



What's wrong with depoliticisation?

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Abstract

The tension between the cosmopolitan vocation of the economy and the national character of politics has lately reached a considerable level of pressure, as control over some political economic determinants of growth has been gradually acquired by European Union (EU) institutions at the expense of national political communities. In his book *Authoritarian Liberalism*, Michael Wilkinson calls this development a depoliticisation of fundamental decisions concerning economic and socio-economic relationships, a process which has culminated in the Maastricht Treaty. In my comment, I intend to explore the argument concerning depoliticisation, by examining the relationship between economy and politics from a constitutional standpoint. While I agree with the author that depoliticisation has been systematically translated into a political mode of screening decisions concerning economy behind the narrative of necessary and unavoidable developments within the European project, I take a difference stance on the meaning and risks of depoliticisation. I shall argue that a certain form of depoliticisation is intrinsic to any process of constitutionalisation understood as a reflex of a political will. I then shall explain that European constitutional culture's anti-political prejudice may have at times transfigured depoliticisation into a technique to tame and restrict disagreement.

Keywords: European economic governance; national politics; constitutions; constitutional culture; new constitutionalism

1. Introduction

One of the key contributions of Michael Wilkinson's book *Authoritarian Liberalism* is that it explains the sense in which the European integration process cannot be disentangled from either the history of transformation of European national states, or from their dominant intellectual classes. From this perspective, the book describes domestic and supranational developments as being parts of the same historical movement, which can be consistently represented through a unified constitutional theory. This constitutional theory is not overly concerned with discussing the extent to which European Union (EU) constitutional features have twisted the abstract model of European constitutionalism, a pathway which some scholars who question EU economic governance and integration processes have explored. Rather, the theory is preoccupied with understanding which space, if any, is left to the political in both state and EU constitutional settings, in the wake of substantive economic decisions. Thus, this book invites us to consider the relationships among the political, the economy, and the constitution in this part of the world.

I think that the historical movement captured in Michael Wilkinson's book can be synthesised as the tension between the 'cosmopolitanism' of the economy, particularly the capitalist economy, and the national character of politics. Notably, both cosmopolitanism and national character are

used here without the broader moral significance and implications these terms connote within recent scholarly debate. By ‘cosmopolitanism of economy’, I refer to those developments of economic systems that make international markets (of goods, capitals, and labour) more lucrative and attractive than isolated national markets. By ‘national character of politics’, I denote the preference for political action to address a homogeneous and clearly identifiable community of people.¹ This tension is by no means a prerogative of our times, and has been explored in political philosophy since even before the founding treaties of the European Communities had been imagined.² The history of European integration, however, tells us that this tension has culminated in the political having progressively adapted its physical space to the dimension of economic exchanges. Michael Wilkinson’s book suggests that this process of adaptation has occurred through a reduction in the amount of room for political deliberation; or, to put it differently, by subtracting decisions affecting economics from the variable of politics. The tension between the cosmopolitan vocation of the economy and the national character of politics has lately reached a considerable level of pressure, as control over some political economic determinants of growth has been gradually acquired by EU institutions at the expenses of national political communities. Michael Wilkinson calls this development a depoliticisation of fundamental decisions concerning economic and socio-economic relationships, a process which has culminated in the Maastricht Treaty.

In my comment, I intend to explore the argument concerning depoliticisation, by examining the relationship between economy and politics from a constitutional standpoint. While I agree with the author that depoliticisation has been systematically translated into a political mode of screening decisions concerning economy behind the narrative of necessary and unavoidable developments within the European project, I take a different stance on the meaning and risks of depoliticisation. Indeed, I suggest that there are different forms of depoliticisation with disparate impacts on democratic deliberation. In particular, I shall argue that a certain form of depoliticisation is intrinsic to any process of constitutionalisation understood as a reflex of a political will. In such context, constitutions mark the space for the political by isolating – through democratic procedures – some decisions from the volatility of political preferences. To pursue my argument, I shall clarify in which sense constitutionalisation depoliticises issues, including those generating from economic dynamics. I shall then provide some examples of constitutionalisation and depoliticisation of the economy. I continue by addressing how some portions of European constitutional culture tackled and worked through depoliticisation, by pointing out that an anti-political prejudice may have at times transfigured depoliticisation into a technique to tame and restrict disagreement. Finally, I shall circle back to the relationship among constitutionalisation, depoliticisation, and economy within the EU.

