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ARTICLE

Was Grimm wrong? Putting the Over-constitutionalization of EU Law to the Test

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Abstract

EU law is over-constitutionalized. Advanced a decade ago by Dieter Grimm, this thesis seems like a truism that requires neither proof nor refutation. This Article follows a different intuition: What if Grimm was wrong? Breaking with an orthodoxy of EU law, the article puts the over-constitutionalization thesis to the test. It reveals that Grimm's claims are questionable at a theoretical, analytical, and normative level. Grimm departs from the premise that any constitution faces the task of striking a balance between stability and flexibility at the level of the constitutional text and between law and politics on the institutional plane. According to Grimm, this balance is disturbed at the EU level, an analysis which appears plausible at first sight. However, in both respects—Treaty text and institutional practice—there is a mismatch between Grimm's theory and reality. While he overestimates the Treaties' rigidity in substance and procedure, he underestimates the rise of judicial responsiveness and legislative activity. These analytical shortcomings taint Grimm's normative proposal. Disregarding the institutional practice, he suggests scaling back the Treaties to their genuinely constitutional contents. Drawing on Luxembourg's increasing responsiveness to the Union legislature this Article advances an alternative way forward by further calibrating the Court's jurisprudence.

Keywords: EU constitutional law; over-constitutionalization; Dieter Grimm; Court of Justice of the European Union; EU legislature; primary law; secondary law; economic constitution

A. Introduction

Treaty change is on the official agenda again. After the post-Lisbon fatigue, potential Eastern enlargements have rekindled the reform will in the European Union. The European Parliament has made a start, called for a Convention to revise the Treaties,[1] and submitted a highly ambitious and far-reaching proposal.[2] The Parliamentarians suggested no less than 245 amendments touching upon many fundamental issues. Although the proposal's success remains unlikely, it nonetheless indicates a shift in the Union's political environment. In other words, we may start rethinking the Union's Treaty framework again.

[1] *See* Resolution of 9 June 2022 on the Call for a Convention for the Revision of the Treaties, 2022/2705/RSP, 2022 O.J. (C 493/130).

[2] *See* Resolution of 22 November 2023 on Proposals of the European Parliament for the Amendment of the Treaties, 2022/2051/INL, 2022 O.J. (C 2024/4216).

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A particularly far-reaching proposal was advanced by Dieter Grimm, "one of the most influential constitutional scholars and theorists in Germany."[3] A decade ago, he formulated what has become known as the over-constitutionalization thesis.[4] Even though the Treaties fulfil the function of a constitution at the EU level, their content exceeds any equivalent in the Member States. According to Grimm, this state considerably reduces the scope for legislative decision-making. In short, EU law is over-constitutionalized. To counter this development, politics must regain terrain. Grimm therefore suggested scaling back the Treaties to their "truly constitutional elements" and downgrading all other provisions to the status of secondary law.

Even if it did not find expression in any amendment projects yet, Grimm's thesis was extremely influential. With its elegant brevity, it shaped the imagination of many EU lawyers and their way of looking at the Treaties. Today, it has become a broadly shared view on EU constitutional law. But what if Grimm was wrong? In following this intuition, the present Article will put the over-constitutionalization thesis to the test. After a brief recap of the thesis' substance, reception, and success in Section B, Section C will start at the *theoretical* level by challenging two of Grimm's central premises: He assumes, first, that there can be "too much" constitutional law in a given legal system and, second, that constitutionalization leads to depoliticization. However, a deeper engagement with these premises reveals the need for contextualization, in particular by considering the institutional practice.

On that basis, Section E will assess the merits and fallacies of Grimm's thesis from an *analytical* perspective. Abstractly, it seems uncontroversial that any constitution faces the task of striking a balance between stability and flexibility at the level of the constitutional text and between law and politics on the institutional plane. Applied to the EU context, Grimm's analysis seems plausible at first sight. As Section D will outline, EU law appears to suffer from an extensive entrenchment of primary law and an institutional imbalance between the legislature and judiciary. Yet, the over-constitutionalization thesis must stand the test of legal and institutional reality. And this is exactly where it fails us. While Grimm overestimates primary law's rigidity, he underestimates the increasing responsiveness of the Court of Justice to the Union legislature and fails to account for the continuous rise in legislative activity. In this spirit, there is a mismatch between Grimm's theory and the Union's reality.

These analytical shortcomings taint Grimm's proposal at the *normative* level. Disregarding the institutional practice, he suggests remedying any imbalances by formally "de-constitutionalizing" large parts of the Treaties. Section F will suggest a different route. Instead of locating the problem—and thus its solutions—in the Treaties, we should rather focus on the *institutional practice*, especially the Court's jurisprudence. During the past decade, the Court has not only become increasingly responsive to the Union legislature, but has also started to distinguish a "constitutional framework" from the plethora of Treaty provisions. Building on this jurisprudence, the Court could start differentiating between those Treaty provisions that belong to the Union's "constitutional framework" and those that do not. Applying strict scrutiny to the former, it could relax the constraints imposed on the legislature by the latter. Put differently, the Court could defer their interpretation and implementation to the realm of legislative discretion. This would lead to a soft "de-constitutionalization" of the respective Treaty parts.

[3]*See* OLIVER LEPSIUS, CHRISTIAN WALDHOFF & MATTHIAS ROSSBACH, DIETER GRIMM: ADVOCATE OF THE CONSTITUTION ix (2020).

[4]Dieter Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21 EUR. L. J. 460 (2015). Although this Article will refer only to this piece, Grimm articulated his thesis also in other writings, *see, e.g.,* DIETER GRIMM, THE CONSTITUTION OF EUROPEAN DEMOCRACY 21, 32 (2017).

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B. The Over-constitutionalization Thesis: Substance, Reception, and Success

The over-constitutionalization thesis is not new. Especially in the context of the failed Constitutional Treaty, many argued that the Treaties excessively reduce the space for legislative decision-making. For instance, Agustín José Menéndez criticized in 2005 that the Constitutional Treaty did not assign to its various parts a different constitutional status, arguing that there is a "serious risk of over-constitutionalization, and consequently, of the substantive emptying of the democratic decision-making process." Eventually, this could lead to a situation where European legislation is reduced to "the implementation of the political programme articulated in the Constitution."[5] After the entry into force of the Lisbon Treaty, Bruno de Witte reiterated this critique of "constitutional over-abundance," which "unduly reduces the scope for democratic deliberation." His remedy was to "de-constitutionalize" particular norms "so as to put back into the democratic arena matters which had previously been entrenched."[6]

However, it was Dieter Grimm who placed the issue most prominently on the agenda of legal scholars. Grimm starts from the premise that constitutions provide a "durable structure for change." While they contain "lasting principles for politics," the policy process "fills the space they leave according to changing preferences and circumstances." Based on this premise, constitutions can take two extreme forms. On the one hand, they can fail their function of guiding and limiting government efficiently. On the other hand, there can be too much constitutional law. In this case, "politics is reduced to an execution of constitutional prescriptions."[7] This danger exists especially where courts have the last word in constitutional interpretation. In such cases, politics can re-program the judiciary only by amending the constitution, which is easy in some countries, but extremely difficult in others.

Applying these observations to the EU context, Grimm ascertains that the Treaties are full of provisions that would be ordinary law in the Member States. Instead of stipulating a framework for political decision-making, the Treaties contain these decisions *themselves*.[8] In a nutshell: EU law is "over-constitutionalized." According to Grimm, this state fosters depoliticization. In particular, the Treaties' constitutionalization "immunises" the Court from attempts of override. This applies not only to the legislature, which cannot override an interpretation based on primary law, but also to the Member States as the Treaties are difficult to amend. Consequently, the Treaties' confusion of constitutional with ordinary matters favors an unelected and non-accountable institution, the Court, over democratically legitimized and accountable institutions, the legislature. Grimm concludes: "As far as the Treaty extends, elections do not matter."[9] This imbalance can only be repaired by re-politicizing decision-making processes in the EU. To achieve this goal Grimm suggests scaling back the Treaties to their truly constitutional elements and downgrade all other provisions of a non-constitutional nature to the status of secondary law.

Grimm's thesis has been extremely influential and resonated well with other critical strands in the literature, such as as Fritz Scharpf, Turkuler Isiksel, Kaarlo Tuori, Sacha Garben, Vilija

[5]Agustín J. Menéndez, *Between Laeken and the Deep Blue Sea*, 11 EUR. PUB. L. 105, 124. (2005). *See also* John E. Fossum & Agustín J. Menéndez, *The Constitution's Gift?*, 11 EUR. L. J. 380, 409 (2005). Roughly around the same time Christoph Möllers argued that the Treaties' constitutional quality was limited by their "overloaded contents" and described them as "over-materialised," *see* Christoph Möllers, *Pouvoir Constituant-Constitution-Constitutionalization, in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 169, 189, 214 (Armin von Bogdandy & Jürgen Bast eds., 1st ed., 2006). *See also* Anne Peters, *The Constitutionalisation of the European Union—Without the Constitutional Treaty, in* THE MAKING OF A EUROPEAN CONSTITUTION 35, 40 (Sonja Puntscher Riekmann & Wolfgang Wessels eds., 2006), who argued to "separate the truly constitutional substance in the treaty-law from the rest and create an internal hierarchy of norms within European primary law." In similar terms, *see* Joseph H.H. Weiler, *On the power of the Word: Europe's constitutional iconography*, 3 INT'L J. CONST. L. 173, 175 (2005).

[6]Bruno de Witte, *The Rules of Change in the European Union—The Lost Balance between Rigidity and Flexibility, in* INSTITUTIONAL CHALLENGES IN POST-CONSTITUTIONAL EUROPE 33, 34–36 (Catherine Moury & Luís de Sousa eds., 2009).

[7]Grimm, *supra* note 4, at 464.

[8]*Id.* at 470.

[9]*Id.* at 471.

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Velyvyte, and Joseph Weiler.[10] Further, it was received not only in German and transnational European scholarship but found its way in other national legal discourses[11] and disciplines as well.[12] Subsequently, this thesis was applied to many individual policy areas. Walking in Grimm's shadow, scholars have ascertained that specific policy areas were over-constitutionalized, be it equality, financial, and health law, or the internal market in general.[13] Others again have applied the thesis to lament the lack of normative hierarchies between market freedoms and genuinely constitutional standards—and raised it even to a central "constitutional problem" of the Union.[14] Finally, many scholars agreed with Grimm's proposals to de-constitutionalize important parts of the Treaties.[15] Grimm's over-constitutionalization thesis thus seems to have found its place among the grand theories shaping our understanding of EU primary law. Today, it is a truism that is seldomly questioned.

C. Questioning Grimm's Premises

This Article breaks with this largely uncritical reflection and puts Grimm's over-constitutionalization thesis to the test. It will start at the *theoretical* level by questioning two central premises on which the over-constitutionalization thesis builds, namely that there can be "too much" constitutional law and that constitutionalization leads to depoliticization. In my view, both premises are difficult to sustain, especially if applied to the EU context.

I. Constitutional Substance: Can There Be Too Much Constitutional Law?

Starting with the first claim, Grimm asserts that too much constitutional law proves detrimental to the democratic process. He concludes with the plain formula: "[M]ore constitutional law means less democracy."[16] This is a sweeping assumption at best—and a rather shaky one as the following considerations will demonstrate.

[10]*See, e.g.*, Fritz-W. Scharpf, *De-Constitutionalization and Majority Rule: A Democratic Vision for Europe,* 23 EUR. L. J. 315, 316 (2017); TURKULER ISIKSEL, EUROPE'S FUNCTIONAL CONSTITUTION 86, 220 (2016); Kaarlo Tuori, *European Constitutionalism, in* THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW 521, 528 (Roger Masterman & Rober Schütze eds., 2019); Sacha Garben, *From sneaking to striding: Combatting competence creep and consolidating the EU legislative process*, 26 EUR. L. J. 429, 432, 443 (2020); VILIJA VELYVYTE, JUDICIAL AUTHORITY IN EU INTERNAL MARKET LAW 38 (2022); Joseph H.H.Weiler & Andreas P. Müller, *Dogma und Dissonanz in der Jurisprudenz des EuGH*, 149 ARCHIV DES ÖFFENTLICHEN RECHTS 498, 531 (2024).

[11]*See, e.g.*, EDOUARD DUBOUT, DROIT CONSTITUTIONNEL DE L'UNION EUROPÉENNE 25 (2d ed., 2023) ("un ordre matériellement sur-constitutionnalisé"); FRANCESCO MEDICO, IL DOPPIO CUSTODE. UN MODELLO PER LA GIUSTIZIA COSTITUZIONALE EUROPEA 286 (2023) ("sovracostituzionalizzazione").

[12]From political science, *see* Susanne K. Schmidt, *Governing by Judicial Fiat? Over-Constitutionalization and Its Constraints on EU Legislation, in* AUTONOMY WITHOUT COLLAPSE IN A BETTER EUROPEAN UNION 105 (Mark Dawson & Markus Jachtenfuchs eds., 2022); SUSANNE K. SCHMIDT, THE EUROPEAN COURT OF JUSTICE AND THE POLICY PROCESS (2018); Martin Höpner & Susanne K. Schmidt, *Can We Make the European Fundamental Freedoms Less Constraining?*, 22 CAMBRIDGE Y.B. EUR. LEGAL STUD. 182 (2020). *See also* PHILIP MANOW, UNTER BEOBACHTUNG 174 (2024).

[13]ELISE MUIR, EU EQUALITY LAW 3 (2018); Marco Dani, *Deconstitutionalising the Economic and Monetary Union, in* CONTINUITY AND CHANGE: ECB LEGAL CONFERENCE 2021 282 (2022); ANNIEK DE RUIJTER, EU HEALTH LAW & POLICY 183 (2019); VELYVYTE, *supra* note 10, at 38.

[14]Sacha Garben, *The European Union and its Three Constitutional Problems, in* THE FUTURE OF EU CONSTITUTIONALISM 87, 93 (Matej Avbelj ed., 2023).

[15]In the internal market, *see, e.g.*, Jacquelyn Veraldi & Matthew Hassall, *The Politics of The Constitutionalisation of Corporate Power in Europe, in* RESEARCH HANDBOOK ON THE POLITICS OF CONSTITUTIONAL LAW 350, 376 (Mark Tushnet & Dimitry Kochenov eds., 2023); Martin Höpner, *Die Zukunft der europäischen Grundfreiheiten: Plädoyer für eine Erweiterung der EU-Reformdebatte*, 15 J. COMP. GOV. & EUR. POL'Y 671 (2017). Even broader, *see* Peter M. Huber, *Die Europäische Union ist um der Menschen willen da*, 24 ZEITSCHRIFT FÜR EUROPARECHT 1, 28 (2022).

[16]Grimm, *supra* note 4, at 471.

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Let us take a step back. Some claim that a constitution's entrenchment is *per se* undemocratic.[17] The possibility to reverse laws, including the constitution, is part and parcel of democracy. In this sense, binding later generations by the "dead hand of the past" sits uneasy with democratic equality and representation.[18] This applies especially when constitutional amendments have become procedurally impossible. That much has been suggested by several US scholars and their experience with constitutional entrenchment.[19] However, Grimm does not go that far. He rather argues that *too much* constitutional law can prove detrimental in democratic terms.

But how much is too much? Grimm admits that there are "no universally applicable principles for determining what belongs in a constitution and what not."[20] Every constitution is unique. It emerges from a highly specific context and is usually the outcome of difficult compromises. Grimm nevertheless seems to have a very clear picture in mind. He starts from the constitution's function, which is to legitimize and limit, not replace political decision making: "Constitutions are a framework for politics, not the blueprint for all political decisions."[21] From that he derives a relatively precise list of things, he deems worthy of being enshrined in a constitutional text, such as decisions between a federal or unitarian setup and a presidential or parliamentary system, the voting system, judicial review, or the extent of fundamental rights. "Trivial" issues, by contrast, should not be included.[22] Ultimately, Grimm seems to embrace the idea of a pocket size constitution which reminds the trite formula "une constitution doit être courte et obscure."[23] However, two considerations, one general, the other EU-specific, cast doubt over this premise.

