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# Dual Sovereignty in Europe?: A Critique of Habermas's Defense of the Nation-State

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# DOUBLE SOVEREIGNTY IN EUROPE?
# A CRITIQUE OF HABERMAS'S DEFENSE OF THE NATION-STATE

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## 1. INTRODUCTION

European integration is the French Revolution of our time. Just as the French Revolution set the agenda for modern political thought by bringing the nation-state and democracy onto the historical stage, so now European supranational integration transnationalizes sovereignty and recasts the legitimacy of political institutions. In recent work,[1] Jürgen Habermas has put forth the most elaborate and influential theory of supranational constituent power.[2] Habermas argues that the 'great innovation' of European integration is the 'complementary connection and interdependence'[3] between the national and the supranational levels of government. Nation-states sur-

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[1] J. Habermas, *The Crisis of the European Union* (Polity, 2012); J. Habermas, *The Lure of Technocracy* (Polity, 2015); J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible', (2015) 21 (4) European Law Journal 546-557.

[2] Scholars have long called for such an account, 'understood in the vocabulary of normative political theory'. See, e.g., J.H.H. Weiler, 'Epilogue: The European Court of Justice: Beyond "Beyond" Doctrine or the Legitimacy Crisis of European Constitutionalism', in A. Slaughter, A. S. Sweet and J.H.H. Weiler, 'The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context' 366 (Hart, 1998).

[3] J. Habermas, *The Crisis of the European Union* 28 (Polity, 2012). This approach has been influential. See, e.g., H. Brunkhorst, 'Europe in Crisis - An Evolutional Genealogy', in C. Thornhill and M.R.

vive the process of supranational integration and coexist alongside the Union their citizens have created.

According to this conception, the coexistence of member nation-states and the European Union ('EU') is reflected in a fundamental split in the identity of the sovereign. Individuals are and see themselves both as peoples of nation-states and as citizens of the EU.[4] In the first capacity, they are committed to their national polities as 'guarantors of the already achieved level of justice and freedom' against intrusions and encroachments by an 'unfamiliar' supranational polity.[5] As EU citizens, theirs is a project of transnationalizing democracy as a way of reconnecting the fragmented politics of nation-states with the demands of globally integrated markets.[6] Be-

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Madsen (eds.) *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law* 232-233 (Cambridge, 2014); C. Franzius, *Recht und Politikin der transnationalen Constellation* (Mohr Seibeck, 2014).

[4] J. Habermas, *The Crisis of the European Union* 35 (Polity, 2012). See also, P. Allott, 'Europe and the Dream of Reason', in J.H.H. Weiler and M. Wind, *European Constitutionalism Beyond the State* (eds.) 225 (Cambridge, 2003) (mentioning 'one person' in the metaphysics of Europe's self-constituting).

[5] J. Habermas, *The Lure of Technocracy* 40 (Polity, 2015).

[6] As Habermas puts it, 'the globalization of commerce and communication, of economic production and finance, of the spread of technology and weapons, and above all of ecological and military risks poses problems that can no longer be solved within the framework of nation-states or by the traditional methods of agreement between sovereign states', in J. Habermas, *The Inclusion of the Other: Studies in Political Theory* 106 (MIT Press, 1996). This is a plausible enumeration of the social conditions that might lead to something akin to a 'type-switch' in political organization. See G. Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford University Press, 1978) (studying 'type-switch' between different types of states, at 60). Habermas is, of course, well aware that globalization does not fit as justification of the early periods of integration, but he argues that 'neither of the two original motives for integration' - preventing war and containing Germany – 'are a sufficient justification for pushing the European project any further', in J. Habermas, 'Why Europe Needs a Constitution', (2001) 11: 5-26 New Left Review 7.

cause neither identity is transient or subordinate to the other, transnationalized democracy is not democracy that has transcended, in the sense of overcoming, the nation-state. Rather, Habermas's dual sovereignty thesis theorizes the national and supranational levels as co-original and co-determinate.[7] A choice between them is neither necessary nor possible.

My aim here is to challenge this account. I argue that it would be irrational for individuals in their supranational capacity to accept the constituent process in the terms laid out by the dual sovereignty thesis. While Habermas deserves credit for reaffirming the importance of constituent power,[8] and for introducing a distinct account of *supranational* constituent power against

[7] A rational reconstruction whereby EU citizens are part of the constituent power already challenges, or, depending on one's perspective, advances, traditional approaches. See J.H.H. Weiler, 'Europe's Constitutional Sonderweg', in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State*, 13 (Cambridge, 2003) ('Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos, and, hence, as both a matter of normative political principle and empirical social observation the European constitutional discipline does not enjoy the same kind of authority as may be down in federal states where federalism is rooted in a classic constitutional order.'). While Habermas agrees with the latter part of the statement regarding the difference between the European construct and typical federalism, including, prospectively, the imperative of avoiding 'normative subordination of states to the federal level', see J. Habermas, *The Lure of Technocracy* 37 (Polity, 2015), his dual sovereignty thesis rejects the argument about the absence of a European citizenry (and thus a rationally reconstructed demos) as co-original with the peoples of the nation-states. See J. Habermas, *The Crisis of the European Union* 38 (Polity, 2012) (claiming that 'the division of constituent power divides sovereignty at the origin of a political community which is going to be constituted.'). For a similar recent account in the general, international context, see Mattias Kumm, Constituent Power, cosmopolitan constitutionalism, and post-positivist law, Int'l J. Const. L. (I-CON) (2016), 14 (3): 697-711 (arguing that constituent power is vested not only in the "We the people" but also in "the international community", at 698).

[8] The concept of constituent power, not only its contours but its very usefulness, has become contested as unnecessary to legality-centered approaches. See, e.g., D. Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power', (2012) 1 Global Constitutionalism 229. For helpful recent studies of

the prevailing scholarly view that questions the utility and normative appeal of such an account in European context,[9] dual sovereignty does not withstand close scrutiny. This theory builds on an asymmetry between the national and the supranational identities that violates the principle of equality between the two political identities. Its implicit though unmistakable priority of the national versus the supranational perspective legitimates nation-states to undermine the project of European unification. I argue that the split political identity is a source of fragmentation and dissonance that subverts rather than supports the transnationalization of democracy.

In addition to analyzing tensions internal to the structure of dual sovereignty, I discuss whether European constitutionalism supports this account. Habermas argues that it does, and that '[w]e need only to draw the correct conclusions from the unprecedented development of European law over the past half-century.'[10] The difficulty, in my view, is not with the turn to law, which

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constituent power, see M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, 2007).

[9] C. Thornhill, 'Contemporary Constitutionalism and the Dialectic of Constituent Power', Global Constitutionalism 1 (3) (Cambridge, 2012) 369-404, 373 (noting that 'the very absence of a traditional constituent power has haunted research on the public legal order of the EU from its inception until today.') (footnote omitted). See also, N. Hrisch, '*Pouvoir Constituant* and *Pouvoir Irritant* in the Postnational Order', (2015) 1I-CON Working Paper Series (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430128) (accessed Sept. 15, 2016), at 14 (noting that international responses the domestic challenge to theorizing about constituent power have failed to advance visions of a regional or global constituent power. Hrisch then argues that, in the particular European context, such accounts might be normatively appealing but would not find support in societal and political practices.).

[10] J. Habermas, *The Crisis of the European Union* 3 (Polity, 2012).

by itself is compelling,[11] but with the specific interpretation of European constitutionalism that Habermas endorses. This interpretation places municipal and supranational legal orders alongside one another in a relation of heterarchical coordination that is incompatible with hierarchical subordination of (any) one order to the other. I argue that the principles of European constitutionalism that Habermas lists as evidence call for a more nuanced interpretation, and do not offer firm support to the dual sovereignty thesis.