2. Depoliticisation and constitutions

I begin by clarifying my understanding of the word depoliticisation, which also implies partial expansion of Michael Wilkinson’s use of the expression. By using the term depoliticisation, we can capture two different but related phenomena: (a) the withdrawal of items from democratic debate and deliberation, on account of their belonging to an unnegotiable set of values or priorities (constitutionalisation); and (b) the introduction of items within the public debate as political or even constitutional necessities (the ‘There is no Alternative’ narrative to which Michael Wilkinson dedicates Part III, Ch. 8). I will frame the first phenomenon *depoliticisation by withdrawal*, and the

¹Reference is made to the classical liberal thought which connected the existence of free representative institutions with the homogeneity of the represented population: see John Stuart Mill, *Considerations on Representative Government* (Parker, Son, and Bourn 1861) 296: ‘Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.’

²Political philosophy at the beginning of the 20th century devoted much attention to this tension: Giuseppe Vacca, *Introduzione. Nel mondo grande e terribile. Antologia degli scritti 1914–1935* (Einaudi 2007).

second *depoliticisation by necessity*. The first phenomenon constrains the space for political deliberation, while the second substantively confines the role of the political subject by concealing the nature of public decisions. To explain this point, let us start from depoliticisation by withdrawal and what it means to withdraw items from political debate.

Written constitutions are designed to shape the legal system according to an act of political will. By doing so, they subtract some rules or, more frequently, principles from political deliberation, in the sense that those rules or principles cannot be questioned without implying an intention to rewrite the constitutional contract or even to overthrow the existing constitutional regime.³ Through written constitutions, the political expresses itself by depoliticising certain themes: qualifying some decisions as conclusively embedded in the identity or form which the political community has decided to take. Depoliticisation thus becomes a technique for both avoiding conflicts and maintaining stability, on the assumption that the written constitution – which is the act of political will of the people – has settled conflicts over certain themes once and for all. Constitutions typically do so by recognising rights to which state obligations correspond. Thornhill has elaborated on this phenomenon by highlighting that in contemporary democracies, the political, structured around rights, always ‘presupposes its own reflective depoliticization’.⁴ Hence, the way back from such depoliticisation can be quite easy to take: it requires a new act of political will.

After the collapse of authoritarian regimes, some European constitutions incorporated principles of economic regulation, including limiting freedom to conduct business and recognising employees’ participation rights in private companies. This occurred via various degrees of public regulation of economic activities. In this way, constitutions struck a balance between economic freedoms and social rights, aimed at removing pure economic liberalism from political options. Because such original removal from practicable options is an act of political will, depoliticisation can be described as the result of a political decision, made by a constituent power.

Depoliticisation has worked through social conflicts, without constraining the space for rethinking its own limits. That is to say, it did not prevent radical changes that happened democratically. I shall provide two examples. The first is the 1976 Portuguese Constitution, adopted after the collapse of the dictatorship. The constitution declared Portugal in transition to socialism by prescribing the socialisation of the means of production, and by providing the legal basis for agrarian reform. Nevertheless, soon after the adoption of the Constitution, a gradual conversion of the 1976 Constitution into a liberal-democratic model took place. In particular, the Partido Social Democrata, a right-wing party which led the government from 1978 to 1983 after the fall of the coalition government guided by the Partido Socialista, introduced constitutional amendments aimed at reducing the ideological references to socialism in the Constitution.⁵ When the socialist party, which had led the country from 1983 to 1985, lost the 1985 elections, the right-wing coalition completed the process of ‘ideological neutralization of the Constitution’⁶ through a series of reforms that eliminated any reference to the socialist state. Other amendments

³Constitutional supremacy is conceptualised in different ways in legal traditions. For the purpose of this article, I am referring to constitutions as embodying the existence of a body of institutions, principles, and rules that cannot be altered by political deliberation: see Charles H McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press 1974).

