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Supremacy Rule of Law in the Service of a Depoliticised Democracy—Pondering the Nature of the EU's ‘Social Contract’

Dimitry V. Kochenov  | Jacquelyn D. Veraldi 

CEU Democracy Institute, Budapest, Hungary

Correspondence: Dimitry V. Kochenov (kochenovd@ceu.edu)

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ABSTRACT

Seeing the EU roughly as a political system designed to remove the most essential political decisions from democratic control, while in a large part abiding by legal frameworks, we could speak about an opposition between technocratic legalism and democracy. At best, the EU offers a democracy of means, with limited capacity to affect the ends of the project. Most recently, even this limited democracy came under attack through a further reduction of transparency, a proliferation of omnibus legislation and constant executive overreach. In its current emanation, ‘integration through law’ aims to shield all aspects of governance not only from democratic but also legal contestation. It thereby structurally prioritises ‘supremacy’, ‘direct effect’, ‘mutual trust’ and other procedural aspects of its own functioning over the essential foundations of justice, democratic citizenship based on equality and dignity and human rights protection. We could thus also speak of ‘supremacy rule of law’, which might or might not be an attack on the essential aspects of legality and justice, removing the added value of the rule of law as such. Consequently, distilling the essence of the ‘social contract’ in Europe today, one arrives at a bundle of oxymorons: The EU’s supremacy rule of law is in the service of an ever fading depoliticised democracy of means.

1 | Introduction and Structure of the Argument

To speak of an EU social contract requires confronting the deep and long-standing constitutional asymmetry between the market-making and democratic authorship that has shaped European integration since its inception (Weiler et al. 1995, 2011, 2012a; Wilkinson 2015; Přibáň 2015; Weiler 2016; Wilkinson 2021; Auer 2022; Neuhold 2020). Democracy is rightly framed as the starting point for the social contract (Abat i Ninet 2025), with ordinary citizens consenting to foregoing certain freedoms in exchange for other rights and protections (Abat i Ninet and Goikoetxea Mentxaka 2026). However, the EU never had a democratic foundation *sensu stricto* (Wilkinson 2021, 2013): The core of the EU (the internal market) was created by élites and for élites (Kochenov 2013). Indeed, if a social contract existed in the EU’s foundational period, it was not between ordinary citizens and political leaders, but rather between the latter and industrial élites, with the core aim, precisely, to ‘depoliticise’ the economic governance of the continent (Wilkinson 2015; Menéndez 2015). Hence, notwithstanding legal proclamations (Bouzoraa 2023; Lenaerts and Gutierrez-Fons 2017), it is no surprise that to this day, the EU’s deep democratic deficit is an essential part of the constitutional structure of the

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Union, revealing itself in terms of the dearth of transparency and accountability, as well as participatory and representative democracy. This is descriptive in the most positive sense of the word. To arrive at this observation, there is no need to construct castles in the sky, in the manner of some popular literature flying the banners of *democracy* and nebulous legal pluralism.¹ While cliché, it is hard to ignore that the EU boasts of a legal system where citizens cannot vote out of office those who govern them, let alone affect policy by their preferences (Weiler 2016; Wilkinson 2021; Auer 2022; Weiler 1996; Weiler 1998); where the Court of Justice shields the citizens of the Union from human rights protection (de Witte and Imamović 2015; Eeckhout 2015; Kochenov 2015) and accountability (Spijkerboer 2017; Fink 2019; Moreno-Lax 2020; Schotel 2022; De Coninck 2024; Ganty and Kochenov 2024a, 145 et seq); and where the most fetishised principle of law in application—one that is able to supplant all EU values, including democracy, the rule of law and human rights protection—is the autonomy and supremacy of the EU's own legal provisions, no matter what (Kochenov 2024b; van de Beeten 2023). That the polity is said to be atypical (e.g. van den Brink 2024) helps little: having successfully built a shield against democratic constitutionalism cannot foreclose essential questions of democratic legitimacy and the rule of law (Wilkinson 2013; Weiler 2012a; Basheska and Kochenov 2026). As we know from countless examples from the Roman Empire to the Soviet Union a polity is not necessarily a democracy if it tells us so (e.g. Starr 1952). Self-characterisations of this kind, even those coming from the most titled mandarins are absolutely meaningless in this regard (Vyshinsky 1949, 248–249; Lenaerts 2025).

This game of smoke and mirrors is exacerbated by struggling output legitimacy caused by absent growth, lack of international capacity to assert European interests in turbulent times and the incapacity to put its own house in order to ensure observance of rule of law and democracy both at the level of the member states (Pech and Scheppele 2017; Sadurski 2019; Bakó 2023) and, supranationally, the ensuing adherence to basic rule of law standards and minimal accountability (De Coninck 2024; Shatz 2023; Basheska and Kochenov 2026), particularly through the embrace of so-called coordination space approaches that essentially render any talk of democracy, legitimacy and the rule of law irrelevant as Mark Dawson has shown (Dawson 2024, esp. 760–762), as well as sectorally, especially in the management of international migration (Ganty and Kochenov 2024a; Shatz 2023), investment protection (Kochenov and Lavranos 2022; Sadowski 2018) and mutual trust (Bárd 2021; Bárd and Kochenov 2026), to name just a few key areas,² further exacerbated by the ample proliferation of double standards on the rule of law (e.g. Kochenov 2024b; Kochenov and Butler 2021; Kochenov and Bárd 2022).

That the rule of law can exist without democracy has been robustly demonstrated by constitutional legal scholars focusing in particular on Asia but also on the history of the rule of law as a concept (Potsema 2024; Chen and Fu 2019). The standard reference to rule of law regimes, where democracy does not play a significant role is 'authoritarian legalism' (Scheppele 2018). What the EU has in common with such regimes is its commitment to 'integration through law'³ in the absence of strong democratic foundations and a turning away from a substantive understanding of its proclaimed values and rights (Williams 2009a; Kochenov 2015; O'Brien 2017, 2021). Conceptualising the EU as a governance system removing the most essential political decisions from democratic control, while in large part abiding by legal frameworks, we could speak of technocratic legalism as opposed to democracy. In the apt words of Gianluigi Palombella, the Union is thus stuck 'beyond legality – before democracy' (Palombella 2016). This cleavage has recently been amplified by the sustained attacks against even the democracy of means, which allowed Europeans, albeit to a very limited extent, to participate in deciding *how* the preset objectives of 'depoliticised' integration were to be attained (Wilkinson 2021). These took the shape of economic coordination (Dawson 2024) and omnibus legislation, making any meaningful democratic engagement even at this severely reduced scale impossible (Alemanno 2025; Ouyang 2025; Todeschini 2025).