1. Contingency: Need for Context Sensitivity

At a general level, the determination of whether there is too much constitutional law is relative and requires a point of reference, namely a right amount of constitutional law. Yet, there is no set of commonly agreed constitutional contents or functions. Eventually, most scholars end up referring to a constitution's context, the historical, political, or social situation from which it emerged as well as the legal culture in which it is embedded. At the same time our understanding of what has a genuinely constitutional character might change not only horizontally from one society to another but also vertically through time. With other words: A constitution's content, and thus its length and detail are highly *contingent*.

The quest to determine what should be the content of a constitution has been as old as the constitutional project itself. Already Article 16 of the 1789 Declaration stated—positively—that "any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution."[24] At that time, however, very different views on the level of constitutional detail subsisted. Whereas Condorcet's proposal for a "constitution girondine" was extremely

[17]For a critique of such positions, *see* Jeff King, *The Democratic Case for a Written Constitution*, 72 Current Legal Probs. 1, 2 (2019).

[18]Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions 194 (2008).

[19]Sanford Levinson, Our Undemocratic Constitution 165 (2008).

[20]Grimm, *supra* note 4, at 464.

[21]*Id.*

[22]Grimm defended a similar position as a constitutional judge. When interpreting Art. 2(1) of the Basic Law—the general freedom of action—he warned against a "trivialization" through an over-inclusive understanding of fundamental rights, *see* BVerfG, 1 BvR 921/85, June 6, 1989 – *Horseback Riding in the Forest* (opinion of Judge Grimm). *See also* Christian Bumke & Andreas Voßkuhle, German Constitutional Law 103, 321–23 (2019). For a recent affirmation, *see* Grimm in Lepsius, Waldhoff & Rossbach, *supra* note 3, at 92.

[23]This saying is variously ascribed to Napoléon, Sieyès, or Talleyrand, *see* Wolfgang Graf Vitzthum, *Form, Sprache und Stil der Verfassung, in* Verfassungstheorie § 10, 373 (Otto Depenheuer & Christoph Grabenwarter eds., 2011).

[24]Déclaration des Droits de l'Homme et du Citoyen, Aug. 26, 1789.

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detailed featuring even the opening hours of polling stations,[25] Madison embraced the opposite approach trying to determine—negatively—the limits of such a codification.[26] In this spirit, there have been many attempts to develop a common substance of constitutions. A substantive constitutional content has been ascribed, for instance, to provisions on institutions, competences, law-making procedures, the relation of the individual to public authority, and provisions on basic values and objectives.[27] Nevertheless, there has never been an agreed line between the contents of ordinary and constitutional law, neither in practice, nor in theory.[28]

In *practice*, constitutions differ profoundly both in content and length. As to the content, there is a broad diversity of issues which the respective drafters deemed worthy of including in the constitution. The status of churches and religious groups, electoral law, the status of political parties, social rights, affirmative actions, language arrangements ... whether and how these issues are laid down in the constitution may vary to a considerable extent. A similar diversity prevails regarding the length and structure of constitutions.[29] Some are short and concise codifications, such as the Latvian constitution with less than 5,000 words, others are lengthy and detailed, like that of India with over 140,000 words. Some, like the Swedish constitution, are spread over several documents, whereas others, like the Autrian one, contain only a core while bits and pieces of constitutional value are scattered over the entire legal order. And then there are countries without any constitutional entrenchment at all, such as the UK or Israel. Among this diversity, EU primary law with its 110,000 words and several documents is surely long and complex, but not beyond comparison.

Also in *theory* there is no agreement on a constitution's substance.[30] At an analytical level, scholars usually confined themselves to identifying typical contents. As with every typology, however, they leave much room for exceptions. And even those scholars who make a normative claim identify only a minimum of necessary essentials, which must be *positively* included. Karl Loewenstein, for instance, developed an "irreducible minimum" of any serviceable democratic constitution.[31] Still, this does not allow us to stipulate *negatively* what should be excluded. Eventually, the criteria for identifying what is fundamental, important, or significant and thus merits to be included in a constitution are usually subjective. As such, it comes as no surprise that most accounts seem to be a product of the author's intuition rather than a systematic approach. This applies not only to a constitution's substance but also to its function.[32]

[25]Titre III, Section III, Plan de Constitution présenté à la Convention nationale les 15 et 16 février 1793 (Constitution girondine). *See also* ELISABETH BADINTER & ROBERT BADINTER, CONDORCET: UN INTELLECTUEL EN POLITIQUE 603 (1988).

[26]Memorandum from James Madison to the Constitutional Convention Chairman George Washington: Vices of the Political System of the United States (Apr. 16, 1787) ("As far as laws are necessary, to mark with precision the duties of those who are to obey them ... their number is the price of liberty. As far as the laws exceed this limit, they are a nusance: a nusance of the most pestilent kind.")

[27]*See, e.g.*, Ruth Gavison, *What Belongs in a Constitution?*, 13 CONST. POL. ECON. 89, 90 (2002). *See also* GIUSEPPE DE VERGOTTINI, DIRITTO COSTITUZIONALE COMPARATO 247 (11th ed., 2022); FRANCIS HAMON & MICHEL TROPER, DROIT CONSTITUTIONNEL 32 (43d ed., 2022); Lucio Pegoraro, *La costitución, in* DERECHO CONSTITUCIONAL COMPARADO 154, 185 (Diego López Garrido, Marcos F. Garrote & Lucio Pegorano eds., 2017); Markus Möstl, *Regelungsfelder der Verfassung, in* VERFASSUNGSTHEORIE § 16, 569 (Otto Depenheuer & Christoph Grabenwarter eds., 2010).

[28]Early on GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 532–33 (3d ed., 1925).

[29]For a comparative overview, *see* COMPARATIVE CONSTITUTIONS PROJECT, *Constitution Rankings* https://comparativeconstitutionsproject.org/ccp-rankings/. For an observation of a general "ascendance of constitutional micromanagement" and thus longer and more specific constitutions, *see* Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657 (2016).

[30]From a German persepctive, *see, e.g.*, CHRISTIAN WALDHOFF, DER POSITIVE UND DER NEGATIVE VERFASSUNGSVORBEHALT 58 (2015).

[31]KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 127 (1963).

[32]For diverse accounts on the substance, *see* note 27. From the variety of conceptualizations concerning a constitution's function, *see, e.g.*, DIETER GRIMM, CONSTITUTIONALISM 143 (2016); MARIE-CLAIRE PONTHOREAU, DROIT(S) CONSTITUTIONNEL(S) COMPARÉ(S) 290 (2d ed., 2021); Till-Patrick Holterhus & Sven Siebrecht, *Functions of Constitutions, in* MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Rainer Grote et al. eds., 2023). This applies also to

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Summing up, these observations boil down to the following objection: There is no general theory or practice of what belongs into a constitution and what does not. Drawing general red lines seems therefore a futile endeavor. Instead, these questions must be settled within each unique *constitutional context*.

2. Context: Reasons for a Long EU Constitution

Against this backdrop, Grimm's claim that the Treaties are full of provisions that would be ordinary law in the Member States seems to lack the necessary contextualization. The need for such a contextualization is especially strong at the EU level. From the outset, any application of state-based concepts to the EU faces the dilemma of translation.[33] Beyond the general need for contextualization, we therefore need to take the Union's specificities into account when determining whether there is too much constitutional law at the EU level.

Early on, several reform projects were guided by the ideal of a short and concise constitution.[34] In 1994, Fernand Herman noted that the Union's constitution "is dispersed throughout texts which also contain legal norms which are in no way 'constitutional.'"[35] Many subsequent proposals sought to divide the Treaties into a basic one featuring provisions of constitutional value and a separate text containing provisions for specific policies.[36] In this spirit, several members of the European Convention argued for a leap from the "jungle" or "labyrinth" to a more concise and coherent primary law.[37] Yet, these claims never materialized. Instead, the Lisbon Treaty has still been described as a "constitution 'longe et obscure.'"[38] Nevertheless, there were good reasons to maintain the Treaties in their current shape.

On the one hand, their detailed character, especially the provisions on competences, legal bases, and Union policies, are a feature of many federal systems. Suffice to look at the lengthy Indian, Brazilian, Mexican, or Nigerian constitutions. Given the Member States' low level of trust in the restraint of Union institutions, primary law's long and detailed form expresses the Member States' desire for control.[39] As Neil Walker noted: "More constitutional law and its more protracted rollout ... has been the consequence of less constitutional authority."[40] Jean-Claude Piris, former Director of the Council's legal service, predicted that "a short Treaty will always be impossible" as the Member States want to control how much power they confer to the Union.[41] These concerns

seemingly empirical studies, where authors have rated the "importance" of constitutional provisions, *see* Mila Versteeg et al., *Which Constitutional Provisions Are Most Important?*, 1 EUR. J. EMP. LEG. STUD. 19, 30 (2024) (rating merely three percent of the assessed constitutional provisions to be "unimportant.").

[33] *See, e.g.*, Tuori, *supra* note 10, at 528.

[34] On the project of reorganization, *see* Armin von Bogdandy & Jürgen Bast, *The Constitutional Core of the Union*, 61 COMMON MKT. L. REV. 1471, 1474 (2024).

[35] *See* Second Report of the Committee on Institutional Affairs on the Constitution of the European Union (Feb. 9, 1994), European Parliament, Session Doc. A3-0064/94.

[36] *See, e.g.*, Resolution on the Constitutionalisation of the Treaties, 2001 O.J. (C 197/186) 4; EUI, A BASIC TREATY FOR THE EUROPEAN UNION: A STUDY OF THE REORGANISATION OF THE TREATIES 1 (May 15, 2000); JEAN-LUC DEHAENE, RICHARD VON WEIZSÄCKER & DAVID SIMON, THE INSTITUTIONAL IMPLICATIONS OF ENLARGEMENT 12 (Oct. 18, 1999).

[37] *See, e.g.,* Plenary Debate of Sep. 13 2002, 5-023, López Garrido (Parl.-ES), https://www.europarl.europa.eu/Europe2004/textes/verbatim_020913.htm ("Creemos que hay que ir a una Constitución breve, sencilla, corta, y a esa Constitución se tiene que adaptar lo existente hoy, no al contrario, es decir que la Constitución futura se adapte a la selva, a la jungla, al laberinto que tenemos hoy.")

[38] Franz C. Mayer, *Die Rückkehr der Europäischen Verfassung?,* 67 HEIDELBERG J. INT'L L. 1141, 1185 (2007).

[39] *See, e.g.*, Manfred Zuleeg, *The Advantages of the European Constitution, in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 763, 779 (Jürgen Bast & Armin von Bogdandy eds., 2d ed., 2010); Jacques Ziller, *Une Constitution courte et obscure ou claire et détaillé?, in* GENÈSE ET DESTINÉE DE LA CONSTITUTION EUROPÉENNEN 957, 967 (Giuliano Amato et al. eds., 2007); JEAN-CLAUSE PIRIS, THE CONSTITUTION FOR EUROPE 59 (2006).

[40] Neil Walker, *Where's the "E" in Constitution? A European Puzzle, in* ECONOMIC CONSTITUTIONALISM IN A TURBULENT WORLD 11, 25 (Achilles Skordas et al. ed., 2023).

[41] JEAN-CLAUDE PIRIS, THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS 21 (2010).

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were also prevalent during the drafting of the failed Constitutional Treaty. Jack Straw, then the UK's foreign secretary, explained that were the EU "a superstate, writing its constitution would be easy, and the result short [...] it is precisely because the EU is not a superstate that it needs a more complicated rule-book spelling out, policy by policy, the areas of its competence."[42] In the same vein, one of the constitution's drafters stated in very clear terms:

> [U]ne Constitution doit être courte et obscure, disait Napoléon. [...] Et nous, nous nous accordons contre. Pourquoi contre? Notre Constitution ne peut qu'être longue. Elle le sera forcément du fait des contraintes que nous subissons ... Quand on attribue des pouvoirs, fixe des relations, précise des compétences, règle des procédures, on ne peut pas [...] échapper à ces tâches ingrates d'écriture complexe.[43]

On the other hand, the Union's "economic constitution", which should be downgraded in Grimm's view, is a distinguishing feature of primary law.[44] Grimm seems to assume that economic law has no place in a constitution, which might be explained by his German background. The Bundesverfassungsgericht stipulated early on the "wirtschaftspolitische Neutralität" of the Basic Law.[45] The constitution does not prescribe a specific model of the economy and leaves this decision to the legislature. In the aftermath of this decision, the economy was largely blindsided in German constitutional doctrine,[46] which might well-explain Grimm's view on the appropriate contents of a constitution. European integration, however, has trodden on different paths. One of several influential strands was the ordoliberalist paradigm, according to which the economy can be shaped through the constitutional entrenchment of certain general principles.[47] Along these lines, many have argued that the Treaties express "une vision économique."[48] Even though this does not mean that economic law *must* be enshrined in the Union's constitution, it questions the premise that economic policy has no place in a constitution. Many European constitutional traditions, including the Union's one, point in a different direction.[49]

II. Institutional Practice: Does Constitutionalization Lead to Depoliticization?

Grimm further assumes that "all matters regulated at the constitutional level are not open to political decision."[50] With other words: "[E]lections do not matter as far as constitutional law

[42]Jack Straw in The Economist (July 8, 2004).

[43]Plenary Debate of Feb. 27, 2003, 4-040, Duhamel (PE), https://www.europarl.europa.eu/Europe2004/textes/verbatim_030227.htm ("Our Constitution can only be long. It will inevitably be so because of the constraints to which we are subject [...] When powers are conferred, relationships established, competences specified, procedures regulated, there is no escaping [...] these thankless tasks of complex writing.") (author's translation).

[44]Arguing for its constitutional importance, *see* Miguel Maduro, We the Court 166–168 (1998); Francesco Martucci, Droit de L'Union Européenne 69, 72 (3d ed., 2021); Matthias Goldmann, *Die Wirtschaftsverfassung, in* Unionsverfassungsrecht 299, 303 (Armin von Bogdandy & Jürgen Bast eds., 2024).

[45]BVerfG, 1 BvR 459, July 20, 1954 – *Investment Aid* [BVerfGE 4, 7 (17)].

[46]For a critique, *see* Matthias Ruffert, *Zur Leistungsfähigkeit der Wirtschaftsverfassung*, 134 Archiv des öffentlichen Rechts 197 (2009).

[47]*See, e.g.*, Ernst-Joachim Mestmäcker, Wirtschaft und Verfassung in der Europäischen Union 507 (2003). Emphasising the ordoliberal roots of the European economic constitution, *see* Christian Joerges, *Economic Constitutionalism and "The Political" of "The Economic", in* The Idea of Economic Constitution in Europe 789, 805 (Guillaume Grégoire & Xavier Miny eds., 2022); Kaarlo Tuori, European Constitutionalism 127 (2015).

[48]Jean-Paul Jacqué, *La Constitution de la Communauté européenne*, 7 Revue Universelle des Droits de L'Homme 397, 405 (1995).

[49]For instructive contributions, *see* The Idea of Economic Constitution in Europe: Genealogy and Overview (Guillaume Grégoire & Xavier Miny eds., 2022).

[50]Grimm, *supra* note 4, at 463.

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extends."[51] This claim can be made at two levels. While constitutional entrenchment may withdraw issues from the political process in the first place, a constitution's broader scope empowers constitutional courts to the detriment of the political process. In both cases, the outcome might be depoliticization. Yet, there are strong arguments against these claims.

1. Constitutional Revision: Constitutional vs. Ordinary Politics?

To start with, constitutions are open to revision and hence not *withdrawn* from, but rather *subject* to political processes. Suggesting that these processes are depoliticized seems rather counterintuitive. To the contrary. As Grimm emphasizes, constitutions contain fundamental issues. Touching them is bound to be controversial. This suggests a strong politicization.

