The Constitutionalization of the European Union

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1. When it all began: Constitutionalization and the Treaties of Rome

Constitutionalization has become one of the buzz-words in the study of the European Union (EU). Past years have seen a constant increase of references to constitutionalization in the academic literature and in political commentary. In the EU literature, constitutionalization has traditionally been employed to denote the process of European legal integration which has lead to a remarkable transformation of the EU replacing the traditional notion of a state-centered international organization with “a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of EC law.” (Haltern 2002: 2)¹ Hitherto, the political science and legal literatures have dedicated volumes to the question of constitutionalization qua legal integration by taking recourse to and refining theories of European integration, most notably intergouvernementalism and supranationalism/neofunctionalism.² However, constitutionalization is more than legal integration. The constitutions of liberal democratic polities encompass a set of core principles such as fundamental rights, the separation of powers and democracy. Form this perspective, the constitutionalization of the EU relates to all those processes through which these core principles are becoming embedded in the EU’s legal order. This article takes issue with precisely two constitutionalization processes: the development of representative parliamentary institutions (parliamentarization) and the codification of fundamental rights at the EU level (institutionalization of human rights).

Looking back half a century, the Treaties of Rome featured little with regard to parliamentary powers or human rights provisions. The embryonic European Parliament’s first and foremost role was still – akin to the ECSC Treaty – the supervision of the Communities supranational ‘executive’: the Commission. After the double-failure of the European Defense Community and the European Political Community in the mid-1950s and their respective attempts to promote constitutionalization (see Rittberger, 2006), strong supranational or federal-style institutions were all but en vogue by the time the Treaties of Rome were negotiated (see Küsters 1982: 198). Against this background, the six founding states of the EEC and Euratom endowed the European Parliament merely with a supervisory role vis-à-vis the Commission and refused to grant any budgetary or legislative competencies. Regarding the former, it was not until the Treaty of Luxembourg in 1970 that the European Parliament

¹ See, for example, the pioneering works by Stein (1981) and Weiler (1981).
² The battle between intergouvernementalists (see Moravcsík 1991, 1993, 1998; Garrett 1995, Garrett et al. 1998) who argue that legal integration broadly reflects the interests of the (large) member states and supranationalists/neofunctionalists (Burely and Mattli 1993, Alter 1998, Stone Sweet 2000, 2003) who argue that legal integration has progressed ‘behind the back’ of and even against the interests of the member states is still waging. Empirical evidence suggests however that the ‘winning formula’ is to be found with the supranationalists/neofunctionalists (see Stone Sweet and Brunell 1998, Stone Sweet 2000, 2003).
assigned more than a consultative role in the budgetary procedure. Concerning its legislative function, the Treaties of Rome envisaged a consultation procedure which obliged the member states to consult the European Parliament in certain policy areas, yet it took another thirty years – until the adoption of the Single European Act – that the so-called ‘cooperation procedure’ provided the European Parliament with ‘real’ legislative powers. How about the institutionalisation of human rights? The Treaties of Rome did not contain any general human rights provisions – let alone a “bill of human rights” – nor did they accord the supranational organs any competencies in this area. It was through the European Court of Justice that fundamental rights were evoked in its jurisprudence since the late sixties (Stone Sweet 2000). The recent past has seen the codification of fundamental rights in the Charter of Fundamental Rights and, most recently, in the Treaty establishing a Constitution for Europe.

Fifty years after the signing of the Treaties of Rome, both processes of constitutionalization – parliamentarization and the institutionalization of human rights – have thus progressed remarkably. Today, the European Parliament has “significant legislative and executive investiture/removal powers and all the trappings of a democratic parliament” (Hix et al. 2003: 191-192). Human rights are firmly embedded in the EU’s legal order. The task of this paper is to offer an explanation for these two striking developments. In the ensuing sections, we will present our theory and hypotheses to explain these constitutionalization processes. We will then demonstrate the plausibility of our theory by offering a two-staged empirical test. In a first step, we conduct a qualitative comparative analysis (QCA) employing a data-set of 66 cases of constitutionalization from 1951-2004. In a second step, we probe whether the causal processes identified by the QCA are at play in two cases studies about the empowerment of the European Parliament and the institutionalization of human rights.4

2. Liberal community, rhetorical action, and political spillover

Neo-functionalist expectations
In spite of the scant or almost invisible powers of the European Parliament as well as the non-existent human rights provisions in the Treaties of Rome, neo-functionalists, most notably Ernst Haas, famously pointed at the potential held by political elites in the new supranational institutions, such as the Commission’s forerunner – the High Authority – or the political

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3 The only exceptions are the provisions on nondiscrimination on the grounds of nationality and gender in Art. 69 ECSC Treaty and Art. 7 and 119 EEC Treaty. These provisions, however, are very much connected with market integration (equal pay and working conditions, nondiscrimination of foreign competitors).
4 This paper draws heavily on Rittberger and Schimmelfennig (2006, 2007) and Schimmelfennig et al. (2006).
parties in the Common Assembly to promote the European integration project by triggering political spillover processes. Haas argued that the new supranational political elites possessed the ability to persuade national political elites “to shift their loyalties, expectations and political activities” (Haas 1958: 16) towards the new central institutions: “If permitted to operate for any length of time, the national groups now compelled to funnel their aspirations through federal institutions may also be constrained to work within the ideological framework of those organs.” (Haas 1958: 19). For Haas, the political parties in the Common Assembly carried the potential to become “crucial carriers of political integration” (Haas 1958: 437; see also Scaliingi 1980). Given their sense of intra-party discipline and the prior commitment of most parliamentarians to further political integration, the perspectives and expectations of the vast majority of the Assembly’s members would “outgrow the boundaries of the national state as the referents of legislative action.” (Haas 1958: 438) In due course, Haas expected the main impetus of the Common Assembly for political integration to consist in the promotion of “political spillover”, the process whereby formerly national actors form transnational coalitions to generate new problem-solving perspectives which may even result in a shift of loyalties towards the new center (see Haas 1968: xxxiv).5

In sum, according to neo-functionalism, supranational constitutionalization would be explained as the result of political spill-over of functional integration. The socialization of individuals acting in the new supranational organizations, the increasing political activities of the Community, and its supposedly superior problem-solving capacity would induce elites to shift their political loyalties away from the nation-state and to increasingly provide the new center with the characteristics of constitutional statehood. Following Schmitter’s politicization hypothesis (1969: 166), one might also imagine this process as a conflictive one. As its functional scope and level increase, supranational integration will become more controversial, involve opposing interest groups and parties. Politicization would then result in a more assertive stance of the European Parliament and in an increase of its power, and it would promote the institutionalization of human rights in the EU.

