The Rise of the Supranational Executive and the Post-Political Drift of European Public Law

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ABSTRACT

Contemporary European public law is marked by the uneasy relationship between national constitutional democracies and the executive-based supranational governance of the European Union. Whereas constitutional democracy remains the dominant source of inspiration for European institutional imagination, the supranational executive has relentlessly expanded its scope and institutional culture to key policy fields at the core of national constitutional democracies. This article tracks the rise of the supranational executive by examining three relational paradigms developed between national constitutional democracies and the European Union in distinct phases of the European integration process (i.e., the complementarity paradigm in the foundational period; the competition paradigm in the transformative period; and the encroachment paradigm during the economic and financial crisis). Following this account, this article claims that the supranational executive, owing to its predominance and ethos, corrodes and gradually displaces national constitutional democracies, bestowing an increasingly post-political character to European public law. This article concludes by discussing the possibilities to reverse the current institutional trend and to realign Europe's institutional reality and constitutional imagination.

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INTRODUCTION

Contemporary European public law is marked by the uneasy relationship between national constitutional democracies and the executive-based supranational governance of the European Union (EU). Constitutional democracy occupies a special place in European institutional imagination[1] for it promises a legal and political order securing collective self-government, the protection of a rich catalogue of fundamental rights, and an institutional framework mediating otherwise intractable conflicts revolving around competing visions of social justice and, more in general, of the common good.[2] Yet, despite its uncontested ideological status, nowadays constitutional democracy struggles to shape legal and political reality. To a considerable extent, this difficulty has to do with a challenge inherent in the EU policy objectives and institutional architecture. Latent in the symbiotic relationship between national constitutional democracies and the supranational executive characterizing European public law ever since the end of World War II, this challenge has eventually materialized with the economic and financial crisis. In the absence of sufficient social prerequisites and political agency to develop a pan-European constitutional democracy, the European Union has adopted a highly controversial set of policy measures and institutional arrangements to stabilize the economic system.[3] These instruments have expanded the remit of the Union and exported its *modus operandi* into salient policy fields at the core of national constitutional democracies. Although this strategy has so far yielded dubious policy outcomes, its impact on national self-collective determination and the fundamental rights associated with the welfare state has been corrosive.[4] To account for this distress, a large number of commentators and scholars identify the executive-based structure of supranational policy-making as one of the main culprits. Although this camp hosts a variety of remarkably different views and proposals alternative to the status quo, a consensus exists on the notion that, in its current form, the supranational

1. *See* Martin Loughlin, *The Constitutional Imagination*, 78 MOD. L. REV. 1, 2–3 (2015).

2. *See* Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, *in* THE TWILIGHT OF CONSTITUTIONALISM? 3, 3–4 (Petra Dobner & Martin Loughlin eds., 2010).

3. *See generally* Alexander Somek, *Europe: Political, Not Cosmopolitan*, 20 EUR. L.J. 142, 142–45 (2014) (providing an example of how the EU has adopted policy measures to stabilize the economic system).

4. *See* Augustín José Menéndez, *The Existential Crisis of the European Union*, 14 GER. L.J. 453, 511–20 (2013).

executive encroaches on national democratic structures[5] and stifles Europe's democratic potential.[6]

As criticism reaches the point of tracing alarming analogies between the current architecture of EU economic governance and Europe's authoritarian drift in the interwar period,[7] it may be of some interest to examine the rise of the supranational executive by focusing on its evolving interactions with national constitutional democracies throughout the European integration process. This article tracks this trajectory by focusing on three distinct phases of the European integration process: the foundational period (1951–86), in which national constitutional democracies and the supranational executive coexisted in a complementary relationship; the transformative period (1986–2007), where the supranational executive expanded its scope to transform national social government and ended up competing with national constitutional democracies; and the current period opened by the economic and financial crisis, in which the supranational executive encroaches on national constitutional democracies. Following this account, it is argued that the supranational executive, owing to its predominance and ethos, corrodes and gradually displaces national constitutional democracies, bestowing an increasingly post-political character to European public law.

The article concludes by discussing the possibilities to reverse the current institutional trend and to realign Europe's institutional reality and constitutional imagination. As the prospects for recovering the original equilibrium of the foundational period or establishing a pan-European constitutional democracy remain similarly implausible, a more realistic option is offered by proposals aimed at establishing a more politicized version of the supranational executive that is more sensitive to the claims and structures of national constitutional democracies. But given that at the moment these proposals do not seem

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5. *See generally* WOLFGANG STREECK, BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM (2014) (placing the financial and economic crisis of 2008 in the context of the long neoliberal transformation of postwar capitalism that began in the 1970s and analyzing the subsequent tensions and conflicts involving states, governments, voters and capitalist interests, as expressed in inflation, public debt, and rising private indebtedness).

6. *See, e.g.*, JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE (Ciaran Cronin trans.) (2012); JÜRGEN HABERMAS, THE LURE OF TECHNOCRACY (Ciaran Cronin trans.) (2015).

7. *See generally* William E. Scheuerman, *Herman Heller and the European Crisis: Authoritarian Liberalism Redux?*, 21 EUR. L.J. 302 (2015) (identifying in contemporary neoliberal arrangements in Europe a predisposition at insulating politically instituted markets from democratic politics similar to the authoritarian liberal regime described by Herman Heller in 1933); Michael A. Wilkinson, *Authoritarian Liberalism in the European Constitutional Imagination: Second Time as a Farce?*, 21 EUR. L.J. 313 (2015) (same).

to produce sufficient intellectual impetus and political mobilization, the possibility should not be ruled out that European public law will remain stuck in the current post-political configuration.

I. THE FOUNDATIONAL PERIOD AND THE COMPLEMENTARITY PARADIGM

The starting point to explore European evolving public law arrangements may conveniently be situated in the aftermath of World War II. The end of the war opened a rather long period that witnessed the foundation of both national constitutional democracies and supranational institutions, and the establishment of a pattern of relationships between them that would mark European public law until the Single European Act.[8]

The centrality of constitutional democracy in European institutional imagination dates back to the achievements of this period. Immediately after the war, legal and political resources were prevailingly employed to heal divisions in national societies, reconstruct national economies, and re-found national political communities. Although implicated in these developments, the European integration process was originally conceived as a more modest project.[9] In those years, most of the political and institutional efforts were devoted to the enactment of democratic constitutions, and documents celebrating collective democratic self-determination, social emancipation, and human dignity as their normative focal points.[10] Key to the new national legal and political order was the idea that the constitution is not meant to decide legitimate social conflicts, but to establish the formal and substantive prerequisites for democratic competition.[11] Accordingly, its task is firstly securing an adequate institutional setting for the mediation of political conflicts, then ensuring that their acting out does not jeopardize political pluralism.[12] In the words of Chantal Mouffe, "conflict, in order

8. Single European Act, 17 February 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506.

9. *See infra* Part I.

10. *See generally* ALEXANDER SOMEK, THE COSMOPOLITAN CONSTITUTION 134–75 (2014) (discussing the challenges faced by the German constitution and other constitutions relating to human dignity and exploring three themes: (1) by virtue of their humanity human beings are ends in themselves and must not be treated as mere means; (2) freedom depends on the realization of community; and (3) dignity may entail obligations and not only rights for those who possess it).

11. *See* Dieter Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21 EUR. L.J. 460, 464 (2015) ("The function of constitutions is to legitimise and to limit political power, but not to replace it. Constitutions are a framework for politics, not the blueprint for all political decisions.").