As long as the EU's 'integration through law' seeks to shield all the aspects of depoliticised democracy, or what is left of it, from contestation—thereby structurally prioritising supremacy, direct effect and other procedural aspects of its own functioning over key aspects of justice, democratic citizenship based on equality and dignity and human rights protection—we could also speak of 'supremacy rule of law' (Kochenov 2024a), which might or might not be an attack on the essential aspects of legality and justice, removing the added value of the rule of law as such (Dawson 2024; Ziegler 2023). Consequently, distilling the essence of the 'social contract' in Europe today, one arrives at a bundle of oxymorons: The EU's supremacy rule of law is in the service of a depoliticised democracy.

Let us unpack these ideas by considering in turn the lacking democratic foundations of the Union (Section 2), further engaging with the 'democracy of means' and its over-constitutionalisation (Section 3), emphasising the recently intensified undoing of even this truly minimal simulacrum of democracy through the rise of omnibus legislation (Section 4), then charting the undoing—as a matter of principle—of a democratic constitutional subject in Europe (Section 5), the emergence of purely negative forms of democracy that imply freedom from national regulation and an inability to foster EU's social contract (Section 6), aided by the deployment of the 'supremacy rule of law' as a tool deactivating rather than

fostering the contestation of the rule of those in power (Section 7). We conclude by outlining the troubling features of the ‘social contract’ discourse in its application to the EU as it stands, calling for an urgent U-turn in both policy and theory, to allow democracy and the rule of law to acquire a meaning through informing and constraining supranational power, however much the original set-up and objectives of the Union in Europe would be naturally hostile to both concepts. Shoving them aside and interpreting away their essence does a dangerous disservice to the project of European unity as it faces the most intense—and the most well-founded—contestation in its history.

2 | The EU’s Foundation and the Problem of Democracy

At a minimum, democratic constitutionalism presupposes that there are suitable mechanisms for citizens to directly or indirectly contribute to the creation and contestation of the laws that govern them (Bertelli et al. 2025). Measured against these standards, the EU’s founding framework appears structurally indifferent or even hostile to such manifestations of democratic self-governance. Based on its founding legal documents, it is not evident that the European Union was ever meant to be a democratic project. The Treaty establishing the European Coal and Steel Community of 1951 contained no reference to democracy. True, there was the Assembly consisting of representatives of national parliaments, but they were allocated a mere supervisory role (Art. 20 ECSC), which was upgraded to include a ‘deliberation’ competence in 1957 (Art. 157 EEC), alongside certain consultation prerogatives (as in Arts 43, 54, 63, 86, 100 EEC). Following a handful of curious proclamations,⁴ the reference to democracy finally appeared in the Preamble of the Single European Act (SEA), which declared that the European idea and results achieved thus far corresponded to the ‘wishes of the democratic peoples of Europe’.

In reality, there was little that was democratically sound about the Treaties to that point. The Treaty of Rome, which constitutionalised the *goal* of a common market, was facilitated in large part by the informal Bilderberg Group of leading business figures (Wilford 2003). Their ultimate aim was to address ‘the growing menace to the West of Communist expansion’ (Wilford 2003) p. 72, and this was to be done through the establishment of a European-level liberal market economy. This idea was essentially shelved for three decades due to a lack of political will, only to be reignited in the 1980s, again at the behest of business interests in cooperation with Industry Commissioner-turned-lobbyist Viscount Étienne Davignon.⁵ Both industry and the Commission had something to gain: profit maximisation and a dramatic expansion in competences, respectively. The white paper on ‘Completing the Internal Market’ by Internal Market Commissioner Lord Cockfield has been identified in its essence as an industry proposal, with its conceptual basis being the plan for establishing the common market drafted by the Chair of Philips and member of the European Roundtable of Industrialists (ERT), Wisse Dekker (Bornschier 2000), whose proposals went largely unaltered into the White Paper. Key Commission officials have since acknowledged the ERT’s pivotal role in the creation and subsequent implementation of the SEA—including Lord Cockfield (Doherty and Hoedeman 1994) and then Commission President Jacques Delors (Cowles 2012)—providing crucial insight into the otherwise opaque negotiations and lobbying surrounding the SEA.

When the primary effect of constitutionalisation is to protect the constitution from political intervention, but that very constitution was born out of extensive external intervention, it is questionable whether such principally antidemocratic foundations can be corrected (Veraldi and Hassall 2023). For this historical series of events gave rise to a structural problem whereby a market-oriented project with all its numerous later additions, pointing in all directions that was never democratically chosen in the first place has become constitutionally insulated. Instead of safeguarding democratic consent, constitutional rigidity here functions as a substitute for it. Joseph Weiler was right, writing a quarter of a century ago, that the internal market is ‘naked, without a mantle of ideals’ (Weiler 1998, 231). The situation has been significantly exacerbated ever since.

The Union was not founded on the values that Article 2 TEU preaches, and the integration project went through a significant evolution throughout its history.⁶ A vivid daily reminder of this is that the Union as a space of rights under its law only exists for Europeans (Ganty and Kochenov 2024a; Kochenov and van den Brink 2015, 88–98)—an *apartheid européen* in Étienne Balibar’s apt phrase (Balibar 2001, 192), upgraded by Hans Kundnani to ‘Eurowhiteness’ (Kundnani 2023).

