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Double 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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TABLE OF CONTENTS

| | |
|---|----|
| INTRODUCTION | 1 |
| I. DUAL SOVEREIGNTY: SPLIT POLITICAL IDENTITY | 4 |
| II. DUAL SOVEREIGNTY: NATIONAL VERSUS SUPRANATIONAL | 9 |
| III. RIGHTS AND SELF-DETERMINATION IN THE CONSTITUTIONAL STATE | 11 |
| IV. REVISITING THE CONSTITUTIONAL STATE: THE <i>SOZIALSTAAT</i> | 16 |
| V. THE LESSONS OF EUROPEAN CONSTITUTIONALISM | 19 |
| CONCLUSION..... | 25 |

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 people as the constitution-founding subject onto the historical stage, so now European supranational integration transnationalizes democracy and recasts the legitimacy conditions of political action. In his recent work,¹ Jürgen Habermas has put forth one of the most elaborate and

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1. See generally JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE (2012) [hereinafter HABERMAS, CRISIS OF EU]; JÜRGEN HABERMAS, THE LURE OF TECHNOCRACY (Ciaran Cronin trans., 2015) (2013) [hereinafter HABERMAS, TECHNOCRACY]; Jürgen Habermas, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, 21 EUR. L.J. 546 (2015) [hereinafter Habermas, *Democracy in Europe*].

influential theories of supranational constituent power.² Habermas argues that the great “innovation” of European integration is the “complementary dependence and interconnection”³ between the national and the supranational levels of government. Nation-states survive the process of supranational integration and coexist alongside the Union their citizens have created.⁴

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.⁵ 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.⁶ As EU citizens, theirs is a project of transnationalizing democracy as a way of reconnecting the fragmented politics of nation-states with the pressures of an increasingly interdependent world society.⁷ Because neither identity is transient nor 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.⁸ A choice between them is neither necessary nor possible.

2. Scholars have long called for such an account “understood in the vocabulary of normative political theory.” Joseph H.H. Weiler, *Epilogue: The European Court of Justice: Beyond ‘Beyond’ Doctrine’ or the Legitimacy Crisis of European Constitutionalism*, in *THE EUROPEAN COURTS AND NATIONAL COURTS - DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT* 365–66 (Anne-Marie Slaughter et al. eds., 1998).

3. HABERMAS, *CRISIS OF EU*, *supra* note 1, at 27. This approach has been influential. See, e.g., Hauke Brunkhorst, *Europe in Crisis - An Evolutionary Genealogy*, in *LAW AND THE FORMATION OF MODERN EUROPE: PERSPECTIVES FROM THE HISTORICAL SOCIOLOGY OF LAW* 308 (Mikael R. Madsen & Chris Thornhill eds., 2014) (discussing the concept of evolution in a societal and constitutional context and relating that framework to the dependence and interconnection between the national and supranational levels of government within the EU).

4. See Habermas, *Democracy in Europe*, *supra* note 1, at 556 (analyzing the tension between the supranational polity and its member states, and the gap in democratic legitimization of the EU).

5. See HABERMAS, *CRISIS OF EU*, *supra* note 1, at 35. See also Philip Allott, *Epilogue: Europe and the Dream of Reason*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 202, 225 (Joseph H.H. Weiler & Marlene Wind eds., 2003) (mentioning “one person” in the metaphysics of Europe’s self-constituting).

6. HABERMAS, *TECHNOCRACY*, *supra* note 1, at 40.

7. As Habermas puts it, “[t]he 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.” JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 106 (Ciaran P. Cronin & Pablo De Greiff eds., 1998) [hereinafter HABERMAS, *THE INCLUSION OF THE OTHER*]. This is a plausible enumeration of the social conditions that might lead to something akin to a “type-switch” in political organization. See GIANFRANCO POGGI, *THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION* 60 (1978) (studying “type-switch” between different types of states). 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.” Jürgen Habermas, *Why Europe Needs a Constitution*, 11 *NEW LEFT REV.* 5, 7 (2001) [hereinafter Habermas, *Constitution*].

8. A rational reconstruction whereby EU citizens are part of the constituent power already challenges, or, depending on one’s perspective, advances, traditional approaches. See Joseph H.H. Weiler, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 7, 9 (Joseph H.H. Weiler & Marlene Wind eds., 2003) (“Europe’s constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos and, hence, as a matter of both normative political principles and empirical social observation the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where federalism is rooted in a classic constitutional order.”). Habermas seems to agree with the latter part of the statement regarding the difference between the European construct and

My aim here is to challenge, at the meta-level level that dual sovereignty occupies, its specific terms of justifying constituent authority. 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 the concept of constituent power,⁹ and for introducing a distinct account of *supranational* constituent power against the prevailing scholarly view that questions the utility and normative appeal of such an account in the European context,¹⁰ the dual sovereignty thesis does not withstand close scrutiny. This thesis builds on an asymmetry between the national and the supranational identities that violates its own normative premises, specifically the principle that future citizens of the Union and current citizens of the nation-states are equal subjects in their dual role. By assuming that constitutional states are nation-states, the account under review undercuts what Habermas himself identifies as the urgent task of using the republican legacy of nation-states to devise mechanisms of democratic will-formation at the supranational level. The implicit though unmistakable priority of the national versus the supranational perspective ends up legitimizing the myriad ways in which nation-states routinely undermine the project of European unification, in ways inconsistent with dual sovereignty's own normative premises. Finally, the split political identity itself becomes a source of fragmentation and dissonance that subverts the transnationalization of democracy.

Beyond exposing tensions internal to the structure of the dual sovereignty thesis, of particular interest is the claim that this account is reflected in the legal order of the constituted European Union. Habermas advises that “we need only to draw the correct conclusions from the unprecedented development of European law over the past half-century.”¹¹ While philosophy's turn to law is compelling as ever¹², the question remains which specific

typical federalism, including, prospectively, the imperative of avoiding “normative subordination of states to the federal level.” HABERMAS, *TECHNOCRACY*, *supra* note 1, at 37. However, 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 HABERMAS, *CRISIS OF EU*, *supra* note 1, at 38 (claiming “[t]he division of the constituent power divides sovereignty at the origin of a political community which is going to be constituted. . . .”).

9. The concept of constituent power, not only its contours but its very usefulness, has been contested as unnecessary to legality-centered approaches. See, e.g., David Dyzenhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 1 *GLOBAL CONST.* 229, 229 (2012) (arguing against the analysis of constituent power in legal and constitutional theory). For helpful recent studies of constituent power, see *generally* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2008).

10. Chris Thornhill, *Contemporary Constitutionalism and the Dialectic of Constituent Power*, 1 *GLOBAL CONST.* 369, 373 (2012) (noting that “the absence of a traditional constituent power has haunted research on the public legal order of the EU from its inception until today.”). See also Nico Krisch, *Pouvoir Constituant and Pouvoir Irritant in the Postnational Order*, 14 *INT'L J. CONST. L. (I-CON)* 657 (noting that international responses to the domestic challenge of theorizing about constituent power have failed to advance visions of a regional or global constituent power that, in the particular European context, might be normatively appealing but would not find support in societal and political practices).

