

# FROM UTOPIA TO APOLOGY: THE EUROPEAN UNION AND THE CHALLENGE OF LIBERAL SUPRANATIONALISM

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*Amid the wealth of scholarship on European integration and its values, positive political liberty tends to languish in the background while democracy, efficiency, and other goals occupy the limelight. This short contribution aims to correct that neglect by setting out a normative approach to European integration that places positive political liberalism front and center. I offer this approach, which I call liberal supranationalism, as a complement to existing normative accounts of European integration.*

*I make three claims. First, I claim that liberal supranationalism offers a particularly appealing normative orientation for the European project. Second, I claim that, to the extent that liberal supranationalism is appealing, the political structure of the Union should be developed in such a way that maximally satisfies the demands of positive political liberalism across three dimensions of what I call the supranational governance triangle. Third, I claim that liberal supranationalism’s analytical value can be illustrated by its application to a familiar topic—the loss of the Member State legislative veto in the Single European Act—to reveal the underappreciated relationship between exit and veto in the European legal order.*

## TABLE OF CONTENTS

INTRODUCTION .....	850
I. POSITIVE POLITICAL LIBERTY IN THE EUROPEAN UNION .....	852
A. <i>The Demands of Positive Political Liberalism</i> .....	852
B. <i>The Appeal of Positive Political Liberalism</i> .....	854

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II. AN OUTLINE OF LIBERAL SUPRANATIONALISM .....	858
A. <i>A Triangular Vision of Liberal Supranationalism</i> .....	858
B. <i>Liberal Supranationalism Compared</i> .....	860
C. <i>An Overview of Political Choice-Rights</i> .....	864
III. RETHINKING VETO AND EXIT.....	868
A. <i>The Lost Veto</i> .....	869
B. <i>A Liberal Supranationalist Perspective</i> .....	870
CONCLUSION: TOWARD A SECOND TRANSFORMATION?.....	875

#### INTRODUCTION

This Article begins from the proposition that the rich and reflective literature on the normative foundations of European integration has generally failed to give sufficient attention and priority to a basic value: *positive political liberty*. In what follows, I will argue that taking this value seriously can make a distinctive and useful contribution to integration theory, and that what I call *liberal supranationalism* demonstrates one way in which this might be done.

Liberal supranationalism offers both a normative and an analytical payoff for the study and practice of European integration. Normatively, the case for positive political liberty as a first-order value has distinctive (and under-appreciated) purchase and appeal in the context of European integration. In addition to its traditional merits as a normative orientation for any political system, there are compelling reasons to think that this value is particularly suited to the nature, history, and pathologies of European integration. Analytically, moreover, liberal supranationalism offers us a vision of political order as a system of relations of governance bounded by what I will call political choice-rights, and it directs us to assess the legitimacy of each relation of governance—at least in the first instance—by reference to the choice-rights held by the governed entities in that relation. Among the many implications of this perspective is the insight that what many theorists have long recognized for private associations is true of political orders too, including nation-states and supranational orders: rights to exit or withdraw (partially or entirely) from systems of governance are—so long as they are genuine—central and foundational, not marginal or technical, matters in the assessment of the legitimacy of a political order.

My claims will be developed in three Parts. Part I makes the case for positive political liberty as a first-order value for European integration. It sets out what this form of liberty demands, and why we might think it particularly appealing in the context of the European project. Part II offers a basic analytical and normative framework for applying the demands of positive political liberty to a supranational

structure like the European Union (E.U. or the Union): I call this framework liberal supranationalism. Finally, Part III briefly demonstrates the analytical utility of liberal supranationalism by pointing out what has been ignored by much of the critical scholarship on the loss of the Member State legislative veto: that the right of Member State exit in Article 50 of the Treaty on European Union (TEU) plays a critical role in restoring a vital measure of positive political liberty—and legitimacy—to the Union’s political order.

My title—an homage to Martti Koskenniemi’s dazzling book, of course<sup>1</sup>—speaks of a journey from utopia to apology, and I intend this in a double sense. The first sense is a descriptive one, and it refers to the Union’s inexorable slide from utopia to apology in the everyday sense of those words: from an idealistic dream to the pincushion of European politics. This slide encourages us to re-examine, at least, the basic structures and directions of European integration, and to engage in the kind of first-principles reflection I offer here.