⁴Chris Thornhill, ‘The Autonomy of the Political. A Socio-Theoretical Response’, 35 (6) (2009) *Philosophy & Social Criticism* 705–35, at 723.

⁵António De Sousa Franco, ‘A revisão da constituição económica’, 42 (3) (1982) *Revista da Ordem dos Advogados* 601 <<http://www.oa.pt/upl/%7Bc0941130-efdb-4360-a221-07f180f9397b%7D.pdf>> accessed 2 March 2022.

⁶António De Sousa Franco and Guilherme D’Oliveira Martins, *A constituição económica portuguesa. Ensaio interpretativo* (Almedina 1993) 147. According to other scholars, including those who participated as members of the 1976 Constituent Assembly, what had occurred was indeed a dilution of the ideological foundations – which corresponded, however, to the evolution of the political community still compatible with the fundamental (untouchable) principles of the 1976 Constitution – mere formalisation of constitutional practices that had been accepted since 1976. Jorge Miranda, *Manual de Direito Constitucional* vol II, 3rd edn (Almedina 1991) 182, and José Joaquim Gomes Canotilho and Vital Moreira, *Constituição da República portuguesa anotada* (Almedina 1993) 1062.

were aimed at transferring to the Parliament fundamental choices concerning financial and fiscal policy, thus enhancing parliamentary powers to interpret constitutional mandates in those subject matters; or, we can say, politicising economic regulation. Moreover, some amendments were directed at cutting back the scope of certain constitutional principles, such as the irreversibility of nationalisation of private enterprises.⁷ In the end, the dilution of the revolutionary inputs establishing the 1976 Constitution was gradually achieved without political turmoil: the initially socialist Portuguese Constitution was rendered compatible with the European integration process, without the need for dramatic changes or even a formal transition to a regime that aimed at radically differentiating itself from the 1976 Constitution, which continued to be identified as the historical moment of democratic transition.⁸

The second example is the Italian 1948 constitution and its provisions regarding the economy. It has been documented that the socialist party, sitting in the Constituent Assembly, decisively contributed to the delineation of principles and rules concerning economic regulation in the Constitution. In particular, constitutional provisions were introduced to protect the freedom to conduct private economic enterprise (Article 41, section 1) and, at the same time, to prescribe that this freedom “shall not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity” (Article 41, section 2). Other provisions stated that some enterprises or categories thereof could be reserved to the government (Article 43) and that workers had participatory rights in the management of enterprises, as prescribed by law (Article 46). These provisions might suggest that Italy embraced a mixed economic system, but ruling classes have progressively departed from them, especially after the country joined the European integration process. On the one hand, starting from the 1980s, Italy began a process of liberalisation among many fields in application of EU treaty provisions; on the other hand, the Constitutional Court clarified that the notion of common good in Article 41 includes the preservation of the existing system of production⁹ as well as that of competition.¹⁰ The substantive departure from the economic model laid down by the Constitution did not entail, as in the Portuguese case, the need for a formal constitutional amendment.¹¹ Constitutional provisions were sufficiently broad to leave space for political debates and manoeuvring. As a result, the departure took place because of political decisions, consisting of legislative reforms. In this sense, depoliticisation of economic options did not ultimately prevent courses of action precisely realising those choices which were theoretically precluded by the Constitution. What depoliticisation did, in the Italian case, was soothe social conflicts during the founding moment of the constitutional system; afterward, ruling classes reshaped substantive constitutional rules without even advocating for radical changes.