12. On the relationship between social conflicts and public law, see Marco Dani, *Rehabilitating Social Conflicts in European Public Law*, 18 EUR. L.J. 621, 622–25 (2012).

to be accepted as legitimate, needs to take a form that does not destroy the political association. This means that some kind of common bond must exist between the parties in conflict, so that they will not treat their opponents as enemies to be eradicated, seeing their demands illegitimate . . . ."[13] This notion resonates in the structure of democratic constitutions, where conflict and cooperation are conceptually separated giving rise to distinct domains in which constituted and constituent power acquire a renewed historical meaning.[14]

In charge of the domain of social cooperation, constituent power stands, in principle, isolated from ordinary political conflict. The task of defining the terms of political association requires political parties qua constitution-makers to set aside their routine distributive struggles and engage in constitutional politics. This entails a cooperative effort in which each party is expected to reach across the boundaries of its particular worldview and political goals on behalf of peaceful coexistence. The overall result is a form of consensual politics that, inaugurated with the approval of a new constitution, reemerges subsequently in the less spectacular forms of constitutional adjudication and constitutional amendment. Admittedly, constitutional politics also involves a certain degree of contestation and, frequently, constitution-makers cannot attain more than a "conflictual consensus."[15] However, this is the only form of political unity available in the circumstances of pluralism.[16] Constitutions can no longer prescribe, entrench, and impose the values, decisions, and institutional solutions favored by a particular segment of society.[17] To make a claim of legitimate authority, constitutions provide a shared symbolic space and an institutional setting allowing the identification and representation of virtually all the segments of society. As a genuine creature of the people, the constitution cannot but reflect its elusive consensus and irreducible pluralism.[18]

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13. *See* CHANTAL MOUFFE, ON THE POLITICAL 19–20 (2005).

14. *See* GUSTAVO ZAGREBELSKY, LA LEGGE E LA SUA GIUSTIZIA [THE LAW AND ITS JUSTICE] 131–57 (2009).

15. *See* MOUFFE, *supra* note 13, at 52.

16. *See* Roberto Bin, *Che cos'è la Costituzione? [What Is the Constitution?]*, 27 QUADERNI COSTITUZIONALI 11, 22–25 (2007).

17. *See* SOMEK, *supra* note 10, at 82–84 (observing that democratic constitutions are only formally programmatic).

18. This may be exemplified by the notion of human dignity. *See id.* at 140 ("[Human dignity] stands for some 'overlapping consensus' on decency whose effectiveness depends decidedly on abandoning the idea of a unified conception. Any more ambitious reconstruction would be inadequate to its object, for it is intrinsic to dignity to serve as an integrative symbol by virtue of being barely understood.").

Within a similar legal and political framework, constituted power emerges as the domain of partisanship and political competition. The open nature of constitutions leaves broad room to the ordinary political conflicts of the industrial society and majoritarian decision-making. Objectives such as social justice are sufficiently defined to rule out both socialist rule and unrestrained *laissez-faire*.[19] The ideas that markets not socially embedded are unstable and that social policies are required to make capitalism acceptable pervade ruling political parties.[20] But apart from this general consensus, the specific level of protection of economic freedoms and property rights and the exact definition of social entitlements depend to a large extent on the outcomes of political and social disputes for the direction of government and the contents of legislation taking place in representative assemblies.[21]

While constitutional democracies are being established, the European integration process is taking its first steps giving rise to a legal and political order characterized by a distinct ideology, rationality, and legal culture. Absent the social and political preconditions sustaining constitutional democracy at the national level, such as a thick collective identity and a reasonably strong sense of solidarity, the possibility of establishing a fully-fledged pan-European political community appears foreclosed.[22] Instead, European integration begins as a purely intergovernmental and rather unspectacular undertaking. The pursuit of peace and prosperity are the ideals justifying the establishment of supranational institutions.[23] In particular, economic motives seem to motivate European integration.[24] Supranational institutions are expected to increase the capacity of national governments to govern transnational problems and improve the quality of national policymaking.[25] For this reason, they are entrusted with a set of regulatory powers circumscribed to the less politically salient

19. *See* DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 3–4 (1999).

20. *See* Floris de Witte, *The Architecture of a 'Social Market Economy'* 2–4 (LSE Law, Society & Econ., Working Paper No. 13, 2015).

21. *See generally* Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335 (2009) (exploring what makes legislation an attractive mode of lawmaking compared to lawmaking by judges, decree, executive agencies, treaties, or custom).

22. *See* FRITZ W. SCHARPF, GOVERNING EUROPE: EFFECTIVE AND DEMOCRATIC? 7–9 (1999).

23. On the ideals originally inspiring European integration, see J. H. H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 244–56 (1999).

24. *See* Andrew Moravcsik, *The European Constitutional Settlement,* 31 WORLD ECON. 157, 167 (2008) (stressing the importance of instrumental rather than idealistic reasons).

25. *See* Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1, 4–5 (2009).

policy areas concerning market regulation.[26] As a result, the original structure of European public law follows a rather neat division of labor in which collective decision-making processes with more significant redistributive implications remain governed at the national level under democratic constitutions, while efficiency-driven regulatory processes are delegated to supranational institutions.[27] The task of the latter, however, is instrumental to the operation of national constitutional democracies: the discipline of the negative externalities of national policymaking, the promotion of allocative efficiency, and individual emancipation through free movement. These are all goals that, in the intentions of original member states, are part of the state-(re)building undertaking characterizing the foundational period.

This instrumental connotation emerges also from a procedural perspective. Supranational institutions operate on the basis of a formal delegation that links the exercise of regulatory powers by nonstate institutions to national democratic constitutions.[28] As a consequence, the activity of supranational institutions is legitimate not only for the outputs delivered[29] but also for the continuous oversight by institutions endowed with superior legitimacy resources,[30] such as national executives, parliaments, and courts.[31]

The distinctiveness of supranational law emerges not only from its objectives and standards of legitimacy but also from its institutional culture. The pursuit of the original supranational goals is articulated in two distinct regulatory strategies. Negative integration supranational law, by means of binding principles and independent institutions (the Commission and the European Court of Justice), imposes external legal constraints on national political institutions to contrast factions, protect underrepresented groups, and improve the epistemic basis of decision-making.[32] This strategy expresses clearly the disciplinary vocation of supranational law to counter the dysfunctions or the excesses of national policies, in those years identified essentially in protectionism and discrimination.[33]

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26. *See* Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603, 606–10 (2002).

27. *See* Giandomenico Majone, *Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions* 10 (Eur. Univ. Inst., Working Paper No. 96/57, 1996).

28. *See* PETER L. LINDSETH, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE 47–48, 56–57 (2010).

29. *See* SCHARPF, *supra* note 22, at 12–13.

30. *See* LINDSETH, *supra* note 28, at 53.

31. *See id.* at 88–90.

32. *See* Keohane et al., *supra* note 25, at 9–22.

33. *See* WEILER, *supra* note 23, at 341.

In positive integration, instead, the conferral of regulatory powers to supranational institutions aims at creating at a supranational level the political capacity required to cope with problems with a transnational dimension.[34] Yet, the nature of supranational institutions and their mode of operation depart considerably from the legislative culture developed at the national level around representative lawmaking. This emerges first of all in the predominance of executive-based institutions in the so-called Community Method. Supranational lawmaking is the product of intergovernmental bargaining involving national governments (Council) and supranational officials (Commission).[35] This originates a type of consensual lawmaking[36] pervaded by the ethos of diplomacy with scant transparency and parliamentary accountability.[37] Secondly, supranational legislation takes place in the interstices of treaty principles as interpreted by the Court of Justice.[38] Entrusted with the task of articulating the common market project, supranational legislative bodies do not benefit from the same degree of political latitude enjoyed by national parliaments, but occupy a position more akin to that of a special regulator.[39] The predominance of executive-based institutions and their reduced scope for political action leads to a third element distinguishing supranational lawmaking from national legislation. Supranational lawmaking is presented as a largely technical and depoliticized matter.[40] This democratically uninspiring sublimation of political conflicts and social cleavages owes in part to the nature of the regulated policy fields and in part to the search of consensus required by treaty legal bases.[41] Yet technocratic depoliticization functions also as a convenient ideological cover for ushering in a new regime of rulemaking shielded from parliamentary interference.[42] Thus, only at the level of declamation is the delegation of regulatory powers to supranational institutions justified by lofty ideals associated with the creation of "an ever closer Union." More pragmatically, delegation allows national governments to establish horizontal ties among themselves with a view to strengthening their position vis-à-vis their domestic societies, insulating policymaking from partisanship and

34. *See* SCHARPF, *supra* note 22, at 13.

35. *See* Moravcsik, *supra* note 24, at 163–64.

36. *See infra* Part I.

37. *See* LINDSETH, *supra* note 28, at 204.

38. *See* Gareth Davies, *The European Union Legislature as an Agent of the European Court of Justice*, 54 J. COMMON MKT. STUD. 846, 846 (2016).