But in its second sense, my title is a prescriptive and constructive one. “Apology” and “utopia” here bear not their everyday but their Koskenniemiian meaning, which is the sense in which I will use them throughout the rest of this Article. Thus, by “apology” and “apologetic” I refer to a normativity of law that flows from and is determined by what governed entities actually, subjectively choose and do; by “utopia” and “utopian” I refer to a normativity of law that flows from an objective normative proposition, regardless of whether that proposition is in fact accepted by those to whom it is applied.<sup>2</sup> And in this second sense, the journey from utopia to apology is one that my analysis will prescribe and recommend. For liberal supranationalism is premised on the view that the Union should be justified at the deepest level not by reference to purportedly objective propositions of value or interest, but by reference to the political choice—rights held by governed entities—Member States and citizens alike. I claim that a retrenchment of the Union in this direction would represent a worthwhile improvement in the political morality of European integration.

Accordingly, this contribution, like my title, is intended to be simultaneously critical and constructive. The Union has exchanged much of its original sparkle for a weary campaign of defensive apologetics. But the problem may not be “too much Europe.” The height of the spires of the European cathedral may be less objectionable than the failure to ground it in a genuinely liberal foundation. Liberal supranationalism invites us to do just that.

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<sup>1</sup> MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005).

<sup>2</sup> *See id.* at ch. 1.

## I. POSITIVE POLITICAL LIBERTY IN THE EUROPEAN UNION

There is no shortage of deeply normative work on the European Union, its foundations, and its goals.<sup>3</sup> But by contrast with the detailed treatment extended to values like justice, democracy, efficiency, and sovereignty, the value of positive political liberty in European integration has generally been left as a background assumption.<sup>4</sup> This Part argues that this is a mistake. I shall begin by setting out precisely what I mean by positive political liberty, then explore some reasons to think that a first-order commitment to this value (i.e., what we might call positive political *liberalism*) may be peculiarly appropriate and appealing for the European Union.

A. *The Demands of Positive Political Liberalism*

Positive political liberty, as I will use that term, is a quality of what I shall call a relation of governance. A relation of governance is any relationship between two entities such that one entity (the “governing” entity) addresses a claim to the other (the “governed” entity) that the political relation between them constitutes, for the governed entity, a reason for accepting and complying with the acts and decisions of the governing entity. To put it the other way around, a relationship is one of governance to the extent that one (governing) entity claims that its own acts and decisions should be normative for the other (governed) entity because of the political relation between them.

A basic premise of this Article is that relations of governance are subject to the demands of positive political liberalism: or, more precisely, that a relation of governance becomes normative in a distinctive way for a governed entity to the extent that the demands of positive political liberalism are met. By “the demands of positive political liberalism” I mean three things: first, that the relation reflects, accommodates, and is contingent upon the will of the governed entity, as expressed in the governed entity’s actual subjective contemporaneous

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<sup>3</sup> See, e.g., TÜRKÜLER ISIKSEL, EUROPE’S FUNCTIONAL CONSTITUTION: A THEORY OF CONSTITUTIONALISM BEYOND THE STATE (2016); EUROPE’S JUSTICE DEFICIT? (Dimitry Kochenov, Gráinne de Búrca & Andrew Williams eds., 2015); ERIK O. ERIKSEN, THE NORMATIVITY OF THE EUROPEAN UNION (2014); PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW (Julie Dickson & Pavlos Eleftheriadis eds., 2012); JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE (Ciaran Cronin trans., 2012); ANDREW WILLIAMS, THE ETHOS OF EUROPE: VALUES, LAW AND JUSTICE IN THE EU (2010).

<sup>4</sup> Of course, this neglect has been relative, not absolute. See, e.g., Richard Bellamy, *The Liberty of the Post-Moderns? Market and Civic Freedom Within the EU* (LSE “Europe in Question” Discussion Paper Series, Paper No. 01/2009); Erik O. Eriksen, *The EU and the Right to Self-Government*, in DEVELOPING A CONSTITUTION FOR EUROPE 34 (Erik O. Eriksen et al. eds., 2004).

exercise of rights of choice (call this “liberal freedom”); second, that these choice-rights are distributed equally among governed entities without arbitrary discrimination among them (call this “liberal equality”); and, third, that liberal freedom and liberal equality are enjoyed directly by governed entities, not ascribed to them through purported relations of representation or agency (call this “independence”). In summary, then: positive political liberty requires that governed entities enjoy independent liberal freedom and independent liberal equality in the relations of governance in which they participate. These are what I will call the demands of positive political liberalism,<sup>5</sup> and my particular focus in this Article will be on independent liberal freedom, rather than equality.