Perhaps most regrettable of all is that, having set out to reject the 'hopeless alternative'[12] between nation states and a European federation, the dual sovereignty thesis ill-serves Habermas's vision of a European Union whose peoples are the true masters of the Treaty[13] and whose supranational project is the political self-constitution of 'higher freedom.'[14] Habermas rejects a

[11] The focus on the European legal system, and especially its constitutional dimension, provides access to the structural features of European integration that the daily ebb and flow of ordinary politics oftentimes obscures. See C. Joerges, 'Taking Law Seriously: On Political Science and the Role of Law in the Process of European Integration', (1996) 2 (1) European Law Journal. See also J. MacCormick, *Weber, Habermas, and the Transformations of the European State* 14 (Cambridge, 2007) ('Attention to the law has been the most effective way of grasping the several transformations of state, society, and economy in the modern epoch despite the differences among the discrete eras contained within it.'). However, the prominence of the ECJ, a constituted power, has generally been seen as an obstacle for thinking about constituent power in the EU. As Chris Thornhill puts it, its version of 'judicial constituent power' has 'revived long-suppressed memories of deep hostility to judicial norm setting, which inhered in the origins of modern European constitution making', in C. Thornhill, *The European Constitution and the pouvoirs constituants: No longer, or never, sui generis?*, in J. Přibáň (ed.) (Routledge, 2016), *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* at 13 (Routledge, 2016).

[12] J. Habermas, *The Crisis of the European Union* 38 (Polity, 2012).

[13] J. Habermas, *The Lure of Technology* (Polity, 2015).

[14] A. Somek, 'Constituent Power in National and Transnational Contexts', (2012) 3 (3) Transnational Legal Theory 31-60, at 33 (pointing out that constituent power 'emerges only in a philosophical context in which questions of legitimacy and authority are ultimately debates as matters of freedom.')

supranational federation for lack of popular support, much like Kant rejected a world state in *Perpetual Peace*.[15] But, unlike Kant's conception, which has the internal resources to overcome the shortcomings of its initial formulation,[16] Habermas's account casts in stone a state of European affairs that is both fleeting and directionless.

## 2. DUAL SOVEREIGNTY: SPLIT POLITICAL IDENTITY

The split political identity pulls dual sovereignty in opposing directions: in the particular direction of specific nation-states and in the general direction of the regime-type -- *constitutional* state – to which these nation-states belong. The question is: how does the dual sovereignty thesis straddle this tension?

Habermas claims that two different subjects can be said to have created the supranational political community: the individual citizens of the already constituted nation states and the (same) individuals as citizens of the to-be-constituted European Union. The two subjects coexist within the divided identity of individuals who exercise their constituent power. These two identities are of equal standing and their conflicts cannot be resolved through structural rules that would prioritize one identity over the other. Harmonization processes within individual identity must respect and reinforce the equality of the constituent parts, which, in Habermas's view, rules

[15] I. Kant, 'Perpetual Peace: A Philosophical Sketch', in *Kant: Political Writings* (Hans Reiss, ed., H.B. Nisbet trans., 1991).

[16] By this I mean that the normative principles underlining Kant's account, specifically his conception of republican constitutions, can be used to fill in the gaps of Kant's limited institutional vision for perpetual peace. See V. Perju, 'Cosmopolitanism in Constitutional Law', (2013) 35 Cardozo Law Review 711.

out hierarchy.[17] But, since the political and psychological foundations of democratic self-government require predictable and reliable stability, harmonization cannot result from accidental, and thus essentially fleeting, overlaps of interests; it must, in some reliable way, rest on rational grounds.[18]

What, then, are the rational grounds for individuals' attachment to their nation-states? Habermas's answer carries all the baggage of the unresolved tensions of this theory of constitutional patriotism[19], only heightened now by the more fundamental perspective from constituent power. His answer is that nation-states must be seen as constitutional states, that is, statist political formations that have reached a specific normative understanding about justice and equality and whose political practices and institutional structures entrench the lessons of those collective

[17] Such harmonization poses difficult questions about timing, method and outcome. Habermas says little to clarify these matters, other than to point out that 'from the perspective of democratic theory, the agreement by the two sides to cooperate in founding a constitution opens up a new dimension.' See J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible', (2015) 21 European Law Journal (4): 546-557. But, since this new dimension also does not allow for hierarchical prioritization, the conflicts between the constitutive parts and the ensuing need for harmony is simply replicated at that new dimension.

[18] While this need not imply the exclusivity of rational grounds, it does mean that, as Jan-Werner Müller has put it, "cognitive elements will predominate." Furthermore, I believe that the need to stabilize split identity requires that the cognitive elements be even more predominant in the case of dual political identity than under Habermas's general account of constitutional pluralism, which posited a unitary self. See J-W Müller, 'A General Theory of Constitutional Patriotism', (2008) International Journal of Constitutional Law 6: 72-95, 86.

[19] Habermas formulates that account in J. Habermas, *The Inclusion of the Other* 105-127 (MIT Press 1998); J. Habermas, 'Why Europe Needs a Constitution', (2001) 11: 5-26 New Left Review 7; J. Habermas, *Between Facts and Norms* (MIT Press 1996).

learning processes. The next sections take up the normative makeup of the constitutional state. Here I address the centrality of the regime-type to the dual sovereignty thesis.

Conceptually, it is possible to distinguish between a normative core common to all constitutional states and the particulars of one's own nation-state. But how can individuals as citizens of nation-states make that distinction? One option is to envisage a version of political literacy whereby citizens reflect on the historical development of the state as a form of political organization, strive to separate historical contingency from normative principle, and place their attachment with 'the'- as opposed to 'their' - constitutional state. What complicates this process is the issue of identity attachment. Since the preservation of nation-states applies to particular, nationally bounded political communities, individuals as members of these nation-states have, and presumably share among themselves, a sense of the worth and accomplishments of their specific political community. They can be rationally committed to the deep principles of the constitutional state as well as, simultaneously, attached to the specific embodiment of those principles in time and space, within each particular political community. Individuals *qua* members of nation-states want to bring to the process of European integration the specific ways in which their cultures and traditions give meaning to the general principles of the constitutional state. Conversely, in that capacity, individuals also expect that European integration should not endanger their polity's ability to live by its specific interpretation, which is part of their national political identity. One might therefore be excused for thinking that dual sovereignty is compatible with at least a modicum of national specificity.[20]

[20] This is a compelling interpretation of Habermas's earlier account of constitutional patriotism. See F. Michelman, Morality, Identity and 'Constitutional Patriotism', (2001) Ratio Juris 14 (3): 253-271 (char-

Yet Habermas is uneasy with this approach. He insists that the object of individuals' attachment as members of their nation-states is their nation state *qua* constitutional state. Valuing instead the concrete historical nation-state would be 'to confuse [the principles of the constitutional state] with one of its context-bound historical modes of interpretation.'[21] Why? As far as one can tell, there are are at least two main reasons. First, because particularism distracts from the emphasis on individuals as the bearers of popular sovereignty. When political identity attaches itself to the preservation of the culture of a particular community, there is of a shift away from the individuals to the collective of that political community. Yet, it is not entirely clear how to gauge this risk with the tools that dual sovereignty makes available. It seems perfectly consistent with this approach to cluster individuals within the collective political communities to which they belong. One of their two identities is that of citizens of their nation states, sufficiently distinct from other peoples, and desiring to preserve that difference as they see it reflecting the normative accomplishments of their particular states. Individuals do not lose their individual identity by virtue of belonging to a particular community, or else they could never be the dual sovereigns that Habermas posits them to be.