This intuition finds support in the realities of constitutional amendments. For one, many constitutions are subject to frequent revision.[52] The Austrian Bundesverfassungsgesetz has been amended 142 times since 1931 (on average 1.5 times per year), the Italian constitution nearly fifty times since 1947, the German Basic Law nearly seventy times since 1949, the French twenty-five times since 1958, and the Belgian constitution over thirty times since 1994. Many amendment proposals concern fiercely contested issues, such as the right to abortion in France, direct elections for the head of government in Italy, or financing the German military beyond the constitutional debt brake. In France, some even observe an "inflation" of constitutional amendment proposals and an increasing "constitutional desacralization."[53] An extreme, even abusive form can be found in Hungary, where the constitution has become the instrument of every-day party politics.[54] Accordingly, constitutional entrenchment does not automatically lead to depoliticization by withdrawal.[55]

However, even though constitutional entrenchment might not exclude political processes per se, it might exclude certain kinds. Paul Craig once noted that "[b]y denominating an issue as 'constitutional' we recognize that it is taken off the agenda of normal politics."[56] Can we thus side with Craig and state that constitutional entrenchment leads to less *normal* political processes? This requires us to distinguish between normal and constitutional, ordinary and extraordinary politics.[57] Though there might be a difference between expressions of "We, the people" and "We, the majority,"[58] this does not mean that there is a difference in the level of politicization. Constitutional politics are not necessarily inclusive, deliberative, and consensual affairs, but may also consist of shabby compromises in which party interests prevail. Vice-versa can apply to ordinary politics. As Bellamy and Schönlau argue, politics *tout court* necessarily employs elements of both.[59] A clear line between "normal" and "constitutional" politics seems therefore difficult to

[51] *Id.* at 473.

[52] *See* Versteeg & Zackin, *supra* note 29 and Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?*, 13 Int'l J. Const. L. 686, 690 (2015). Empirically, longer constitutions tend to be amended more frequently, George Tsebelis & Dominic J. Nardi, *A Long Constitution Is a (Positively) Bad Constitution,* 46 Brit. J. Pol. Sci. 457 (2016).

[53] Baptiste Charvin, *Is France Desacralizing its Constitution?*, Verfassungsblog (Nov. 16, 2023).

[54] *See, e.g.*, Pál Sonnevend, András Jakab & Lorant Csink, *The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary, in* Constitutional Crisis in the European Constitutional Area 33 (Armin von Bogdandy & Pál Sonnevend eds., 2016).

[55] *See also* Graziella Romeo, *What's Wrong with Depoliticisation?*, 1 Eur. L. Open 168, 169 (2022).

[56] Paul Craig, *Constitutions, Constitutionalism and the European Union*, 7 Eur. L. J. 125, 126 (2001). *See also* Joseph H.H. Weiler, *A Constitution for Europe? Some Hard Choices*, 40 J. Common Mkt. Stud. 563, 571. (2002).

[57] Such a distinction was suggested by Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L. J. 453, 485 (1989).

[58] William Partlett & Zim Nwokora, *The Foundations of Democratic Dualism: Why Constitutional Politics and Ordinary Politics are Different*, 26 Constellations 177, 184 (2019).

[59] In the EU context, *see* Richard Bellamy & Justus Schönlau, *The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights*, 11 Constellations 412 (2004).

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draw. Even if a constitution stabilizes certain decisions by withdrawing them from the volatilities of day-to-day politics, constitutional entrenchment does not mean that these issues are less politicized.

2. Constitutional Meaning: Juridical vs. Political Institutions?

This politicization does not only occur with regard to constitutional revision, but—importantly—also with regard to the meaning of a constitution. Eventually, politicization or depoliticization depends to a large extent on who decides on the constitution's meaning. Is constitutional interpretation exclusively entrusted to the judiciary? Or do the other branches also have a voice? In the former case, constitutional interpretation might indeed be monopolized in the hands of constitutional judges. As Grimm observes, this shifts decisions of high political impact to institutions that operate in a "non-political mode."[60] Ultimately, this can result in an overly constraining juridification of political processes.[61]

Yet, this nexus between juridification and depoliticization is not a necessary conclusion. One can also observe the opposite. Judicial proceedings often stir and improve the quality of public discourse. This becomes particularly important when the political process does not prove to be sufficiently discursive or inclusive.[62] In such cases, judicial procedures can provide new fora to identify structural deficiencies and a new language for articulating demands—all features of politicization rather than depoliticization. Put differently, a constitutional court does not necessarily *restrict* but can also *foster* political processes.[63]

Depoliticization seems to be even less of an issue once the other branches are included in the task of constitutional interpretation. Whereas the constitution itself usually transcends the volatilities of day-to-day politics, this is not necessarily the case for its concrete interpretation or application. Even if far-reaching in scope and detail, constitutions still employ an open language. As their interpretation is bound to be controversial, political processes can emerge in conflicts over the meaning of a constitution. In the EU context, this intuition finds support in the major conflicts across European society over the past decade. Be it the Euro crisis, the migration crisis, the rule of law crisis, the pandemic, the war in Ukraine: These conflicts and the struggle for common solutions have been articulated in notions enshrined in the Treaties. They were understood as conflicts overs European rights, European democracy, European rule of law, and, in all these cases, over European solidarity.[64]

D. The Merits of Grimm's Analysis

The previous Section has not only demonstrated the need for contextualizing a constitutional text, but also for considering the institutional practice. Moving to the *analytical* level, these insights will guide the following assessment of the over-constitutionalization thesis. As Grimm rightly points out, any constitution faces the task of striking a balance between *stability and flexibility* at the level

[60]Grimm, *supra* note 4, at 470. *See also* Dieter Grimm, *What Exactly is Political About Constitutional Adjudication, in* JUDICIAL POWER 307 (Christine Landfried ed., 2019).

[61]On the nexus between juridification and depoliticisation, *see* among many others RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM 147 (2008). On the "judicialisation of politics," *see* Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008) or Christine Landfried, *Constitutional Review in the European Legal Space: A Political Science Perspective, in* THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW, VOL. 4 591, 604 (Armin von Bogdandy, Peter M. Huber & Christoph Grabenwarter eds., 2023).

[62]*See, e.g.*, from the perspective of two former constitutional judges with very different backgrounds, Susanne Baer, *Who cares? A Defence of Judicial Review*, 8 J. BRIT. ACAD. 75, 95 (2020) and PETER M. HUBER, WARUM DER EUGH KONTROLLE BRAUCHT 61 (2023).

[63]In the EU context, *see* Armin von Bogdandy & Luke Dimitrios Spieker, *Transformative Constitutionalism in Luxembourg*, 29 COLUM. J. EUR. L.. 65, 69 (2023).

[64]*See also* Section E.II.2.

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of the constitutional text and between *law and politics* on the institutional plane. Applied to the European context, Grimm's analysis seems plausible at first sight. Looking at the Treaties, primary law's extent and entrenchment seem to reduce the legislature's scope of action. Looking at the institutions, the Court has an exceptionally powerful position vis-à-vis the legislature. Taken together, both factors might overly constrain the space left to legislative decision-making.

I. Extensive Entrenchment

Constitutions are not only supposed to leave room for political decision making, but also guarantee continuity, stabilize the political process, and exonerate it from the burden of constantly rebuilding consensus on fundamental issues.[65] This tension between stability and flexibility depends on many legal, institutional, political, historical, and social factors. Among these factors are the *mode* of constitutional change, the amendment procedures, and the *extent* of constitutional entrenchment, meaning a constitution's scope and detail. Even if there is no universal way to strike the balance, the following thumb rule has been suggested: "the more stringent the amendment procedure is, the shorter the constitution should be."[66]

At first glance, the Treaty drafters did not seem to have followed this basic rule of reason. To start with, primary law is subject to demanding thresholds for Treaty amendments. Not only does it require consensus among the Member State governments, but those changes must be approved by an increasing number of national "veto players," such as national parliaments, constitutional courts, and even the citizens if the national constitutional setting requires a referendum. At the same time, primary law is extensive in scope and detailed in content. *Quantitatively*, primary law comprises not only two Treaties with overlapping contents but also the Charter and a myriad of protocols, reservations, and annexes amounting to roughly 110,000 words. *Qualitatively*, it regulates in considerable detail a vast array of matters ranging from constitutional core areas, such as fundamental rights, to seemingly prosaic matters, such as the imports of petroleum products refined in the Netherlands Antilles under Protocol No 31. Further, the Treaties contain many so-called "purposive competences" that define an ultimate goal of action, such as Articles 114, 127, 151, 165, 166, 174, 191, or 206 TFEU. Pursuant to Article 127 TFEU, for instance, monetary policy is aimed at price stability instead of fostering full employment, whereas the Union's common commercial policy is geared by Article 206 TFEU at free trade instead of ensuring a high level of consumer protection. This fixation of objectives reduces the EU legislature's discretion from making a choice of direction—where should we go?—to merely selecting the means of implementation—how do we get there?[67]

II. Institutional Imbalance

The second assumption is that democratic constitutions strive to connect, separate and balance law and politics. The constitution politicizes the creation of laws by connecting it to the political process and juridifies said processes by submitting them to constitutional constraints.[68] The way in which this reciprocal relationship is institutionalized can differ considerably. Some legal orders

[65]On the constitution's stabilising or "relief function," *see, e.g.*, GRIMM, *supra* note 32, at 217, 248; Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries, in* CONSTITUTIONALISM 152, 153, 174 (Larry Alexander ed., 2001).

[66]Gavison, *supra* note 27, at 95.

[67]Gareth Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence*, 21 EUR. L. J. 2, 3 (2015). On the increase of purposiveness in EU law, *see also* Marco Dani, *Openness, Purposiveness, and the Realignment of the EU and the Democratic and Social Constitutional State*, 24 GERMAN L. J. 1099, 1100 (2023).

[68]*See, e.g.*, NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 403 (2004). From the rich literature, *see* Dieter Grimm, *Types of Constitutions, in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 98, 124 (Michael Rosenfeld & András Sajó eds., 2012).

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might set up constitutional courts, others may rely on the self-discipline of their parliaments. If a legal order opts for a system of constitutional adjudication though, a certain balance between the respective court and the political process should be maintained. Still, drawing the line between both spheres is always controversial. Potential criteria are hardly clear-cut.

Seen in this light, the relationship between the EU legislature and the Court of Justice might appear imbalanced. While the legislature seems to be largely unable to *negatively* delimit or override the Court's jurisprudence, the Court has on many occasions *positively* assumed the function of a policymaker. Starting with the former, the CJEU operates in an "unusually permissive strategic environment."[69] In principle, a legislator may constrain a court *ex ante* by drafting rules which the court has to apply and *ex post* by reversing the court's jurisprudence through legislative or constitutional amendments. Both paths, however, are structurally weakened at the EU level.

From an *ex ante* perspective, the EU legislature is often unable to constrain the Court. Usually, EU legislation is drafted in a multilingual setting and reflects hard-won compromises between many relevant stakeholders. This renders it likely to feature open formulations or deliberate gaps.[70] By implication, EU legislation will often constitute rather weak *ex ante* constraints on the Court's activity. To the contrary, it will require further interpretation and elaboration. Moreover, by interpreting the Treaties, the Court defines the default conditions for legislative decision-making.[71] And indeed, many legislative acts read like a codification of its case law.[72] For instance, legislation on public procurement, patient mobility, competition damages as well as much of the EU's anti-discrimination legislation have been understood as codifying prior case law.[73]

Ex post, there are rather limited opportunities to override or re-direct the Court's jurisprudence against its will. The possibility to respond via secondary legislation is already reduced as there is a general discrepancy between the limited competences of the EU legislature and the CJEU's general jurisdiction to interpret the Treaties.[74] If the Court interprets, for example, a Treaty freedom as barring certain Member State regulations, the EU legislature does not necessarily have a competence to positively re-regulate these issues at the EU level. Further, legislative override becomes structurally difficult when the respective jurisprudence is based on an interpretation of EU primary law. As Gareth Davies observed, "an interpretation of the Treaty effectively *becomes* the Treaty."[75] Even if the EU legislature adopts acts aiming to override the case law,[76] it is at the Court's discretion to change its respective interpretation of primary law. The only way to force the

[69]Alec Stone Sweet, *The European Court of Justice, in* THE EVOLUTION OF EU LAW 121, 127 (Paul Craig & Grainne de Búrca eds., 2d ed., 2011).

[70]For "why EU legislation is the way it is," *see* Eleanor Sharpston, *Legislating and Adjudicating, in* THE FOUNDATIONS AND FUTURE OF PUBLIC LAW 173, 174 (Elizabeth Fisher et al. eds., 2020).

[71]*See* SCHMIDT, *supra* note 12, at 10. On such an "anticipatory" or "shadow effect" of a constitutional court's case law, *see also* Grimm, *supra* note 60, at 604 and Tommaso Pavone & Øyvind Stiansen, *The Shadow Effect of Courts*, 116 AM. POL. SCI. REV. 322, 322 (2022).

[72]*See* VELYVYTE, *supra* note 10, at 199; Gareth Davies, *The European Union Legislature as an Agent of the European Court of Justice*, 54 J. COMMON MKT. STUD. 846, 854 (2016); Anastasia Iliopoulou-Penot, *Réflexions sur la codification de la jurisprudence par le législateur européen, in* MÉLANGES EN L'HONNEUR DE CLAUDE BLUMANN 187 (2015).

[73]*See, e.g.*, Christopher H. Bovis, *Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making*, 43 COMMON MKT. L. REV. 461, 461 (2006); Stéphane de La Rosa, *The Directive on Cross-border Healthcare or the Art of Codifying Complex Case Law,* 49 COMMON MKT. L. REV. 15, 15 (2012); Jens-Uwe Franck, *Striking a Balance of Power Between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm,* 43 EUR. L. REV. 837, 837 (2018); MUIR, *supra* note 13, at 83. For further examples, *see* the annex to DORTE SINDBJERG MARTINSEN, AN EVER MORE POWERFUL COURT? 241 (2016).

[74]*See, e.g.*, Mark Dawson, *The Political Face of Judicial Activism: Europe's Law-politics Imbalance, in* JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE 11, 13–17 (Mark Dawson, Bruno De Witte & Elise Muir eds., 2013).

[75]Gareth Davies, *Legislative Control of the European Court of Justice*, 51 COMMON MKT. L. REV. 1579, 1582–83 (2014).

[76]*See, e.g.*, Olof Larsson, *Political and Constitutional Overrides: The Case of the Court of Justice of European Union*, 28 J. EUR. PUB. POL'Y 1932, 1941 (2021).

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Court is by amending the Treaties. Despite some precedents in this respect,[77] past experience demonstrates that Treaty amendments rather codify than correct the case law.[78]

Besides these weak negative constraints, it has been claimed that the Court of Justice has assumed, positively, on many occasions the role of a "direct policymaker."[79] In this sense Grimm observed that judicial policymaking has become a veritable alternative to legislative policymaking in the EU context.[80] The way in which the Court propelled the integration process seems to support this observation. According to the prevalent narrative, the Union legislature was often deadlocked in the course of European integration requiring the Court to step in as an "engine of integration."[81] This does not mean that such steps were illegitimate. Being an EU institution, the Court might even be subject to the obligation in Article 13 TEU to "promote [the EU's] values, advance its objectives, serve its interests" and thus to foster the integration process.[82] Yet, there are institutional reasons that call this approach into question. The Court might be a hybrid, political and legal, and even a representative institution. Nevertheless, its democratic legitimacy is more fragile than that of a democratically accountable legislature. Furthermore, the legislature seems often better equipped than the Court to conduct complex and controversial balancing processes between different social interests and decide on the EU's course of action in an inclusive and transparent manner.[83] As such, there are strong arguments from legitimacy and capacity in favor of the EU legislature.

E. The Fallacies of Grimm's Analysis

The previous Section has demonstrated that Grimm's analysis seems plausible at first glance. However, as Robert Schütze once noted, every constitutional theory should allow us to explain, criticize, or suggest constitutional practice: "[A] theory without facts is of purely 'artistic' use at best, and of no use at worst. For every theory must ultimately be measured by its explicative and predictive value."[84] This is exactly where the over-constitutionalization thesis fails us. At the *Treaty level*, Grimm overestimates the rigidity of primary law both in substantive and procedural respects. The Treaties are framed very open and provide much more room for legislative decision-making than Grimm assumes. Moreover, primary law itself is neither petrified nor shielded from political processes, but subject to political changes also below the threshold of formal amendment. At the *institutional level*, Grimm's theory not only disregards the Court's increasing responsiveness to the Union legislature but also fails to account for the continuous rise in legislation. Especially this institutional perspective seems essential for our understanding of EU law.[85]

[77]For instances of override, *see* Giuseppe Martinico, *Chasing the European Court of Justice: On Some (Political) Attempts to Hijack the European Integration Process*, 14 Int'l Community L. Rev. 243, 245 (2012).

