

Enhancing Political Representation Through the European Economic Constitution? Regressive Politics of Democratic Inclusion

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Interrelation between economic and political dimensions of constitutionalism – European market integration and erosion of democratic representation within Member States of the EU – Regulatory externalities between national democracies – European market citizenship and its ramifications for democratically legitimate exercise of the power to tax – Underinclusiveness of domestic democratic process – Political representation beyond the state – European economic constitution as a source of political empowerment and the EU economic freedoms as political rights – The European Court of Justice as a protector of representation – Reinforcing political participation through regulatory competition – European market freedoms enhance representation but at the expense of political equality – Economic freedoms as insufficient means of political empowerment – Improving democratic representation and equality beyond the state requires properly political citizenship instead of mere market rights

INTRODUCTION

One of the recurrent issues in constitutional scholarship is the relationship between the economic and the political. In this regard, the transition from the 19th century liberal state and the formal paradigm of law to the interventionist

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welfare state and the material legal paradigm is particularly compelling.¹ Whereas the liberal state endorsed the independent unfolding of the economic domain, the interventionist state abandoned the doctrine of an autonomously functioning market economy: from a descriptive perspective, the economic order is indisputably a political product, while from a normative vantage point the economy should not be left to unfold without political constraints but should be deliberately structured through democratic authority.² Furthermore, 19th century liberalism kept the political dependent on the economic by stipulating individual economic resources as a prerequisite for possessing formal political rights. In this sense, the historical development of economic liberties, as a constituent of citizenship, preceded ownership of political rights and obtained primacy over political citizenship.³ While the interventionist state also acknowledged the interconnectedness of the economic and the political, it raised the concern that individuals' uneven economic standing would lead to unequal accumulation of political power. Consequently, it aspired, through democratic control of the economy, to level the distribution of economic goods between individuals.⁴ Hence, politically pre-determined boundaries for the markets obtained primacy in relation to the economy. The transition from the liberal to the interventionist state demonstrates a two-way affectedness between the political and the economic dimensions of constitutionalism and national citizenship. This sentiment informed post-war state-building and constituted the golden age compromise between politics and markets, between democracy and capitalism.

The relationship between the economic and the political has also been clearly present in the discourse on European integration. On the one hand, economic integration has been envisaged as preceding political integration. Furthermore, the claim has been made that integrating national economies and creating a European market would eventually contribute to the occurrence of political unification, hence being vessels for advancing the political. From this perspective,

¹See D. Grimm, 'Der Staat in der kontinentaleuropäischen Tradition', in D. Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (Suhrkamp 1987) p. 53 at p. 63 ff and J. Habermas, *Between Facts and Norms* (Polity Press 1996) p. 388–446.

²See K. Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (Beacon Press 1957) p. 249–258 and C. Schmitt, *Der Begriff des Politischen* (Duncker & Humblot 1963) p. 23–26.

³T.H. Marshall, 'Citizenship and Social Class', in T.H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge University Press 1950) p. 1 at p. 10–27.

⁴For this aspiration, see H.M. Heinig, *Der Sozialstaat im Dienst der Freiheit. Zur Formel vom "sozialen" Staat in Art. 20 Abs. 1 GG* (Mohr Siebeck 2008) p. 277–291.

the economic influences the political and creates preconditions for its realisation.⁵ On the other hand, it has been asserted that economic integration cannot be decoupled from politics; establishing the European market order presupposes a vision that is clearly political in nature – a vision that is primarily realised through institutions of political decision-making. Moreover, the process of market-making extends its repercussions to politically salient branches of governance, which in turn highlights its profoundly political character. In this sense, the construction of a transnational economic order is conditioned by and embedded in the political.⁶ Therefore, in the context of European integration and supranational polity-building, the mutual affectedness between the economic and the political should be acknowledged, although the balance between these two dimensions of integration has varied from one historical phase to another.⁷

In the context of European integration, the reciprocation between the economic and the political has obtained concrete shape in the interrelatedness between the European market-making process and national democratic orders. The present article addresses this dynamic, especially in regard to democracy and taxation. In so doing, the article consists of three sections. In the first section, the article outlines the concern that the advancement of market-making policies has proceeded at the cost of national democratic traditions. The characteristic dynamic of this trajectory has been, so runs the argument, that the four economic freedoms established through the European economic constitution have become obstacles to the genuine exercise of democratic capacities within national polities because these liberties have distorted democratic representation and participation. In the second section, two counter-considerations are constructed for the preceding argument. These counter-considerations assert that the European economic constitution does not conflict with the fundamental values that underpin national democracies but rather contains the potential to reinforce those values – demands for political participation and representation. In accordance with this view, European market citizenship provides complementary forms of political representation, which in turn lead to democratic empowerment. In the third section, the counter-considerations are appraised. It will be observed whether the economic freedoms of the European

⁵This experience characterised some initial visions and scholarly interpretations of European integration, especially the neofunctionalist understanding. For instance, see E. Haas, *The Uniting of Europe. Political, Social and Economical Forces 1950–1957* (Stevens & Sons 1958) p. 11–19. For a summary, see N. Walker, ‘The Philosophy of European Union Law’, in A. Arnall and D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) p. 3 at p. 8–9.

⁶For instance, see W. Hallstein, *Die Europäische Gemeinschaft* (Econ Verlag 1974) p. 26–30.

⁷K. Tuori, ‘The Many Constitutions of Europe’, in K. Tuori and S. Sankari (eds.), *The Many Constitutions of Europe* (Ashgate 2010) p. 3 at p. 15–27 and H. Brunkhorst, *Das doppelte Gesicht Europas. Zwischen Kapitalismus und Demokratie* (Suhrkamp 2014) p. 59–129.

constitution may indeed be deemed to enhance the political aspirations of constitutionalism or whether they are adversarial to those values.

The article contends that while the economic freedoms might enhance the representation of cross-border market citizens, they decrease the proportional representation of others. The article argues that advancing political representation through the economic leads to a regressive politics of democratic inclusion: aggregate growth of representation occurs at the expense of political equality. The article demonstrates – especially by the example of taxation – that transnational economic rights can hardly compensate for the democratic losses they originally provoked and that they cannot take over properly political modes of representation. In so doing, the article improves our understanding of the political effects of cross-border economic liberties and properly political forms of representation.

EUROPEAN MARKET-BUILDING AND EROSION OF DEMOCRATIC REPRESENTATION WITHIN MEMBER STATES

In the context of European integration, the concerns about democracy are basically twofold.⁸ First, the notorious ‘democratic deficit’ of the European Union addresses the democratic shortcomings of the EU itself: exercising the type of public authority possessed by the EU requires democratic legitimacy, whose social and legal-institutional preconditions are allegedly missing at the European level.⁹ Second, European integration is seen as undermining existing democratic traditions within national polities. From this perspective, the core of the problem is not a lack of democratic credentials on the part of the EU itself, but the fashion in which European policies erode domestic democracies. In accordance with this mindset, it has been claimed that asymmetric and one-sided advancement of market-making policies, instead of more balanced integration, has crippled the essentials of democracy within Member States.¹⁰ In this section, the discord between supranational economic integration and national democracy is depicted.

⁸J.E. Fossum, ‘The European Union and Democracy’, in D. Patterson and A. Södersten (eds.), *A Companion to European Union Law and International Law* (Wiley Blackwell 2016) p. 136 at p. 137.

