Developments

Review Essay – Capitalistic Constitutional Transformations? Danny Nicol's *The Constitutional Protection of Capitalism* (2010)

By Agustín José Menéndez[*]

[DANNY NICOL, THE CONSTITUTIONAL PROTECTION OF CAPITALISM (Hart Publishing, 2010); ISBN 978-1841138596; pp. 200; £35]

A. Introduction

The Constitutional Protection of Capitalism examines the key role that British constitutional law has played as the privileged mediator between politics and the socio-economic structure of the United Kingdom. Nicol's main thesis is that the present fundamental law of Great Britain entrenches a neoliberal socio-economic order [1], shorthand for a society where the interests of capital holders are paramount [43]. This "upgrading" of neoliberal ideology into *the* constitution [152] was allegedly effected through the opening of British law to supranational and international legal regimes (European Union law, the European Convention of Human Rights and international trade law). The bias of the latter in favor of neoliberal policies and values resulted in the demise of the postwar "radical" constitution.[1] By opening the doors of the British citadel to these three constitutional Trojan horses, British politicians provoked the enmeshment of the fundamental law of the United Kingdom into a transnational legal web, leaving Britons "bereft of choice over fundamental aspects of (their) economic governance." [159] Not only the markedly procedural character of the "radical" British constitution has been superseded by the entrenchment of specific constitutional provisions which are no longer easily amended (at the very centre of which one finds the rights of capital owners and multinational corporations) [127], but the very evolutive character of British fundamental law has been betrayed by the elevation of written treaties to the level of constitutional law. Given this state of affairs, there is a need for a democratic reform of the constitution. Nicol claims that in the short run the priority is a rearguard defense of national competences against any further encroachments; but in

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[1] Hereafter, I refer to the ("fully democratic") postwar constitution as the radical constitution, to the present constitution as either the present constitution or the neoliberal constitution, and to the 18th and 19th century constitutions as the "common law" constitutions.

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the long run, something else is needed: a positive transformation of the transnational web, rendering possible the release of national constitutions from the chains of global neoliberalism.

This review is structured in four parts. Firstly, I will reconstruct the four main claims which make up Nicol's argument. Secondly, I will explore the main methodological and substantive contributions of the book. Thirdly, I will engage in a critical spirit with the main theses of the book. The last and fourth section holds the conclusions.

B. The Argument of the Book

It seems to me that it is proper to distinguish (both for descriptive and evaluative purposes) four different claims in Nicol's argument. The first claim is that the British Constitution had evolved by 1945 into a radical and democratic fundamental law. The second is that supranational and international law, and in particular, EU, ECHR and WTO laws have played a key role in the neoliberal transformation of the fundamental laws of the United Kingdom. The third is that the present British Constitution has become radically undemocratic, because it elevates a given set of fundamental values over democratic procedure. The fourth is that a deep reform of the supranational legal framework is needed, so as to recreate the political space in which national political processes can be re-democratized. In the remaining of this section, I will consider each of these claims in some more detail, while in section "D," I will offer a critical assessment of three of them.

I. The Democratic Evolutionary Achievement of the British Constitution

The first premise in logical terms is that the British Constitution had become a radical democratic constitution by 1945,[2] (or perhaps even some three decades earlier).[3] This was the result of the slow but steady evolution of the common law British Constitution into a radical fundamental law which committed the state to "whatever political orientation [was] popularly decided."[4] This democratic breakthrough was all the more remarkable

[2] The author does not date the beginning of the radical constitution era (indeed, part of the charm of evolutionary constitutions is that they escape easy temporal location). But on the basis of the constant reference in his counterexamples from chapters 2 to 5 to Labor political manifestos from 1945 to the 1980s, 1945 is not a bad guess.

[3] The 1911 "Parliament Act" fully confirmed the legislative supremacy of the House of Commons over the House of Lords. From 1906 to 1914 the so-called "welfare reforms" launched by Asquith's Liberal governments laid the foundations of the British welfare state. From a constitutional perspective, *see* ELIZABETH WICKS, THE EVOLUTION OF A CONSTITUTION: EIGHT KEY MOMENTS IN BRITISH CONSTITUTIONAL HISTORY 83-110 (2006).

[4] DANNY NICOL, THE CONSTITUTIONAL PROTECTION OF CAPITALISM 29, 107 (2010).

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given that the common law constitution was highly inhospitable to democratic government. Indeed, the British Constitution of the 19th and early 20th centuries was a mixed and class-based constitution, in which the fundamental laws of the realm played a key role in the protection of the vested interests of the ruling few and the taming of the radical democratic aspirations of the restless many. The central legislative role of the House of Lords, the commitment to the gold standard, the upholding of a virtually sacrosanct right to private property [131] and the support of a civilizing international law through which imperialistic expansion was rendered possible were key constitutional planks of the common law British constitution.

By 1945 fundamental changes had transformed British constitutional law and three principles had become well-established at the very core of the new democratic order: (A) the *contestability of all legal norms*, including constitutional norms, which meant that there were no special amending procedures to be followed when changing the contents of any legal norm [24];[5] (B) the *ideological neutrality of constitutional norms*, which implied that the constitution only entrenched the pre-commitment to keeping open the political process. Consequently, no institution or substantive value was sheltered from questioning and eventual change or amendment; in particular, law would not place above politics any socio-economic principles or institutions.[6] Finally (C), the *accountability of power-holders to citizens*, which required that the institutional setup and decision-making processes were so designed as to make effective the power of citizens to check what their representatives, and very especially their government, were doing and eventually "kick the rascals out", to borrow a much used phrase inspired by Schumpeter's reconstruction of the British parliamentarian monarchy.[7] This excluded the conferral of power onto *private actors or structures* to monitor and hold accountable political institutions [36].[8]

This finest British constitutional hour extended to the first three decades of the postwar period, a period during which Britons "never had it so good" not only in material terms, but

[5] Whereas it may be an exaggeration to claim that Parliament could change at their whim the constitution, that would be clearly closer to British constitutional practice than the (continental) strict proceduralization of constitutional amendment (which results in more or less rigid constitutions) and the explicit or implicit assumption of the immutable character of certain contents of the fundamental law. But more on this in section C.I.

[6] DANNY NICOL, THE CONSTITUTIONAL PROTECTION OF CAPITALISM 23 (2010).

[7] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269-83 (1976).

[8] That was indeed a powerful motive leading to the nationalization of the Bank of England (on the evolution of the Labor party's views on the matter, *see* JIM TOMLINSON, DEMOCRATIC SOCIALISM AND ECONOMIC POLICY, THE ATTLEE YEARS 1945-51 ch. 7 (1997). It is however doubtful whether the objective was achieved at all. A prescient contemporary analysis can be found in Karl R. Bopp, *Nationalization of the Bank of England and the Bank of France*, 8 J'RNL OF POL. 308-318 (1946).

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perhaps, if Nicol is right, even constitutionally speaking.[9] We could say that they were *Les Trente Glorieuses* of the British constitution.

II. The Constitutionalization of Supranational and International Law and the Transnational Web as Constitution

The golden decades of the radical British Constitution were also the very same years in which the British legal system was opened to international legal regimes by means of the signature and progressive entry into force of the GATT, ECHR and (with British accession in 1973) EEC Treaties. While the "global law" of the United Nations soon became entrapped in the Cold War web,[10] and the International Trade Organization (hereafter ITO) died in the cold water of a Republican and rabidly anti-communist US Congress,[11] the General Agreement on Trade and Tariffs (hereafter GATT) signed in 1947, became a modest but functional legal regime. Originally intended as a *de minimis* and *pro tempore* set of trade norms, after the demise of the ITO GATT became the central piece of Western trade law. Britain was a founding and leading member of GATT (as well as the failed ITO). In 1950, Western democratic European countries signed the European Convention of Human Rights (hereafter ECHR). This document gave more specific content to the vague provisions of the Universal Declaration of Human Rights. Britain was a founding and leading member of the ECHR, which was rapidly ratified and came into force in late 1953. The United Kingdom was not a founding member of the European Communities. The Attlee government decided to abandon at a rather early stage the negotiations that lead to the establishment of the first European regional organization, namely the European Coal and Steel Community (hereafter ECSC) in 1951. Great Britain originally favored an alternative European integration project, the European Free Trade Area (hereafter EFTA), but it is revealing of the degree of its failure that Nicol does not even mention it (and it is hard to blame him for not doing so). Decolonization (with the brutal awakening following the Suez debacle, both

[9] The phrase, as is well known, was MacMillan's. On 20 July 1957, in a speech in Bradford, Harold MacMillan claimed that "most of our people have never had it so good." However, public discourse tends not to associate that phrase with the 1970s, which tend to be recollected as a period of repeated crises, decline and uncertainty. However, recent literature has stressed that while political elites were up in arms in the early 1970s, public sentiment was better than ever before and probably even better than it has been since. Richard Vinen argues rather convincingly that optimism was grounded in the fact that wages were higher than ever before and high inflation had drastically reduced the burden of previous debts for most Britons. *See* RICHARD VINEN, THATCHER'S BRITAIN 76 (2009). A similarly nuanced assessment can be found in both ANDY BECKETT, WHEN THE LIGHTS WENT OUT (2009), & DOMINIC SANDBROOK, STATE OF EMERGENCY: THE WAY WE WERE: BRITAIN 1970-1974 (2010).

[10] *See* MARK MAZOWER, NO ENCHANTED PALACE (2010).

[11] As Nicol mentions, Keynes had contributed to shape the ITO Treaty *malgré* the fact that the American hegemony grew by the minute as the Bretton Woods negotiations unfolded. Nicol also suggests that the Keynesian mark on the ITO might have been decisive in its rejection by a US Congress, which was at the peak of its red baiting mood, at 52-56.

militarily and financially painful for the United Kingdom) and the very success of the European Communities would result in the (belated) accession of the United Kingdom to the European Communities in 1973.