[78]*See* Alain Ondoua, *L'influence de la Cour dans l'elaboration des traités européens, in* Dans la fabrique du droit européen 199 (Antoine Vauchez & Pascal Mbongo eds., 2009).

[79]Thomas Horsley, The Court of Justice of the European Union as an Institutional Actor 156 (2018). *See also* Velyvyte, *supra* note 10, at 191 ("quasi-legislative judgments") or Ninke Mussche & Dries Lens, *The ECJ's Construction of an EU Mobility Regime*, 57 J. Common Mkt. Stud. 1247 (2019) ("direct design").

[80]Grimm, *supra* note 4, at 469. *See also* Schmidt, *supra* note 12, at 123; Horsley, *supra* note 79, at 156; Hjalte Rasmussen, On Law and Policy in the European Court of Justice (1986).

[81]*See, e.g.*, Renaud Dehousse, The European Court of Justice: The Politics of Judicial Integration 70 (1998).

[82]Dominique Ritleng, *The Independence and Legitimacy of the European Court of Justice, in* The Institutional System of the European Union 83, 104 (Dominique Ritleng ed., 2016).

[83]*See, e.g.*, Martijn van den Brink, Legislative Authority and Interpretation in the European Union 63–73 (2024).

[84]Robert Schütze, "*Re-constituting*" *the Internal Market*, 39 Y.B. Eur. L. 250, 265 (2020).

[85]*See, e.g.,* Bruno De Witte, *Legal Methods for the Study of EU Institutional Practice*, 18 Eur. Const. L. Rev. 637, 638 (2022) stressing that EU law remains a "dead letter without reflecting in its analysis the various practices which EU institutions develop in shaping and implementing the formal legal norms".

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I. Overestimating the Treaties' Rigidity

1. Open Substance

Grimm submits that the Treaties level the "crucial difference between the rules for political decisions and the decisions themselves."[86] He is not alone with that claim.[87] As noted before, this might be especially the case for so-called purposive competences. Yet, it seems that Grimm overstates how much the Treaties constrain, steer, or pre-determine policy outcomes. The legal bases enshrined in the Treaties provide much more room for legislative decision-making than Grimm tends to admit.

On the one hand, many legal bases are extremely broad. This applies especially to Article 114 TFEU, the centerpiece of the internal market. Due to its third paragraph, this legal basis allows measures with objectives far beyond the "establishment and functioning of the internal market." Even though the Court has emphasized that an "unlimited" interpretation of Article 114 TFEU cannot be sustained,[88] that provision was still capable of shouldering a vast array of different acts covering data retention, health, or environmental protection[89] and more recently issues such as the regulation of Artificial Intelligence, the acquisition and possession of weapons, and possibly even measures against investor citizen schemes.[90] Indeed, the notion of the "internal market" leaves varying interpretations. Many argue that the Union's economic constitution—Grimm's central target—is "open," "mixed," or "pluralist."[91] As the objective of an internal market can accommodate a broad range of diverging and shifting political and economic beliefs,[92] its legal realization can take very different forms and shapes as well.[93] In this sense, the Commission stressed that the "single market is dynamic, constantly evolving and adapting to new realities."[94]

These dynamics are not limited to the internal market but extend to the Union's economic constitution at large. Profound transformations can be found, for instance, in the context of the Eurozone crisis,[95] or the pandemic, most notably the unprecedented Next Generation EU program. The latter demonstrates what "creative legal engineering" by a political institution, the

[86]Grimm, *supra* note 4, at 470.

[87]*See, e.g.*, Isiksel, *supra* note 10, at 86; Scharpf, *supra* note 10, at 316; Tuori, *supra* note 10, at 528.

[88]Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising Directive)*, ECLI:EU:C:2000:544 (Oct. 5, 2000), para. 107 and paras. 84, 95, 108.

[89]Case C-301/06, *Ireland v. Parliament and Council*, ECLI:EU:C:2009:68 (Feb. 10, 2009); Case C-376/98, *Tobacco Advertising Directive*; Case C-300/89, *Commission v. Council (Titanium dioxide)*, ECLI:EU:C:1991:244 (June 11, 1991). *See also* Bruno de Witte, *A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Legislation, in* The Judiciary, the Legislature and the EU Internal Market 25 (Phil Syrpis ed., 2012).

[90]On the latter proposition, *see* Resolution of 9 March 2022 with Proposals to the Commission on Citizenship and Residence by Investment Schemes, 2021/2026/INL, 2022 O.J. (C 347/97).

[91]*See* Wouter Devroe & Pieter Van Cleynenbreugel, *Observations on Economic Governance and the Search for a European Economic Constitution, in* European Economic and Social Constitutionalism after the Treaty of Lisbon 95, 120 (Dagmar Schiek, Ulrike Liebert & Hildegard Schneider eds., 2011); Hermann-Josef Blanke, *The Economic Constitution of the European Union, in* The European Union after Lisbon 369, 372 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2012); Clemens Kaupa, The Pluralist Character of the European Economic Constitution (2016).

[92]*See, e.g.*, Dariusz Adamski, *The Faustian Bargain: How Evolving Economic and Political Beliefs Have Redefined the European Economic Constitution, in* The Metamorphosis of the European Economic Constitution 25 (Herwig C.H. Hofmann, Katerina Pantazatou & Giovanni Zaccaroni eds., 2019); Vivien A. Schmidt, *Reconsidering the EU's economic ideas on markets and law, in* Continuity and Change: ECB Legal Conference 2021 262 (2022).

[93]*See, e.g.*, Jan Zglinski, *The Internal Market as a Dynamic Process: Five Scenarios for the Future, in* The Internal Market Ideal 77 (Jeremias Adams-Prassl et al. eds., 2024); Inge Govaere, *Internal Market Dynamics*, in The Internal Market 2.0 75 (Sacha Garben & Inge Govaere, 2020).

[94]Commission Communication, A Single Market for Citizens, COM (2007) 60 final (Feb. 21, 2007), at 3.

[95]*See, e.g.*, Vestert Borger, The Currency of Solidarity. Constitutional Transformation during the Euro Crisis (2020); Michael Ioannidis, *Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis*, 53 Common Mkt. L. Rev. 1237 (2016). More restrained in his assessment, *see* Bruno de Witte, *A Gentle Criticism of the Metamorphosis Thesis, in* The Metamorphosis of the European Economic Constitution 106 (Herwig C.H. Hofmann, Katerina Pantazatou & Giovanni Zaccaroni eds., 2019)

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Council, can achieve. Article 122 TFEU was used as a legal basis to establish more than a mere crisis mechanism: A new type of instruments for redistribution between Member States funded through debt.[96] Some go even further and read Article 122(1) TFEU as allowing the Union to develop its own economic policy.[97] In this spirit, the Draghi Report suggests to extend its use.[98] All this demonstrates the economic constitution's openness to changes below the level of formal Treaty amendment.

On the other hand, the Treaties' overaching teleology has become increasingly broader. Article 3 TEU contains a plethora of highly disparate and vaguely outlined objectives which the Union shall pursue. Whereas the former Article 2 EEC contained a clear canon of objectives leaving only limited space to the Community institutions, the proliferation of objectives provided much more autonomy to the Union legislature.[99] This teleological openness has been coupled with co-called "integration clauses." According to Articles 8 to 12 TFEU, non-discrimination, social, environmental, or consumer protection "must be integrated" or "shall be taken into account" in defining and implementing the Union's policies.[100] The full impact of these clauses remains subject to controversy. Some argue that these provisions expand the Union's competences, others stress that they only provide for additional policy considerations within the existing legal bases.[101] Still, it seems clear that such integration clauses expand the scope of political considerations. To provide just one example: Many argue that Article 11 TFEU allows the European Central Bank to go beyond its mandate in Article 127(1) TFEU to maintain price stability and pursue climate protection goals as well.[102]

2. Flexible Procedures

Further, Grimm seems to overestimate the rigidity of the Treaties' amendment procedures. In fact, the modes of Treaty change lead neither to its depoliticization, nor its petrification. First, the legislature can actively participate in the revision process. The current push for Treaty change emanates primarily from civil society and the European Parliament. The Conference on the Future of Europe followed a bottom-up approach involving civil society that stirred a pan European debate.[103] In the aftermath of this exercise, it was the Parliament that called for a Convention

[96]Maria Antonia Panascì, *Unravelling Next Generation EU as a transformative moment: from market integration to redistribution*, 61 Common Mkt. L. Rev. 13 (2024). For a critical discussion, *compare* Päivi Leino-Sandberg & Matthias Ruffert, *Next Generation EU and its Constitutional Ramifications: A Critical Assessment*, 59 Common Mkt. L. Rev. 433, 444 (2022) *with* Daniel Calleja, Tim Maxian Rusche & Trajan Shipley, *EU Emergency - Call 122?*, 29 Colum. J. Eur. L. 520, 548 (2024). Seeing no manifest breach of competences, BVerfG, 2 BvR 547/21, Dec. 6, 2022 – *NGEU*.

[97]Merijn Chamon, *The Non-Emergency Economic Policy Competence in Article 122(1) TFEU*, 62 Common Mkt. L. Rev. 1501 (2024). For a criticial discussion, *see* Paul Dermine, Le plan de relance de l'Union européenne 121 (2023) and Ruth Weber, *Die Neuordnung der EU-Wirtschaftsverfassung durch Art. 122 AEUV?*, 149 Archiv des öffentlichen Rechts 82 (2024).

[98]The Future of European Competitiveness: In-depth analysis and recommendations (Part B) (Sept. 9, 2024), at 316. For a critique, *see* Peter Lindseth & Päivi Leino-Sandberg, *Democratizing Draghi: Why the "Competitiveness Report" Demands Treaty Reform*, Verfassungsblog (Sept. 12, 2024).

[99]Speaking of a "Zielkakophonie," *see* Jörg Philipp Terhechte, *Art. 3 EUV, in* Das Recht der Europäischen Union para. 23 (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 83th ed., loose-leaf, 2024).

[100]In detail, *see* The EU and the Proliferation of Integration Principles under the Lisbon Treaty (Francesca Ippolito, Maria Eugenia Bartoloni & Massimo Condinanzi eds., 2014).

[101]*Compare* Wolfgang Kahl, *Art. 11 AEUV, in* EUV/AEUV para. 28 (Rudolf Streinz ed., 3d ed., 2018) *with* Evangelia Psychogiopoulou, *The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice*, 7 Eur. Papers 1357, 1363 (2022).

[102]*See, e.g.*, Chiara Zilioli & Michael Ioannidis, *Climate Change and the Mandate of the ECB*, 59 Common Mkt. L. Rev. 363, 377 (2022); Christian Calliess & Ebru Tuncel, *The Role of Article 11 TFEU in the Greening of the ECB's Monetary Policy*, 24 German L.J. 796, 797 (2023).

[103]On the potential of politicizing the process, *see* Sandra Seubert, *The Conference on the Future of Europe as a Chance for Democratic Catching up?*, 13 Glob. Const. 429 (2024).

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under Article 48(2) TEU and submitted a highly ambitious proposal.[104] Even if the final decision is taken by the Member States, the power of the "first word" should not be underestimated.

Second, Treaty change—in a broader sense—is not as foreclosed as Grimm assumes. Obviously, the growing number of Member States makes formal amendments, especially in politically controversial areas, increasingly difficult. In the words of Bruno de Witte, the "'happy days' of the semi-permanent Treaty revision process" have come to an end.[105] However, this does not lead to a petrification of the current Treaty framework. Besides the profound shifts in the Union's economic constitution mentioned before, the Treaties have proven robust and flexible enough to manage a series of unprecedented crises. Consider only the past decade: The financial, migration, values, and pandemic crisis ... all these crises were processed within the existing Treaty framework, leading to deep transformations of the constitutional system.

Moreover, the Treaties reveal a largely untapped potential for change, as Daniel Calleja and Clemens Ladenburger have outlined.[106] Besides the simplified revision procedure in Article 48(6) TEU and differentiated integration in Article 20 TEU, they refer to special legislative procedures that allow for a revision of the Treaties in specific areas, such as Article 25(2) TFEU, passerelle clauses that allow the shift from unanimity to majority voting, such as Article 48(7) TEU), changes to important protocols by legislative procedures, such as those in Articles 129(3) or 281(2) TFEU, or the flexibility clause in Article 352 TFEU. Finally, they suggest the development of the Union's institutional system through "constitutional practices."

All this allows and fosters constitutional change below the threshold of formal amendments. Importantly, these changes are not only driven by the Court of Justice, but by the *political institutions*. It should be stressed that this is by no means a unique feature of the EU legal order. Most legal orders are familiar with such political changes without formal constitutional amendments, be it a "Verfassungswandel" or "Verfassungsentwicklung,"[107] a "mutuation constitutionnelle" or "changement informel,"[108] "transformazioni" or "mutamenti informali."[109] Political science has long argued that this applies in particular to federal systems. These systems face a dilemma: While being subject to constant dynamics between unitary and federalizing forces, which are difficult to fix once and for all, the individual components of such systems want to prevent the migration of authority from one level to the other, which leads to more detailed and rigid constitutions. To hold the federal system together, the respective polity must therefore often resort to "implicit constitutional change."[110] The EU as a federal system is subject to similar dynamics. Accordingly, its constitution has been described early on as "Wandelverfassung"[111]

[104]*See* European Parliament, *supra* note 1 and note 2.

[105]Bruno de Witte, Constitutional Challenges of the Enlargement 19 (2019).

[106]Daniel Calleja & Clemens Ladenburger, *The Future of European Law, in* 70 Years of EU Law 381, 384 (Commission Legal Service ed., 2023).

[107]*See, e.g.*, Klaus-Ferdinand Gärditz, *Constitutional Development and Constitutional Jurisprudence, in* Constitutional Law in Germany § 4, 187 (Matthias Herdegen et al. eds., 2025) or Lothar Michael, *Verfassungswandel, in* Handbuch des Staatsrechts, Vol. 1 § 8, 361 (Uwe Kischel & H Hanno Kube eds., 2023).

[108]*See, e.g.,* Guillaume Drago, *Les Mutations Constitutionnelles: Notion, Types, Causes, in* Les mutations constitutionnelles 201 (Société de législation comparée ed., 2013) or Manon Altwegg-Boussac, Les changements constitutionnels informels (2013).

[109]*See* Maurizio Fioravanti, *La Trasformazione Costituzionale*, Rivista trimestrale di diritto pubblico 295 (2014) or, with regard to the EU itself, Francesco Palermo, *I Mutamenti Costituzionali Informali Nell'Unione Europea*, Diritto pubblico comparato ed europeo 1748 (2009).

[110]*See, e.g.,* Arthur Benz, Constitutional Policy in Multilevel Government: The Art of Keeping the Balance 1, 177 (2016); Arthur Benz & César Colino, *Constitutional Change in Federations—A Framework for Analysis*, 21 Reg. & Fed. Stud. 381, 389 (2011).

[111]Hans-Peter Ipsen, *Europäische Verfassung—Nationale Verfassung*, 22 Europarecht 195, 201 (1987). *See* also the characterisation as "Verfassung als Prozess," Ingolf Pernice, *Europäisches und nationales Verfassungsrecht*, 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 148, 165 (2001).

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or—in the words of Vlad Constantinesco—as "un mouvement, une tendance, une émergence, une dynamique, un devenir plus qu'un être."[112]

II. Underestimating the Institutional Practice

1. Judicial Responsiveness

Grimm asserts that the constitutionalization of the Treaties immunizes the Court of Justice against any attempt of legislative override.[113] As discussed before, nobody denies that the Court has an extremely powerful position in the Union's constitutional architecture. However, Grimm's observations revolve in a theoretical vacuum. Importantly, he ignores a crucial strand of case law that seeks to remedy the asymmetries between the Union's legislative and judicial branch.