The Union has gradually accrued ever more competences without necessarily caring for the considerations of justice lying outside of the pursuit of its tasks (Williams 2009a; O’Brien 2017; Kochenov et al. 2015). This resulted, to quote Michael Wilkinson’s words, in a system of ‘Authoritarian liberalism’ (Wilkinson 2021, 2013; Williams 2009b). EU values, especially democracy and the rule of law, have gradually turned in this process from image-related luxury items that, *sensu stricto*, barely made up part of the *acquis* (the Copenhagen criteria were not binding law per se, showcasing the *acquis*’

limitations) (Kochenov 2017a), into familiar ornaments, adorning the legal-political edifice of the EU (Wouters 2020; Klamert and Kochenov 2024). This does not mean, however, that the Union is in a position to defend the values it proclaims to be built upon (Pech and Scheppele 2017), or indeed that it can export these values abroad effectively (Pech 2013) or adhere to them itself in daily affairs (Shatz 2023). One observes this, as Elena Basheska demonstrated (Basheska 2022), even in the context of EU enlargements, where EU leverage and power is at its utmost and the desire to promote change is clearly articulated (Kochenov 2008; Kochenov and Basheska 2025). Moreover, studying the historical context reveals a richer and a more multi-faceted story of values and aspirations, some of which are now out of sight—none of them democratically chosen.⁷

While most law faculties in Europe still teach EU law as a creature of constitutional law (Weiler 1999), the constitutional nature of the Union, although assumed,⁸ is regularly questioned.⁹ The reasons for the constant questioning are quite evident and essentially stem from the set-up of the federal legal system and the social contract among the élites at the EU's inception and its consequences for ordinary people (Kochenov 2017b; O'Brien 2021, 2017). The rule of law and other values, although mentioned in the Treaties, are *not* the EU's founding idea, or, to paraphrase Joseph Weiler, they are not in the EU's 'DNA' (Weiler 2012b; cf. Williams 2009a; O'Brien 2017; Williams 2009b), notwithstanding the constant rhetorical rehearsing of this *credo* (Williams 2009b, 2009a). Ultimately, the Union not only pretends to know better what the citizens want (Weiler 2009), but it also declares that equality and justice are by definition beyond reach, because the legal system of the Union in Europe is 'built like this', and the Court—in celebration of self-restraint—usually concurs (Davies 2014; Weiler 2013; Bengoetxea 2010).¹⁰

3 | Over-Constitutionalisation of the 'Democracy of Means'

Further references to democracy appeared with the entry into force of the Treaty of Maastricht in 1993, whose Preamble set the objective of further enhancing the democratic functioning of the institutions, and which also resulted in the emergence of EU citizenship. At this point, however, it may have already been too little, too late, for European democracy, as what had been created allowed only for a democracy of *means* rather than *ends* (Kochenov 2013), representing a qualitatively different model of governance altogether (Davies 2015; Peebles 1997). The problem was not simply that democratic elements were introduced at a later stage in the EU's constitutional story, but that they were introduced into a constitutional architecture whose main purpose had already been fixed and insulated from democratic contestation.

Through this constitutionalisation of the internal market objective as the core of the European Union—as opposed for instance to the promotion of the basic values contained in the TEU since the Amsterdam revision through constitutional constraint—the means-focused and instrumentalist nature of Union democracy comes into sharp focus. In a democracy of ends, citizens can dynamically and collectively decide what the community is for by contesting and changing fundamental policy goals. This requires the existence of elections that actually affect substantive direction, rather than the mere selection of personnel. A democracy of ends has to allow for political disagreement over whether to pursue certain objectives and the possibility of reversing core policies through democratic decision-making.

The EU, by contrast, is confined to having a democracy of means (though as we will see below, even this is increasingly limited). In this narrower form of democracy, the core objectives are fixed in advance (Davies 2015; Peebles 1997): The internal market objective remains the EU's constitutional core. Democratic processes only discuss how those objectives are achieved, how the burdens of achieving those objectives are distributed and how the rules operationalising those objectives are implemented. Whereas citizens may influence technical design and administrative details, they cannot democratically contest the existence of the objectives themselves or the priority given to those objectives over others. Democracy becomes managerial, not political. Such a system is a proverbial example of 'over-constitutionalisation', that is, giving constitutional status to 'provisions which would be ordinary law in states' (Grimm 2015). This goes far beyond the usual insulation of core values and institutional competences and constraints, thereby removing entire areas of substantive political choice from the arena of democratic disagreement and locking in particular economic and policy commitments at the constitutional level.

It is with Maastricht that we begin to see the instrumentalist limitation of European democracy: Article 138a of the Treaty establishing the European Community declared that 'Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union'. Hence, a more democratic European institution was not desirable in and of itself, but rather as a means to contribute to the attainment of the already predetermined objective of further integration. Citizens

are thereby treated as market participants and emerge as rights-holders only in a narrow, functional sense, with EU citizenship granting mobility and market access but not equality before the law, not inalienable rights and protections for EU market logic and not collective control over the polity's direction, illustrating the destruction of the democratic constitutional subject, an issue we will return to shortly. EU citizenship thus operates less as a legal status with rights of political authorship and more as a legal technique for facilitating market participation, functioning to stabilise the democracy of means rather than challenge it. It grants individuals mobility rights whose actual or sometimes potential exercise determines an individual's entitlement to equal treatment under the law and triggers a bundle of rights including those granted by the Charter of Fundamental Rights but withholds all the defining features of modern citizenship, alienating citizens from the institutions (Kochenov 2017b).

The EU's democracy of means manifests itself in several ways. The most notable is the limited role of the European Parliament, which has no capacity to freely initiate legislation and despite numerous Treaty amendments successively conferring increased powers on the Parliament, is often sidelined in key policy areas. Powers of consent only are ascribed when it comes to adopting legislation related to combating discrimination (Art. 19 TFEU), enhancing citizens' rights (Art. 25 TFEU), crimes affecting the Union's financial interests (Art. 86 TFEU), agreements with third countries (Art. 218(6)(a) TFEU), the multi-annual financial framework (Art. 312(2) TFEU), the flexibility clause (Art. 352(1) TFEU) and even the election of its own members (Art. 223(1) TFEU). In even more areas, such as social security or protection (Art. 21(3) TFEU), the ability to vote and stand in parliamentary elections (Art. 22(2) TFEU), rolling back the free movement of capital (Art. 64(3) TFEU), 'an emergency situation characterised by a sudden inflow of nationals of third countries' (Art. 78(3) TFEU), competition law (Art. 103(1) TFEU), indirect taxation (Art. 113 TFEU) and so forth—the Parliament is only consulted. Even where the Parliament has the power to debate and amend legislative proposals, the lack of a democracy of ends implies that they cannot redefine constitutional priorities (e.g., by deprioritising the internal market or reversing core integration goals). Hence, they can only operate reactively and are confined to policy refinement rather than creation.

