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Ran Hirschl

Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution

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Hegemonic Preservation in Action?
Assessing the Political Origins of the EU Constitution

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"Enlargement and the constitution are two sides of the same coin"
Gerhard Schröder, Germany's chancellor

Constitutionalization is widely perceived as a power-diffusing measure often associated with limiting government action and protecting basic rights. As a result, broad accounts of its political origins tend to portray the adoption of constitutions as a reflection of progressive social or political change, or simply as the result of societies' genuine commitment to "thick" notions of democracy, separation of powers, and human rights. Unfortunately, however, most of the assumptions regarding the power-diffusing, predominantly benevolent and progressive origins of constitutionalization remain mostly untested and abstract.

The ambitious attempt to adopt a constitution for Europe – a process that was launched with the Laeken declaration of December 2001 and culminated in June 2004 with the agreement on the adoption of a 300 plus page Constitutional Treaty – provides a unique context for addressing this lacuna. From the post-World War II constitutions of western Europe to the post-authoritarian constitutions of Latin America, Southern Europe, and Asia, to the post-communist constitutions in Eastern Europe, constitutionalization has more often than not been a byproduct of a major political and/or economic regime change. In contrast, the EU Constitution has neither been accompanied by, nor resulted from, any apparent fundamental changes in political or economic regime. Likewise, it has not been the outcome of any revolutionary or otherwise memorable "constitutional moment," to use Bruce Ackerman's terminology.[1] And it is also clearly

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distinguishable from the gradual, decades-long, "quasi-constitutionalization" of the European Community's legal order, driven by the European Court of Justice's interpretation of the EEC Treaty as a constitution-like charter.[2] Akin to a few recent "no apparent transition" constitutional revolutions elsewhere,[3] the current attempt at adopting a Constitution of Europe provides a near ideal testing-ground for identifying the political origins of constitutionalization by allowing us to disentangle the political origins of constitutionalization from other possible explanations.

In this paper I examine the contribution of the main theories of constitutional transformation to the understanding of the causal mechanisms behind the EU constitutionalization process. The primary focus of the paper is not the specific details and precise mechanisms of the EU constitution. Rather, it is aimed at offering a coherent intellectual framework for thinking about the political origins of constitutionalization. For the sake of clarity and simplicity, I group extant theories of constitutional transformation into three broad categories, which I discuss in the paper's three main parts. I begin by critically assessing the main "evolutionist" explanations for constitutionalization, at the core of which stand idealist notions of constitutionalization as a byproduct and an emblem of democratization, nation building, and prioritization of human rights. Next I examine "functionalist" theories of constitutional transformation that emphasize systemic needs and other structural and organic origins of constitutionalization trends. In the third part, I explore strategic approaches for understanding constitutional transformation that focus on interests and incentives as the major driving force behind constitutionalization.

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[1] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (Harvard University Press, 1992).

[2] The literature on the ECJ-initiated, gradual quasi-constitutionalization of the EC legal order is too vast to cite. The thematic focus of this branch of scholarship is the role of the ECJ in the process of European integration. The seminal account is J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991). The distinct features of the current attempt to adopt a formal comprehensive EU constitution, the draft constitution, etc. are discussed in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. Weiler & M. Wind, eds., Cambridge University Press, 2003).

[3] A few examples of the "no apparent transition" constitutionalization scenario are the constitutional revolution and the corresponding establishment of active judicial review in Sweden (1979), Egypt (1980), Hong Kong (1991), Mexico (1994), Argentina (1994), and Thailand (1997); the enactment of the New Zealand Bill of Rights Act in 1990; the adoption of two new Basic Laws in Israel protecting a number of core rights and liberties; the adoption of the Canadian Charter of Rights and Freedoms in 1982; or the adoption of the Human Rights Act in Britain in 1998.

Specifically, I argue that the current EU constitutionalization trend is hardly driven by politicians' dedication to promoting European grandeur and unity, nor by member states' commitment to a progressive agenda of democracy, power sharing, social justice, or universal rights.[4] Akin to a few other "no apparent transition" constitutional revolutions over the past two decades, the EU Constitution is best understood as a type of "hegemonic preservation" measure undertaken by self-interested, risk-averse political power-holders who, given the uncertainty and potential threats posed by EU enlargement and other potentially destabilizing processes, may seek to entrench their privileges, worldviews and policy preferences through constitutionalization. In other words, I argue that strategic constitutional innovators – hegemonic yet threatened political power-holders, in association with bureaucratic, economic and judicial elites sharing compatible interests – have been the major driving forces behind the EU constitutional reform.

I. Ideals

"In principle," argues a recent article, "all modern constitutions begin with "We the People."[5] Arguably, the most common view of constitutionalization portrays the adoption of a new constitution as a symbolic proclamation of the creation of a new political community or as the by-product of political leaders' benign attempts to enhance social integration in systemically divided polities. Unlike its relatively successful legal and economic integration, the emerging EU entity has long suffered from lack of social integration. The transformation of a primarily economic community (the European Community) to a thicker supra-national regime (the European Union) – a process that began with the Maastricht Treaties (1991) and continued with the Treaty of Amsterdam (1997) – brought about a much greater involvement of the EU in core political, social, and moral issues that had hitherto been dealt with at the nation-state level. These developments have been politicizing the EU, and consequently, engendering legitimation problems. Indeed, few would deny that EU suffers from an endemic "democratic deficit"

[4] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (Harvard University Press, 2004).

[5] Simone Chambers, *Democracy, Popular Sovereignty, and Constitutional Legitimacy*, 11 CONSTELLATIONS 153 (2004).

and is in dire need of popular legitimacy.[6] In that respect, leading European intellectuals suggest that the EU can attain democratic legitimacy only if a European demos with a collective identity takes shape. Purportedly, that is the very role of a European constitution.[7]

The main motive for the adoption of an EU Constitution, argues prominent German jurist Dieter Grimm, is to remedy this deficiency, and to fulfill the original blueprint of the EC Treaty (Article 2) of aspiring to achieve an "economic and social cohesion and solidarity among Member States." According to this argument, the driving force behind the EU Constitution, therefore, is not juridical, but rather a "Demos-building" one – the EU Constitution will serve an important symbolic, even emotional, social integration function, and will enhance the social cohesiveness of the supra-national European polity.[8] In short, the recent EU constitutionalization process is viewed as a further step towards the formation of a thicker social and political Union. While the social integration or the "Demos-building" explanation of constitutionalization is quite convincing, it still does not provide a full answer as to why the need for enhancing social integration through constitutionalization has become so acute thirteen years after Maastricht and not say a decade earlier.

The "Ackermanian" view of constitutionalization portrays constitutional law making as derivative of a large-scale political mobilization of vast numbers of citizens over a substantial period of time ("constitutional moments" in Ackerman's terminology), leading to a constitutional transformation that genuinely reflects the demos' will. Granted, some of the post authoritarian constitutional revolutions of the last three decades (e.g. in South Africa, Latin America, Latin Europe and post-communist Europe) appear to fit this Ackermanian, "nation-building" notion of constitutional law making. However, it is difficult to see how this notion of constitutional transformation helps us understand the vectors behind the current attempt to adopt a Constitution for Europe. This attempt clearly has not emerged out of any revolutionary or otherwise memorable "constitutional

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[6] *See, e.g.*, PHILLIP SCHMITTER, HOW TO DEMOCRATIZE THE EUROPEAN UNION . . . AND WHY BOTHER (Rowman & Littlefield, 2000).

[7] *See, e.g.*, Dieter Grimm, *Does Europe Need a Constitution?* 1 EURO. L.J. (1995), 282.

