign affairs (the newly appointed High Representative of the Union for Foreign Affairs and Security Policy), there is a "Mr. Europe" in international trade negotiations (the European commissioner in charge of the trade portfolio), and there is now also a European president (although the effective standing of this office is yet to be clarified).[7] There is also the European Court of Justice. So surely with such a comprehensive institutional structure the Union must be more than an international organization. But is it really?

European laws are influential and have continent-wide implications, but at the same time there appears to be something lacking or deficient about this entity that makes people uneasy: it lacks core state vestiges. There is no European army, there are no European prisons (albeit Community law has framing effects on national defense and national criminal law), and there are no substantial European taxes (although there is a handful of smaller European taxes). There is no deep sense of European national identity (Who is willing to die for Europe? Who feels that the European Union should ensure economic solidarity? Who thinks paying European taxes is a duty?). That is perhaps why so many authors have sought refuge in the notion that the European Union is a genuinely new political formation that is distinct from what we understand by both nation and state. Indeed, the hybrid and complex character of the Union seems to fit well with this understanding.

What is less clear, however, is in what sense the Union is unique and the specific implications this has on behavior. Or, to put it differently, if the

Union is a new type of political entity, what does this entail for the member states that have come together to form it? Are they superseded by, or assimilated into, a new, unique political formation? Others deny that the Union is so distinct. Instead of transcending the nation-state, they argue that it rescues it.[8] Skeptics go further and argue that the Union's apparent chameleonic character is a play with symbols to conceal that the Union is an unauthorized power grab by Europe's elites.[9] They rightly note that political communities are not chameleons and cannot easily change color. The upshot is that for both academic and political reasons, we cannot escape the question of the kind of polity the European Union is.

WHICH AND WHOSE EUROPEAN CONSTITUTION?

Is perhaps, then, the best way to shed light on this vexing issue to look more closely at the European Union's fundamental norms? Might this not take us closer to a solution? Not necessarily. There is an equally profound disagreement over the status of the Union's fundamental norms. To start with, there are clashing views on whether the Union has a constitution—some claim it has, whereas others emphatically deny this. The negative view seems to be supported by the lack of any document thus called, and perhaps more importantly, by the lack of any process explicitly declared as having produced such a constitution: no Bastille, no European Philadelphia. But if the Union does not have a constitution, it becomes very difficult to explain how the Union was established and how it has become such an important player in Europe, indeed in the world. How could such an organization that has such a direct impact on the member states' constitutional arrangements endure without a constitution to operate through? Yet it is obvious that there is no text or set of norms that is widely and uncontroversially referred to as "the European Constitution."

WHICH LEGITIMACY CREDENTIALS?

The third source of confusion pertains to the Union's democratic legitimacy credentials. The Union has reiterated its vocation to be a democratic polity and has set up democratic institutions (can the European Parliament be anything but testimony to the will to democratize the Union? Indeed, it has no equal among the assemblies of all international organizations!), but this has in no way prevented a decades-long and heated debate on the Union's so-called democratic deficit, which has failed to bring even a modicum of clarity. Euro-skeptics not only find the Union deficient, they also claim that it drains out the democratic lifeblood from the only viable democratic

entities in Europe, the nation-states (that now make up the Union's member states). Others flatly deny that the Union harbors any real democratic deficit. It is interesting to note that what people disagree about is not the need for democracy, but how it should be configured because they disagree so profoundly over what the Union is and *what it should be*. This has direct bearings on the "who gets what and when" that underpins all European policies.[10] The problem is, put simplistically, that of establishing what democracy for what European Union. European integration has arguably contributed to some convergence on the appropriate mode of democracy in Europe (indeed, the Union has given a helping hand to southern and eastern European states on their road to democracy), but this has not led to agreement on how we should evaluate the democratic quality of the Union. Since people disagree on what type of political entity the Union is and should be, they disagree on the appropriate standard of democracy to assess it by. The point is that the democratic legitimacy standards that we use to assess an international organization will be very different from those with which we will assess a democratic nation-state. And what democratic standards we should apply to an entity sui generis is one of the great mysteries of European integration. At any rate, as long as the character of the polity remains shrouded in uncertainty and/or people cannot agree on what European Union they want, there will be contest over the appropriate democratic evaluation criteria and therefore also disagreement over the character and gravity of the democratic deficit.

