Preserving hegemony? 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, chancellor of Germany

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 a constitution as a reflection of progressive social or political change, or simply as the result of a society’s genuine commitment to “thick” notions of democracy, separation of powers, and human rights. Unfortunately, however, most of the assumptions regarding the power-diffusing, 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 in agreement on a 300-plus-page draft Treaty establishing a Constitution for Europe—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 postcommunist 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 European Union (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 term. And it is also clearly distinguishable from the gradual, decades-long quasi constitutionalization of the European Community’s legal order, a process driven by the European Court of Justice (ECJ) having

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treated the EEC treaty as a constitution-like charter. 2 Akin to a few recent constitutional revolutions elsewhere that were marked by no apparent transition, the current attempt at adopting a constitution for Europe provides a near-ideal testing ground for identifying the political origins of constitutionalization, allowing us to disentangle them from other possible causes.

In this paper I examine the contribution of the main theories of constitutional transformation to the understanding of the causal mechanisms behind the EU’s constitutionalization process. The primary focus of this essay is not on 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 the extant theories of constitutional transformation into three broad categories, which I discuss in the essay’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 the byproduct and emblem of democratization, nation building, and an emphasis on human rights. Next, I examine functionalist theories of constitutional transformation that emphasize the systemic needs and structural and organic origins of constitutionalization. In the third part, I explore strategic approaches that focus on interests and incentives as the major driving force behind constitutionalization. Specifically, I argue that the current EU constitutionalization process can scarcely be attributed to politicians’ dedication to promoting European grandeur and unity, much less to the member states’ commitment to a progressive agenda of democracy, power sharing, social justice, or universal rights.3

1. Ideals: evolutionist theories

“In principle,” argues a recent article, “all modern constitutions begin with ‘We the People.’ ” 4 Arguably, the most common view of constitutionalization portrays the adoption of a new constitution as symbolic of the creation of a new political community or as the byproduct of political leaders’ benign attempts to enhance social integration in systemically divided polities. In contrast with its relatively successful legal and economic integration, the emerging EU entity has

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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 on the role of the ECJ in the process of European integration. The seminal account is Joseph 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 and Marlene Wind eds., Cambridge Univ. Press 2003).


long suffered from a lack of social integration. The transformation of a primarily economic community (the European Community) into a “thicker” supranational 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, which 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 the EU suffers from an endemic “democratic deficit” and is in dire need of popular legitimacy.5 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.6

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 essential motivating force behind the EU constitution, therefore, is not juridical but, rather, a demos-building aspiration—the EU constitution will serve an important symbolic, even emotional, integrative function and will enhance the social cohesiveness of the supranational European polity.7 In short, the recent EU constitutionalization process is viewed as a further step toward the formation of a thicker social and political union. While the social integration or 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. And it certainly does not alleviate concerns about a top-down approach to constructing collective identity.

The Ackerman view of constitutionalization depicts constitutional lawmaking 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 people’s will. Granted, some of the postauthoritarian constitutional revolutions of the last three decades (for example, in South Africa, Latin America, southern Europe, and postcommunist Europe) appear to fit this Ackermanian nation-building notion of constitutional lawmaking. However, it is difficult to see how this notion of constitutional transformation helps us understand the current attempt to adopt a constitution for Europe. This attempt has not emerged, by any stretch of the imagination, out of some


7 Dieter Grimm, address at the University of Toronto Constitutional Roundtable (Mar. 15, 2004).
revolutionary or otherwise memorable “constitutional moment.” Furthermore, the European constitutionalization process has evolved at a considerable distance from the will or interest of the member states’ citizenries; there is a general sense that political leaders and technocrats are cutting a deal, as it were, and trying to foist it on the public. This is further reflected in the record low voter turnout (44 percent), the big anti-incumbent vote, and the sizable support registered for Euroskeptics in the June 2004 elections to the European Parliament that took place just days prior to the adoption of the constitutional treaty. In short, the adoption of the proposed EU constitution seems to be anything but a reflection of Ackerman’s constitutional moment.