The second argument against particularism is the risk of distraction from constitutional principle. Even when forms of culture develop originally as specific interpretations within a po-

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acterizing Habermas's account, and engaging it, in the terms of the political community's concrete – rather than abstracted – ethical character).

[21] This is Habermas's critique of Ernst-Wolfgang Böckenförde, in J. Habermas, *Between Facts and Norms* (MIT Press, 1992). This process of abstraction is similar in nature to the process that led to the formation of nation-states. See J. Habermas, 'Why Europe Needs a Constitution' (2001) 11: 5-26 New Left Review 16 (arguing that the 'emergence of national consciousness involved a painful process of abstraction, leading from local and dynastic identities to national and democratic ones').

litical community of abstract principles of self-government, a focus on the particular nation-states risks obscuring their origins as derivative from normative. From that point on there is only one small step across the Rubicon as such identitarian versions of collective-based argument coming perilously close to nationalism. This is the specter of nationalism in its myriad pathological forms that explains Habermas's urgent rejection of particularism.

But looming nationalism is less a ground for rejecting the particularism of nation-states than a fear of the possible implications of failing to reject it. Put differently, the question is not if the risk of nationalism is real, but, rather, if dual sovereignty is able to eliminate or mitigate that risk. I believe its resources are quite limited. The reason is that particularism lurks behind a core assumption of dual sovereignty: that the constitutional state must be a nation-state. Habermas makes the normative accomplishments of constitutional states parasitic upon the institutional form of the nation-state so that the imperative that 'the democratic-constitutional structure continue to exist intact in the future Union'[22] becomes the *sine qua non* condition for attaining the normative goals. The crucial implication is that the European Union, which is not a nation-state, cannot therefore be a constitutional state.[23] At no point does Habermas entertain the possibility

[22] J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible', (2015) 21 European Law Journal (4): 546-557, 554.

[23] Far from outlandish, this possibility has been part of the long and venerable tradition of theorizing the constitutional nature of the European. Many scholars of European integration have argued that the EU is in the process of becoming, and thus has the capacity to become, a state. See F. Mancini, 'Europe: The Case for Statehood', (1998) 4 (1) European Law Journal 29-42. For a more recent and comprehensive argument, see G. Morgan, *The Idea of a European Superstate: Public Justification and European Integration* (Princeton, 2007). But see N. Walker, 'Constitutional Pluralism Revisited', (2016) 22 (3) European Law Journal 333-355, 344 (arguing that 'proponents of the federalist version of the EU have long insisted that the appropriate form of federal compact for the EU is not a European federal state') (emphasis in the original).

of the EU as a constitutional state. In fact, that possibility would undermine dual identity as a core tenet of dual sovereignty. To explain, if the normative accomplishments of the nation-states *qua* constitutional states could be protected at the supranational level, then, as far as constituent power is concerned, the task for individuals *qua* citizens of the EU will be to set out the normative parameters of that protection. Whatever those parameters, the broader implication of pursuing that task would be to leave the political identity of citizens as members of their nation-states, at least insofar as that other identity makes a claim to autonomy from the supranational identity, without a political agenda. Emptied of normative content, the national political identity would be replaced by the all-absorbing political project of a supranational constituent power.

## 3. DUAL SOVEREIGNTY: NATIONAL VERSUS SUPRANATIONAL

The unresolved tensions around this split political identity have far-reaching implications for the dual sovereignty thesis. Consider the temporal aspects of Habermas's theory. In his account, individuals seek the 'conservation of the normative substance that their national democracies already historically embody.'[24] One temporal dimension of their judgment is retrospective; it focuses on the preservation of what states have 'already achieved.'[25] This claim is not historical in nature, as it is implausible to refer to nation-states such as Germany or Italy at the EU's constitutive moment as 'guardians of freedom' whose normative accomplishments ought to be preserved.[26] The claim is, rather, one of rational reconstruction.[27] Individuals as holders of popu-

[24] J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible', (2015) 21 European Law Journal (4): 546-557, 556.

[25] Id.

[26] If anyone's memory needs to be refreshed, Friedrich Reck's diary is a good place to start. See F. Reck, *Diary of a Man in Despair* (New York Review Books, 2000). And, while at it, consider the following ru-

lar sovereignty are rational actors whose motivations are retrospectively reconstructed to demand the preservation of what they, through collective learning processes, know to be within the realm of their nation-states' normative potential.

The temporal dimension of this reconstruction is complex. Judgments about the accomplishments of the state are judgments that, even when rationally reconstructed, occur by definition at the moment in time when political authority is being constituted. The dual sovereignty thesis is about the co-original nature of the double moment of constituting power. However strong the impulse to compress historical duration, the moment at which power is constituted is an inflection in time that cannot be extended indefinitely. Concessions to temporality come with the territory of constituent power.[28] This reveals the dual temporality of the judgment of individ-

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mination, dated October 1940: 'The idea of a united Europe was not always upheld by me, but I know now that we can no longer afford the luxury of considering it a mere idea. Europe must either make any further wars impossible, or this cradle of great ideas will see its cathedrals pulverized, and its landscape turned into a plain.', at 106.

[27] It has been argued that this type of retrospective reconstruction is a common feature of contemporary accounts of constituent power. See N. Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order', (2015) 1 I-CON Working Paper Series (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430128), at 6 (arguing that constituent power today 'operates through the — retroactive — attribution facts to a socially constructed collective self.'). Such is, unsurprisingly, the style of normativist approaches to constituent power. See M. Loughlin, 'The Concept of Constituent Power', (2014) 13 European Journal of Political Theory (2): 218-237, 221-223 (describing the normativist approach to constituent power, and it to decisionism as well as to the author's preferred approach, relationalism).

[28] Hans Lindahl identifies the same feature but embraces the paradox, in H. Lindahl, 'The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union', (2007) 20 (4) Ratio Juris 485-505, 496 ('The "re" of representation does not refer to what supervenes or follows an original present and presence, a "now" in which a community constitutes itself as a community in the plenitude of a sim-

uals as citizens of nation-states about the preservation of the constitutional state. In addition to the retrospective embrace of the normative accomplishments of the constitutional state, individuals also prospectively anticipate, first, that those accomplishments could be endangered at the supranational level and, second, that, if protected from such threats, nation-states could remain a site where past accomplishments could be at least preserved, if not even amplified.

The difficulty with this view is not temporality as such.[29] Rather, it is the asymmetry of normative expectations in the construction of dual political identity. The asymmetry is between how individuals as citizens of their nation-states relate to their states, and how individuals *qua* citizens of the EU relate to the EU. Specifically, individuals assume the best about what their states are and will remain — namely, guarantors of the level of justice and freedom, political sites that foster solidarity.[30] At the same time, they assume that the supranational union cannot become a primary site within which any such guarantees could be secured. This reflects a signif-

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ple presence to itself. Instead, and paradoxically, an act *originates* a community through the *representation* of its origins.') (emphasis in the original)

[29] The temporal aspects of constituent power have been the object of scholarly reflection. See, e.g., A. Somek, 'Constituent Power in National and Transnational Contexts', (2012) 3 (1) Transnational Legal Theory 31-60, at 35-36 (discussing the temporality of constituent power: '[a] successful act of constitution is possible only if successive acts engage with one another… The intertwinement of acts is possible if those finding themselves confronted with the expectation to act as members of a collective body "retroactively" comet to accept this attribution "by exercising the powers granted to them by a constitution"', at 35.). See also M. Patberg, 'Constituent Power Beyond the State: An Emerging Debate in International Political Theory', (2013) 42 (1) Millennium: Journal of International Studies 224-238, 231 (identifying retrospective and prospective ascriptions as part of the normative dimension of constituent power).