Historical and political circumstances leading to constitutional developments in Portugal and Italy were quite different. There was, however, a common driver: the political will of acquiring the credentials to be part of the European project while that project was still unfolding. So, the transition from mixed economic models to fully fledged free-market economies represented a gradual democratic adjustment that did not happen in a political vacuum. In fact, it was an effort carried out by political parties of different ideologies. From such viewpoint, there are at least two lessons to be drawn from the Portuguese and the Italian examples. The first one is that depoliticisation can result from the openly political decision to subtract items from public debate with a view to establish the conditions of democratic politics. The second one is that, even under those conditions, depoliticisation does not constrain democratic deliberation when political will coagulates around

⁷De Sousa Franco and D'Oliveira Martins, *A constituição económica portuguesa* (n 6) 147.

⁸Rui Manuel Moura Ramos, ‘The Adaptation of the Portuguese Constitutional Order to Community Law’ 76 (2000) *Boletim da Faculdade de Direito: Universidade de Coimbra* 1.

⁹Corte cost., dec. 439/1991.

¹⁰Corte cost., dec. 241/1990.

¹¹Giuliano Amato, ‘Il mercato nella costituzione’ 1 (1992) *Quaderni costituzionali* 12.

the need to reopen the discussion on what had been removed from constitutionally practicable options.

Let us now return to depoliticisation by necessity, which refers to a situation in which items are introduced in political debate as political or constitutional necessities. Michael Wilkinson's book explores this in depth, in discussing the European constitutional landscape after Maastricht, and particularly the functioning and significance of the Economic and Monetary Union (EMU). I found this part of the book extremely relevant to understanding the implications of depoliticisation at the national level. Michael Wilkinson identifies depoliticisation as theoretically puzzling per se, as it undermines the relevance of popular sovereignty. The circumstances under which the EMU has been enforced show that depoliticisation of economy may be also practically problematic considering the overall constitutional design.

An interesting development during that phase of EU history is the Treaty on Stability, Coordination and Governance (TSCG) in the EMU, adopted in the aftermath of the crises of sovereign debt. One of the main provisions of that Treaty is the requirement to have a binding balanced-budget rule in domestic legal orders. The Treaty does not require states to include this rule in constitutions, but many states did.¹² What did this imply? Let us consider the Italian example. Italy complied with that treaty provision by adopting a constitutional amendment to Article 81, which now includes a balanced-budget clause that takes into account both adverse and favourable phases of economic cycle.¹³ The constitutional reform was introduced into public debate as a political and constitutional necessity stemming from the TSCG.¹⁴ Scholarly debate was quite lively, while public opinion remained aloof from the topic.¹⁵ However, to what extent was it necessary to incorporate the rule in the constitutional text? For purposes of the application of the TSCG, the new constitutional clause is inconsequential. The Stability and Growth Pact, as modified in 2005 and 2011, provides for an excessive deficit procedure (EDP), which entails sanctions for EU Member States not complying with the Fiscal Compact, irrespective of any additional rule adopted by those states. Moreover, the TSCG establishes an automatically triggered corrective mechanism in case of excessive deficit, which Member States are obliged to put in place. The application of either treaty derives from the law incorporating both at the domestic level. Although, according to some scholars, the formulation of Article 81 allows Italy a margin of flexibility in the adoption of anti-cyclical deficit spending policies, virtually everyone agrees this margin is quite strict in light of the rules of European economic governance.¹⁶ The inclusion of such a rule in the Constitution, then, simply magnifies the options for excluding macroeconomic policies affecting aggregate demand from the horizon of what is constitutionally possible, with disparate

¹²The TSCG requires states to transpose the balanced-budget rule into their national legal systems, through binding, permanent, and *preferably constitutional provisions*. The Commission is required to prepare a report on compliance with this transposition requirement. If the Commission concludes in its report that a contracting party has failed to comply, one or more of the other contracting parties will bring the matter before the European Court of Justice. Moreover, independently of such a Commission report, any contracting party can also call upon the Court to verify the transposition of the balanced-budget rule and the corrective mechanism into the national law: 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' (2012), Art. 3.

¹³Constitutional Law 17 April 2012, no. 1.