Another common evolutionist explanation for constitutional transformation portrays it as the inevitable side effect of a new and near-universal accent on human rights in the wake of World War II.8 According to the generic version of this canonical view, the sweeping worldwide convergence toward constitutionalism reflects modern democracies’ genuine precommitment to the entrenched, self-binding protection of basic rights and liberties. This commitment, it is thought, implies the attempt to secure vulnerable groups, individuals, beliefs, and ideas against 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 true democracy, namely, a democracy subscribing 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 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 a free and equal people might agree to impose on themselves voluntarily to protect their basic rights.9 Realizing the occasional temptation of popular majorities to adopt measures that infringe on the basic rights of

8 The most prominent exponent of this line of thought is Ronald Dworkin. See, e.g., RONALD DWORcIN, A BILL OF RIGHTS FOR BRITAIN 13–23 (1990); TAKING RIGHTS SERIOUSLY 147–149 (1978).

some, although not having an a priori indication of whose rights might be restricted by such measures, the 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 nonlegislative body, 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 precommitments against their own imperfections or harmful future desires and bind themselves to their initial agreement on the basic rules and rights that specify their sovereignty.

While providing a thoughtful and parsimonious explanation of the worldwide expansion of constitutionalism and judicial review over the past few decades, these evolutionist accounts of constitutional transformation do not provide a coherent explanation for the great variance in the scope and timing of constitutionalization as it has developed of late. Such idealist theories of constitutionalization fail to explain why new constitutional polities such as Canada (1982), Israel (1992), South Africa (1993–96), or the European Union in the early 2000s, for example, converged on the post–World War II thick notion of constitutional democracy precisely in the year they did. Granted, the nightmare of World War II still looms large in the collective European memory. However, if the current EU constitutionalization is fueled primarily by a collective reaction to the horrors of World War II, it is unclear why it has taken the proconstitution 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 have peaked in the early 2000s and not earlier or later. To this, one must add 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 been negligible thus far.

2. Necessities: Functionalist theories

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

In its most common version, the needs-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 trend toward 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 rules and decision-making processes to which all political actors must adhere. The persistence and stability of such a system, in turn, requires at least a semiautonomous, supposedly apolitical judiciary to serve as an impartial umpire in disputes concerning the scope and nature of the fundamental rules of the political game.\(^\text{10}\)

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 both multilayered federalist countries and emerging supranational polities such as the European Union.

The notion of the democratic imperative captures an important feature of the force behind the constitutional revolutions in the new democracies of Latin America and in the postcommunist world. However, the attempt to adopt an EU constitution has not been accompanied by, or resulted from, any transition to democracy or by any other fundamental changes in the EU’s basic organization or regime type. Since its inception, the EU has been a multiunit, 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 apparent urge of prominent EU member states to adopt a constitution precisely in the early 2000s.

Another version of the functionalist approach suggests that constitutionalization derives from a structural or organic political problem such as a weak, decentralized, or 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.\(^\text{11}\) Constitutionalization and political deference to the judiciary, more generally, are seen as effective ways of both overcoming political ungovernability 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 concomitant 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 (such as constitutional courts, for example).

In its consociational variant, the needs-based explanation of constitutional transformation emphasizes political necessity in the development of formal

\(^{10}\) See Martin Shapiro, The Success of Judicial Review and Democracy, in On Law, Politics, and Judicialization (Martin Shapiro & Alec Stone Sweet eds., Oxford Univ. Press 2002). According to this thesis, constitutional courts tend to be more powerful in polities requiring them to police federalism or separation-of-powers boundaries.

mechanisms, such as mutual veto and proportional representation, characterizing them as inevitable constitutional solutions allowing ethnically fragmented polities to function. According to this logic, in polities facing political polarization, constitutionalization is the only institutional mechanism that enables opposition groups to monitor distrusted politicians and decision makers. This model of constitutions—as effective power-sharing mechanisms—is often applied, with varying degrees of success, in understanding the constitutional pacts of multiethnic countries such as Belgium, Spain, Switzerland, and other similarly situated polities.