To be clear, my concern is with positive political autonomy in the Rousseau-Kant-Locke tradition as lawgiving to the self, rather than negative liberty in the Constant-Mill-Nozick sense as freedom from regulatory interference.<sup>6</sup> I set the latter aside here, despite its obvious importance both to liberal theory and the practice of European integration, for two reasons. First, my concern is with basic first principles, and there is an important sense in which the robustness of the negative freedoms (as well as the crucial question of which negative freedoms shall be recognized and protected) depends, in practice, upon the positive political ones.<sup>7</sup> Second, positive political liberty seems to present a much richer issue and a sharper problem in the European Union as it stands than does negative liberty.<sup>8</sup> In fact, the Union’s credentials as a creator and protector of negative freedom rights have

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<sup>5</sup> Of course, the term “liberalism” is notoriously capacious, and I make no claim that what I describe in the text reflects any other account in particular, still less the great mass of liberal theory. The relevant literature defies curation. See generally, e.g., Gerald Gaus et al., *Liberalism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014); ISALIAH BERLIN, LIBERTY (Henry Hardy ed., 2d ed. 2002); LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1st ed. 1982); Ronald Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113 (Stuart Hampshire ed., 1978).

<sup>6</sup> On the basic distinction, see, e.g., ISALIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 166 (Henry Hardy ed., 2002) (comparing “positive” with “negative” liberty); Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns*, in CONSTANT: POLITICAL WRITINGS 307 (Biancamaria Fontana ed., 1988) (comparing “political” with “individual” liberty). But see Bellamy, *supra* note 4 (distinguishing Constant’s treatment from Berlin’s).

<sup>7</sup> See, e.g., Jeremy Waldron, *Participation: The Right of Rights*, 98 PROC. ARISTOTELIAN SOC’Y 307, 320–37 (1998); see also Eriksen, *supra* note 4, at 35 (“The EU establishes *post-national rights*, including fundamental rights of a constitutional kind. But as its citizens have not given themselves these rights, what kind of validity can they possibly possess?”).

<sup>8</sup> It has also received much less attention. Much scholarship on “Member State autonomy” in the European legal order deals with autonomy in the negative sense: Member State freedom from Union interference. See, e.g., THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES (Hans-W. Micklitz & Bruno de Witte eds., 2012); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612 (2002).

been strong: particularly, of course, with respect to economic activity.<sup>9</sup> To pick an obvious example, the Court of Justice's free movement jurisprudence protects economic freedom against state-level discriminatory or protectionist regulation much more vigorously than does the dormant Commerce Clause jurisprudence of the U.S. Supreme Court.<sup>10</sup>

I will add two important observations regarding the demands of positive political liberalism. First, the fully liberal political order is—like the fully just or the fully democratic political order—an ideal, not a reality. It is not clear what it would mean for an order to be fully liberal on my account, but it would probably not be a workable polity. Actual political orders will approach the ideal to the extent that the demands of liberalism are satisfied. Second, my account does *not* come with a meta-normative claim that there is some kind of a pre-political duty to maximize the liberal credentials of political orders. Liberal freedom and equality alone are not enough to make a political order maximally desirable in some all-things-considered sense. What I call political autonomy is simply a quality or value with some appeal, which—like justice or peace or productive efficiency or subjective preference-satisfaction—will have to roll up its sleeves and get into the battle of first-order normativities with everything else. Thus, for example, my liberal frame will lead me to speak mainly of rights, but accounts of duties and even virtues will have a role in any full and appealing normative picture of European integration.<sup>11</sup>

### B. *The Appeal of Positive Political Liberalism*

The standard case for positive political liberalism is familiar: agnosticism about the good as a response to deep disagreement; respect for the inherent value of human autonomy and dignity; the epistemic value of free choosers in searching for the good and the useful; and so on.<sup>12</sup> But there are a number of reasons to think the European Union a peculiarly appealing site for pursuit of this value.<sup>13</sup>

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<sup>9</sup> See, e.g., ERIKSEN, *supra* note 3, at 3 (“In [the European] system regulation is mostly *negative*; it is about abolishing barriers for an effective internal market.”); FRITZ W. SCHARPE, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 56 (1999) (“By judicial fiat . . . the freedom to sell and to consume had achieved constitutional protection against the political judgement of democratically legitimized legislatures.”).

<sup>10</sup> I have elsewhere charted the remarkable and under-appreciated erosion of this doctrine in U.S. law. See Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255 (2017).

<sup>11</sup> I owe this observation to Joseph Weiler.

<sup>12</sup> See *generally supra* note 5.