⁹See M.T. Greven, ‘Can the European Union Finally Become a Democracy’, in M.T. Greven and L.W. Pauly (eds.), *Democracy beyond the State? The European Dilemma and the Emerging Global Order* (Rowman & Littlefield 2000) p. 35 at p. 37 and A. Follesdal and S. Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, 44 *Journal of Common Market Studies* (2006) p. 533 at p. 534–537.

¹⁰F.W. Scharpf, ‘Economic Integration, democracy, and the welfare state’, 4 *Journal of European Public Policy* (1997) p. 18 at p. 19–23 and C. Offe and U.K. Preuss, ‘The problem of legitimacy in the European polity: is democratization the answer?’, in C. Crouch and W. Streeck (eds.), *The Diversity of Democracy. Corporatism, Social Order and Political Conflict* (Edward Elgar 2006) p. 175 at p. 177–180.

Since the inception of the European communities, economic integration has principally proceeded by way of two modes of regulation: by establishing the borderless European single market (market-making) and by approximating Member State laws (harmonisation).¹¹ Market-making has set out to facilitate transnational economic structures and to eradicate national regulations that account for obstacles to cross-border economic movement. The targeted barriers exist between national territories and gain relevance precisely in regard to trans-border economic activities within the internal market. In terms of its modus operandi, market-making follows above all the path of negative integration, as it chiefly tends to prohibit Member States from using their regulatory powers.¹² To use the simple but apt idea expressed by Friedrich A. Hayek, market-making relies on the supranational power to say ‘no’ to national regulatory attempts.¹³ Although the method of harmonisation also serves the purpose of market-making, it is concurrently more evidently harnessed to creating equal conditions of competition between private actors and, additionally, to preventing regulatory competition among governments. The rationale is to level the differences between national legal systems by reconstructing common regulations at the European level. Since harmonisation involves the positive construction of supranational legal standards, it is supposed to proceed along the path of positive integration.¹⁴ While market-making regulatory technique addresses distinctively cross-border obstacles, harmonisation is more concerned with Member States’ internal policies, that is, regulatory circumstances within national polities. Income taxation counts as one example of a regulatory branch whose scope of application may be mainly polity-internal but which is nonetheless recurrently deliberated in regard to harmonisation.¹⁵ Without European coordination, regulatory treatment would vary across countries and burden economic pursuits diversely in different Member States, entailing distorted conditions of competition between private actors and regulatory rivalry among governments.

In retrospect, the market-making mode of regulation has prevailed to a great extent, of which the four freedoms of the European economic constitution are the

¹¹See C. Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart 2016) p. 26–85.

¹²F.W. Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford University Press 1999) p. 45.

¹³F.A. Hayek, *The Road to Serfdom* (Routledge 1993) p. 172.

¹⁴Scharpf, *supra* n. 12, p. 45.

¹⁵For the history of income tax integration, see P. Genschel, *Steuerwettbewerb und Steuerharmonisierung in der Europäischen Union* (Campus 2002) p. 128–189 and A.J. Menéndez, ‘Neumark vindicated: the three patterns of Europeanisation of national tax systems and the future of the social and democratic *Rechtsstaat*’, in D. Chalmers et al. (eds.), *The End of the Eurocrats’ Dream. Adjusting to European Diversity* (Cambridge University Press 2016) p. 78.

most tangible instances. Harmonisation of national regulations, by contrast, has been more stagnant. As a result, the bulk of barriers to trans-border economic movement have been abolished and regulation of cross-border economic movement tends to be governed by European law, while a wide range of highly salient policies has remained under domestic political discretion and, consequently, persisted in the state of indeterminacy and national differences. Market-making has, through enforcement of economic freedoms, enhanced the cross-border economic mobility of actors, while the concurrent absence of harmonisation has kept Member States' political latitude chiefly intact in multiple areas of high political relevance. Since deep integration of the markets has not been accompanied by any substantial harmonisation, countries exist in an anarchical state of being, which, to a certain degree, continues to characterise the international community, where national normative orders evolve without formal legal standards that can be asserted above state organisations and prescribe the outer limits of national political latitude.¹⁶

Because of the dual development of market-making and harmonisation, economic integration has ended up reconfiguring national decision-making autonomy in uncoordinated policy fields. On the one hand, by resisting Europeanisation in salient regulatory branches, states have somewhat retained their formal political self-determination in the vertical relationship with the European Union, that is, a supranational organisation. On the other hand, and partly as a result of the same type of resistance, states have lost some of their factual or effective policy-making autonomy in the horizontal relationship with other countries.¹⁷ The retained formal sovereignty has become an impediment for political autonomy in a more comprehensive sense. Under circumstances of enhanced economic mobility and without supranational constraints on national political discretion, domestic legal orders expand their effect to foreign polities and countries become exposed to transnational regulatory externalities. This, in turn, constitutes interdependence between national polities and in ever more numerous divisions of policies. Indeed, measured by the extension of their causes and effects, political orders are losing their national character and cease to be reproduced as self-enclosed entities. As democracies are entangled by externalities, they suffer defeat in terms of effective political performance or viable policy options, whose range tends to be constrained by external regulatory orders. Since genuine democracies are characterised by the ability to make autonomous

¹⁶See E.-J. Mestmäcker, 'On the Legitimacy of European Law', 58 *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law* (1994) p. 615 at p. 620.

¹⁷On the separation between vertical and horizontal sovereignty, see D. Grimm, *Sovereignty. The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015) p. 92 and p. 121.

choices between policy alternatives while enjoying a wide margin of political imagination, the decrease in policy options counts as a deficiency for national democracies.¹⁸

Without a doubt, trans-border effects have long featured as an integral structural element in the community of states. Moreover, technological development and transformations in economic practices have exacerbated interdependencies. Nonetheless, the creation of a European market through normative decisions, that is, through deliberate politics of globalisation, has aggravated interdependencies in policy terrains where externalities are contingent on the existence of formal liberties to engage in cross-border economic pursuits.¹⁹ To an unprecedented extent, economic actors and factors of production become disentangled from a particular jurisdiction and are enabled to migrate across countries. Economic migration and also the mere threat of emigration horizontally transmit the influence of one national normative order to another. Because democratic capacities within national polities tend to be constrained by horizontal relationships, this systemic dysfunctionality surely does not qualify as a democratic deficit of the EU as such but presents itself rather as an ‘inter-democratic deficit’, that is, a deficiency that transpires between interdependent countries.²⁰ However, since economic migration is partly facilitated by the European economic constitution, the comprehensive legal substructure serving as a precondition for a democratic deficiency is actually triangular: it is dependent on Member States’ co-existent normative orders and the European polity. Therefore, the postulated erosion of national democracies is partly ascribed to the four economic freedoms of the EU. In the resultant setup, reproduction of national democracies is embedded in the transnational market order.

From the perspective of the democratic community, unconfined mutual affectiveness between national polities constitutes a deficiency. One essential question about the democratic collective has always been the problem of inclusion. People must decide who is eligible to be a member of a particular democratic community that exercises authority over community affairs.²¹ The traditional normative criterion for granting individual suffrage in a democratic community reads as

¹⁸See A. Schäfer and W. Streeck, ‘Introduction: Politics in the Age of Austerity’, in A. Schäfer and W. Streeck (eds.), *Politics in the Age of Austerity* (Polity 2013) p. 1 at p. 1. See also Offe and Preuss, *supra* n. 10, p. 178–179.

¹⁹Hence, one should be cautious enough not to depoliticise the development of the transnational market order: see G. Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalization* (Oxford University Press 2012) p. 12.