This stands in sharp contrast to national parliaments, whose members often have a general right of legislative initiative¹¹ and even have the competence to propose constitutional changes.¹² This is of constitutional significance, in that national parliaments remain sites of constituent power capable of redefining the polity's ends, whereas the European Parliament is confined to operating within a framework whose ends are predefined and thereby placed beyond ordinary political reach.

Another way in which the EU's democracy of means rather than ends materialises is through the mechanisms of citizen's participation. The European Citizen's Initiative, for instance—which allows one million EU citizens to invite the Commission to submit a proposal—is confined, as per Article 11(4) TEU to suggesting legal acts that are 'required for the purpose of implementing the Treaties'. The same is true of the right to petition the European Parliament in Article 277 TFEU: Petitions can only be made on matters that fall within the Union's fields of activity. The Treaties themselves and hence the core objectives of the political project—including its principled depoliticisation—cannot be questioned by citizens at the EU level. This is in contrast to the remarkably light treatment of the rule of law guarantees underpinning the principle of conferral by the Court of Justice and some scholarship (e.g. Spieker 2025): systemic brushing away of the this principle as a key element of the supranational rule of law leads to the voiding of the EU legal system of vital constitutional constraints, thereby constituting and unprincipled attack on the rule of law (van den Brink 2026). The EU allows democratic participation only after the most important political questions have already been removed from democratic choice and the sphere where this is the rule is growing.

4 | Ongoing Assault: The 'Democracy of Means' Under Threat

To make matters worse, the democracy of means is increasingly limited in nature, casting into doubt whether we can speak of the existence of a Union democracy at all. Whereas Article 11 TEU, contained in the title on democratic principles, requires that the institutions give citizens the opportunity to 'make known and publicly exchange their views', that the institutions be open and transparent and that the Commission carry out 'broad consultations with parties concerned', a concerning anti-democratic shift has materialised in this respect under the second von der Leyen Commission. This has taken the form of co-called coordination. As recalled by Mark Dawson, the outcome of this approach is nothing less than sidelining the very idea of legitimacy and the law, as anything, be it democracy or the rule of law, is flexible and renegotiable upon this view as a matter of principle with no exceptions (Dawson 2024). Moreover, this Commission has been

using the ‘omnibus’ technique to ‘simplify’ what were once considered groundbreaking pieces of legislation, such as in the areas of sustainability and digital regulation (Alemanno 2025).

It would be one thing if this simplification, which is nothing more than deregulation, had been undertaken according to the appropriate democratic processes. Instead, in the name of supposed urgency, these proposals have been fast-tracked through the decision-making process without abiding with the safeguards set out in the Commission's own Better Regulation Toolbox (BRT), in particular, impact assessments and public consultations. The former are simply not conducted, whereas the latter are largely limited to closed-door meetings with industry. This is not in just a few areas: In the 2014–2024 period, legislative proposals accompanied by impact assessments reached an all-time low, at just 15%—and this is even before the use of the omnibus technique (Council of the European Union 2025). Impact assessments are not only important for weighing evidence; they provide transparency of Commission policymaking processes for co-legislators, stakeholders and the public (European Commission 2023, 42), which in turn facilitates democratic scrutiny and debate, and the ability of holders to make their views known. But the latter can only be done where the Commission also carries out the requisite public consultations. This was not done with the controversial Sustainability Omnibus I proposal, for instance, which the European Ombudsperson condemned as an example of maladministration in light of the Commission's broad interpretation of ‘urgency’ and failure to justify the urgency that required a lack of public consultation and impact assessment (European Ombudsperson 2025). These developments illustrate a further radical contraction of EU's already barely breathing democracy of means, in that even the limited spaces for public participation and deliberation are being narrowed in the name of efficiency and urgency. Democratic means are thus being treated as optional distractions rather than constitutional imperatives in the context of an increasingly technocratically-driven system systemically brushing aside the very idea of accountability and either democratic or rule of law-imposed constraints on its power.

Just like democracy, other officially proclaimed constitutional values of the Union are treated equally instrumentally. The rule of law in particular operates less as an autonomous normative commitment and more as an enabling framework providing the structural conditions for the proper functioning of EU law. As a matter of policy, the protection of the rule of law is largely pursued where this is instrumental to the protection of the internal market. Judicial independence, the main subject of rule of law case-law in which the rule of law has been deemed justiciable going back to *Portuguese Judges*, can be seen as a case in point (Pech and Kochenov 2021; Dawson 2024, 762–766). With the EU's core freedoms and competition being enforced primarily through national courts, if judges are not independent, they cannot be trusted to enforce internal market rules against the state itself, nor to disapply conflicting national measures or to make preliminary references. The Commission therefore recognises that ‘the rule of law is central for the functioning of the Single Market’ (European Commission 2025a, 3).¹³ The importance of the rule of law to the single market is hence given priority in the latest Commission Rule of Law Report, with it deemed ‘necessary for delivering policies that promote competitiveness through the Single Market’ (European Commission 2025b), thereby framing rule of law compliance as a functional precondition for economic performance rather than as a self-standing constitutional obligation. Accordingly, ‘a particular understanding of the rule of law’ emerges, whereby legal certainty and predictability for market actors prevail, preventing member states from directing economic processes (Brännström 2014) and leaving the EU itself seemingly unconstrained in principle (Kochenov and Bárd 2022; Kochenov and Íñiguez 2025).

Other core aspects of the rule of law—in particular, equality before the law and non-discrimination—are not treated with the same level of respect. As mentioned, equality before the law is only afforded to those who are economically active or have sufficient means, reflecting the internal market logic of conditional inclusion and marginalising those whose connection to EU law is not mediated by economic participation (Kochenov 2017b; O'Brien 2021). Likewise, non-discrimination based on nationality has been interpreted as only applying to the nationals of member states, despite the fact that the provision establishing the non-discrimination principle does not limit its scope to any particular set of nationalities, being confined instead to the ‘scope of the Treaties’.¹⁴ Moreover, where the further development of the internal market is deemed necessary, the rule of law is sidelined (Crosby 1991), and the rule of the market emerges, with legal constraints receding in favour of integration-driven imperatives, exposing the contingent and instrumental deployment of the Union's constitutional values.