<sup>13</sup> To be clear, in making the case for positive liberalism's normative appeal in this Section I am *not* also making the descriptive claim that in either theory or practice the Union strongly

First, positive political liberalism is above all an approach of humility and caution in normative affairs: it is characterized by an unwillingness to force a vision of the good, in a strong sense, onto governed entities that do not choose it.<sup>14</sup> We traditionally associate this caution with the epistemic limits faced by those who govern: How can those who govern us claim privileged knowledge of the good? But it is equally associable with limits to the *authority* (in whatever sense one might favor) or to the functional mandate of those who govern. (A version of the point could be illustrated by supposing that the Post Office or Internal Revenue Service were one morning to issue a set of broad principles of social justice or personal morality.) Here the proposition would be that forcing a strong vision of the good onto the governed is inappropriate for a supranational Union *not* because the Union does not or cannot know the good, but simply because that task falls beyond its purview. Without pushing the point too far, I think it more than plausible that the moral authority or mandate of the Union and its institutions, in the eyes of its citizens at least, to define and prescribe the good for citizens or Member States (or both) is weak, both in absolute terms and in particular by comparison with the position of the Member States themselves, *qua* European Council or otherwise.<sup>15</sup>

Second, the demands of positive political liberalism—and specifically its aversion to the forcing of thick normative propositions on those who do not accept them—seem to fit well with some of the emergent pathologies of the Union. These to a great extent seem to reflect increasing opposition to utopianism in the Koskenniemiian, norm-forcing sense, and a growing dissatisfaction with governance that pursues the *interests* of citizens (or the interests that they “should” have

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safeguards, or even pursues, positive political liberty. Quite to the contrary, in a series of very obvious ways, the nature and activities of the Union are, or can be, sharply inconsistent with this value. My point here is the more modest one that there are under-appreciated reasons to think positive liberty is an appealing value in the context of supranational integration.

<sup>14</sup> See, e.g., Dworkin, *supra* note 5, at 127–28 (defining the core of liberalism as the supposition “that government must be neutral on what might be called the question of the good life”). The nuance “in a strong sense” recognizes that even positive political liberalism’s commitment to the normative priority of free equal governed choosers as a foundational principle of political morality is itself a contestable and contested normative stance: there is, after all, no neutral form of political order. Separately, at the risk of repetition, my comments regarding *positive* liberalism in the text here and throughout this Article should not be confused with *negative* conceptions of liberalism (such as libertarianism, market liberalism, and so on), distinguished by a foundational commitment to private freedom of action and a minimal, “neutral” State focused on the protection of private rights of person, property, and contract. Conceptions of the latter sort *certainly* reflect a developed—and controversial—vision of the good; and today’s Union is arguably much more protective of negative than positive liberty.

<sup>15</sup> See, e.g., PETER L. LINDSETH, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE 257 (2010) (“Europeans see the EU . . . as fundamentally administrative . . .”). The position is not quite as clear as I make it sound in the text: the Commission and the Court, for example, have long had an important role in elaborating and defending the Treaties and their (explicit and implicit) values. I thank Thomas Streinz for rightly urging this qualification.

or “really” have) rather than endowing them with rights to make political *choices*. Alexander Somek, for example, has recently criticized the authoritarian dimensions of an integration process in which the interests of Europeans are pursued by institutions for which “[t]he will of the people counts as an obstacle that has to be overcome.”<sup>16</sup> Others have made similar observations.<sup>17</sup> Positive political liberalism presents itself as a natural vehicle for the expression and analysis of such concerns.

Third, the value of liberalism in the European Union is heightened by the multiplicity and diversity of the political, social, and legal traditions that any supranational order must embrace, and specifically among the accounts of value and interest that they imply. Of course, a liberal premise would demand individual choice-rights even in a homogeneous and unitary society, but the salience of such rights increases with heterogeneity and division. For the risk that social choices will invade or conflict with the values, preferences, and interests of individual participants in political life (whether these are persons or polities) increases as a function of the separateness of, and divergence among, the participants’ own values, preferences, and interests.<sup>18</sup> As a result, mechanisms of individual control—what I am calling here choice-rights—become more appealing in proportion to the separateness and diversity of values and preferences of governed entities.<sup>19</sup> This makes the demands of liberalism particularly apt in supranational orders.

Fourth, the choice of liberal normative theory captures something of the uniquely voluntaristic, constructed, intentional, aspirational, *positive* (in both senses) quality of European integration. By contrast with the political orders of most states, the constitutional identity of the European Union has been intentionally designed and pursued as a

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<sup>16</sup> Alexander Somek, *Delegation and Authority: Authoritarian Liberalism Today*, 21 EUR. L.J. 340, 354 (2015).