Let us take a step back. It seems to be part of the standard repertoire of a constitutional court to establish mechanisms easing the general tension with the political process. Such strategies can take many forms, like excluding constitutional amendments or laws adopted by way of referenda from judicial review in France, a system of legislative prerogatives and discretion in Germany, a political question doctrine in the United States, or a margin of appreciation developed by the ECtHR.[114] The Court of Justice is no exception in this regard. In the words of Koen Lenaerts, the Court "moved onto a new paradigm. As the constitutional court of a more mature legal order, it now tends to be less assertive as to the substantive development of EU law [. . .] overall it displays greater deference to the preferences of the EU legislator."[115]

In this spirit, the Court seeks to be responsive towards the EU legislature. In general terms, the Court's jurisprudence seems to follow the logic of *compensating* and *promoting* European legislation. According to Miguel Maduro, the Court has primarily relied on fundamental freedoms to compensate for the lack of harmonization.[116] In case the respective area has been harmonized at the EU level, this rationale ceases to apply and the Court can defer to EU legislation. This deference has recently been described as "legislative priority rule" and pervades the entire free movement case law.[117] At the same time, Armin von Bogdandy has proposed to read this deferential attitude against the Court's rigorous review of national measures that potentially violate fundamental freedoms. Read together, both jurisprudential strands seem to serve the ultimate purpose of encouraging the Member States to adopt legislation at the EU level, promoting European law making, and thus strengthening the European political process.[118]

How does the Court's deferential attitude operate in practice? Luxembourg has not only adjusted its case law to the express will of the EU legislature—even if it was based on

[112]Vlad Constantinesco, *L'émergence d'un droit constitutionnel européen*, 7 Revue universelle des droits de l'homme 445, 447 (1995).

[113]Grimm, *supra* note 4, at 471.

[114]Peter M. Huber, *Constitutional Courts and Politics in the European Legal Space, in* The Max Planck Handbooks in European Public Law, Vol. 4 547, 563 (Armin von Bogdandy, Peter M. Huber & Christoph Grabenwarter eds., 2023).

[115]Koen Lenaerts, *The Court's Outer and Inner Selves, in* Judging Europe's Judges 13, 16 (Maurice Adams et al. eds., 2013).

[116]Maduro, *supra* note 44, at 78.

[117]In detail, *see* Eadaoin Ní Chaoimh, The Legislative Priority Rule and the EU Internal Market for Goods (2022); Eadaoin Ní Chaoimh, *Introducing the Legislative Priority Rule: A Constitutional Compass for the Court*, 42 Y.B. Eur. L. 84 (2023).

[118]Armin von Bogdandy, The Emergence of European Society through Public Law 199 (2024). The Court has often been described as an agenda setter, catalyst, and idea giver for legislation before, *see* Dehousse, *supra* note 81, at 82; Anne-Marie Burley, *Democracy and Judicial Review in the European Community*, Univ. of Chic. Legal F. 81, 90 (1992). Others refer to the CJEU's "impulse function," *see* Jürgen Basedow, *The Judge's Role in European Integration, in* The European Court of Justice and the Autonomy of the Member States 65, 72 (Hans-Wolfgang Micklitz & Bruno De Witte eds., 2012).

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primary law[119]—but seems to employ a deferential approach towards EU legislative acts at a more general level.[120] Three strands of case law might serve as illustrative examples.

First, the Court leaves a margin of discretion to the EU legislature when reviewing legislation. The Court affirmed that the legislature must be allowed "broad discretion" in areas which entail "political, economic and social choices."[121] The legality of an act adopted by the EU legislature is only affected if the measure is manifestly inappropriate with regard to its objective.[122] A similarly broad discretion applies to highly complex economic, scientific, and technical facts.[123] Even if such a reduced standard of review has been subject to severe criticism concerning the ECB, these objections do not unfold the same power with regard to legislative processes. To the contrary, a reduced review intensity broadens the space for political processes.

Second, it is established jurisprudence that where a matter is the subject of exhaustive harmonization at the EU level, any national measure relating thereto must be assessed in light of the respective EU legislation and not the Treaties.[124] This is not limited to provisions that expressly defer to legislative concretization, such as Article 21(1) TFEU, but extends to the entire internal market context. For example, where a legislative act has exhaustively harmonized an area of law, Member States cannot appeal to the grounds of public morality, public policy, or public security under the fundamental freedoms to circumvent these legislative constraints.[125] In this sense, the Court applies the fundamental freedoms only if there is no fully harmonizing secondary law. But also beyond cases of full harmonization, the Court is often inclined to defer to legislation. In *Dano*, for instance, it stressed that the principle of non-discrimination under Article 18 TFEU is "given more specific expression" in Article 24 of the Free Movement Directive 2004/38 and decided the case exclusively on that basis.[126] The Court's readjustment, construing the Union citizens' right to equal treatment in increasingly narrow terms, was read as giving way to the legislative decisions taken in the Directive. Even though one can legitimately criticise the Court's restrictive approach, it seems responsive to the legislature.[127]

Third, the CJEU has even gone so far as to interpret provisions of primary law in light of secondary legislation. One example is the relationship between Articles 20 and 21 TFEU and the Free Movement Directive. The Court has not only interpreted Article 21 TFEU in line with the Directive before the latter's transposition period had elapsed;[128] it even started to apply the Directive by analogy to areas and situations that are not covered but nonetheless fall within the

[119]For examples, *see* Dorte Sindbjerg Martinsen & Michael Blauberger, *The Court of Justice of the European Union and the Mega-Politics of Posted Workers*, 84 L. & CONT. PROB. 29, 51 (2022); Christopher Vajda, *Democracy in the European Union: What Has the Court of Justice to Say*, 4 CAMBRIDGE J. INT'L & COMP. L. 226, 237 (2015); Vassilis Hatzopoulos, *Actively Talking to Each Other: the Court and Political Institutions, in* JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE 102, 133 (Mark Dawson, Bruno De Witte & Elise Muir eds., 2013).

[120]*See also* STEPHEN WEATHERILL, THE INTERNAL MARKET AS A LEGAL CONCEPT 158 (2017) and Mattias Wendel, *Auf dem Weg zum Präjudizienrecht?,* 68 JAHRBUCH DES ÖFFENTLICHEN RECHTS 113, 122–24 (2020).

[121]Case C-626/18, *Poland v. Parliament and Council*, ECLI:EU:C:2020:1000, para. 96 (Dec. 8, 2020); Case C-58/08, *Vodafone*, ECLI:EU:C:2010:321, para. 52 (June 8, 2010); Case C-37/83, *Rewe-Zentrale*, ECLI:EU:C:1984:89, para. 20 (Feb. 29, 1984).

[122]*See, e.g.*, Case C-611/17, *Italy v. Parliament and Council*, ECLI:EU:C:2019:332, para. 27 (Apr. 30, 2019).

[123]*See, e.g.*, Case C-128/17, *Poland v. Parliament and Council*, ECLI:EU:C:2019:194, para. 95 (Mar. 13, 2019).

[124]Case C-147/21, *CIHEF and Others*, ECLI:EU:C:2023:31, para. 26 (Jan. 19, 2023); Case C-205/07, *Gysbrechts and Santurel*, ECLI:EU:C:2008:730, para. 33 (Dec. 16, 2008); Case C-150/88, *Parfümerie-Fabrik 4711*, ECLI:EU:C:1989:594, para. 28 (Nov. 23, 1989).

[125]*See, e.g.,* Case C-78/18, *Commission v. Hungary (Transparency of associations)*, ECLI:EU:C:2020:476, para. 88 (June 18, 2020); Case C-112/05, *Commission v. Germany*, ECLI:EU:C:2007:623, para. 72 (Oct. 23, 2007); Case C-5/77, *Tedeschi v. Denkavit*, ECLI:EU:C:1977:144, para. 35 (Oct. 5, 1977).

[126]Case C-333/13, *Dano*, ECLI:EU:C:2014:2358, para. 61 (Nov. 11, 2014).

[127]In detail, *see* VAN DEN BRINK, *supra* note 83, at 75. For possible explanations, *see*, *e.g.*, Michael Blauberger et al., *ECJ Judges Read the Morning Papers*, 25 J. EUR. PUB. POL'Y 1422, 1424 (2018).

[128]*See, e.g.*, Case C-158/07, *Förster*, ECLI:EU:C:2008:630 (Nov. 18, 2008).

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ambit of Article 21 TFEU.[129] Yet, this approach is a two-edged sword. The extension of secondary law can undermine the intention of the legislature, who might have deliberately excluded certain situations from the respective act's scope.[130] Further, such an approach can lead to a legislative ossification at the Treaty level.[131]

Ultimately, the Court's responsiveness had an overall effect on the case law. Ask yourself the following question: Beyond the free movement of persons, which is the last jurisprudential leap in the market freedoms that you remember in the past decade? Should you struggle to answer, rest assured, you did not miss much. Indeed, empirical evidence suggests that cases based on the fundamental freedoms are increasingly disappearing from the Court's docket. According to Jan Ziglinski, for instance, there has been a drastic decline in litigation based on Article 34 TFEU, from over twenty-five cases in 1985 to not even two cases in 2020.[132] Also beyond the free movement of goods, Urška Šadl and her team observed that fewer and fewer judgments address obstacles to the Treaties' free movement rules. Her empirical analysis reveals that litigation arises rather with respect to European regulations and directives.[133] Taking an even broader perspective, the data set gathered by Joshua Fjelstul shows that the Court not only interprets secondary legislation much more frequently than Treaty articles, but also that the Luxembourg judges use secondary legislation much more often as a yardstick to review EU or national measures.[134]

2. Increasing Legislation

This growing judicial responsiveness is coupled with an increasing legislative activity. Grimm departs from the idea that a strong Court took the driver's seat in construing the internal market, a weak legislature only the back seat. Here, Grimm seems to follow Fritz Scharpf, who ascertained an asymmetry between negative integration, the setting aside of national regulation in conflict with EU law, and positive integration, meaning the re-regulation of these issues at the EU level.[135] Since the turn of the past decade, however, a new stream of literature started questioning these assumptions. Many argue that while the contribution of the legislature is highly underestimated, the judiciary's role tends to be over-emphasized. In this sense, newer research demonstrates that positive integration has gained in force.[136]

What do empirical findings suggest? To start with, the overall rate of adopted legislation per year has drastically decreased since the 1990s (Fig. 1). At first glance, this seems to support Grimm's thesis. Still, this finding alone does not tell us much. First, it can be observed that legislation adopted with the European Parliament as co-decision maker has increased (Fig. 2).

[129]*See, e.g.,* Case C-456/12, *O. and B.*, ECLI:EU:C:2014:135, para. 50 (Mar. 12, 2014); Case C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354, para. 54 (May 10, 2017); Case C-673/16, *Coman*, ECLI:EU:C:2018:385, para. 24 (June 5, 2018).

[130]Davies, *supra* note 75, at 1603.

[131]Case C-282/10, *Dominguez*, ECLI:EU:C:2011:559, para. 157 (Sept. 8, 2011) (Opinion of Advocate General Trstenjak). For a critique, *see also* Friedrich Müller & Ralph Christensen, Juristische Methodik, Vol. 2: Europarecht paras. 548-560 (3d ed., 2012).

[132]Jan Zglinski, *The End of Negative Market Integration*, 31 J. Eur. Pub. Pol'y 633, 639 (2023) (figure 1). For a similar finding with regard to internal market cases more generally, which includes fundamental freedoms, *see* Mark Dawson, *The Changing Substance of European Law*, 20 Eur. Const. L. Rev. 451, 463–64 (2024).

[133]Urška Šadl, Lucía López Zurita & Sebastiano Piccolo, *Route 66: Mutations of the Internal Market Explored Through the Prism of Citation Networks*, 21 Int. J. Const. L. 826 (2023).

[134]Joshua C. Fjelstul, *The Evolution of European Union Law: A New Data Set On the Acquis Communautaire*, 20 Eur. Union Pol. 670, 683 (2019)

[135]Fritz W. Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot Be A 'Social Market economy'*, 8 Socio-Econ. Rev. 211, 214 (2010).

[136]Martijn van den Brink, Mark Dawson & Jan Zglinski, *Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU*, 32 J. Eur. Pub. Pol'y 209 (2025).

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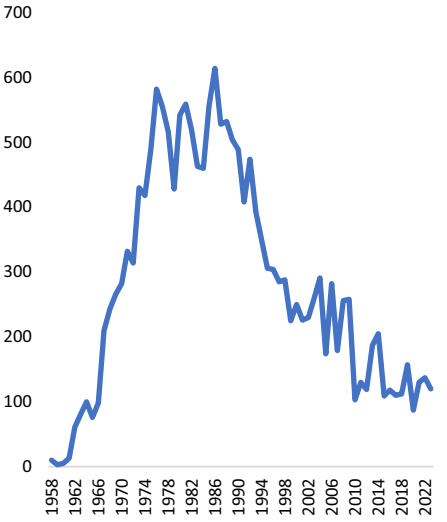

Figure 1. Adopted Legislative Acts Per Year.[137]

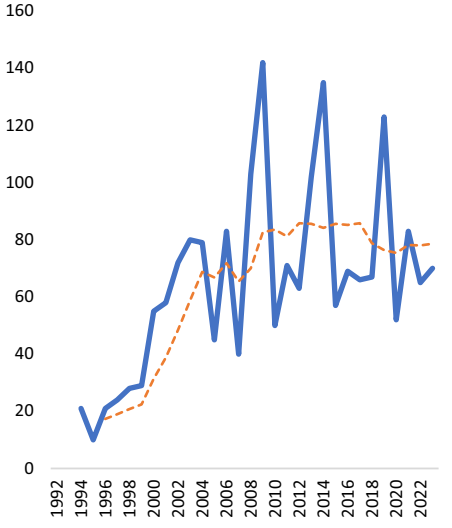

Figure 2. Adopted Legislative Acts Per Year Including the EP as Co-Decision Maker.[138]

Legislative acts with a stronger democratic pedigree are therefore on the rise. Second, it seems only natural that the pace of legislation has been reduced with time. After the Treaty of Rome, the early European Communities had to start from scratch. That explains the exponential rise of legislation

[137]The data displayed in figures 1 to 6 was gathered from *EUR-Lex*. The notion of "adopted legislative acts" refers to directives and regulations, including amendments, excluding decisions, implementing or delegated legislation, and corrigenda. Search criteria for figure 1: "Exclude corrigenda"; Author: "Council"; Type of act: "Regulation" & "Directive." The data largely matches the results reached by Michal Ovádek, *Legislative Output of the European Union*, https://michalovadek.github.io/eulaw/ and Jonathan Golub, *EUPROPS: A new dataset on policymaking in the European Union from 1958 to 2021*, 25 Eur. Union Pol. 197, 205 (2024) (figure 1).

[138]This includes the "co-decision procedure" under Maastricht and excludes the "cooperation procedure" under the Single European Act. The second line indicates the 5-year median. Search criteria for figure 2: "Exclude corrigenda"; Author: "European Parliament"; Type of act: "Regulation" & "Directive."

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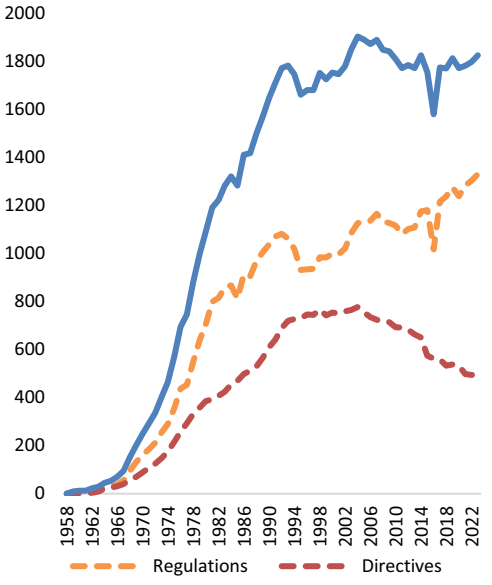

Figure 3. Basic Legislative Act in Force Per Year.[139]

in the early days. The cumulative number of legislative acts in force is more instructive in this respect (Fig. 3). After a certain bump from the mid-1990s on, there has been an increase in legislative acts again.