Taken together, these dynamics reveal a Union in which democracy is structurally subordinated to pre-constitutionalised economic objectives and constitutional values, which are mobilised selectively to secure their effectiveness. What emerges, then, is a polity in which democratic participation is permitted only within parameters fixed by market integration and constitutional values that are invoked only insofar as they sustain that project. Critically, in such a setting the rule of law as a legal principle is mobilised to achieve the opposite of taming the powers that be: it stars as, an instrument

mobilized to justify and advance unconstrained supranational power (Ganty and Kochenov 2024a; Kochenov and Ganty 2024; Kochenov 2024b, 2015).

5 | The Annihilation of the Democratic Constitutional Subject

Originally presented as a market to serve ideals grander than simple economic prosperity—thus intended to benefit each and every European through becoming part of our ‘legal heritage’, as the Court has amply noted in *van Gend en Loos* (Weiler 2011)¹⁵—the European project has since erected a constitutional cage and thrown away the key. As the glitter of the original promises faded, so did the ideals meant to justify the cage in the first place. Conceived once upon a time as, rhetorically at least, a stepping stone to peace¹⁶ and a clutch of other valuable ideals now reflected in Article 2 TEU (but also colonialism, Hansen and Jonsson 2014; racial segregationism, Eklund 2023; dismissing any foreigner as a non-subject of rights by default, Ganty and Kochenov 2024a, 88–97; Kochenov and van den Brink 2015; and building a unified European nuclear force in violation of international law, Mallard 2014, which failed essentially as a result of a French betrayal), the Union gradually lowered its ambition: The means for greater progress, which was the market, came to be chief among the Union’s rhetorical ends (Kochenov 2013; Peebles 1997). This is the current euro-soteriology we live under and cannot vote against in Europe (Weiler 2016). This subtle taming of ambition, while sellable to an inattentive observer as a sign of respect vis-à-vis the member states’ sovereignty, is in fact something else, it seems.

When the supranational legal system flying the banner of the internal market is the means to achieve something greater, the limitations it imposes on the national authority and individual citizens alike could be justifiable: As the official story goes, the member states’ democracies lost the political and economic upper hand in the name of liberty—an insurance policy against lurches towards totalitarianism—and prosperity—a social Europe where tomorrow is better than today—which are to come through unity. Much has changed, however, since the first version of the story was written. Prosperity is not on the horizon anymore—at least not for everyone (Menéndez 2013)—as the European economy falls further and further behind the United States and China, and liberty is none of the Union’s business either at the national or at the supranational level (Kochenov 2015; Kochenov 2017c). Quite the contrary is true, as the equality, dignity and human rights of EU citizens and non-citizens alike come under frontal attack from a Union, which has failed its core promise (O’Brien 2021; Kochenov and Ganty 2024). Yet, the constitutional cage is now locked, and the élites–élites bargain remains beyond the reach of ordinary Europeans more than ever before.

Instead of the optimism of a new beginning hailed by the élites of the past, Union law is now a binding and directly effective tool to tame European citizens in the name of a highly specific version of the unprincipled supranational rules that it cherishes and the frivolous and sometimes criminal behaviour of those whom we have not elected to govern us: such as the successful deployment of the outright illegal shadow immigration system, which has killed thus far dozens of thousands with no accountability and at a huge expense (Ganty and Kochenov 2024a; Shatz 2023). In the name of the internal coherence of the supranational governance system, we are shielded from European human rights standards¹⁷; in the name of its smooth operation, the market this system installed is said to be ‘apolitical’ (Wilkinson 2015, 2021). Those who disagree should stop wasting their time. This is good for all of us, we are told, because the Treaties say so (Williams 2009a) and because politics, as much as the Treaties allow for it, is by definition the politics of means, not the politics of ends. The direction of European Unity is set in stone and not politically negotiable within the framework of the institutions the Treaties have created (Davies 2015).

De facto, this amounts to the denial of the political and makes any serious talk of actual democracy difficult (Menéndez 2015; Davies 2015). Indeed, knowing that the ‘common good’—however enlightened its proclamation—is no simple matter and that it is always at someone’s service (Offe 2012), a traditional understanding of democratic citizenship necessarily implies the ability to shape politics: self-government, rather than subjection to governance (Allott 2002) if not sacrifices in the name of so-called coordination, untamed by either democracy or law (Dawson 2024). This is why any ‘trust-enhancing principles’ of EU law are bound to fail in the long run,¹⁸ as long as the citizen, as construed in EU law, ‘è ridotto a un consumatore di risultati politici’ (Weiler 2009, 64),¹⁹ remains unable to affect the ends of integration. The rhetorical depoliticisation of the internal market and other key elements of EU law points to a possible conclusion that like justice, democratic EU citizenship, although proclaimed,²⁰ is not Europe’s signifier (Roy 2015). This is thus, following Philip Allott’s insights (Allott 2002), the governance approach, where popular involvement is limited to satisfaction with the results of ‘apolitical’ work, as the EU claims,²¹ underpinning technocratic interventions by those in charge (Allott 2002), and the political means of contesting such interventions are by definition discredited (Bartl 2015). In the nominally ‘apolitical’ world of the internal market, the interests of citizens deviating from the pre-ordained path, which

is preset by the powers that be, cannot seriously be taken into account due to the system's very design and the kind of knowledge it encourages and generates, as Marija Bartl, *inter alia*, has demonstrated (Bartl 2015; Gearty 2015). In this context EU citizenship Europeans are told they have as a fundamental status is instead a flop—an illusion (O'Brien 2021).