As we know today, these expectations did not match with the realities of the integration process for decades to come. Empirical tests of the expectation of significant socialization proved disappointing (Pollack 1998). Whereas empirical studies generally found evidence of cognitive change – individuals involved in integrated decision-making processes

5 For Haas, the “significance to political integration … is the mere fact that the hundred-odd members of the Common Assembly developed into the European parliamentary elite, whose very existence and functioning in the nexus of High Authority, Council of Ministers and European integration issues has given it a unique outlook and original channels of communication for carrying out the expanded task of ‘parliamentary control’ …” (Haas 1958: 439-440)
became more interested in and knowledgeable about international organizations – they detected little in the way of positive affective change, especially if factors like self-selection, national and party affiliation had been controlled. Recent studies of socialization in EU organizations (Beyers 2005; Hooghe 2005; Scully 2005) also come to skeptical conclusions. Whereas the adoption of and support for supranational norms may indeed be strong, this cannot be explained by supranational socialization but is conditioned by domestic factors. The constructivist literature concurs in the finding that the EU-related identities and constitutional ideas of member states and member state parties not only differ strongly but also changed little over time (see Jachtenfuchs et al. 1998; Jachtenfuchs 2002; Marcussen et al. 1999; Wagner 1999).

Finally, the historical record contradicts the expectation of constitutionalization as a result of politicization. The main steps toward the increase of parliamentary powers and the institutionalization of human rights have been undertaken in the absence of public debate, societal mobilization, and interest group pressure. Indeed, there was conflict, but it was largely confined to conflict between governments and organizations.

We will therefore present an alternative explanation of constitutionalization. Whereas it also draws on the basic neofunctionalist mechanism of political spillover, it theorizes the process of spillover in a different way. In a nutshell, we argue that functional supranational integration has regularly undermined existing democratic and human rights institutions at the national level and thereby created a democratic legitimacy deficit of European integration. This legitimacy deficit triggered arguments, in which interested or committed actors drew on the shared liberal-democratic community norms in order to create normative pressure in favor of the constitutionalization of the EU.

Rhetorical action in a liberal international community

Any theoretical solution to the puzzle of EU constitutionalization therefore needs to explain why and how the EU has made progress toward parliamentarization and the institutionalization of human rights in spite of stable adverse or divergent member state attitudes and in the absence of learning and socialization effects conducive to constitutionalization. The solution we propose here is “strategic action in a community environment” (Schimmelfennig 2003: 159-163).

Like neo-functionalism (and also liberal intergovernmentalism) we start from the assumption that supranational integration begins with functional integration in areas of high interdependence and common interests. It is designed as an instrument to solve common
problems and to realize gains from international cooperation. Supranational organizations are established to help governments maximize these gains, reduce the transaction costs of international negotiations, and prevent them from defecting from cooperative agreements.

In addition, however, European integration is embedded in an international community. A community is most fundamentally based on a common ethos. The ethos refers to the constitutive values and norms that define the collective identity of the community – who “we” are, what we stand for, and how we differ from other communities. From the beginning, the member states of the European Communities have been part of the Western international community. The members of this community share a commitment to liberal-democratic values and norms: respect for individual liberties and civil rights, the rule of law, democracy, private property, and a market-based economy. Only states that base their political systems on these principles and reliably follow these values and norms are regarded as fully legitimate by the Western international community.

Such a community environment affects interaction and collective outcomes in the following ways:

1. It triggers arguments about the legitimacy of preferences and policies. Actors are able – and forced – to justify their preferences on the basis of the community ethos. They engage in “rhetorical action”, the strategic use of the community ethos. They choose ethos-based arguments to strengthen the legitimacy of their own goals against the claims and arguments of their opponents.

2. The community ethos is both a resource of support and a constraint that imposes costs on illegitimate actions. It adds legitimacy to and thus strengthens the bargaining power of those actors that pursue preferences in line with the community ethos.

3. Community actors are concerned about their image. This image does not only depend on how they are perceived to conform to the community ethos but also on whether they are perceived to argue credibly. Credibility is the single most important resource in arguing and depends on both impartiality and consistency (Elster 1992: 18-19). If inconsistency and partiality are publicly exposed and actors are caught using the ethos opportunistically, their credibility suffers. As a result, their future ability to successfully manipulate the standard of legitimacy will be reduced. Thus, community members whose preferences and actions violate the community ethos can be shamed and shunned into conformity with the community.
ethos and their argumentative commitments – even if these contradict their current policy preferences.

What do these theoretical ideas imply for the study of liberal-democratic constitutionalization in the EU? The results of functional integration will come under normative scrutiny with regard to liberal democratic values and norms. If functional integration undermines or violates liberal democratic standards such as parliamentary powers and human rights protection, a legitimacy deficit arises. Under this condition, actors interested in changing the distribution of power, or committed to democratic and human rights norms, are able to draw on the liberal democratic ethos of the community to argue in favor of parliamentarization and human rights protection at the EU level and to put effective pressure on reticent community members to make concessions to accommodate these normative concerns. Thus, even though parliamentarization and institutionalization of human rights at the EU level may not be functionally required or useful or may not reflect the interest of the dominant community actors, their collective identity as democratic states and governments and as members of a liberal international community obliges them in principle to conform to basic norms of liberal democracy.

The strength of these community effects varies according to several context conditions. First, salience is an essential condition (see Rittberger 2003, 2005). Constitutionalization becomes salient if a proposed or implemented step of EU integration is perceived to curb the competencies of national parliaments and to undermine national or other international human rights provisions. As will be demonstrated below, salience reliably triggers demands for constitutional change and, with a few exceptions, reliably results in progress in constitutionalization as well. By contrast, in the absence of salience, demands for the strengthening of the EP or EU human rights protection are either absent or unsuccessful.

In addition, coherence and consistency are helpful condition. Demands based on precedent, that is, for instance, earlier treaty provisions, common member state declarations, or informal practices (coherence), and – as in the case of human rights – international codifications of community norms elsewhere in the Western community (consistency), exert an additional compliance pull (Franck 1990: 49). Historical institutionalism and supranationalist integration theory stress the role of institutional or legal precedent in systematically structuring future decisions thereby producing institutional path-dependencies (see Pierson 1998, 2004) or argumentation frameworks (Shapiro and Stone Sweet 2002: 113-135). Accordingly, we expect that coherence to be more important in the more recent process of European integration than during its early phases.
Furthermore, we assume that shaming and shunning work better in public than behind closed doors. In a public setting, strategic actors feel more compelled to use impartial and consistent norm-conforming language and to behave accordingly. We therefore assume that the community ethos will have a stronger impact on constitutional negotiations and outcomes if they are public than in the usual format of Intergovernmental Conferences. The preceding discussion is summarized in the ‘constitutionalization hypothesis’: Decisions to empower the European Parliament and to institutionalize human rights in the EU are likely to occur

- the more a proposed step of EU integration is perceived to undermine the powers of national parliaments or human rights provisions thereby producing a “democratic deficit” exercising normative pressure on EU actors to redress the situation through strengthening constitutional rights at the EU (salience),
- the more legitimate a particular norm is (coherence and consistency),
- the more public the setting for constitutional decision-making is (publicity).