[30] J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible', (2015) 21 (4) European Law Journal 546-557, 554.

icant asymmetrical preference for nation-states over the supranational Union. [31] The dual sovereignty thesis provides no justification for this asymmetry, which is not altogether surprising since facing this tension would reveal a deep normative problem: namely, that it is irrational for individuals as citizens of the EU to participate in the constituent process in the terms laid out by the dual sovereignty thesis. The asymmetry of normative expectations has the effect of introducing a structural rule of priority that violates the premise of equality between the two sovereigns. It is irrational for individuals in their supranational capacity to accept that role. In fact, their participation would be rational only if the task they set for themselves at the constitutive moment is to work out how the European Union can preserve the accomplishments of the constitutional state. But, as we have already seen, that task conceivably makes the nation-state dispensable and thus undercuts the necessary duality of sovereignty.

Suppose, however, that it is possible to justify the asymmetry of political expectations on prudential, rather than normative, grounds. Habermas urges the 'conservation of the normative substance that our national democracies already historically embody.'[32] The argument takes the following form: since it cannot be definitively shown that similar accomplishments cannot be delivered at the supranational level, nor can it be doubted that a similar level has not already been reached at the supranational level, it is simply wise, according to this interpretation, to protect the existent accomplishments of the nation-stated. With the hard-fought accomplishments of

[31] This is similar to debates about judicial review whose supporters assume the best about courts and the worse about legislatures. For a discussion and critique of asymmetries in that context, see J. Waldron, 'The Core of the Case against Judicial Review', (2006) 115 Yale Law Journal 1346.

[32] J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible', (2015) 21 (4) European Law Journal 546-557, 556.

the constitutional state on the line, risk-aversion demands holding fast to national identity, which must not be subsumed to supranational identity.[33]

Dismantling this claim will require a more thorough investigation of just what Habermas believes are the normative accomplishments of the constitutional state. Before proceeding to that analysis, it is worth pausing over the internal structure of the argument. First, a particular historical moment in the development of European integration is selected, without any underlying account of what makes that moment stand out in relation to other previous or subsequent moments. Then accomplishments are identified for which the nation-state receives full credit, and the role of supranational contributions is obscured. And, importantly, the theory takes the dynamic of that moment - a questionable interpretation of a fleeting historical moment - to provide sufficient ground for theorizing the normative dynamic between the national and supranational levels and, through it, the transnationalization of democracy in Europe. Underlying this problematic method is the need for stability, by itself unsurprising given the inherent instabilities of dual identity, and the willingness to meet that need by ascribing stabilizing traits to an artificially depoliticized status *quo*.[34] The price, however, will be steep. It will come as a reversal of equality between the dual identities on which the dual sovereignty thesis is premised. The reversal takes the form of implicitly prioritizing the attachment to one's national political community over supranational identity, thus undermining the latter's viability and stability. Even more importantly, the reversal

[33] See, e.g., Albert Hirschman, The Rhetoric of Reaction: Perversity, Futility, Jeopardy (Harvard, 1991).
[34] This is similar to the mistake for which Habermas chastises authors who failed to decouple state sovereignty and popular sovereignty, namely the mistake of 'overgeneralizing a contingent historical constellation and obscures the artificial, and thus floating, character of the consciousness of national identity constituted in nineteenth century Europe', in J. Habermas, *The Crisis of the European Union* 17 (Polity, 2012).

fails to acknowledge the new institutional forms that the protection of "higher freedom" may now require.

## 4. Rights and Self-Determination in the Constitutional State

The philosophical core of dual sovereignty aims to protect the normative make-up of the constitutional state. Habermas rejects the hierarchical subordination of the national to the European supranational structure as compromising the normative integrity of nation-states, specifically the political institutions and communicative processes that have been established around a particular kind of collective self-determination. European nation-states are constitutional democracies of a certain type. The European *Sozialstaat* gives institutional expression to a particular understanding of political freedom where 'no one is free as long as the freedom of one person must be purchased with another's oppression.'[35] Therein rest the normative anchors of practices of mutual recognition and of material redistribution whose cumulative effect is the creation of the social solidarity that allows individuals the benefit of the 'fair value'[36] of their rights. Social solidarity is the hard-fought result of protracted and painful learning processes that have been unfolding within the institutional and normative framework of nation-states. Those accomplishments — the 'free and relatively equitable and socially secure living conditions'[37] — would be at risk of dissolving if the social texture that underpins the constitutional state caved under market pressure. [38]

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[35] J. Habermas, *Between Facts and Norms* 418 (MIT Press, 1992).

[36] See J. Rawls, *Political Liberalism* (Harvard, 1996).

[37] See supra note__.

[38] For a formulation from the perspective of systems theory, see H. Brunkhorst's formulation in 'The European Dual State: The Double Structural Transformation of the Public Sphere and the Need for Re-

This approach has two component parts. One part involves the role of rights in a political community's project of democratic self-determination; the other concerns the question of the fair value of those rights. I discuss the first aspect here and take up the question of fair value, with its implications about social solidarity and material redistribution, in the next section.

One important lesson of Habermas's larger body of work is that rights are not only shields or swords through which individuals relate with the institutions of their constitutional democracy. They are also repositories of the lessons learned during that democracy's hard-fought struggles for recognition. Consider the transnational aspect to how those repositories come into existence. Habermas, who is not a methodological nationalist in constitutional construction, argues that constitutional democracies are not closed to one another but rather are interlocked in a process of mutual co-dependence.[39] Normative forces internal to constitutional states make constitutional developments in each jurisdiction relevant to the experiences of self-government of other jurisdictions. For instance, the duty of responsiveness that constitutional states owe to their individuals as sovereigns requires that political institutions set in place mechanisms that provide

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Politicization', in J. Přibáň (ed.), Self-Constitution of European Society: Beyond EU Politics, Law and Governance at 244 (Routledge, 2016) (discussing the need to prevent the 'usurpation of the constituent power by the economic system' at the supranational level.). Concerns about how 'executive federalism' undermine political self-government are among the primary motivation for Habermas's transnationalization of popular sovereignty. See J. Habermas, *The Crisis of the European Union* viii (Polity, 2012) (identifying the threat that the kind of 'executive federalism of a self-authorizing European Council of the seventeen [members of the Eurozone, my note] would provide the template for a post-democratic exercise of political authority.'].

[39] Habermas does not develop these matters at great length. What follows in this and next paragraph is my own account that, while not derived from Habermas's, is perfectly consistent with his views. See V. Perju, 'Cosmopolitanism and Constitutional Self-Government', (2010) 8 International Journal of Constitutional Law (I-CON) 326-353.

clear channels of communication between the state and its citizens. Transjurisdictional mutual co-dependence is part of those constitutional mechanisms of self-correction. Given their common political commitment to the creation of free communities of equals, constitutional orders that stand alongside one another are a repertoire of normative frameworks within which different dimensions of common commitments — equality, autonomy, dignity — are revealed and can be explored. The experiences in self-government of other political communities can reveal dimensions of these values that discrete historical developments oftentimes obscure. In practice, of course, questions of institutional capability and technological prowess, among others, determine the modalities and extent of inter-systemic communication. But, the point is that the openness of constitutional orders to one another is not contingent. It is, rather, anchored in the very normative core of the constitutional state.

As they relate to one another, constitutional orders must account for variations in how each jurisdiction interprets shared normative commitments. The French interpretation of freedom of religion or anti-discrimination on the basis of sexual orientation is very different from the Italian interpretation, to take one example. Each system must rationalize for itself that difference if it is to preserve its normative openness toward one another constitutional states. Glossing over nuance, assume that the most usual answer explains variation as points on a spectrum of reasonable interpretations. For reasons that might be labelled burdens of (institutional) judgment, and which include particularities of historical development, different legal traditions, varying cultural backgrounds, each system give specific - and, at the inter-systemic level, conflicting - meanings to its broad, fundamental rights guarantees. This explanation allows each state to perceive the other interpretations of common guarantees as reasonable, even if different from its own.