Speaking of 'good' citizenship in the context of the the supranational apolitical Union and its internal market is a crucial consideration that should be kept constantly in mind to shed light on what lies at the heart of the type of constitutionalism we are confronted with. Markets, in the correct understanding of Ulrich Haltern, 'cannot tell us who we are' (Haltern 2006, 216), erasing the identity and individuality not only of the constitutional system as a whole but also necessarily of the individual citizens. The conflict between 'market citizenship' and citizenship *tout court* is thus much more ingrained than what the Court or EU scholarship has ever come to admit. A 'good' market citizen is, necessarily, a nobody. And a democracy of means by and for nobodies is a farce.

Speaking of utopias, Sir Isaiah Berlin diagnosed that 'in a society in which the same goals are universally accepted, problems can be only of means, all soluble by technological methods. That is a society in which the inner life of man, the moral and spiritual and aesthetic imagination, no longer speaks at all' (Berlin 1991, 15). EU law deploys its euro-soteriology to lay claim to our imagination and fails, to which the rise of all kinds of extremist movements testifies. For the first time in its history, the Union is routinely perceived as a potentially powerful agent of injustice not only by nationalists and outcast lunatics but also by its own servants and facilitators, professors of EU law: Gráinne de Búrca is absolutely right when pointing out that the EU can be perceived as 'patent injustice' (de Búrca 2015 see also Ganty and Kochenov 2024a; Shatz 2023; Kochenov and Ganty 2024).

6 | 'Democracy' as Liberty From National Regulation?

The free equal citizens of the national constitutions were significantly re-imagined upon the advent of the 'constitutional market'. This reinvention is not always in line with the basics of '*liberté, égalité, fraternité*'. Even more importantly, this reinvention cannot remain confined to the supranational legal order, deeply affecting every European, even if not always openly (Kochenov 2016, 2017d). This shifts the moral foundations of European constitutionalism most broadly conceived. It also affects the legitimacy of the project of European unity.

A legal system where the commodification of the human being is the core rationale behind the construction of personhood in law—albeit ideologized as the first step down the road towards peace, prosperity and dignity for all—is most unlikely to win firm support among those it commodifies, beyond those very few it delights by liberating them from specific national law obligations as a result of moving about or economic activity, and thus seeing EU law applying differently to their case (Davies 2019) unlike all those who are proclaimed by law not to be good enough (Kochenov 2017b; O'Brien 2021). The fundamental principle of equality demanded by the citizenship logic is replaced by liberty from national regulation for a small, vaguely defined group (Kochenov 2010). Yet liberty from local regulation is self-evidently hardly a sound foundation upon which to build a constitutional system, let alone start speaking of a 'social contract'.

There is more to this story, however: Such a negative understanding of liberty implies freeing the market from democratic control, while decoupling citizenship from liberty understood through the idea of collective self-determination (Davies 2010; Somek 2013, 2012; Streeck 2013). Should this line of thought be correct, the EU's 'democracy', praised in legal texts (Bouzora 2023; Lenaerts and Gutierrez-Fons 2017), emerges as a rather flimsy façade for something else, protecting *the market* from the citizens, rather than the other way round. This is where the fundamentally problematic 'market citizenship' takes centre stage (O'Brien 2017; Nic Shuibhne 2010).

The consequences of the current framing of the law, which is as Gareth Davies rightly says, 'convoluted and unconvincing' (Davies 2017, 468), are threefold:

- First, the EU legal system can legitimately be perceived as unjust, since the logic of any genuine constitution is precisely about protecting human dignity and freedom from commodification, rather than making the scope of the available citizenship rights dependent on economic considerations.
- Second, the legal system undermines equality and thereby citizenship, of which equality is the core element, since equality before the law is precisely about combating commodification in the name of citizenship and social coherence (Kochenov 2010, 12–25). This does not change depending on the level of the law: whether you are carved out

from the national legal sphere by EU law or denied inclusion within the scope of EU law is irrelevant, so long as the accepted constitutional principles proclaimed in the national constitutions and Article 2 TEU do not play a role in determining who is to be carved out from the scope of a particular legal system and who is not (Kochenov 2010, 34–57).

- Third, the legal system makes political contestation and fully fledged participation impossible, thereby severely limiting the number of avenues for the legitimisation of supranational law (Allott 2002; Somek 2013; Somek 2012).

When combined, these three factors strip EU citizens of dignity and strongly suggest describing the legal system in question as authoritarian (Somek 2015). Democratic citizenship remains entirely paralysed, the wording of the Treaty pointing to its potential importance notwithstanding. Upholding and perpetuating this paralysis on procedural grounds with a strong emphasis particularly on the supremacy of EU law as opposed to the substance of rights and protections shaping individual citizens' lives—as is clear, *inter alia*, from the CJEU's Opinion 2/13—is bound to magnify the drawbacks of the *status quo*, thus exacerbating rather than tackling its urgent deficiencies.

7 | 'Supremacy Rule of Law' Exacerbating the Democracy Problem

The EU's governance structure may be characterised as a 'supremacy rule of law' that prioritises internal market ideology backed by procedural legal tools over democratic principles and human rights. Supremacy rule of law thus deploys the rhetoric of the rule of law to strip the legal principle of any meaning and effect, as the aim of such deployment is to diminish rather than augment the legal checks on the supranational level of governance, using the principle of supremacy of EU law as a pretext (Kochenov 2015, 2024b, 2024a, 2023). This has led to a situation where the EU's institutions have significant power to shape the lives of individuals without being held accountable through either democratic processes or legal checks *sensu stricto*.

The deployment of the rule of law in a supranational system immune to traditional democratic control as a tool to silence the dialogue about the substance of the law and limit Socratic contestation while diminishing the level of human rights protection would be Europe's 'agreement with Hell' in Balkinian terms (Balkin 1997)—an outright Evil Law (Lukina 2023). Restoring the rule of law once it has been hijacked to attain power unchecked as a matter of principle is very difficult (Sajó 2023). Restoring supranational rule of law to a bulwark against the abuse of power from its current debased state as a legalistic affirmation of supremacy benevolent to the wishes of the *Herren der Verträge* could be much harder still, especially in the new legal environment of so-called coordination, which sidelines both democracy and the rule of law as a matter of starting principle (Dawson 2024).