We speak of normative spillover in the sense that steps of functional supranational integration in the Community have regularly undermined national parliamentary competencies and the protection of human rights by either national institutions (constitutional courts) or international organizations (such as the Council of Europe), and the resulting legitimacy deficit has regularly triggered demands to redress the situation. As a consequence, parliamentary competencies and human rights protection at the EU level have been enhanced. This normative spillover, however, has not been the result of elite socialization at the top or political mobilization from below, but of normative argument among member state governments and organizations of the EU multi-level system.

3. Constitutionalization part I: Qualitative Comparative Analysis (QCA)
To provide a first test of our central hypothesis, we take recourse to the method of Qualitative Comparative Analysis (QCA) advanced by Charles Ragin (1987; 2000). Ragin defines the essence of qualitative research by its case-orientation. Qualitative analysis distinguishes itself from quantitative research not just – or not so much – by the (limited) number of cases or the (qualitative) kind of data and measurements but by its “holistic character”. Qualitative social researchers look at and compare “cases as wholes”: “cases are viewed as configurations – as combinations of characteristics” (Ragin 1987: 3). Qualitative research then seeks “to determine the different combinations of conditions associated with specific outcomes or processes.” (Ragin 1987: 14) As a consequence, qualitative research is less concerned with the number of cases than with the variety of conditional configurations. It does not work with
sampling, frequencies, and probabilities; its methods are logical rather than statistical. It is not interested in the general significance and explanatory power of individual variables but in their embeddedness in causal fields as either individually or jointly necessary and/or sufficient conditions (Ragin 1987: 15-16). This corresponds to the interest of this paper in discovering the conditions of constitutionalization in the EU.

Basic QCA requires the researcher to conceptualize variables dichotomously and use binary data (0/1). “Fuzzy-set” QCA (Ragin 2000) also works with values between 0 and 1 and thus allows for a more fine-grained and information-rich analysis. However, fuzzy-set QCA still requires the researcher to define a theoretically meaningful qualitative “breakpoint” and to interpret the intermediate values as degrees of membership in the 0 or 1 class of cases. For reasons of simplicity and clarity of interpretation, we therefore decided to eliminate theoretically less relevant information and to use a binary coding – at least in this first-cut analysis.

The data is arranged as a “truth table”. That is, each conditional configuration (combination of values of the independent variables) present in the data set is represented as one row together with the associated (“truth”) value of the dependent variable. Finally, the truth table is analyzed with procedures of combinatorial logic to arrive at a solution specifying a parsimonious combination of necessary and sufficient causes (Ragin 1987: 86-99).

Units of Analysis


In addition, we subdivide constitutionalization not only into the two processes of parliamentarization and institutionalization of human rights but further differentiate them according to four specific competencies and rights each. For parliamentarization, we distinguish legislative competencies, budgetary competencies, control of the Commission, and appointment of the Commission. With regard to the institutionalization of human rights, we distinguish civil and political rights, nondiscrimination, social rights, and minority rights.

6 Though not ratified, both, the Treaty establishing a European Defence Community and the Treaty establishing a Constitution for Europe were preceded by IGCs and adopted by the participating member state governments. Hence, they are included in the data set.
However, with the exception of the issue of parliamentary budgetary powers, we exclude the 1970 and 1975 IGCs because they were specifically planned to amend the competencies of the EP in this sphere. We thus arrive at 66 cases.\(^7\)

Conceptualizing the unit of analysis in this way entails a principled openness toward the outcome of our dependent variable “constitutionalization”. Constitutional decisions of the EU may be accompanied by (further) parliamentarization or institutionalization of human rights or they may not. Whereas many studies of European integration look at instances of constitutional change only, thus privileging the “positives” and neglecting the “negatives”, our data set includes as many negative as positive cases of constitutionalization (33 each).

**Variables and operationalization**

Our dependent variable is *constitutional change*. If constitutional decisions on the distribution of competencies and transfers of sovereignty are accompanied by a positive change in favor of parliamentarization and institutionalization of human rights, we code the outcome as “1”. “Positive change” can mean two things:

1. A move from a lower to a higher level of constitutionalization:
   a. from “no constitutionalization” to at least “declaratory constitutionalization” (official references to parliamentarization and human rights, recommendations to strengthen competencies);
   b. from “declaratory constitutionalization” to at least “weak constitutionalization” (non-binding rights and competencies);
   c. and from “weak” to “strong constitutionalization” (binding rights and competencies)

2. An significant extension of rights and competencies within each level of constitutionalization:
   a. At the levels of “declaratory” and “weak” constitutionalization: horizontal extension to new issues (additional human rights or additional parliamentary competencies);
   b. At the level of “strong constitutionalization”: horizontal extension to further issues and/or strengthening of obligation and delegation resulting in stronger EU parliamentary and human rights competencies.

In our analysis, we include four independent variables: salience, coherence, consistency and publicity.

\(^7\) For the parliamentarization process the count is 34 (3x8 + 1x10) and for institutionalization of human rights the count is 32 (4x8).
**Salience**

Constitutionalization becomes salient when a (planned) constitutional decision, which changes the distribution of competencies within the European multi-level system results (would result) in a reduction of previous (national or international) parliamentary competencies or human rights protection. For constitutionalization to be coded salient (1), such a reduction must also be perceived to be problematic by EU actors (see Rittberger 2005). We thus code salience as present if at least one EU actor brings up the problem and demands constitutional change. Salience disappears (0) after the institutionalization of parliamentary competencies and human rights at the EU level, provided that previous levels of parliamentary competencies and human rights protection are re-established.

**Coherence**

We code constitutional decisions as coherent if there exists a formal or informal institutional precedent within the EU (1) and incoherent if such a precedent is absent (0). Formal precedence is always present if there has been constitutional change at a previous IGC. Technically speaking, a value of 1 for constitutional change sets coherence to 1 for all subsequent constitutional decisions. In addition, informal precedence is established by codification between IGCs, e.g., through interinstitutional agreements that enhance the powers of the parliament or by ECJ rulings that establish the legal validity of human rights at the EU level. Theoretically, coherence adds normative power to attempts at constitutionalization and creates path-dependency. It can be used by rhetorical actors to support their claims for change in a pre-established direction.