11. HABERMAS, *CRISIS OF EU*, *supra* note 1, at x.

12. 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 *generally* Christian Joerges, *Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration*, 2 *EUR. L.J.* 105 (1996) (exploring legal analysis of European integration needed to supplement political analysis). See also JOHN P. MCCORMICK, WEBER, HABERMAS, AND THE TRANSFORMATIONS OF THE EUROPEAN STATE 14 (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, as part of the constituted powers, 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

interpretation of European constitutionalism is at work here. Habermas's account 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 believe that conception of European constitutionalism, while prevalent, has important limitations. The principles of European constitutionalism call for a more nuanced, and at times altogether different, interpretation of European constitutional doctrine than either the dual sovereignty thesis or related constitutional theories are able to offer. Perhaps most regrettable of all is that, having set out to reject the "hopeless alternative"¹³ 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 Treaty¹⁴ and whose supranational project answers the need for more abstract forms of social integration of the kind that the political self-constitution of 'higher freedom'¹⁵ requires under an interdependent world society. Habermas rejects a supranational federation for lack of popular support,¹⁶ much like Kant rejected a world state in *Perpetual Peace*.¹⁷ But, unlike Kant's conception, which has the internal resources to overcome the shortcomings of its initial formulation,¹⁸ Habermas's account casts in stone a state of European affairs that is, by his own account, fluid.

I. 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 this: How does the dual sovereignty thesis straddle this tension?

Recall that Habermas conceptualizes individuals as citizens of the already constituted nation-states and the (same) individuals as citizens of the to-be-constituted European Union as subjects that coexist within the divided identity of individual sovereigns.¹⁹ These two roles

power" has "revived long-suppressed memories of deep hostility to judicial norm setting, which inhered in the origins of modern European constitution making." Chris Thornhill, *The European Constitution and the Pouvoirs Constituants: No Longer, or Never, Sui Generis?*, in SELF-CONSTITUTION OF EUROPEAN SOCIETY: BEYOND EU POLITICS, LAW AND GOVERNANCE 13, 14 (Jiří Přibáň ed., 2016).

13. HABERMAS, CRISIS OF EU, *supra* note 1, at ix.

14. See generally HABERMAS, TECHNOCRACY, *supra* note 1.

15. See Alexander Somek, *Constituent Power in National and Transnational Contexts*, 3 TRANSNAT'L LEGAL THEORY 31, 33 (2012) (pointing out that constituent power "emerges only in a philosophical context in which questions of legitimacy or authority are ultimately debated as matters of freedom.").

16. See Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 EUR. J. INT'L L. 335, 338 (2012) ("For a long time, the dense network of supranational organizations has aroused fears that the connection between civil rights and democracy assured by the nation-state is being dissolved and that the democratic sovereign is being dispossessed by executive powers operating independently at the global level.").

17. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), reprinted in KANT: POLITICAL WRITINGS (Hans Reiss ed., H. B. Nisbet trans., 1970).

18. 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 Vlad Perju, *Cosmopolitanism in Constitutional Law*, 35 CARDOZO L. REV. 711, 741-46 (2013) (arguing that Kant's conception of republican constitutions is used to bolster his limited institutional vision for perpetual peace).

19. Habermas, *supra* note 16, at 342-43 ("Article 1(1) of the Treaty Establishing a Constitution for Europe refers to both subjects, the 'citizens' and the 'states' of Europe. Even though this constitution drawn up by a convention in 2004 was never adopted, the Lisbon Treaty currently in effect supports the thesis that sovereignty is 'shared' between citizens and states . . .") (citations omitted). Thus, the two subjects coexist within the divided

are of equal standing and the conflicts between the identities related to each role cannot be resolved through structural rules that would prioritize one identity over the other.²⁰ Harmonization processes within individual identity must respect and reinforce the equality of the constituent parts, which, in Habermas's view, rules out hierarchy.²¹ 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; rather, it must rest on rational grounds.²²

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,²³ only heightened now by the more fundamental perspective from constituent authority. His answer, in a nutshell, is that nation-states must be seen as constitutional states, that is, statist political formations that have been the sites for unprecedented normative accomplishments formulating and securing the freedom and equality of their members and whose political practices and institutional structures reflect the entrenched lessons of processes of collective learning that have made those accomplishments possible.²⁴ 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 do individuals, in their capacity as citizens of their nation-states, distinguish between the republican and the particularistic dimensions of their nation-states? Put differently, how do they have access to the normative core of the constitutional state in a way that can be separated from the particular form that normative core takes in the cultural-historical circumstances of their own nation-state? One option is to envisage citizens possessing a version of political literacy whereby

identity of individuals who exercise their constituent power. *Id.* at 343 ("Citizens are involved on both sides within the higher-level political community — directly in their role as Union citizens, and indirectly in their role as citizens of the Member States."). This conception shares a family resemblance but is rather different from earlier theories of dual sovereignty, which became prominent in the German constitutional thought as an attempt to theorize the constitutional form of the Holy Roman Empire. Responding to that particular context, the seventeenth century conception distinguished the personal rights of the holders of sovereignty (*maiestas personalis*) from the *maiestas realis*, as the property of the whole state. The Hobbesian/Bodinian conception of sovereignty countered the dualist approaches by emphasizing the unitary nature of sovereignty. See generally DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT (2016), for more on this debate.

20. *Id.*

21. Such harmonization poses difficult questions about timing, method and outcome. Habermas says little to clarify these matters other than to point out that "[f]rom the perspective of democratic theory, the agreement by the two sides to cooperate in founding a constitution opens up a *new dimension*." Habermas, *Democracy in Europe*, *supra* note 1, at 556. 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.

22. 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." Jan-Werner Müller, *A General Theory of Constitutional Patriotism*, 6 INT'L J. CONST. L. (I-CON) 72, 86 (2008). Furthermore, 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.

23. Habermas formulates that account in multiple works. See HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 7, at 105–27; Habermas, *Constitution*, *supra* note 7, at 7. See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996) [hereinafter, HABERMAS, FACTS AND NORMS].

24. See HABERMAS, FACTS AND NORMS, *supra* note 23, at 290–95, for Habermas's discussion of normative models of democracy.

they are able to 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 a result of understanding that those normative accomplishments have not been preconditioned by the functional process of securing the foundations of social integration, but rather have resulted from slow and intricate learning process that have been constitutive of one among a number of evolutionarily available types of social integration. Simultaneously, however, individuals are attached to the specific embodiment of those principles in time and space, within each particular political community. As members of nation-states, individuals 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.²⁵ They expect European integration not to endanger their polity’s ability to live by its specific interpretation, which is part of their national political identity. The dual sovereignty approach seems compatible, indeed premised, on at least a modicum of national specificity.²⁶

But Habermas is understandably uneasy with some of the implications of this approach. While the tension between particularism and universalism is built-into the very concept of the nation-state²⁷, and to that extent unavoidable within its confines, the dual sovereignty thesis seeks not to replicate the tension into the internal dynamic of the constituent power at the European level. Individuals are committed to their nation-state *qua* constitutional state.²⁸ 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.”²⁹ One problem with particularism is that it distracts from the emphasis on individuals as ultimate sovereigns.³⁰ When political identity attaches itself to the preservation of the culture of a particular community, there is a risk of a shift away from the individuals to the collective of that political community. The risk is, of course, greater when social integration is premised, as it has been throughout much of German modern history, on an ethnic conception of political membership. But the risk is present even outside of that context, at least from the

25. HABERMAS, *CRISIS OF EU*, *supra* note 1, at 42.

26. This is a compelling interpretation of Habermas’s earlier account of constitutional patriotism. See Frank Michelman, *Morality, Identity and “Constitutional Patriotism”*, 14 *RATIO JURIS* 253, 253–55 (2001) (characterizing Habermas’s account of constitutional patriotism in the terms of the political community’s concrete—rather than abstracted—ethical character).