Nicol makes a rather obvious but infrequently articulated point, namely that the internationalization of the British legal system did not have many direct implications for Britons for a rather long time. All three systems had a very limited impact on domestic policies. If they had specific legal effects on national legal systems, these effects were limited to the disciplining state legislation and action *vis-à-vis* non-nationals (or non-national goods or factors of production), by requiring that the latter benefit from equal and non-discriminatory trade policies. Supranational and international norms reconfigured the powers of nation-states regarding the definition of their national economic borders, without erasing them or affecting the substantive content of their legal systems. In spatial terms, the effects of EEC, ECHR and GATT laws were felt at the border; and there they ended. The ECHR was conceived of as a Cold War tool, whose main purpose was to show that Westerners had rights while those on the other side of the Iron Curtain did not.[12] This was reflected in the literal tenor of the Convention, which repeatedly ensured that Member States enjoyed a wide margin of discretion when defining the breadth and scope of the rights acknowledged within its framework. In their own right, both the GATT and the EEC Treaties were underlined by a Keynesian understanding of how capitalism could be made sustainable. Goods were to be made to circulate as freely as possible[13] while the movement of all other factors of production was to be regulated.[14] Not only was violation of the Treaties conditional on the suspect national measure effectively discriminating against foreigners or foreign goods, services or capital, but the relationship between a state and its own nationals fell outside the scope of EEC and GATT laws (thus the tolerance of reverse discrimination was to be dealt with by national political processes, not supranational institutions). In the case of the EEC, the founding Treaties contained an explicit commitment to socio-economic ecumenism, in the form of a provision (originally

[12] Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 L. AND SOC. INQUIRY 137-59 (2007). Although focusing on the Universal Declaration of Human Rights and *en passant* distinguishing the motives and rationales of the ECHR, it is worth reading Mark Mazower, *The Strange Triumph of Human Rights, 1933-1950*, 47 THE HISTORIC JOURNAL 379-98 (2004). Indeed, the Foreign Office would be struck by thunder when Greece pushed the Cyprus decolonization process through the door of the ECHR Commission. *See* BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE (2000).

[13] That explains the emphasis on getting rid of quantitative restrictions and measures having an equivalent effect, of "translating" all barriers to trade into visible tariffs in the GATT, as well as the place of honor given to free movement of goods in the EEC Treaty, enshrined in the first of the chapters devoted to substantive policies.

[14] This is why GATT was limited to goods and did not extend to services or capital, and why in the EEC Treaty, free movement of goods was kept separate from all other economic freedoms, the latter relegated to a third chapter following the one devoted to agriculture.

Article 222 of the TEC) providing for the specific protection of nationalized industries and, in general, for the public ownership of public enterprises.[15]

Similarly, the means of enforcement were very modest, thereby weakening the legal impact of the three regimes. The EEC Treaty established what in retrospect has come to be regarded as the paradigmatic supranational court: the European Court of Justice (hereafter ECJ). But it is important to keep in mind that the ECJ was the heir of the ECSC Court, which resembled rather closely an arbitration panel (composed as it was by both jurists and lay members); that considerable time elapsed before the ECJ signaled its constitutional aspirations unequivocally (in the fundamental cases of *Van Gend en Loos* and *Costa*); and that it took even longer for the ECJ to make use of its authority and strike down national laws in response to their breach of one of the four economic freedoms (indeed, the trend was only unequivocal from *Dassonville* onwards).[16] Similarly, the enforcement of the ECHR was left in the hands of an intergovernmental Commission and a potentially full-blown court, although it could only hear the cases referred to it by the Commission, the competence of which necessitated voluntary acceptance by signatory states of the right of individual petition. As a result, the Court was a fully dormant institution for a good number of years.[17] Finally, the GATT system came poorly equipped in terms of its institutional mechanisms of enforcement. Panels developed as part of a constitutional convention, which the Nixon administration tried to foster, but with rather limited results overall [58]. On such a basis, one may conclude that the transnational web may have indeed contributed to reinforcing, not undermining, the process of consolidation of the "radical" constitution (if only to the extent that the EEC, ECHR and GATT Treaties fostered a European context much more amicable to democratic welfare states than the League of Nations in the interwar period, or for that matter the secular balance of power system).

The constitutional nature of these legal regimes was radically transformed from the early seventies onwards. All three systems developed an ambition to extend their legal authority to the design of national domestic policies, while at the same time dramatically upgrading their enforcement mechanisms.

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[15] Article 222 of the 1957 Treaty Establishing the European Community read "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." For commentary on its present embodiment, *see* Bram Akkermans & Eveline Ramaekers, *The Treaties Shall in No Way Prejudice the Rules in Member States Governing the System of Property Ownership: Article 345 TFEU (Ex Article 295 EC), its Meanings and Interpretations*, 16 EUROPEAN LAW J'RNL. 292-314 (2010).

[16] Joseph Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, *in* THE EVOLUTION OF EU LAW, 349-76 (Paul Craig & Grainne de Búrca eds., 1999).

[17] The well-known Danish legal theorist, Alf Ross, then a judge of the ECHR, seems to have written an article very critical with the dormant state in which the ECHR found itself, but was persuaded by his colleagues not to publish it. *See* Alf Ross, *En arbejdsløs domstol* (1964), unpublished manuscript, referred to by Ole Spiermann, *A National Lawyer Takes Stock: Professor Ross' Textbook and Other Forays Into International Law*, 14 EUROPEAN J. OF INT'L LAW 675, 690 (2003).

Because it is the most ambitious and openly political of the structures, the mutation of the European Union is the most decisive one. Nicol claims that the most fundamental single decision pushing the EU into the neoliberal road has been the ruling of the ECJ in *Cassis de Dijon* [97].[18] At first sight, that case was a rather unremarkable dispute over German regulations on liquor sales. However, the ruling given by the ECJ in the case led to a radical transformation not only of the breadth and scope of economic freedoms, but also of the very nature of the European Union.[19] While the ECJ had been ready to go beyond *formal* discrimination against foreign goods, and had found that national norms were in breach of Community regulations when they were *de facto* (even if not *de jure*) discriminatory, the ECJ had not even come close to conceiving of non-discriminatory breaches of Community law. In normative terms, this implied that economic freedoms were to be regarded as concretizations of the right to be free from discrimination on the basis of nationality. In competence terms, that understanding implied that Community law limited itself to extend domestic regulatory standards to all Community nationals, while leaving untouched the very definition of such national regulatory standards. *Cassis de Dijon* changed all this. The ECJ affirmed that goods in compliance with other national regulatory standards (namely the French cassis) should be deemed to have complied with functionally equivalent regulatory demands (of France) and be allowed unhindered access to the German national market (no matter the domestic rules on the graduation of liquor aimed at the protection of consumers). Indeed, the Commission derived from this part of the *Cassis* ruling the wider paradigm of mutual recognition of laws, which it claimed rendered unnecessary positive European regulation prior to incorporating specific goods or sectors into the *common market*.[20] The Single European Act [98] (and the parallel abandonment of the more political path proposed by the European Parliament in the failed Treaty of European Union of 1984) confirmed this normative and power shift. In normative terms, economic freedoms were from now onwards not only part of the anti-discrimination constitution, but self-standing rights requiring Member States to eliminate all obstacles to movement across borders. In competence terms, this implied emancipating economic freedoms from the national constitutional matrix; "obstacles" were not to be defined by reference to national legislation, but on the supranational level. As the umbilical cord connecting European constitutional law and national constitutional law was severed, the

[18] Case C-120/78, Cassis de Dijon, 1979 E.C.J. I-649.

[19] Similar leading judgments will be given by the ECJ on each of the economic freedoms as years passed by. *Cf.* Case C-76/90, Säger, 1991 E.C.R. I-4221; Case C-55/94, Gebhard, 1995 E.C.R. I-4165; Case C-415/93, Bosman, 1995 E.C.R. I-4921; and after the entry into force of Directive 88/361 of 8 July 1988, 1988 O.J. (L 178) at, 5-18— on free movement of capital , Case C-163/94, Sanz de Lera, 1995 E.C.R. I-4821. This turn had been nurtured and fostered by the Directorate General for Competition at the European Commission. *See especially* G. GRIN, THE BATTLE OF THE SINGLE EUROPEAN MARKET: ACHIEVEMENTS AND ECONOMIC THOUGHT, 1985-2000 (2003).

[20] *Cf.* 'Declaration of the Commission concerning the consequences of the judgment given by the European Court of Justice on 20 February 1979 ("Cassis de Dijon"),(1980) O.J. C 256, at 2-3.

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margin of discretion in the hands of the ECJ to shape the substantive constitutional norms of the European Union grew exponentially. There we find the seeds of the judicialization of Community law. This centralizing and neo-liberalizing trend was further accelerated by the asymmetric design of economic policy after the Maastricht Treaty. Monetary policy has been federalized by delegating power to a central bank at the radical end of the non-democratic spectrum in its category, while fiscal and social policies have been nominally left in the hands of Member States. Structural coupling of federal monetary policy and national fiscal and social policies has been trusted to "governance" structures (the Eurogroup, various open methods of coordination) which have proven both ineffective and deeply problematic from a democratic perspective. As a result, national fiscal and social policies have indeed also been deeply (even if not homogeneously) Europeanized not as the result of political decisions, but out of market pressures exerted by private actors repeatedly empowered by the European Court of Justice, which has imposed its transcendental reading of the four economic freedoms upon subsequent domestic legislators.