[8] Dieter Grimm, "An EU Constitution?" presentation at the University of Toronto' *Constitutional Roundtable*, March 15, 2004.

moment by any stretch of the imagination. It has not emerged out of any revolutionary or otherwise memorable "constitutional moment." Furthermore, the European constitutionalization process has evolved in considerable distance from the EU demos' will or interest, with the general sense being that of political leaders and technocrats "cutting a deal" and trying to foist it on the public. This is further reflected by the record low voter turnout (44 per cent), the big anti-incumbent vote and quite sizable support for Euro-skeptics in the June 2004 elections to the European Parliament that took place merely days prior to the adoption of the Constitutional Treaty. In short, the adoption of the EU Constitution seems anything but a reflection of an Ackermanian constitutional moment.

Another common explanation of constitutional transformation portrays the trend toward constitutionalization as an inevitable by-product of a new and near universal prioritization of human rights in the wake of World War II.[9] According to the generic version of this canonical view, the sweeping worldwide convergence to constitutionalism reflects modern democracies' genuine pre-commitment to entrenched, self-binding protection of basic rights and liberties in an attempt to protect vulnerable groups, individuals, beliefs, and ideas vis-à-vis the potential tyranny of political majorities; especially in times of war, economic crisis, and other incidents of political mass hysteria. The greatest proof of democracy's triumph in our times, it is argued, stems from the increasing acceptance and enforcement of the idea that democracy is not equivalent to majority rule; that in a real democracy (namely a democracy that subscribes to the constitutional supremacy principle rather than a democracy governed predominantly by the principle of parliamentary sovereignty), individuals should possess legal protections in the form of a written constitution unchangeable even by an elected parliament. According to this view, the presence of an effectively enforced, written and entrenched constitution is the crowning proof of a given polity's political development. Consequently, the seemingly undemocratic characteristics of constitutions and judicial

[9] The works that adopt various versions of this approach are too numerous to cite. However, the most prominent exponent of this line of thought is Ronald Dworkin. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 147-149 (Duckworth, 1978); A BILL OF RIGHTS FOR BRITAIN 13-23 (Chatto and Windus, 1990).

review are often portrayed as reconcilable with majority rule, or simply as necessary limits on democracy.

The conception of constitutional transformation that stems from the *social contract* school of thought views constitutions and judicial review as procedural devices that free and equal people might agree to voluntarily impose on themselves to protect their equal basic rights.[10] Realizing the occasional temptation of popular majorities to adopt measures that infringe on the basic rights of some, while not having an *a priori* indication of whose rights might be restricted by such potential measures, members of a polity might rationally choose to entrench the fundamental rules of the political game and the basic rights of its participants by granting a non-legislative body that is insulated from majoritarian politics the power to review legislation. In so doing, members of the polity (or its constituent assembly) provide themselves with precautions or pre-commitments against their own imperfections or harmful future desires, and tie themselves into their initial agreement on the basic rules and rights that specify their sovereignty.

In its more concrete guise, this thesis suggests that constitutionalization (and the expansion of judicial power, more generally) is derivative of a general waning of confidence in technocratic government and planning, and a consequent desire to restrict the discretionary powers of the state.[11] By increasing "access" points for special interest groups, constitutionalization and the establishment of active judicial review promote the diffusion of political power, add veto mechanisms, restrict maneuvering of policymakers, and limit the power of legislative majorities.[12] According to this view, independent constitutional courts not only monitor untrustworthy executive and legislative bodies, but also facilitate the political representation of diffuse but well-organized minorities. This

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[10] *See generally* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36-111 (Cambridge University Press, 1979); STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134-177 (University of Chicago Press, 1995); JEREMY WALDRON, LAW AND DISAGREEMENT (Oxford University Press, 1998).

[11] *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (University of Chicago Press, 1981); Martin Shapiro, *The Success of Judicial Review, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 193 (Sally J. Kenney, et al. eds., Macmillan Press, 1999).

[12] See George Tsebelis, Decision-Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism, and Multipartyism, 25 BRITISH J. POL. SCI. 289, 323 (1995); see also DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD 31 (R. Kent Weaver & Bert A. Rockman eds., Brookings Institution, 1993).

representation creates opportunities for certain groups to participate in policy-making processes that might otherwise be closed to them in majoritarian parliamentary politics.[13] Proponents of this approach therefore regard constitutionalization as the outcome of successful efforts by well-organized minority groups to protect themselves against the systematic threat of majoritarian political whims, and to increase their impact on public policy outcomes.

While providing a thoughtful and parsimonious explanation of the worldwide expansion of constitutionalism and judicial review over the past six decades, these *evolutionist* accounts of constitutional transformation do not provide a coherent explanation for the great variance in the scope and timing of constitutionalization across the new constitutionalism world. Such idealist theories of constitutionalization fail to explain why "new constitutionalism" polities such as Canada (1982), Israel (1992), South Africa (1993-1996), or the European Union in the early 2000s, for example, converged to the post-World War II thick notion of constitutional democracy precisely in the year they did and not, say, a decade or two earlier. Granted, the nightmare of World War II still looms large in the collective European memory. However, if the current EU constitutionalization is driven primarily by a collective reaction to horrors of World War II, it is unclear why it has taken the pro-constitutionalization movement some sixty years to gain momentum at the continental level. Likewise, evolutionist theories fail to explain why the waning of confidence in technocratic government, and a consequent desire to restrict the discretionary powers of the new European supranational entity has reached its peak in the early 2000s and not earlier or later. Not to mention the fact that the involvement of well-organized minority groups, or indeed any other segment of the EU population, in the current EU constitutionalization process has thus far been negligible.

II. Necessities

[13] *See* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 377-379 (1995).

Somewhat more convincing explanations concerning the origins of the EU constitution are offered by *functionalist* theories of constitutional transformation. Like the evolutionist approach, functionalist (or systemic needs-based) explanations cast constitutional transformation as an organic response to pressures within the political system itself. These explanations emphasize the ineluctability embedded in constitutional change, and tends to minimize the significance of human agency and choices. However, they also recognize particular ways in which legal innovations can follow from demonstrations of social, economic, or bureaucratic need.

In its most common version, the need-based explanation for the emergence of constitutions points out a strong correlation between the recent worldwide expansion of the ethos and practice of democracy and the contemporaneous global convergence to constitutional supremacy. Indeed, by its very nature, the existence of a viable democratic regime implies the presence of a basic separation of powers among state organs, as well as a set of procedural governing rules and decision-making processes to which all political actors are required to adhere. The persistence and stability of such a system, in turn, requires at least a semi-autonomous, supposedly apolitical judiciary to serve as an impartial umpire in disputes concerning the scope and nature of the fundamental rules of the political game. The establishment of some form of agreed upon power sharing mechanisms among the subunits and between the central government and the subunits is a necessary component of viable governance in multi-layered federalist countries, and in emerging supra-national polities such as the European Union.

The democratic imperative thesis captures an important driving force behind the constitutional revolutions in new democracies in Latin America or in the post-communist world. However, the attempt to adopt an EU Constitution has neither been accompanied by, nor resulted from, any transition to democracy, or any other fundamental changes in the EU's basic organization or regime type. Since its inception, the EU has been a multi-unit, quasi-federal entity perpetually searching for a set of governing principles, separation of powers structures and power sharing mechanisms. It is therefore unclear what accounts for the seeming urge of prominent EU member states to adopt a constitution precisely in the early 2000s.