The potential extent of the problem is hinted at by the climbing death toll in the Mediterranean, which is of the EU's own making and also seemingly 'legal'. We witness the absolute legal marginalisation of racialised non-citizens, which results in the physical annihilation of thousands in the border spaces by the concerted efforts of the EU and its member states together their foreign (but EU funded) proxies in the Mediterranean. The sea has been transformed into a mass grave of terrifying proportions. Those who do not die are enslaved, tortured and kept in EU-funded prisons where there is no law until ransoms to EU's clients are paid (Shatz 2023; Urbina 2021). The main tool here is what Ganty and Kochenov termed 'EU lawlessness law' (Ganty and Kochenov 2024a). The lawlessness law is a steadily evolving system of conscious legal arrangements purposefully aimed at removing accountability and enforceable rights from the totality of the liminal boundary context when dealing with the racialised 'other' attempting to reach European soil from the former colonies of the EU.

EU lawlessness law is a collection of legal rules and practices that results in making the taming of abusive power extremely difficult, while honouring its supremacy—it is criminal violence avoiding any checks unleashed by 'supremacy rule of law'. Like Orbán's constitution, it is 100% legal, yet its purpose is in direct conflict with the values of Article 2 TEU. Among its tools is the fetishisation of the limits of the Court's powers to stop abuse by the sovereign, as in the *Sharpston* cases (Kochenov and Butler 2021); moving whole agreements with principled human rights implications outside the scope of EU law; setting up enormous, intrusive and unaccountable funding schemes to establish, preserve and sponsor the export of rights violations outside the EU's borders (Castillejo 2017; Molinari 2021); and deploying FRONTEX (Fink 2019; Ganty and Kochenov 2024a, 139–153) to commit and cover up crimes and share vital intelligence with those hunting the passport poor on the Union's behalf (OLAF final report on Frontex 2021). Torture, pushbacks and the killing of thousands of innocent people—either directly or via proxies—happen in an atmosphere of near-total unaccountability

and seemingly beyond the reach of Union law (De Coninck 2024). The EU acts in concert with its member states, rather than alone (Basheska and Kochenov 2026; Baranowska 2021), creating a system ‘too complex’ to speak of real accountability, while horrible mass crimes are committed by the public authorities, including EU institutions and agencies and their agents. Such a system can only flourish in a Union where democratic and rule of law checks on large scale criminal abuse of power is virtually entirely missing. This is the state of the EU today.

8 | The Existence and Creation of an EU Social Contract: As a Conclusion

In this context, it is difficult to speak of the existence of an EU social contract. Statements by senior members of the EU institutions and their officials have referred to the need to ‘renew’ the social contract—implying that one already existed. Such statements risk obfuscating the fact that what is often labelled a ‘social contract’ at EU level lacks the constitutive features traditionally associated with the concept, most notably collective authorship and the capacity for ongoing political self-determination. As we saw in the preceding analysis, the core of the EU political project—the internal market—was the result of an opaque technocratic-industrial collaboration, to the complete exclusion of EU citizens. Moreover, the constitutionalisation of this objective removes by definition the possibility for dynamic self-determination, hence the problem with the EU being over-constitutionalised. What emerges from the analysis contained herein is not only the absence of a social contract but a consolidation of a constitutional order that actively works towards the foreclosure of the conditions under which such a contract could meaningfully arise: The EU’s democracy of means, which is already structurally limited, is being progressively hollowed out through technocratic governance practices that sidestep what was left of participatory democracy through the instrumentalisation of constitutional values and through the selective deployment of the rule of law for the purposes of market integration.

Funded by the EU, colleagues set out to create a new and explicit social contract that is both democratic and sustainable (European Movement International 2024). Whereas other contributions to this symposium focus especially on the latter element by discussing how to address phenomena that may be disruptive to the social contract, this piece focuses on the challenges of creating a new social contract in the context where democratic governance and meaningful rule of law offering genuine checks on supranational power are not among the foundations of the legal system, as we highlighted in this piece. This calls for a serious interrogation whether the proposed move from an implicit to an explicit social contract meaningfully addresses the structural constraints on democratic agency that characterise the Union’s constitutional order.

It should first be emphasised that the drafting of a social contract that is ‘explicit’, while enhancing transparency, does not transform citizens from mere subjects in governance processes into authors of political ends. Only if citizens or their democratic representatives were able dynamically to deliberate and decide on the core objectives of the EU political project would this be the case. Such deliberation and decision-making power would have to extend beyond policy preferences and regulatory trade-offs to encompass the definition of foundational objectives. It would require revisiting the Treaties and how they are constructed altogether. Without this possibility, democratic participation remains confined to execution rather than direction. The new social contract, by contrast, is intended to guide policy and regulations (European Movement International 2024), taking the foundational constitutional documents and corresponding arrangements, including supremacy rule of law, as given. It thereby risks functioning as a managerial instrument, operating downstream of the most politically consequential decisions. But this level of participation does not equate to self-government, in light of its inability to redefine fundamentally consequential objectives.

As a minimum, if the EU’s political ends must remain out of democratic reach, to maintain a semblance of credible democracy, an express social contract must at least insist on a binding commitment to the protection of the democracy of means, however limited its democratic credentials *sensu stricto* might be. Indeed, where democratic self-rule over ends is structurally precluded, the integrity of democratic procedures governing means becomes normatively indispensable rather than optional. This would require a total rejection of the use of the omnibus technique as it is practised by the Commission, which—as currently deployed—short-circuits those exact deliberative and participatory safeguards that compensate for the Union’s limited democracy of ends. Indeed, the adoption of wide-sweeping legal measures should not be possible opaquely and without participation. This is especially the case for measures that involve the rolling back of fundamental rights protection in the name of economic efficiency and competitiveness. Such measures should not be eligible for the omnibus technique and in fact warrant even greater democratic scrutiny and participation, involving mandatory impact assessments, extensive stakeholder consultation and parliamentary involvement that is not rushed through urgent procedures. The omnibus should be reserved for legislative tinkering with technical details, at most, and

even then should at least be subject to public consultation, if not an impact assessment. Where democratic self-rule over ends is foreclosed, the integrity of democratic procedures governing means becomes a decisive criterion for legitimacy.