AN UNSETTLED, RESTLESS, BUT EXPANDING EUROPEAN UNION

The apparently convoluted and at any rate disputed character of the European Union puzzles Europeans and non-Europeans alike. The EU is often portrayed as a baroque entity, a highly composite structure apparently incapable of becoming a "serious" global actor. Remember the famous question that was attributed to Henry Kissinger: "Who do I call if I want to talk to Europe?"[11] What and whose Europe? The Europe that Henry Kissinger referred to was labelled the European Community and had a handful of member states. It has since then changed to the European Union (in the Maastricht Treaty, 1992) and now consists of twenty-seven member states. Does the name change signal a profound metamorphosis—from a limited international organization to something new and distinctly different? If so, when did this take place? As Baroness Ashton, the brand-new high representative of the European Union (a position which has come closer to a European minister of foreign affairs) wryly commented, it is *her* number that the Kissingers of the world should now call. When you dial it, you hear a

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recorded message saying, "If you want the British view, press 1; if you want the French view, press 2; if you want the German view, press 3."[12] So the question remains valid: what and whose Europe?

The enigma of the European Union is well reflected in (1) an apparently perpetual process of fundamental reform and (2) a rather baroque constitutional practice, plagued by apparently irresolvable disputes about the true constitutional nature of the Union.

A Perpetual Reform Process?

The Union is not only an unsettled political construction, it also appears to be quite restless.

The founding of the Communities in the fifties was followed by a frantic period in which the European constitutional and institutional edifices were built according to the road map set forth in the treaties, but very much drawing on elements of national constitutional and institutional traditions. During the past three decades, the Union has gone through a constant process of mainly successive fundamental reform processes. Since 1979, seven major reform proposals have been produced (and five passed): the Spinelli Draft Treaty (1984), the Single European Act (1986), the Maastricht Treaty (1992), the Amsterdam Treaty (1997), the Nice Treaty (2001), the Laeken Constitutional Treaty (2004), and the Lisbon Treaty (2007). The ink had hardly been allowed to dry on the document reflecting the last settlement before the reform process was started again.

Both the original foundation and the recent reform processes need to be studied closely to make sense of the European Union. But special attention is due to the last two rounds, the Laeken and the Lisbon reform processes. Lisbon determines the present normative and institutional setup of the Union (and as such is of special interest to the student of the present European Union, from the perspective of both positive law and political science). In addition, the Laeken process marked a major break with previous reform processes by being conducted by reference to an explicit constitutional agenda and resulting in what was at first sight a document of clear constitutional color, the so-called Constitutional Treaty (formally labelled as the Treaty Establishing a Constitution for Europe). Finally, the Lisbon Treaty represented a full retreat from the constitutional idiom, albeit perhaps not from the constitutional ground.

The initiative to write a constitution for the European Union (a constitution that would be similar to national constitutions in terms of legitimacy and in structural and substantive content) was (re)launched[13] in 2000 by then–German minister of foreign affairs Joschka Fischer. This set in motion the so-called Laeken constitution-making process that is assessed in detail in chapter 4 of this book. Initial drafting was entrusted to a body that

resembled a constitutional assembly (the European Convention), which raised hopes of a major constitutional transformation. But the process was reined in by the national governments, which had a privileged role throughout, thus underlining the formally speaking intergovernmental character of this process. This became apparent even within the convention, where foreign ministers drew up "red lines" to demarcate what their national governments would accept. The convention's draft was then submitted to the next stage, the Intergovernmental Conference (made up of the Union's heads of states and governments), which accepted (after amending) the draft. The draft then had to be ratified by all the member states in accordance with their ratification procedures. Ten countries opted to hold popular referenda, among them France and the Netherlands. In the latter two countries the mismatch between initial aspirations and subsequent realities formed the background to the decisions by majorities of French and Dutch citizens to reject the draft in 2005. Some regarded this as a democratic triumph (in terms of reaffirming the ultimate democratic control of reform processes); others were extremely concerned about the implications for the very future of European integration.

It took long before the governments recognized this as a ratification failure. After the referenda rejections they embarked on an eighteen-month period of "reflection," which is better cast as inaction. And then apparently in a sudden (in a matter of weeks) burst of action, the national executives came up with a *nonconstitutional* replacement for the Constitutional Treaty. The whole undertaking reeked of cloning of a legal kind because the new draft was close to a replica of the Constitutional Treaty, but this time with no explicit constitutional ambition (the provisions on symbols or on the terminology of legal sources were out), with a peculiar collection of exceptions and opt-outs (including an opt-out from the Charter of Fundamental Rights) being granted to the governments that requested such. All this was in exchange for accepting that most of the text of the Constitutional Treaty was to be preserved. Thus, the so-called Treaty of Lisbon was born, with the ambition and pretense to manage properly the inefficiencies effected by enlargement on the Union's institutional structure and decision-making processes. After a convoluted and agitated ratification process (charged with drama by the initial popular rejection of the Treaty in Ireland, in the only referendum that executives could not avoid calling), the Treaty of Lisbon was formally ratified and entered into force after the Irish apparently changed their minds in a second referendum.