²⁰D. Innerarity, ‘The Inter-Democratic Deficit of the European Union’, in M. Dawson et al. (eds.), *Beyond the Crisis. The Governance of Europe’s Economic, Political, and Legal Transformation* (Oxford University Press 2015) p. 173 at p. 178.

²¹N. Bobbio, *The Future of Democracy. A Defence of the Rules of the Game* (Polity 1987) p. 24–25.

follows: all those who are affected by community decisions and are subjected to its authority should be allowed to participate and enjoy representation in the political process.²² In modern constitutional orders, the principle has been translated into a formal demand that political rights in a domestic community should be possessed by nationals. Under circumstances of cross-national interdependence, the viability of the principle is called into question. Since the domestic regulatory system is partly determined by a foreign legal order in which the constituency of the former system is not allowed to participate, citizens are affected by political decisions in whose enactment they have no representation. This gives rise to non-democratic incongruences that exist between citizens, representatives, and affectedness.²³ Put differently, the personal scope of the democratic community becomes under-inclusive.²⁴ As a result, interdependencies lead to discord with traditional standards of democratic inclusion. One could even say – as has indeed been done in the tradition of republican political theory – that political communities now exist under foreign dominance because the power of one democracy over another counts as a form of arbitrary authority.²⁵

The diagnosis of eroding national democracy has been particularly pertinent in the context of income taxation. To begin with, taxation has been routinely experienced as a policy field that is vulnerable to regulatory competition, and economic integration has been perceived to have established tangible fiscal interdependence between nation states.²⁶ Furthermore, the demand for democratic representation has been exceptionally authoritative in regard to the political process of regulating taxes. In an emphatic fashion, John Locke argued that tax liabilities may not be imposed on taxpayers without their consent, which is to be given directly by citizens or indirectly by citizens' representatives.²⁷ Towards the end of the 18th century, this constitutional principle was already institutionalised in such a strong doctrinal spirit that Jean-Jacques Rousseau noted how '[t]he truth

²²R. Dahl, *Democracy and Its Critics* (Yale University Press 1989) p. 119–131.

²³M. Zürn, 'Democratic Governance beyond the Nation-State', in Greven and Pauly, *supra* n. 9, p. 91 at p. 92–94.

²⁴Particularly in the context of taxation, see A.J. Menéndez, 'Another View of the Democratic Deficit: No Taxation without Representation', in C. Joerges et al. (eds.), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (European University Institute 2000) p. 125 at p. 130–135.

²⁵In the context of state sovereignty and autonomous communities, see C. Laborde and M. Ronzoni, 'What Is a Free State? Republican Internationalism and Globalisation', 64 *Political Studies* (2016) p. 279. More specifically in regard to taxation, see T. Rixen, 'Globalisierung und fiskalische Demokratie', 59 *Politische Vierteljahresschrift* (2018) p. 103.

²⁶For a comprehensive approach, see J. Habermas, 'The Postnational Constellation and the Future of Democracy', in J. Habermas, *Postnational Constellation. Political Essays* (Polity 2011) p. 58.

²⁷J. Locke, *Two Treatises of Government* (Cambridge University Press, 1988) II treatise, articles 138–140.

that taxes cannot be legitimately imposed without the consent of the people or its representatives has been generally recognized by every philosopher or jurist [. . .] who has gained any reputation in questions of public law'.²⁸ Indeed, 'no taxation without representation' has fixed itself as an almost symbolic expression for the requirement of parliamentary acquiescence by individuals, historically paving the way for later calls for representative and democratic politics. Furthermore, the 20th century state transformed income taxation from a mere fiscal means of collecting public revenues to a redistributive instrument. Taxation matured into a constitutive device for implementing the democratic allocation of economic resources between citizens. This social contract that determines distributional patterns within a polity requires democratic representation of all members who are affected by that settlement in a given community.²⁹ Against this backdrop, the above-described reorganisation of democratic representation and its consequent under-inclusiveness constitutes a defeat in terms of fiscal democracy.

In conclusion, three observations should be reiterated. First, European integration demonstrates a specific kind of interplay between the economic and the political. In the process of integration, market integration has grown into an obstacle for Member State democracies and challenged the traditional structures and standards of representation. Second, the constraints on democracy, as observed in this section, do not derive from any direct authority that the EU exercises over Member State normative orders. Rather, the constraints grow out of the multi-faceted interaction between multiple national regulatory systems and EU law. In concrete terms, this happens by rendering foreign constituencies influential in domestic political settings through cross-border market citizenship. As a consequence, an intermingling of political authority occurs between those who are insiders (nationals) in a political community and those who ought to remain outsiders (non-nationals) according to the traditional standard for a democratic community. Third, income taxation represents one of the most prominent branches of regulation through which the above-described constraints on democratic traditions are experienced.

PROMOTING INTEREST REPRESENTATION THROUGH THE EUROPEAN ECONOMIC CONSTITUTION

Horizontal democratic deficiencies among co-existent and interdependent Member States are widely acknowledged in integration studies. In spite of that,

²⁸J.-J. Rousseau, 'Political Economy', in J.-J. Rousseau, *Discourse on Political Economy and The Social Contract* (Oxford University Press 2014), section III.

²⁹See J. Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis between Taxation and Democracy Beyond the State?', *German Law Journal* (forthcoming).

counter-considerations have also been presented. The counter-claims declare that the European economic constitution not only (if at all) undermines national democracies but rather empowers individuals politically and provides them with measures to reinforce representation and participation. In this section, the two most appealing variations of this argument are reconstructed.³⁰ The first line of reasoning is based on the idea of enhancing democratic representation through supranational adjudication. In accordance with this position, the four economic freedoms provide otherwise political outsiders with a medium for being represented through formal judicial review. In European studies, this conviction is distinctively and compellingly argued for by Christian Joerges and Miguel Poiares Maduro. The second train of thought builds on the benefits engendered by indirect political influence, which is facilitated by economic freedoms. This approach asserts that the freedoms provide individuals with opportunities to influence political processes within foreign polities even though foreigners are bereft of formal rights to participate in the respective communities. This argument is reconstructed on the basis of ideas proposed by neoliberal internationalists and later more explicitly by James M. Buchanan and Geoffrey Brennan. In the context of the present article, the argument will be construed with a view to the democratic promise of European market citizenship. The argument builds on the considerations presented in the previous section, but only to arrive at more positive conclusions about the representative capacity of transboundary interdependence.

Enhancing interest representation through supranational judicial review

One of the momentous evolutionary steps in the constitutional history of European integration was the change in the functioning of the economic freedoms. Originally, the freedoms mandated and ordered the European legislator to abolish obstacles to cross-border economic movement for the sake of creating the common market. This was to take place in the political mode of decision-making: the economic freedoms served as aspirational legal principles and were to be fleshed out through legislative acts.³¹ As a result of landmark decisions delivered by the European Court of Justice (the Court) in the 1960s, the economic freedoms acquired an additional constitutional function: they

³⁰See also J. Snell and J. Jaakkola, 'Economic Mobility and Fiscal Federalism: Taxation and European Responses in a Changing Constitutional Context', 22 *European Law Journal* (2016) p. 772 at p. 777–779.