<sup>17</sup> See, e.g., Giuliano Amato et al., *Towards a “New Schuman Declaration”*, Editorial, 13 INT’L J. CONST. L. 339, 340 (2015); Andreas Føllesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533, 548–49 (2006); J.H.H. WEILER, *To Be a European Citizen: Eros and Civilization*, in THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION 332, 336 (1999).

<sup>18</sup> See, e.g., F.A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 264–65 (1948).

<sup>19</sup> This dynamic can be seen in consociational political orders—designed to accommodate separate and divergent communities under one political roof—which frequently rely on strong political choice-rights, up to and including minority vetoes, to protect the rights of individual constituent communities. See, e.g., AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 36–38 (1977). Likewise, in the European Union, the imperative to protect “vital national interests” provided the principled basis for the veto rule enshrined in the Luxembourg Compromise. See, e.g., Anthony L. Teasdale, *The Life and Death of the Luxembourg Compromise*, 31 J. COMMON MKT. STUD. 567, 567–69 (1993).



voluntary commitment by its members.<sup>20</sup> It is, in other words, every bit as much a *project* as a polity. Positive political liberalism, with its distinctive form of normativity grounded in the free choices of those who are governed, accurately captures this aspect of the Union's identity, self-understanding, and history. With its willingness to accord normative priority to the governed, liberalism also captures something of the self-understanding of a Union in which Member States jointly remain "masters of the Treaties," as well as its aspiration toward a Union that genuinely "belongs to its citizens."<sup>21</sup>

Finally, a focus on liberalism in the Union has practical analytical value, for it allows us to take up some of the central normative problems of political structure—and particularly those relating to political choice-rights—without running immediately into the familiar terrain of democratic theory and the *no demos* debate.<sup>22</sup> For while the Union is founded on what we might call liberal-democratic values,<sup>23</sup> much more attention has been paid in the literature to the demands of the democratic side of that coin than to those of its liberal side, and it might not be too much to suggest that the shadow of the *no demos* debate may have foreclosed some analytical progress in liberal theory. For example, while it may be true that the demands of democracy do indeed presuppose the existence of a "demos,"<sup>24</sup> it is by no means so clear that the demands of political liberalism—premised as they are on individual rights rather than collective ontology—are so conditioned. Thus, focusing on the rights of *individual* governed entities (both Member States and citizens) in the Union order allows us to make analytical progress without running into the difficulties that attend an effort to understand the rights of those entities in the aggregate, and without any need for strong assumptions about the nature of European society.<sup>25</sup>

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<sup>20</sup> See, e.g., ERIKSEN, *supra* note 3, at vii ("[The Union] has been brought about by the will and power of European actors . . .").

<sup>21</sup> See, e.g., J.H.H. Weiler, *The European Union Belongs to Its Citizens: Three Immodest Proposals*, 22 EUR. L. REV. 150, 150 (1997).

<sup>22</sup> I will not attempt a fair selection of the literature here, but for some important contributions, see Kalypso Nicolaidis, *European Democracy and Its Crisis*, 51 J. COMMON MKT. STUD. 351 (2013); JAMES BOHMAN, *DEMOCRACY ACROSS BORDERS: FROM DEMOS TO DEMOI* (2007); J.H.H. WEILER, *European Democracy and Its Critics: Polity and System*, in *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION*, *supra* note 17, at 264; JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* (Max Pensky ed. & trans., 2001); Dieter Grimm, *Does Europe Need a Constitution?* 1 EUR. L.J. 282 (1995); J.H.H. Weiler et al., *European Democracy and Its Critique*, 18 WEST EUR. POL. 4 (1995).

<sup>23</sup> See, e.g., Consolidated Version of the Treaty on European Union arts. 2, 3, 9, 10, 11, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

<sup>24</sup> See, e.g., Grimm, *supra* note 22, at 293–96.

<sup>25</sup> This is not to suggest that we can *avoid* the democratic debates: just to suggest that the question of political choice-rights in European integration can be helpfully approached from a different analytical angle that does not rely on or implicate claims about the ontology of collective life in Europe. Such an approach offers a useful complement, not a substitute, to

## II. AN OUTLINE OF LIBERAL SUPRANATIONALISM

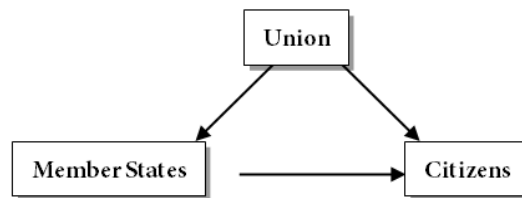
So, what would positive political liberalism demand of the European Union? In this Part, I will outline one way in which this value might be made analytically applicable to a supranational order, compare the resulting framework to some alternatives, and briefly survey some of the tools with which liberal supranationalism might be pursued.