Add to this the European supranational dimension and consider how each municipal jurisdiction relates to the interpretation of rights at the supranational level (leaving aside for the moment the problem of hierarchy). Supranational interpretation would be a threat if it fell outside the range of reasonable interpretations. This could not be because the protection of fundamental rights fell outside of European Union's goals or competencies, since the opposite has long been recognized.[40] More likely, the reason why supranational interpretation falls short has to do with the importance of the task of securing the protection of fundamental rights to its self-governing citizens, through certain procedures that all reasonable persons count as fair, which is so momentous that each jurisdiction understandably seeks to preserve it within its own jurisdiction. In the above example, the meaning of freedom of religion is too important a matter of collective self-government to grant a transfer to the supranational level.

This formulation, particularly the meaning of 'transfer', might rub the reader as vague. I will tighten it up shortly, but its vagueness helps to make the following point. If the protection of fundamental rights is by definition superior within each national jurisdiction, then national jurisdictions would be entitled to normative closure not only from supranational protection but also from other national jurisdictions. The spectrum of reasonable interpretative positions would be reduced to the one interpretation, that reached by the sovereign political community itself. The point is that if citizens have rational grounds to fear the supranational level, those same grounds would suggest that they should be fearful of one another. But a constitutional mindset where each political community can only trust its own judgment is incompatible with the normative

[40] Even before such protections were codified in the Treaties, once both the European institutions and national constitutional courts acknowledged that fundamental rights are parts of the European legal order. See Solange II, 22 October 1986, BVerfGE 73, 339, [1987] 3 CMLR 225.

openness that each constitutional state must display toward other constitutional states. Conversely, if national jurisdictions within the EU can trust one another, there is no reason to want to maintain the national level as the sole or final guarantor of any kind. For the same reasons they trust one another, they equally trust the supranational level.

Unless the argument is that, by itself, a plurality of jurisdictions enhances the protection of fundamental rights. This familiar argument can take one of two forms, neither of which is particularly convincing. First, a plurality of jurisdictions might offer an additional safeguard for the protection of rights. In this view, supranational delegation of the protection of fundamental rights leaves individuals vulnerable to the risk of authoritarian abuse. But this argument restates the implicit preference for nation-states that we identified in the previous section. That risk allocation requires an account of why the likelihood of abuse is greater (and the protection from it is more difficult) at the supranational level than at the national level. The argument that European supranational institutions are waiting to unleash the forces of the market upon the defenseless citizens of the EU's member states cannot win by stipulation. European nation-states have perpetrated both vicious and subtle, and in either case abhorrent, abuses on their own citizens during the long twentieth century. The superiority of nation-states as defenders of rights cannot be taken for granted. As far as risk-gauging is concerned, there are risks on both the national and supranational sides.

The second version of the argument holds that a plurality of jurisdictions is preferable since lateral communication within national constitutional orders leads to improved understanding of the demands of rights. The advantage comes here from the existence of a plurality of jurisdictions, with the implication that, if that plurality is outpaced, as it would be if the supranational level were hierarchically superior, an important correction mechanism becomes unavaila-

ble to national constitutional democracies. But this is at best an exaggeration. Even under the current system, one in which municipal jurisdictions engage in normative lateral communication, final decisions about how to direct the coercive force of public authority are made by domestic institutions. National judges remain the filter for all decisions of authority. Furthermore, if the municipal institutions of the European nation-states were to be united through some form of fusion, legal practice under the newly created institutions could certainly find ways of translating the rich diversity of the past. Arguably, fusion at the EU level would not need to monopolize the task of right-interpretation from political units at the lower level. And, while the plurality of national states would not continue within the European structure, it would continue outside of it. Europe is not the world, and there would be constitutional states in other parts of the world alongside which the newly formed European political structure would coexist and to whose experiences in self-government it would relate.

I have argued that the protection of fundamental rights at the European level is no less out-of-range, at least *a priori*, than the protection afforded within different national constitutional orders. This, one can object, might be true but it is still not convincing as an account of why the members of a political community would endorse and live by those alternative interpretations. Even if reasonable in itself, the interpretation on the basis of which rights are protected at the supranational level are not *their* interpretation, that is, an interpretation their own community has reached through on its own. The point is that, whatever else it might mean, democracy fundamentally means self-government. In the same way that the French are free to reject the German's interpretation of the right to freedom of opinion as reasonable in itself but still different from the French, so the same would be true about how members of a national political community would

relate to the European interpretation. What matters, in this view, is not objective reasonableness, but the self-determination of a political community.

This is an important insight. But is an insight about the importance of self-determination, which should not replicate the normative asymmetry that tacitly positions nation-states above the European Union in Habermas's account. Let me explain. Consider the reconstruction of constitutional patriotism as attachment to constitutional culture. According to this view, which seeks to mediate between universal norm and particular context, citizens form attachments to the "kinds of conversations, controversies, and disagreements" that constitute the process of mutual justification of the terms of collective self-government, including the interpretation of rights.[41] The abstract norms and principles of a political community become appropriated as the norms of that specific community as they enter a public process of meaning specification. So deep is that process that it ought to be called 'cultural', and so important it is that itself becomes the object of attachment of the members of a political community. Now, this account may or may not be convincing as an account of constitutional patriotism. But its relevance and force as an account of constituent power, especially one that splits the identity of the sovereign, is a separate matter. The difference has to do with taking the state for granted as an existing political unit.[42] This assumption of the state can be built-into the account of constitutional culture as an account of constitutional patriotism, but its role cannot be same in the dual sovereignty account of constituent power. The task for citizens in their supranational capacity is how to conceive of self-government at the European level. With that question as the agenda for constituent power, failure of the constituent process would be preordained if the process had to proceed from the premise

[41] J.-W. Müller, 'A General Theory of Constitutional Patriotism', (2008) International Journal of Constitutional Law 6: 72-95, 82.

[42] Id at 76.

of a thick conception of constitutional culture within the existing political structure of the nation-state. The self-constitution of the EU requires the constituent power to take up the central task, which is the articulation of the normative foundations of the mechanisms of self-determination at the supranational level. At that constitutive moment, and given the task they have set for themselves, individuals ought to be free not to reject placing the protection of rights, which I take to include not only the specific application of rights but also the cultural, deliberative processes of rights interpretation, at the supranational level.

## 5. REVISITING THE CONSTITUTIONAL STATE: THE *SOZIALSTAAT*

As members of their nation-states, individuals seek to protect the accomplishments of the constitutional state. Securing the living conditions and educational opportunities that are 'preconditions for effective democratic participation'[43] is one of the historical accomplishments of European states post-World War II as they created systems of economic redistribution. It is a longstanding critique of European integration that it poses a deadly threat to national welfare projects on this front, which would stand no chance in the face of market forces unleashed by supranational institutions. While, at first glance, it might look as if using redistributive policies to preserve nation-states runs counter to Habermas's post-metaphysical liberalism for pluralist societies[44], a better reading shows that at issue are the deep foundations of redistribution, specifically the risk that the social bond nurtured by the *Sozialstaat*'s conception of autonomy would unravel once decoupled from the institutional structure of the nation-state. Such a development would

[43] J. Habermas, 'Why Europe Needs a Constitution', (2001) 11 New Left Review 11: 5-26, at 4.