27. HABERMAS, *The European Nation-State: On the Past and Future of Sovereignty and Citizenship*, in HABERMAS, *THE INCLUSION OF THE OTHER*, *supra* note 7, at 115 (“The tension between the universalism of an egalitarian legal community and the particularism of a community united by historical destiny is built into the very concept of the national state.”).

28. See *id.* at 254 (explaining Habermas’s assertion that national identity derives from the community’s attachment to idealized but sometimes counterfactual notions about their constitution).

29. HABERMAS, *FACTS AND NORMS*, *supra* note 23, at 250 (critiquing Ernst-Wolfgang Böckenförde). This process of abstraction is similar in nature to the process that led to the formation of nation-states. See Habermas, *Constitution*, *supra* note 7, at 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 . . .”).

30. See Bernard Yack, *Popular Sovereignty and Nationalism*, 29 *POL. THEORY* 517, 530 (2001) (contrasting popular sovereignty as a creature of the people with cultural particularism, which has its roots in community identities).

perspective of the individuals themselves, concerned as they must be with distinguishing the transcendent, or universalizing, core of the constitutional state from the particular cultural form around which they as citizens have clustered around their collective political community.

It is unclear if dual sovereignty has the capacity to mitigate or even to gauge this risk. The difficulty comes from the preservation of the national political culture, which is part of the territory of preserving the attachment of individuals to their nation-states. In that capacity, individuals are part of political communities that presumably are sufficiently distinct from other political communities. Their continuing attachment to their nation-states signals their justified desire to preserve that difference, as reflected in the normative accomplishments of their particular states. To be sure, people 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. But it is nevertheless true that there can be no guarantee that the lens of constitutional culture, even in forms that are meant to be non-naturalistic, will not be totalizing. And such a lens distracts from constitutional principle. Even when forms of culture develop originally as specific interpretations within a political community of abstract principles of self-government, a focus on the particular nation-states risks obscuring their origins as derivative from those normative principles. From that point on there is only one small step across the Rubicon – itself a rather shallow river – since such identitarian versions of collective-based argument coming perilously close to nationalism. It is the specter of nationalism in its myriad pathological forms that explains Habermas's rejection of particularism. The question, however, is not if the risks posed by nationalism are real but rather if the dual sovereignty thesis has the resources to eliminate or mitigate them.

I have suggested that a particular challenge comes from the particularism lurking behind a core assumption of dual sovereignty, namely the assumption that the constitutional state must be a nation-state. To argue, as Habermas does, that individuals as members of their nation-states want the preservation of their state formations in order to hold onto the normative accomplishments of the constitutional state is to assume that those normative accomplishments are parasitic upon the political form of the nation-state. That “the democratic-constitutional structure [of the nation-state] continue to exist intact in the future Union”³¹ becomes the *sine qua non* condition for attaining the normative goals. The European Union, which is not and will never become a nation-state, cannot by implication be a constitutional state.³²

It is quite surprising that the dual sovereignty thesis should stipulate that impossibility. In fact, one might have defined the problematique facing individuals qua bearers of constituent authority as whether, and under what conditions, social integration can take place in a politically integrated Europe in ways that can secure and replicate, at unprecedentedly high levels of abstraction, the normative accomplishments of nation-states. Can a united

31. Habermas, Habermas, *Democracy in Europe*, *supra* note 1, at 554.

32. Far from outlandish, this possibility has been part of the long and venerable tradition of theorizing the constitutional nature of the European Union. 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 generally* G. Federico Mancini, *Europe: The Case for Statehood*, 4 EUR. L. J. 29 (1998) (detailing scholarly arguments that the EU is in the process of becoming a state). For a more recent and comprehensive argument, *see generally* GLYN MORGAN, *THE IDEA OF A EUROPEAN SUPERSTATE: PUBLIC JUSTIFICATION AND EUROPEAN INTEGRATION* (2007) (detailing a more recent and comprehensive argument in support of a European superstate). *But see* Neil Walker, *Constitutional Pluralism Revisited*, 22 EUR. L. J. 333, 344 (2016) (arguing that “[p]roponents 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.”).

Europe be the functional equivalent of a constitutional state? Does a unified Europe provide the political form in which freedom and equality can be secured under conditions of globalization, just as the nation-state provided the political form for freedom and equality under conditions of industrialization and modernization? These questions take on even greater urgency when the burden on the individuals qua citizens of the EU is defined as setting the conditions under which the Union can become a supranational constitutional state as the only means for preserving the normative accomplishments secured by the nation-state over the past two centuries.

It is telling that Habermas does not discuss, in this context, the possibility of the EU as a supranational constitutional state. One concern is, presumably, that the possibility by itself could undermine dual identity as a core tenet of dual sovereignty. If the normative accomplishments of 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 work out the normative parameters of that protection. Whatever shape they give to those parameters, shifting the center of gravity to the supranational level risks emptying the political identity of citizens as members of their nation-states of an agenda. Bereft of such normative content, the national political identity would be vulnerable to replacement by the “overwhelming”³³ supranational political project.³⁴ That, of course, is not to imply that, under such a scenario, national political form itself would disappear. The lesson of history is that higher forms of integration subsume but need not displace lower forms of integration, so here the supranational political form itself would entirely displace national political form. But national political forms would become hierarchically integrated within a vertical structure of authority.

A central concern of Habermas’s own thinking about European integration, which dovetails uneasily with his dual sovereignty thesis, is to theorize the conditions for the Union becoming a political space where communicative processes transcend national boundaries and where it can be shown how democracy could discipline the forces of the market by creating a universe of intersubjectively shared meanings.³⁵ Just as the nation-state created, at its particular moment in history, the conditions of legitimacy for processes of democratic will-formation that reversed social disintegration, so a supranational constitutional state could perform a similar task under the conditions of post-war European integration. If it is possible to conceptualize the task of the individuals qua citizens of the EU at the constitutive moment along these lines, it becomes difficult to defend the assumption the EU cannot be a constitutional state, and its corollary that nation-states must be preserved or else their normative accomplishments would be endangered.

33. HABERMAS, *TECHNOCRACY*, *supra* note 1 at 40.

34. This is an understandable concern, at least so long as one accepts its underlying model of political identity formation. The model, which underpins the German Constitutional Court’s *Maastricht* decision, assumes that identity-formation boils down to an all-or-nothing game of allocation of competencies. The aim of the German judges on that occasion was to protect and preserve national political identity. But one could flip the priorities and instead allocate competencies to the supranational level. While Habermas’s position on matters of identity formation is characteristically complex, there are indications of his sympathy for this model. See, e.g., JÜRGEN HABERMAS, *THE POST-NATIONAL CONSTITUTION AND THE FUTURE OF DEMOCRACY* 77 (1998) (“But to remain a source of solidarity, the status of citizenship has to maintain a use-value: it has to pay to be a citizen, in the currency of social, ecological, and cultural rights as well.”).