39. *See id.* at 848.

40. *See* LINDSETH, *supra* note 28, at 34.

41. *See* Paul Craig, *Integration, Democracy and Legitimacy*, *in* THE EVOLUTION OF EU LAW, 13, 16 (Paul Craig & Gráinne De Búrca eds., 2d ed. 2011).

42. *See* LINDSETH, *supra* note 28, at 105.

short-term electioneering[43] and, eventually, relativizing their commitment to constitutional democracy.

In the light of all these elements, it can safely be said that from the outset the supranational executive establishes with a constitutional democracy an ambiguous relationship. On the one hand, its operation is meant to cope with the failures of the member states to live up to their constitutional democratic ideals.[44] Supranational lawmaking is an outlet for effective problem solving, particularly in fields such as market regulation, consumer protection, and environmental policy in which national policy making is deficient.[45] Moreover, supranational institutions have the capacity to correct national regulatory biases such as protectionism and discrimination.[46] On the other hand, the supranational executive expresses a post-political predisposition that challenges national constitutional democracies. The European Communities are depoliticized entities with a depoliticizing potential.[47] The idea of insulating policy making from democratic contestation, the emphasis on expertise and consensus as the main sources of legitimacy, and the scepticism toward representative lawmaking are all aspects of a legal and political culture alternative to the idea of legitimating and mediating social conflicts inspiring in those years national constitutional democracies. But the distance between the constitutional democracies and supranational law emerges even more clearly at a more structural level: by entrenching in the treaties a coherent regulatory project aimed at market integration, supranational law develops a legal culture defying the idea of constitutional democracy. The treaties are no longer the place for an open compromise between opposing worldviews and political forces: rather than being the place where the left and the right reach a conflictual consensus, they are the locus in which what is right is decided. Within a similar legal framework, the room for legitimate political contestation is narrowed down,[48] relegating politics (or what remains of it) essentially to the technocratic implementation of a predefined regulatory project. Opponents of this project, as a result, are viewed as enemies rather

43. *See* CHRISTOPHER J. BICKERTON, EUROPEAN INTEGRATION: FROM NATION-STATES TO MEMBER STATES 52 (2012).

44. *See* Keohane et al., *supra* note 25, at 9.

45. *See* Anand Menon & Stephen Weatherill, *Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union* 6–7, 12 (LSE Law, Society & Econ., Working Paper No. 13, 2007).

46. *See id.* at 9.

47. *See* Peter Mair, *Political Opposition and the European Union*, 42 GOV'T & OPPOSITION 1, 7–8 (2007).

48. *See id.* at 13–14.

than as adversaries for, in this context, their claims appear illegitimate.[49]

Nevertheless, throughout the foundational period, the post-political challenge inherent in the ethos and structure of the supranational executive fails to materialize. This can be explained by referring to two characteristics of supranational law. Firstly, during the entire period under consideration, supranational decision making is governed by the Luxembourg compromise (unanimity voting of national governments). This requirement not only reinforces the oversight capacity over supranational independent institutions[50] but also constitutes a serious limit to their effective political capacity, particularly if national preferences represented in the Council reflect wider bargains between national executives and civil societies.[51] Thus, the technocratic depoliticization associated with supranational law-making remains an available course of action only if national governments manage to reach a consensus. Secondly, in the foundational period, the supranational executive maintains a deferential attitude toward national constitutional democracies. Albeit constantly expanding its remit, the supranational executive avoids interferences with the most salient policy areas concerned with the redistribution of wealth, foreign policy, or public security.[52] Fields such as taxation, social government, and criminal law remain for a long time almost entirely governed under national democratic constitutions. Insofar as the separation between redistributive and efficiency-driven policies is maintained, the supranational executive and national constitutional democracies establish a virtuous synergy based on their functional complementarity.[53]

II. THE TRANSFORMATIVE PERIOD AND THE COMPETITION PARADIGM

The complementarity paradigm will sustain Europe's *trente gloriouses,* and only with the crisis of social government and the expansion of competences of supranational law will it be called into question. Indeed, for at least twenty-five years the post-World War II

49. *See* MOUFFE, *supra* note 13, at 48–50.

50. LINDSETH, *supra* note 28, at 95.

51. *See* Christopher J. Bickerton et al., *The New Intergovernmentalism: European Integration in the Post-Maastricht Era*, 53 J. COMMON MKT. STUD. 703, 708 (2015).

52. *See* Ernest A. Young, *The European Union: A Comparative Perspective*, *in* 3 GENERAL PRINCIPLES OF EU LAW (Takis Tridimas ed., forthcoming 2018) (observing that, although supranational law relies on member states for enforcement, supranational law lacks federal identity and does not possess meaningful taxing and spending powers).

53. *See* Menon & Weatherill, *supra* note 45, at 23–24.

nation-state, with the contribution of supranational law, fulfills its promise to advance civilization through the democratic government of capitalism:[54] it promotes unprecedented economic welfare, secures increasing standards of social protection, and mediates previously intractable conflicts through representative democracy and redistributive policies.[55] With the economic crisis in the mid-1970s, however, social government and the institutions of the industrial society become the target of wide criticism.[56] As the post-war compromise unravels, national governments are pressured to transform the social state with a view to reform national welfare structures.[57] Boosting the competitiveness of national economies by countering vested interests arises as a priority. Yet, only a minority of European countries succeeds in implementing this policy agenda. To overcome their difficulties, national governments begin to look at supranational institutions as a valuable vehicle to promote reform, due to their institutional expertise in correcting national policies.[58]

Against this background, it does not come as a surprise to see in those same years supranational institutions gradually adventuring into policy areas previously ring-fenced against supranational interferences.[59] If the initial expansion of supranational policy initiatives toward social regulation[60] is still coherent with an holistic notion of market integration,[61] the inroads made by the Union law into

54. *See* SCHARPF, *supra* note 22, at 33.

55. *See* BICKERTON, *supra* note 43, at 76–81.

56. *See* NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 137–66 (2008).

57. *See* BICKERTON, *supra* note 43, at 92–99.

58. *Id.* at 105–06. Negative integration in the 1970s already promoted the liberal transformation of social market member states, which created incentives for regulatory and tax competition. *See* Fritz W. Scharpf, *After the Crash: A Perspective on Multilevel European Democracy*, 21 EUR. L. J. 384, 386 (2015).

59. Already in the foundational period, negative and positive integration revealed a predisposition to expand their scope. *See* Sacha Garben, *Confronting the Competence Conundrum: Democratising the European Union Through an Expansion of its Legislative Powers*, 35 OXFORD J. LEGAL STUD. 55, 60–65 (2014).

60. *See* Giandomenico Majone, *The European Community Between Social Policy and Social Regulation*, 31 J. COMMON MKT. STUD. 153, 154 (1993) (exploring the ambiguities of the social dimension of European integration and defining social regulation as "primarily occupational health and safety and equal treatment for men and women"). These interventions constitute a complement to market regulation for their purpose is to contrast unfair competition and even out potential economic asymmetries. *See* de Witte, *supra* note 20, at 9–13.

61. *See* ALEXANDER SOMEK, INDIVIDUALISM: AN ESSAY ON THE AUTHORITY OF THE EUROPEAN UNION 159–99 (2008).

social, economic, and monetary policy with the Treaty of Maastricht[62] are clear signs that the original equilibrium based on the separation of competences between the (national) redistributive state and the (supranational) regulatory state is on the wane. Once the premises of the complementary paradigm are undermined, the supranational executive and constitutional democracies enter in a more competitive relationship in which the former exerts pressures for transformation and the latter oscillate between adjustment and resistance.

To be sure, a great deal of legal commentaries offer a much more benign and gratifying account of this period. In this highly influential literature, a lot of emphasis is put on the constitutional transformation of the Union's normative claims and institutional architecture.[63] As the Union expands its remit, this narrative goes, its institutional profile also undergoes remarkable change: Once a mainly intergovernmental-technocratic entity, the Union acquires a more robust political and constitutional pedigree and reduces its distance from the idea of constitutional democracy. Thus, losses in constitutional government at the domestic level are somehow compensated by equivalent structures and guarantees at the supranational one, with the net result that, all things considered, constitutional democracy is healthy and thriving in Europe also in this period.