Yet even the restoration of the democracy of means would remain insufficient for the purposes of creating a social contract if the rule of law continues to be treated as a supremacy-driven market-enabling mechanism of greenlighting the foreclosure of accountability. Instead of functioning as an effective safeguard against arbitrary power, the EU's 'supremacy rule of law' largely functions to insulate institutional actors from accountability and to legitimise practices that are in tension with Article 2 TEU values, as exemplified through the EU's migration and border regime, where criminal lawlessness prevails and agencies and institutions with blood on their hands get unaccountable access to significant budgets to facilitate killings and other mass violations of non-citizens rights either directly or by proxies and where theft from EU citizens in broad daylight for such illegal ends is marked by solid impunity. A social contract cannot coexist with a legal order that actively constructs such lawless zones and sponsors, supports and pro-actively organises the innocent deaths of many. In the absence of a democracy of ends to ensure that the architects of the EU's death machine can be voted out of office (Ganty and Kochenov 2024b), only a proper functioning rule of law could offer justice and compliance with the most essential principles. The EU does not boast this kind of rule of law at the time of writing. Consequently, without a reorientation of the rule of law in a direction that respects the human rights of all and ensures the accountability of those in power, claims as to the existence of a social contract risk serving as rhetorical compensation for the ongoing destruction of legal accountability and democratic erosion observed in today's Union.

The problem, therefore, is not merely the lack of an explicit social contract, but that its constitutional structure and machinery neutralise the conditions upon which such a contract would depend, as we have demonstrated. This calls for a reconsideration and confrontation of the EU's constitutional ends and a review of the democracy of means, of how its citizenship status has been constructed and conceptualised, and of how the constitutional values are invoked and manipulated in an increasingly instrumental way—sometimes with fatal ends. Efforts to construct a new social contract could provide this opportunity.

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Conflicts of Interest

The authors declare no conflicts of interest.

Data Availability Statement

Data sharing is not applicable to this article as no datasets were generated or analysed during the current study.

Endnotes

- ¹ For rare critical voices in the flood of popular literature, see, for example, Davies (2012), Letsas (2012), Kelemen (2016) and Kelemen (2018).
- ² For a general picture of the European Union's rule of law compliance, see, for example, Grabowska-Moroz and Grogan (2025) and Grabowska-Moroz and Grogan (2024).
- ³ On the vacant nature of voluminous theorising to this effect, see, for example, van den Brink (2026) and Walker (2005).
- ⁴ For a brief outline of these developments, see Kochenov (2004).
- ⁵ (Later created count by King Philippe of course). On the technocratic-industrial collaboration resulting in the creation of the SEA and subsequent secondary legal measures creating the internal market, see for example, Fielder (2000), Bornschieer (2000), Cowles (2012), Doherty and Hoedeman (1994), Harryvan (2020), and Veraldi and Hassall (2023).
- ⁶ In addition to J.H.H. Weiler's brilliant scholarship, the crucial argument in this vein has been made most powerfully by Andrew Williams in Williams (2009a) and Williams (2009b). For the argument of how crucial the latest enlargements of the EU were for the codification and articulation of Art. 2 TEU values, see Sadurski (2012).

- ⁷ On colonialism, nuclear proliferation and flirting with big business, see Veraldi and Hassall (2023), Hansen and Jonsson (2014) and Mallard (2014).
- ⁸ On the crucial importance of this presumption, see Weiler and Haltern (1996). Indeed, ‘who cares what it “really” is’ (Weiler and Haltern 1996, 422).
- ⁹ For the most compelling account, see Lindseth (2010).
- ¹⁰ Even if it sometimes mounts a frontal attack against the status and rights of whole groups of EU citizens: for example, Kochenov and Íñiguez (2025).
- ¹¹ See, for example, Article 76(1) of the German Basic Law; Article 39 of the French Constitution; Article 71 of the Italian Constitution; Article 87 of the Spanish Constitution; Article 82 of the Constitution of the Kingdom of the Netherlands; Article 118 of the Polish Constitution; Article 4 of the Constitution of Sweden; Article 167 of the Constitution of the Portuguese Republic; Article 20 of the Constitution of Ireland.
- ¹² For example, in Article 76 jo. Article 79 of the German Basic Law; Article 89 of the French Constitution; Article 71 jo. Article 138 of the Italian Constitution; Article 87 jo. Article 166 of the Spanish Constitution; Article 82 jo. Article 137 of the Constitution of the Kingdom of the Netherlands; Article 235 of the Polish Constitution; Article 4 jo. Articles 14–18 of the Constitution of Sweden. Article 284 of the Constitution of the Portuguese Republic.
- ¹³ See May (2018, 366) further on the ‘link between (capitalist) economic development and the rule of law’.
- ¹⁴ Art. 18(1) TFEU reads as follows: ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’. For a sound criticism of reading a list of nationalities in the text of what is now Art. 18 TFEU, see Ganty and Kochenov (2024a), Boeles (2005) and Hublet (2009, 95–98).
- ¹⁵ Case 26/62 *van Gend & Loos* EU:C:1963:1; see also Jacobs (1974) and Due (1994).
- ¹⁶ The irony of this promise is astonishing, as the ‘peace’ the EU offered only concerned half the space between the two nuclear super-powers of the day and could not be of global relevance. Worse still, it was never supposed to concern the colonised spaces or ‘non-EU’ areas of Europe, showcasing the absurdly flawed nature of the promise: Williams (2009b).
- ¹⁷ Opinion 2/13 *Accession to ECHR (No. 2)* EU:C:2014:2454 (Weiler 2012a; de Witte and Imamović 2015; Eeckhout 2015; Kochenov 2015). See also Opinion 2/94 *Accession to ECHR (No. 1)* EU:C:1996:140 (Wilkinson 2015).
- ¹⁸ But see Koen Lenaerts’ position (Lenaerts 2004). The necessary failure of trust enhancement is good news, though, since a healthy share of mistrust is a natural bulwark against authoritarianism: (Somek 2015, 347).
- ¹⁹ ‘reduced to a consumer of political results’.
- ²⁰ On the formal place of justice in the context of EU rule of law, see Douglas-Scott (2015).
- ²¹ See Joseph Weiler’s work for criticism: Weiler (1991). Jiří Příbáň perceptively called this process ‘the politics of depoliticisation’: Příbáň (2009, 45).

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