Thus ended a process that had initially been aimed at constitutionalizing the Union and that had produced a legal document with the impossible and contradictory denomination of Constitutional Treaty. This process was sunk by two popular referenda only to be resuscitated with largely the

same substance but in the form of a nonconstitutional treaty in a secretive process of intergovernmental negotiations.

How can it be that the answer to the initial plea for a European constitution that deserves its name (a democratic constitution) was the Treaty of Lisbon, whose text had been cleansed of any constitutional symbolism and which had been approved through a closed and secretive process of diplomatic bargaining? How could such an apparent U-turn be justified by those same national governments that had been in charge of and had sanctioned the Laeken constitutional exercise?

Europe, if the Lisbon Treaty process is anything to go by, has shifted from constitutional ambiguity to constitutional rejection. This verdict appears to be grounded in a far more skeptical public attitude. Is the story of Laeken and Lisbon then one of outright *deconstitutionalization*? Does the Lisbon Treaty represent a qualitative change in the sense of rejecting the very notion of a European constitution? Or is there more to the story?

Our point of departure is that the contorted character of the Laeken and Lisbon processes, and especially the peculiar way in which national governments changed their constitutional discourse, can be made sense of only insofar as we take properly into account the essentially contested character of the Union as a polity combined with the profound contestation over the Union's legitimacy and the previous history of treaty making and reform.

THE MANY RIDDLES OF EUROPEAN LEGAL PRACTICE

The lack of clarity on the character of the basic institutional configuration of the European Union (the polity and constitutional questions) and on the appropriate normative standards to apply to the Union has a direct impact on the legal practice of Community law, especially on what concerns the application of Community law to cases in which national and European laws enter into conflict or where the construction of Community norms is deeply controversial. While these conflicts may be few in quantity, they are qualitatively important, as they help define the constitutional grounds of the Union. How they are solved structurally permeates the entire European constitutional practice.

Because the European Union was created by member states and not the reverse, it would be reasonable to expect that European law could not but be regarded as *derivative* from national constitutions. Indeed, the treaties were ratified in compliance with national fundamental laws, by reference to the constitutional clauses that authorized ratifying treaties such as the founding treaties of the Communities. Under such conditions, one may be

tempted to think that the rules according to which conflicts between Community law and national law should be solved would be *national* (and that in line with national traditions, such rules would not assign primacy to Community law when the latter enters into conflict with national constitutions). And still, European constitutional practice is far more complicated. Community norms have been acknowledged to have *direct effect*, something which, as we will see at length in chapter 3, implies that conflicts between national and Community norms are indeed settled by Community, not national law, because it is Community law, not national law, that governs whether a Community norm has direct effect in one member state. Moreover, and despite the residual disagreement, which we will also analyze in chapter 3, both European and national institutions have come to accept that Community law should prevail over national law, even over some national constitutional norms.

However, that practice is deeply muddled and lacks a clear, principled foundation, which *cannot* be forthcoming in the absence of a solution to the polity and legitimacy puzzles. Consider one of the most spectacular European constitutional conflicts of late, the *Viking* case.[14] Finnish law seemed to affirm that the right to collective action of Finnish workers should include the right to trigger a pan-European strike to prevent a Finnish ferry company from relocating to Estonia, where labor costs were lower (and workers' rights weaker). The right of the employer to decide where to set up shop was to be trumped and set aside because otherwise, there was not much left of the constitutional commitment to protect workers' rights, which indeed is premised on the state's countering the growing structural economic power of capital owners in a globalizing world and on workers being capable of organizing at the same level as capital makes use of its structural power. In brief, Finnish law was for the right of workers to strike. And, so one suspects, were most, if not all, national constitutions.[15] And still the European Court of Justice solved the conflict in favor of the freedom of establishment of the ferry owners. The ruling is in the books, but it is far from obvious whether member states will comply with it. The writing on the wall consisted in the appeals to disregard the previous judgment of the ECJ in *Mangold* (concerning a conflict on what forms of age discrimination were constitutional) by no other than the former president of the German Constitutional Court, of the German Republic, *and* of the convention that drafted the Charter of Fundamental Rights of the European Union in its first version, Roman Herzog,[16] and by the bellicose standing of one of the doyens of European studies, Fritz Scharpf vis-à-vis *Viking*.[17] The ruling did not settle the issue but only exacerbated the sense that there was something terribly amiss in the understanding of the principle of primacy in the case law of the court—even if what is terribly amiss is unclear.