³¹P. Craig, 'The Evolution of the Single Market', in C. Barnard and J. Scott (eds.), *The Law of the Single European Market* (Hart 2002) p. 1 at p. 4.

transformed into directly applicable subjective rights, which could be invoked by private actors with the purpose of obtaining protection against undue interference in the sphere of individual economic liberty.³² As a result, these freedoms can be advanced in the judicial mode of decision-making and their functioning comes to resemble the logic of fundamental rights, familiar from the national constitutional setting. The most essential aspects of this development were that the freedoms ended up empowering individuals and evolved from political authorisations to personal liberties. Within the European legal substructure, the economic became decoupled from political authority and its evolution partly independent of the political.³³

Modern constitutional thought acknowledges fundamental rights as the outer limits of not only the administrative exercise of public authority but also of the outcomes of democratic will-formation and legislation. Basic rights draw the boundaries that the legislator may not transcend, no matter how exemplary the instantiation of democratic ideals. What becomes constitutionalised as a fundamental right is transposed from a disputable political issue to a settled legal precondition for the legitimacy of politics itself.³⁴ This function of constitutional rights lends itself to two – though far from mutually exclusive – interpretations. First, constitutional rights entitle individuals to certain substantive or material goods: private property, religious beliefs, and so on. Second, and more importantly for our considerations, they may be construed as rights that advance individuals' political or procedural goods: the right to participate and enjoy representation. The latter understanding, which might be called 'structural' or 'process-oriented',³⁵ is famously avowed in John Hart Ely's theory of constitutional rights and judicial review. Ely professed the insight that, by applying fundamental rights, courts ought to enforce the elementary values of the political system of representative government. By executing fundamental rights, judiciaries are to guarantee the representation of individuals instead of providing them with substantive rights only. For this reason, the nature of constitutional adjudication is

³²J.H.H. Weiler, 'The Transformation of Europe', in J.H.H. Weiler, *The Constitution of Europe. 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (Cambridge University Press 1999) p. 10 at p. 16–39 and D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', 21 *European Law Journal* (2015) p. 460.

³³Quite interestingly, the constitutional functions of European law grew in an adverse direction from what took place in the context of some national constitutional orders: see E.-W. Böckenförde, 'Grundrechte als Grundsatznormen', in E.-W. Böckenförde, *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp 1993) p. 159.

³⁴See D. Grimm, 'Ursprung und Wandel der Verfassung', in D. Grimm, *Die Zukunft der Verfassung II. Auswirkungen von Europäisierung und Globalisierung* (Suhrkamp 2012) p. 11 and especially at p. 34.

³⁵See K. Lenaerts, 'The European Court of Justice and Process-Oriented Review', 31 *Yearbook of European Law* (2012) p. 3.

‘participation-oriented’ and ‘representation-reinforcing’.³⁶ Judicial review ought to enhance the representation of those who are structurally disadvantaged in their interests by a deficiently representative process. In Ely’s view, constitutional rights are implementations of the political and they serve as vessels for promoting representative democracy. Consequently, economic fundamental rights do not in fact conflict with democracy. In tandem with the above-described constitutionalisation of the European economic freedoms, interpreting judicial activity as representation-enhancing underpins the first argument that defends the democratic capacity of the European economic constitution.

When analysing the democratic significance of economic integration, Christian Joerges acknowledges the democratic deficiencies resulting from the interdependent co-existence of states. He castigates the current state of affairs: ‘Constitutional states must not unilaterally impose burdens on their neighbours. Such extraterritorial effects may be intended or not. They are nevertheless real and unavoidable in an economically and socially interdependent community’.³⁷ In the framework of untamed interdependence, countries inevitably adopt decisions that influence neighbouring constituencies in an unfavourable fashion, which is an in-built feature of institutions that operate solely within national confines.³⁸ Joerges’ concern is evidently in accord with the pessimistic account given in the previous section, although it emphasises unharmonised national legal orders rather than European law as the prime constituent of interdependence. The same unease surfaces in the writings of Miguel Poiares Maduro: ‘The risk inherent in state regulations is that they will be *biased* by an institutional environment that often neglects, or simply cannot in practical terms take into account, the interests of nationals of other Member States’.³⁹ Those who – due to their nationality – are outsiders in a particular political community lack suffrage in that polity. By the same token, they do not enjoy proper representation in the political process in that country. As a result, nationally-bounded proceedings have a tendency to show only insufficient deference to the interests and preferences of voiceless

³⁶J.H. Ely, *Democracy and Distrust* (Harvard University Press 1980) p. 87 and more extensively p. 73–104.

³⁷C. Joerges, ‘Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration’, 2 *European Law Journal* (1996) p. 105 at p. 117.

³⁸The inevitability of externalities resembles Stephen D. Krasner’s account of interdependence as a logically structural constituent in an international community without supranational ordering: see S.D. Krasner, ‘Economic Interdependence and Independent Statehood’, in R.H. Jackson and A. James (eds.), *States in a Changing World. A Contemporary Analysis* (Clarendon Press 1995) p. 301 at p. 301–302.

³⁹M. Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’, 3 *European Law Journal* (1997) p. 55 at p. 77 and M. Maduro, *We the Court. The European Court of Justice and The European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Hart 1998) p. 172.

non-nationals and to expose them to discriminatory regulatory treatment. Or, as formulated more decisively by Jürgen Neyer, national politics is inclined to become 'one-sided and parochial or selfish'.⁴⁰ For instance, discriminatory tax burdens on foreigners have customarily accounted for the infamous practice of unfairly disadvantaging those bereft of proper political rights.

Following the descriptive diagnosis, the argument moves to a normative stance. Since national political systems as such are under-representative and neglect the interests of non-nationals, the search is then on for a proper supranational medium for reinforcing outsider interests. Although this necessitates certain constraints on national legal systems, it does not require restructuring national political orders by enfranchising outsiders. As stated by Joerges: 'Supranationalism need not amount to conceding the right to vote to non-nationals. But it does require that the interests and concerns of non-nationals be given consideration by national legislatures'.⁴¹ Following this line of thought, which endorses the due representation of outsider preferences, Maduro argues that 'there should be some form of representation of interests for the broader community within the regulating State's decision-making process'.⁴² The normative solution proposed by Joerges and Maduro does not necessitate the new politics of inclusion or that outsiders be represented as members of a democratic constituency. What needs to be represented are those interests that are not only relevant to nationals but also to outsiders, a broader community than the national constituency. By Joerges, these are conceived of as 'community concerns'.⁴³ In regard to interest-representation, one prominent institutional actor is the European Court of Justice. By adjudicating on economic freedoms, the Court observes the interests of foreigners and mediates those concerns into national legal orders through its supreme authority towards domestic legislatures. However, in the footsteps of the structural theory of constitutional review, the argument declares that the four economic freedoms may not be accepted as posing any constraints whatsoever on the design of national normative orders. Instead, the Court should 'focus on enhancing the representation of the interests of nationals of other Member States within national political processes'.⁴⁴ From this perspective, the economic freedoms are not a vessel for securing economic or other substantive interests but, rather, the foundational choices characterising representative democracy as a system of governance. This is something that both Joerges and

⁴⁰J. Neyer, 'Europe's Justice Deficit: Justification and Legitimacy in the European Union', in J. Neyer and A. Wiener (eds.), *Political Theory of the European Union* (Oxford University Press 2010) p. 169 at p. 170.

⁴¹Joerges, *supra* n. 37, p. 117.

⁴²Maduro (1997), *supra* n. 39, p. 68.

⁴³Joerges, *supra* n. 37, p. 117.

⁴⁴Maduro (1997), *supra* n. 39, p. 72.