Another functionalist, needs-based systemic explanation emphasizes the general proliferation in levels of government, and the corresponding emergence of a wide variety of semiautonomous administrative and regulatory state agencies, as the main impetus behind the expansion of judicial power over the past few decades. According to this thesis, independent and active judiciaries armed with the powers of judicial review are necessary for the efficient monitoring of the ever-expanding administrative state. Moreover, the modern administrative state embodies a notion of government as an active policy maker, rather than as a passive adjudicator of conflicts. It therefore requires an active, policy-making judiciary.

Following this logic, some accounts of the rapid growth of supranational judicial review in Europe over the past few decades depict 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. This is particularly so in an era of converging economic markets with an accompanying need for international regulation and coordination. Some argue that successive treaties among the EU countries have created a mass of overlapping legal texts that 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 fifteen to twenty-five countries will make the EU’s bureaucratic project that much harder to manage. A two-thirds increase 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 recalcitrant countries will be enough to guarantee chaos.

12 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.


This argument centered on standardization stems from a broader view within international relations theory that sees governments’ pooling and delegation of sovereignty to international policy-making bodies as occasioned primarily by a quest for efficient solutions to complex coordination problems. According to this view, international institutions’ centralized technocratic functions are more efficient than those of decentralized governments in generating and processing information, economic planning, and coordination.\textsuperscript{15} A similar standardization rationale may explain what could be called the “incorporation” scenario of constitutional reform. According to this view, the constitutionalization in member states of supranational economic and political regimes (the EU, for example), as well as in states parties to transnational trade and monetary treaties, occurred through the incorporation of international and trans- or supranational legal standards into domestic law. The draft treaty, indeed, does 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 the 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 of the 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 accounts for the precise timing of constitutional reform. And, if we apply these theories of constitutional transformation to a concrete example, they consistently fail to explain why a specific polity reaches its most advanced stage of judicial progress at a specific moment and not, say, a decade earlier. Like the thesis based on the idea of “democratic proliferation,” arguments we might label “constitutionalization in the wake of World War II” and “constitutionalization as precommitment” similarly 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 twenty-first 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 argument founded on constitutionalization as pre-commitment 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 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 structurally ungovernable to a greater degree in the early 2000s than in the early 1990s, right after Maastricht.

\textsuperscript{15} ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT 7 (Cornell Univ. Press 1998).
for example. Furthermore, both evolutionist and 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 the institutional settings to serve their own agendas.

Another utilitarian approach—the theory of constitutional transformation derived from institutional economics—sees the development of constitutions and judicial review as mechanisms to mitigate systemic concerns regarding collective action, such as commitment, enforcement, and information problems. One such explanation regards the development of constitutions and independent judiciaries as an efficient institutional answer to the problem of “credible commitments.” Constitutionalization 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.

Even if constitutionalization does indeed mitigate problems of information, commitment, and enforcement, as suggested by this and related institutional-economics theories, these models cannot explain how prosperous democratic polities managed successfully to address collective action problems prior to the establishment of a constitution. Indeed, a successful monetary union that addresses the concern for credible commitments 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 quest for efficiency in 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 efficiency mechanisms at a particular point in time, and not much earlier. If a constitution is, indeed, an efficient and essential mechanism for credible commitments, why has it taken the EU authorities so long to adopt one?

3. Interests: Constitutionalization as “hegemony 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 apart from the concrete social, political, and economic struggles that shape a given political system. Indeed, constitutionalization and, more generally, the expansion of judicial power 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 the initiatives’ 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) decided to embark on a constitutional overhaul precisely in the year it did and not 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 the result of an attempt to maximize their gains or optimize their status or position within the structural constraints of the system in which they operate. Like other major political and legal institutions, constitutions produce differential distributive effects; they privilege some groups, policy preferences, and world-views over others. Other variables being equal, prominent political, economic, and judicial actors are, therefore, likely to favor the establishment of the institutional (and constitutional) structures most beneficial to them.

And fifth, because constitutions and constitutional courts hold no purse strings, have no independent enforcement power, yet limit, nonetheless, 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 clipping their own 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—or, at the least, not deteriorate—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 result, therefore, in support for judicial empowerment vis-à-vis legislatures.17

Observing variations in the degree of judicial independence among industrial democracies, Mark Ramseyer has developed 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.18 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 the courts (or the other semiautonomous regulatory agencies), the harder it will be for the succeeding government to reverse the policies of the incumbent government.19 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 may lose control of the legislature in each election.