Most of the elements inspiring this account for the European integration process deserve careful consideration. For one, the expansion of Union competences is coupled by a concomitant process of revaluation of supranational law, that is, the incorporation of principles and motives deriving from the tradition of national constitutional democracies.[64] Fundamental rights,[65] citizenship,[66] and substantive

62. Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. C 191/1. Incursions into foreign policy, defense, immigration, and law and order are also worth mentioning.

63. *See, e.g.*, Koen Lenaerts & Damien Gerard, *The Structure of the Union According to the Constitution for Europe: The Emperor is Getting Dressed*, 29 EUR. L. REV. 289 (2004) (concluding that the European Union, as a political authority in its own right, might engender collective identification and contribute to the foundation of a European identity by analyzing various formal and substantive development proposed by the Constitution pertaining to the structure of the Union).

64. *See* Loïc Azoulai, *The European Court of Justice and the Duty to Respect Sensitive National Interests*, *in* JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE 167, 180–83 (Mark Dawson et al. eds., 2013).

65. *See* Consolidated Version of the Treaty on European Union art. 6, Mar. 30, 2010, 2010 O.J. C 83/01, at 19 [hereinafter TEU post-Lisbon].

66. *See id.* art. 9, at 20; Consolidated Version of the Treaty on the Functioning of the European Union arts. 20–22, Oct. 26, 2012, 2012 O.J. C 326/47, at 56–57 [hereinafter TFEU].

principles related to social justice[67] are all elements that go into making up a renovated supranational institutional framework. Moreover, in the same period, the Union gains increased political capacity with the shift to qualified majority voting in the Council in an ever-growing number of policies. This process is paralleled by progresses also in the form of EU government, marked by increasing parliamentarization. The European Parliament evolves from a consultative to a deliberative legislative body operating on an equal foothold with the Council.[68] National parliaments are also involved in supranational policy making,[69] in a clear effort at reconnecting supranational governance to national representative government.[70] Even the European Commission, through the practice of the *Spitzen-kandidat,* aspires to status of fully fledged accountable parliamentary government.[71] So, also from an institutional perspective, it would seem that the Union abandons its executive-based and post-political culture to embrace constitutional democracy.

Nevertheless, for all the progresses made in incorporating constitutional democratic motives, it can safely be argued that in this period the Union does not abandon but just recalibrates and, ultimately, reinforces its post-political profile. Admittedly, revaluation and parliamentarization are remarkably important developments nourishing a process of convergence of the Union institutional setting toward constitutional democracy. This convergence, however, does not amount to a conversion to constitutional democracy. With its emphasis on constitutionalization, this narrative fails to consider other important and more structural developments taking place in the same period that witness a great deal of continuity in the ethos and institutional architecture of the supranational executive. When these elements are added to the picture, a remarkably different image of this period emerges: the expansion of Union competences entails the exportation of the supranational executive toward increasingly salient policy areas previously presided by national constitutional democracies. Constitutional developments facilitate this process rendering more sustainable the impact of intergovernmental and technocratic structures on core aspects of national constitutional democracies. But the supranational executive maintains its dialectic profile vis-à-vis

67. *See* TFEU, *supra* note 66, arts. 8–17, 2012 O.J. C 326, at 53–55.

68. *See* TEU post-Lisbon, *supra* note 65, art. 14, 2010 O.J. C 83, at 22–23. This is valid in the areas where the assent and ordinary legislative procedures apply.

69. *See id.* art. 12, at 21.

70. *See* LINDSETH, *supra* note 28, at 230–36.

71. *See* Joseph H. H. Weiler, *Fateful Elections? Investing in the Future of Europe*, 12 INT'L J. CONST. L. 273, 275–78 (2014).

national constitutional democracies and, owing to its material expansion, it engages in a competitive relationship with them.

To substantiate this alternative claim, the rationale underlying the expansion of Union law must be first considered. As said, the attribution of new competences to the Union responds primarily to the pressing institutional demand of national governments to promote the reform of social government. Tellingly, the expansion of powers is not followed by a proportional increase of the Union budget. Supranational policy making is attractive essentially because of its original distinctive normative and institutional qualities: its capacity to constrain national representative policy making and corporatist structures, its ability to overcome national legal and political hurdles, and its promise to counter vested interests opposing the transformation of social government. Situated in a similar context, parliamentarization and revaluation may be viewed as the legitimacy tools facilitating the expansion of the supranational executive. In this way, they likely reinforce rather than question the original post-political character of the Union.[72]

The structure of the new competences confirms this general impression. Indeed, the treaties may increase the influence of the European Parliament and national parliaments in policy making, but democratic contestation remains constrained by the purposive nature of Union legislative competences.[73] Political capacity in fields like monetary, employment, or industrial policy comes with predefined policy directions.[74] Goals such as price stability, empowerment, and competitiveness are prioritized, leaving those furthering full employment, social emancipation, and interventionist industrial policy without the possibility to pursue their aspirations within the given institutional framework.[75]

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72. Overall, constitutionalization has largely succeeded not only in defusing the legal resistances of national constitutional courts but also in co-opting the political Left in the transformative agenda of the Union. The promise of a pan-European constitutional democracy has worked as a bait for Left idealists convinced that the challenge of global capitalism requires at least continental responses. It did not occur to them that, under the guises of constitutional language, European integration had embraced a strategy aimed at facilitating rather than governing capital dynamics. *See* Wolfgang Streeck, *Heller, Schmitt and the Euro*, 21 EUR. L.J. 361, 365 (2015).

73. *See* Gareth Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence*, 21 EUR. L.J. 2, 2 (2015).

74. *See* TFEU, *supra* note 66, arts. 127, 145, 173, 2012 O.J. C 326, at 102–03, 112, 126. On the phenomenon of overconstitutionalization in the EU, see generally Grimm, *supra* note 11.

75. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 243 (1999) ("The whole point of voting is that . . . social ends are to be determined collectively by millions of individual judgments. But that can hardly be so if the process of enfranchising, counting, and

But the challenge to constitutional democracy inherent in the new competences is not confined to the procedural dimension. From a more substantive standpoint, the material expansion of the Union reduces the capacity of democratic politics to deal with capitalism and contributes to rising social inequality and the erosion of public services.[76] As in the foundational period with the common market project, in the transformative period the Union is entrusted with a specific policy agenda. Newly attributed competences enable supranational institutions to pursue advanced liberalism, a set of policies aimed at improving the competitiveness of national economies by means of a reorientation of social government toward entrepreneurship, the instauration of a market of services, and the empowerment of the workforce.[77] In particular, the Economic and Monetary Union is deployed as a strategic lever to counter vested interests and reform social models in contingent policy areas.[78] In this period, therefore, the Union does not renounce but strengthen its original role of *vehiculo externo* for structural change.[79] In the newly acquired policy fields, the supranational executive operates as a major force of transformation: by dictating the direction of national policy making[80] and pushing forward in post-political regulatory style the reforms experimented in *avant-garde* countries,[81] it enters in a competitive relationship with constitutional democracy challenging its normative claims and institutional structures.

A number of other developments regarding the renovated Union institutional architecture confirm its post-political character. First of all, the role of the European Parliament requires careful consideration. Despite its considerable empowerment and its capacity to appoint and censure the Commission, the European Parliament is not in the position of holding accountable the European Council, that is, the institution directing supranational policy making.[82] The European Parliament is not grounded in a majoritarian institutional setting but in an executive-

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implementing these judgements is governed and modified by some prior and entrenched selection among the alternatives.").

76. *See* Scharpf, *supra* note 58, at 385.

77. *See* ROSE, *supra* note 56, at 139–42.

78. *See* Kevin Featherstone, *The Political Dynamics of the* Vincolo Esterno*: The Emergence of EMU and the Challenge to the European Social Model*, 9–15 (Queen's Papers on Europeanisation, Working Paper No. 6, 2001).

79. *See* BICKERTON, *supra* note 43, at 131–36.

80. *See* Featherstone, *supra* note 78, at 8.

81. *See id.* at 6–7, 13.