Another guise of the functionalist approach suggests that constitutionalization derives from a structural, organic political problem such as a weak, decentralized, or a chronically deadlocked political system. The more dysfunctional the political system is in a given democracy, the greater the likelihood of expansive judicial power in that polity.[14] Constitutionalization, and political deference to the judiciary more generally, is seen as an effective way of overcoming political "ungovernablity," and ensuring the unity and "normal" functioning of such polities. According to the ungovernability thesis, a polity's structural inability to deal with its embedded social and cultural rifts, and the stalemate faced by that polity's majoritarian politics corrode the authority of the legislative and executive branches of government, thereby leading to a systemic dependency of that polity on a dominant, seemingly apolitical, professional decision-making agencies (e.g. constitutional courts).

In its "consociational" variant, the needs-based explanation of constitutional transformation emphasizes political necessity in the development of formal mechanisms such as mutual veto and proportional representation, characterizing them as inevitable constitutional solutions that allow ethnically fragmented polities to function. According to this logic, constitutionalization in polities facing political polarization is the only institutional mechanism that enables opposition groups to monitor distrusted politicians and decision makers.[15] This model of constitutions as effective power-sharing mechanisms is often applied, with variable degree of success, to understanding constitutional pacts in multi-ethnic countries such as Belgium, Spain, Switzerland, and other similarly situated polities.

Another functionalist, systemic needs-based explanation emphasizes the general proliferation in levels of government and the corresponding emergence of a wide variety of semi-autonomous administrative and regulatory state agencies as the main driving forces behind the expansion of judicial power over the past few decades. According to this thesis, independent and active judiciaries armed with judicial review practices are

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[14] *See* CARLO GUARNIERI ET AL., THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURT AND DEMOCRACY 160-181 (Oxford University Press, 2002).

[15] The works that adopt various versions of this approach are too numerous to cite. However, some of the most prominent exponents of this line of thought are Donald Horowitz, Arend Lijphart, and Yash Ghai.

necessary for efficient monitoring of the ever-expanding administrative state. Moreover, the modern administrative state embodies notions of government as an active policymaker, rather than a passive adjudicator of conflicts. It therefore requires an active, policy-making judiciary.[16]

Following this logic, some accounts of the rapid growth of supranational judicial review in Europe over the past few decades portray it as an inevitable institutional response to complex coordination problems deriving from the systemic need to adopt standardized legal norms and administrative regulations across member-states in an era of converging economic markets and the need for international regulation and coordination.[17] Some argue that successive treaties between the EU countries have created a mass of overlapping legal texts, which must be consolidated into a single document. According to this argument, there is a systemic need to address the basic questions at the heart of the EU legal structure such as supremacy, residual powers, and "subsidiarity." Along the same lines, others argue that the enlargement from 15 to 25 countries will make the EU bureaucratic project much harder to manage. A two-thirds rise in membership may bring gridlock to a busy EU. Misunderstandings and disagreements will multiply, even with goodwill on all sides. Two or three disorganized or actively impudent countries will be enough to guarantee chaos.

This "standardization" or "simplification" argument stems from a broader view within international relations theory that sees governments' pooling and delegation of sovereignty to international policy-making bodies as driven primarily by a quest for efficient solutions to complex coordination problems. According to this view, international institutions' centralized technocratic functions are more efficient than decentralized governments at generating and processing information, economic planning and coordination.[18] A similar "standardization" rationale may explain what may be called

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[16] *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 22-25 (Cambridge University Press, 1998).

[17] *See* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (Oxford University Press, 2000), at 139; Alec Stone Sweet & Thomas Brunell, *Constructing a Supranational Constitution*, 92 AM. POL. SCI. REV. 63, 65 (1998).

[18] ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT 7 (Cornell University Press, 1998).

the "incorporation" scenario of constitutional reform. In this view, the constitutionalization in member-states of supranational economic and political regimes (the EU, for example), as well as signatory states to transnational trade and monetary treaties, occurred through the incorporation of international and trans- or supra-national legal standards into domestic law.[19] The Constitutional Treaty does indeed consolidate all European treaties into a single document. However, it is still unclear why a constitution is needed to resolve foundational structure and jurisprudence problems in EU law, as all of these problems seem resolvable through already existing mechanisms of treaty-making, and multilateral agreements among member states.

In sum, while the evolutionist and functionalist theories outlined above account for some factors contributing to the adoption of constitutions, none analyzes the specific political vectors behind any of the constitutional revolutions of the past several years in a comparative, systematic, and detailed way. Moreover, none of these theories account for the *precise timing* of constitutional reform. If we apply these existing theories of constitutional transformation to a concrete example, they consistently fail to explain why a specific polity reached its most advanced stage of judicial progress at a specific moment and not, say, a decade earlier. Like the "democratic proliferation" thesis, both the "constitutionalization in the wake of World War II" argument and its corresponding "constitutionalization as pre-commitment" argument fail to account for the significant variations in the timing, scope, and nature of constitutionalization. It is hard to see, for example, why members of the Canadian polity in 1982, members of the Israeli polity a decade later, or members of the European Union in the first decade of the 21st century, chose to take precautionary steps against their own imperfections precisely in the year they did, and not earlier or later. What is more, the constitutionalization as pre-commitment argument is based on a set of hypothetical and speculative presuppositions concerning the origins of constitutions and judicial review that at the very best provide an

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[19] Recent examples of this scenario of constitutionalization include the affirmation of New Zealand's commitment to the International Covenant of Civil and Political Rights (ICCPR) by the preamble to the New Zealand Bill of Rights Act 1990; the incorporation of the European Convention on Human Rights provisions into Danish law in 1993, into Swedish law in 1995, and into British law through the enactment in Britain of the Human Rights Act of 1998 (came into force in October 2000) – the first rights legislation introduced in the United Kingdom in 300 years.

ex *post facto* normative justification for their adoption. Moreover, the European Union is certainly not "structurally ungovernable," and even if it were, it is difficult to see in what way it was more structurally ungovernable in the early 2000s than in the early 1990s, right after Maastricht, for example. Furthermore, both evolutionist and systemic needs-based theories of constitutional transformation tend to ignore human agency, and the fact that constitutional innovations require innovators – people who make choices as to the timing, scope, and extent of constitutional reforms. Both of these kinds of explanation overlook the crucial self-interested intervention by those political power-holders who are committed to constitutionalization and judicial expansion in an attempt to shape their institutional settings to serve their own agendas.

Another utilitarian approach – the *institutional economics*-derived theory of constitutional transformation – sees the development of constitutions and judicial review as mechanisms to mitigate systemic collective action concerns such as commitment, enforcement, and information problems. One such explanation sees the development of constitutions and independent judiciaries as an efficient institutional answer to the problem of "credible commitments."[20]

Political leaders of any independent political unit want to promote sustainable long-term economic growth and encourage investment that will facilitate the prosperity of their polity. Two critical preconditions for economic development are the existence of predictable laws governing the marketplace and a legal regime that protects capital formation and ensures property rights. The constitutionalization of rights and the establishment of independent judicial monitoring of the legislative and executive branches are seen as ways of increasing a given regime's credibility and enhancing the ability of its bureaucracy to enforce contracts, thereby securing investors' trust and enhancing their incentive to invest, innovate, and develop.

[20] *See* Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. OF ECON. HIST. 803 (1989); Barry Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. OF INSTITUTIONAL & THEORETICAL ECON. 286 (1993); Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 A. POL. SCI. REV. 245 (1997).