Tom Ginsburg builds on this logic to provide a compelling account of the politics of constitution-making processes during periods of regime change and political transition. Just as insurance provides security in uncertain contracting environments, judicial review provides “insurance” against the risks that come with electoral defeat, thereby facilitating the transition to and consolidation of democracy. “Where constitutional designers believe 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.”

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 the 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. Or in our context, the greater the veto power 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 their anticipated 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 office to increase the central bank’s independence in order to limit the future options of their political opponents.

According to the second and thicker strategic explanation for constitutionalization—which I term the hegemony preservation thesis—constitutionalization

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21 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 id.; Pedro Magalhaes, The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies (unpublished Ph.D. dissertation, Ohio State University 2002).

is often driven by threatened political power holders who seek to entrench their worldviews and policy preferences against the growing influence of alternative worldviews, policy preferences, and interests in pertinent policy-making bodies. When facing possible threats to their hegemony, elites possessing 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 the institutional entrenchment of political privileges, hegemonic worldviews, and cultural propensities, 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 hegemony-preserving approach to constitutionalization.23 As I show elsewhere, understanding constitutionalization as a form of hegemony 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 was inevitable.24 Other examples include Canada and Israel. In the former, the adoption of the Charter of Rights and Freedoms in 1982 appears as part of a broader strategic response by the federalist, anglophone, and business-oriented elites to the growing threat of both Québec separatism and Canada’s rapidly changing demographics. In the latter, Israel’s 1992 adoption of two new Basic Laws protecting core rights and liberties, and the corresponding establishment of constitutional review in 1995 are, arguably, 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.

Similarly, judicial empowerment through constitutional reform in Mexico in 1994 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 PRI’s increasingly popular political opponents (the 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. Such logic may explain, as well, Britain’s enthusiastic support for the

23 See HIRSCHL, supra note 3 at 50–99, for a detailed discussion of these illustrations of the hegemony preservation thesis in action.

24 See Id. at 27–30, 89–99; HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION (Cambridge Univ. Press 2000).
entrenchment of property rights in the “independence constitutions” of newly self-governing African states (for example, Ghana in 1957, Nigeria in 1959, and Kenya in 1960), even though it was unwilling to incorporate the provisions of the European Convention on Human Rights into its own legal system (let alone 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, where they may well function as part of a broad strategy by secular, relatively cosmopolitan elites in these countries to tame antisecularist popular political forces. The hegemony preservation approach may also explain the key role the Turkish Constitutional Court has played in preserving the strictly secular nature of Turkey’s political system, by continuously outlawing antisecularist 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). Consider, too, the establishment of judicial review in Egypt in 1979 amid 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.25

A similar rationale for judicial empowerment at the supranational level is put forward by the intergovernmentalist thesis concerning the evolution of the ECJ.26 According to this argument, member states choose to create (and selectively adhere to the limits imposed by) supranational institutions primarily because these institutions help them both 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 have 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 of national governments (such as their 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 genuine impact in various areas of public policy, depending on the constellation of political forces in each.27

Along the same lines, other works suggest that in newly established democracies in post–World War II Europe, governments committed themselves to international human rights regimes (by supporting the European Court of


Human Rights, for example) as a way of locking in fundamental democratic practices in order to protect against future antidemocratic threats to domestic governance.\(^{28}\) 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 in the EU context, this rationale may explain the proconstitutional 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 secure their liberal, cosmopolitan worldviews against increasingly popular extreme right, nationalist, and racist political platforms.

The same reasoning may also 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); 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). Likewise, NAFTA’s regulatory precision, for example, may be viewed as “part of the Mexican government’s strategy to bind successor governments to its policies of economic openness.”\(^{29}\) Hence, “governments 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.”\(^{30}\) In other words, self-interested political incentives—rather than the altruistic considerations of political leaders or universal commitments to a morally elevated conception of human rights—provided the major impetus for various countries’ acceptance of binding supranational human rights and free-trade regimes.

In sum, under circumstances of increased uncertainty, 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 interests within the body politic outweigh the limits they have imposed on themselves.