82. *See* Philipp Dann, *European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy*, 9 EUR. L.J. 549, 558 (2003).

based structure.[83] Over the years its lawmaking powers have constantly increased, but even in the policy fields where its legislative role is more pronounced, the European Parliament is far from functioning as the central political forum imparting democratic legitimacy to the overall institutional structure. The type of political participation it offers is similar to that existing in mixed regimes, where popular elements are inserted in a broader structure alongside other sources of legitimacy. But this hardly amounts to the type of political participation postulated in the idea of constitutional democracy.[84]

What is worse is that in its actual contribution to lawmaking, the European Parliament falls short of democratic standards. Rather than improving the transparency and contestation of decision-making procedures, the European Parliament has been sucked into the executive mode of diplomatic and opaque bargaining.[85] This is largely the result of practices known as "first reading agreements" and "trialogues," informal meetings in which legislation is agreed among representatives of the Commission, the COREPER, and representatives of the relevant parliamentary standing committee.[86] Recourse to these informal practices is usually justified pointing at the need of the Union to maintain high levels of legislative productivity, even if this may be detrimental to the democratic quality of lawmaking. Yet, "first reading agreements" and "trialogues" are controversial for their lack of transparency, their exposure to regulatory capture, and their marginalizing effects on the smaller parties represented in the European Parliament.[87] It is particularly this *de facto*

83. *Id.* at 553–54.

84. *See* WALDRON, *supra* note 74, at 235 ("[W]hen participation in politics is demanded these days as a human right, it usually means much more than this. The demand is not merely that there should be a popular element in government, but that the popular element should be decisive. The demand is for democracy, not just the inclusion of a democratic element in a mixed regime.").

85. *See* Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, 77 MOD. L. REV. 1, 17–18 (2014).

86. *See* DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW: TEXT AND MATERIALS 120–22 (3d ed. 2014). Figures show that in 1999–2004, only 28% of EU legislation was approved in the informal meetings. However, in 2004–12, this modus operandi was employed in 79.5% of approved dossiers. *Id.* at 121.

87. *See generally* OLIVIER COSTA ET AL., CODECISION AND "EARLY AGREEMENTS": AN IMPROVEMENT OR A SUBVERSION OF THE LEGISLATIVE PROCEDURE? (2011) (exploring two unanswered areas regarding first readings and the conciliation procedure: (1) the origins of early agreements; and (2) the impact of such practice on the way the institutions function and how their respective actors relate to them); Henry Farrell & Adrienne Héritier, *Interorganizational Negotiation and Intraorganizational Power in Shared Decision Making: Early Agreements Under Codecision and Their Impact on the European Parliament and Council*, 37 COMP. POL. STUD. 1184 (2004) (arguing that exogenous changes in macro-institutional rules, which result in a move from formal and sequential to

disenfranchisement of smaller parties that is a source of concern from a democratic perspective. For a long time, the Union has been ruled by a *große Koalition* composed of the European People's Party and the Party of European Socialists. Whereas this coalition has secured the Union a stable government, it has also stifled the emergence of an effective political opposition within the Union institutional setting. Sure, Eurosceptic parties have won a remarkable number of seats, but, due to "first reading agreements" and "trialogues," their presence within the European Parliament is largely symbolic. This marginalization, however, comes at a cost: Rather than nourishing vibrant contestation within the institutions, political opposition articulates its claims against the institutions, perceived as representing only a supranational elite and foreclosing any meaningful possibility of democratic contestation.[88]

The relative importance of parliamentarization in the EU is then evident in the growth of alternative decision-making processes. It is noteworthy, for instance, that in a period in which the European Parliament increases its influence in legislation, lawmaking in the same policy areas migrates toward other less dignified institutional destinations.[89] Political administration emerges as a new regulatory function carried out in the post-legislative phase by a variety of bodies including committees, regulatory agencies, and private entities involved in co- and self-regulation.[90] Here, it is impossible to detail the functioning, structure, and rationales of this vast range of bodies. Yet, a number of common elements can be identified, which witness the limits of the Union's democratic commitment in the transformative period.[91] Firstly, political administration is not restricted to minor issues. Although the treaty discipline of legislative delegation in the treaties is formally stringent,[92] salient political decisions are adopted in the post-legislative phase, with the result that decisions normally subject to democratic deliberation are transferred to technocratic decision making.[93] This brings in a second aspect that goes to the nature and institutional culture of these bodies: the organs carrying out functions of

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informal and simultaneous interaction between collective actors, will lead to changes in individual actors' respective influence over outcomes within organizations).

88. *See* Mair, *supra* note 47, at 7.

89. *See* Damian Chalmers & Mariana Chaves, *EU Law-Making and the State of European Democratic Agency*, *in* DEMOCRATIC POLITICS IN A EUROPEAN UNION UNDER STRESS 155, 155 (Olaf Cramme & Sara B. Hobolt eds., 2014).

90. *See* Renaud Dehousse, *Misfits: EU Law and the Transformation of European Governance*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 207, 209–10 (Christian Joerges & Renaud Dehousse eds., 2002).

91. *See* SOMEK, *supra* note 61, at 165–68.

92. *See* TFEU, *supra* note 66, arts. 290–91, 2012 O.J. C 326, at 172–73.

93. *See* Dehousse, *supra* note 90, at 209–10.

political administration are mainly composed of government officials and experts operating in the light of a consensus culture in which scientific expertise is privileged over alternative knowledge paradigms.[94] The epistemic communities developing within committees or regulatory agencies enjoy a considerable degree of autonomy vis-à-vis national governments to which they are in principle accountable.[95] Also, democratic control on their operation is weak: parliamentary oversight is at best occasional,[96] and the participatory opportunities for stakeholders underdeveloped.[97]

The final element cautioning against the constitutional narrative and substantiating the rise of the supranational executive is referred to the modes of policy making adopted in the most salient fields included in Union competences. Already in the foundational period, the incremental material expansion of supranational policy making was accompanied by a supplement of delegation by national governments guaranteed by the participation of the European Council.[98] This trend intensifies in the transformative period, where newly acquired policy fields become the locus for a higher accumulation of Union executive power.[99] The supranational institutional setting experimented in these areas gives rise to a constellation different from the more ordinary patterns of executive dominance developed by the Union. For one, in these areas independent institutions such as the Commission and the Court of Justice play a much more limited role. The supranational executive relies essentially on intergovernmental institutions entrusted with tasks of policy coordination.[100] Supranational policy making does not preempt national governments, and, to a large extent, salient policy fields such as economic or social policies remain formally governed

94. *See generally* Mihail Kritikos, *Traditional Risk Analysis and Releases of GMOs into the European Union: Space for Non-Scientific Factors?*, 34 EUR. L. REV. 405 (2009) (asking whether the institutional design of the decision-making procedures has proved to be an effective way to provide an inclusive and responsive transnational regulatory platform).

95. *See generally* Christian Joerges & Jurgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 EUR. L.J. 273 (1997) (arguing that the irresistible rise of Comitology is an institutional response, on the one hand, to the deep-seated tensions between the dual supranational and intergovernmentalist structure of the Community, and, on the other hand, to its problem-solving tasks).

96. *See* Deirdre Curtin, *Holding (Quasi-)Autonomous EU Administrative Actors to Public Account*, 13 EUR. L.J. 523, 524–31 (2007).

97. *See* Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Polity*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 135, 150–56 (J. H. H. Weiler & Marlene Wind eds., 2003).

98. *See* LINDSETH, *supra* note 28, at 129–30.

99. *See* Curtin, *supra* note 85, at 6–7.