Maduro subscribe to. Maduro proclaims that '[f]ree movement will be a political fundamental right, not an economic fundamental right'.⁴⁵ Joerges, for his part, states that 'supranationalism does convey political and not just economic rights on Community citizens, and is to be understood as a fundamentally democratic concept'.⁴⁶ The political coalesces into the economic, and vice versa.

In order to sum up the essentials of the argument, two aspects deserve highlighting. First, the authority to reinforce the economic freedoms is institutionally decoupled from a political mode of decision-making. The realisation of the freedoms is not an issue of political will alone but also a matter of judicial deliberation. Hence, not only are the economic freedoms a means of governing inter-democratic dependencies but the management of interdependencies takes place specifically through adjudication, which in fact became a common path of integration during the 1960s.⁴⁷ Accordingly, the representation of non-nationals is more about representing their interests and preferences than empowering them through political channels of representation in the classic sense. Second, enhancement of political representation is rendered dependent on economic rights: in order to have one's interests represented, one should be under specific factual circumstances where one's affairs may become subject to review by the European Court of Justice. Indeed, when political values are enforced by virtue of economic rights, the political is coupled with the economic. This is precisely the promise behind Joerges' and Maduro's interpretation. Advancement of the political takes place in the medium of the economic because economic rights are more or less tantamount to political rights and include genuinely democratic capacity. In conclusion, in Joerges' and Maduro's reading, the four economic freedoms appear more as remedies for than sources of the democratic deficiencies inherent in the unorganised European community of states.

Reinforcing interest representation through inter-jurisdictional regulatory competition

While the first counter-consideration was originally construed with reference to the problem of interest representation in general, the second consideration is more specifically construed in regard to taxation. The latter consideration ties in with the tradition that intends to introduce restraints and checks on the

⁴⁵Maduro (1997), *supra* n. 39, p. 73 and also M. Maduro, 'Europe and the constitution: what if this is as good as it gets?', in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge University Press 2003) p. 74 at p. 85.

⁴⁶Joerges, *supra* n. 37, p. 117.

⁴⁷F. de Witte, 'Interdependence and Contestation in European Integration', 3 *European Papers* (2018) p. 475 at p. 482–485.

legislative process through which fiscal policies are adopted. For this type of approach, Knut Wicksell was an important forerunner.⁴⁸ The latter half of the 19th century witnessed demand for universal suffrage that was independent of voters' economic circumstances. Extensive enfranchisement was also emphatically endorsed by Wicksell.⁴⁹ However, broadening the scope of suffrage resulted in a situation in which possession of formal political power no longer coincided with economic power, that is, with the possession of personal wealth. This raised the concern that an enfranchised but economically worse-off majority might impose a gargantuan tax burden on the wealthier minority, which was conceived of as an endogenous threat in a genuine system of democracy.⁵⁰ In order to prevent overly excessive taxation of the minority, the political decision-making process in fiscal issues was seen as requiring constraints with which the exercise of legislative authority would have to comply, as suggested by Wicksell himself.⁵¹ The conception of constitution-like constraints on the exercise of the power to tax became a precursor for theorists, especially those of the public choice school, who later sought to delimit the exercise of fiscal authority through more or less comparable means. In fact, especially since the 1970s, there has been a constant and diverse growth in regulatory restraints through which the public authority to tax and spend has been reined in.⁵²

Wicksellian ideas were taken up especially by James M. Buchanan and Geoffrey Brennan. In their work, they pursued principles for a fiscal constitution that would set up the 'means of constraining government's power to tax' and help in 'keeping governments within appropriate limits'.⁵³ The choice of a 'fiscal constitution' as one of their key notions is perhaps not quite fortuitous. Brennan and Buchanan subscribe to one of the basic assumptions of public choice theory, which asserts that governmental actors seek to maximise public revenues, through which they can respond to the preferences of diverse groups in the electorate and,

⁴⁸In addition to this discussion, the 19th century witnessed a substantive discourse on the material limits of taxation, beyond which legitimate taxation may not step, especially in terms of its distributive consequences (for instance, see J.S. Mill: *Principles of Political Economy with Some of their Applications to Social Philosophy* (August M. Kelley 1961) p. 802–822).

⁴⁹K. Wicksell, 'A New Principle of Just Taxation', in R.A. Musgrave and A.T. Peacock (eds.), *Classics in the Theory of Public Finance* (Macmillan 1958) p. 72, at p. 87 and further at p. 89–90, p. 95, p. 117–118.

⁵⁰See F. Schui, 'Zum Begriff des Steuerstaats', in P. Becker (eds.), *Sprachvollzug im Amt. Kommunikation und Verwaltung im Europa des 19. und 20. Jahrhunderts* (Transcript 2011) p. 107 at p. 112 and p. 118–125.

⁵¹For instance, see Wicksell, *supra* n. 49, p. 87–97.

⁵²C. Webber and A. Wildavsky, *A History of Taxation and Expenditure in the Western World* (Simon and Schuster 1986) p. 555.

⁵³G. Brennan and J.M. Buchanan, *The Power to Tax. Analytical Foundations of a Fiscal Constitution* (Cambridge University Press 1980) p. 153.

as a result, support their selfish efforts to be re-elected. Therefore, governments act, by their nature, as Leviathans, and their actions should be contained accordingly. This, however, cannot be achieved by post-constitutional and electoral means alone.⁵⁴ Consequently, in the vertical relationship between government and individuals, whose protection constitutes the core of that doctrine, the power to tax must be constrained by constitutional measures that prevent the undue exercise of fiscal authority.⁵⁵ In this approach, Brennan and Buchanan concur with some of the characteristic ideas of constitutionalism – ideas which have actually already been touched upon in connection with Joerges' and Maduro's arguments.

One important consideration in Brennan and Buchanan's analysis of constitutional constraints is the precise nature of the restraints. On the one hand, two types of constraint are of a formal nature. The first sort of formal rules imposes procedural demands on general political procedures and may also pertain to fiscal issues. These were the subject matter of Wicksell's examination.⁵⁶ The second category of formal principles is of a substantive nature and applies to fiscal issues in particular. Analysis of these principles constitutes the essence of Brennan and Buchanan's work and, compared with various other constitutional constraints, these are advocated as the most proper means of keeping the Leviathan in check. On the other hand – and, importantly, for reconstruction of the argument at hand – constraints may be of a more informal or indirect nature. Furthermore, informal restraints concern the political decision-making process, being therefore procedural in nature. In essence, constraints of this sort are equated with inter-jurisdictional regulatory competition, which serves as an additional disciplinary mechanism of political discretion within separate and relatively sovereign political units. The regulatory competition between political entities is analysed by Brennan and Buchanan as follows:

Implicit in all of the analysis of earlier chapters has been the assumption that the polity and the economy are perfect mappings of each other with respect to geography, membership, and the extent of trade and resource allocation. That is, we have assumed the economy to be closed: neither trade nor migration extend the economy beyond the boundaries of the political unit. Consequently, all fiscal activities are carried out exclusively within the polity. [...] If persons are free not only to engage in trade but also to shift capital and labor resources in response to differential economic signals, the economy becomes genuinely international, even if political units remain separate. [...] Freedom of trade and migration among separate governmental units acts as a substitute for overt fiscal constraints. [...]

⁵⁴Brennan and Buchanan, *supra* n. 53, p. 13–33.

⁵⁵Brennan and Buchanan, *supra* n. 53, p. 1–12.

⁵⁶Brennan and Buchanan, *supra* n. 53, p. 153–167.