Indeed, as Max Weber noted, the fundamental building-block of every successful capitalist market is a secure "predictability interest."[21] Without this, potential investors lack the incentive to invest. Scholars have shown how entrenched legal rights that enhance investors' trust have led to economic growth in various historical contexts. Douglass North and Barry Weingast, for example, have illustrated how limitations on rulers' power in early capitalist Europe increased legal security and predictability, thereby allowing certain polities to borrow capital from external lenders, who were protected by law from the seizure of their capital.[22] More recent empirical studies have established a positive statistical correlation between the existence of institutional limitations on government action (rigid constitutional provisions and judicial review, for example) and fast economic growth.[23]

Even if constitutionalization does indeed mitigate problems of information, commitment and enforcement, as suggested by this and related institutional economics-driven theories, these theories cannot explain how prosperous democratic polities managed to successfully address collective action problems prior to the establishment of a constitution. Indeed, a successful monetary union that addresses the credible commitments concerns has already been established in the EU, without reliance on formal constitutionalization. Constitutionalization, in other words, is not a necessary precondition for mitigating commitment problems. Constitutionalization in the EU context therefore cannot be explained solely by the EU's efficiency-driven quest for the mitigation of such problems. More importantly, these theories do not explain why a certain polity – the EU for that matter – would choose to adopt such efficient mechanisms at a particular point in time, and not much earlier. If a constitution is indeed an efficient and essential credible commitments mechanism, why it has taken the EU authorities so long to adopt one?

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[21] MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 161-162 (University of California Press re-issue 1978) (1922).

[22] *See* North and Weingast, *supra* note 20.

[23] *See* Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001); Rafael La Porta et al., *Law and Finance*, 106 J. OF POL. ECON. 1113 (1998); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222 (1999).

III. Interests: Constitutionalization as "Hegemonic Preservation"

A strategic approach to constitutional transformation focuses on various power holders' incentives for constitutionalization. This approach makes five preliminary assumptions.

First, constitutionalization does not develop separately from the concrete social, political, and economic struggles that shape a given political system. Indeed, constitutionalization, and the expansion of judicial power more generally, are an integral part and an important manifestation of those struggles, and cannot be understood in isolation from them.

Second, when studying the political origins of constitutionalization (as well as the political origins of other institutional reforms), it is important to take into account events that did *not* occur and the motivation of political power holders for not behaving in certain ways. In other words, the political origins of constitutional reform cannot be studied in isolation from the political origins of constitutional stalemate and stagnation.

Third, deriving from the second assumption is the idea that the precise timing of constitutionalization initiatives is of great significance in understanding their political origins. Demands for constitutional change often emanate from various groups within the body politic. However, unless powerful political, economic, and judicial stakeholders envisage absolute or relative gain from a proposed change, the demand for that change is likely to be blocked or quashed. It is therefore essential to understand why a given polity (or an entity such as the European Union, for that matter) decided to embark on a constitutional overhaul precisely in the year it did and not a decade earlier or later.

Fourth, political actors' behavior may be explained largely by reference to their interests or preferences. More often than not, their behavior is derivative of an attempt to maximize their gains or optimize their status or position within the structural constraints of the system they operate in. Like other major political and legal institutions, constitutions produce differential distributive effects: they privilege some groups, policy preferences and worldviews over others. Other variables being equal, prominent political, economic, and judicial actors are therefore likely to favor the establishment of institutional (and constitutional) structures most beneficial to them.

And fifth, because constitutions and constitutional courts hold no purse-strings, have no independent enforcement power, but nonetheless limit the institutional flexibility of political decision makers, the voluntary self-limitation through the transfer of policy-making authority from majoritarian decision-making arenas to courts seems, *prima facie*, to run counter to the interests of power-holders in legislatures and executives. Unless proven otherwise, the most plausible explanation for voluntary, self-imposed constitutionalization is therefore that political power holders who either initiate or refrain from blocking such reforms estimate that it serves their interests to abide by the limits imposed by greater judicial intervention in the political sphere. Political actors who voluntarily establish institutions that appear to limit their institutional flexibility may assume that the clipping of their wings under the new institutional structure will be compensated for by the limits it might impose on rival political elements, their alternative worldviews and policy preferences. In short, those who are eager to pay the price of constitutionalization must assume that their position (absolute or relative) would be improved under a binding constitution. Such an understanding of judicial empowerment through constitutionalization as driven primarily by strategic political considerations may take a thin or a thick form.

First, let us consider the thin strategic approach – *constitutionalization as insurance*. In their seminal work of 1975, William Landes and Richard Posner argued that, other variables being equal, legislators favor the interest groups from which they can elicit the greatest investment through lobbying activities. A key element in maximizing such investments is the ability of legislators to signal credible long-term commitments to certain policy preferences. An independent judiciary's role in this regard complements parliamentary procedural rules – it increases the durability of laws by making changes in legislation more difficult and costly. A judiciary that is overtly subservient to a current legislature (or expressly biased against it) can nullify legislation enacted in a previous session (or current legislation), thereby creating considerable instability in legal regimes. In such legally unstable settings, selling legislation to powerful interest groups may prove difficult from the politicians' point of view. The potential threat of instability or loss of

mutual profits and power may therefore result in support for judicial empowerment vis-à-vis legislatures.[24]

Observing variations in the degree of judicial independence among industrial democracies, Mark Ramseyer develops Landes and Posner's argument into a "party alternation" model, which suggests that judicial independence correlates to the competitiveness of a polity's electoral market.[25] When a ruling party expects to win elections repeatedly, the likelihood of judicial empowerment is low. Since rational politicians want long-term bargains with their constituents, they lack the incentive to support an independent judiciary when their prospects of remaining in power are high. However, when a ruling party has a low expectation of remaining in power, it is more likely to support an independent judiciary to ensure that the next ruling party cannot use the judiciary to achieve its policy goals. In other words, under conditions of electoral uncertainty, the more independent courts (or other semi-autonomous regulatory agencies) are, the harder it will be for the successive government to reverse the policies of the incumbent government.[26] Therefore, in Japan, for example (where a single party ruled almost without interruption for more than four decades following World War II), judicial independence is weaker than it is in countries where there is an acknowledged risk that the party in power might lose control of the legislature in each election.

Tom Ginsburg builds upon this logic to provide a compelling account of the politics of constitution-making processes during periods of regime change and political transition. Akin to purchasing insurance in uncertain contracting environments, judicial review provides "insurance" against the risk of electoral defeat, thereby facilitating transition to and consolidation of democracy. "Where constitutional designers believe

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[24] William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 879 (1975); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?* 13 INT'L REV. L. & ECON. 349, 358 (1993); Eli Salzberger & Paul Fenn, *Judicial Independence: Some Evidence from the English Court of Appeal*, 42 J.L. & ECON. 831 (1999); Robert D. Tollison & W. Mark Crain, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165 (1979).

[25] *See* J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994). J. MARK RAMSEYER & ERIC RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (University of Chicago Press, 2003).

[26] *See* Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 227 (1990).

that they may not control the political institutions of government, they are likely to set up a court to serve as an enforcement body protecting the constitutional bargain from encroachment. When designers believe that they will retain a dominant position in government, they seek stronger power for the political branches and will forge institutional constraint in favor of parliamentary sovereignty."[27] At times of political transition, greater degrees of political deadlock and/or more diffused or decentralized political power increase the probability that uncertainty will be embedded in its constitution-making process and subsequent electoral market. This in turn leads to a greater likelihood that a relatively powerful and independent constitutional order will emerge as insurance adopted by risk-averse participants in the constitutional negotiation game. In short, judicial review, and constitutionalization more generally, are solutions to the problem of uncertainty in political transformation.[28] Or in our context, the greater the number of veto points and/or projected political uncertainty, the greater the politicians' corresponding desire for constitutionalization.