100. *See* Bickerton et al., *supra* note 51, at 711.

under national democratic constitutions. Supranational institutions, however, are entrusted with the definition of general guidelines steering national policy making and the monitoring and control of their implementation. Thus, competences subject to coordination reveal a lower degree of centralization and a more prominent role assigned to democratic legislative processes. This more decentralized structure, however, is not exempted from post-political characterization. Supranational intervention in these fields comes with predefined policy strategies aiming at undoing national rigid positions[101] and sidelining national existing constellations.[102] Subject to technocratic guidelines and control, national democratic institutions are pressured toward the advanced liberal agenda. Coordination, therefore, results in a more sophisticated form of co-optation of national constitutional democracies in the transformative agenda of the supranational executive. Owing to the ramifications of economic and social policy, it expresses a wide-ranging steering potential in fields such as energy, research, education, social security, and pensions.[103] In the period under review, this potential is not fully exploited. Due to their soft-law nature, policy guidelines and control mechanisms appear rather ineffective devices for prompting the expected degree of transformation.[104] Still, the supranational executive establishes in this period an outpost in these policy fields, which, with the economic and financial crisis, will be strengthened, becoming more effective and problematic.[105]

In sum, the policy goals and institutional culture inspiring the Union in the transformative period corroborate the challenge to constitutional democracy latent in the foundational period.[106] The expansion of Union post-political structures toward more salient policy areas obscures the original division of labor underpinning the complementarity paradigm and generates an alternative and more problematic pattern of relation. The policy areas where supranational and national law increasingly overlap become a terrain of competition between the transformative ambitions of the Union and the normative claims of national constitutional democracies. European public law becomes the center of peculiar legal and political tensions. On the one

101. *Id.* at 708.

102. *See* Garben, *supra* note 59, at 66–68.

103. *See, e.g.*, Eur. Comm'n, *Recommendation for a Council Recommendation of 27.4.2010 on Broad Guidelines for the Economic Policies of the Member States and of the Union, Part I of the Europe 2020 Integrated Guidelines*, SEC (2010) 488 final (Apr. 27, 2010).

104. *See* Servaas Deroose et al., *The Broad Economic Policy-Guidelines: Before and After the Re-launch of the Lisbon Strategy*, 46 J. COMMON MKT. STUD. 827, 834–36 (2008).

105. *See infra* Part III.

106. *See supra* Part II.

hand, measures viewed at a national level as genuine social policy achievements are challenged by supranational law as containing a social-democratic bias requiring an element of correction. On the other, transformative measures promoted by the Union as attempts to counter vested interests and the crisis of social government appear in constitutional democracies as neoliberal efforts justifying constitutional resistance. Of course, parliamentarization, the revaluation of supranational law, and the checks and balances inserted in the treaties offer plenty of opportunities to internalize constitutional normative claims within the dominant supranational agenda and make supranational law more sustainable.[107] Yet, the dominant policy agenda remains largely insulated from legitimate political contestation.[108] This generates a more intractable and unmediated type of conflict between insiders of the European integration process, interested in harnessing the opportunities inherent in its policy agenda and cosmopolitan ethos,[109] and the outsiders, experiencing the Union as an ahistorical and authoritarian threat to their cherished civil identities and constitutional structures.[110] Owing to the checks and balances inserted in the treaties, throughout the transformative period these mutually delegitimizing tensions manifest themselves only episodically. Conflicts will erupt spectacularly with the referenda on the Constitutional Treaty in 2005, when the sleeping giant of European opposition will be awakened.[111] But the situation will grow even more sour with the economic and financial crisis.

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107. *See generally* Kalypso Nicolaïdis, *The JCMS Annual Review Lecture: Sustainable Integration: Towards EU 2.0?*, 48 J. COMMON MKT. STUD. 21 (2010) (arguing that the EU will only be sustainable as a political project if its leaders and citizens abandon the equation of integration with oneness, top-down policy design and simple hierarchical structures, all of which are anachronistic in a 2.0 world).

108. This is why attempts at politicization within the current institutional architecture such as the *Spitzen-kandidat* experiment are largely unsuccessful. *See generally* Marco Goldoni, *Politicising EU Lawmaking? The* Spitzenkandidaten *Experiment as a Cautionary Tale*, 22 EUR. L.J. 279 (2016) (putting forward a sobering account of the normative and instrumental reasons that explain why expectations regarding the *Spitzenkandidaten* experiment were grounded on shaky premises and the experiment could not have delivered its promises).

109. *See* SOMEK, *supra* note 10, at 282.

110. *See* Damian Chalmers, *The Unconfined Power of European Union Law*, 1 EUR. PAPERS 405, 424–31 (2016).

111. *See* Mair, *supra* note 47, at 12–13.

III. THE ECONOMIC AND FINANCIAL CRISIS AND THE ENCROACHMENT PARADIGM

With the Lisbon Treaty, European integration seems to have reached a stable constitutional settlement.[112] The Union appears in the position to cope with any likely challenge by maintaining its post-political profile. In European circles, depoliticization is regarded as a rather successful strategy enabling pragmatic problem solving and incremental reform.[113] The outbreak of the economic and financial crisis proved this prediction both right and wrong. The Union responds to the crisis without dramatic constitutional changes.[114] Yet, in continuing its previous modus operandi, it becomes more salient and divisive.[115] The policy measures and institutional arrangements adopted to cope with the crisis radicalize the transformative commitment of the supranational executive. Correspondingly, national constitutional democracies are downscaled to a subservient role, aggravating the post-political drift of European public law.

The diagnosis underpinning a similar development is that the economic and financial crisis only exposed structural weaknesses in national economies,[116] particularly in the countries that previously failed to implement the advanced liberalism agenda. Hence, institutional devices and policy measures are designed to embolden the Union transformational commitment. On the one hand, financial stability is promoted through plans of fiscal consolidation and financial assistance.[117] On the other hand, the reform of social government is inculcated to recalcitrant member states through more stringent direction and control of national political economies, even at the cost of encroaching on constitutional democracy.[118] Justified as it may be on

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112. *See* Moravcsik, *supra* note 24, at 158.

113. *See id*. at 180.

114. *See* Bruno De Witte, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?*, 11 EUR. CONST. L. REV. 434, 453–57.

115. Damian Chalmers et al., *The Retransformation of Europe*, *in* THE END OF THE EUROCRATS' DREAM: ADJUSTING TO EUROPEAN DIVERSITY 1, 6 (Damian Chalmers et al. eds., 2016).

116. *See* Eur. Comm'n, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, at 7, COM (2010) 2020 final (March 3, 2010).

117. *See* Treaty Establishing the European Stability Mechanism, Feb. 1, 2012, EC D/12/3. Financial assistance has also been provided by the European Central Bank through the Securities Market Programme and Expanded Asset Purchase Program. *See Asset Purchase Programmes,* EUR. CENTRAL BANK, https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html (last visited March 22, 2017).

118. *See* Eur. Comm'n, *supra* note 116, at 7. *See also* Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, art. 1(1), Feb. 1, 2012, EC D/12/2

policy grounds, however, this strategy undermines the precarious equilibrium existing in the previous stage and renders more concrete the dangers inherent in the rise of the supranational executive.

Looking more in detail at these developments, the measures introduced to cope with the financial crisis entail first of all a further expansion of EU competences.[119] To a large extent, this results from the ramifications of economic and monetary union (EMU): as in the transformative period the regulation of the single market justified interventions also in ancillary areas such as environmental or consumer law, during the crisis the EMU brings the supranational executive into the core of national social government.[120] Owing to the newly established instruments of macroeconomic coordination,[121] supranational intergovernmental and technocratic institutions take hold of issues such as wages, productivity, pensions, social security, and national public and private indebtedness.[122]

This development invites two different types of reflections. Firstly, this peculiar expansion of competences detaches the Union from the evolutionary trajectory of mature federal systems. Mature federal systems have traditionally followed a path to centralization centered on the establishment of welfare structures: It was the inability of state and local governments to respond to the Great Depression that motivated the development of welfare institutions at the federal level during the New Deal.[123] Centralization in the Union follows an opposite path: It is the incapacity of national governments to reform or dismantle welfare institutions[124] that motivates centralization in the form of an expansion

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[hereinafter TSCG]; Eur. Council, *Conclusions – 24/25 March 2011*, 13–15 [hereinafter Euro Plus Pact].

119. *See* Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 76 MOD. L. REV. 817, 824–26 (2013).

120. *See* Chalmers et al., *supra* note 115, at 19.

121. Article 9 of the TSCG establishes policy coordination "in all the domains which are essential to the good functioning of the euro area." TSCG, *supra* note 117, art. 9. *See also* Euro Plus Pact, *supra* note 17, at 13, 14-15 (dictating actions in areas where the competence lies with the member states such as wage setting arrangements, education systems, pensions, health and social assistance). In addition, Articles 3 and 4 of Regulation 1176/2011 extend policy surveillance by supranational institutions towards private indebtedness, the housing market, and energy. *See* Commission Regulation 1176/2011, of the European Parliament and of the Council of 16 November 2011 on the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25, 29. Finally, the Compact for Growth and Jobs calls for reforms in the field of public administration and justice. Eur. Council, *Conclusions – 28/29 June, 2012*, 9.