### A. A Triangular Vision of Liberal Supranationalism

We begin by recalling that the demands of positive political liberalism pertain to relations of governance. And at the highest level of generality there are three types of governance relations in the Union: relations between the Union and each Member State, between the Union and each citizen, and between each Member State and each of its respective citizens. This follows from my definition of a relation of governance, above,<sup>26</sup> as a political relation whose nature is offered as a reason by one entity to another for accepting or complying with it and with its acts and commands. The Union and its institutions address such claims to Member States,<sup>27</sup> the Union and its institutions address such claims directly to individuals,<sup>28</sup> and Member States address such claims to individual citizens.<sup>29</sup>

Crudely, we might present these three relations together as what I will call the supranational governance triangle:

*Figure 1: The supranational governance triangle.*



With this picture in mind, I shall use the term “liberal supranationalism” to denote three propositions about supranational integration: (1) the descriptive proposition that each of these three

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analytical work in democratic theory.

<sup>26</sup> See *supra* Section I.A.

<sup>27</sup> See, e.g., TEU art. 4(3).

<sup>28</sup> See, e.g., Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 2, 12 (“[T]he [Union] constitutes a new legal order of international law . . . the subjects of which comprise not only Member States but also their nationals.”).

<sup>29</sup> The basis of the claims made by each Member State turns on the nature and terms of that Member State’s own constitutional order.

relations constitutes an autonomous relation of governance; (2) the normative-prescriptive proposition that each of these relations is subject to the demands of positive political liberalism; and (3) the normative-evaluative proposition that the legitimation of each relation of governance is a function of the extent to which reasons for accepting the normativity of the relation are actually offered to and actually accepted by free governed entities.

Liberal supranationalism thus boils down to the claim that each side of this triangle is an autonomous relationship of governance that is subject to the demands of liberalism and in which the maximization of political autonomy is a first-order priority. In Koskenniemi terms, it requires that each side be legitimated *apologetically*—i.e., by reference to the contemporaneous choices of the governed—rather than by reference to *utopian* propositions about value or interest.

Liberal supranationalism as I describe it here implies and incorporates an account of political legitimacy that falls between the traditional conceptions of normative legitimacy, on the one hand (i.e., accounts of the extent to which relations of governance *should be* accepted by governed entities), and empirical legitimacy, on the other (i.e., accounts of the extent to which relations of governance *are in fact* accepted by governed entities).<sup>30</sup> Specifically, legitimation appears here as neither a conclusion of theoretical reasoning nor an emergent property of a political order. Instead, it appears as the successful offering of reasons to accept and comply: an *activity*, a process that requires literal and reciprocal *doing* by entities with the ability and incentive to formulate and communicate such reasons and those able to understand and freely accept or reject them as normative (regardless of whether, all things considered, they do in fact accept or comply). The more and better these reasons, the greater the legitimating resources supporting the relation of governance. This conception prompts us to ask which entities are supposed to be offering these reasons, how (and how well) they do so in practice, and what reasons are being offered. Such a conception, which we might call *claiming legitimacy*, might help to avoid both the slightly lecturing conclusive-prescriptive tone that normative legitimacy scholarship can sometimes take (the Union *is* legitimate, if only people would *understand!*) and the blindness to the internal perspective that the empirical approach can imply.<sup>31</sup>

Liberal supranationalism is plainly an analytical and normative

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<sup>30</sup> I have articulated this conception of legitimacy elsewhere. See Daniel Francis, *Exit Legitimacy*, 50 VAND. J. TRANSNAT'L L. 297, 320–21 (2017).

<sup>31</sup> Of course, others have also stressed the active nature of legitimation: my point is the relative, not absolute, neglect of this dimension, and the aptness of claiming legitimacy to help us see it more clearly. See, e.g., Andreas Føllesdal, *The Legitimacy Deficits of the European Union*, 14 J. POL. PHIL. 441, 448–49 (2006); Gráinne de Búrca, *The Quest for Legitimacy in the European Union*, 59 MOD. L. REV. 349, 352 (1996).

premise. (It is also, as I have noted above, an unattainable ideal: the demands of liberalism can never be “fully” satisfied.) It is a set of simple propositions about how the political structure of the Union should be understood and evaluated at a very high level of generality.