When looking at the individual policy areas, which Grimm suggests to downgrade, this rise in legislation becomes even clearer. With regard to the internal market, many have observed its development from a free trade area into a "maze of common policies."[140] Jan Zglinski, for instance, showed that internal market related legislation has steadily increased from the 1970s until today.[141] Zglinski concentrates on a rather small portion of legislation, which excludes important areas commonly associated with the internal market.[142] Even after broadening the scope of inquiry, however, both the overall number of legislative acts in force (Fig. 3) as well as the consolidated internal market acquis have considerably grown (Fig. 4). Further, the empirical evidence suggests a rise in legislative activity. In the past twenty years, there have been new peeks of newly adopted legislation in the internal market (Fig. 5). This applies especially to acts adopted on the basis of Article 114 TFEU (Fig. 6). It is to be expected that this development will continue. Enrico Letta even suggested to commit the EU legislature to a principle of "non regression" in the internal market.[143]

At the same time, the increasing importance of legislation can also be traced qualitatively. First, the level of specificity of legislation seems to have been reduced. From the 1970s to the end of the 1990s many highly specific legislative acts were adopted that concerned narrowly defined

[139]The notion of "basic legislative acts" refers to regulations and directives, excluding amendments and corrigenda. Search criteria for figure 3: "Exclude corrigenda"; "Limit to basic acts"; Author: "Council of the European Union"; Type of act: "Regulation" & "Directive."

[140]Šadl, López Zurita & Piccolo, *supra* note 133.

[141]Jan Zglinski, *Governing the Internal Market: From Judicial Politics to Ordinary Politics, in* Revisiting Judicial Politics in the European Union 171, 182 (Mark Dawson, Bruno de Witte & Elise Muir eds., 2024).

[142]Zglinski draws on data gathered from *EUR-Lex* by using only one directory code, 13.30 Internal market, and including Commission decisions. The data presented in figures 1 to 6 deviates by concentrating on regulations and directives and by broadening the scope, see below.

[143]Enrico Letta, Much more than a market – Speed, Security, Solidarity 125 (2024).

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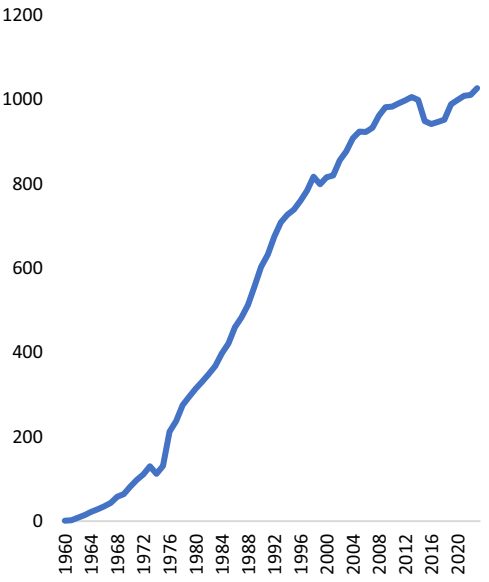

Figure 4. Basic Legislative Acts On the Internal Market in Force Per Year.[144]

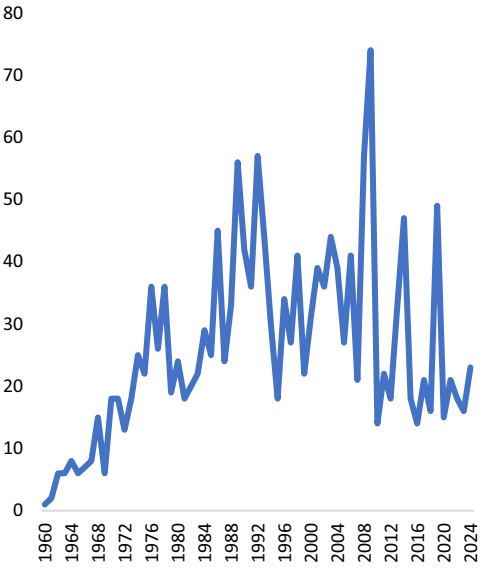

Figure 5. Adopted Legislative Acts on the Internal Market Per Year.[145]

questions. Today, the EU legislature seems to have turned to bigger legislative packages. This is evidenced by the size of legislative proposals put forward by the Commission, which have considerably increased during the past twenty-five years (Fig. 7). Second, there have been general

[144]Search criteria for figure 4: "Exclude corrigenda"; "Limit to basic acts"; Author: "Council of the European Union"; Type of act: "Regulation" & "Directive"; Directory code: 02.40.10.10 Free movement of goods, 02.40.10.40 Elimination of barriers to trade, 05.10 Freedom of movement for workers, 06 Right of establishment and freedom to provide services, 08 Competition policy, 10.40 Free movement of capital, 13.30 Internal market: approximation of laws, 13.40 Internal market: policy relating to undertakings, 15.20 Consumers, 17 Law relating to undertakings. This excludes acts relating to other policy areas, such as customs, agriculture, fisheries, transport, taxation, energy, or monetary policy and—importantly—the free movement of persons.

[145]Search criteria for figure 5: "Exclude corrigenda"; Author: "Council of the European Union"; Type of act: "Regulation" & "Directive"; Directory code: *see supra* note 144.

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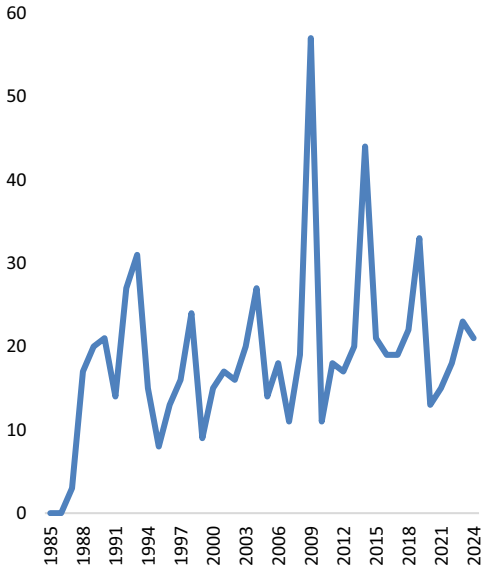

Figure 6. Adopted Legislative Acts Based on Art. 114 TFEU (prior Art. 95 EC and Art. 100a EEC).

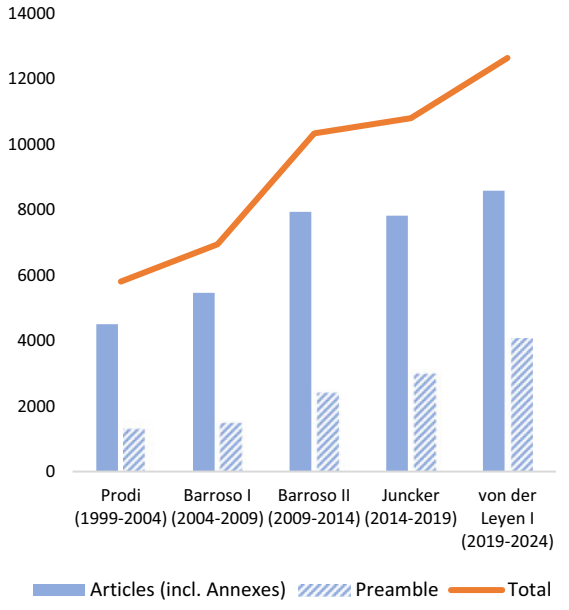

Figure 7. Average Number of Words of Legislative Proposals.[146]

switches from minimum to maximum harmonization and a turn from directives to regulations (Fig. 3), which increases the impact of the respective legislation.[147] And third, legislation focuses

[146]This data was gathered by Kamil Sekut & J. Scott Marcus, *Simplifying EU Law: A Cumbersome Task With Mixed Results*, BRUEGEL ANALYSIS (Sept., 23 2024) (gathering the data from *EUR-Lex*, considering only Commission proposals under the ordinary legislative procedure, excluding amendments and recasts).

[147]On the Commission's push for full harmonisation, *see*, *e.g.*, Stephen Wheatherill, *The Fundamental Question of Minimum or Maximum Harmonisation*, *in* THE INTERNAL MARKET 2.0 262, 278–82 (S. Garben & I. Govaere eds., 2020) and, specifically for the field of consumer protection, *see* Commission Communication, EU Consumer Policy strategy 2007-2013, COM(2007) 99 final (Mar. 13, 2007), at 7. On the rise of regultions, *see* Steffen Hurka & Yves Steinebach, *Legal Instrument Choice in the European Union*, 59 J. COMMON MKT. STUD. 278, 285 (2021).

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on establishing broader frameworks. This is also possible due to implementing or delegated legislation adopted by the Commission, which does not feature in the data presented in this Article. In sum, the legislature's ambition and self-understanding becomes readily apparent when considering the denomination of many regulations or directive as "Act," "Code," or "Law."[148]

Taken together, these observations might indicate a more general shift from judicial to legislative politics. Similar developments can be observed in other policy areas as well. In the area of free movement, Rainer Bauböck argued that "the battle [. . .] is no longer fought primarily in courts where individual rights can trump majority preferences; it is increasingly fought in polling stations, parliament and the mass media."[149] Even in the area of social policy it has been established both in quantitative and qualitative terms that legislation is on the rise.[150] Since the mid-2010s, the EU legislature has managed to adopt a number of directives which raise protective standards, covering issues ranging from work-life balance, over minimum wages, to working conditions.[151]

This shift finds expression not only at the legislative level, but in the Union's political arena more generally. Luuk van Middelaar, for instance, ascertained that the Union underwent a "metamorphosis" during the past decade of crises from a "depoliticized Brussels rule-making factory that, out of public view, knocked together a continental market" to an increasingly politicized Union.[152] In this narration the European Council, not the ordinary legislative process, takes center stage. However, the European Council is composed of the Member States' heads of state and government, which all enjoy democratic legitimacy. In the Union's "democracy of many mediations"[153] it is one of several institutions securing the democratic legitimacy of decision-making processes at the European level.

This increasing politicization in various loci demonstrates that even an over-constitutionalization of EU law does not rule out the development of meaningful political processes at the European level. Still, this observation is limited in two important respects. On the one hand, it cannot demonstrate to which extent legislation is, despite its rise, determined by primary law or the Court's case law. On the other hand, the previous assessment cannot rule out the counterfactual that reducing the scope of primary law would not lead to even more space for legislative or political decision making and thus an even greater rise of legislation and politicization. Yet, these scenarios are difficult—if not impossible—to assess.

Nevertheless, we can prove that legislative activity increased *despite* the continuous increase in primary law. This indicates that there is no necessary causal link between the extent of primary law and the amount of legislation or degree of politicization. If we reverse this reasoning this means that reducing primary law might not lead to more legislative activity. Grimm's thesis remains an unproven—and after the previous assessment a rather shaky—hypothesis, which cannot serve as a stable basis for his ambitious Treaty reform proposal.

[148]For example, the Digital Services, AI, Chips, or the European Media Freedom Act, all adopted based on Art. 114 TFEU, the Electronic Communications Code based on Art. 114 TFEU or the "Visa Code" based on Art. 62 TFEU, as well as the Nature Restoration Law based on Art. 192 TFEU. This applies also to other language versions, which speak of "Gesetz," "legislation," "ley," or "legge" and "Kodex," "code," "codice," or "código."

[149]Rainer Bauböck, *The New Cleavage Between Mobile and Immobile Europeans, in* DEBATING EUROPEAN CITIZENSHIP 125, 127 (Rainer Bauböck ed., 2019).

[150]Claire Kilpatrick, *The Roaring 20s for Social Europe,* 29 TRANSFER 203 (2023). For a quantitative analysis, *see* Dorte Sindbjerg Martinsen, *Social policy: The European Social Union and EU legislative politics, in* A EUROPEAN SOCIAL UNION AFTER THE CRISIS 459, 462 (Frank Vandenbroucke, Catherine Barnard & Geert De Baere eds., 2017).

[151]*See, e.g.,* Amandine Crespy, *Can Scharpf Be Proved Wrong? Modelling the EU Into a Competitive Social Market Economy For the Next Generation*, 26 EUR. L. J. 319, 321 (2020); Sven Schreurs, *Scharpf Revisited: European Welfare Governance Through the Lens of Actor-Centred Institutionalism*, 31 J. EUR. PUB. POL'Y 2692 (2024).

[152]LUUK VAN MIDDELAAR, PANDEMONIUM: SAVING EUROPE 113 (2021). *See also* Jim Cloos, *Les 50 ans du Conseil européen. Acteur central de l'intégration européenne*, REVUE DU DROIT DE L'UNION EUROPÉENNE 99 (2024).

[153]On this conceptualization, *see* VON BOGDANDY, *supra* note 118, at 135.

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F. An Alternative Way Forward: Calibrating the Court's Case Law

What remains of the over-constitutionalization thesis? Grimm certainly expresses a legitimate concern: Preserving sufficient space for legislative decision-making. As the previous sections have demonstrated though, there is a mismatch between Grimm's theory and the Union's reality. He overestimates the Treaties' rigidity in substance and procedure and underestimates the rise of judicial responsiveness and legislative activity. These insights allow us not only to locate problems, but also to draw *normative* conclusions on how to remedy them.

Disregarding the institutional practice, Grimm seeks to remedy any imbalances between the legislature and the Court at the *Treaty level*. He suggests scaling back the Treaties to their genuinely constitutional content. All other Treaty provisions should be "de-constitutionalized" by transferring them into the sphere of secondary legislation.[154] Yet, this proposal has several shortcomings. First, it seems highly unrealistic that the Member States would agree to such a profound Treaty change.[155] Second, Grimm assumes that scaling back the Treaties will reduce the constraints on the legislature set by the Court. However, the developments in jurisdictions with much shorter constitutions—such as Germany—demonstrate that courts can nonetheless pursue the constitutionalization of a legal order and impose hefty constraints on legislative processes.[156]

For these reasons, it seems preferable to concentrate on the *institutional level*. Despite the Court's increasing responsiveness and the rise in legislative activity, there is room for improvement. At times, the Court continues to place tight constraints on the Union legislature in important policy fields. In particular, its responsiveness does not seem to be guided by any consistent, overarching idea as to the relationship among Treaties, judiciary, and legislature. How could Luxembourg then further calibrate its jurisprudence and broaden the space for legislative decision-making?

During the past decade, the Court has started to reorganize the Treaties by distinguishing a "constitutional framework" from the plethora of its provisions. This framework comprises only certain constitutional provisions and excludes large parts of the Union's policy areas. I suggest taking this development a step further: The Court could introduce not formal, but substantive hierarchies between provisions pertaining to the Union's constitutional framework and the rest of primary law. Based on this differentiation, the Court could start relaxing the constraints imposed on the legislature by the latter parts of primary law. This might lead to a soft form of "de-constitutionalization" bridging two conflicting rationales: Taking into account the Member States' desire for control—by leaving the Treaties in their current shape—and rebalancing the relationship between the Court and the legislature—by relaxing constraints imposed by the Court's interpretation of certain Treaty parts.

[154]Grimm, *supra* note 4, at 473. *See also,* Sacha Garben, *Restating the Problem of Competence Creep, Tackling Harmonisation by Stealth and Reinstating the Legislator, in* THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES 300, 330 (Sacha Garben & Inge Govaere eds., 2017); Höpner & Schmidt, *supra* note 12, at 193. With regard to economic and monetary policy, *see* Dani, *supra* note 13, at 302. On a narrower level, some propose to limit the judicial enforcement of certain parts of EU primary law, *see* Scharpf, *supra* note 10, at 422; Fritz W. Scharpf, *De-constitutionalisation of European Law: The Re-empowerment of Democratic Political Choice, in* THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES 284, 297 (Sacha Garben & Inge Govaere eds., 2017); Martijn van den Brink, *The European Union's Demoicratic Legislature*, 19 INT'L J. CONST. L. 914, 938 (2021).

[155]On the Member States' desire for control, *see* Section C.I.2.