122. *See* Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Preemption of Democracy* 30 (LEQS Paper No. 36, 2011).

123. *See* Young, *supra* note 52, at 44.

124. *See* de Witte, *supra* note 20, at 13–17 (observing that, in this phase, social policy is viewed as inimical to the function of the market and EMU).

of the regulatory state beyond its original remit.[125] Secondly, centralization is not only peculiar but is also concerning. In many instances, the coordination mechanisms approved during the crisis destabilize the competence boundaries established by the Lisbon Treaty.[126] Short of effective institutional constraints and accountability mechanisms, the Union gradually replaces national institutions in their decision to delegate powers to the supranational executive, lending to European public law arrangements a disturbing authoritarian connotation.[127]

The encroachment of the supranational executive on national constitutional democracies does not ensue only from its further and uncontrolled material expansion. It also relates to the style of policy making embraced by the Union in the newly acquired competences. Material expansion, indeed, does not usher in a radical rethinking of the policy goals and institutional profile of supranational law. On the contrary, in expanding its scope, the Union abandons parliamentarization and revaluation, the constitutional tools previously employed to vehicle into national constitutional democracies its transformative agenda. Set aside the constitutional register, the Union shows its crudest intergovernmental and technocratic side by extending its regulatory machinery to pursue even more widely and effectively the liberalizing agenda inspiring the transformative period and, in this way, to promote the degree of convergence of national economies required by the EMU.[128] The goals of promoting supply-side reforms and the introduction of wage cuts emerge as the only policy options available for encouraging an export led recovery of national economies.[129] To pursue this unpopular agenda, national governments intensify their horizontal ties to shield macroeconomic policy from the intrusion of mobilized and angry societies.[130]

The corrosive potential of this strategy emerges in both its substantive and procedural dimension. From a substantive standpoint, national budgetary processes are constrained by a web of macroeconomic targets, whose strictness at least in part depends on the financial situation of individual member states.[131] The proliferation of

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125. *See infra* Part III.

126. *See* Alexander Somek, *Delegation and Authority: Authoritarian Liberalism Today*, 21 EURO. L.J. 340, 342–43 (2015).

127. *See id.* at 346–47 (examining this authoritarian turn of delegation).

128. *See* Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 EUR. L.J. 667, 685 (2012).

129. *See* Scharpf, *supra* note 58, at 391.

130. *See* BICKERTON, *supra* note 43, at 144, 149–50.

131. *See* Mark Dawson, *The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance*, 53 J. COMMON MKT. STUD. 976, 981–82 (2015).

macroeconomic indicators generates a form of public power informed by expertise and insulated from the vagaries of politics. What is more, macroeconomic indicators and the language of numbers displace constitutional language and, in particular, fundamental rights as the main coordinates of economic and social policies. In the emerging legal framework, fundamental rights can be protected and inspire policy making, but only within the margins indicated by macroeconomic indicators and surveying supranational institutions.

This brings in the procedural dimension of the new coordinating mechanisms. Two so far have been the institutions that most benefited from the new economic governance. Firstly, the European Council has increased its role as agenda setter and crisis manager.[132] As a reflection, a more informal and secretive style of policy making has emerged.[133] Secondly, the European Central Bank has intensified its activity, in particular supplementing the European Council when the divisions between national governments stalled decision making.[134] Consequently, the routine operation of the new economic governance combines intergovernmental decision making with the supervisory framework of the community method.[135] In order to manage and enforce macroeconomic indicators, the Union promotes more intensive forms of policy coordination of national economic and social policies.[136] Multilateral surveillance on national budgets is secured through stricter and quasi-automatic sanctions,[137] and structural reforms are encouraged with the promise of a more relaxed fiscal discipline.[138] As a

132. *See* Curtin, *supra* note 85, at 7. There are different views on whether this is consistent with the role assigned by the Lisbon Treaty or entails a more profound and structural change. *Compare* De Witte, *supra* note 114, at 450 (concluding that the euro crisis has not led to a profound constitutional mutation of the EU order because neither the Maastricht Treaty nor the Lisbon Treaty provided the European Union with a unified institutional architecture, and the euro crisis reforms have 'merely' deepened the institutional variation existing between EMU law and other areas of EU law), *with* Chalmers et al., *supra* note 115, at 4 ("[T]he increased role of the European Council is not merely a phenomenon that accompanied the most dramatic years of the crisis but a long-term structural change which the crisis brought to the forefront.").

133. *See* Curtin, *supra* note 85, at 20–21. Wolfgang Streeck has also observed that the primacy of the European Council in economic governance replaces class struggle with diplomacy. *See* Streeck, *supra* note 72, at 367.

134. *See* Chalmers et al., *supra* note 115, at 4.

135. *See* Dawson, *supra* note 131, at 978–83.

136. *See id*. at 984–86.

137. *See* Commission Regulation 1173/2011, of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. (L 306) 1, 3; TSCG, *supra* note 117, art. 7.

138. *See, e.g.*, Commission Regulation 1175/2011, of the European Parliament and of the Council of 16 November 2011 Amending Council Regulation (EC) No 1466/97 on the

result, national policy making develops within stricter and more rigid constraints that, in the case of countries receiving financial assistance, entail a *de facto* evacuation of representative institutions by the supranational executive.[139] Entrusted with essentially implementing tasks, parliaments and, more generally, constitutional democracies are relegated to the largely symbolic role of lending mass support to the demands of administrative and economic rationality.[140]

Doubts may be expressed as to the long-term capacity of the supranational executive to obtain this form of acclaim.[141] Deference to expertise at the cost of participation is a successful strategy as long as it provides in exchange effective problem solving. As the current macroeconomic arrangements fail to secure prosperity and social protection, it cannot be ruled out that, sooner or later, national constitutional democracies will turn into a less cooperative pattern of relationship. Constitutional democracy is a powerful idea that could inspire political actors in resisting the current institutional trend and formulating proposals to realign Europe's legal reality and constitutional imagination.[142]

CONCLUSION

The rise of the supranational executive is certainly part of a wider phenomenon of migration of executive power toward modes of decision making eschewing electoral accountability and popular democratic control.[143] It is also a distinctively European phenomenon for its peculiar entanglement with some of the main achievements of post-World War II European civilization such as constitutional democracy, the welfare state, and supranationalism.[144] The excursus developed in this article has tried to track this path toward executive dominance and the corresponding displacement of national constitutional democracies. It has shown how, under this development, public law arrangements

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Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 2011 O.J. (L 306) 12, 16.

139. This is most visible when national institutions are required to implement packages of reforms negotiated with the 'Troika' of the International Monetary Fund, the European Commission and the European Central Bank. *See* Chalmers et al., *supra* note 114, at 5.

140. *See* Somek, *supra* note 126, at 347–48.

141. *See* Damian Chalmers, *European Restatements of Sovereignty* 20–23 (LSE Law, Society and Econ., Working Paper No. 10, 2013).

142. *See* Menéndez, *supra* note 4, at 521–26.

143. *See* Curtin, *supra* note 85, at 3.

144. *See* Jürgen Habermas & Jacques Derrida, *February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe*, 10 CONSTELLATIONS 291, 293–95 (2003).

have acquired an increasingly post-political character sitting uncomfortably with prevailing European constitutional imagination.

This phenomenon is the consequence of a deliberate and legitimate strategy initially conceived to strengthen and complement the operation of national constitutional democracies in the circumstances of economic interdependence. More recently, this trend has accentuated the relativization of constitutional democracy under the shadow of economic and financial necessity, giving rise to an institutional constellation of dubious legitimacy. While exerting almost uncontested symbolical hegemony, constitutional democracy suffers from a process of gradual evacuation, aggravated by an extensive use of constitutional language aimed sedating national constitutional resistance.