¹⁴See, for example, the synthesis of parliamentary debates and *travaux préparatoires* on the constitutional reform available at the website of the House of Representatives (Camera dei Deputati): <https://temi.camera.it/leg17/post/trattato_fiscal_compact.html?tema=temi/le_regole_della_governance_economica_europea> accessed 2 March 2022.

¹⁵See Omar Chessa, 'Il pareggio di bilancio tra ideologie economiche, vincoli sistemici dell'unione monetaria e principi costituzionali supremi' (2016) Forum Costituzionale <<https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2016/04/chessa.pdf>> accessed 2 March 2022.

¹⁶While it is true that under Art. 81 the balanced-budget rule, being construed as a requirement to achieve balance between expenses and potential revenues, allows for structural corrections of the output gap (meaning the difference between effective and potential revenues), such output gap is calculated through a mechanism, upon which states and EU institutions agreed, that always underestimates potential revenues: see Sebastian Barnes et al, 'Europe's New Fiscal Rules' 7 (1) (2016) *Review of Economics and Institutions* 2.

consequences on the social and the legal order which might not otherwise have been achieved. Those consequences primarily concern rights. In its first decision interpreting the new Article 81, the Italian Constitutional Court clarified that the balanced-budget clause requires a derogation from the principle of retroactive effects of decisions of unconstitutionality.¹⁷ In particular, constitutional decisions which impose financial consequences on the State, by recognising entitlements to categories of citizens originally excluded, will have effects only for the future with a view to avoid imposing deficit spending on the national budget. Without the new Article 81, the TSCG would not have determined per se the same result, because obligations stemming from it would have been balanced against, and eventually interpreted in light of, constitutional principles. The constitutional reform, then, depoliticised economic policy options even beyond what the TSCG would have achieved.

The example shows that Michael Wilkinson sharply identifies depoliticisation of economic options included in the TSCG as a problematic device for introducing changes in a sort of political vacuum, that is, in the absence of thorough confrontation on the implications of those choices. At the same time, one should not overlook that depoliticisation by necessity does not bear the same characteristics and implications of depoliticisation by withdrawal. The Italian constitutional reform of Article 81 tells us that while depoliticisation always implies the reduction of space for political deliberation, it does not necessarily indicate disempowering parliaments as such. Rather, depoliticisation is often carried out or completed by parliaments themselves, through approving constitutional amendments that further restrain the space of their deliberation, or through backing up the choices made by executives. Thus, depoliticisation by necessity is a complex phenomenon resulting from presenting choices that reflect the political deliberations of a ruling class as being indispensable to carrying out the ordinary functions of a given political and economic order.

One might wonder whether a ruling class is able to present its political options as historical necessity also because of the substantial inability of those social and political forces, which may represent opposition to the dominant view, to effectively perform their role of driving changes. If this is the case, then they allow the ruling forces to direct political courses of action consistent with the set of beliefs and assumptions that has maintained their position of political power. This is another way of saying that changes happen passively, driven by dominant political forces in the absence of thorough political confrontation. Michael Wilkinson has explored this topic, addressing the crisis of the social-democratic agenda in some European countries, as well as the later emergence of ‘third way’ narratives in national political discourses in Germany, France, and the United Kingdom.¹⁸ However, I shall not dig into the reasons why those social and political forces that can potentially oppose or resist dominant narratives do not carry out that function. These questions are probably better left to sociological and political science analysis. Instead, my argument insists on the need to distinguish two forms of depoliticisation. The first one, depoliticisation by withdrawal, may be considered inherently political and embedded in any exercise of constituent power. While the second, namely depoliticisation by necessity, is problematic because it constrains the space for political deliberation without implying the same levels of elaboration, political compromise, and reflective exercise that adopting a constitution requires. Against this backdrop, I shall now focus on how constitutional theory addresses depoliticisation in order to show that the first form of depoliticisation, via a certain reading of the constitution, may translate into the second, dangerous, form.