35. HABERMAS, *THE INCLUSION OF THE OTHER*, *supra* note 7 at 125.

II. DUAL SOVEREIGNTY: NATIONAL VERSUS SUPRANATIONAL

The previous section has identified unresolved tensions around this split political identity with implications for the dual sovereignty thesis. Consider, as an entry point into the next step of the analysis, its temporal implications. According to the dual sovereignty thesis, individuals seek the “conservation of the normative substance that their national democracies already historically embody.”³⁶ One temporal dimension of their judgment is retrospective; it focuses on the preservation of what states have “already achieved.”³⁷ This claim is not historical in nature³⁸, 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.³⁹ The claim is, rather, one of rational reconstruction.⁴⁰ Individuals as holders of popular 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 nation-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.⁴¹ This reveals the dual temporality of the judgment of individuals 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,

36. *Id.* at 556.

37. *Id.* at 554.

38. For a discussion about the normative and the sociological dimensions of a theory of constituent power, see Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 *Int’l J. Const. L.* 697 (2016). See also Neil Walker, *The Return of Constituent Power: A Reply to Mattias Kumm*, 14 *Int’l J. Const. L.* 906 (2016).

39. If anyone’s memory needs to be refreshed, Friedrich Reck’s diary is a good place to start. See FRIEDRICH RECK-MALLECEWEN, *DIARY OF A MAN IN DESPAIR* (Paul Rubens trans., Duckworth Literary Entm’t 2000). And, while at it, consider the following rumination, 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.” *Id.* at 124.

40. It has been argued that this type of retrospective reconstruction is a common feature of contemporary accounts of constituent power. See Krisch, *supra* note 10, at 660 (arguing that constituent power today “operates through the—retroactive—attribution of acts to a socially constructed collective self.”). Such is, unsurprisingly, the style of normativist approaches to constituent power. See Martin Loughlin, *The Concept of Constituent Power*, 13 *EUR. J. POL. THEORY* 218, 221–231 (2014) (describing the normativist approach to constituent power, and comparing it to decisionism as well as to the author’s preferred approach, relationalism).

41. Hans Lindahl identifies the same feature but embraces the paradox. See Lindahl, *The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union*, 20 *RATIO JURIS* 485, 496 (2007) (“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 simple presence to itself. Instead, and paradoxically, an act *originates* a community through the *representation* of its origin.”)

if protected from such threats, nation-states could remain a site where past accomplishments could be at least preserved, if not even amplified.⁴²

The difficulty with this view is not temporality as such.⁴³ 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 that political construct. Specifically, in this conception, individuals assume the best about what their states are and will remain—namely, guarantors of the level of justice and freedom, as well as political sites that foster solidarity.⁴⁴ 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 significant asymmetrical preference for nation-states over the supranational Union.⁴⁵

It is not altogether surprising that the dual sovereignty thesis provides no justification for this asymmetry. Facing this tension would raise concerns over how rational it is for individuals as citizens of the EU to participate in the constituent process in the terms laid out by the dual sovereignty thesis. The effect of the asymmetry of normative expectations is to introduce a structural rule of priority that violates the premise of equality between the two sovereigns.⁴⁶ But how rational is it for individuals in their supranational capacity to accept that role? Their participation seems rational if the task they set for themselves at the moment of the origin of the political community that is going to be constituted 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. Those grounds are the “conservation of the normative substance that our national democracies already historically embody.”⁴⁷ Since it cannot be definitively shown that similar accomplishments can be delivered at the supranational level, and nor can it be doubted that a similar level has not been reached at the supranational level, it is simply prudent to protect the existent accomplishments of the nation-

42. See generally Frank Schimmelfennig, *The Normative Origins of Democracy in the European Union: Towards a Transformationalist Theory of Democratization*, 2 EUR. POL. SCI. REV. 211 (2010).

43. The temporal aspects of constituent power have been the object of scholarly reflection. See, e.g., Somek, *supra* note 15, 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 intertwining of acts is possible if those finding themselves confronted with the expectation to act as members of a collective body ‘retroactively’ come to accept this attribution ‘by exercising the powers granted to them by a constitution.’”). See also Markus Patberg, *Constituent Power Beyond the State: An Emerging Debate in International Political Theory*, 42 MILLENNIUM: J. INT’L STUD. 224, 231 (identifying retrospective and prospective ascriptions as part of the normative dimension of constituent power).

44. See Habermas, *Democracy in Europe*, *supra* note 1, at 553–54 (discussing European citizens’ interest in forming a supranational polity conflicting with interest in having their nation-states remain guarantors of the level of justice and freedom already achieved).

45. 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 generally Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346 (2006).

46. See *id.* at 552 (explaining the lack of trust between European nations for a European superstate as an insistence of self-conscious citizens on the normative achievements of their respective nation-states).

47. *Id.* at 556.

stated.⁴⁸ With the hard-fought accomplishments of the constitutional state on the line, risk-aversion demands holding fast to national identity.⁴⁹

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 to piece together the internal structure of Habermas's argument. First, a particular historical moment in the development of European integration is selected. Then accomplishments of the nation-state are identified, with comparatively little in-depth analysis of failures and atrocities perpetrated by those state formations both within and outside their sovereign jurisdictions. Further, the normative accomplishments for which the nation-state is given full credit are considered in a context from which everything else is obscured, including the role of supranational integration in securing those accomplishments. The dual sovereignty thesis takes the dynamic of that moment—a questionable interpretation of a moment that, in world-historical terms, is fleeing—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.⁵⁰ 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 fails to acknowledge the new institutional forms that the protection of higher freedom may now require.

III. 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 structure to the European supranational structure as compromising the normative integrity of nation-states, and specifically the political institutions and communicative processes that have been established around a particular kind of collective self-determination.⁵¹ 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

48. *See id.* at 553 (discussing a well-founded interest of self-conscious citizens in their nation-states not being exposed to the risk of intrusions and encroachments by an unfamiliar supranational polity).

49. *See, e.g.*, ALBERT HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 89–96 (1991) (discussing the rise of the cult of the British Constitution in response to revolutions in France, especially the general aversion of the educated class to any extension of the franchise in favor of permanent fixture of constitutional order restricting suffrage).

50. This is similar to the mistake for which Habermas chastises authors who failed to decouple state sovereignty and popular sovereignty, namely the mistake of “overgeneraliz[ing] a contingent historical constellation and obscur[ing] the artificial, and thus floating, character of the consciousness of national identity constituted in nineteenth-century Europe.” HABERMAS, *CRISIS OF EU*, *supra* note 1, at 16–17.

51. *See id.* (discussing the collective practice of participating in democratic election transforming into decisions of a collective only in a distributively general sense, making popular sovereignty a mirror image of state sovereignty only through a reifying singularization of pluralistic processes of opinion- and will-formation).

free as long as the freedom of one person must be purchased with another's oppression."⁵² 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" of their rights.⁵³ Social solidarity is the hard-fought result of protracted and painful learning processes that take place within the institutional and normative framework of nation-states. Those accomplishments—the "free and relatively equitable and socially secure living conditions"⁵⁴—would be at risk of dissolving if the social texture that underpins the constitutional state caved under the pressure of global markets.⁵⁵

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.