In a similar vein, the literature about the political origins of other relatively autonomous agencies suggests that the autonomy of, for example, central banks in advanced industrial countries is simply a function of government politicians' time horizons. The longer the horizon of their time in power, the more politicians will desire the greatest possible control over economic policy. This implies a consequent loss of independence for the central bank. By this logic, short horizons or forthcoming elections can lead politicians who fear losing their office to increase central bank independence in order to limit the future options of their political opponents.[29]

According to the second and thicker strategic explanation for constitutionalization – which I term the *hegemonic preservation* thesis – constitutionalization is often driven by threatened political power-holders who seek to entrench their worldviews and policy

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[27] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 200-201 (Cambridge University Press, 2003).

[28] This logic has been forcefully put forth and cleverly drawn upon to explain variance in judicial power among new Asian democracies (Taiwan, Mongolia, and South Korea), and among Southern European democracies (Greece, Portugal, and Spain). *See*, GINSBURG, supra note 27; Pedro Magalhaes, *The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies* (unpublished Ph.D. dissertation, Ohio State University, 2002).

[29] *See, e.g.* John Goodman, *The Politics of Central Bank Independence*, 23 COMP. POL. 329, 333 (1991).

preferences against a growing influence on the part of alternative worldviews, policy preferences, and interests in pertinent policy-making bodies. When facing possible threats to their hegemony, elites who possess disproportionate access to and influence over the constitutional arena may initiate a constitutionalization process in order to lock in their worldviews and policy preferences against unfavorable developments in the political sphere. Constitutionalization as political entrenchment of political privileges, hegemonic worldviews and cultural propensity may provide an efficient institutional means by which political power-holders can insulate their potentially challenged policy preferences against popular political pressure, especially when majoritarian decision-making processes are not guaranteed to operate to their advantage.

Space limitations preclude full substantiation of the hegemonic preservation approach to constitutionalization.[30] As I show elsewhere, understanding constitutionalization as a form of hegemonic preservation by threatened elites and power-holders may shed light on the near-miraculous conversion to constitutionalism and judicial review among South Africa's white political and business elites during the late 1980s and early 1990s, when it became clear that the days of apartheid were numbered and an ANC-controlled government became inevitable.[31] Other examples include Canada's adoption of the Charter of Rights and Freedoms in 1982 as part of a broader strategic response by the federalist, anglophone, business-oriented elites to the growing threat of Quebec separatism and rapidly changing Canadian demographics; and Israel's 1992 adoption of two new Basic Laws protecting core rights and liberties, and the corresponding establishment of constitutional review in 1995 as part of a strategic response by Israel's secular Ashkenazi bourgeoisie to the decline of its historical grip over that country's majoritarian decision-making arenas.

Likewise, the 1994 judicial empowerment through constitutional reform in Mexico was a calculated attempt by the then ruling party (Partido Revolucionario Institucional – PRI) to lock in its historic influence within the judicial branch before the

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[30] *See* HIRSCHL, *supra* note 4, for a detailed discussion of these illustrations of the hegemonic preservation thesis in action.

[31] *See* HIRSCHL, *supra* note 4; HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (Cambridge University Press, 2000).

PRI's increasingly popular political opponents (and eventual winners of the 2000 presidential election) gained control. The same logic may also explain the scope and timing of the June 1991 constitutionalization of rights in British-ruled Hong Kong, which occurred less than two years after the British Parliament ratified the Joint Declaration on the Question of Hong Kong, whereby the province was restored to China in July 1997; or Britain's enthusiastic support for the entrenchment of property rights in the "independence constitutions" of newly self-governing African states (e.g. Ghana in 1957, Nigeria in 1959, and Kenya in 1960), while it was unwilling to incorporate the provisions of the European Convention on Human Rights into its own legal system (let alone to enact a constitutional bill of rights of its own).

Or consider the establishment of strong constitutional courts in predominantly Islamic polities such as Egypt, Pakistan, and Turkey as part of a broad strategy by secular, relatively cosmopolitan elites in these countries to tame anti-secularist popular political forces. The hegemonic preservation approach may explain the key role the Turkish Constitutional Court has played in preserving the strictly secular nature of Turkey's political system, by continuously outlawing anti-secularist popular political movements in that country (including the 2001 dissolution of the pro-Islamic Virtue Party, which was the country's main opposition group at the time); or the establishment of judicial review in Egypt in 1979 amidst a resurgence in Islamic fundamentalism, and the crucial role of the Egyptian Supreme Constitutional Court in advancing a liberal interpretation of Islamic *Shari'a* rules.[32]

The counterintuitive nature of the strategic approach to constitutionalization has striking parallels in works concerning the political origins of empowerment of other semi-autonomous institutions, such as central banks, environmental regulatory bodies, and supranational treaties and tribunals. Variance in the capacities of early central banking institutions in developing countries, for example, was shaped by the changing financial interests of those in a position to voluntarily delegate authority to central banks:

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[32] Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819 (2004).

government politicians and private banks.[33] Similarly, varying degrees of support by existing firms towards proposed environmental regulatory policies can be explained by the different limits and costs such policies impose upon new firms. Because environmental regulation typically imposes more stringent controls on new firms, it restricts entry into the marketplace and potentially enhances the competitive position of existing firms.[34]

A similar rationale for judicial empowerment at the supranational level is put forward by the "intergovernmentalist" thesis concerning the evolution of the European Court of Justice (ECJ).[35] According to this thesis, member states choose to create (and selectively adhere to the limits imposed by) supranational institutions primarily because these institutions help them surmount problems arising out of the need for collective action, and overcome domestic political problems. National governments of the EU member states have not been passive and unwilling victims of the process of European legal integration; they consciously transferred power to the Court, and where the ECJ has been proactive, the member governments have supported this. Moreover, the selective implementation of ECJ rulings by member states derives from domestic political considerations by national governments (such as a greater willingness to implement ECJ judgments that favor certain constituencies whose political support is essential for governments and ruling coalitions). Decisions of the ECJ enjoy different levels of enforcement and real impact in areas of public policy, depending on the constellation of political forces in each.[36]

Along the same lines, other works suggest that in newly established democracies in post-World War II Europe, governments committed to international human rights regimes (the European Court of Human Rights, for example) as a means of "locking-in"

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[33] *See, e.g.,* Sylvia Maxfield, *Financial Incentives and Central Bank Authority in Industrializing Nations,* 46 WORLD POL. 556, 564 (1993).

[34] *See* Michael Maloney & Robert McCormick, *A Positive Theory of Environmental Quality Regulation,* 25 J.L. & ECON. 99 (1982).

[35] *See* Geoffrey Garrett, *The Politics of Legal Integration in the European Union,* 49 INT'L ORG. 171 (1995). *See* also, Geoffrey Garrett et al., *The European Court of Justice, National Governments and Legal Integration in the European Union,* 52 INT'L ORG. 149 (1998).

[36] *See* LISA CONANT, JUSTICE CONSTRAINED: LAW AND POLITICS IN THE EUROPEAN UNION (Cornell University Press, 2002).

fundamental democratic practices in order to protect against future antidemocratic threats to domestic governance.[37] Governments resorted to this tactic when the benefits of reducing future political uncertainty outweighed the "sovereignty costs" associated with membership in such supranational human rights enforcement mechanisms. When applied to the EU context, this rationale may explain the pro-constitutionalization stance of progressive circles within member states such as Germany, France, Austria, and the Netherlands. These constituents view the adoption of a constitutionally entrenched European bill of rights as a mechanism to lock in their liberal, cosmopolitan worldviews against the increasingly popular extreme right, nationalist and racist political platform.