¹⁷Italian Constitutional Court dec. 10/2015. Chiara Bergonzini, ‘The Italian Constitutional Court and Balancing the Budget: Judgment of 9 February 2015, no. 10; Judgment of 10 March 2015, no. 70’ 12 (1) (2016) *European Constitutional Law Review* 177–91.

¹⁸See Michael Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) at 129, mentioning François Mitterrand’s decision to abandon his socialist programme out of fear of currency devaluation under the weight of the Deutschmark.

3. An anti-political prejudice?

Depoliticisation is an intended effect of the constitutionalisation of principles and rules. A constitutionally problematic depoliticisation takes place when it cannot be traced to a clear act of political will, but to a contingent combination of social and political forces, acting without mobilising the political subject, that drive changes by reducing the space for political – and thus discretionary – deliberation.

There is something within the European constitutional culture that may have, albeit unintentionally, provided some support to such problematic form of depoliticisation. I refer here to what can be named an anti-political prejudice that seems to be entrenched in those constitutional theories that undermine the political decisions which any constitution incorporates, on the assumption that constitutional values reflect a universal, *apolitical*, and to some extent *ahistorical*, agreement. Michael Wilkinson has devoted a chapter to some of these theories, which he describes as ‘new constitutionalism’.¹⁹ This term captures a constitutional idea that entrusts non-political institutions with the task of ascertaining the existence, within a cosmopolitan legal order, of a coherent set of principles and rights which constrain the exercise of public powers.²⁰ This understanding of constitutionalism rejects ‘any sense in which a constitution’s authority must be tied to the exercise of a popular constituent power’.²¹ The anti-political prejudice lies here – or, more precisely, in overlooking that constitutions express a political, historically situated will, through which the conflicted and divided social coexistence manages to form a unity.²²

In my view, however, a further critical element of these theories is their use of the conceptual apparatus of constitutional supremacy. Generally speaking, constitutional supremacy describes a particular quality of constitutional norms: their ability to condition the application and interpretation of any other norm in the legal system.²³ In this way, constitutional supremacy defines a hierarchy between the constitution and the legislation, which in turn is reflected in a hierarchy between the constitution (and its guardians) and the legislative power, specifically the Parliament. Therefore, the principle of supremacy affects not only the rank order of legal norms, but also the institutional structure of the state, because the supremacy of the constitution also entails the subordination of the legislature to constitutional imperatives.²⁴

Constitutional supremacy may coexist with constitutions that do not intend to be all powerful in their own polity or shape any relationship of legal significance, thus leaving the legislator free to adopt discretionary decisions on every topic that is not covered by a constitutional principle or rule. However, constitutional supremacy may also lead to a different outcome whereby the role of ordinary legislation should be one of unfolding constitutional and hierarchical superior imperatives, either because it is interpreted as such, or because it should be adopted to specify or to enforce those superior principles or norms.

Assigning political institutions the task of guaranteeing the application of the constitution in its particulars implies envisaging the political community as coextensive with the constitution

¹⁹See Wilkinson, *Authoritarian Liberalism*, 230.

²⁰For example, a line of scholarship investigates the existence of a ‘generic constitutional law’ that is preoccupied with understanding how to protect fundamental rights and defines conditions for their limitations: see David S Law, ‘Generic Constitutional Law’ 89 (2005) *Minnesota Law Review* 652–742, 659, and Mark Tushnet, ‘Comparative Constitutional Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 1249.

²¹See Wilkinson, *Authoritarian Liberalism*, at 235.

²²Italian scholarship has developed a critique of new constitutionalist theory by reflecting on the anti-parliamentary and anti-legislative prejudice that minimises the democratic decisions encapsulated in constitutions, through entrusting judges with the task of ascertaining rights which are not conceptualised as political decisions, but rather as objects of judicial review: Massimo Luciani, ‘Costituzionalismo irenico e costituzionalismo polemico’ IV (2006) *Giurisprudenza costituzionale* 1643–68.

²³Mattias Kumm, ‘Who’s Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ 7 (2006) *German Law Journal* 341.