### B. *Liberal Supranationalism Compared*

Let us see liberal supranationalism more clearly by comparing it with some of the dominant normative models of European integration. For illustrative purposes, I will single out four traditions of scholarship, which I shall call *liberal intergovernmentalism*, *utopianism*, *democracy*, and *Eurostatism*.<sup>32</sup>

*Liberal intergovernmentalism.* Those writing in the liberal intergovernmentalist tradition regard the Union as essentially an expression of Member State preferences and choices, and its acts as the outcome of traditional inter-state bargaining.<sup>33</sup> On this view, the Union is an agent for the Member States, albeit an active one enjoying considerable free rein in practice.<sup>34</sup> For the writers in this tradition, the relationship between the Union and its citizens is epiphenomenal to the relation between citizens and national governments, and stands in need of no independent justification.<sup>35</sup>

Liberal supranationalism shares with intergovernmentalism an account of normativity that is based in the free choosing–power of constituent political entities, but it departs from it by simultaneously regarding human persons as well as states as co-equal constitutive choosers in the Union’s political order. Unlike intergovernmentalism, it fully embraces Wojciech Sadurski’s observation that any treatment of European integration must take seriously the *direct* political relation

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<sup>32</sup> I am omitting some familiar perspectives (perhaps most importantly federalism and pluralism) because it is not at all clear to me that they have any definitional normative foundations in the sense with which I am concerned here. “Federalism” is a notoriously protean concept and does not (either in general or in its specifically European manifestations) connote any particular normative premises. Pluralism, on the other hand, amounts to a kind of abstinence from the project of reconciling competing accounts of legal normativity. Merits aside, such accounts lack the kind of definitional normative commitments that distinguish the examples in the text.

<sup>33</sup> See, e.g., Andrew Moravcsik & Frank Schimmelfennig, *Liberal Intergovernmentalism*, in EUROPEAN INTEGRATION THEORY 67 (Antje Wiener & Thomas Diez eds., 2d ed. 2009); ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT (1998).

<sup>34</sup> Peter Lindseth’s work is crucial on this issue. See, e.g., Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628 (1999).

<sup>35</sup> See, e.g., Moravcsik & Schimmelfennig, *supra* note 33, at 83 (“Some believe . . . that the EU suffers from a ‘democratic deficit’ that will generate a backlash from angry European citizens. [Liberal intergovernmentalism]’s focus on national interest leads naturally to the contrary assessment.”).

between Union and citizen.<sup>36</sup>

*Utopianism.* Utopianists—in the Koskenniemiian, not the pejorative, sense—do take the relationship between citizen and Union to be an independent problem for political theory. But they regard that relation as one that can be justified by reference to the provision of some good or benefit that is objectively in the enlightened interests of citizens (regardless of citizens’ actual choices). I include in this category the work of scholars like Giandomenico Majone (who has argued that aspects of European integration can be justified by the technocratic development of welfare-maximizing regulatory policy)<sup>37</sup>; Türküler Isiksel (who offers a “functional” legitimacy for Union governance)<sup>38</sup>; and the deliberativists like Jürgen Neyer (who argues that European integration may be justified by the justice dividend—the right to demand reasons—that the Union legal order confers).<sup>39</sup>

In an obvious sense, utopianism is the line of thought most directly opposed to liberal supranationalism: it represents the mirror image of it from the perspective of the Koskenniemiian apology-utopia dichotomy. Where utopian scholars take some value—efficiency, justice, and so on—as a source of objective rightness claims for the Union order, liberal supranationalism makes the opposite choice to accord priority (for practical purposes at least) to actual subjective choices: to *apologetic*, not utopian, normativity.<sup>40</sup>

*Democracy.* Democrats (and I use the term with caution as the tradition is still emerging) offer an account in which the Union’s political structure is constituted among peoples, with each individual person standing in a direct political relation with his or her own people.<sup>41</sup> There is therefore an important sense in which peoples

<sup>36</sup> See Wojciech Sadurski, *Democratic Legitimacy of the European Union: A Diagnosis and Some Modest Proposals*, 32 POLISH Y.B. INT’L L. 9, 33–42 (2012).

<sup>37</sup> See, e.g., Giandomenico Majone, *Europe’s ‘Democratic Deficit’: The Question of Standards*, 4 EUR. L.J. 5 (1998); see also GIANDOMENICO MAJONE, DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH 191 (2005) (comparing “efficiency-enhancing policies” with “redistributive policies”).

<sup>38</sup> See, e.g., ISIKSEL, *supra* note 3; SCHARPF, *supra* note 9, at 13–21 (describing forms of “output” legitimation).