In particular, EU law has become inimical of public ownership or the public provision of goods or services; and has turned the rights of corporate holders into the meta-rights of the European constitution. Private ownership has come to be regarded as the norm, and public ownership as the odd exception [115]. The abovementioned ecumenism of the founding Treaties implied that Community law treated public and private companies differently because they were regarded as fundamentally different. The Transparency Directive, confirmed by the fundamental judgment of the ECJ in case 188-90/80, led to a new paradigm under which Community law tends to treat public and private enterprises as if they were equal*,* which *de facto* results in discrimination against public enterprises.[21] For example, the application of the "market economy investor" standard when determining whether state aid is or is not in breach of EU law assumes that the purpose of all economic enterprises is to make a profit, which is not the rationale of public companies [120]. Similarly, the *mutual recognition* turn has come hand in hand with the enlargement of the breadth and scope of the principle of "undistorted competition" for the supply of goods or services, including those in sectors where public provision was once the rule. As a result, EU law became a one-way privatizing avenue.[22] Secondly, Community law has come to give greater weight to the rights of corporate shareholders than to the socio-economic rights typically associated with the European welfare state; in essence, the four economic freedoms have been canonized as *überfreedoms*. The case law of the ECJ on personal taxation or non-contributory pensions has for a rather long time revealed the existence of

[21] Joined Cases 188-90/80, [1982] E.C.R. 2425; Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings,(1980) O.J. (L 195), at 35-37.

[22] Nicol claims that this is further confirmed by the extent to which state aid has consolidated into a technocratic policy in which the Commission divines a rational consensus which substitutes for democratic decision-making [117].

this, and it has been spectacularly confirmed by the trio of rulings in *Viking, Laval and Rüffert* [102-103], in which the ECJ made economic freedoms prevail over the collective rights of workers.[23] The use of proportionality review (which at least for continentals provides a reassurance of continuity with the methods of national constitutional courts) is the cloak under which a radical reordering of constitutional values has taken place. In sum, while the enforcement mechanisms of Community law were in place well before the neoliberal turn of the constitutional law of the European Union— the structural principles of direct effect and primacy can be traced back to rulings of the early 1960s, and the structural relationships between the ECJ and national courts were also rather well-oiled, thanks to the way in which the preliminary reference to the ECJ has worked since the early 1970s— the substantive filling of Community law has transformed their significance.

In the case of the ECHR, the fundamental transformation resulted from the radical shake up of enforcement mechanisms stemming from Protocol 13 to the Convention, which entered into force in 1999.[24] This made the right of the individual complaint a defining feature of the ECHR, at the same time that shifted the centre of gravity of the enforcement procedure from the intergovernmental Commission to the supranational Court. However, as Nicol rightly stresses, if this change has been of considerable consequence it has been because the Court had developed since the 1970s a line of interpretation of the Convention which much narrowed the discretion of Member States. The key turning point in that regard was the ruling in *Sporrong*, in which the ECHR placed the right to private property into a "fair balance" framework, which greatly reduced leeway for national discretion enshrined in the literal tenor of ECHR law. Thus private property, originally excluded from the Convention and only included in a rather diluted from in the First Protocol (by means of specifically accounting for the socio-economic purpose of welfare state legislation and the ensuing constrains that this necessarily imposes on the right of private owners), was now transformed into a central element of the Convention. As a consequence, ECHR law emancipated itself from national constitutional standards, in a move that structurally speaking was very similar to the one undertaken by the ECJ in *Cassis de Dijon* [140]. This quite predictably resulted in the ECHR endorsing a substantially loaded understanding of the principle of proportionality as the framework within which to resolve conflicts between fundamental rights [141].

The most obvious mutation was that of the GATT regime, as the GATT Treaty was superseded by the WTO Agreements. This has had three major consequences. Firstly, the scope of international trade law was dramatically widened, and now includes not only goods, but also services, intellectual property and public procurement within its remit. As a result, international trade law has entered the *inner sanctum* of national domestic policy.

[23] C-438/05, Viking [2007] E.C.R. I-10779; C-341/05, Laval [2007] E.C.R. I-11767; C-346/06, Ruffert [2008] E.C.R. I-1989. *See also* C-319/06, Luxembourg Case [2008] E.C.R. I-4323.

[24] For a contextual analysis of the transformation of the ECHR, *see* JONAS CHIRSTOFFERSE & MIKAEL RASK MADSEN (EDS.), THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS (2011).

Secondly, enforcement mechanisms have been reinforced and partially privatized. The WTO Agreements turned the panels into an Appellate Board system, a much more institutionalized means of enforcement with greater institutional efficacy. Additionally, private companies have become part and parcel of the enforcement process. Both the EU and the USA have decisively contributed to this development [63].[25] The result is that corporations play one national authority against the other so as to contest all national policies [65]. Thirdly, the ratchet effect of international trade law has been heightened, especially on what concerns services. The net effect of the inclusion of a given sector of economic activity in the "commercial market access" area is to entrench privatization in that sector forever. So, for example, a return to fully public provision of health services when their provision had been privatized (even if the bill is collected at the end of the day by the Exchequer, as in many European countries) would simply be in breach of international trade law [71]; so much so that not even regional governments would be free to take that decision when being devolved such competences in internal decentralizing processes [72].

III. The Undemocratic Mutation of the British Constitution

The enmeshment of the British Constitution in the transnational web has resulted in a constitutional mutation. The fundamental norms of the neoliberalized EU, ECHR and WTO laws have come to make up the British meta-constitution [81] that elevates "a certain form of capitalism above politics" [1]. In particular, the neoliberal myth of a self-regulating free market has come to be endorsed as the core component of this reconfigured constitution.

This marks a clear break with the old constitution because it implies (1) drawing a clear and neat line between what is constitutional (the new neoliberal meta-constitution) and what is merely legal (the rest, including the old constitution), and subordinating the normative and legal forces of the whole set of legal norms to their "fitting" the constitution; as a result the contestability of the British constitution is on its way out; [155] (2) biasing the political process in favor of specific substantive outcomes, contrary to the old principle of contestability; the right to private property has become again a "divine" right, and especially so to the extent that it concerns capital holdings and the use of capital [42]; this entails biasing the outcomes of the democratic process in favor of certain societal groups; the "new" constitutional law systematically loads the dice in favor of "business" interests (especially big multinational corporations) and against a public, solidaristic vision of the

[25] Council Regulation (EC) No 3286/94, of 22 December 1994, (1994) O.J. (L 349), at 71, lays down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization; text as amended available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1994R3286:20080305:EN:PDF (last accessed: 23 December 2011).

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socio-economic order, something only to be expected when apolitical technocrats replace political decision-making [42]; finally, this (3) entails asphyxiating the classical lines of democratic accountability by the proliferation of new actors to which political agents are indeed responsible, especially when that implies rendering accounts to private actors who in the process become as powerful and potentially oppressive as the state itself, but can cloak themselves under their characterization as parts of civil society (to wit that strange institution called financial markets) [43-44].

IV. A Call for a New International Legal Framework, Empowering Not Constraining Democratic Polities

The Constitutional Protection of Capitalism does not only offer the reader a reconstruction and a normative assessment of the neoliberal transformation of the British Constitution, but also a (sketchy) set of proposals concerning how the constitutional train could be returned onto democratic tracks.

Nicol has no qualms with his conviction that the abandonment of the radical democratic constitution was a grave mistake [159] and that we should return to its legal framework [160]. This sets the book apart from the far from unusual defeatism, according to which changes (i.e. globalization) are irreversible, so at most we should consider how to make virtue out of necessity and rethink democratic and progressive ideals within this new context (something which invariably leads to the radical diminishing of normative expectations).[26]

Nicol strikes a balance between his instrumental defense of the preservation of national competences and his conclusion that meaningful reform cannot be purely domestic. In several passages of the book, but perhaps more explicitly in [155], the author claims that a vindication of national competences when confronted with an unremitting arrogation of powers by transnational institutions and decision-making processes is not necessarily to be seen as a parochial vindication of sovereignty, but indeed as a necessary precondition for a defense of the remaining pockets of democratic self-government.

However, to the extent that the enmeshment of the British constitution into a transnational web is the root cause of present democratic troubles, any effective reform cannot be purely domestic in the long run. If we could construct the European Communities Act so as to respect, as much as possible the powers and competences of

[26] Perhaps the clearest example is the book produced by Gordon Brown. *See* GORDON BROWN, BEYOND THE CRASH: OVERCOMING THE FIRST CRISIS OF GLOBALISATION, (2010). Brown foresees a future in which China would become a major importer of goods and services, thus reversing the present commercial trend. Whether this is a perspective to rejoice at (ecologically and socially) is a question that the former British Prime Minister simply does not address properly.

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Parliament, we would be forced to conclude that the primacy and direct effect of Community law that depended on the will of the British Parliament (an interpretation basically codified in the European Union Act of 2011) might contribute to a marginal improvement of things, but not to their proper mending.[27] [93] A comprehensive solution would require a structural reform of the transnational web. This does not entail a nostalgic return to an impossible autarchic constitution, but "a global order that amplifies the room of choice of states, that does not undermine national autonomy" [160]. Indeed, international law is a key element for rectifying the neoliberal colonization of constitutional law. That seems to this reader a vindication of the interpretation of Keynes's basic insights proposed so long ago by Barbara Wootton; in brief, an empowering, not disempowering, international law.[28]

C. What the Book Contributes to the Debate

The Constitutional Protection of Capitalism makes six important contributions to the study of public and transnational law, namely (1) it offers a structural reconstruction of law from the standpoint of the addressee that tears down the wall of separation between national and international law; (2) It puts forward a refreshing assessment of the dynamics of supranational law, which not only pays attention to the division of power across levels of government or institutional actors, but also to the distributive consequences of constitutional law; (3) it shows the extent to which the institutional setup (and its change) predetermines the substantive content of law, something which is however compatible with (4) an emphasis on individual agency; the structural, institutionally-focused and economically informed approach followed in the book allows the author (5) to show the discontinuities in the evolution of transnational law, and very especially Community law; instead of one monolithic form of "capitalism" (*viz.* internal market), Nicol shows us the varied nature of capitalism, both across space and time (in short, from the common to the single market); (6) to recalibrate the analytical categories of public law, or what is the same, to take power seriously by means of drawing a constitutional map which focuses not only on public power-holding institutions, but also on private ones.