Intergovernmental competition for fiscal resources and interjurisdictional mobility of persons in pursuit of 'fiscal gains' can offer partial or possibly complete substitutes for explicit fiscal constraints on the taxing power.⁵⁷

The freedom to migrate across borders constitutes a legal precondition for regulatory rivalry. While the mechanism of competition can be operational within diverse multi-level and federal-type polities, a community of states, functioning under the co-existence of unharmonised national regulatory systems and liberalised transboundary capitalism, is one of its distinctive scenarios. In Europe, the four freedoms of the EU guarantee cross-border economic mobility and facilitate tax competition between Member States. In fact, in the context of arranging international legal orders, the disciplinary function of international economic integration had already been sanguinely envisaged by early neoliberal internationalists who thought that national sovereign powers would tend to be limited by competition for the sake of individual liberty.⁵⁸ The hope for inter-jurisdictional competition and the authority of empowered market forces was cherished especially by Hayek, who predicted that international economic mobility would abridge national legislators' sovereign powers, by virtue of which they had increasingly intervened in the economy. Hayek furthermore thought that the capacities lost by the nation-state should not be reconstituted at the international level or conferred upon transnational organisations whose only task Hayek saw as preventing nation states from interfering with the economy. In the Hayekian view, the overall result would be 'less government'.⁵⁹ This appears to be a wished-for result from Brennan and Buchanan's angle, too.

The logic according to which regulatory competition serves as a constraint on the taxing authority and as a source of political empowerment has long been acknowledged. Freedom of cross-border movement enables private actors to decide on the location at which to initiate economic activities or where to relocate existing ones. Since they affect states' fiscal performance, these decisions are to be taken into account by governments when designing local taxation systems. As a result, individuals' influence on political proceedings is enhanced, as they are not bound to exert their influence and preferences through genuinely political means only but are equipped to do so through economic pressure as well. Expressed in Albert O. Hirschman's terms, in addition to the voice that is granted

⁵⁷Brennan and Buchanan, *supra* n. 53, p. 168, p. 171–172 and p. 184.

⁵⁸For an excellent intellectual history of the transnational neoliberal vision, see Q. Slobodian: *Globalists. The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) p. 91–145.

⁵⁹F.A. Hayek, 'The Economic Conditions of Inter-state Federalism', in F.A. Hayek, *Individualism and Economic Order* (University of Chicago Press 1958) p. 255 at p. 260 and p. 264–269.

through political rights, individuals are empowered to make a jurisdictional exit (to vote with their feet).⁶⁰ Precisely at this point, the argument couples the political with the economic. Since additional political influence is established through economic mobility – and, in the specific context of the EU through the economic freedoms – the political is made dependent on the economic. This testifies to what Ulrich Beck depicted as one of the more comprehensive mutations of democracy: properly political mediums lose some of their authority and relevance when purportedly non-political mediums gain political significance and displace traditional institutions of democracy.⁶¹ Indeed, the economic is no longer merely one branch of regulation among other issues of politics but becomes a means by which the political is executed. In the result of regulatory competition and an economy-anchored capacity to influence public matters, the market has partly transformed from the ‘object’ of regulation into the ‘subject’ or actor in politics.⁶²

The endorsement of regulatory rivalry as an informal constitutional constraint marks a departure from ordinary routes of constitutionalism which advocate formal rules and constitutionally established institutions that are designed – with manifest intent – to prevent the abusive exercise of public power. As noted by Fritz W. Scharpf, post-war democratic constitutions have endeavoured to constrain the exercise of public authority through electoral competition, separation of powers, fundamental rights, and the rule of law. The public choice approach condemns these as insufficient and suggests complementing them with regulatory competition between political units.⁶³ In this respect, the argument also departs from the one presented by Joerges and Maduro. While their argumentation made the representation of interests dependent on a supranational body instituted in a supranational legal order, Brennan and Buchanan’s argumentation does not assume any constitutional body that would act as a substitute organ for an absent supranational legislator. Moreover, for national legal orders, the repercussions of competition differ slightly from the effects of supranational court decisions. The difference may not, however, be reduced to the fact that judgments by the court

⁶⁰A.O. Hirschman, *Exit, Voice, and Loyalty. Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1974) p. 1–43. For a more general but less well-known analysis, see A.O. Hirschman, *The Passions and the Interests. Political Arguments for Capitalism before Its Triumph* (Princeton University Press 1977) p. 69–93.

⁶¹U. Beck, *The Reinvention of Politics. Rethinking Modernity in the Global Social Order* (Polity 1997) p. 94–109.

⁶²V. Mayer-Schönberger and A. Somek, ‘Introduction: Governing Regulatory Interaction: the Normative Question’, 12 *European Law Journal* (2006) p. 431 at p. 432.

⁶³F.W. Scharpf, ‘Globalisierung als Beschränkung der Handlungsmöglichkeiten nationalstaatlicher Politik’, in K.-E. Schenk et al. (eds.), *Jahrbuch für Neue Politische Ökonomie. 17. Band: Globalisierung, Systemwettbewerb und nationalstaatliche Politik* (Mohr Siebeck 1998) p. 41 at p. 43–45.

are endowed with formal legal authority. In the case of court decisions, the regulatory consequences derive more directly from the interpretation and legal content of the free movement norms as such, while in the case of competitive pressures, the policy outcomes are less dictated by the free movement rules themselves and also more indeterminate than in the former instance. One might say that the process through which the political effects ensue – and which is endorsed by Brennan and Buchanan as well as neoliberal internationalists – is institutionally more unbounded and constitutionally more loosely structured than a supranational judicial process. For this reason, it may be dissociated from the more distinctively rights-based approach of Joerges and Maduro.

In order to reconstruct the essentials of the argument that has its basis in the analyses of neoliberal internationalists and the public choice school, three remarks should be made. First, that argument refrains from proposing the enactment of political rights which would entitle individuals to a properly political voice. Rather, it aims at alternative means of enforcing the political and the representation of interests. Second, rights to cross-border economic migration are seen as enhancing individuals' political capabilities and making their interests heard across national borders. Therefore, it can be argued that rights promote the interests of nationally-bounded constituencies to foreign polities. Unlike in Joerges' and Maduro's argument, the mediation of interests proceeds without any supranational arbitrator and therefore happens in a supranational institutional vacuum. Third, by making interest representation dependent on economic rights, the argument couples the political with the economic and renders the former dependent on the latter. Overall, the argument builds on the positive contribution that economic freedoms make to representation and envisages them as a means of political empowerment. Even though the idea of disciplinary competition was originally put forward to contain the outcomes of modern mass democracy, the argument may also be construed in defence of political representation. Precisely this aspect has been emphasised in the above reading of the argument.

REGRESSIVE POLITICS OF DEMOCRATIC INCLUSION AND RECONFIGURATION OF POLITICAL EQUALITY

The counter-considerations analysed above depart from the interpretation by which the economic freedoms of the EU merely undermine the core tenets of representative democracy within Member States. The arguments rather submit that the European economic constitution and market citizenship enhance democratic representation and support the underlying principles of representative democracy. In so doing, both arguments advocate a mode of interest representation that serves as a substitute for – or complementary means of achieving – properly

political rights to participation. Since genuine political integration within the EU has been absent in a number of policy fields,⁶⁴ this is a sound alternative. Most essentially, however, the theories of unconventional representation advocate the constitutional coupling of the political and the economic. Bearing this background in mind, the present section considers whether and to what degree the arguments succeed in promoting representation, contending that the arguments assert a precipitate equation of economic and political rights and confuse these two facets of constitutionalism. As a result, they compromise the demand for equality of political representation and democratic agency, which constitute two essentials of democratic rule.