**Consistency**

In contrast with coherence, consistency refers to the international institutionalization of the norms in question outside the EU (1). It is absent if there are no such international norms for a proposed or required constitutional change (0). The causal effect is assumed to be the same as for coherence but presumably weaker. Generally, codification is absent in the area of parliamentarization because there is no internationally codified norm requiring parliamentary competencies beyond consultation to be granted to international assemblies outside the EU. In contrast, it is mostly present for human rights. In this area, we interpret international codification narrowly and code it as “1” if a particular class of human rights has been codified by the Council of Europe in form of a binding convention, namely the ECHR of 1950.
(political rights and non-discrimination), the European Social Charter of 1961 (social rights) and the Framework Convention on National Minorities of 1995 (minority rights).

Publicity
At the structural level, publicity is a feature of the negotiating forum for constitutional decisions. In the EU, formal constitutional decisions are made in IGCs behind closed doors, that is, they are generally characterized by low publicity. The only distinction we can make at the structural level is that between regular IGCs (0) and IGCs that are preceded by convention-type preparatory conferences (1). The latter are conceived to involve a higher degree of publicity because conventions include other actors besides the representatives of member-state governments and public proceedings. IGCs following conventions are assumed theoretically to increase the pressure on actors to use and respond consistently to norm-based arguments, because actors making their arguments in a public setting are more likely to be rhetorically entrapped by the norm-based arguments and conclusions of the conventions. In the parliamentarization case, the only IGC preceded by a convention was the 2003–2004 IGC on the constitutional treaty; for human rights, the Nice IGC of 2000 is an additional instance (preceded by the Convention, which drew up the Charter of Fundamental Rights).

Analysis
The “truth table” displayed as Table 1 summarizes the conditional configurations present in the data.8

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8 To analyze the data we used fs/QCA 1.4 software (Ragin et al. 2003) which can be downloaded at <www.fsqca.com>.
Table 1  Truth table

<table>
<thead>
<tr>
<th>Salience</th>
<th>Coherence</th>
<th>Consistency</th>
<th>Publicity</th>
<th>constitutional change</th>
<th>N (66)</th>
<th>Cases</th>
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</tbody>
</table>

The truth table represents 13 of the 16 (= 2^4) possible configurations. That is, there are only three logically possible configurations for which we do not have empirical outcome observations (rows 5, 7, and 15). The absent configurations are called “remainders”. QCA can deal in different ways with these remainders depending on the goal of the analysis. In order to maximize parsimony, remainders can be used as potential simplifying assumptions in the logical minimization of conditions. The truth table also shows three configurations as contradictory, that is, the same configuration of conditions leads to constitutional change in some cases and no change in others (see rows 4, 8 and 12 with “1/0” or “0/1” outcomes). In contrast to a probabilistic statistical analysis, a deterministic logical analysis cannot incorporate such contradictory results. However, the evidence points overwhelmingly in one direction, and the contradictions can be reduced to three cases of Commission appointment (CA52, CA86 and CA97). There seems to be something particular about this issue that requires careful analysis. For the moment, however, we exclude the three contradictions from the analysis to obtain a general picture.
The salience of salience

With this caveat, the parsimonious solution produced by QCA for the presence of constitutionalization is “SALIENCE or (COHERENCE and CONSISTENCY and PUBLICITY).” That is, constitutional change has occurred either whenever the issue was salient (there was a perceived legitimacy deficit) or, in the absence of salience, when all other conditions were jointly present.

This solution offers general support for the constitutionalization hypothesis. All conditions which we expected to be causally related with constitutional change appear to be relevant and all show into the expected direction: However, salience clearly stands out. According to the parsimonious solution, salience is a necessary and sufficient condition of constitutional change in 61 out of 66 cases. Constitutional change even occurred when salience was present in the absence of all other theoretically postulated conditions (see Row 8). Conversely, whenever salience was absent, usually no (further) parliamentarization or institutionalization of human rights occurred. As a cross-check, we reran the analysis for the negative outcome, the absence of constitutional change. Here, the solution is “(salience and publicity) or (salience and COHERENCE and consistency) or (salience and coherence and CONSISTENCY)”. The negative analysis generally confirms the importance of salience because the absence of salience is a necessary condition for the absence of constitutional change in all alternative paths to non-constitutionalization and produces a negative outcome independently of coherence and consistency.

Time-dependence?

If – in addition to salience –coherence is a relevant condition of constitutionalization, it is plausible to assume that it will be more relevant in the later stages of European integration, that is, after institutional precedent has been established. We therefore subdivided our cases into two groups, one covering all early constitutional decisions before 1986, and the other comprising the more recent decisions starting with the 1986 SEA. The results confirm our assumption. The time-dependent analysis separates the two main solutions we arrived at for the time-independent analysis. The (conservative) solution for the early cases is “(SALIENCE and consistency and publicity) or (SALIENCE and coherence and publicity)”. By contrast, “SALIENCE and COHERENCE” appears for the time period between 1986 and 2004. The other configurations of constitutionalization in this time period were “(COHERENCE and CONSISTENCY and PUBLICITY) or (SALIENCE and CONSISTENCY and publicity).”

\(^9\) In QCA notation, upper-case letters indicate the presence of a condition, whereas lower-case letters indicate the absence of a condition.
Whereas coherence and consistency are negative conditions in the early integration period, they are positive in the second integration phase.

**Issue-specificity?**

We also checked our findings for issue-specificity. Do parliamentarization and institutionalization of human rights follow a common logic or does constitutionalization in these two issue-areas depend on different (sets of) conditions? The solution for the human rights issues is “((SALIENCE and CONSISTENCY and publicity) or (COHERENCE and CONSISTENCY and PUBLICITY))” with the first configuration accounting for a far greater number of human rights cases (9 to 2). The solution for the parliamentarization issues is “((SALIENCE and consistency and publicity) or (SALIENCE and COHERENCE and consistency))”. We find that issue-specificity is low. Whereas salience and coherence are relevant conditions of constitutionalization in both issue-areas, the only major issue-specific difference is the relevance of consistency for the institutionalization of human rights and its general absence in the positive parliamentarization cases. That is, whereas consistency may help to produce constitutional change when it is present, its absence does not prevent constitutionalization.

**4. Constitutionalization part II: Case studies**

The QCA has enabled us to analyze the conditions and conditional configurations of constitutionalization in the EU for a large number of cases covering the entire history of European integration. QCA, however, follows the congruence method of comparative analysis and does not give us direct insight into the political process of constitutionalization. To further substantiate the results, the ensuing case studies conduct process-tracing analyses in order to determine, whether there really was a clear causal process linking salience, coherence, consistency and constitutional change.

*Extending the legislative powers of the European Parliament*

Under the so-called consultation procedure which was introduced in 1957 with the Treaty establishing the EEC, the European Parliament merely played a consultative role in the legislative decision-making process which was dominated by member state governments in the Council of Ministers who decided upon a Commission proposal. Even though the application of qualified majority voting (QMV) in the Council was envisaged after a transition period following the entry into force of the Rome Treaties, the ‘empty chair crisis’ and the
subsequent ‘Luxembourg Compromise’ stalled the de facto application of QMV for a long time to come. As we will see, this also had a sustained effect on the legislative powers of the European Parliament. It took until the adoption of the SEA, that the so-called ‘cooperation procedure’ was adopted which, in turn, led to a remarkable increase in the powers of the European Parliament, making it more difficult for the Council to overturn parliamentary amendments than to accept them (see Tsebelis 1994). How can we explain this increase in the legislative powers of the European Parliament?