[27] The text is now in force (*see* http://www.legislation.gov.uk/ukpga/2011/12/contents/enacted) (last accessed: 23 December 2011). *See also* the "European Union Bill 2010-11," s. 18, available at http://services.parliament.uk/bills/2010-11/europeanunion.html (last accessed: 23 December 2011).

[28] *See Socialism and Federation* (1941), now republished in RAÚL LETELIER & AGUSTÍN JOSÉ MENÉNDEZ (EDS.), THE SINEWS OF PEACE 575 (University of Oslo, RECON Report 9/2010).

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I. A Structural Reconstruction of Law from the Standpoint of its Addressee

The first methodological contribution of Nicol's book is a reconstruction of positive law undertaken from the standpoint of the addressees of legal norms, rather than from the viewpoint of institutional actors. This reveals that the continuous insistence on the separated and fully autonomous national (in this case, British) constitutional law confronted with supranational and international laws is an increasingly empty mantra. Once EU law has been recognized as the supreme law of the land, by means of an almost conditional acceptance of the doctrine deriving from the ruling of the ECJ in *Costa* (*Francovich* being the leading British case in that regard), and given that EU law serves as the conduit through which WTO law and to a certain extent ECHR law acquire legal effect at the national level (or get it enhanced), it is simply artificial to keep a high wall of separation between British domestic law and the three abovementioned legal regimes. If that is so, it is a matter of accuracy and honesty that the object of study of public law comprises not only domestic, but also transnational cases and statutory norms. Put differently, one should consider *Cassis de Dijon* or *Spoorong* on the same footing and with the same interest as the decisions which have long been entrenched in the national constitutional canon [37].[29]

So for all purposes, including those of normative assessment, we should consider the four legal regimes *en bloc*.[30] Even if the lines of causality are complex and should be of interest (more on that in the third section), the fact is that legal-dogmatic and normative problems affect the transnational web, not each legal regime in isolation. So the perception that the eventual democratic deficit of EU, ECHR or international trade law does not affect British constitutional law is simply wrong, because British constitutional law is made of those planks, which are not mere ornamental addenda to it.

[29] Indeed, one could ask oneself whether on certain subject matters (say the law of trusts) legal education should actually focus so much on British law, as on say Jersey or Caribbean trust law, given that in actual practice, the economic relevance of the latter is actually bigger. While law schools may have very good (normative) reasons to accept that state of affairs (British law offering the analytical and substantive tools to argue for the really relevant set of laws), legal publishers do actively market their books assuming that the readership of, for example, "The Caribbean Law of Trusts" goes beyond the Caribbean states. For example, *see* GILBERT KODILINYE & TREVOR A. CARMICHAEL, COMMONWEALTH CARIBBEAN LAW OF TRUSTS (2002). The enduring association of the Law of Trusts to Equity is rather ironic given the actual use at which most trusts are nowadays put, namely tax avoidance or outright fraud.

[30] A further implication of this approach is that we would be well advised to overcome the separate analysis of international and supranational legal regimes as such. It is not only the case that Community law, as a matter of positive law, serves as the carrier of WTO law and ECHR law into national law, but also that Nicol's historical analysis reveals that all three systems exert quite an effect on the evolution of the others [152]. Indeed, the transnational web is one in which all the four legal regimes under consideration have been enmeshed [67]. Thus, our proper object should indeed be transnational constitutional law, as "an integrated body of domestic and international law that regulates both private persons and states, competition in both the market for private goods and the market for public goods" [157, which is in its turn taken from Joel Trachtman, "The international economic law revolution," U of Pennsylvania Journal of Economic Law and Politics, 1996].

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II. Distributive Consequences of Constitutional Law are of Essence

Nicol makes a second major methodological point, namely, that the socio-economic consequences of changes in constitutional law are of essence. It is perhaps here where Nicol makes a more refreshing contribution to the literature, or to be more precise, recovers a perspective and an approach which has become increasingly infrequent in the last three decades, from what this reviewer knows in all four legal systems under consideration, but perhaps particularly so on what concerns Community law.

Indeed, constitutional law has tended to be analyzed in rather aseptic terms. In particular, Community law has largely portrayed European integration as a competence game played among states (most of the time meaning national governments) and/or institutions. So much so that, as Giandomenico Majone has rightly insisted, European law and politics tends to be appraised from a one-dimensional perspective, that of more or less integration. [31] The decisive question seems to be whether a given change results in more integration (more powers being shifted from the regional and national levels to the supranational one) or in less. Nicol's argument leads to adding (or perhaps one should say recovering) a second and fundamental dimension, that of the distributive consequences of changes. *The Constitutional Protection of Capitalism* invites us to appraise transformations by considering which specific rights (private property, freedom to move capital, freedom of establishment) and whose interests (those of capitalists and renters) benefit from the progressive transnationalization of law. And because Nicol does not subscribe to a benign and naïve (when not perfidious) positive-sum game hypothesis (implicit in a good deal of the literature, and certainly on the Commission's policy statements of the last four decades), the author also stresses which rights are weakened (political and socio-economic rights), and to the detriment of whose interests (those of citizens at large, especially those depending on waged labor or those who lack a proper job or simply cannot participate for one reason or the other in the labor market) transnationalization moves forward. So while *Cassis de Dijon* certainly furthered European integration (it has indeed been portrayed by many authors as a key decision in the process leading to the overcoming of the "Euro-sclerosis" of the seventies and the re-launching of the process of European integration), it did so to the benefit of capital holders and to the detriment of most citizens. Indeed, Nicol seems to suggest that the key conflict is not so much between levels of government as it is between public versus private power-holders. The European Communities of the 1950s and 1960s augmented their powers while reinforcing those of its Member States (a key insight of Milward's *European Rescue of the Nation-State*).[32] There was no magic in this equation, but a shift in influence, which moved from private to public hands. *Cassis de Dijon* started a different pattern of power dynamics, in which the shift of competences to

[31] GIANDOMENICO MAJONE, EUROPE AS THE WOULD-BE WORLD POWER: THE EU AT FIFTY ch. 3 (2009).

[32] ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE (1992).

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the supranational level has weakened public power across all levels, to the benefit of private actors.

Consider the most praised of the four economic freedoms in the constitutional literature, free movement of persons. The right of free movement of workers (widened to free movement of persons after the Maastricht Treaty and the ECJ ruling in *Martínez Sala*) may indeed be seen as fostering the civic rights and liberties of some individuals, which would otherwise be prevented from moving to their destination of choice to engage in paid work (or now, in more general terms, decide where and in the company of whom they spend their lives). But the overall assessment of free movement of persons must take into account the aggregate and structural implications of that faculty. In particular, (1) what other rights are weakened when free movement of persons is strengthened (*viz.* the traditional tradeoff between higher salaries and restrictions on the entry of foreigners to the labor market); and (2) what the aggregate implications are of entrenching a supranational right of free movement of persons (the subjection to constitutional review by reference to that economic freedom of areas of the law which were built and keep on being structured according to a very different logic, such as personal tax laws or non-contributory pensions).[33] European law may be more humane in specific cases at the cost of undermining distributive justice at large.[34]

This distributive assessment of constitutional law is absolutely necessary when undertaking a proper assessment of positive constitutional law and of prospective reforms. Indeed, the denial of the relevance of the distributive consequences of constitutional law is a key ideological device to hide not only the socio-economic implications of fundamental laws, but also the power shifts resulting from constitutional changes. A device which has been fully at work in British debates over the convenience of a written Constitution or a written Bill of Rights [30], and one may say the same in European debates on constitutional reform processes (*viz.* the recent debates on Laeken and Lisbon). One may be allowed to point to the reader that the popularity of judicial review is a rather recent fruit of the case law of the US Supreme Court in the 1950s and 1960s, and of the German Constitutional Court since the entry into force of the 1949 Fundamental Law. But it suffices to evoke the New Deal polemics (on the two sides of the Atlantic) to realize that judicial review of legislation does not necessarily lead to such progressive results, and can indeed lead to very regressive distributional results.[35]

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[33] One is tempted to add that these two-dimensional perspectives would certainly be of great relevance in assessing the various proposals to overcome the present European financial crisis, but this will be further covered later in this review.

[34] Or so I have argued. *See* Agustín José Menéndez, *More Humane, Less Social*, *in* THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 363-393 (Miguel Poiares & Loïc Azoulay eds., 2009).

[35] Among the vast literature, *see* I.F. STONE, THE COURT DISPOSES (1937); DEAN ALFANGE, THE SUPREME COURT AND THE NATIONAL WILL (1937); EDOUARD LAMBERT, LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX

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III. The Institutional Setup and the Realm of What is Substantively Possible

But the fact that substance is of essence does not mean that institutional setups are irrelevant; far from it. Nicol rightly emphasizes that the European constitutional mutation is also an institutional transformation. The two processes are deeply related, because institutional structures may play a considerable role in predetermining what is (and what is not) substantially possible. The institutional grammar, so to say, predetermines the substantive language. While in the purely procedural radical British Constitution institutions facilitate wide-ranging democratic choice, the transnational web biases the constitution by shaping the institutional setup so as to ensure that whatever norm it produces is one in line with neoliberal values. In particular, the shifting of power from the hands of directly elected and politically accountable institutions (Parliament) to unelected, unrepresentative institutions (supranational and international judges and institutions such as the European Central Bank) results in accountability lines biased towards non-political and non-public institutions. As a result, private actors such as financial institutions and financial markets (one is tempted, although Nicol rarely uses the word, to simply write "the City," as I will do in section D. 2. II) become key constitutional and political players. Indeed one may read *The Constitutional Protection of Capitalism* as the application of a number of the theoretical points raised by Nicol in his previous study on the judicialization of British politics as a result of accession to the EEC.[36] Whether one agrees or not with this specific finding, his reminder that institutional design predetermines the realm of what is possible in substantive policy terms is worth keeping in mind.