The same logic may explain the voluntary incorporation of major international treaties and covenants protecting fundamental human rights and civil liberties into embattled democracies' constitutional law (as happened in Argentina in 1994);[38] or the constitutionalization of rights and the corresponding establishment of full scale constitutional review following years of political instability and recurring military coups d'état (as happened in Thailand in 1997).[39] Likewise, NAFTA's precision, for example, may be viewed as "part of the Mexican government's strategy to bind successor governments to its policies of economic openness."[40] Hence, "governments may turn to international enforcement when an international commitment effectively enforces the policy preferences of a particular government at a particular point in time against future domestic political alternatives."[41] In other words, self-interested political incentives – rather than the altruistic considerations of political leaders, or universal commitment to a morally elevated conception of human rights – provided the major impetus for various countries' commitment to binding supranational human rights and free trade regimes.

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[37] *See* Andrew Moravcsik, *The Origins of Human Rights Regimes*, 54 INT'L ORG. 217 (2000).

[38] The progressive-liberal Argentine government adopted a constitutional amendment in 1994 that incorporated ten international treaties and covenants protecting fundamental human rights and civil liberties into Argentina's domestic law.

[39] *See* Pinai Nanakorn, *Re-making of the Constitution in Thailand*, 6 SINGAPORE J. OF INT'L & COMP. L. 90, 103 (2002).

[40] *See* Miles Kahler, *The Causes and Consequences of Legalization*, 54 INT'L ORG. 661, 663 (2000).

[41] *See* MORAVCSIK, *supra* note 37, at 220.

In sum, under circumstances of increased uncertainly, potential risk, or perceived threat to their interests, political power holders may choose to enhance their position by voluntarily tying their own hands. Such incidents of strategic self-limitation may be beneficial from the point of view of political power holders when the limits imposed on rival elements, worldviews, or interest within the body politic outweigh the limits imposed on themselves.

IV. Strategic Constitutionalization in Europe

The process of adopting a comprehensive EU Constitution is still in its formative stages. The final legal text of the June 2004 constitutional treaty may not be available for several months. At least ten member states, including Britain, Spain, and Poland, plan to hold referendums on the constitution. Other countries may yet follow suit. Though no definitive statements as to the origins of the EU constitution can be offered, I believe that initial evidence concerning the political vectors behind the EU constitutionalization process lends credence to the strategic approach to constitutional transformation. Akin to the few other "no apparent transition" constitutional revolutions mentioned above, the current EU constitutionalization process is best understood as a type of "hegemonic preservation" measure undertaken by self-interested, risk-averse political power-holders who, in an attempt to mitigate the uncertainty and potential threats posed by EU enlargement, may seek to entrench their privileges, worldviews and policy preferences through constitutionalization. In other words, I argue that strategic constitutional innovators – hegemonic yet threatened political power-holders (e.g. important member state governments), in association with bureaucratic, economic and judicial elites sharing compatible interests – have been the major driving forces behind the EU constitutional reform.

The May 2004 enlargement poses a potential threat to established power-holders within the EU. For one, it means an unprecedented expansion in the number of member states by two-thirds (from 15 to 25), and an addition of more than 80 million new EU citizens. The post-expansion EU citizenry will include roughly 455 million people, over

20 per cent more than the size of the pre-enlargement populace.[42] Such a dramatic overnight expansion of a supra-national polity's populace has only two analogous occurrences in recent memory – the incorporation of the former East Germany into unified Germany, and the 20 per cent rise in Israel's population following the arrival of approximately one million immigrants from the ex-Soviet Union during the early 1990s. Such dramatic expansion entails greater social, cultural and political heterogeneity within the EU. It inevitably increases the level of political unpredictability and possibly even instability within the EU. The sense of increasing uncertainty is further intensified by central Europe's suspected harboring of an outmoded attachment to national sovereignty, as well as by the rather limited experience of the eight central European accession countries with the prevalent western formula of liberal democracy and market economy. Indeed, the general sense among core EU members is that the eastward expansion decreases democratic attitudes and increases "statist" orientations within the EU.

The very entry of the large and heavily populated Poland, as well as the smaller yet symbolically central Czech Republic and Hungary is profoundly unsettling to EU traditionalists. European integration began with Franco-German reconciliation after World War II. The EU's main institutions are still stretched out along the Franco-German borderlands, in Brussels, Luxembourg, and Strasbourg. For French and German politicians, it is axiomatic that their relationship should remain the fulcrum around which the EU revolves. But enlargement will shift the center of gravity. The decision of the Poles and most other central Europeans to take a pro-American stand over Iraq was received particularly badly in France, prompting Jacques Chirac's now infamous remark that the newcomers had "missed a good opportunity to shut up." As Viscount Etienne Davignon, a Belgian former vice-president of the European Commission, and one of the epitomes of the EU's great and good says: "We have to remember that the Poles have only recently regained their national sovereignty and are new to the European Union. It takes many years of membership before people really understand how Europe works."[43]

[42] Poland's population alone (40 million) accounts for half of that increase. The combined population of the biggest four accession countries (Poland, Czech Republic, Hungary, and Slovakia) accounts for nearly 70 million of the 80 million new EU citizens.

[43] Cited in "Those pesky Poles," *The Economist* (Nov. 27, 2003).

Core elements within the EU view the May 2004 enlargement as a watering down the entire integration process. The notion that Poland and the other seven central European accession countries might possibly have alternative ideas and policy preferences that are as valid as those of the six "founding members" is apparently too fanciful to contemplate. As recent accounts of European integration have noted, it is now taken that post enlargement EU will be a much more diversified entity. "The Eastern European accession countries are significantly poorer than the current West European member states. Their democracy and in some cases even their statehood is newly established and presumably more fragile. Their economic, legal, and administrative structures are less developed. They also have their own distinct histories, societies, and cultures." [44] Thus, their visions, interests and priorities may diverge within the "Eastern" group, in addition to differing from those of current EU members. "In fact, in view of the numerous structural differences between the current and prospective EU member states, it is difficult to expect there to be a major durable alignment of their respective political preferences and behavior after enlargement."[45] Indeed, the post-communist accession countries have long been perceived by the West as "backward" and less "civilized," and not an integral part of Europe. As Giuliano Amato and Judy Batt have observed, "[t]he prospect of enlargement to the East has brought these prejudices to the fore, further contributing to the tendency to portray the increasing diversity that it entails as a new and uniquely threatening challenge for the EU."[46]

And we have not yet said a word about deeper threats posed by further enlargement that would include developing countries such as Romania, Bulgaria, Croatia, and Macedonia (let alone Albania, Bosnia-Herzegovina and Turkey) – all of which lag far behind West European development standards, include significant non-Christian population, and most importantly, lack political stability or long term commitment to liberal democratic values. The constitutional entrenchment of a core set of cultural

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[44] *See* Jan Zielonka & Peter Mair, *Introduction: Diversity and Adaptation in the Enlarged European Union*, in THE ENLARGED EUROPEAN UNION: DIVERSITY AND ADAPTATION (J. Zielonka & P. Mair, eds., Frank Cass, 2002), at 1.

[45] Id.

[46] Giuliano Amato & Judy Batt, *Final Report of the Reflection Group on The Long-term implications of EU Enlargement: The Nature of the New Border*, 11 (1999), cited in Zielonka & Mair, *supra* note 44, at 3.

propensities, moral standards, and practical guidelines for public life addresses such concerns by imposing a centralizing, “one rule fits all” regime upon an enormous and exceptionally diverse EU.