We have argued that functional integration will come under normative scrutiny when it is perceived to undermine or violate liberal democratic standards such as parliamentary power and human rights protection. In this context, salience is crucial condition to advance constitutionalization. We expect that political actors express concerns about and make reference to the discrepancy between liberal-democratic constitutional standards (“ought”) and the challenges functional integration is expected to pose with regard to upholding these standards (“is”). To illustrate the plausibility of the salience-proposition, we will shed light on the arguments that were advanced in the context of the introduction of ‘cooperation procedure’.

The introduction of QMV in the Council and its application to virtually all matters relating to the creation of an internal market was one of the quintessential features of the SEA. All national governments came to the conclusion that this large extent of pooling sovereignty was acceptable or even desirable given the objective to pass almost 300 pieces of Community legislation until the end of 1992, the target date for the completion of the internal market. In the run up to the IGC and during the negotiations, several member state governments responded to the introduction of QMV by voicing concerns about the increasing marginalization of national parliaments in their capacity to exercise control and influence over EU decision-making. With the introduction of QMV, so the argument, ever more policy-decisions would be taken at the EU level by-passing national parliaments, thereby triggering a democratic legitimacy deficit.

Although certain national governments, members of national parliaments and of the European Parliament have, throughout the 1980s, consistently criticised that the Community suffered from a ‘democratic deficit’ (see Corbett, 1998), it was the potential impact of the introduction of QMV and the ensuing prospect for a reform of the EEC Treaty, that made the prospect of an empowerment of the European Parliament in the legislative domain increasingly likely. There is ample evidence that political elites perceived parliamentarization be salient. For example, at the European Council summit meeting in Fontainebleau in June
1984, an *ad hoc committee* composed of personalities appointed by the governments of the Member States was created to discuss the pressing issues of deeper cooperation and institutional reform (the so-called ‘Dooge Committee’). In its final report to the Brussels European Council in late March 1985, the Dooge Committee advocated, *inter alia*, the creation of a ‘fully integrated internal market’ and simultaneous institutional reform in order to achieve the policy goals set out by the report. A plea was made for the provision of more ‘efficient’ but also for more ‘democratic’ institutions. A majority of Member State representatives wanted the European Parliament to play a more prominent role in the Community legislative process once the Member States opted for the QMV.\(^\text{10}\)

Parliamentary debates and resolutions in many of the national parliaments equally reflected the awareness that the introduction of QMV would exacerbate the democratic legitimacy deficit.\(^\text{11}\) In France, for example, Charles Josselin, a Socialist MP said before the Assemblée Nationale that “the process embarked upon will lead ... to a considerable reduction of the competences of national parliaments in almost all domains”\(^\text{12}\), and in a similar vein, the centre-right politician Adrien Zeller (UDF – Union pour la démocratie française) emphasised that “the only means to re-establish democratic control of such decisions [which evade national parliamentary control] is to endow the European Parliament with the means not just to *influence* Community decisions but also to *legitimise* them by its votes.”\(^\text{13}\) In Germany, the governing Christian Democrats (CDU/CSU) and Liberals (FDP) as well as the opposition Social Democrats (SPD) were very explicit about the challenges further pooling posed for *procedural* legitimacy. For example, the chair of the EC Committee, Renate Hellwig (CDU), criticised the executive dominance of Community decision-making and concluded that to reduce the ‘legitimacy deficit’ the legislative powers of the European Parliament had to be increased.\(^\text{14}\)

We argue furthermore that the argumentative link which was established between the introduction of QMV and the demand to enhance the European Parliament’s legislative powers also informed subsequent Treaty reforms. Following the SEA, further rounds of integration produced extensions of the application of QMV to new policy areas. Proponents of parliamentarization thus employed the argument which linked the extension of QMV to parliamentary powers as precedent (*coherence*). This simple formula became a guiding

\(^\text{10}\) See Agence Europe, 16 March 1985. The report reflects a ‘majority opinion’ and reveals that the Danish, Greek and UK representatives entered reservations to various sections of the report, the question of the democratisation of Community decision-making.

\(^\text{11}\) See Corbett (1998: 185-194) for an analysis of the debates in national parliaments prior to the SEA.


\(^\text{13}\) Journal Officiel, Assemblée Nationale, debate of 11 June 1985: 1613 (author’s translation, emphasis added).

\(^\text{14}\) Deutscher Bundestag, debate of 27 June 1985: 11111.
principle for future instances of Treaty reform since the extension of QMV to new policy areas was always an issue which was placed on the agendas of subsequent IGCs. In the period preceding the adoption of the Maastricht Treaty, government representatives and major political parties in voiced the demand that any further extension of QMV must be accompanied by granting the EP with legislative powers (see, for instance, Corbett 1992; Rittberger 2005). Following Maastricht, the IGCs leading to the adoption of the Amsterdam and Nice Treaties also invoked the ‘Council QMV-EP participation’-formula. During the Amsterdam IGC, the Benelux governments issued a memorandum in which they explicitly acknowledged the link between the application of QMV and legislative co-decision for the European Parliament (see European Parliament 1996: 20). Similarly, a Spanish government document on the IGC foresaw that “there will be considerable scope for progress through an extension of the field of application of the codecision procedure; this concept should … logically be viewed in close relation to majority decision-making.” (European Parliament 1996: 47) During the Nice IGC, the question of parliamentary involvement in QMV-based legislative decision-making procedures (co-decision) was a lesser concern. The Treaty provided for six new cases of co-decision. Yet, among the new cases under QMV, three legislative ones remained outside the co-decision procedure: financial regulations, internal measures for the implementation of cooperation agreements, as well as the Structural Funds and the Cohesion Fund. Since some member states consider these policies to be particularly ‘sensitive’ on account of their major budgetary implications, the call for co-decision in these areas was resisted and the EP bemoaned that “in refusing even to consider switching matters already subject to qualified-majority voting to the codecision procedure, the [IGC] was rejecting a basic institutional principle on which significant progress had been made at Amsterdam: as a general rule, codecision should accompany qualified-majority voting in matters of a legislative nature.” (European Parliament 2001: 28) Following the European Council meeting at Laeken and the establishment of the European Convention, a working group on ‘Simplification’ was instituted facing the twin objective of making the European system of governance more transparent and more comprehensible.15 The report issued by the working group stipulated that the legislative co-decision procedure should “become the general rule for the adoption of legislative acts.”16 The Draft Treaty establishing a Constitution for Europe (DTC) and the ensuing IGC which resulted in the signing of the Treaty establishing a Constitution for Europe (TCE) implemented the working group’s recommendation: Article I-34(1) TCE stipulates that what was hitherto known as the co-

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15 See European Convention, CONV 424/02.
16 See European Convention, CONV 424/02, p. 15.
decision procedure becomes the ‘ordinary legislative procedure’. The logic inherent in the ‘Council QMV-EP participation’-formula had thus not only gained broad acceptance in the post SEA-era. Some commentators have even gone so far as to label this formula a *technical* formula. This label strips the formula of its potential political and normative character and gives credence to the interpretation that the link between Council decision-making by QMV and legislative participation by the European Parliament is a ‘natural’ one and hence not (or not any more) politically or normatively contested (see Norman 2003: 102).