[44] See G. Morgan, *The Idea of a European Superstate: Public Justification and European Integration*, 85-88 (Princeton , 2007).

lead to the 'fragmentation of the care for the common good,'[45] and undermine the conditions that make consideration of the public good a political necessity (and perhaps even an option). The erosion of solidarity undercuts redistributive policies and can lead to the demise of the European model of social integration. Individuals as citizens of their nation-states understand that not any version of European integration is defensible, and, accordingly, see the version that undercuts their states as guarantors of social solidarity as indefensible.

One could, of course, find this development plausible and support the project of European integration, as Hayek did[46], precisely for its capacity to unravel the thick solidarity that supports material redistribution. But how should one less inimical to redistributive policies relate to the project of European integration?

This is an important, and indeed pressing question, as recent developments make all-too-clear. Recall only the Irish and Portuguese bail-outs ('voluntary' in the Inquisition sense of the word[47]) or Greece's crucification to the altar of austerity, to grasp the magnitude of the risks of governance by 'executive federalism.'[48] The risk is compounded once these policies are interpreted against the background of the remarkable accomplishments of the European postwar order. Social democracy became a model in which society was neither 'an adjunct to the market',

[45] E.W. Böckenförde, 'Which Path is Europe Taking?' (1997), included in M. Künkler and T. Stein (eds.), *Collected Works of Ernst-Wolfgang Böckenförde* (forthcoming, Oxford, 2017).

[46] F. Hayek, The Economic Conditions of Interstate Federalism', Free Press, 1948) *Individualism and Economic Order*, 255-272.

[47] This is Gavin Hewitt's perceptive depiction, in G. Hewitt, *The Lost Continent* 246 (Hodder & Stoughton, 2013).

[48] This is a term used in J. Habermas, *The Crisis of the European Union* 35 (Polity, 2012), and contrasted with transnationalized democracy.

as Karl Polanyi had warned[49], nor was the market's liberating social effects stifled by unmovable social structures. The result was, as Berman put it, 'the most successful ideology and movement of the twentieth century: its principles and policies undergirded the most prosperous and harmonious period in European history by reconciling things that hitherto seemed incompatible — a well-functioning capitalist system, democracy and social stability.'[50] The accomplishments of that political model translated into constitutional goods now endangered by European integration.

Now, as far as dual sovereignty is concerned, the risks to social solidarity ought to be assessed from the specific perspective of constituent power. And so it is important not to gloss over nuances in how the social democratic model was supposed to work in theory and how it actually worked in practice. One should especially not exaggerate the levels of solidarity that European postwar nation-states have achieved. In his earlier work, Habermas was rightly critical of nation-states on this front.[51] Yet in moving from the national to the supranational, he succumbs to reductionist tendencies. The resource of his reductionism is not Habermas's propensity to operate with ideal types, but rather the unbalanced idealizations that, I argue, end up imposing unreasonable burdens on the supranational level. The dual sovereignty thesis makes assumptions about

[49] K. Polanyi, *The Great Transformation* 52 (Beacon Press, 1957).

[50] S. Berman, *The Primacy of Politics: Social Democracy and the Making of Europe's Twentieth Century* 6 (Cambridge, 2006).

[51] See J. MacCormick, *Weber, Habermas and the Transformation of the European State* 200-201 (University of Chicago, 2007) (pointing out Habermas's reliance on Foucault's critique of bureaucratization and normalization in the *Sozialstaat*).

redistribution and solidarity that are too demanding even for the traditional nation-state to meet.[52]

Consider Habermas's own account of how social solidarity came about within nation-states. The dual sovereignty thesis describes circularly social solidarity as created by welfare policies that themselves depend on the existence of a strong social bond. This is a vicious circle that Habermas breaks through the formative role of political institutions. He distinguishes between social integration and political integration, and shows how the latter created the former in the context of nation-states.[53] The implication is that one cannot bemoan the lack of social solidarity if the political institutions necessary to bring it about are not in place. Equally importantly, the existence of social solidarity should not be interpreted as the natural or organic expression of a special society; but rather as the successful outcome of that society's political institutions operation over time. But what is true at the national level is also true at the supranational level: the establishment of supranational political institutions can precede the creation of the underlying solidaristic social basis (including media of communication), or at least a lack of such basis should not hamper the political institutional project.

More importantly, social welfare reveals another unresolved tension in the dual sovereignty thesis. To see it, assume for now that nation-states have accomplished (idealized) social solidarity within their borders and that this accomplishment together with the related constitutional conception of the self are strong reasons why their citizens wish their preservation, as well as the preservation of their own identity as members, even after creating the EU. Having secured

[52] Id. at 287 ('Notwithstanding Habermas's best intentions and efforts, democracy in a supranational age could never stand up to criteria derived from a democratic past that never existed.')

[53] J. Habermas, *The Lure of Technocracy* 38 (Polity, 2015).

this constitutional good, nation-states find themselves co-existing alongside the European Union. The harmonization of the dual identity of sovereign individuals, who have co-originally created the two levels of government, requires a certain normative continuity between the political and constitutional structures of these two orders. Assume further that Habermas is right about the *Sozialstaat* conception of autonomy within the former context ('no one is free as long as the freedom of one person must be purchased with another's oppression'[54]), a version of the same would have to be the case in the European context. Unless that is the case, harmonization processes between the two parts of one's identity would prove difficult. But autonomy will develop this layer of interdependence at the European level presumably only under conditions of social solidarity that are different but still comparable to those in effect at the national level. So, social solidarity would have to develop at both the national and European levels; the very viability of the project of self-determination at either level would depend on that development.

Now, Habermas is of course well aware that the European supranational project cannot succeed without transnational solidarity - which is to say that European identity, as one dimension of the dual political identity, lacks viability without the mechanisms to structure the supranational polity. His proposals for the creation of a European public sphere, including but not exclusively through the use of European media, the reform of European institutions, most importantly by disempowering the European Council and continuing the empower the European Parliament, attempt to create the institutional structure where that form of solidarity can take root. But the dual sovereignty thesis lacks the insight that the simultaneous development of social solidarity at both levels is conflict-ridden. If the material but, more importantly, symbolic resources from which solidarity grows are limited, the relation between national and European

[54] J. Habermas, *Between Facts and Norms* 418 (MIT, 1992).

projects is likely to be closer to zero-sum. The point is that the very existence of nation-states (as equals to the supranational Europe) is an obstacle to transnational solidarity. For as long as they will exist on equal footing with the supranational level, a state-of-affairs to which dual sovereignty is committed, nation-states will claim license to act in ways that will undermine the creation of sovereignty at the European level. Dual sovereignty downplays and generally glosses over the existential tensions between the two sovereigns because it is a severely depoliticized account.[55] Yet as soon as one replaces this distorting lens with one more attune to latent conflict, the current configuration of the constitutional relations between the Union and its members appears for what it is, namely the outcome of conflict. To take just one example, the EU has failed to create its own budget through direct taxation not because it is a supranational institution, but because nation-states mustered all their political influence to prevent that development. If conflict such as this is inescapable, then choices must be made between the national and supranational levels. To see how they are made, and what they are, we turn to European constitutionalism.

## 6. The Lessons of European Constitutionalism

European law holds the key to understanding the nature of the European project, Habermas claims, as he adduces principles of European constitutionalism -- from limited conferral to the requirement of unanimity in treaty amendments to the protection of national constitutional

[55] One among many. See, e.g., H. Lindahl, 'The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union', (2007) 20 (4) Ratio Juris 485-505, 494 (one of the features that distinguishes the EU from the US is that,European integration is not a zero-sum game: The presupposition of a European people, as the collective subject of the European legal order, does not exclude the presuppositions of European peoples, in the plural, as the collective subjects of national legal orders.')

identity -- as evidence for the dual sovereignty thesis. The gist of the interpretation is that European constitutional doctrine endorses a heterarchical, not hierarchical, relation between municipal and supranational law, which relate to each other as co-original and co-determinate equals. However, I argue that the principles on which Habermas relies are more ambiguous than he claims. A more nuanced interpretation of European law provides at best tangential support and, more often than not, undercuts the case for dual sovereignty.