The hardest questions to tackle in the adjudication of European Community law are indeed insoluble because we have not clarified what the Union is and how its legitimacy is to be assessed and tested. The polity, constitution, and legitimacy puzzles that we described at the beginning of this chapter have a direct legal translation into (a) the "genesis" riddle (why are formal international treaties that were derivative of national constitutions now constructed as if they themselves had given birth to a constitutional order?), which underlies the very characterization of *Viking* as a conflict between two sets of constitutional norms; and (b) the primacy riddle (why can a legal order that is logically and normatively a derivative of national constitutional law pretend to *prevail* over that same national constitutional law?), which underlies the constitutional practice of primacy.

The problems seem so intractable that many jurists and legal theorists have retreated into a mere *sociological analysis* of the problem, suspending their legal disbelief, and claiming that the best we can do is to say that there are *two correct* legal solutions, depending on the point of view from which you look at the problem.[18] That is, however, a deeply unsatisfactory solution if we aim at engaging with constitutional practice and not limiting ourselves to describing how things are. So we need a European constitutional theory capable of solving these central constitutional problems.

THE MAIN ARGUMENT OF THE BOOK: THE SYNTHETIC PATH TO THE EUROPEAN CONSTITUTION

The purpose of this book is to shed light on the puzzles and riddles of European integration by providing a constitutional theory of European integration. That is the role and purpose of our theory of constitutional synthesis. Let us briefly explain what we mean by it.

The theory is built on two key intuitions. The first is that the structural and substantive core of European constitutional law was composed of and to a large extent keeps on being composed of the *common constitutional law* of the member states. The establishment of the European Communities was thus akin to a foundational moment; but contrary to what is the case in a revolutionary constitutional tradition (such as those of the French or the Italian), the constitution of the Union was not written by *we the European people* but was defined by implicit reference to the six national constitutions of the founding member states. In that way, the French, German, Italian, Dutch, Belgian, and Luxembourgian constitutions were *seconded* to the role of being part of the constitutional collective of Europe. National constitutions started living a "double constitutional life." They combined their old role as national constitutions and their

new role as part of the *collective* supranational constitution.[19] Our second key intuition is that the foundation of the European Communities resulted in the creation of bits and pieces of the supranational institutional structure, a structure that was superimposed on the national institutional structures without aiming at a hierarchical structure or even a clear-cut division of labor by reference to competences. Because there had not been many institutional structures at the supranational level (with the exception of the League of Nations to the extent that it was basically a European institution), there were good reasons to limit the initial effort to the fundamental elements of the structure. The institutional structure was then to be progressively fleshed out (with different national institutional traditions and cultures competing to shape the new institutions) and completed. The peculiar constitutional pluralism resulting from combining one single constitutional law (originally merely the regulatory ideal of a common constitutional law) with a pluralist institutional structure was unavoidable if the path to a supranational democratic constitution was not to be mediated by a revolutionary constitution-making act (and Europeans were not interested in waiting until constitutional conventions would eventually and gradually emerge to organize their life in common). The theory of constitutional synthesis takes seriously the distinct fact of Europe, namely that the Union is a constitutional union of already established constitutional states. First, the synthetic characterization of European constitutional law clarifies the central role played by national constitutions in the process of European integration. It not only focuses our attention on the *integration mandates* contained in five out of the six constitutions of the founding member states (forged through national constitution makers recognizing in the immediate postwar period that constitutional democracy *in one country* was inherently unstable), it also stresses the continuity—and similarity in identity—between the national and the supranational fundamental law. Second, constitutional synthesis is indeed a process through which national constitutions came together without losing their specific constitutional identity; constitutional synthesis is thus *normative* synthesis, the synthesis of constitutional norms. Third, the pluralistic institutional anchoring of the process of normative synthesis was the ultimate guarantee of the European Union's basis on democratic legitimacy. The collective of member states represented the ultimate source of democratic legitimacy for the whole edifice. Fourth, the Union's pluralistic insitutional anchoring stems from the number and diversity of member states (with diversity increasing as new members are added). The Union-level institutions also embody some of this diversity through complex patterns of replication and adaptation.[20]

But the theory of constitutional synthesis does more than clarify the regulatory ideal that underpins European constitutional law (the common

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