Both counter-arguments posit that interest representation is dependent on the economic freedoms. In consequence, in order to become politically empowered, one must be eligible to invoke economic rights and be effectively capacitated to make use of them. In both instances, one must have the capacity for cross-border mobility or to engage in transnational affairs. Capacity for trans-border mobility, however, is in effect unevenly distributed between different types of economic actors and factors of production, as opposed to what is assumed in the inaugural theories that argued for the political virtues of cross-border mobility.⁶⁵ Corporate entities and activities, as well as financial and immaterial capital, possess a higher degree of mobility than natural persons, who are socially embedded in their local living environments and economically more entangled in a particular business environment.⁶⁶ The latter are socio-economically bounded constituencies that cannot, without some degree of compromise, break the ties with their domestic living environments. Therefore, interest representation that is advanced on the basis of economic mobility is inclined to result in partisan political empowerment. This should not come as a surprise. When oversight of political preferences is made contingent on specific empirical-material conditions, interest representation is bound to exclude from its scope and gains those citizens who do not comply with those conditions. This defect lies at the heart of rendering the political dependent on economic circumstances, which has a tendency to undermine the equality of political authority. As noted by Alexander Somek, this sort of 'representation resembles more closely a bourgeois liberal democracy of the nineteenth century

⁶⁴See text between n. 8 and n. 16 *supra*.

⁶⁵See C. Tiebout, 'A Pure Theory of Local Expenditures', 64 *The Journal of Political Economy* (1956) p. 416.

⁶⁶R.S. Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State', 113 *Harvard Law Review* (2000) p. 1573 at p. 1611–1612 and p. 1616–1625; Scharpf, *supra* n. 63, p. 45–47; Hirschman (1974), *supra* n. 60, p. 76. In the EU context, the intra-EU mobility of EU citizens of working age remains around 4%: see E. Fries-Tersch et al., *2017 Annual Report on Intra-EU Labour Mobility. Final Report January 2018* (European Union 2018) p. 26.

than a modern democracy that is based on general and equal franchise'.⁶⁷ This is a sound observation. As was pointed out in the introduction to this article, one of the distinctive premises of 19th century democracy was the requirement of personal wealth as a precondition for political rights. Thus, when the link between socio-economic conditions and political representation is fortified, the post-war grail of autonomous political citizenship is compromised and the regressive politics of democratic inclusion seems to be in the making.

Resort to alternative means of representation depends on the degree of cross-border mobility, for which reason individuals are provided with uneven opportunities to become represented in foreign polities. Hence, novel means of representation are accessible only to some and the preferences of transnational actors find more vigorous expression in foreign polities. Importantly, however, the interests of cross-border operators have not been enhanced in foreign countries only, but also in domestic polities. Surely, whereas the first counter-consideration is primarily animated by the concern to abolish nationality-based discrimination against non-nationals, Court-driven interest representation is inclined to empower them also to challenge their domestic regulations.⁶⁸ The second counter-argument does not even confine itself to the intention of eradicating regulatory treatment chiefly in foreign polities, which comports quite accurately with the actual functioning of competitive pressures. Therefore, interest representation of transnational citizens is bolstered in countries where they are anything but political outsiders and where they can surely not claim to be bereft of political rights of participation. Resulting from this, domestically constituted political power is reallocated and the balance of interests rearranged in foreign as well as domestic polities. In this respect, not only may it be declared that rights-based interest representation reinforces the interests of transnational market citizens but, in addition, that it simultaneously disempowers those whose pursuits remain within national boundaries.⁶⁹ Furthermore, regulations that are affected through alternative forms of representation do not concern trans-border affairs exclusively, nor do they relate to the treatment of outsiders only. Most certainly, although the capacity to achieve transnationality is a precondition of representation, the policies that are eventually influenced also pertain to affairs that are conducted entirely within national borders. In consequence, transnationality becomes a means for mobile actors to exert enhanced influence on policies whose application is not confined to transnational situations. This holds true not only with regard to

⁶⁷A. Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement', 16 *European Law Journal* (2010) p. 315 at p. 342.

⁶⁸For a detailed account, see Maduro (1997), *supra* n. 39, p. 78–79. For discussion, see Somek, *supra* n. 67, p. 329–335.

⁶⁹See A. Somek, 'The European Model of Transnational Democracy: A Tribute to Ernst-Wolfgang Böckenförde', 19 *German Law Journal* (2018) p. 435 at p. 456.

foreign, but also to domestic polities, where cross-border citizens are politically enfranchised from the start. Considering the initial concern that people tend to be under-represented in foreign states whose decisions nonetheless affect them in their home countries, privileged interest representation abroad and redistribution of political power at home are evident excess effects of the envisaged remedies.

When observing the effects of alternative modes of interest representation, it becomes clear that these means of representation do not result in the empowerment of foreigners only. In fact, the distinction between insiders (enfranchised nationals) and outsiders (disenfranchised non-nationals) is far from being the only relevant dichotomy in regard to alternative modes of representation. Since actors with a high degree of mobility are empowered abroad as well as at home, it follows that empowered actors are not exclusively either outsiders or insiders. Rather, transnational actors possess an ability to be both, with enhanced political influence across borders as well as in their home countries.⁷⁰ This empowerment translates into effects on representation within national polities. In domestic democracies, political controversies commonly derive from conflicting and antagonistic preferences that are rooted in the interests of domestic socio-economic groups. Through the increase of transnational mobility, the interests of those endowed with high economic mobility gain increased political prominence at the expense of their more static fellow citizens. Indeed, the line of demarcation between interests is not drawn merely along state boundaries but is also defined in accordance with domestic socio-economic positions.⁷¹ These interests are part and parcel of political contestation.⁷² In the framework of transnational economic mobility, political compromises between these interests are increasingly influenced by cross-border market actors. Hence, rebalancing the weight of these interests is anything but a neutral pathway to political empowerment. One should, therefore, be cautious enough to avoid the presupposition of homogenous interests and of unanimous constituencies within Member States.⁷³

For the reasons above, alternative modes of representation are bound to result in the reallocation of power within national polities. Empowerment through the economic freedoms does not enhance the representation of interests as such,

⁷⁰See W. Streeck, *Buying Time. The Delayed Crisis of Democratic Capitalism* (Verso 2014) at p. 79–81.

⁷¹W. Streeck, 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy', in S. Leibfried and P. Pierson (eds.), *European Social Policy. Between Fragmentation and Integration* (The Brookings Institution 1995) p. 389 at p. 416.

⁷²From a theoretical point of view, see C. Mouffe, *On the Political* (Routledge 2005) p. 1–7.

⁷³This was also later noted by Maduro: see Maduro (2003), *supra* n. 45, p. 93–94 and p. 101; see also M. Maduro, A New Governance for the European Union and the Euro: Democracy and Justice (RSCAS Policy Paper 2012/11, European University Institute) p. 13–16.

nor does it lead to the neutral growth of democratic representation. Rather, it invigorates the relative weight of preferences endorsed by transnational economic actors, which tend to be coterminous with capital interests.⁷⁴ This development bespeaks the twofold nature of alternative representation and of European integration in general. On the one hand, European law promotes and protects cross-border pursuits. On the other hand, integration has attempted to refrain from intervening in merely polity-internal issues. By stealth, however, integration provokes secondary ramifications in Member States.⁷⁵ In respect of intent, the EU qualifies as a community of transnational pursuits, yet in regard to consequences, the ethos of transnationality is in effect transcended.⁷⁶ While the European polity acquires legitimacy by addressing issues that are not confined to national boundaries, its legitimacy begins to perish as it encroaches on national matters without giving due consideration to the preferences of national constituencies in their entirety. Thus, representation on the basis of the economic freedoms falls prey to the same deficiency that has, in the first place, plagued the relationship between supranational market integration and national democracies: one-sided reliance on the economic gives rise to worries about the democratic legitimacy of political decision-making.