The presence of *salience* and *coherence* as conditions conducive for constitutionalization suggest that parliamentarization was driven by the mechanism of *rhetorical action*. We have argued that rhetorical action, the strategic use of norm-based arguments, helps proponents of constitutionalization to rhetorically ‘entrap’ recalcitrant political actors and ‘shame’ them into compliance with proposed steps of constitutionalization. We have shown in the previous paragraphs that political actors supporting further constitutionalization have made ample use of salience- and coherence-based arguments. Were these arguments effective in making recalcitrant political actors comply with proposal to further constitutionalization? We illustrate the relevance of rhetorical action for constitutialization again with reference to the SEA and the extension of the European Parliament’s legislative powers.

During the course of the IGC leading towards the adoption of the SEA, the member state governments were well aware of the possibility that the legislative empowerment of the European Parliament would run to the detriment of their own decision-making influence in the Council. The British, French but also the German governments were not enthused by this prospect even though – as we shown in the preceding sections – they all shared the interpretation that the application of QMV undermined domestic parliamentary prerogatives. Even though the governments of the ‘Big Three’ were privately not committed to push strongly for the legislative empowerment of the European Parliament, how can we explain the victory of the pro-constitutionalization camp, represented most notably by small member states – such as the Netherlands – or medium-sized ones – such as Italy?

One central indicator for the normative strength of the salience argument is the fact that none of the governments openly launched an argumentative attack against the participation of the European Parliament in the legislative process. Arguments that appealed to material self-interest (‘keeping the power in the Council’) were not voiced publicly. The only argument that was presented to fend off attempts to endow the European Parliament with legislative powers pointed to the potential efficiency-harming effects of legislative...
empowering. Since all governments had subscribed to create the internal market by improving and speeding up Community decision-making through the use of QMV, it was evident to all that a more influential Parliament would certainly not improve the efficiency of the legislative decision-making process. The fiercest opponents of constitutionalization, the British and Danish governments, insisted that an increase of the legislative powers of the European Parliament would run the risk of complicating or even paralyzing the legislative decision-making process and would thus counteract the overarching objective of creating the internal market (De Ruyt 1989: 75). Against this background, how could the pro-constitutionalization camp ‘convince’ the recalcitrant member states to agree to the EP’s legislative empowerment?

Since the outset of IGC, the British government had pursued a line of argumentation stressing that the main criterion for institutional reform was the efficiency of any new decision-making procedure.\(^\text{17}\) The British but also the Danish government argued that any involvement of the European Parliament must not be detrimental to decision-making efficiency and to achieving substantive policy goals associated with the realization of the internal market. This line of reasoning and arguing, however, left a door open to the pro-constitutionalization camp, or “creative maximalist draughtsmen” (Budden 1994: 327). As long as the recalcitrant member state governments could be presented with a proposal that did not compound the efficiency of the new decision-making procedure and assured that the member states kept the ‘last word’, proposals to empower the European Parliament would have a chance of success. A proposal by the German delegation – acting under pressure from domestic MPs and MEPs – which foresaw a conciliation committee between Council and EP\(^\text{18}\) was quickly hailed by opponents of constitutionalization to fail the ‘efficiency test’ and was scrapped quickly. However, as Budden (1994: 333) put it, the British government’s strategy to play the efficiency-card “left the Government potentially exposed to discovery of a … procedure which met the [efficiency] criterion.” And so it came. “The introduction of a Council “common position” and second EP reading marked a breakthrough … Drawing on French ideas to link the Council’s decision-making rule to the EP’s vote, the Presidency introduced a formal procedure offering considerable influence to the EP, while protecting … Council prerogatives.” (Budden 1994: 338) Having fallen into the efficiency rhetoric-trap, the British delegation lived grudgingly with the proposal of the so-called cooperation procedure which effectively gave the European Parliament a substantial role in the legislative process: At second reading stage, Parliament could pass amendments which (if accepted by the Commission) could be adopted by the member state governments by QMV (but amended only

\(^{17}\) Agence Europe, 19 June 1985.

\(^{18}\) Agence Europe, 27 September 1985.
by unanimity). In the inter-state arena, the British government was thus effectively silenced and refrained from advancing new proposals to counter-act parliamentary involvement. To the domestic audience, the British government attempted to sell the co-operation procedure as being both power-neutral as well as efficiency-neutral, claiming that the Council kept the ‘last word’. In his address to the House of Commons, Foreign and Commonwealth Secretary Geoffrey Howe – deliberately or unknowingly – misrepresented the implications of the new cooperation procedure for the Council’s capacity to affect legislative outcomes. He claimed that “the [European] Parliament can in certain circumstances change the Council’s voting provisions back from qualified majority to unanimity. In no circumstances can it change them the other way.”\(^{19}\) Howe thus talked into existence a ‘protective’ mechanism for the member states which, in fact, did not exist. The exact opposite was the case. Unanimity, as employed by Howe, meant that the Council could only reject or change amendments tabled by the European Parliament unanimously whereas the Council ‘only’ needed QMV to accept them. This ‘illusion’ of unanimity thus worked to the detriment of the Council and not to its advantage. And it was a crucial step to a parliamentary Europe.

*The institutionalization of human rights*

The initial steps of institutionalizing human rights in the EC were taken by the European Court of Justice (ECJ) in the early 1970s when it established human rights as general principles of Community law, referred to the ECHR and the constitutional traditions of the member states, and claimed the competence to review the conformity of Community and member state acts with these human rights norms. It was only in the Preamble of the SEA of 1986 that human rights featured in an intergovernmental treaty of the Community for the first time and in a purely declaratory manner.

The ECJ did not act as a champion of individual constitutional rights from the beginning. In its judgment on the *Stork* case (4 February 1959), the Court refused explicitly to “rule on provisions of national law” and maintained that the High Authority was “not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of national constitutional law.”\(^{20}\) In the *Geitling* case (15 July 1960), it reiterated that “it is not the function of the Court to ensure respect for national law in force in a member state, and this is true even of constitutional laws.”\(^{21}\) The ECJ only changed its stance in its *Stauder* and *Internationale Handelsgesellschaft* decisions when its claim for

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\(^{19}\) Hansard, House of Commons, 23 April 1986: 322.