²⁴Jutta Limbach, ‘The Concept of the Supremacy of the Constitution’ 64 (1) (2001) *Modern Law Review* 7.

and thus implicitly reducing the space for what is left to political (discretionary) deliberation.²⁵ Hence, the endurance of a democratic order is attached to the existence of a constitutional dimension that is always capable of drawing the boundaries of the legally possible and the politically questionable.²⁶ Another aspect of this theory is the idea that judicial review – in the event of conflicts – will improve or optimise the conditions of democratic life.

This theoretical construction, which countervails the view of political constitutionalism, is consistent with the idea of written constitutions as acts of collective political will. It is also predominant in some European countries, namely Italy and Germany.²⁷ However, when the theory is applied to a constitutional structure in which a political sovereign is unclearly identified, it transfigures constitutionalism in a legal technique which creates a lockbox of political disagreement. The requirement to introduce balanced budget rules in constitutions, or norms alike, can be taken as an example. The option for balanced budget rule has been identified as necessary to preserve the existing structure of European economy and financial stability and then transposed in constitutional norms on account of its necessity, thus conditioning the application of other norms, including constitutional ones in the legal system. There is therefore a continuity between the logic of depoliticisation and that of delegating to constitutions the power to dominate political disagreement. However, this latter development is twisting the logic of constitutions as political acts taming rather than ending disagreement.

In this sense, such an understanding of constitutional supremacy may have assisted the drift towards depoliticisation of economic policies in at least two senses. Firstly, this version of constitutional supremacy reduces the area of social disagreement either by shielding some items from ordinary political discourse, or by broadening the scope of constitutional imperatives. Secondly, it extracts the political responsibility for solving conflicts, on the assumption that the solution may be found in constitutional (or any hierarchically superior) norms.

4. Conclusion

In recent decades, scholars have elaborated the concept of output legitimacy to make sense of the exercise of public powers via supranational decision-making processes, with only marginal involvement from national democratic circuits. Fritz Scharpf identified two frames for input and output legitimacy, by conflating the normative and social legitimacy of a given political regime.²⁸ Input legitimacy refers to the bottom-up process through which the people make political choices regarding how they want to be governed. Within the ‘input frame’, political choices are legitimate to the extent that they reflect the will of the people. The latter, moreover, expresses a collective self-determination of preferences that the representatives are expected to address.

Input legitimacy resorts to a kind of consensus rhetoric, whereby the people define preferences based upon a minimum agreement on some values. In contrast, under an output-oriented model, legitimacy concerns are addressed by focusing on the effective promotion of a constituency’s common welfare through a number of political actions designed to solve collective problems. The output model was, then, suggested as possible theoretical frame of European governance.²⁹

²⁵Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 2012), 47. The authors argue that in German public mind and legal scholarship the normativity of the Constitution needs to go hand in hand with the political reality.

²⁶Such a view of constitution is opposed by scholars who identify disagreement as the existential condition of democratic political regimes: Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 293–4.

²⁷Kommers and Miller, *The Constitutional Jurisprudence* (n 25) 47.

²⁸Fritz Scharpf, *Governing Europe: Effective and Democratic* (Oxford University Press 1999) 11–12.

²⁹Some years before Scharpf, Joseph Weiler discussed the problem of legitimacy of the exercise of public powers in the EU, criticising output models based on telos, whereby legitimacy is gained by promising desirable results: Joseph HH Weiler, ‘The Transformation of Europe’ 100 (8) (1991) *Yale Law Journal* 2403–83.

On closer examination, it appears that the output perspective takes into consideration a political environment of articulated needs and preferences in which shared values do not necessarily express a common identity that translates into a unitary political will. Output legitimacy was therefore supposed to be achieved while involving a limited mobilisation of political subjects.

The progressive depoliticisation of economic issues has been pushed forward on similar assumptions, by justifying decisions in light of the need to keep alive the particular form that the EU integration process was taking. Providing decisions concerning the economy with some form of legal and/or constitutional supremacy lent momentum to the process at various stages, possibly also because European constitutional culture's discontentedness with political disagreement may have provided some sound arguments to depoliticising narratives.