[156]On the critique, *see* MATTHIAS JESTAEDT, OLIVER LEPSIUS, CHRISTOPH MÖLLERS & CHRISTOPH SCHÖNBERGER, THE GERMAN FEDERAL CONSTITUTIONAL COURT: THE COURT WITHOUT LIMITS (2020).

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I. Defining the Union's "Constitutional Framework"

Since its early case law, the Court understands the Treaties as a "constitutional charter."[157] Does this cover the *entire* Treaties? At first glance, the Court seems to refer, just as Grimm does, to the full breadth of primary law. In lack of a formal constitutional document, however, there is no reason why the Court should be required to equate the Union's constitutional law with the entirety of primary law. In this spirit, the Court has started to distinguish certain elements from the plethora of Treaty provisions that form the Union's "constitutional framework."[158]

Such judicial attempts of constitutional "reorganization" are not new but can be observed in many jurisdictions. On the one hand, courts have defined the scope of constitutional law itself. Substantive constitutional value might often coincide with a formal constitution's content but can also be broader or narrower.[159] One powerful example is the "bloc de constitutionnalité" in France. In *Liberté d'association*, the Conseil Constitutionnel acknowledged the constitutional rank of the preamble to the 1958 constitution and thus, implicitly, of the texts to which the preamble refers, such as the 1789 Declaration of the Rights of Man and of the Citizen.[160] In doing so, the Conseil expanded constitutional value beyond the formal constitution and extended its yardsticks for judicial review.[161]

On the other hand, courts have identified certain constitutional provisions or principles that transcend other constitutional norms. Even a short look into the Member States' constitutions reveals that—despite their equal formal rank—not all provisions feature the same significance. Article 20 of the German Basic Law, for instance, is generally understood as a "Verfassung der Verfassung," Article 1 of the Spanish Constitution is considered the "constitución de la constitución," and Austrian constitutional law draws on the "Baugesetze der Verfassung."[162] In this sense, there can be asymmetrical relationships between provisions of equal constitutional rank.[163]

These two approaches have become increasingly visible in the Court's jurisprudence. As previously noted, the Court started identifying a "constitutional framework" from the plethora of Treaty provisions. Especially Opinion 1/17 establishes what some might call a "constitutional blueprint" of contemporary EU law:[164]

> [T]he Union possesses a constitutional framework [. . .] That framework encompasses the founding values set out in Article 2 TEU [. . .] the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties, which include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in such a way as to contribute to the implementation of the process of integration [. . . .][165]

[157]*See, e.g.,* Joined Cases C-357, 379, 547, 811 & 840/19, *Euro Box Promotion*, ECLI:EU:C:2021:1034, para. 247 (Dec. 21, 2021); Joined Cases C-402 and 415/05 P, *Kadi,* ECLI:EU:C:2008:461, para. 281 (Sep. 3, 2008); Case C-294/83, *Les Verts*., ECLI:EU:C:1986:166, para. 23 (Apr. 23, 1986). Early on Opinion 1/76, *European laying-up fund*, ECLI:EU:C:1977:63 para. 12 (Apr. 26, 1977).

[158]*See* Opinion 2/13, *ECHR Accession II*, ECLI:EU:C:2014:2454, paras. 165–177.

[159]For a comparative assessment, *see*, *e.g.*, Richard Albert, *Multi-Textual Constitutions*, 109 U. Virginia L. Rev. 1629, 1629 (2023).

[160]Conseil Constitutionnel, Decision no. 71-44 DC, *Liberté d'association*, July 16, 1971, para. 2.

[161]*See*, *e.g.*, Charlotte Denizeau-Lahaye, *La genèse du bloc de constitutionnalité*, 8 Titre VII 11 (2022).

[162]*See*, *e.g.*, Markus Kotzur, *Art. 20 GG, in* Grundgesetz-Kommentar, Vol. 1 para. 195 (Ingo von Münch & Philipp Kunig eds., 7th ed., 2021); Angel Garrorena Morales, El Estado espanol como Estado social y democrático de derecho 13 (1984); Ludwig K. Adamovich et al., Österreichisches Staatsrecht, Vol. 1: Grundlagen 120 et seq. (3d ed., 2020).

[163]In this sense, *see also* Bogdandy & Bast, *supra* note 34, at 1492.

[164]Borrowing from Takis Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, 13 Rev. Eur. Adm. L. 5, 12 (2020).

[165]Opinion 1/17, *CETA*, ECLI:EU:C:2019:341, para. 110 (Apr. 30, 2019).

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As indicated by this account, the Union's values in Article 2 TEU seem to feature a central constitutional importance in the Court's jurisprudence.[166] Already before Lisbon, Article 6(1) TEU-Amsterdam/Nice and Article I-2 of the Constitutional Treaty seemed to feature a unique rank in the Union's hierarchy of norms.[167] The Court seems to have embraced a similar reading with regard to Article 2 TEU. Today, its values "define the very identity of the European Union as a common legal order."[168] Further, the Court has started to increasingly connect these values to other Treaty provisions that give specific expression to them, such as Articles 6, 10, and 19 TEU, the Charter of fundamental rights, or the principle of non-discrimination in Article 18 TFEU.[169] Such links to the Union's values suggest that these provisions are of increased constitutional significance.

In sum, the Court has started both defining the scope of the Union's constitutional framework as well as singling out provisions that transcend other primary law. Certainly, these bits and pieces do not form a complete constitutional picture yet. However, the nascent jurisprudence is still at its very beginning. It is to be expected that the Court will continue on this path and spell out the Union's constitutional framework in the future. This raises the question of its contours. Does it comprise those parts of the TFEU, that Grimm suggests downgrading to the level of secondary legislation, such as the Union's policy areas? Initially, the Court seemed taking such a view. In Opinion 2/13, it loosely outlined those elements that are part of the Union's constitutional framework. In this context, it also mentioned the pursuit of the Union's objectives, which is entrusted to a "series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons."[170] This reference has vanished in the account articulated by Opinion 1/17. This suggests that, beyond the "rules on the conferral and division of powers," the Union's policy areas in the TFEU's third part do not feature in the Union's constitutional framework.[171] This concerns not only agriculture, transport, employment, education, health, consumer protection, energy, or environment, but also the AFSJ and the economic constitution.

II. Introducing Substantive Hierarchies

Why does it matter what is part of the Union's constitutional framework and what is not? The notion of a constitution comes with certain effects in constitutional adjudication. Besides a specific constitutional methodology, constitutions usually imply some kind of hierarchy with respect to other law. Today, most European constitutions feature "primacy," "Vorrang," "primauté," or "supremacía,"[172] meaning they condition the adoption of ordinary law and serve as yardstick for

[166] Luke Dimitrios Spieker, EU Values Before the Court of Justice 87 (2023).

[167] *See* Joined Cases C-402 & 415/05 P, *Kadi*, ECLI:EU:C:2008:461, para. 303 (Sep. 3, 2008). Many scholars have read this decision as establishing a new level of higher-ranking primary law, *see, e.g.*, Alan Rosas & Lorna Armati, EU Constitutional Law 53 (3d ed., 2018). On Art. 6 TEU-Amsterdam, *see* Takis Tridimas, The General Principles of EU Law 16 (2d ed., 2007); Anne Peters, Elemente einer Theorie der Verfassung Europas 341 (2001); Hélène Gaudin, *Amsterdam: l'échec de la hiérarchie des normes?*, 35 Rev. Trim. Droit Eur. 1 (1999).

[168] Case C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97, para. 127 (Feb. 16, 2022). *See also* Gerhard van der Schyff, *Parameters of EU and Member State Constitutional Identity: A Topic in Development*, 4 Eur. Y.B. Const. L. 89, 101 (2022); Pablo Cruz Mantilla de los Ríos, *La identidad constitucional de la Unión europea: una categoría jurídica en construcción*, 70 Estudios de Deusto 153, 153 (2022); Panagiotis Zinonos, *Émergence, contenue et mise en oeuvre de l'identité juridique de l'Union: signe de maturité du 'nouvel ordre juridique' ?*, Rev. de l'Union Eur. 144 (2024).

[169] *See, e.g.,* Case C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97, para. 157 (Feb. 16, 2022). *See also* Spieker, *supra* note 166, at 95.

[170] Opinion 2/13 *ECHR Accession II*, ECLI:EU:C:2014:2454, para. 172 (Dec. 18, 2014).

[171] For possible contours of such a "constitutional framework," *see* Spieker, *supra* note 166, at 95–99. For a model based on Art. 1 to 19 TEU, *see* Bogdandy & Bast, *supra* note 34.

[172] *See, e.g.,* Maria Elvira Méndez-Pinedo, *Supremacy/Primacy*, *in* Max Planck Encyclopedia of Comparative Constitutional Law (Rainer Grote et al. eds., 2017); Véronique Champeil-Desplats, *Hiérarchie des normes, principe justificatif de la suprematie de la constitution, in* Traité international de droit constitutionnel 733 (Michel Troper & Dominique Chagnollaud eds., 2012); Christoph Grabenwarter, *Die Verfassung in der Hierarchie der Rechtsordnung, in* Verfassungstheorie § 11, 391 (Otto Depenheuer & Christoph Grabenwarter eds., 2011).

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its review by constitutional courts. Yet, the concept of hierarchies is not restricted to formal understandings. Even if certain provisions might be of equal *formal* rank, it does not mean that they are also of equal *substantive* significance. And indeed, there is a strong and growing tendency to identify *substantive hierarchies* among provisions at the same formal level. Some speak of material, normative, or axiological hierarchies.[173] Their effect is softer and unfolds especially in constitutional adjudication. Constitutional provisions of such an increased substantive significance serve as guiding star for the interpretation of other provisions and take precedence in case of collision with them, though leaving their validity intact.

How could we apply these insights to the Union's constitutional framework? To start with, all provisions of primary law have the same formal rank, as Articles 1(3), 6(1), 51 TEU, and Article 1(2) TFEU indicate. Formally, the Charter has the same legal value as, for instance, Protocol No. 31 concerning imports into the European Union of petroleum products refined in the Netherlands Antilles. Introducing a formal hierarchy among them would require a Treaty change. Still, this does not mean that the Court actually accords the same weight to these two documents.

Early on, Pierre Pescatore noted that "a clear hierarchy of values emerges in the Court's case law, insofar as certain Treaty provisions are singled out as 'essential.'"[174] Writing in the 80s, he referred to the Community's objectives enshrined in Article 2 EEC. As noted before, Lisbon has profoundly altered the Union's constitutional setup. Articles 2 and 3(1) TEU place the Union's constitutional principles before its other objectives. This indicates a different constitutional significance.[175] The Court's efforts to form the Union's constitutional framework during the past decade might thus provide a new "sense of prioritization" and increase the interpretative authority of these provisions.[176]

Drawing on these insights, the Court could reorganize the Treaties by introducing substantive hierarchies between the Union's constitutional framework and the rest of primary law. Eventually, this could lead to a tripartite structure: (1) The Union's founding values in Article 2 TEU are the summit of the EU legal order, (2) the Union's constitutional framework forms a second level, and (3) the rest of primary law is allocated at a third one. As noted before, the latter level would include large parts of the Union's policy areas stipulated in the TEFU's third part.

III. "De-Constitutionalizing" the Union's Policies

What follows from this? I suggest that the Court should strip all provisions that do not belong to the Union's constitutional framework of an important feature of constitutional law: Being the yardstick for judicial review and interpretation of legislation. In consequence, this recalibration would lead to a judge-driven, substantive "de-constitutionalization" of the relevant Treaty parts. With regard to these provisions, the Court could embrace the idea of "interpretative pluralism."[177]

[173]Cesare Pinelli, *Theories Concerning the Hierarchy of Norms, in* Max Planck Encyclopedia of Comparative Constitutional Law paras. 32 et seq. (Rainer Grote et al. eds., 2017). *See also* Uwe Volkmann, Grundzüge einer Verfassunsglehre der Bundesrepublik Deutschland 93 (2013); Orlando Scarcello, *On the Role of Normative Hierarchies in Constitutional Reasoning,* 31 Ratio Juris 346, 349 (2018); Riccardo Guastini, *Gerarchie normative*, 21 Revus 57, 61 (2013).

[174]Pierre Pescatore, *Die Gemeinschaftsverträge als Verfassungsrecht, in* Festschrift zum 70. Geburtstag von Hans Kutscher 319, 331 (Wilhelm G. Grewe et al. eds., 1981) (author's translation).

[175]Joris Larik, *From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union*, 63 Int'l & Comp. L. Q. 935, 951 (2014); Giuliano Amato & Nicola Verola, *Freedom, Democracy, the Rule of Law, in* The History of the European Union: Constructing Utopia 57, 60 (Giuliano Amato et al. eds., 2019).

[176]*See, e.g.,* Takis Tridimas, *Wreaking the Wrongs*, 29 Colum. J. Eur. L. 185, 195 (2023).

[177]From the EU context, *see* Gareth Davies, *Does the Court of Justice own the Treaties? Interpretative Pluralism As a Solution to Over-Constitutionalisation*, 24 Eur. L. J. 358, 362, 368 (2018); Gareth Davies, *Interpretative Pluralism and the Constitutionalization of the EU Legal Order, in* Autonomy without Collapse 124 (Mark Dawson & Markus Jachtenfuchs eds., 2022).

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Under such a conception, both the legislature and constitutional courts share the responsibility for constitutional interpretation.[178] What could this entail?

First, the Court should continue to defer as far as possible to acts adopted by the EU legislature. It is already established case law that once an area of law is harmonized, the Court applies and interprets the respective act of secondary legislation without any reference to primary law. As previously indicated, this requires an exhaustive, full, or maximum harmonization.[179] In case of minimum harmonization, the Member States retain the right to adopt stricter standards than those provided for in the respective EU legislation. Still, the Court can assess whether these standards are compatible with primary law. As the line between these forms is far from clear, the Court enjoys considerable leeway. Without being able to conduct a comprehensive assessment, it seems that the Court frequently declares secondary legislation to constitute a minimum harmonization and adjudicates the case on the basis of primary law.[180] Further, the Court has sometimes tightened its grip so far that it rendered the legislature's choice for minimum harmonization almost redundant. In cases like *Laval* and *Alemo-Herron*, it ruled that any national measure going beyond the minimum established by the respective secondary law violated the Treaties.[181] The floor thus became a ceiling.

Several approaches could strengthen deference to the legislature in these cases. If an area is subject to minimum harmonization, the Court could reduce the intensity of review from a fully-fledged assessment of the respective national measures in light of the Treaties, such as the fundamental freedoms, to a mere proportionality assessment by reference to the legislative act in question.[182] If the area has not been harmonized at all, the Court should emphasize that its interpretation of the respective primary law "is subject to diverging legislation." This would indicate its openness to change its jurisprudence in case the legislature decides to regulate the respective area differently.[183] This might provide an incentive and draw the legislature's attention to pressing social and political problems.[184] Of course, this presupposes that the EU legislature actually has a competence in the relevant area. If this is not the case, the Court could restrict its interpretation of the Treaties as far as is possible and tailor it to the specific case at hand.

Second, the Court could reduce the constraining and steering effect of primary law. Substantively, the EU legislature is bound even by those Treaty provisions that Grimm suggests to de-constitutionalize, including the fundamental freedoms.[185] Procedurally, these provisions can

[178]*See also* Martijn van den Brink, *Justice, Legitimacy and the Authority of Legislation within the European Union*, 82 MODERN L. REV. 293, 314 (2019); Mark Dawson, *Constitutional Dialogue Between Courts and Legislators in the European Union*, 19 EUR. PUB. L. 369 (2013).

[179]Marcus Klamert, *What We Talk About When We Talk About Harmonisation*, 17 CAMBRIDGE Y.B. EUR. L. STUD. 360, 362 (2015).

[180]*See, e.g.*, Case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037, paras. 56–64 (July 1, 2014) (on the internal market for electricity); Case C-6/16, *Eqiom and Enka*, ECLI:EU:C:2017:641, paras. 56, 64 (Sep. 7, 2017) (regarding the Parent-Subsidiary Directive); Case C-198/14, *Visnapuu*, ECLI:EU:C:2015:751, paras. 40–48 (Nov. 12, 2015) (regarding the Directive on packaging and packaging waste).