IV. Still, Individual Agents Matter

While law should be approached in a systematic, structural and empirically attentive manner, Nicol does not put into question the relevance of individual agents. The book spares no criticism on the British (and by implication European) political elites that since the late 1970s have played a key role in the radical transformation of the UK (and in general, European) Constitution [3, 91, 126, 154]. All key decisions (or non-decisions, as

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ÉTATS-UNIS: L'EXPÉRIENCE AMÉRICAINE DU CONTRÔLE JUDICIAIRE DE LA CONSTITUTIONNALITÉ DES LOIS (Government of Judges and the Fight Against Social Legislation in the United States: The American Experience of Judicial Control of the Constitutionality of Legislation) (1921). *See also* the exchange between Carl Schmitt and Hans Kelsen *in* CARLOS MIGUEL HERRERA, LA POLÉMICA SCHMITT/KELSEN SOBRE LA JUSTICIA CONSTITUCIONAL, (The Schmitt/Kelsen Controversy on Constitutional Justice, 2009); among recent scholarship, *see* MARIÁN AHUMADA, LA JURISDICCIÓN CONSTITUCIONAL EN EUROPA (Constitutional Jurisdiction in Europe, 2009).

[36] *See* DANNY NICOL, EC MEMBERSHIP AND THE JUDICIALIZATION OF BRITISH POLITICS (2001). Both books share a good deal of the basic premises of Ran Hirschl, *see especially* RAN HIRSCHL, JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

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Susan Strange rightly pointed out long ago)[37] were indeed framed by the specific political, historical and economic context [7, 12, 16] from which they were taken (or not taken). But at the end of the day, they were all human decisions, which could have been different if taken by different persons [152] and, moreover, can still be reversed. If one is allowed to reverse the order of a famous dictum, men don't make history as they please, but they still make history. That Nicol believes this is so makes of the book something rather more valuable than a nostalgic and depressive indictment of the present, as an early reviewer rather hastily concluded.[38]

V. The Plurality of Capitalisms

The brief but significant historical accounts of the evolution of EU, ECHR and WTO law included in chapters 2 to 4 of *The Constitutional Protection of Capitalism* cast very significant light on the relationship between law and capitalism, and this is true for at least four significant reasons.

Firstly, Nicol's analysis shows that we have to account for the spatial variations in the institutional and substantive definition of what a market economy is (as the political and economic literature on the varieties of capitalism invites us to do),[39] but also with temporal variations on the characterization of the main institutional and substantive components of the market economy. Nicol rightly insists on the transformative role played by *Cassis de Dijon* (and the leading companion judgments concerning each of the other three economic freedoms) in the understanding of what the internal market was about. Indeed, the ECJ shifted the EU's socio-economic constitution from one of anti-discrimination (which extended the protection it afforded to national economic actors, goods and services as well as non-national ones) to a substantive constitution that Member States would breach by creating obstacles to the exercise of economic freedoms (in the very terms already considered above).[40] We would only fool ourselves into an anachronistic trap if we

[37] *See* SUSAN STRANGE, MAD MONEY 5, 38 (1988).

[38] TONY PROSSER, PUBLIC LAW 208-213 (2011).

[39] *See* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001). GEORG MENZ, VARIETIES OF CAPITALISM AND EUROPEANIZATION: NATIONAL RESPONSE STRATEGIES TO THE SINGLE EUROPEAN MARKET (2005); MATHHEW ALLEN, THE VARIETIES OF CAPITALISM PARADIGM: EXPLAINING GERMANY'S COMPARATIVE ADVANTAGE? (2006); and BEYOND VARIETIES OF CAPITALISM: CONFLICT, CONTRADICTIONS, AND COMPLEMENTARITIES IN THE EUROPEAN ECONOMY (Bob Hancké, Martin Rhodes & Mark Thatcher eds., 2008). A refreshing approach can also be found in HA-JOON CHANG, 23 THINGS THEY DON'T TELL YOU ABOUT CAPITALISM (2010).

[40] While the literal tenor of the Treaties has remained largely unchanged, the way in which the basic principles are constructed has been dramatically transformed. Consider that the free movement of capital was originally the "Keynesian" freedom of payments, a faculty ancillary to actual trade in goods. Now it has become a meta-freedom, instrumental in the financialization of the economy as a whole.

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pretended that there was a historical continuity where one finds a radical change.[41] In brief, there is a big difference between the market in the common market of the 1960s and early 1970s and the market in the single market of the 1980s and 1990s.

Secondly, Nicol highlights the tension between the ideal of neoliberalism (the myth of the self-regulating market) and the actual practice of neoliberalism, which can be properly defined as the promotion of the interests of capital holders [38]. When the myth clashes with the interests of the selected few, the myth gives way. That is a point that Nicol illustrates directly by reference to the measures adopted after the fall of Lehman Brothers (and one could argue, during the Eurozone crisis) [124]. His empirical approach to what neoliberalism is (certainly inspired by Harvey's works) explains why Nicol considers neoliberalism to cut across the traditional left/wing divide, or what is the same, that the political spectrum has been reconfigured by the victory of neoliberalism, so while the left/right divide continues to make sense, how we place political parties or politicians in that axis may be divorced from actual policies.[42] Nicol invites us to realize that we are confronted with "neoliberals of all parties", if the reader allows me the occasional Hayekian pun.

Thirdly, *The Constitutional Protection of Capitalism* underlines the historical and contingent character of the neoliberal turn. Not only markets are social constructs, but the shift of power from representative institutions to non-elected ones and to corporations is not a matter of fact, but the result of decisions (or non-decisions). We could discuss whether neoliberalism should be reversed (and on that Nicol makes a very persuasive argument), but what is to be accepted is that it *can* be reversed (cost and expediency being, I insist, a different matter) [152].

Fourthly, Nicol suggests that the specific implications of the transnational enmeshment of constitutional law depend on the national constitutional setup. So while the rhetoric of internationalization and globalization of law is a homogenizing one, proper attention to the institutional setup and the socioeconomic configuration of each political community points to the far from homogeneous character of transnational law. Each constitution will be differently affected by supranational and international legal regimes [44]. Transnational law is not (yet) global law, but varies across countries as a result of different national

[41] Indeed, it is part of the ideology of neoliberalism, and indeed of (whether conscious or unconscious) neoliberal interpretations of Community law to downplay how much Community law was transformed by the paradigm shift in the understanding of economic freedoms following *Cassis de Dijon* (in itself, one should add for the sake of completeness, much influenced by political decisions, including the abandonment of capital controls by Thatcher in 1979). This will be elaborated upon later in the review.

[42] See the very instructive review of Ian Gilmour & Mark Garnett's WHATEVER HAPPENED TO THE TORIES: THE CONSERVATIVES SINCE 1945, in Ross McKibbin, *Why One-Nation Tories Can No Longer Make an Impression on the Political Establishment*, 20 London Rev. of Books 8-9 (1998). *See also* DAVID HARVEY, A SHORT HISTORY OF NEOLIBERALISM (2007) and DAVID HARVEY, THE ENIGMA OF CAPITAL (2010).

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constitutional traditions and historical trajectories. I will return to this point (perhaps with a vengeance) in section D.

VI. Recalibrating the Analytical Categories of Public Law

A systematic, institutionally sensitive and empirically oriented reconstruction of constitutional law reveals the limits of the traditional conceptual and analytical tools of public law. Stated in such terms, Nicol's thesis seems to be echoing a central tenet of *sui generis* theories of Community law (and for that matter, international trade or ECHR law), according to which the radical novelty of the new legal order requires fully rethinking the conceptual and analytical toolbox of public law. In particular, we are frequently told in the EU literature that we would be well advised to get rid of all state-centric concepts and analytical categories, which seem to be most of those usually employed, given the predominant methodological nationalism in law and political science. However, Nicol's point is a rather different one. His is a call for a recalibration of conceptual and analytical tools to take account of the key role of private actors. More than methodological nationalism, what Nicol wants to overcome is state-fetishism, i.e. the assumption that the only power to be checked and reined in by public law is the power of public institutions [8].[43] But if there is indeed no longer a clear line of demarcation between national and transnational law, then it really makes no sense to keep on pretending that the institutional actors and the decision-making procedures which play a key role in giving law its shape are only public institutional actors. Indeed, major constitutional transformations have been supported and fostered by private actors. Nicol refers here to the central role played by the European Roundtable of Industrialists on the road to the Single European Act, and in general, to the efforts (and successes) of multinational companies to camouflage the high politics of constitution-making in international trade law as the low politics of technical international trade law [9, 67, 153]. A rather similar line of argumentation could exist at the legislative stage (*vis.* standard-setting in European

[43] It would be extremely interesting to apply this insight to some of the recent debates on constitutional law and political theory. Consider taxation for instance: Robert Nozick rehashed some (allegedly classical Greek) ideas to defend his claim that personal income taxation was a form of slavery (*see* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 169 (1974), "Taxation of earnings from labor is on a par with forced labor"). This was then popularized by neoliberals, both at the intellectual and rhetorical level, as an argument against the state *in toto*. Leaving aside for a moment the essential manipulative character of Nozick's claim and its vulgarization (obviously, taxes in authoritarian regimes are a form of slavery, but definitely not most taxes in most European countries, certainly not in contemporary France or Sweden, targets of choice for neoliberals as large and mature welfare states), it must be noticed that by limiting the concept of taxation to money compulsorily requested by the state and paid to it, we leave out of the picture any other form of compulsory extraction of money. So how do we call the exorbitant price that many people had to pay for their houses during the real estate bubbles of the past decade? Indeed, Dühring was perhaps after something when he characterized monopoly rents as taxes by the sword, leaving aside for a moment Engels's quibbles on the extent to which Dühring failed to offer a comprehensive analysis of the problem. *See* Friedrich Engels, *Anti-Dühring*, in Vol. 25 THE COLLECTED WORKS OF KARL MARX AND FRIEDRICH ENGELS 200 (1987).