"Who, if not nation-states, would guarantee equal rights for all citizens on their territories"⁵⁶, Habermas asks, marking the irreplaceability of state political formations. Yet, rhetoric should not obscure complexities. Consider first the nature and role of rights, drawing from Habermas's own body of work. 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.⁵⁷ Consider the transnational aspect to how those repositories come into existence. Habermas, who is not a methodological nationalist, conceptualizes constitutional democracies not as closed to one another but rather as interlocked in a process of mutual co-dependence.⁵⁸ 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 clear channels of communication between the state and its citizens.⁵⁹

52. HABERMAS, *FACTS AND NORMS*, *supra* note 23, at 418 (emphasis in original).

53. See JOHN RAWLS, *POLITICAL LIBERALISM* 5–6 (1996) (referring to Rawls's first principle of justice: A guarantee that political liberties to all citizens are secured because they are equal in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions).

54. Habermas, *Democracy in Europe*, *supra* note 1, at 553.

55. For a formulation from the perspective of systems theory, see Hauke Brunkhorst, *The European Dual State: The Double Structural Transformation of the Public Sphere and the Need for Re-Politicization*, in *SELF-CONSTITUTION OF EUROPEAN SOCIETY: BEYOND EU POLITICS, LAW AND GOVERNANCE* 239, 244 (Jiří Přibáň ed., 2016) (discussing the need to prevent the "usurpation of the constituent power by the economic system" at the supranational level (emphasis omitted)). Concerns about how "executive federalism" undermines political self-government are among the primary motivation for Habermas's transnationalization of popular sovereignty. See HABERMAS, *CRISIS OF EU*, *supra* note 1, at viii (identifying the threat that the kind of "executive federalism of a self-authorizing European Council . . . would provide the template for a post-democratic exercise of political authority.").

56. JURGEN HABERMAS, *EUROPA: VISION UND VOTUM* 518 (2007).

57. See, e.g., Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State* (Shierry Weber Nicholens trans.), in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 107, 108–09 (Amy Gutmann ed., 1994) (pointing to the struggles democratic societies faced in order to gain recognition of their rights and the struggles of minority groups in democratic societies at the present who are fighting to have their own rights recognized as well).

58. Habermas does not develop these matters at great length. What follows in this and the next paragraph is my own account that, while not derived from Habermas's, is perfectly consistent with his views. See generally Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, 8 *INT'L J. CONST. L.* 326 (2010).

59. *Id.* at 336.

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 constitutional equality is very different from the Italian interpretation, to take one example.⁶⁰ Each system must rationalize for itself that difference if it is to preserve its normative openness toward other constitutional states. Glossing over nuance, assume that the most usual answer explains variation as points on a spectrum of reasonable interpretations. For reasons that could be labeled, in Rawlsian fashion, burdens of (institutional) judgment, and which include particularities of historical development, different legal traditions, and varying cultural backgrounds, each system gives specific—and, at the inter-systemic level, conflicting—meanings to its broad, fundamental rights guarantees.⁶¹ 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 the European Union's goals or competencies, since the opposite has long been recognized.⁶² 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,

60. See Malick W. Ghachem, *Introduction: Symposium: Law, Religion, and Laitsi v. Italy*, 65 ME. L. REV. 755, 756 (2013) (illustrating the differences between the interpretation of freedom of religion of France, with *laïcité*—the French secular state—and Italy, i.e. with official state church); Omar G. Encarnación, *Gay Rights: Why Democracy Matters*, 25 J. DEM. 90, 91 (2014) (pointing to the differences of the legality of gay marriage in France, where it is legal, and Italy, where it is not).

61. See Perju, *supra* note 58, for a more detailed account of my own approach on constitutional traditions and differences in constitutional cultures and doctrines.

62. Even before such protections were codified in the Treaties, both the European institutions and national constitutional courts acknowledged that fundamental rights are parts of the European legal order. See BVerfGE 73, 339 2 BvR 197/83 Solange II-decision, Oct. 22, 1986.

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 reached by the sovereign political community itself. My 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 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.

But what if a plurality of jurisdictions, by itself, 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.⁶³ 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 were 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 institution, by design, create a form of politics that unleash the forces of the market upon the defenseless citizens of the EU's member states is one that has long defined left critiques of European integration.⁶⁴ While sharing a keen awareness of the political stakes, Habermas, to his credit, does not see the Union as impervious to institutional reform. At the same time, it helps to keep in focus the historical reality of European nation-states perpetrating a long string of vicious abuses on their own citizens and any other subjects coming under their jurisdiction during the long twentieth century.⁶⁵ My point is that 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.

Another way of interpreting this argument is 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 unavailable to national constitutional democracies. This argument, I believe, is at best an exaggeration. Even under the current system, where municipal jurisdictions engage in normative lateral communication, final decisions about how to direct the coercive force of public authority are made by municipal 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

63. See generally François-Xavier Millet, *The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constructionism*, in *THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION* 253 (Loïc Azoulay eds., 2014) (discussing the existence of legal pluralism in the European Union between the Union itself and its member states).

64. For a recent, post-Brexit vote, statement of this position, see Richard Tuck, *A Prize in Reach for the Left* (Jul. 17, 2017) (transcript available at <https://policyexchange.org.uk/pxevents/brexit-a-prize-in-reach-for-the-left/>).

65. See, e.g., WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (2nd ed. 2000) (detailing the abuses committed by European nation-states during the twentieth-century).

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. Structural allocations of decision-making authority would be the object of political bargaining and constitutional interpretation. 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 each political community interprets the rights it protects in a way itself reasonable, supranational interpretation is not *their* interpretation, that is, an interpretation over which the political community assumes ownership. Democracy 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 it 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 an 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.⁶⁶ 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 the process itself becomes the object of attachment for 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.⁶⁷ 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 the 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 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

66. Jan-Werner Müller, *A General Theory of Constitutional Patriotism*, 6 INT'L J. CONST. L. 72, 82 (2008).

67. *Id.* at 89.

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.

IV. 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”⁶⁸ 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.⁶⁹ 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,⁷⁰ 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 lead to the “fragmentation of the care for the common good,”⁷¹ 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 one that should not be defended.⁷²

One could, of course, find this development plausible and support the project of European integration, as Hayek did,⁷³ 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 word⁷⁴) or Greece’s crucifixion to the altar of austerity, to grasp the magnitude of the risks of governance by “executive federalism.”⁷⁵ 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,” as Karl Polanyi had warned,⁷⁶ nor were the market’s liberating social effects

68. MCCORMICK, *supra* note 12, at 200 (internal quotations omitted) (citation omitted).

69. See Habermas, *Constitution*, *supra* note 7, at 14 (explaining that Europe falls short of what is needed for the kind of supranational decision-making that is already developed within the institutional framework of the union).

70. See MORGAN, *supra* note 32, at 85–88 (examining the general argument for a welfare-based European political integration and that there is no reason Europeans *ought* to accept this type of welfare state).

71. ERNST-WOLFGANG BÖCKENFÖRDE, *Which Path is Europe Taking?*, in CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 343, 351 (Mirjam Künkler & Tine Stein eds., 2017).

72. See *id.* at 360 (discussing the difficulties of creating a unified European identity out of the European Union).

73. See generally Friedrich Hayek, INDIVIDUALISM AND ECONOMIC ORDER 255–72 (1948).

74. See GAVIN HEWITT, THE LOST CONTINENT 246 (2013).

75. HABERMAS, CRISIS OF EU, *supra* note 1, at 12 (using the term executive federalism in contrast with transnationalized democracy).

76. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 60

stified by unmovable social structures. The result has been described as “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.”⁷⁷ 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, 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.⁷⁸ 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 redistribution and solidarity that are too demanding even for the traditional nation-state to meet.⁷⁹

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.⁸⁰ This is a vicious circle that Habermas breaks through the formative role of political institutions.⁸¹ Social integration and political integration are distinct processes, and Habermas’s work shows how the latter created the former in the context of nation-states.⁸² 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 important, 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. Now, what is true at the national level is also true at the supranational level.⁸³ The establishment of supranational political institutions can precede the creation of the underlying solidaristic

(2nd ed. 2001).

77. SHERI BERMAN, *THE PRIMACY OF POLITICS: SOCIAL DEMOCRACY AND THE MAKING OF EUROPE’S TWENTIETH CENTURY* 6 (2006).

78. See MCCORMICK, *supra* note 12, at 200–01 (pointing out Habermas’s reliance on Foucault’s critique of bureaucratization and normalization in the *Sozialstaat*).

79. *Id.* at 288 (“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.”).

80. See ILSUP AHN, *POSITION AND RESPONSIBILITY: JÜRGEN HABERMAS, REINHOLD NIEBUHR, AND THE CO-RECONSTRUCTION OF THE POSITIONAL IMPERATIVE* 111 (2009) (“Habermas argues that the sources of social solidarity can only be available through the communicative practices of autonomous citizens: ‘The forces of social solidarity can be regenerated in complex societies only in the forms of communicative practices of self-determination.’”).

81. See HABERMAS, *TECHNOCRACY*, *supra* note 1, at 38 (“[T]here is a widespread conviction that national citizens owe the fragile resource of free and relatively equitable living conditions to the democratic practices and liberal institutions of their states.”).

82. *Id.*

83. This assumes, correctly in my view, that solidarity and underlying trust does not depend on small communities. See generally AXEL HONNETH, *THE IDEA OF SOCIALISM* 29 (2017) for a similar view.

social basis (including media of communication),⁸⁴ 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 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”⁸⁵); then 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.⁸⁶

Now, Habermas is of course intensely 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.⁸⁷ His proposals for the creation of a European public sphere attempt to create the institutional structure where that form of solidarity can take root.⁸⁸ 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 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.⁸⁹ Yet as

84. HABERMAS, *TECHNOCRACY*, *supra* note 1 at 39 (stating that national media needs to report on issues of common concern to EU citizens, which will develop the current nationally limited civic solidarity trust among EU citizens into one that reaches across national borders).

85. HABERMAS, *FACTS AND NORMS*, *supra* note 23, at 418.

86. For a discussion, see AXEL HONNETH *supra* note 83, 99–103.

87. HABERMAS, *FACTS AND NORMS*, *supra* note 23, at 502 (characterizing the present European political sphere as fragmented and discussing the importance and likelihood of creating “an obligation towards the European common good” in order to achieve transnational unification).

88. His proposals include, but are not limited to, the use of European media, the reform of European institutions, and most importantly by disempowering the European Council and continuing to empower the European Parliament. *See generally id.*

89. *See, e.g.*, Lindahl, *supra* note 41, at 494 (stating that one of the features that distinguishes the EU from the US is that “European integration does not imply a zero-sum game: The presupposition of a European people, as the collective subject of the European legal order, does not exclude the presupposition of European peoples, in the plural,

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.⁹⁰ 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.

V. THE LESSONS OF EUROPEAN CONSTITUTIONALISM

European law holds the key to understanding the nature of the European project, Habermas claims, as he deploys the principles of European constitutionalism—from limited conferral to the requirement of unanimity in treaty amendments to the protection of national constitutional identity—to shape the philosophical intuitions behind dual sovereignty thesis.⁹¹ He interprets European constitutional doctrine to reflect a heterarchical, not hierarchical, relation between municipal and supranational law, which relate to each other as co-original and co-determinate equals.⁹² I argue in this section 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 is influenced, if my interpretation of that thesis is correct, by the German court's theorizing of the normative interface between municipal and European law. What Habermas criticizes in the *Maastricht* decisions are the nationalist, organicist idea of political community that had deep roots in German constitutional thought and which the *Maastricht* Court endorses. That critique is certainly well taken.⁹³ But at least an equally insidious point of contention concerns the deep normative core of the German judges' jurisprudential vision, which denies the European legal order the autonomy the supranational order has claimed since the constitutionalization of the Treaty of Rome.⁹⁴ That conceptualization has ushered in a nation-state centered approach to European constitutionalism.⁹⁵ It is not by accident that Habermas does not take issue with this conceptualization, which replicates the same kind of asymmetries that favor the nation-state against the European Union as the dual sovereignty thesis itself.⁹⁶ My aim in this section

as the collective subjects of national legal orders.”)

90. See generally LUCA CERIONI, *THE EUROPEAN UNION AND DIRECT TAXATION* (2015)

91. See generally, HABERMAS, *FACTS AND NORMS*, *supra* note 23.

92. See generally *id.*

93. See J. H. H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, *Eur. L. J.*, vol. 1 (3): 219–258 (1995).

94. On the constitutionalization of the Treaty of Rome, see J. H. H. Weiler, *The Transformation of Europe* 100 *Yale L. J.* 2403 (1991).

95. See generally Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralism Movement*, 14 *EUR. L. J.* 389 (2008), for an account of the German Constitutional Court's role in establishing the national-constitutional approach to European integration.

96. As late as 2007, Habermas compared the European Union to an international organization. See generally Habermas, *supra* note 56, at 518. For an explanation of his views in terms of intellectual biography, see STEFAN

is not to offer a comprehensive critique of that approach or to flesh out an alternative account of European constitutionalism. Those are challenges for another day. My study here is limited to select principles of European constitutionalism invoked in connection to the dual sovereignty thesis.⁹⁷

Front and center in Habermas's account is the principle of limited conferral of powers.⁹⁸ 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 individually, do not withdraw such authority.⁹⁹ 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.¹⁰⁰ This reading is correct insofar as, formally speaking, the powers of the EU institutions are limited and subject to oversight.¹⁰¹ But it helps to recall that limited conferral is a principle that structures the relation between the federal center and the constitutive states or provinces in typical federations. The EU is in this sense like all other such structures, which is to say that the principle of limited conferral is consistent with a logic of hierarchy of precisely the type that Habermas rejects in the European constitutional context.¹⁰²

The interpretation and application of limited conferral are also important in this context. The German Constitutional Court understandably inquired, in the *Maastricht* judgment, whether supranational delegation in the European context is structured in a "manner sufficiently foreseeable to ensure that the principle [of limited conferral] is observed"¹⁰³ Surprising was its conclusion that the EU competencies indeed met that foreseeability threshold.¹⁰⁴ Interpreted against the background of decades of EU constitutional practice, that conclusion reveals how useful a fiction the principle of limited conferral has been. Indeed, one would be hard-pressed to offer a plausible interpretation of European

MULLER-DOOHM, HABERMAS: A BIOGRAPHY 356 (2016) (discussing Habermas's initial approach to European integration as primarily an economic organization). This changes by 2011, when he describes the task at hand as the development of an international community of states into a cosmopolitan community of states and world citizens. *See generally* HABERMAS, CRISIS OF EU, *supra* note 1, at xi.