[181]Case C-341/05, *Laval*, ECLI:EU:C:2007:809, paras. 79, 80 (Dec. 18, 2007); Case C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521, para. 46 (July 18, 2013). *See also* Hatzopoulos, *supra* note 119, at 122; Marija Bartl & Candida Leone, *Minimum Harmonisation after Alemo-Herron*, 11 EUR. CONST. L. REV. 140, 141 (2015).

[182]On such approaches in the Court's case law, *see* Nina Boeger, *Minimum Harmonisation, Free Movement and Proportionality, in* THE JUDICIARY, THE LEGISLATURE AND THE EU INTERNAL MARKET 62 (Phil Syrpis ed., 2012).

[183]*See, e.g.*, Case C-73/08, *Bressol*, ECLI:EU:C:2009:396, para. 153 (Apr. 13, 2010) (Opinion of Advocate General Sharpston) ("I invite the Community legislator and the Member States to reflect upon the application of these criteria").

[184]Dawson, *supra* note 178, at 381.

[185]*See* Case C-620/18, *Hungary v. Parliament and Council*, ECLI:EU:C:2020:1001, paras. 104–106 (Dec. 8, 2020); Case C-626/18, *Poland v. Parliament and Council*, ECLI:EU:C:2020:1000, paras. 87–89 (Dec. 8, 2020). There is much controversy in German scholarship on this issue, *see* Höpner & Schmidt, *supra* note 12; Thorsten Kingreen, *Fundamental Freedoms, in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 515, 543 (Jürgen Bast & Armin von Bogdandy eds., 2d ed., 2010).

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become a yardstick for secondary legislation in two situations. While the Court can perform a fully-fledged judicial review in procedures, such as Article 263 or 267(1)(b) TFEU, it can also interpret secondary legislation in conformity with primary law. The first avenue is extremely rare. Even after extensive research, I was able to identify only one express instance during the past twenty years in which the Court annulled secondary legislation based on free movement provisions.[186] Much more frequent is the second avenue. Where it is necessary to interpret a provision of secondary law, "preference should be given to the interpretation which renders the provision consistent with primary law."[187] Even if this prevents invalidating legislation, it allows the Court to align it with its own conception of primary law.[188]

How could the Court relax these constraints? For one, it could reduce its judicial review to the Union's constitutional framework. During the past decade, the Court has increasingly reviewed legislation against such constitutional yardsticks, especially fundamental rights.[189] Alternatively, the Court could operate with a flexible degree of discretion. Beyond the Union's constitutional framework, it could leave a greater margin of appreciation to the Union legislature. This could concern the proportionality test and lead to relaxing the assessment of coherence, aptitude, or necessity.[190] As far as the constitutional framework is concerned, it could apply strict scrutiny.

IV. Anticipating Objections

Two sets of objections, substantive and institutional, are likely to be raised against these proposals. At the *substantive level*, the soft de-constitutionalization of the Union's policy areas will be difficult to digest. First, many will argue not only for the centrality of the economic constitution, outlined in Section C.I.2, but also for its role in protecting private autonomy—a constitutional guarantee—through fundamental freedoms or competition law.[191] Yet, this facet could equally be expressed through Charter rights such as Articles 15, 16, and 17,[192] which, as Charter rights, form part of the Union's constitutional framework. Further, it should be stressed that the approach suggested in this section does not call into question the salience of the individual policy areas. To the contrary. Excluding them from the Union's constitutional framework in the

[186]*See* Case C-221/09, *AJD Tuna*, ECLI:EU:C:2011:153 (Mar. 17, 2011), where the Court found that a regulation establishing fishing quotas infringed the prohibition of discrimination on grounds of nationality in then Art. 12 EC. For another, less explicit case, *see* Case C-457/05, *Schutzverband der Spirituosen-Industrie*, ECLI:EU:C:2007:576 (Oct. 4, 2007), paras. 23. Identifying only four cases before 2000, *see* Karsten E. Sørensen, *Reconciling secondary legislation with the Treaty rights of free movement*, 36 EUR. L. REV. 344, 347 (2011).

[187]Case C-481/19, *Consob*, ECLI:EU:C:2021:84, para. 50 (Feb. 2, 2021). *See also* Stefan Leible & Ronny Domröse, *Interpretation in Conformity with Primary Law, in* EUROPEAN LEGAL METHODOLOGY § 8, 181 (Karl Riesenhuber ed., 2d ed., 2021).

[188]*See, e.g.,* Phil Syrpis, *The Relationship Between Primary and Secondary Law in the EU*, 52 COMMON MKT. L. REV. 461, 470 (2015); Davies, *supra* note 75, at 1598; VAN DEN BRINK, *supra* note 83, at 313.

[189]For declarations of invalidity, *see, e.g.*, Case C-37/20, *Luxembourg Business Registers*, ECLI:EU:C:2022:912 (Nov. 22, 2022); Case C-181/20, *VYSOČINA WIND*, ECLI:EU:C:2022:51 (Jan. 25, 2022); Case C-362/14, *Schrems*, ECLI:EU:C:2015:650 (Oct. 6, 2015); Joined Cases C-293 and 594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238 (Apr. 8, 2014); Case C-236/09, *Association Belge des Consommateurs Test-Achats*, ECLI:EU:C:2011:100 (Mar. 1, 2011); Joined Cases C-92 and 93/09, *Schecke and Eifert*, ECLI:EU:C:2010:662 (Nov. 9, 2010). For assessments of compliance with Charter rights, *see, e.g.*, Case C-61/22, *Landeshauptstadt Wiesbaden*, ECLI:EU:C:2024:251 (March 21, 2024); Case C-817/19, *Ligue des droits humains*, ECLI:EU:C:2022:491 (June 21, 2022); Case C-426/16, *Liga van Moskeeën*, ECLI:EU:C:2018:335 (May 29, 2018); Case C-283/11, *Sky Österreich*, ECLI:EU:C:2013:28 (Jan. 22, 2013); Case C-544/10, *Deutsches Weintor*, ECLI:EU:C:2012:526 (Sep. 6, 2012). *See also* Darren Harvey, *From Low- to High-Intensity Review in the Protection of EU Fundamental Right*, 31 MAASTRICHT J. EUR. & COMP. L. 171 (2024).

[190]*See, e.g.,* Syrpis, *supra* note 188, at 484.

[191]*See, e.g.,* Carsten König, *Zum Verfassungsrang der Grundfreiheiten und des europäischen Wettbewerbsrechts,* 57 EUROPARECHT 48, 62 (2022); Elias Deutscher, *The competition-democracy nexus unpacked—competition law, republican liberty, and democracy*, 41 Y.B. EUR. L. 197 (2022).

[192]RUFAT BABAYEV, PRIVATE AUTONOMY IN EU INTERNAL MARKET LAW 50 (2024).

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Court's jurisprudence only shifts them into a different institutional arena: that of the political institutions.

Second, one can question the added value of my proposal. Even if the Court were to recalibrate its jurisprudence, it might nonetheless rely on Articles 15, 16, and 17 of the Charter. Many read these provisions as equivalent to the fundamental freedoms.[193] Regarding Article 15(2) of the Charter, the Court expressly acknowledged that it "reiterates" Article 45 TFEU or "corresponds" to Article 49 TFEU.[194] Further, it stated that assessing violations of fundamental freedoms also covers possible limitations of Articles 15, 16, and 17 of the Charter making a separate examination unnecessary.[195] In consequenece, the Court could simply continue its free movement jurisprudence through the corresponding Charter rights.

Nevertheless, there are important differences between Charter rights and market freedoms. As the Court noted in *Schmidberger*, free movement is an "instrument for the realization of a market without internal frontiers."[196] Along these lines, many have argued that these freedoms are primarily of instrumental value.[197] Whereas EU fundamental rights have been introduced to strengthen supranational legitimacy, free movement rules primarily serve transnational integration.[198] This explains why fundamental freedoms are, unlike fundamental rights, subject to several preconditions, like a transnational or economic activity.[199] On this basis, much speaks for distinguishing between freedoms and rights.[200] Whereas some argue for an enhanced protection under Articles 15, 16, and 17,[201] others suggest that the conduct protected under these rights should be narrower than under the market freedoms.[202] Others point to different factors in the proportionality assessment—protecting entrepreneurial freedom here, establishing an internal market there.[203] Against this backdrop, the suggested recalibration could go hand in hand with a stronger differentiation between fundamental freedoms and fundamental rights.

[193]*See, e.g.,* Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303/02) (Explanation on Art. 15). *See also* Verica Trstenjak & Erwin Beysen, *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU*, 38 EUR. L. REV. 293, 309 (2013).

[194]*See* Case C-284/15, *ONEm and M*, ECLI:EU:C:2016:220, para. 33 (Apr. 4, 2016); Case C-166/20, *Lietuvos Respublikos sveikatos apsaugos ministerija*, ECLI:EU:C:2021:554, para. 32 (July 8, 2021).

[195]Case C-391/20, *Cilevičs and Others*, ECLI:EU:C:2022:638, para. 56 (Sep. 7, 2022). *See also* Case C-598/22, *Società Italiana Imprese Balneari*, ECLI:EU:C:2024:597 para. 33 (July 11, 2024); Joined Cases C-407/19 & C-471/19, *Katoen*, ECLI:EU:C:2021:107, para. 56 (Feb. 11, 2021); Case C-322/16, *Global Starnet*, ECLI:EU:C:2017:985, para. 50 (Dec. 20, 2017).

[196]*See, e.g.,* Case 112/00, *Schmidberger*, ECLI:EU:C:2003:333, para. 56 (June 12, 2003).

[197]*See, e.g.,* Damian Chalmers & Luis Barroso, *What Van Gend en Loos Stands For*, 12 INT'L J. CONST. L. 105, 121 (2014); JOHANNES MASING, DIE MOBILISIERUNG DES BÜRGERS FÜR DIE DURCHSETZUNG DES RECHTS 44 (1997); Josse Mertens de Wilmars, *La jurisprudence de la Cour de Justice comme instrument de l'intégration Communautaire*, 1 CAHIERS DE DROIT EUROPÉEN 135, 147 (1976).

[198]Kingreen, *supra* note 185, at 530; BABAYEV, *supra* note 192, at 177–89, 230–31; Francesco de Cecco, *Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law*, 15 GERMAN L. J. 383, 388–91 (2014).

[199]Koen Lenaerts & José Gutiérrez-Fons, *The EU Internal Market and the EU Charter: Exploring the "Derogation Situation", in* THE INTERNAL MARKET AND THE FUTURE OF EUROPEAN INTEGRATION 49, 62 (Gareth Davies, Dmitry Kochenov & Justin Lindeboom eds., 2019). On the market freedoms as *lex specialis* in transnational situations, *see* Matthias Ruffert, *Art. 15 Charta, in* EUV/AEUV: DAS VERFASSUNGSRECHT DER EUROPAISCHEN UNION MIT UEOPAISCHER GRUNDRECHTECHARTA para. 26 (Matthias Ruffert & Christian Calliess eds., 6th ed., 2022).

[200]For "autonomous" conceptions of Art. 16, *see, e.g.*, NIALL O'CONNOR, BUSINESS FREEDOMS AND FUNDAMENTAL RIGHTS IN EUROPEAN UNION LAW 163 (2024); Olha O. Cherednychenko, *Fundamental Freedoms, Fundamental Rights, and the Many Faces of Freedom of Contract in the EU, in* THE REACH OF FREE MOVEMENT 273, 286 (Mads Andenas, Tarjei Bekkedal & Luca Pantaleo eds., 2017); Jacobien W. Rutgers, *The European Economic Constitution, Freedom of Contract and the DCFR*, 5 EUR. REV. CONTR. L. 95 (2009).

[201]EU AGENCY FOR FUNDAMENTAL RIGHTS, FREEDOM TO CONDUCT A BUSINESS: EXPLORING THE DIMENSIONS OF A FUNDAMENTAL RIGHT 12 (July 29, 2015).

[202]*See, e.g.,* Sacha Garben, *The "Fundamental Freedoms" and (Other Fundamental Rights), in* THE INTERNAL MARKET 2.0 335, 352 (Sacha Garben & Inge Govaere, 2020); Nik J. de Boer, *Fundamental Rights and the EU Internal Market*, 9 UTRECHT L. REV. 148, 165 (2013).

[203]HANS D. JARASS, EU-GRUNDRECHTE-CHARTA Art. 16, para. 31 (4th ed., 2021).

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Doubts might also arise at the *institutional level*. First, many will question the legitimacy of such a profound shift through judicial means. In 2005, Agustín José Menéndez warned that—without Treaty change—the over-constitutionalization of EU law could only be remedied if the Court were to arrogate to itself the power to determine what is really constitutional and what is not. For him, it would mean leaving a "decisive political question" in the hands of the judiciary.[204] Yet, this recalibration can hardly be described as judicial overreach. Its very aim is not to *extend*, but to *limit* the Court's power in favor of legislative processes. Further, it does not lead to any formal changes, which could only be achieved through Treaty amendment. Instead, the envisioned calibration remains within the confines of judicial interpretation. As noted in Section F.I., reorganizing a constitutional text in the interest of coherence, manageability, and eventually also the institutional balance is part and parcel of constitutional adjudication.

Second, even if one agrees with the foregoing, one could object that the proposed turn is highly unlikely to occur as the Court lacks incentives to adjust its jurisprudence. From the perspective of critics, recourse to judicial ethos and self-restraint are hardly reassuring. Indeed, prevalent narratives assume that the Court of Justice has always seized opportunities to enlarge its authority and power, not restrain it. However, as seen before, the Court has not only increased its responsiveness to the legislature in the past, but even performed remarkable U-turns without much pressure. A case in point is the Court's citizenship case law. As such, we can place some trust in the judge's institutional awareness.

G. Conclusion

Was Grimm wrong? From the outset, the over-constitutionalization thesis was based on shaky premises. On the one hand, the content of constitutions is highly contingent and context-specific. We can hardly determine a "right amount" of constitutional law. On the other hand, it seems questionable whether constitutionalization actually leads to depoliticization. This would require us to distinguish between constitutional and ordinary political processes, which is a blurry line. Eventually, the central issue seems to be an institutional, not substantive one: Which institution applies and interprets the constitution?

Against this backdrop, the contribution tried to reframe Grimm's critique in two parts: primary law's extensive entrenchment, first, and an institutional imbalance between the Union's judiciary and legislature, second. Although plausible at first glance, Grimm's analysis fails us when exposed to the Union's realities. For one, Grimm overestimates the Treaties' rigidity. Primary law has allowed for responses to a multiplicity of crises by political, often legislative means. This practice has transformed our understanding of primary law as well. Even without significant revision, the Treaties of today are a very different animal than at the time of Lisbon's entry into force. Moreover, Grimm disregards the institutional practice and took no notice of the Court's growing responsiveness and the rise in legislative activity. A decade after its formulation, the over-constitutionalization thesis did not age well.

Was Grimm wrong then? Should we lay his thesis to rest? The answer is "yes" and "no". Grimm expresses a legitimate concern: Preserving sufficient space for legislative decision-making in the face of a structurally powerful Court of Justice. Instead of pondering unrealistic Treaty amendments, however, I suggest focusing on the *interaction of the institutions* that fill the constitutional framework with life. In this context, I propose recalibrating the Court's jurisprudence. In particular, it should continue the path of distinguishing a "constitutional framework" from the plethora of Treaty provisions. Taking this jurisprudence to its logical conclusion, it should differentiate between provisions that form part of this framework and the rest of primary law. The latter parts should not serve as a yardstick for legislation in the Court's

[204]Menéndez, *supra* note 5, at 125.

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jurisprudence but should be deferred to the realm of legislative discretion. This would lead to their soft, judicial "de-constitutionalization."

Finally, it should be admitted that this proposal is inherently limited: It relaxes and mitigates *external* ties placed on the political process by primary law and the Court. This is based on the hope that more space for legislative decision-making might further encourage the EU political process. Still, it cannot render the EU political process *internally* more active, inclusive, or controversial. This leads us to an important insight: Law is an important, but only one of many factors in the strive towards the Union's democratic politicization.

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