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Community law [99-101]), And it goes without saying, although Nicol does not dwell at length on this point, that multinational corporations tend to be repeated players before courts and judicial or quasi-judicial enforcement mechanisms, something which makes judicialization an even more problematic development.[44]

Additionally, the analysis proposed by Nicol does away with many of the simplistic assumptions of traditional constitutional law, such as the famous claim that the British Constitution is unwritten. Leaving aside the (rather to the point) argument concerning the fact that it was actually a written constitution, although scattered in many different texts,[45] the enmeshment of the Constitution in the transnational web actually implies that the real British meta-constitution, which prevails over the old Constitution, is a written constitution [11].

D. Three Critiques

In the following, I will (1) critically consider the evolutionary democratic achievement of the British constitution, by means of questioning whether the British honestly is the only full-blown procedural constitutional democratic tradition, and by means of showing that the evolutionary nature of the British Constitution may account for its low resilience when confronted with the neo-liberal trend; (2) question the causal role allegedly played by all three international legal regimes, and especially Community law, in the demise of the radical British constitution, on the basis of the enduring ambivalence of Community law, and the key role played by domestic British constitutional law in the neoliberal transformation of EU, ECHR and international trade law; (3) insist on the democratizing potential of EU law and European politics.

I. A Radical Democratic Constitution: Only in Britain?

Nicol claims that only a purely procedural constitution (i.e. one that limits itself to ensuring that the democratic will is the law) is a truly democratic constitution. He seems to come very close to affirming that only the radical British constitution of the 1940s, '50s and '60s was a purely procedural constitution, and that the only proper role model of a democratic constitution is the radical British one.[46] These three claims are in my view clearly at work in

[44] *Cf.* The seminal article of Chris Harding, *Who Goes to Court in Europe*, 17 EUROPEAN LAW REV. 105-195 (1992).

[45] *See* John MacDonald MacCormick vs. Lord Advocate, (1953) SC 396. And the very apt comment of Neil MacCormick, *Does the United Kingdom Have a Constitution? Reflections on MacCormick vs. Lord Advocate*, 29 N. IRELAND LEGAL QUARTERLY 1-20 (1978).

[46] At present perhaps New Zealand would remain closer to the radical democratic British model than the British Constitution itself, although the New Zealand legal system is of course also enmeshed in a transnational legal web.

Nicol's thorough indictment of US-style constitutionalism. "Madisonian" constitutional philosophy would have been and would remain not so much about realizing the democratic will of citizens as about constraining it [32].[47] This would account for the central role played by the US Supreme Court in the political process, which in its turn would have fed an adversarial and elitist style of politics. The globalization of law is indeed a development that worries Nicol because it consists of, to a rather large extent, the Americanization of law [26], and consequently, would end up undermining democratic constitutional traditions wherever they exist, and replacing them with reborn Madisonian constitutionalism.

Let us assume, for arguments sake, that Nicol is right in his indictment of "Madisonian" constitutionalism (whether that is coterminous with US constitutionalism is indeed another matter)[48] and on his claim that a democratic constitution is essentially about process, not substance (so much so that its defining principles are those of contestability, neutrality and political accountability). Does this immediately entail that the British radical constitution is the only democratic constitution in sight? Can we indeed be so sure that we have to resign ourselves to the fact that no democratic constitution can be more resistant than the British one when confronted with such neoliberal and transnational forces?

1. All Democratic Constitutions Point to a Thin Constitutional Substance

Democratic constitutions may well be properly defined as contestable and neutral fosterers of political accountability. But that still leaves open how these three features, and especially the first two, relate to each other. Neutrality seems to require the constitution to be so thin as to be invisible. In the famous dictum of AJ Griffiths, the constitution is whatever happens.[49] Contestability seems to point to a reflexive procedure which makes contestation and change possible. But such a procedure requires more than an invisible constitution. It requires a pre-commitment to the reflexive procedure itself. That points to a thin substance, fleshed out not by reference to metaphysical truths, but by means of considering the practice of democratic decision-making, namely what citizens themselves assume is part of that "thin substance" when they enter into actual democratic deliberations. The connection is not with one concrete democratic deliberation, but with the practice of democratic deliberation (so much so that we can talk, and perhaps we should talk, of a procedural substance) as I have just suggested. That thin procedural

[47] Which is historically rather accurate. *See* ROBERTO GARGARELLA, THE SCEPTER OF REASON (2000).

[48] Whether the only constitutional theory fitting the US Constitution is a Madisonian one is a rather different issue. *Cf.* BRUCE ACKERMAN, WE THE PEOPLE (1998); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000); and LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[49] A. J. Griffiths, *The Political Constitution*, 42 MOD. LAW REV. 1, 19 (1979).

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substance is part and parcel not only of continental constitutions, but also of the British one.

Nicol oscillates between these two possible understandings of what a procedural democratic constitution actually is, but the superiority and exclusivity of the British Constitution could only be based on the understanding of the procedural democratic as an invisible, Griffithian fundamental law. Such a conception can be used as a rhetorical or pedagogical device to illustrate the differences between the British and the American thick substantive constitutions (as Nicol does),[50] and it could also be said to represent the understanding of the constitution of the "man on the Clapham omnibus."[51]

Having said that, the Griffithian understanding of constitutional law does not come to terms with the problem of the "suicide of democracy", or put differently of a democratic decision to put an end to contestability (something Nicol claims in the book is now the case, and is the result of the neo-liberal ascendancy) which can only be solved in a non-paradoxical way by means of accepting the grounding of democracy in a thin substance. Moreover, the invisible constitution offers a poor substitute for British constitutional practice in the golden postwar years, which was underpinned by the identification of the fundamental law with a "thin substance". Firstly, law students taking their BA in Law in the United Kingdom did indeed spend some time reading constitutional law. Such a practice would have been rather odd were the radical British Constitution to be deprived of any substance, or to be purely contingent in a Griffithian sense ("whatever happens"). Secondly, and more decisively, British constitutional discourse supported the claim that there was a substance that made up the British Constitution. Consider the debates surrounding the accession of the United Kingdom to the European Communities, and in particular, the question of whether the decision could be taken by a simple vote in Parliament. Of all MPs, what Enoch Powell, or for that matter Chris Shore, seemed to be arguing in 1972 was that the decision was a constitutional one, and as such, could not be taken by Parliament without a further consultation with the people (i.e. a general election in which a key issue in the parties manifestos would have been their attitude towards British accession, or more oddly at that stage, a referendum). And that was so because the decision was likely to have a major transformative impact on the design of political institutions and the substantive content of public policies. If that was so, then there are some questions, institutional structures and substantive contents which were part and parcel of the British Constitution; which made up the substance defining it, and in the first three decades of the postwar period, amounted to the radical democratic British constitution.

[50] Which indeed was part of the constitutional practice of the US Supreme Court before the New Deal and seems to be on its way back, and that certainly has inspired both the ECJ and the ECHR since the late 1970s.

[51] If one is allowed to paraphrase Walter Bagehot's timeless quip.

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So it seems that we need a more nuanced understanding of the idea of a purely procedural constitution. Contestability must be taken to require that the fundamental law should contain no institutional or substantive pre-commitments other than those strictly necessary to ensure that the political process remains open. This understanding points to a thin constitutional substance, not to a constitutional void. Part of this thinness in the British radical version responded to the fact that the constitution was to remain largely unwritten and mostly enshrined in constitutional conventions rather than on formal documents. While that might have increased the discretion to muddle through during constitutional crises, it did not mean that there was no line dividing what was fundamental from what was not fundamental in the law.

2. Expanding the Concept of Radical Democratic Constitution

But if the latter is the proper definition of a purely procedural Constitution, then the differences between the British democratically evolved constitution and postwar continental constitutions are much less than what Nicol seems to assume, and this is true for two main reasons.

Firstly, the difference between the British democratic tradition and the postwar continental ones would boil down to a different prudential judgment on what is the necessary minimum set of constitutional pre-commitments.[52] The radical British Constitution seemed to favor a drastically short set of constitutional pre-commitments, while postwar continental constitutions presupposed that democracy could only take root and entrench itself if a slightly larger set of constitutional pre-commitments were made. Still, the difference would not be of constitutional philosophy, but of prudential constitutional judgment; of quantity, not of quality. Consider the famous German "eternity clause", which seems to set the Teutonic constitution apart from the British (and perhaps even from most if not all other European constitutions). The German Fundamental Law of 1949 included (and keeps on including at the time of writing) an "eternity clause" setting institutional and substantive limits to the amendment of the Constitution, so much so that not even *We the German People* as *pouvoir constituent* could amend that clause (thus the appeal to "eternity"). Still, all democratic constitutions must contain an "eternity clause," if

[52] It seems to me that we should distinguish two main continental traditions: (1) a dominantly revolutionary one, of which the French and Italian constitution would constitute clear examples, and within which the constitution is essentially what "we the people" decide it to be. The constitution remains purely procedural, but assumes the existence of a dualistic democratic process, which distinguishes between extraordinary or constitutional politics and ordinary politics; (2) and a more *substantive* constitutional tradition, which is associated foremost with the German Constitution, and assumes that the constitution is defined by reference to a set of core constitutional values which are placed beyond all politics, both constitutional and ordinary. If within the German tradition one inclines to uphold (as the German Constitutional Court did at some point) the existence of an objective order of values, one comes very close to what Nicol would label as a Madisonian constitutional theory, at least in structural terms. But that is not the only plausible interpretation of the German Constitution, and of its principles.

only implicitly. The reason is not so much substantive, as conceptual. There is a point at which changes in the democratic constitution would be so drastic that to characterize the fundamental law as democratic would stop making any sense. Indeed, were the British Parliament to pass a statute vesting all public powers in the Queen, that statute would be widely regarded as unconstitutional; and even if voted for by a large majority in the Commons under widely exceptional circumstances, one would expect a political backlash as time passed, with the constitutionality of the statute being seriously questioned. While the different British historical tradition will make improbable arguments based on a reference to eternally guaranteed contents of the constitution, structurally similar arguments will be at the center of the debate, even if formulated in a different constitutional dialect. Indeed what German scholars tend to discuss by reference to the "eternity clause" has a strong structural resemblance to what in other jurisdictions is discussed under the topic of the limits to self-amendment. [53]

This proves that a radical democratic constitution is by necessity not so much unbiased, as biased in favor of keeping open the democratic procedure. But that necessity makes reference not to a metaphysical truth, but to a thin substance to be fleshed out by reference to the practice of democratic decision-making (so much so that we can speak, and perhaps we should speak, of a procedural substance).[54] That thin procedural substance is part and parcel not only of continental constitutions, but also of the British one.