One caveat is in order. While Habermas sees himself as a critic of the German Constitutional Court, at least post-*Maastricht*, the dual sovereignty thesis, and in particular his implicit defense of the nation-state, is influenced by the German Court's approach to the normative interface between municipal and European law. That approach has been criticized as a distortion of European constitutionalism[56], but it remains highly influential. However, my aim here is neither to offer a wholesale critique of that approach nor to flesh out an alternative account of European constitutionalism. I challenge only Habermas's claim that select principles of European constitutionalism provide support for dual sovereignty.[57]

Front and center in Habermas's account is the principle of limited conferral of powers. This principle limits EU legislative action to areas where nation-states explicitly or implicitly authorized EU institutions to act and only for so long as and until those states, either as a bloc or

[56] For an account of the German constitutional court's role in establishing the 'national-constitutional approach to European integration', see J. Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralism Movement', (2008) 14 (4) European Law Journal 389-422.

[57] This is, however, prolegomena to the larger descriptive case against constitutional pluralism. Neil Walker is, I believe, correct that a frontal challenge to pluralist accounts of European constitutionalism would have to include just such a descriptive dimension. See N. Walker, 'Constitutional Pluralism Revisited', 22 (2016) European Law Journal 333-355, at 346 (fn. 46). Few existing accounts engage constitutional pluralism on the descriptive front.

individually, do not withdraw such authority. National constitutional courts, Germany's most prominently among them, have pointed to limited conferral as evidence that nation-states have not given the EU a (constitutional) blank check.[58] This reading is correct: formally speaking, the powers of the EU institutions are limited and subject to oversight. The EU is in this sense like all other federal structures, which is to say that the principle of limited conferral is consistent with a logic of strict hierarchy of precisely the type that Habermas rejects in the European constitutional context.

The enforcement of limited conferral, and thus its practical effect, depend on its specific wording as well as on its interpretation over time. As the German Constitutional Court put it in its *Maastricht* judgment, supranational delegation must be structured in a 'manner sufficiently foreseeable to ensure that the principle [of limited conferral] is observed.'[59] And, the German judges famously concluded, the EU competencies meet that criterion. Interpreted against the background of decades of EU constitutional practice, that conclusion reveals how useful a fiction the principle of limited conferral can be. Indeed, one would be hard-pressed to offer a plausible interpretation of European constitutionalism, at least during the pre-Maastricht period, in which

[58] Where limited conferral has been useful is at the discursive level as an argument against the autonomy of the European legal order. Theorists have used limited conferral to argue that, formally speaking, European law derives all authority from conferral by its member states. As Kirchhof explains, '[t]he basis for the validity of EU law in Germany is the German Asserting Act. EU law reaches Germany as an area of application only across the bridge of the national Asserting Act. Where that bridge does not convey this EU law, it cannot, in Germany at any rate, develop any degree of legal force.' P. Kirchhof, 'The Balance of Powers between National and European Institutions' (1999) 5, (3). European Law Journal 226.

[59] Decision of the German Federal Constitutional Court of October 12, 1993 In Re Maastricht Treaty Cases 2 BvR 2134/92, 2 BvR 2159/92, at p. 16 (available here: http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/German%20ConstCourt%20Maastricht.pdf)

the application of limited conferral could be qualified as "sufficiently foreseeable." The European Commission consistently used the Treaty of Rome's open-ended provisions as well as the 'necessary powers' grant liberally. [60] The European Court of Justice endorsed that approach and, until well into the 1990s, it turned down just about every invitation to invalidate secondary legislation as *ultra vires*. Far from the neat demarcation one might expect if the application of limited conferral were indeed sufficiently foreseeable, one commentator noted in the mid-1990s that 'there is no issue area that was the exclusive domain of national policy in 1950 and that has not somehow and to some degree become incorporated within the authoritative purview of the EC/EU.'[61]

Of course, one should not exaggerate this point. The issue is not an exact tally of the division of competencies as much as the constitutional dynamic of allocation of competencies. Consider here the well-known case of fundamental rights. Relying on pre-*Maastricht* case-law of the Italian and German Constitutional Courts, Habermas finds support for dual sovereignty in the decisions of national judges to retain jurisdiction over secondary European legislation falling short of the fundamental rights granted by national constitutions.[62] The exercise of residual sovereignty by national courts qualified the European Court's claim to supremacy and revealed the

[60] Art 308 EC Treaty. For a discussion of how the Community institutions made liberal use of this provision as the legal basis for legislative measures, see J. Weiler, *The Constitution of Europe* (Cambridge, 1999) 55 n. 120.

[61] Schmitter, 'Imagining the Future of the Euro-Polity with the Help of New Concepts', in Gary Marks et. all (eds.), *Governance in the European Union* at 124 (SAGE , 1996). See also K. Laenarerts, 'Constitutionalism and the Many Faces of Federalism', (1990) 38 American Journal of Comparative Law 205, 220 (arguing that there is 'no nucleus of sovereignty that the Member States can invoke, as such, against the Community')

[62] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (German Constitutional Court); Frontini, Sentenza n. 183, 18th December 1973 (Italian Constitutional Court).

"necessarily bi-directional" nature of the doctrine of European supremacy.[63] Debunking this interpretation of European supremacy is a task for another day. For now, it suffices to point out that scholars have long cautioned against accepting the self-serving narrative put forward by national courts themselves, all-too-willing to show to their domestic audiences their power to shape EU doctrine.[64]

Still, one might think, what matters is not how national courts used their powers to review European legislation, but rather the fact that they gave themselves these powers in their first place -- and that their activation depended on their will. The sword of Damocles does its work while hanging in the air. Be that as it may, little danger comes from a sword that has never fallen and which, evidence shows, is too heavy to hold up in the air anyway. It cannot be irrelevant that, in over six decades of the practice of European constitutionalism, only in a handful of cases show national courts challenging the authority of the European Union. [65] The point is that, should

[63] J.H.H. Weiler 'The Community System: The Dual Character of Supranationalism' (1981) 1 Yearbook of European Law 268, 275 ("One dimension of supremacy is the elaboration of the parameters of the doctrine by the European Court. But its full reception, the second dimension, depends on its incorporation into the constitutional orders of the Member States and its affirmation by their supreme courts."). See also Bruno de Witte, Direct Effect, Primacy and the Nature of the European Legal Order, in Grainne de Burca and Paul Craig (eds.), *The Evolution of EU Law*, 351. ("There is a second dimension to the [primacy] matter, which is decisive for determining whether the Court's doctrines have an impact on legal reality: the attitude of national courts and other institutions.")

[64] See also G. Federico Mancini and David T. Keeling, 'Democracy and the European Court of Justice', (1994) 57 Modern Law Review 157, 187 ("It would be an exaggeration to say that the European Court was bulldozed into protecting fundamental rights by rebellious national courts.")

[65] For one such case, originating from the Czech Constitutional Court, in response to the European Court of Justice Case C-399/09 Landtová. For an analysis, see J. Komárek, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires', (2012) 8 European Constitutional Law Review 323. For a recent example of disobedience, see the

such challenges become more common, that change would amount to a paradigm shift away from the past version of European constitutionalism and toward another vision. Perhaps dual sovereignty would capture the new paradigm. What it does not capture, however, is the model of European constitutionalism over the past six decades.