Against the backdrop of the EU's expectation that output legitimacy would aid integration, populist movements have escalated the input legitimacy framework by drawing a direct connection between the will of the people and the accomplishments of an authentic democratic model of government. According to populist rhetoric, democracy exists insofar as it consists of the realisation of people's determinations without the need for further political assessment or appreciation.

Lately, the tension between output expectations, on one hand, and beliefs in the intrinsic merits of input legitimacy, on the other, escalated. So, as the COVID-19 crisis has substantively reshaped debates on economic governance by showing the limits of procyclical policies, EU institutions have been reacting to populism and a crisis of legitimacy by fostering models of public participation that are supposed to help delineate the EU project's future and priorities. Two recent examples include the reform of economic governance and the discussion on the future of Europe. In her most recent State of the Union address, President von der Leyen announced that the Commission would launch a discussion on the Economic Governance Review, which is intended to build consensus on its future developments.³⁰ The Commission has already clarified that this review will be carried out by fostering public debate on the economic governance framework among relevant stakeholders.³¹ The Commission, in turn, will 'consider all views expressed during these debates', together with its own assessment of the economic surveillance framework. On a broader level, the Conference on the Future of Europe represents an example of EU institutions attempting to connect with citizens by promoting debates and confrontations over some of the most urgent and controversial European issues, including economic governance.

Such dialogical approaches resemble an exercise of public reason. Let us consider the Conference on the Future of Europe. It is a vast and virtual venue for hosting debates organised by EU citizens on a variety of issues identified by the convenors. At fixed time intervals, panels of citizens are held to bring together viewpoints to delineate the priorities identified by European civil society. The Conference, however, is not linked to the existence of democratic circuits that elaborate and move forward inputs for political decisions. Most importantly, the aims of the Conference are not immediately evident. The joint declaration of the three Presidents (Commission, Parliament, and Council) who launched the initiative qualifies it as a space for discussion with and for citizens, aimed at 'addressing Europe's challenges and priorities'.³² The short section dedicated to the planned actions declares that the aim is essentially to allow European citizens to express themselves, especially with respect to some issues indicated as crucial in the light of the strategic agenda of the European Council, of the European Commission's 2019–2024 political guidelines, and of the pandemic emergency. These themes range from the challenges that Europe is experiencing in the contemporary era (ecological and environmental

³⁰Ursula von der Leyen, State of the Union address, 15 September 2021 <<https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2021-en>> accessed 2 March 2022.

³¹See the Commission's press release at <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5321> accessed 2 March 2022.

³²See Joint Declaration on the Conference on the Future of Europe <https://futureu.europa.eu/uploads/decidim/attachment/file/6/EN__JOINT_DECLARATION_ON_THE_CONFERENCE_ON_THE_FUTURE_OF_EUROPE.pdf> accessed 2 March 2022.

transition, immigration, solid and equitable economy), to issues related to the Union's ability to fulfil its political agenda. The identification of these topics of debate, in any case, is not accompanied, not even in the digital platform dedicated to participation, by the identification of specific areas of intervention, as defined by the rules of primary or secondary European law. Participation is therefore above all a dialogic and argumentative exercise, which does not pretend to immediately impact on political choices.

After all, both the Conference and the Commission's initiative on economic governance appeal directly to the citizens, as though the populace were capable of self-organising and synthesising political preferences in a sufficiently coherent manner to correct or adjust the assessments of representative institutions. While the Conference and stakeholders' debates may help in identifying who the European political subjects are and what they deem as relevant for the EU to address, one can only doubt that either venue will represent anything close to the expression of a unitary political will.

When looked from such perspective, neither of these dialogical instruments will be capable of effectively addressing the progressive depoliticisation of economic policies. What is still missing in the picture is indeed the exposure of the political nature of some decisions, to which the historical responsibility for having taken a given action corresponds. I believe that Michael Wilkinson's book urges us to address this problem not only as a factual reality, but also as the most compelling challenge for contemporary constitutional theory.