It is difficult to predict whether the strategy of depoliticization underlying the rise of the supranational executive will continue to secure stability to the European integration project. In parallel with the expansion of executive dominance, populism has grown as a regular feature of European politics.[145] To a considerable extent, this phenomenon mirrors in grotesque forms certain aspects of the supranational executive. In identifying a conflict between a pure people and corrupt elites,[146] it plays also politics in the moral register. In delegitimizing expertise, it also shows scarce respect for the normative claims of the political opponent. In paying only lip service to the institutions of constitutional democracy,[147] it further contributes to its decline.

But as the conflicts at the center of European politics are increasingly articulated as an intractable confrontation between technocracy and populism,[148] a rehabilitation of constitutional democracy appears as the most valuable solution to internalize discontent and energize European public law. In the years following the outbreak of the crisis, a number of proposals have been put forward as alternatives to less inspiring plans of the Union institutions perpetuating the status quo.[149] For the most visionary of the commentators, a pan-European constitutional democracy remains the preferable solution to counter the current post-political trend.[150] A more

145. *See* Cas Mudde, *The Populist Zeitgeist*, 39 GOV'T & OPPOSITION 541, 551–55 (2004).

146. *See id*. at 543–44.

147. *See id*. at 561.

148. BICKERTON, *supra* note 43, at 182–83.

149. *See, e.g.*, *The Five President's Report: Completing Europe's Economic and Monetary Union* (June 22, 2015), https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf.

150. *See generally* HABERMAS, THE LURE, *supra* note 6 (arguing that only if the technocratic approach is replaced by a deeper democratization of the European institutions can the European Union fulfill its promise as a model for how rampant

democratic and statist Union is presented as the way forward to cope with global capitalism,[151] restore the functional cleavages mobilizing democratic politics, and secure collective self-determination.[152] One may doubt, however, that the umpteenth appeal to European citizens will motivate them to reappropriate Europe.[153] Skepticism seems justified not only because long-standing structural obstacles stand still in the way of the creation of a robust European political system[154] and supranational budget,[155] but also because the actual political commitment of contemporary European individuals cannot be taken for granted.[156]

An alternative strategy to revitalize constitutional democracy rejects as unrealistic and undesirable the statist democratization of the Union and suggests a retreat of the supranational executive within the original boundaries of market regulation.[157] The idea to revert to the complementarity paradigm and employ national delegations as resistance norms against supranational encroachment inspires the constitutional challenges against the most recent expansion of executive rule,[158] but transpires also in the writings of commentators enhancing both the distinctive institutional capacity of supranational law[159] and the achievements of constitutional democracy.[160] This scenario, however, appears scarcely plausible. First, it contradicts functionality, a persisting feature of supranational law that can possibly be controlled but hardly eradicated.[161] Second, and more critically, it implies the reconsideration (if not the total dismantlement) of a series of supranational projects that either have become entangled with

market capitalism can once again be brought under political control at the supranational level).

151. *See* Scheuerman, *supra* note 7, at 311–12.

152. *See* Mark Dawson & Floris deWitte, *From Balance to Conflict: A New Constitution for the EU*, 22 EUR. L.J. 204, 209–14 (2016).

153. *See* Somek, *supra* note 3, at 160–62.

154. *See generally* Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L.J. 282 (1995) (looking at the calls for a European constitution and asking how far they are already met by the treaties and what consequences fully meeting them would have for the European Union and Member States).

155. *See* GIANDOMENICO MAJONE, DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH 207 (2005).

156. *See infra* Conclusion.

157. *See* MAJONE, *supra* note 155, at 159–61.

158. These challenges have given rise to a series of influential rulings by the German Constitutional Court. *See, e.g.*, BVerfG, 2 BvR 2/08, June 30, 2009, http://www.bverfg.de/e/es20090630_2bve000208en.html; BVerfG, 2 BvR 2728/13, Jan. 14, 2014, https://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813en.html.

159. *See* Menon & Weatherill, *supra* note 45, at 27.

160. *See* STREECK, *supra* note 5, at 189.

161. *See* Garben, *supra* note 59, at 75–76.

European integration[162] or are badly needed to cope with other contemporary challenges.[163]

Between these nonstarters, other less spectacular but more realistic solutions can be advanced to delineate a type of supranational executive more open, democratic, and respectful of national constitutional democracies. Underpinning these proposals is the consideration that constitutional democracy in Europe has almost invariably coexisted with executive-based supranational structures. In a variety of fields alongside market integration, the latter may contribute to strengthen political capacity and counter national biases in policy making. They are also formulated on the methodological assumption that, in a peculiar polity such as the Union, democratic ideals conceived in state polities cannot simply be replicated, but may require considerable adjustment and transformation.[164]

Increased politicization to internalize dissent is the driving motive of proposals devised on the conviction that antisystem opposition may be disarmed when more chances of legitimate opposition are offered.[165] In this vein, opening up (or even deconstitutionalizing) Union policy objectives[166] and, more generally, reconsidering the tendency of supranational law to operate as an agent of transformation rather than a container of political conflicts are valuable suggestions.[167] Politicization can also be increased through proactive and networked mobilization of national parliaments in order to provide legitimate countervailing power to the supranational executive.[168] A more sustainable engagement between the supranational executive and national constitutional democracies could finally be attempted with a new system of opting-outs and differentiated integration more respectful of national constitutional diversities.[169]

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162. This is, in particular, the case of the EMU.

163. This is the case of the Area of Freedom, Security and Justice on the face of the refugee crisis. *See Justice, Freedom and Security*, EUR-LEX, http://eur-lex.europa.eu/summary/chapter/justice_freedom_security.html?root_default=SUM_1_CODED%3D23&locale=en (last visited Mar. 24, 2017) ("The European Union's area of freedom, security and justice was created to ensure the free movement of persons and to offer a high level of protection to citizens. It . . . includes asylum and immigration policies and the fight against crime . . . .").

164. On gradualist and transformationalist theories of future democracy, see Francis Cheneval & Frank Schimmelfennig, *The Case for Demoicracy in the European Union*, 51 J. COMMON MKT. STUD. 334, 336 (2013).

165. *See* Mair, *supra* note 47, at 6.

166. *See* Dawson & deWitte, *supra* note 152, at 214–17.

167. *See id.* at 221–23.

168. *See, e.g.*, Curtin, *supra* note 85 at 23–32; Goldoni, *supra* note 107, at 292–94.

169. *See* Scharpf, *supra* note 58, at 400–04.

Although the perspective of a more open, democratic, and respectful supranational executive could inspire political mobilization and institutional rethinking, another more disturbing scenario must be taken into consideration. Previous proposals all assume that constitutional democracy may still exert its subversive force,[170] and that the resentment of European individuals is a product of the curtailment of their participatory chances. But what if contemporary populism is instead focused only on the poor outputs of European policy making?[171] And what if European citizens have internalized an ethos prioritising outputs over political self-determination? Institutional settings develop an intimate complex relationship with subjects, hence the possibility that the rise of the supranational executive and the corresponding displacement of constitutional democracy may have generated depoliticized European individuals cannot be easily discarded.[172] A large number of Europeans certainly resent the Union because of unemployment, high taxation, intrusive regulation, declining levels of welfare provisions, immigration, and terrorism. But this does not necessarily mean that they would oppose a post-political order entrusted with risk regulation and crisis management able to provide a modicum of prosperity, welfare, and security.[173] Were this to be the case, and were European public law to remain cloaked with constitutional language, we could witness a critical transformation in the history of both European public law and constitutionalism. Stripped of its promise of political freedom and social emancipation, constitutionalism would turn into an ideology legitimating administrative domination.[174]

170. *See* Loughlin, *supra* note 1, at 13.

171. *See* Mudde, *supra* note 145, at 558–60.

172. *See* Marco Dani, *The Subjectification of the Citizen in European Public Law*, *in* CONSTRUCTING THE PERSON IN EU LAW: RIGHTS, ROLES, IDENTITIES 55, 79–88 (Loïc Azoulai et al. eds., 2016).

173. *See* SOMEK, *supra* note 10, at 31–32 ("Internal cosmopolitans demand risk regulation and crisis intervention. They are completely indifferent as to whether it is national or international bodies that provide the solution.").

174. *See* Loughlin, *supra* note 1, at 20–23.