

SOCIAL SCIENCE | EUROPE

"This breakthrough book provides new tools for understanding the distinctive features of the EU's constitutional development—and thereby permits a deeper understanding of the EU's place in the larger world of Western constitutionalism."

—**BRUCE ACKERMAN**, Yale University

"A brilliant and outstanding work on European constitutionalism, written from a critical democratic point of view. Sharply argued, clearly articulated, and enthralling, this book offers a persuasive argument for carrying the European project forward."

—**Hauke Brunkhorst**, Flensburg University

"The theory of constitutional synthesis is a well-argued exercise in normative realism. The authors' intense long-term cooperation across disciplines is clearly visible and has paid off handsomely."

—**Christian Joerges**, University of Bremen

"Cogently argued and accessible to a broad audience, this volume successfully addresses many of the key issues relating to the ongoing constitutionalization of the European Union. Fossum and Menéndez offer an astute analysis that succeeds in relating European developments to constitutional trends in North America and elsewhere. Highly recommended!"

—**William E. Scheuerman**, Indiana University

"Emerging from a masterful blend of interdisciplinary scholarship and intellectual ambition, this theoretical perspective makes visible the normative, analytical, and practical merits of a post-state and post-national understanding of the EU."

—**Rainer Schmalz-Bruns**, Leibniz University

"Historically erudite and broad in its scope, this book explains why and how essential parts of Union law have been severed from the original common constitutional template and have begun to unravel the common bond. A timely and important attempt to address the unfolding crisis."

—**Alexander Somek**, University of Iowa

For orders and information please contact the publisher:  
ROWMAN & LITTLEFIELD PUBLISHERS, INC.  
A wholly owned subsidiary of  
The Rowman & Littlefield Publishing Group, Inc.  
4501 Forbes Boulevard, Suite 200  
Lanham, Maryland 20706  
1-800-462-6420 • www.rowmanlittlefield.com



FOSSUM &  
MENÉNDEZ

THE CONSTITUTION'S GIFT  
A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION

ROWMAN &  
LITTLEFIELD

# THE CONSTITUTION'S GIFT

JOHN ERIK FOSSUM AND  
AGUSTÍN JOSÉ MENÉNDEZ

A CONSTITUTIONAL THEORY FOR A  
DEMOCRATIC EUROPEAN UNION

# The Lisbon Treaty – EU Constitutionalism at a Crossroads?

John Erik Fossum and Agustín José Menéndez  
ARENA

# Why focus on the analytical framework, and why do so in Norway?

- Norway is deeply affected by the EU – understanding what drives the EU helps make sense of the effects on Norway
- What is the European Union? Why should we follow European law? Why the Union grows and endures? How are we to solve conflicts between EU and Norwegian law? (VinMonopolet, Viking, Environmental law)
- Only a proper constitutional theory can make sense of the nature of and broader implications of these controversial issues; but here is as yet no convincing theory of European constitutional integration
- Instead, what we find are many riddles and paradoxes

# Three riddles/unresolved questions:

## 1) Genesis:

How did the present EU come about? Something initially established through three international treaties claims constitutional status, has direct effect on national constitutions, and is embedded in supranational institutions

## 2) Primacy:

How are national and Community norms related to each other? Answers vary from the systemic vantage-point one takes, whether national or European

## 3) Stability:

Can a system that claims supremacy but lacks sanctioning means and that also depends on the member states for implementation be stable?

The Theory of Constitutional Synthesis is based on three core ideas:

a) European constitutional law was made up of and serves as the common constitutional law of the Member States, but with a distinct twist: the national constitutions were seconded to the role of part of the constitutional collective of Europe.

They thus live a 'double constitutional life': each continues as a national constitutional arrangement, whilst is simultaneously also part of the collective European constitution

b) This process is undergirded by the development of a supranational institutional structure. It has emerged through a complex interplay of emulation, adaptation and experimentation. It is highly pluralistic and exhibits a strong centrifugal pull

c) The overarching system is pluralistic, in two distinct senses:

- there is an overarching Union law combined with a set of national constitutional legal orders
- there is no overarching hierarchical structuring of supranational and national institutions

The result is a highly fragile structure with strong built-in tensions and whose sheer pluralism is highly susceptible to external shocks

# Solving the riddles through synthesis

1) Genesis: The European legal order emerged through the *transfer* of the common national constitutional norms to the Community legal order  
This process was mandated by the national constitutions  
This provides a (provisional) democratic licence to the Union which it must deliver on in order to render the integration legitimate

2) Primacy: Under synthesis, there is no conflict because there are not two separate systems: it is the collective of national constitutional norms that constitutes the *deep layer of European constitutional law*

3) Stability: The key to stability resides in the foundational role that national constitutional norms play in both the Community and the national legal orders

This system is frail and is prone to self-subversion:

Viking and Laval are examples of one such form of self-subversion: when the ECJ no longer operates in line with but takes an independent stance in relation to national constitutional norms