\(^{20}\) ECJ, *Stork v High Authority*, Case 1/58.

\(^{21}\) ECJ, Präsident, Geitling, Mausegatt, and Nold v High Authority, Joined Cases 36-38/59 and 40/59.
the supremacy of Community law was challenged by German courts (Craig and De Búrca 2003: 319).

In its two landmark decisions *Van Gend en Loos* (5 February 1963) and *Costa* (15 July 1964), the ECJ had claimed that EC law neither required a formal transposition into national law by national political institutions (direct effect of EC law), nor could it be overridden by subsequent domestic law (supremacy of EC law). According to the ECJ, the EC would not be able to attain its central goal of creating a common market otherwise. The claim for supremacy was thus based on *efficiency*:

“The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures lest the functioning of the community system should be impeded and the achievement of the aims of the Treaty placed in peril. Consequently, conflicts between the rules of the community and national rules must be resolved in applying the principle that community law takes precedence.”

Supremacy not only applied to ordinary domestic law but also to national constitutional law and the individual rights and freedoms protected under it. National constitutional review was effectively suspended for issues regulated by EC law. At the same time, there was no EC system of human rights protection. As a result, the doctrines of direct effect and supremacy threatened to reduce the level of human rights protection in the Community (*salience*). This gap could be used by national courts to challenge the supremacy of EC law and, by extension, of ECJ jurisdiction.

This challenge came when, in the *Stauder* case, the *Verwaltungsgericht* Stuttgart asked the ECJ about the compatibility “with the general principles of community law in force” of a decision by the European Commission that required recipients of surplus butter under welfare schemes to reveal their identity to the seller. If the ECJ was to counter this challenge, it needed to close the legitimacy gap and demonstrate that it was able to protect human rights at least as well as national constitutional courts. In its judgment of 12 November 1969, the ECJ offered a liberal interpretation of the Commission decision and concluded that “interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of community law and protected by the

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22 ECJ, Wilhelm v Bundeskartellamt, Case 14/68.
Court.’\(^{23}\) In other words, the ECJ used this preliminary ruling to assert two things: that human rights were indeed, however implicitly, part of the EC legal system and that they were judicially protected within this system. \textit{Stauder} thus marked the Court’s first attempt to establish itself as a constitutional court protecting constitutional rights on par with national constitutional courts, thereby countering the salience arguments of national courts, protecting the autonomy of the Community legal system from national constitutional review, and adding legitimacy to the efficacy-based claim for the supremacy of EC law.

In subsequent judgments, the ECJ pursued this argumentative strategy further and refined the doctrine. The \textit{Internationale Handelsgesellschaft} case had its roots in another referral to the ECJ by a German administrative court. The \textit{Verwaltungsgericht} Frankfurt argued the case for salience much more strongly than the Stuttgart court by putting forward that EC provisions were “contrary to certain structural principles of national constitutional law which must be protected within the framework of community law, with the result that the primacy of supranational law must yield before the principles of the German Basic Law.”\(^{24}\)

In its decision of 17 December 1970, the Court conceded that such community measures needed to be subject to constitutional human rights review in principle (thus accepting human rights as higher-order norms). However, it rejected the argument for national constitutional review and insisted that this review must be conducted within the legal system of the Community:

> “[A]n examination should be made as to whether or not any analogous guarantee inherent in community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community.”\(^{25}\)

In this ruling, for the first time, the ECJ introduced the “constitutional traditions common to the member states”, a general resonance argument, as a second legal basis besides the “general principles of community law” invoked in \textit{Stauder}. This was another attempt to persuade national courts that the ECJ used their standards of human rights protection, there

\(^{23}\) ECJ, Stauder v City of Ulm, Case 29/69.
\(^{24}\) ECJ, Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide- und Futtermittel, Case 11/70.
\(^{25}\) Ibid.
was no salient human rights deficit, and claims for the supremacy of national constitutional law were unfounded. At the same time, however, the ECJ was cautious enough not to tie itself formally to any national human rights catalog or system of human rights protection. It only declared to be “inspired by the constitutional traditions”. This wording allowed the ECJ to remain autonomous in its interpretation and application of national constitutional rules and rights.

The Frankfurt administrative court did not accept this preliminary ruling and referred the case to the FCC. In the meantime, the ECJ added another “source of inspiration” to its human rights jurisdiction in its Nold decision of 14 May 1974. The Nold company asserted that trading rules authorized by the Commission constituted an infringement of its fundamental right to property “as well as its right to the free pursuit of business activity, as protected by the Grundgesetz of the Federal Republic of Germany and by the constitutions of the other member states and various international treaties”, including the ECHR. The ECJ countered this move by including “international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories” among the “guidelines” which it would follow “within the framework of community law”. It thus sought to establish consistency for its human rights protection and thereby to enhance its legitimacy. The general strategy of the ECJ was to argue that all human rights otherwise observed by the member states and enforced by national and international systems of human rights protection would also be protected in the EC legal system. Hence, the supremacy of EC law and ECJ decisions could not be challenged on the grounds of salience.

For the time being, however, the FCC did not accept this conclusion. Two weeks after Nold, on 29 May 1974, it issued its ruling on the referral of the Internationale Handelsgesellschaft case by the Frankfurt administrative court. Although it found no violation of German constitutional rights in this particular case, it used the occasion to make the general statement that, “as long as the integration process has not progressed so far that Community law also contains an explicit catalog of fundamental rights, passed by a Parliament, valid and equivalent to the catalog of fundamental rights of the Basic Law”, national courts would have the right and, indeed, the obligation to refer the case to the FCC for constitutional review if they deemed the preliminary ruling of the ECJ to collide with fundamental rights as protected by the Basic Law. In the explanation of its ruling, the FCC rejected the “supremacy” of EC law as a general principle and limited the direct effect of EC law to those provisions that did

26 ECJ, Nold v Commission, Case 4/73.
27 Ibid.
28 Bundesverfassungsgericht, Solange I, BVerfGE 37, 271, authors’ translation.
not encroach upon essential elements of constitutional structure – in particular the Basic Law’s catalog of fundamental rights.

Yet the FCC’s claim of supremacy for national constitutional rights and review was conditional, not categorical. Its reservations were based on the provisional state of the integration process at the time and on higher thresholds of legitimacy than those proposed by the ECJ. In the opinion of the FCC, the “admittedly so far rights-friendly jurisdiction” of the ECJ was insufficient but an institutionalization of human rights and democracy similar to that at the national level – including a democratically elected parliament with full legislative powers and a codified human rights catalogue – would eliminate the Court’s reservations.