97. 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 generally* Neil Walker, *supra* note 32, at 346.

98. *See generally* HABERMAS, FACTS AND NORMS, *supra* note 23.

99. Consolidated Version of the Treaty on European Union art. 5 (2), Oct. 26, 2012, 2012 O.J. (C 326), 18 [hereinafter TEU] ("Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."). For a recent study, *see generally* THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION (Loïc Azoulay ed., 2014).

100. Limited conferral has been useful 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 European law in Germany is the German Assenting Act. European law reaches Germany as an area of application only across the bridge of the national Assenting Act. Where that bridge does not convey this European law, it cannot, in Germany at any rate, develop any degree of legal force." Paul Kirchhof, *The Balance of Powers between National and European Institutions*, 5 EUR. L. J. 225, 226 (1999).

101. *See id.* ("European law becomes binding through the conclusion of the Treaty by the parties to it and by the issue of the command to obey the law through the parliamentary Assenting Act in each Member State.").

102. HABERMAS, FACTS AND NORMS, *supra* note 23, at 168–93.

103. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 ENTSHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 171 (Ger.)

104. *Id.*

constitutionalism, at least during the pre-*Maastricht* period, in which the application of limited conferral could be qualified as “sufficiently foreseeable.”¹⁰⁵ During that period, the European Commission consistently used the Treaty of Rome’s open-ended provisions as well as the “necessary powers” grant liberally.¹⁰⁶ 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*.¹⁰⁷ 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 “[t]here is no issue area that was the exclusive domain of national policy in 1950 and that has not somehow and to some degree been incorporated within the authoritative purview of the EC/EU.”¹⁰⁸

Of course, one should not exaggerate this point. The issue here is not an exact tally of the division of competencies as much as the constitutional dynamic of allocation. Consider 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.¹⁰⁹ The exercise of residual sovereignty by national courts qualified the European Court’s claim to supremacy and, it is said, revealed the “necessarily bi-directional” nature of the doctrine of European supremacy.¹¹⁰ This interpretation, however, toes the line of the not-entirely-disinterested national courts, eager to claim before their domestic audiences the power over EU doctrine.¹¹¹ Even in the case of German reception, on which Habermas relies, it helps to recall that, under both *Solange I* and *II*, the German Constitutional Court acquiesced to the European Court’s doctrine that the European legal order is autonomous. Only post-*Maastricht* did the German constitutional judges reverse their own precedent, denying the claim to special status of the Europe-an legal order and adopting a national constitutional standpoint from which EU

105. *Id.*

106. Treaty Establishing the European Community art. 308, Dec. 24, 2002, 2002 O.J. (C 325). See also JOSEPH WEILER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 55 n. 120 (1999) (discussing how the Community institutions made liberal use of this provision as the legal basis for legislative measures).

107. See R. Daniel Kelemen, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone*, 23 *MAASTRICHT J. EUR. & COMP. L.* 136, 140 (2016) (mentioning case-law in the Court of Justice holding that EU law has supremacy over national law).

108. Philippe C. Schmitter, *Imagining the Future of the Euro-Polity with the Help of New Concepts*, in *GOVERNANCE IN THE EUROPEAN UNION* 121, 124 (Gary Marks et al. eds., 1999). See also Koen Lenaerts, *Constitutionalism and the Many Face of Federalism*, 38 *AM. J. COMP. L.* 205, 220 (1990) (arguing that there is “no nucleus of sovereignty that the Member States can invoke, as such, against the Community.”).

109. Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] May 29, 1974, 37 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFG] 271, 285 (Ger.) [hereinafter *Solange I-Beschluß*]; Frontini, *Sentenza* n. 183, 18th December 1973 (Italian Constitutional Court).

110. Joseph H. H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 *Y. B. EUR. L.* 267, 275 (1982) (“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 *THE EVOLUTION OF EU LAW* 323, 351 (Gráinne de Búrca & Paul Craig eds., 2nd ed. 2011) (“There is therefore 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.”).

111. See also G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 *MOD. L. REV.* 157, 187 (1994) (“It would be an exaggeration to say that the European Court was bulldozed into protecting fundamental rights by rebellious national courts.”).

supranational law had to be conceptualized within the framework of international law. The German judges sought to hide the radicalism of their reactionary approach by re-writing constitutional history. They claimed, contrary to established European doctrine, that human rights were absent from the genesis of the European legal order and presumably had to be transplanted from elsewhere, such as from municipal law. The implication of the need for such imports was to undercut the normative viability of European constitutionalism standing alone, and to support the view that European constitutionalism cannot threaten the autonomy of national jurisdictions on whose existence it depends.¹¹²

But, one could argue, whatever the correct interpretation of the human rights saga, doesn't the *ultra vires* review under the *Maastricht* decision and identity review under the *Lisbon* decision¹¹³ give Habermas sufficient ammunition to make the case about the dual nature of sovereignty as a matter of European constitutional law? What matters, in this view, is not how often 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 depends on their will. The sword of Damocles does its work while hanging in the air. Perhaps so. But what danger comes from a sword that has, until very recently, never fallen and which often seemed too heavy to hold up in the air indefinitely? It cannot be irrelevant that, in over six decades of the practice of European constitutionalism, only a handful of cases show national courts challenging the authority of the European Union.¹¹⁴ The point is that, should 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 captures the new paradigm. What it does not capture, however, is existing European constitution practice.

It is perhaps possible to interpret Habermas's account as evidence that such a shift is underway. Take, for instance, the protection of national identity as evidence of underlying dual sovereignty.¹¹⁵ At issue here is the explicit commitment that EU institutions have taken, as early as the Treaty of Maastricht but in a fuller form in the Treaty of Lisbon, to commit the national identity of its member states.¹¹⁶ This provision has been interpreted to show the co-existence as equals of the municipal and European legal orders.¹¹⁷ An alternative interpretation seems to me more defensible. In this alternative interpretation, constitutional identity is consistent with a hierarchical model of constitutionalism. First, as a matter of constitutional doctrine, national identity receives recognition when—and, arguably, precisely because—it coexists along other doctrines of European constitutionalism that neutralize it.

112. For an extended version of this argument, see Vlad Perju, *Uses and Misuses of Human Rights in European Constitutionalism*, in HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD IN DISORDER (Silja Vöneky & Gerald L. Neuman eds., 2018).

113. BVERFG, JUDGMENT OF THE SECOND SENATE OF 30 JUNE 2009-2 BVE 2/08.

114. See Case C-399/09, Marie Landtová v. Česká správa sociálního zabezpečení, 2011 E.C.R. I-05573 (a European Court of Justice case originating from the Czech Constitutional Court); see also Jan Komárek, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, 8 EUR. CONST. L. REV. 323 (2012) (analyzing the significance of a subsequent judgment by the Czech Constitution Court on February 14, 2012 that declared the previously mentioned European Court of Justice opinion to be an *ultra vires* act).

115. See Habermas, *Democracy in Europe*, *supra* note 1, at 556 (discussing citizens' dual identities as citizens of the EU and citizens of their nation); Solange I-Beschluß, *supra* note 109.