4. 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 draft treaty may not be available for several months. At least ten member states, including Britain, Spain, and

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\(^{30}\) Moravcsik, *supra* note 28, at 220.
Poland, plan to hold referendums on the constitution. Other countries may follow suit. Though no definitive statements as to the origins of the EU constitution can be offered, I believe that the current EU constitutionalization process may be best understood strategically, as a type of hegemony-preserving 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 be seeking to entrench their privileges, worldviews, and policy preferences through constitutionalization. In other words, I argue that strategic constitutional innovators—hegemonic yet insecure political power holders (that is, important member state governments) in association with bureaucratic, economic, and judicial elites sharing compatible interests—have been the chief driving forces behind the EU constitutional reform.

The May 2004 enlargement poses a potential threat to established power holders within the EU. It means an unprecedented expansion, by two-thirds, in the number of member states (from fifteen to twenty-five) and an addition of more than 80 million new EU citizens. The postexpansion EU citizenry will include roughly 455 million people, over 20 percent more than the size of the preenlargement populace.31 The only analogies, in recent memory, to such a dramatic overnight expansion of a supranational polity are the incorporation of the former East Germany into unified Germany and the 20 percent increase in Israel’s population following the arrival of approximately one million immigrants from the former Soviet Union during the early 1990s. Such drastic expansion within the EU would seem to entail an even greater degree of social, cultural, and political heterogeneity. This kind of growth inevitably increases the level of political unpredictability and even possible instability. The sense of increasing uncertainty is further intensified by the suspicion that Central Europe still harbors an outmoded attachment to national sovereignty, as well as by a concern about the rather limited experience of the eight Central European accession countries with the prevalent Western combination 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

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

Core elements within the EU view the May 2004 enlargement as 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.” 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.”

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.”

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,


34 Id.

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 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 uncertainty 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 intergovernmental 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 toward 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 enthusiasts 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. They were represented on the convention floor, but not on the initial 12-person presidium that did the crucial work of drafting the text. 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.” Or in the words of Gerhard Schröder, Germany’s chancellor, “Enlargement and the constitution are two sides of the same coin.”

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 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 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 a transition period 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. “If they can’t support themselves, they will be put out of the country,” 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.

Claims that new constitution is designed to cope with European Union expansion are false. The Economist, Oct. 9, 2003.

Id.

EU Expansion: Immigrants refusing to work will be thrown out. Fin. Times (London), Feb. 4, 2004.
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.\(^\text{39}\) In short, suspicion and hostility toward the accession countries’ citizenry are bubbling under the surface.

The “hegemony 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 the 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 policy areas most affected by the transition to majority vote. At present, all

\(^{39}\) Agence France Press, Outline of EU enlargement restrictions planned by current members, Feb. 8, 2004. See also Information on the transitional rules governing the free movement of workers from, to and between the new member states at http://europa.eu.int/eures/main.jsp?lang=en&acro=free&step=0.
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 (such as corruption, tax evasion, money laundering, drug and women trafficking). 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 in its own right to sign treaties that bind all members.

The constitutional treaty also establishes a new voting system at the Council of Ministers, the putative “double majority,” under which an EU law will be passed if it wins the support of at least 55 percent of EU countries, whose combined population represents at least 65 percent of the total EU population. A blocking minority must come from four or more countries. This replaces the system agreed upon at the Nice 2000 summit, in which countries were awarded “weighted votes.” According to the Nice agreement, the “big four”—Germany, the United Kingdom, 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 percent under Nice to 18.2 percent) 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 percent 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. And move they did not.

However, these influential proconstitutionalization 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.

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. 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, 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 influ-
ental political power holders whose institutional room for political maneuvering
is likely to be curtailed by constitutionalization and the corresponding expansion
of supranational judicial power. Thus, the hegemony-preserving impulse of
powerful political stakeholders and ruling 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 con-
structed. 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,”43 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 com-
mittments 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 geopolitical and
macroeconomic benefits of enlargement without risking the embedded uncer-
tainty, 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.

43 Attributed to Lyndon B. Johnson, thirty-sixth president of the United States.