The FCC thus remained within the community-based argumentative framework and shared the effective protection of constitutional human rights as the community’s standard of legitimacy. However, on the basis of insufficient democratic legitimacy and legal codification, it contested the ECJ’s argument that the level of human rights protection in the EC legal system was sufficient to justify the autonomy let alone the supremacy of EC law. At the same time, however, the FCC’s decision partially transformed the controversy about supremacy into a positive competition for human rights standards and gave the supranational institutionalization of human rights further impetus. If the Community was to strengthen the status of its legal order, it would have to progress further towards legitimate and legalized human rights protection.

First of all, the ECJ persisted on its path of defending the supremacy of Community law by linking it to human rights protection. Its judgments neither referred to the FCC’s Solange I decision directly, nor did they change in its aftermath. Starting with Nold, the ECJ also made increasingly detailed use of the European Convention to imbue its case law with legitimacy. In the absence of any internal EC norms it could draw upon (coherence), it had to opt for consistency. Consistency with the ECHR had two strategic advantages for the ECJ. First, it was a single human rights catalogue that was signed and ratified by all member states of the EC.29 It was thus not only highly legitimate but also easier to use than the constitutional traditions of the member states, which required a comparative analysis of national constitutional provisions. In addition, it was beyond the purview of national constitutional courts. However, the Court could not do anything on its own to meet the higher thresholds of legitimacy and legalization claimed by the FCC in 1974. For that, it required the assistance of other Community actors.

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29 France was the last member state to ratify the Convention in May 1974.
On 5 April 1977, the European Parliament, the Council, and the Commission published a Joint Declaration “concerning the protection of fundamental rights”, in which they “stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms” and vowed to respect these rights “in the exercise of their power and in pursuance of the aims of the European Communities”. In the preamble to Declaration, the three Community organs explicitly mention the Court’s recognition that the law of the Community “comprises, over and above the rules embodied in the treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based.” 30 In their 1978 “Declaration on Democracy”, the heads of state and government joined in the European Council aligned themselves with the interinstitutional Declaration. In the Preamble to the Single European Act of 1986, the member states then proclaimed their determination “to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.” 31 The transfer of case law to treaty law via political declarations further legalized and legitimized the ECJ’s rulings and strengthened their democratic legitimacy. The ECJ therefore regularly referred to the 1977 Declaration and, later, the Treaty law to give higher legitimacy to exactly those case law decisions that had inspired the Declaration and the Treaties in the first place.

How did the FCC react to these developments? In its Solange II decision of 22 October 1986, the FCC ruled that “as long as the European Communities, in particular the jurisdiction of the Court of Justice of the Communities, generally guarantee an effective protection of fundamental rights … which is equivalent in principle to the protection of fundamental rights required as indispensable by the Basic Law … the Federal Constitutional Court will cease to exercise its jurisdiction on the applicability of secondary Community law … and to review the compatibility of this law with the fundamental rights of the Basic Law”. 32 This decision was still far from an unconditional acceptance of the ECJ’s supremacy but, for all practical purposes, the FCC gave up its claim that ECJ decisions needed to be reviewed for their compatibility with the national constitution. The FCC now conceded that

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32 Bundesverfassungsgericht, Solange II, BVerfGE 73, 339, authors’ translation.
the institutionalization of human rights in the EU had progressed far enough for the Court to withdraw its reservations.

In the explanation of its decision, the FCC accepted the ECJ’s functional, efficiency-based reasoning that the ECJ’s interpretation of Community law had to be binding for national law and national courts in the interest of a unified application of the law that was indispensable in a common market. However, it reiterated its position that Community law must not undermine the constitutive structures of the national constitutional order including the fundamental rights it guarantees. Consistent with Solange I, the FCC did not claim that these fundamental rights had to be protected by national courts – if an equivalent and effective protection was guaranteed elsewhere. In contrast with its 1974 decision, however, in 1986 it came to the conclusion that, “in the meantime, there has emerged a degree of fundamental rights protection in the jurisdiction of the European Communities that is, in principle, equivalent to the fundamental rights standard of the Basic Law with regard to its conception, content, and effectiveness.” According to the FCC, “all major organs of the Community … have committed themselves in a legally relevant way to the respect for human rights in the exercise of their competences and in the pursuit of the goals of the Community.” In addition to a detailed analysis of the ECJ’s jurisdiction over the past 15 years, the Court referred to the 1977 and 1978 Declarations as evidence. There were “no relevant indications that the achieved Community standard of fundamental rights was not sufficiently consolidated or of merely provisional nature.”

The interaction can be plausibly reconstructed as the competition of two courts claiming adequately (ECJ) and inadequately (FCC) legalized and legitimate human rights protection in the EC in order to support their respective claims of supremacy. In addition, the ECJ was entrapped in its human rights rhetoric by the need to legitimate its claim for supremacy. Without the rights-based challenge of the German administrative and constitutional courts, the ECJ would not have been pressed to introduce, and increasingly strengthen its commitment to, human rights review in order to support its claim of autonomy and supremacy.

5. Implications for European integration theory: Constitutionalization and normative spillover

Our empirical analyses offer evidence that constitutionalization progresses through a novel type of spillover-mechanism: normative spillover. Normative spillover arises when steps of

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33 Ibid.
functional supranational integration undermine national parliamentary competencies and the protection of human rights, and when the resulting legitimacy deficit triggers demands to redress the situation. These demands generate a process of arguing, in which committed or interested actors draw on fundamental values and norms of the liberal international community to make the case for constitutionalization and put normative pressure on their reticent opponents. As a consequence of normative spillover, parliamentary competencies and human rights protection at the EU level have thus been regularly enhanced. We have also argued and shown that normative spillover works neither top-down (as a result of elite socialization at the top) nor bottom-up (as a result of political mobilization from below), but through the exchange of normative argument among member state governments and organizations of the EU multi-level system.

Over time, the effects of normative spillover on constitutionalization are likely to be enhanced as a result of the increasing normative force of precedent-based arguments. Historical institutionalists stress the role of institutional or legal precedent in systematically structuring future constitutional decisions thereby producing institutional path-dependencies or argumentation frameworks. As a result, coherence adds force to normative spillover in the more recent process of European integration than during its early phases.

Has EU constitutionalization reached equilibrium? According to our analysis, this would be the case if the EU’s legitimacy gap was closed. Then, salience would disappear and the normative spill-over mechanism would cease to operate. With regard to the cases we analyzed in this paper, this might indeed happen if a European constitution made co-decision the general rule, included a binding human rights catalogue, and provided for the accession of the EC to the ECHR. However, the Constitutional Treaty, which would have been a large step in that direction, has been rejected. And if it had been adopted, it would probably not have marked the end-point in European integration. We thus expect that as long as European integration continues, that is, as long as the EU is invested with new competencies, it will create new legitimacy gaps and new normative spill-over.
References