Secondly, the actual constitutional experience of the *Les Trente Glorieuses* proves that the postwar European constitutions (containing more substance than the British one) actually contributed to the establishment of functional democracies, instead of undermining the will of the people. Indeed, the overall shape of continental European politics during the first three postwar years was not that different from British politics. The democratic pressures that led the Tory party towards "One-Nation" policies were not that different from the democratic pressures that made Christian-Democratic parties of continental Europe into supporters of the development of the welfare state. In particular, the most problematic of all institutions in Nicol's narrative, courts assuming the power to review the constitutionality of legislation, supported democratization rather than undermining it. Much depended on who was authorized to review the constitutionality of statutes, how constitutional judges were nominated, what the length of their mandates was, and what kind of powers were vested in them. In that regard, it must be said that even in Germany (whose Constitutional Court is perhaps the one which is more frequently compared to the US Supreme Court) constitutional review was never undertaken in a purely "Madisonian" fashion. European constitutional review was openly political by design. The constitutional review of legislation used to be monopolized by a single and *ad hoc* constitutional court, so

[53] Whether the British Parliament can limit itself is an old riddle in British public law.

[54] This is the argument of both JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS ch. 3 (1996); and ROBERT ALEXY, DISCOURSE THEORY AND HUMAN RIGHTS, 9 RATIO JURIS 209-235 (1996).

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ordinary courts could not set aside statutes approved by Parliament. The magistrates sitting in the Constitutional Court tended to be elected by Parliament, mostly among scholars, and at any rate not exclusively among the rank and file of ordinary judges or practitioners. Their terms in office were limited, ensuring a degree of political responsiveness, even if delayed in time. Most importantly, while constitutional courts were assigned roles not so different from those played by the US Supreme Court (such as the review of legislation in concrete cases on request from a citizen whose fundamental rights were allegedly infringed), there was still an underlying culture of self-restraint associated to the historical Kelsenian model of the constitutional court as a negative legislator.

If the constitutional traditions of postwar continental Europe were also procedural ones (the difference lying in prudential judgments about the extent of the institutional and substantive pre-commitments) and if they actually helped in establishing and consolidating functional welfare states in line with the preferences of the majority of citizens, and not the majority of those citizens better off in society, one wonders whether the baseline of democratic constitutionalism should not be rendered more ecumenical. Perhaps, after all, the British is only one, and not the only one, radical democratic constitutional model. Indeed, if my argument so far is not wrong, then postwar continental constitutions, such as the French, Italian and German ones, should also be regarded as procedural constitutions. They contained a thicker and wider set of institutional and substantive pre-commitments than the British Constitution, but that was the result of a different prudential judgment on what the proper "thin" substance of their respective national constitutions should be, given the concrete and idiosyncratic national context. So the British and the postwar continental constitutions are variants of the same genus: the procedural democratic constitution.

3. The Resilience of the British Radical Democratic Constitution

But if this is so, it may be pertinent to consider (following Nicol's invitation to a comparative study) which of the constitutions within the wider procedural family provides a better platform for defend democracy against the neoliberalizing trend. While I do not feel qualified to offer the reader a conclusive argument in this regard, it is far from obvious whether it could be argued that evolutionary constitutions, such as the British, fare better in this regard. Firstly, such a claim seems not to be supported by *The Constitutional Protection of Capitalism*, which documents rather extensively the structural weaknesses of an evolutionary established democratic constitution when facing the pincer movement of a government dedicated to increasing the enmeshment of the British legal system in the transnational neoliberal web (as was the case with all British governments for more than three decades) and an international environment clearly fostering such neoliberal transformations. A monistic political system (in which Parliament can by itself amend the fundamental law without further checks and balances) and an unwritten constitution make possible, even if not unavoidable, rather sudden constitutional shifts. Secondly, the (at

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least partially) unwritten character of the Constitution and the onus on constitutional conventions renders more difficult the rearguard defense of the previous constitutional settlement. Indeed, one guesses that Nicol's attempt at "distilling" the core principles of the procedural constitution would have been easier and would have resulted in even stronger arguments if based on a written constitution in the French, Italian or German style. After all, it was Bentham who argued that the written character of the law is a necessary precondition for its democratic character (and who was also against entrenching substantive constitutional contents).[55] Not only because in such a way we know what it is of the present positive law that we want to change, but also because it is hard to simply flout the democratically established will, as there is a written record of what was decided through the democratic political process.

II. Keeping the Culprit at Bay or is Transnational Law Really the Nemesis of Democracy?

Nicol's second major claim is that the mutation of British fundamental law from a radical democratic constitution to a deeply undemocratic and undemocratizing constitution was caused by the "enmeshment" of British law into transnational law. However, it seems to me that we should question both the simplistic description of Community law as a neoliberalizing force and the direction of the causal arrow, particularly in order to further reflect on whether constitutional changes in Britain played a major role in the radical transformation in the nature and implications of Community (and WTO) law.

1. The Enduring Ambivalent Character of Union Law

Nicol stretches his "neoliberal" capture argument too far, by reducing "trasnationalizing" legal regimes, and very especially Community law, into "neoliberalizing machines". That his point is a trifle exaggerated is something that can be illustrated by the following two considerations.

Firstly, Nicol's historical reconstruction shows that all three regimes, and very especially Community law, were at the very least ambivalent projects; but if that is so, they must contain a latent ambivalent potential, at least until neoliberal capture turns out to be complete. Especially if one adds to Nicol's emphasis on the ambivalent character of the project, the further claim that the historical record supports the conclusion that the main thrust of Community law in action during the *Les Trente Glorieuses* was clearly tilted towards ensuring the preeminence of politics in the design of socio-economic policies.

[55] *See* Jeremy Bentham, *'On Codification', first part of 'Papers relative to codification and public instruction,' in* LEGISLATOR OF THE WORLD: BENTHAM'S WRITINGS ON CODIFICATION, LAW AND EDUCATION 5-54 (Philip Schofield & Jonathan Harris eds., 1998); and Jeremy Bentham, *Anarchical Fallacies*, *in* VOL. 2 THE WORKS OF JEREMY BENTHAM 489-534 (1863).

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Indeed, the Communities aimed at coordinating the exercise of public powers, something that led not so much to centralization as to the reaffirmation of public power at all levels of government (another aspect of *The European Rescue of the Nation-State*).[56] A paradigmatic example was the very act of creation of the European Coal and Steel Community. The powers the High Authority got were only nominally transferred from national capitals, as (barring the cases in which the coal industry had been nationalized in the immediate postwar, such as France), power had *de facto* been in the hands of transnational cartels for decades.[57] Similarly, the completion of the four stages towards the creation of the customs union and the common market prompted debate, studies and Commission proposals aimed at the harmonization of personal tax systems, with a key goal of planned policy being the Europeanization of progressive taxation. Emphasizing this "radical democratic" lineage is very important. Because the neoliberal transformation has itself been the result of an evolutionary transformation of the fundamental principles of Community law, it has not proceeded by weeping out the pre-existing institutional structure and substantive commitments, but by means of infiltrating it. This entails that bits and pieces of the old understanding remain in place, and are somehow pushed into the background, despite the fact that they may eventually be recovered.

Secondly, Nicol offers too flat a description of the European Union at present [163: globalization overkill]. While the main thrust of the case law of the ECJ and of policymaking at the European level could fairly be described as neoliberalizing (indeed one could argue that the structural biases of the European Constitution are even more tilted in that direction than Nicol argues, due to a double structural democratic deficit), the very fact that integration was for three decades based on a different understanding of the socio-economic constitution of the Union renders things a trifle more complicated.[58] The political framing and disciplining of market actors may have lost grandeur, but many regulations and directives approved during the first decades of integration remain in force. More to the point, one finds that even among the recently approved regulations, some still are properly described as corresponding to the first understanding of how to make the market truly common. A clear-cut example is the savings directive of 2003, a rare piece of legislation to the extent that it points to the institutional structure that could effectively undermine the structural power of capital holders and recover public steering capacities, by means of introducing as a general principle the automatic exchange of information

[56] JEAN FOURASTIÉ, LES TRENTES GLORIEUSES (1979) and MILWARD, *supra* note 34.

[57] *See* Paul Reuter, *La Communauté Européenne du Charbon et de l'Acier*, Paris: Librairie générale de droit et de jurisprudence R. Pichon et R. Durand-Auzias, 1953, and G. SPERDUTI, LA CECA, ENTE SOPRANAZIONALE (The European Coal and Steel Community, Supranational Entity, 1966).

[58] On the double democratic deficit, *see* Agustín José Menéndez, *The European Democratic Challenge*, 15 EUROPEAN LAW JOUR. 227-308 (2009).

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among European tax administrations (albeit with many shortcomings and loopholes).[59] However, one may also add that the peculiar way in which "European economic governance" has been reformed since May 2010 considerably reinforces Nicol's case.