In short, the contemporaneous emergence of the enlargement and the constitutionalization processes is anything but coincidental. The EU constitution may be viewed as an attempt to increase the credibility of interstate commitments through the introduction of a binding mechanism that would effectively reduce the threat of accession countries (present and future) advocating worldviews and policy preferences that diverge significantly from those favored by core EU member states. A departure from the treaty route to the entrenched constitution path would increase certainty and predictability within the enlarged EU, and would provide self-interested, risk-averse power holders with formal protection against the potential threat and uncertainly embedded in the enlargement process.

How did the whole constitutionalization process come about? The immediate post-Nice understanding was that the agreement paved the way for enlargement and completed the institutional changes necessary for the accession of new member states. The general consensus was that another inter-governmental conference (IGC) was needed to consider four issues: a more precise delimitation of powers between the EU and its members, the status of the Charter of Fundamental Rights, simplification of EU treaties, and the role of national parliaments in the European architecture. These statements notwithstanding, the drive towards full-scale constitutionalization gained momentum in late 2000 or early 2001. At least timing-wise, the emergence of the enlargement and the constitutionalization processes was indeed synchronized.

Alarmed by the aforementioned concerns, EU federalists launched a successful drive to turn a limited discussion of the Nice “leftovers” into a full-scale effort to write a constitution. That is why the 2001 Laeken summit set up a convention on the future of Europe to precede the IGC. The assumption was that this would generate the momentum to write a constitution. An accelerated timetable was also pushed through. At Nice, it was agreed that the IGC would take place in 2004. That date was brought forward to 2003, largely so that the work on the constitution could be completed before the newcomers joined the Union. Consistent with this, at the 2003 constitutional convention, every effort

was made to limit the influence of the newcomers. Their representatives were present on the convention floor, but not on the 12-person presidium that did the crucial work of drafting the text.[47] It is no coincidence that some of Europe's most prominent federalists, such as Joschka Fischer, Germany's foreign minister, and Guy Verhofstadt, Belgium's prime minister, have been pushing hardest for the convention's draft constitution to be adopted swiftly and without alteration. Indeed, as Jack Straw, Britain's foreign secretary, has recently explained, a constitution was needed "in order to make enlargement work better."[48] Or in the words of Gerhard Schröder, Germany's chancellor, "Enlargement and the constitution are two sides of the same coin."[49]

The deep concerns among leading member states as to the possible threat to their hegemony posed by the EU enlargement is also manifested, quite ironically, by the emergence of the so called "enhanced cooperation" discourse over the past few years. Worried about a loss of influence in an enlarged EU, a few leading member states, most notably France and Germany, have been pushing for the formation of a "hard core" of countries, which would forge ahead with deeper integration and closer links on tax harmonization, justice, and home affairs. Like the emergence of the formal constitutionalization discourse, the contemporaneous emergence in the late 1990s of the enlargement prospect and the enhanced cooperation discourse is anything but fortuitous. The possibility of closer cooperation among member states that wish to move ahead with faster integration in certain policy areas had not been explicitly and formally recognized before the Treaty of Amsterdam (1997). The legal framework for closer integration was further reformed and institutionalized through the 2000 Treaty of Nice. The underlying rationale of all these provisions, as well that of the less formal yet increasingly popular enhanced cooperation discourse has been to allow core member states to differentiate themselves from the crowd, and create secluded enclaves of deeper cooperation within the EU. In other words, just as plans for enlargement were materializing, the legal

[47] The presidium was eventually shamed into adding an invitee from mighty Slovenia to its numbers.

[48] Cited in "Claims that new constitution is designed to cope with European Union expansion are false," *The Economist* (Oct. 9, 2003).

[49] Id.

framework has been laid for the formation of selective fast track integration within a core group of member states.

The cautious (not to say suspicious) attitude of established member states toward the upcoming enlargement (and their motive in pursuing the constitutionalization path) is vividly illustrated by the across-the-board invocation of a provision in the EU agreement that allows member states to impose "passage limitations" on citizens of the accession countries for up to seven years from the date of enlargement. Even considerably progressive prime ministers such as Britain's Tony Blair and Sweden's Goran Person, succumbed to immense public pressure, and introduced a series of limitations on the incoming stream of cheap labor from accession countries, as well as restrictions on the eligibility of newly arrived immigrants for welfare. "Whomever is unable to legally support himself will quickly find himself outside of Britain" declared Blair in February 2004. Workers from the eight central European accession countries will be able to work in Britain, but will not be eligible to receive welfare for the first 12 months of their residency. They will have to register in a special employment database, and prove that they actively work during their stay.

Likewise, Sweden recently introduced a five-year limitation on the number of immigrants it will admit. Belgium, Finland, and Denmark announced a postponement of at least two years before they will open their gates to workers from the accession countries. Denmark also went on to introduce a law that requires incoming immigrants to find work within six months of arrival or face deportation. The Netherlands introduced a cap of 22,000 immigrant workers per year. In short, suspicion and hostility toward the accession countries' citizenry are bubbling under the surface.

The "hegemonic preservation" rationale is also evident in some of the specific choices made by the drafters of the constitution. At the very least, the proposed constitution marks the formal entrenchment of the criteria for joining the EU adopted at the Copenhagen Summit of the European Council in 1993; to wit: a) proof of respect for democratic principles, the rule of law, human rights, and protection of minorities; b) functioning market economies that are able to cope with the competitive pressures and market forces of the EU; and c) the ability to take on all the obligations of membership, including incorporating into their national legal system all the laws agreed by the EU.

The centralizing nature of the Constitutional Treaty is further illustrated by the fact that contrary to the Laeken aspirations to make the union "more democratic, more transparent, and more efficient," no powers have been repatriated to member states. Even the most radical of the mechanisms for repatriation of power – protections for so-called "subsidiarity" (aimed at ensuring that various policy issues are dealt with at the most appropriate level) – are weak at best. Under the newly adopted "early warning system," for example, national parliaments are granted a six-week window to scrutinize European legislative proposals to ensure they conform with the principle of subsidiarity. Even in the unlikely event that a third of national parliaments object to a proposed EU law, the Commission's only obligation is to formally review the contested proposal, after which it may withdraw, amend, or maintain it unchanged.

Arguably the most dramatic change put forth by the Constitutional Treaty, however, is the transition from unanimity to majority vote in adopting new EU legislation pertaining to thirty policy areas, including asylum and immigration, energy, and aspects of criminal due process, with national vetoes retained over direct taxation, foreign and defense policy, and financing of EU budget. This entails further erosion of national sovereignty, and will curtail the relative impact of the small and medium-size member states (i.e. all of the ten accession countries, among others). There is a widespread agreement that justice, home affairs, agriculture policy and subsidies, and the single legal personality issue – all perennial bones of contention in the EU – will be the most affected policy areas by the transition to majority vote. At present, all attempts at integrating criminal and immigration law can be blocked by any single country. Under the Constitution, crucial aspects of immigration policy in the European context – refugees and asylum – will be decided by majority vote, not unanimity. This in turn would help the established member states ensure that no accession country unilaterally opens its doors to massive immigration from neighboring non-EU countries. The Constitutional Treaty also provides for the harmonization of criminal law and sentencing for certain serious crimes with cross-border implications (e.g. corruption, tax evasion, money laundering, drug and women trafficking, etc.). This was done in an attempt to prevent the creation of hubs of criminal activity in the present and future accession countries, some of which lack a longstanding tradition of western style law and order. What is more, the Constitutional

Treaty formally recreates the EU as a single legal personality, thereby enabling it to sign treaties in its own right that bind all members.