116. TEU, *supra* note 99, art 4(2).

117. See, e.g., Leonard F.M. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 UTRECHT L. REV. 36, 48 (2010) (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*.”).

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.¹¹⁸ Secondly, the effect of incorporating the protection of constitutional identity into the Treaty is to make that identity a concept of EU law. This opens the door for the ECJ to define the boundaries of national identity, in the same way that the Luxembourg judges have always invoked the effectiveness of EU law to impose a unified meaning over concepts such as goods, persons, workers, disability and the like.¹¹⁹

There is pressure for the ECJ to move in that direction. The Hungarian constitutional court, having been captured by the Orbán regime and transformed from a defender of constitutional democracy into an effective political tool in Hungary's authoritarian turn, recently invoked the doctrine of national identity to challenge the supremacy of European law.¹²⁰ Given the equally troublesome developments in Poland, one can foresee decisions of national judges invoking the Polish national identity as a limit to the effect of primary or secondary European legislation. Quite apart from how the EU's will answer to such challenges, these examples show how troubling it is to find Habermas's invocation of national identity as constitutional doctrine that supports the normative appeal of the dual sovereignty thesis.

I do not mean to suggest that all invocations of constitutional identity are as malign as those mentioned before. In jurisdictions where the foundations of constitutional democracy are—at least arguably—under attack, national courts, now empowered to protect national identity, have been rather flummoxed by the task of spelling out the elements of their constitutional identity.¹²¹ The elements they have subsumed under the rubric of identity—“inalienable human rights”¹²² or “the rule of law”¹²³—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*.¹²⁴ It is too soon to tell if the

118. TEU, *supra* note 99, art. 2.

119. But see Monica Claes and Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, 16 GERMAN L. J. (4): 917-970 (2015) (discussing the tensions between national and constitutional identity at the national and supranational levels in the context of the German Constitutional Court's OMT decision).

120. *See* Alkotmánybíróság (AB) [Constitutional Court], Nov. 11, 2016, AK X/03327/2015 (Hung.) (holding, citing Solange, that it “cannot set aside the ultima ratio protection of human dignity and the essential content of fundamental rights, and it must [ensure that the EU law] not result in violating human dignity or the essential content of fundamental rights.”) Under Article E (2) of the Hungarian Constitution, “the joint exercising of a competence shall not violate Hungary's sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control).” *Id.* para. 54. For an early analysis see Gábor Halmai, *The Hungarian Constitutional Court and Constitutional Identity*, VERFASSUNGSBLOG (Jan. 10, 2017), <http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>.

121. *See* Armin Von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1440 (2011) (discussing how most domestic constitutional courts' decisions related to constitutional limits are vague).

122. *Id.* at 1436.

123. Ústavní soud České republiky 8.3.2006, (ÚS) [Decision of the Constitutional Court of March 8, 2006], sp.zn. ÚS 50/04; Ústavní soud České republiky 3.5.2006, (ÚS) [Decision of the Constitutional Court of May 3, 2006], sp.zn. U 66/04. For a French example, see generally Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-540, July 27, 2006, (Fr.). In later cases, the Czech court refused to list non-transferable competencies or identify a core of the constitution. See generally: Ústavní soud České republiky 3.11.2009, (ÚS) [Decision of the Constitutional Court of Nov. 3, 2009], sp.zn. ÚS 29/09.

124. BVERFG, 2 BvE 2/08, June 30, 2009 (“[p]articularly sensitive for the ability of a constitutional state to

effectiveness of “identity review” will have to be as qualified as that of the *Maastricht*-era “*ultra vires* review.”¹²⁵ 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 law, rather than co-original. And that derivative nature is no accident; it is normatively continuous with the logic of constitutional identity.

Two other doctrines of European constitutionalism should be briefly discussed. The first is the requirement of consensus among member states for changes to the Treaties.¹²⁶ 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 constitutional changes.¹²⁷ States retain a veto over treaty changes, which Habermas sees as evidence of heterarchy.¹²⁸ That interpretation is questionable. What Habermas calls amendments are, formally speaking, new treaties.¹²⁹ And, as new treaties, they must be valid under international law, which, details aside¹³⁰, grounds obligation in the consent of each state-party. 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.¹³¹

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 of dual sovereignty at work.¹³² 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. By unfolding I mean not only the UK’s vote in favor of exit but also the negotiations, the exit itself (if it happens) and the impact on the UK of its exit from the European Union. At a general level, however, it helps to separate contingent from necessary structural features. In some federations, secession rules are court-made.¹³³ In the EU, the masters of the Treaty intervened (noticeably late, in the Constitutional Treaty and then through the Art. 50 of the Reform Treaty) to fill in a space that the ECJ had not claimed for itself.¹³⁴ The reason for the ECJ’s silence is path-

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).”

125. See Kelemen, *supra* note 107, at 149 (examining existing and possible future approaches to “identity review” and “*ultra vires* review”).

126. Habermas, *supra* note 16, at 340.

127. HABERMAS, *CRISIS OF EU*, *supra* note 1, at 40.

128. HABERMAS, *TECHNOCRACY*, *supra* note 1, at 36–40.

129. HABERMAS, *CRISIS OF EU*, *supra* note 1, at 24.

130. See generally Ronald Dworkin, *A New Philosophy of International Law*, 41 PHIL. & PUB. AFF. 2 (2013) for a similar argument.

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

132. TEU, *supra* note 99, art. 50.

133. This is the case in federations such as the U.S. and Canada. For an analysis, see generally Sujit Choudhry & Nathan Hume, *Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism*, in RESEARCH HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 356 (Tom Ginsburg & Rosalind Dixon eds., 2011).

134. See Mancini & Keeling, *supra* note 111, at 175–87.

dependent: Historically, the ECJ has been reluctant to use heightened scrutiny in reviewing the grand institutional bargains between Brussels and the member states.¹³⁵

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. I do not think this line of argument is strong. First, and ironically, because one of the grand lessons of Habermas's overall body of work is that the theory and the practice should not be hermetically separated.¹³⁶ The strength of the theory is that it fits the practice; if it does not, then another theory must be chosen. If the dual sovereignty thesis does not fit the practice 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.¹³⁷ But that clarification will not be forthcoming if dual sovereignty downplays, as I have argued that it does, the radicalism of European constitutionalism.

CONCLUSION

"Thought completes action," Hannah Arendt wrote.¹³⁸ European integration remains in need of normative models to capture the accomplishments of the European political project and to redirect its future development. Dual sovereignty is 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, politically, ends up legitimizing projects that undermine European unification.

135. 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* Mancini & Keeling, *supra* note 111, at 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* ANDRÉ M. DONNER, *THE ROLE OF THE LAWYER IN THE EUROPEAN COMMUNITIES* 62–63 (1969) (noting that bringing the compromise "would have been the definite end of the communities as communities . . ."). 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 generally* Thomas Pringle v. Gov't of Ireland, Ireland and the Att'y Gen. [2012] IESC 47 339/2012 (SC). For commentary, *see generally* Bruno de Witte & T. Beukers, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle*, 50 *COMMON MKT. L. REV.* 805, 805 (2013).

136. For an early statement, *see* JÜRGEN HABERMAS, *THEORY AND PRACTICE* (1973)

137. HABERMAS, *CRISIS OF EU*, *supra* note 1, at x.

138. HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 6 (Penguin Books 2006).