It is perhaps possible to interpret Habermas's account as evidence that such a shift is underway. He mentions the protection of national constitutional identity as evidence of the constitutional implications of dual sovereignty. At issue here is the explicit commitment that EU institutions have taken, as early as Maastricht but in a fuller form in the Treaty of Lisbon, to commit the national identity of its member states.[66] This provision has been interpreted to show the coexistence as equals of the municipal and European legal orders.[67] And yet, a closer analysis suggests an alternative interpretation. First, national identity receives recognition when – and, arguably, precisely because – it coexists along other doctrines of European constitutionalism that neutralize it. For instance, the values mentioned in Article 2 TEU, which Europeanizes the basic constitutional structures of the EU member states, restrict the reach of national identity. Secondly, the effect of incorporating the protection of constitutional identity into the Treaty is that the concept of constitutional identity one of EU law. If pressed by member states to protect extreme

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case of the Danish Supreme Court, in Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A (at: http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf).

[66] Article 4 (2) TFEU.

[67] See e.g. L. Besselink*, National and Constitutional Identity Before and After Lisbon*, (2010) 6 (3) Utrecht Law Review 36, 48 (remarking that ‚the provision of Article 4(2) EU forms an important qualification of the rule on the primacy of EU law, and a modification of the case law under Costa v. ENEL').

political and constitutional practices, the ECJ will likely invoke the need for effectiveness to affirm its hermeneutic monopoly over that concept.

Not that such pressures are in the offing. National courts, supposedly empowered by the protection of national identity, have been rather flummoxed by the task of spelling out the elements of their constitutional identity. The elements they have subsumed under the rubric of identity — 'inalienable human rights'[68] or 'the rule of law'[69] — are trite and strategically articulated at high level of abstraction. The one clear exception from this trend has been the German Constitutional Court. In its *Lisbon* judgment, the Court drew red lines over what areas ought to remain within the exclusive competence of the German *Staat*.[70] It is too soon to tell if the effectiveness of 'identity review' will have to be as qualified as that of the Maastricht-era '*ultra vires* review.' Regardless, the protection of national identity hardly provides support for the dual identity thesis. As the German origins show, the principle makes the European legal order derivative of national

[68] Id, at 1436.

[69] Czech Constitutional Court Case Pl. US 50/04 (8 March 2006); Case Pl. US 66/04 (3 May 2006). For a French example, see French Constitutional Council, Information Society Case 2006-540 (27 July 2006). In later cases, the Czech court refused to list non-transferable competencies or identify a core of the constitution Treaty of Lisbon II, Czech Constitutional Court Case Pl. US 29/09, para 11.

[70] GFCC, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html ('particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)').

law, rather than co-original. And that derivative nature is no accident; it is normatively continuous with the logic of constitutional identity.

Habermas also mentions two other doctrines of European constitutionalism. The first is the requirement of consensus among member states for changes to the Treaties. Habermas points out that, unlike in the United States, where under the terms of Article V a majority (not unanimity) of states must approve constitutional amendments, all EU member states must ratify a new constitutive treaty. States retain a veto over treaty changes, which Habermas sees as evidence of heterarchy.[71] That interpretation is questionable. What Habermas calls amendments are, formally speaking, new treaties. And, as new treaties, they must be valid under international law, which grounds obligation in the consent of each state-party.[72] While there remains a difference if one compared that system to the US's, that difference is a function of the particular historical trajectory by which the EU came about as an international organization created by sovereign states under international law.[73]

Similarly, one should be cautious about interpreting Lisbon now-famous Art. 50 TEU, which gives member states the option of exiting the EU, as evidence that the EU is not a federal structure. How much residual sovereignty the departing member state must have or be willing to use in the exercise of Article 50 is a matter of constitutional politics and constitutional legal design whose clarification must await the unfolding of the Brexit saga. At a general level, however,

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[71] J. Habermas, *The Crisis of the European Union* 26 (Polity, 2012); J. Habermas, *The Lure of Technology* 36 (Polity, 2015).

[72] *But* see Mattias Kumm, supra note 7, at 702 (challenging the consent of states paradigm in international law). For a similar argument, see Ronald Dworkin, A New Philosophy of International Law, 41 Phil. & Public Affairs 2 (2013).

[73] In addition, qualified majority, not unanimity, is in many areas the voting rule for secondary legislation, some of which can claim quasi-constitutional stature.

it helps to separate contingent from necessary structural features. In some federations, secession rules are court-made.[74] In the EU, the masters of the Treaty intervened through Art. 50 to fill in a space that the ECJ had not claimed for itself. The reason for the ECJ's silence is path-dependent: historically, the ECJ has been reluctant to use heightened scrutiny in reviewing the grand institutional bargains between Brussels and the member states.[75]

I have interpreted constitutional principles in light of constitutional practice, and it might be argued that principles themselves are important in the articulation of a philosophical project of constituent power such as Habermas's. There is little to this critique. First, and ironically, because one of the grand lessons of Habermas's body of work is that the theory and the practice should not be hermetically separated. The strength of the theory is that it fits the practice; if it does not, then another theory must be chosen. If dual sovereignty thesis does not fit the practice

[74] This is the case in federations such as the US and Canada. For an analysis, see S. Choudhry and N. Hume, 'Federalism, Secession & Devolution: From Classical to Post-Conflict Federalism' in T. Ginsburg and R. Dixon (eds.), *Research Handbook on Comparative Constitutional Law* (Edward Elgar Publishing 2011).

[75] One recalls in this context the Court's unwillingness to rule on the Luxembourg Compromise (1966), which allowed states to preserve their veto rights in the Council, in violation of the Treaty of Rome. On the Luxembourg Compromise, and Court's relation to it, see G. Federico Mancini and D. T. Keeling, 'Democracy and the European Court of Justice', 57 (1994) Modern Law Review 157, 187 (arguing that there was no provision in the Treaty of Rome allowing the states to retain their veto rights.). In his account, Andre Donner argues that bringing the Luxembourg compromise to the Court would have brought the Communities to an end. See A. Donner, *The Role of the Lawyer in the European Communities* 62/63 (Edinburgh, 1968). More recently, the Court arguably followed a similar approach when ratifying the political deal to create a European Stability Mechanism outside of the formal institutional framework of Treaties. See Case C-370/12, Thomas Pringle v. Government of Ireland, Ireland, The Attorney General, Judgment of the Court of Justice (Full Court) (27 Nov. 2012). For commentary, see B. de Witte and T. Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle', 50 (2013) Common Market Law Review 805.

of European constitutionalism, then different – and, as it happens – bolder, accounts of supranational constituent power should be sought. It is not a counter-argument to this position that dual sovereignty is a rational reconstruction, which offers an idealized account of European constitutional practice. First, dual sovereignty is not hardly an ideal theory. Second, dual sovereignty is presented as a 'best interpretation' of the normative principles of European constitutionalism. In Habermas's view, distilling the normative theory behind constitutional practice helps to clarify the transnationalization of democracy in the European context and to justify much-needed institutional reforms. But that clarification will not be forthcoming if dual sovereignty downplays, as I have argued that it does, the radicalism of European constitutionalism.

## 4. Conclusion

'Thought completes action', Hannah Arendt wrote[76]. European integration remains in dire need of normative models to capture the accomplishments of the European political project and to redirect its future development. Dual sovereignty is not that theory. It is, at best, a wrong step in the right direction. The direction convincingly identifies constituent power as not only far from obsolete, but in fact indispensable for the project of transnationalizing democracy. That insight, however, is undercut by placing supranational alongside national constituent power. Ultimately, the model it offers caves under its own tensions and ends up giving nation-states a platform from which to undermine the project of European unification.

[76] H. Arendt, *Between Past and Future* 6 (Penguin edition, 2006).