2. Neoliberalism as a Local Specialty: The City and the Making of the Transnational Web

Nicol stresses the role of national political leaders in the making of the transnational web and the consequent enmeshment of national legal systems. National leaders (such as Margaret Thatcher) would have hidden behind the smokescreen of international or supranational law to effect radical changes to the British constitution (one presumes the argument would be the same concerning at the very least the other Member States of the European Union). While this is a plausible argument *prima facie*, it seems to me rather incomplete, because it fails to consider the role that changes in national and political legal systems themselves might have played, and very particularly the British one, in shaping the "transnational" web, and indeed, in neoliberalizing international and supranational legal regimes.

Britain is indeed an ideal case study of inversed causality for at least two reasons. Firstly, the very foundations of the neoliberal wave of the late 1970s and early 1980s were laid in London, particularly in the early 1960s, when the city was confronted with the end of its empire, and as a consequence with a challenge to its international financial role. As recent studies have documented,[60] under the aegis of the Bank of England, London transformed itself into an international financial centre. First was by means of the creation of the Eurobond market and a web of tax havens in British dominions. While the intellectual framework of neoliberalism might have been predominantly Austrian, its actual institutional hardware was very much Londonian. Second was the fact that Thatcher's government took monumental internal decisions which shaped the international playing field. In 1979, it was the decisions to eliminate capital controls and accept huge unemployment levels (with massive redistributive implications; a move preceded by Volcker's tight monetary policies in the US).[61] Such decisions, taken by the country that

[59] Directive 2003/48/CEE of the Council, 3 of June of 2003, (2003) O.J. (L 157), at 38-48. See also the bilateral agreements signed with third countries in (2004) O.J. (L 385), at. 28 and 50 (Switzerland), (2004) O.J. (L 359), at 32 (Andorra); 2004 O.J. (L 379), at 83 (Liechtenstein); (2004) O.J. (L 381), at 32 (San Marino); (2005) DOCE (L 19), at 53 (Monaco).

[60] *See* among others, ROBERT SOLOMON, MONEY ON THE MOVE: THE REVOLUTION IN INTERNATIONAL FINANCE SINCE 1980 (1999); GARY BURN, THE RE-EMERGENCE OF FINANCIAL MARKETS (2006); and NICOLAS SHAXSON, TREASURE ISLANDS (2011).

[61] Resulting more from a deep ideological commitment than from a pragmatic assessment of how to render coherent economic policy (in particular, it was rather impossible to reconcile strict monetarism with the free movement of capital, especially with London rapidly establishing itself as the hotbed of international finance and with North Sea oil revenues exploding).

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hosted the most prominent financial centre, created the conditions under which the effectiveness of capital controls in all other European countries were severely undermined, leaving them with the choice to either follow or perish. Third was the 1986 "big-bang" in the liberalization of financial services.[62]

Secondly, the very intergovernmental nature of the European Union and of its complex constitution implies that actual capacity to shape European policy presupposes access to national power. Indeed, it was the triumph of Margaret Thatcher in 1979 and the major socio-economic change it effected in British politics that led to neoliberalism having a decisive influence on European policy formation. If that influence could be felt before Thatcher it was because neoliberalism had been influential even if not predominant in previous governments before she got into power.

III. On What to Do

As already indicated in section A, Nicol offers the reader a two-pronged prescription: a defense of national competences in the short-run, and the reform of the transnational legal web in the long run.

While in general terms the conclusion is coherent with the arguments put forward in the book, and is at least as feasible as most of the proposals that are taken seriously in scholarly and political debates, it seems to me that one would be led to nuance both its short-term and long-term prescriptions, once taking into account the less simplistic assessment of the democratic credentials of the European Union which was put forward in the previous section.

Firstly, it seems to me rather blunt to claim that "any effective counterbalance to the power of capitalists is embedded in national and subnational units" [162]. Sometimes the national and the regional levels of politics provide the best cover to fight the neoliberalizing trend that renders hollow democracy, as may have been clearly the case on what concerned the Multilateral Agreement on Investments (the MAI). The European Commission played a key role in the concoction and peddling of the draft agreement.[63] So

[62] In addition to Britain, other Member States that would be worth studying would indeed be all those who have been at the forefront of the blocking minorities on tax harmonizing measures within the EU, especially Luxembourg, Belgium and Austria (which negotiated exceptions from the automatic exchange of information system enshrined in the 2003 directive on the taxation of savings income) and Ireland (which has fought hard to maintain its status as a tax haven for corporations).

[63] *See* for example BELÉN BALANYÁ, ANN DOHERTY, OLIVIER HOEDEMAN, ADAM MA'ANIT & ERIK WESSELIUS, EUROPE INC. REGIONAL AND GLOBAL RESTRUCTURING AND THE RISE OF CORPORATE POWER 109-122 (2003). *See* 'A Level Playing Field for Direct Investment World-Wide' COM (95) 42 final (1995), available at: http://aei.pitt.edu/6195/1/003345_1.pdf (last accessed: 23 December 2011). This was indeed preceded by several speeches from Leon Brittan, then the commissioner in charge of commercial policy. *See* 'Commission Launches Discussion Paper on Worldwide

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one could plausibly claim that the MAI would have ended in the *Journal Officiel* were it not for the rearguard fight made at the regional and national levels.[64] But other times the European level might prove to be the most effective level of government from which effective resistance against neoliberalism can be mounted, especially when the purpose is to defend national democracy through establishing bits and pieces of a more adequate transnational law. I have already mentioned the taxation of savings directive, and more references could be made to effective and proposed EU legislation on the general topic of fighting tax evasion, especially when effected through tax havens. While it is obvious that the European Court of Justice has acted as a neoliberalizing machine also in this regard, and while it is clear that the Commissioners in charge of the tax portfolio have not gone beyond symbolic action in the last two decades, it is also the case that some Member States (acting perhaps out of revenue concerns), personnel within the DG Taxation, and above all the European Parliament, could be effectively mobilized in favor of solutions fitting into Nicol's general prescription. So perhaps Habermas may not have come up with clear empirical examples in support of his line of reasoning [as Nicol claims in 43], but such examples exist and can be provided, so there are good reasons to be (moderately) optimistic regarding the democratic potential for action at the European level. Although, I should add, again in the spirit of fairness, that the transformative potential of Union law has been drastically narrowed by the very problematic decisions taken since May 2010 to "deal" with the Eurozone crisis.

E. Conclusion

The Constitutional Protection of Capitalism deals with the most relevant and urgent questions the citizens of a democratic state should be posing themselves.[65] Many of these queries are indeed very old, if not classical. Nicol opens the book asking himself whether

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Investment Rules," IP/95/52, 19 January 1995, where we can read Brittan's revealing words: "Investment is a desirable and desired thing . . . . Nonetheless, governments still sometimes find it threatening, because free direct investment limits administrations' ability to control and shape their countries' economic destiny. This is a small price to pay for allowing private sector decision-makers to generate economic benefits worldwide. But it is a price that some governments in some sectors still find difficult to pay. That is a tragedy." *See also* 'Commission Calls on European Business to Intensify Worldwide Investment Efforts,' IP/95/269, of 17 March 1995.

[64] Still, one should note that the European Parliament, although rather powerless on the terms and contents of the negotiations, was widely critical of both the negotiation procedure and of the contents of the draft MAI. *See* 'Resolution on the MAI,' A4-0073/98 of 11 March 1998, (1998) O.J. (C 104), at 143-144. Indeed, the leakage of the MAI text may have come from Bruxelles, and the French MEP Catherine Lalumiere played a far from minor role in the decision of the French government to withdraw from MAI negotiations, which sealed the fate of the draft proposal. See the report of the commission she chaired, *Rapport sur les négociations commerciales multilaterals*, available at: http://www.minefe.gouv.fr/fonds_documentaire/pole_ecofin/international/rap_multilateral.htm (last accessed: 23 December 2011).

[65] About what I would be tempted to label the economic constitution, was it not for the fact that the term is biased and prejudiced as to be best avoided.

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"the [Constitution of the United Kingdom should] elevate a certain form of capitalism above politics?" [1]. Answering that question unavoidably triggers a whole range of concerns, ranging from the degree to which law should define, shape or frame the fundamentals of the economic structure of the society, to the proper status of the rights of corporations, and the relationship in which those rights should stand *vis-à-vis* individual fundamental rights and collective goods. No matter how well-known and so many times answered, such questions should be asked again and again, not only because discussing them is part and parcel of what democratic politics is about,[66] but also because we have gravitated in the last three or four decades towards thinking that positive constitutional law is informed by the only possible answer to these questions, an answer which has increasingly come to be shaped by the (revived) myth of the self-regulating market, behind which, as Nicol rightly points, lies the promotion of the economic interests of a select few at the expense of the many. Moreover, legal scholars and practitioners have additional reasons to pay close attention to Nicol's agenda. We should indeed be candid about the shortcomings of positive law, legal dogmatics and legal theory in recent years, many of which facilitated or indeed actively contributed to the socio-economic processes that led the world into the recession which started in 2007. As is the case with economists, both our self-respect and the collective welfare of our societies depend to a larger extent on our willingness to trigger the day of our reckoning with our mistakes (accepting that without some serious critical thinking, there can be neither atonement nor forgiveness).[67] Nicol's book is a fundamental and inspiring volume that poses the right questions and comes further than any other this reviewer is aware of, in answering them.

[66] "So as to ensure that the living are not ruled by the dead." This is a motto with Painean connotations which Nicol rightly endorses in [155], and which we should keep in mind is at the core of the idea of the democratic constitution for both normative and historical reasons.

[67] *See* Paul Krugman, *The Return of Depression Economics,* Lionel Robbins Lectures (2009), available at: http://cep.lse.ac.uk/_new/interviews/default.asp (last accessed: 23 December 2011).

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