The Constitutional Treaty also establishes a new voting system at the Council of Ministers (the EU's stirring committee or board of directors) – the putative "double majority" – under which an EU law would be passed if it won the support of at least 55 per cent of EU countries, whose combined population represents at least 65 per cent of the total EU population. A blocking minority must come from four or more countries. This replaces the system agreed upon the Nice 2000 summit, in which countries were awarded "weighted votes." According to the Nice agreement, the "big four" – Germany, Britain, France and Italy – would have been given 29 votes each, and Spain and Poland, each with half the population of Germany, would receive 27 votes. The EU devised such a skewed voting system in reaction to the politics and panic of the moment. Double majority was proposed at Nice, but France, which held the EU presidency at the time, refused to accept the system because due its larger population it gave Germany comparatively more power. The Poles, who were not even at the table in Nice, were the happy beneficiaries of a combination of French intransigence and Spanish negotiating skills.

The move to a "double majority" voting system pumps up German power within the EU (from 9.2 per cent under Nice to 18.2 per cent) and deflates the power of medium-sized countries. Since the total EU population post-enlargement is estimated at 455 million, under the double majority system, any combination of three of the four most populous states (Germany with slightly over 80 million; Britain with roughly 65 million; France and Italy with slightly over 60 million residents each), would exceed the 35 per cent needed to block any substantial change. Such tripartite opposition would only require the support of one additional member state to block any meaningful legislation or decision-making by the Council of Ministers. A united front of the "big four" would not even require the support of another member state to block any Council of Ministers initiative. Therefore, the EU could effectively be governed by the four most populous states. Unsurprisingly, the Spaniards and the Poles were not keen to accept the "double majority" revision to the Nice agreement. Political power holders in Berlin, on the other hand, insisted all along that the double majority was non-negotiable. "This is a point on

which we are not prepared to move" Gerhard Schröder said in December 2003.[50] And move they did not.

However, these influential pro-constitutionalization political vectors in the EU cannot operate in a vacuum. To effectively promote their constitutionalization interests, they must secure the cooperation of powerful stakeholders who possess compatible interests. The adoption of a formal constitution also serves the interests of other important stakeholders who may possess compatible interests, most notably the centripetal interests of the federalist EU bureaucracy, and the quest for expanded ambit of influence by the EU judicial apparatus and its proactive apex court. Likewise, powerful economic producers may view the constitutionalization of certain liberties, especially property, mobility, and occupational rights, as a means of fighting "market rigidities" and promoting the free movement of labor, commodities, and capital.[51] When the interests of these pertinent stakeholders converge, constitutionalization is likely to advance.

In practice, big business showed little interest in the proceedings leading up to Brussels. For economic conglomerates, it was the establishment of the European Central Bank in June 1998 (ensures monetary stability by setting interest rates in the Euro zone), and the transition to a single market regime in 2002 that were crucial steps toward the realization of their interests. Indeed over the past decade, the EU has gone well beyond scrapping tariffs, and declared war on all sorts of protectionist national rules as well as on subsidies to domestic industries. EU leaders have also committed to launch a new round of deregulation as part of the "Lisbon agenda" of economic reform. Indeed, one of the reasons for the failure of the 2003 Brussels summit was the non-business friendly inclusion in the Charter of Fundamental Rights (part two of the constitution) of wide-sounding social rights such as the right to strike, the right to work, the right of workers to be informed and consulted, and even the generous right to free job placement services. Unsurprisingly, Britain, Ireland, and a number of enlargement countries have expressed deep concerns about the non-favorable implications of these generous welfare provisions on big business.

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[50] Cited in "Might it all tumble down?" *The Economist*, Dec. 11, 2003.

[51] On the international and domestic political economy vectors behind the global convergence to constitutionalism, *see* HIRSCHL, *supra* note 4.

As the "strategic revolution" in the study of judicial behavior has established, judges may be precedent followers, framers of legal policies, or ideology-driven decision makers, but they are also sophisticated strategic decision-makers who realize that their range of choices is constrained by the preferences and anticipated reaction of the surrounding political sphere. Likewise, ECJ judges (and indeed the judges of other supranational tribunals and national high courts) may be viewed as strategic actors to the extent that they seek to maintain or enhance their court's institutional position vis-à-vis other pertinent decision-making bodies. Courts may realize when the changing fates or preferences of other influential political actors, as well as gaps in the institutional context within which they operate, might allow them to strengthen their own position by extending the ambit of their jurisprudence and fortifying their status as crucial policy-making bodies.[52] The ECJ is bound to gain a more powerful role in coming decades in interpreting the Constitutional Treaty and especially its attached Charter of Fundamental Rights in such a way as to enforce and accelerate integration. The formal statement of the primacy of EU law over national law, a principle previously established by the jurisprudence of the ECJ;[53] the establishment of a formal EU legal personality, enabling it to sign international agreements; and the extension of EU power to justice and home affairs also entail an inevitable increase in the ECJ's case load and significance as the ultimate definer and interpreter of EU law.

However significant bureaucratic, economic and judicial elites' own support of constitutionalization may be, it is the support of influential political power-holders that remains a key factor in this process. Unlike the federalist EU bureaucracy and judiciary who are set to enhance their influence and profile under a new constitutional order, it is national governments and other influential political power holders whose institutional room for political maneuvering is likely to be curtailed by constitutionalization and the

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[52] *See, e.g.* Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002); KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (Oxford University Press, 2001). *See* also NANCY MAVEETY, THE PIONEERS OF JUDICIAL BEHAVIOR (Michigan University Press, 2003).

[53] *See* the oft-cited ECJ's landmark rulings of *Van Gend and Loos*, 26/62 (1963) ECR 1 (ECJ); and *Costa v. Enel*, 6/64 (1964) ECR 585 (ECJ).

corresponding expansion of supranational judicial power. Thus, the hegemonic preservation impulse of powerful political stakeholders and rulings governmental coalitions – not the pro-constitutionalization stand of judicial, bureaucratic, or economic elites – is the primary catalyst and driving force behind the quest for an EU constitution.

In sum, constitutions do not fall from the sky. They are politically constructed. The causal mechanisms behind the adoption of the EU Constitutional Treaty are not fully delineated by theories of constitutional transformation that emphasize normative principles or organic necessities as the main driving forces behind constitutionalization. In particular, both idealist and functionalist explanations of EU constitutionalization fail to account for the precise timing of and political vectors behind the adoption of a formal EU constitution – a development that is not derivative of any revolutionary or otherwise memorable "constitutional moment" and is clearly distinguishable from the gradual, decades-long, "quasi-constitutionalization" of the European Community's legal order.

As one of those people who "seldom think of politics more than 18 hours a day,"[54] I have advanced here a strategic notion of EU constitutionalization as driven primarily by the interests of risk-averse power-holders within the EU, who seek to reduce uncertainty and enhance the credibility of interstate commitments against the potentially destabilizing consequences of enlargement. In that respect, the contemporaneous emergence of the EU enlargement and formal constitutionalization is anything but coincidental. Put bluntly, the adoption of an EU constitution is best understood as a preventive measure that allows powerful stakeholders within the EU to enjoy the geo-political and macro-economic benefits of enlargement without risking the embedded uncertainty, potential divergence, and other accompanying perils posed by the EU's spread to central and eastern Europe. The EU enlargement and the EU Constitution, as the epigraph to this paper suggests, are indeed two sides of the same coin.

[54] Attributed to Lyndon B. Johnson, 36th President of the United States.