Both arguments for alternative interest representation involve a certain disregard for repercussions that ensue in national polities and touch upon the horizontal allocation of political representativeness. I suggest that the neglect is not a coincidence but results from the structural starting point on which the arguments rely. For both, representation is ultimately anchored in negative liberty rights which, by their nature, aim to remove interference in the sphere of individual liberty and to offer protection against regulatory burdens imposed by public authorities. Indeed, the arguments are built on the legal institution whose rationale is to constrain the exercise of public authority and they operate around the vertical nexus between the individual and the government. Because of this, alternative modes of representation empower transnational actors to challenge legal burdens encountered by individuals. Hence, both are systemically predisposed to contain the regulatory authority of the state.⁷⁷ While the first argument is not intended to promote this sort of consequence within Member State legal orders, this nonetheless is the immediate result of Court decisions vis-à-vis the individual. For the second argument, however, the domestication of Leviathan government is intentional. The fact that interest representation that is made contingent on certain

⁷⁴See S. Steinmo, *Taxation and Democracy. Swedish, British, and American Approaches to Financing the Modern State* (Yale University Press 1993) p. 29 and p. 156–160.

⁷⁵Offe and Preuss, *supra* n. 10, p. 180; Follesdal and Hix, *supra* n. 9, at p. 542 and p. 551.

⁷⁶See Jaakkola, *supra* n. 29.

⁷⁷For further discussion, see A. Somek, 'The Darling Dogma of Bourgeois Europeanists', 20 *European Law Journal* (2014) p. 688 at p. 701–702 and p. 709–710.

economic circumstances provokes, in substantive terms, a particular kind of outcome is quite predictable. Just as the conditionality of representation tends to benefit certain interests and to strengthen certain voices during the political process, it also tends to turn into corresponding regulatory outcomes. This entails congruence between substantive prerequisites for being represented and material outcomes resulting from the means of representation that operate under substantive prerequisites.

The above-purported effects of disproportionate political empowerment are quite well-substantiated by the politics of income taxation. Due to the varying degree of economic mobility, taxpayers are unevenly facilitated to have recourse to alternative modes of representation. The restructured practices of representation are not only inclined to unburden mobile taxpayers of their obligations vertically vis-à-vis the state. In addition, they are predisposed to reorganise horizontal patterns of redistribution, as they encourage shifting tax liabilities to more immobile taxpayers.⁷⁸ While transnational freedoms enhance outsiders' influence on foreign tax systems, they simultaneously create horizontal redistributive effects within polities.⁷⁹ Rather than serving as neutral political instruments, the novel forms of representation reshape horizontal power relationships between taxpayer groups and even invigorate existing democratic flaws. Since these effects have their origin in individuals' uneven economic circumstances, they depart from the post-war ideal of equal democratic citizenship. This development is particularly pertinent in the context of taxation since the post-war compromise between politics and markets has seen income taxation as a means of yielding economic equality between citizens in order to create approximate equality of democratic authority and representation, which was seen as rendering the political relatively independent from the economic.⁸⁰ The occurrence of representation based on the economic freedoms has not helped to achieve this aspiration through taxation under aggravated transborder regulatory externalities. Quite the contrary: they have revitalised the observation, already articulated by Max Weber, that taxation of mobile property and the proper distribution of economic resources are burdensome efforts and nowhere more so than in a society where the co-existence of democracy and cross-border market mobility is witnessed.⁸¹

⁷⁸For instance, see Avi-Yonah, *supra* n. 66.

⁷⁹For empirical assessment, see P. Genschel and P. Schwarz, 'Tax competition: a literature review', 9 *Socio-Economic Review* (2011) p. 339; P. Genschel and P. Schwarz, 'Tax Competition and Fiscal Democracy', in Schäfer and Streeck, *supra* n. 18, p. 59.

⁸⁰R.S. Avi-Yonah, 'The Three Goals of Taxation', 60 *Tax Law Review* (2006) p. 1 at p. 10–22.

⁸¹M. Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie* (Mohr Siebeck 1972) p. 209–211.

CONCLUSION

European integration displays a peculiar reciprocation between supranational economic integration and national representative democracy, which counts as a specific instantiation of the more overarching interrelatedness of the economic and the political. While some approaches acknowledge the democracy-undermining tendencies of the European economic constitution, others endorse its potential to enhance representation. Whereas the former theories consider the economic freedoms to be impediments to enforcing democratic ideals, the latter approaches suggest that the core values of representative democracy are advanced by virtue of European market citizenship. In particular, the latter approaches propound two alternative means of reinforcing representation. The first can be equated to judicial review of the economic freedoms and the second to regulatory competition under increasing economic mobility.

Do alternative modes of representation then succeed in advancing the ideals of democracy? More specifically, do they compensate for the democratic losses that have traditionally been experienced as transpiring as a result of cross-border market integration? First, alternative means of representation provide individuals with enhanced influence within foreign countries. Hence, individuals' interest representation is indeed reinforced in foreign polities and individuals are endowed with an opportunity to exert influence on regulatory burdens that are imposed on them in those polities. Second, the alternative instruments of representation are chiefly disposable for actors with a high degree of transnational mobility. In consequence, the interests whose representation is effectively reinforced are merely those of mobile economic actors. Third, and closely related to the previous consideration, the interests of economically mobile actors are invigorated within foreign as well as domestic democracies. As a result, disproportionate empowerment of mobile economic actors occurs within national polities, which results in horizontal redistribution of political authority and rearranges the balance of interests in national political contestations. Overall, the aggregate growth of representation takes place at the expense of political equality and equal democratic agency.

With respect to the democratic promise of the European economic constitution, one is tempted to conclude that a new politics of democratic inclusion is developing. Alternative means of representation are contingent on individuals' capacity for transnational pursuits, which renders political representation dependent on socio-economic circumstances and cross-border mobility. The factual conditionality of representation deserts the aspiration for equal political subjectivity, as political citizenship becomes recoupled with market citizenship, in a fashion reminiscent of 19th century liberal democracy. The new politics of democratic inclusion stands in sharp contrast to the visions of more democratic, more inclusive and more political decision-making procedures, whose introduction in

the European Union could provide an adequate response to the prevailing transnational regulatory externalities. The shortfall of the arguments demonstrates the actual shortcomings of making the political dependent on the economic or rendering it conditional on empirical circumstances in the first place. Moreover, their insufficiency showcases how arduous a venture it is to advance the political through the economic. The endeavour of furthering the political through the economic is actually one of the core reasons for the kind of democratic deficiency initially examined in this article⁸² since the early stages of integration had envisaged that political unification could eventually be arranged through market integration and achieved by relying on the economic. Clearly, the construction of a genuine European political community and democratic institutions cannot follow a straightforward route. In spite of that, there seem to be no shortcuts to democratic empowerment. Instead of indirect and incidental secondary means, the deliberate and open structuring of political power and democratic practices remains on the European agenda.



⁸²See text between n. 8 and n. 29 *supra*.