<sup>39</sup> See, e.g., JÜRGEN NEYER, THE JUSTIFICATION OF EUROPE: A POLITICAL THEORY OF SUPRANATIONAL INTEGRATION (2012); Jürgen Neyer, *Europe’s Justice Deficit: Justification and Legitimacy in the European Union*, in POLITICAL THEORY OF THE EUROPEAN UNION (Jürgen Neyer & Antje Wiener eds., 2011); Christian Joerges, ‘Deliberative Supranationalism’—Two Defences, 8 EUR. L.J. 133 (2002).

<sup>40</sup> My slightly hedged language here recognizes that neither the utopian writers nor my own primarily apologetic account can claim to have solved the riddle of the mutually constitutive relation between apology and utopia (i.e., between facts and norms). My decision to prioritize subjective choices of governed entities, and even to recognize the existence of such choices in certain ways, is grounded in richly normative premises; the decision of the utopianists to prioritize some value or other reflects their understanding of the path that has actually been chosen for the Union as it actually is. Facts and norms all the way down.

<sup>41</sup> See Nicolaidis, *supra* note 22, at 352–56.

perform for the democrats the role that states perform for the liberal intergovernmentalists. Peoples, not persons, are the foundational choosers in democratic theory.<sup>42</sup> On the other hand, however, some democratic theorists also seem to contemplate an important role for what I would call utopian normativities (such as nondomination and mutual recognition<sup>43</sup>) which have claims over peoples for reasons not grounded in the subjective choices of either peoples or persons.

Both liberal supranationalism and democratic theory recognize the deep normative significance of the choices of free political communities (including the particular significance of exit rights<sup>44</sup>), but liberal supranationalism departs from democratic understandings by insisting on the full co-equality of natural persons as foundational choosers, and by choosing states rather than peoples as the relevant political communities.<sup>45</sup> And, so far as democracy rests on claims about fundamental normativities that are *not* grounded in decisions of foundational choosers, liberal supranationalism denies those claims.

*Eurostatism.* Finally, Eurostatists generally recognize that the direct relation between Union and citizen presents normative difficulties that cannot easily be resolved by a utopian appeal to interest: but, analogizing to the nation-state, they claim that the imperative to legitimate this relationship demands that the Union embrace statehood or an equivalent. On this view, the Union must become a federal state legitimated by a sovereign European citizenry, with the Member States as subordinate regional authorities.<sup>46</sup>

Eurostatism is in some sense the opposite of liberal intergovernmentalism: while the latter sees and foundationally values only Member States, the former sees and foundationally values only individuals.<sup>47</sup> Eurostatists seek to elevate the freedom of the citizen at

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<sup>42</sup> See, e.g., Francis Cheneval et al., *Demoi-cracy in the European Union: Principles, Institutions, Policies*, 22 J. EUR. PUB. POL'Y 1, 4 (2015) ("In a demoi-cracy the individual member statespeople has at least two rights equivalent to the rights of the citizen in democracy: exit and voice. . . . The veto right and exit right assures non-domination of the People.").

<sup>43</sup> See, e.g., Nicolaïdis, *supra* note 22.

<sup>44</sup> See, e.g., Francis Cheneval & Kalypso Nicolaïdis, *The Social Construction of Democracy in the European Union*, 16 EUR. J. POL. THEORY 235, 244 (2016) ("[Peoples] remain sovereign as long as [governing] rules are revocable, as long as sovereigns can formally exit the system or veto the change of the constitutive rules. This feature, we believe, is the most basic principle underlying a democratic order.").

<sup>45</sup> Cf., e.g., Cheneval et al., *supra* note 42, at 8.

<sup>46</sup> See, e.g., GLYN MORGAN, *THE IDEA OF A EUROPEAN SUPERSTATE: PUBLIC JUSTIFICATION AND EUROPEAN INTEGRATION* (2007); Joschka Fischer, Speech at Humboldt University, From Confederacy to Federation—Thoughts on the Finality of European Integration (May 12, 2000) (transcript available at <http://ec.europa.eu/dorie/fileDownload.do?docId=192161&cardId=192161>); G. Federico Mancini, *Europe: The Case for Statehood*, 4 EUR. L.J. 29 (1998).

<sup>47</sup> The work of Jürgen Habermas might be understood as falling into this category. See HABERMAS, *supra* note 3, at 36 (indicating that, despite the apparent co-originality of peoples and persons, *individuals*, in their dual capacities as national and European citizens, are the foundational sources of political normativity in the Union legal order).

the cost of the freedom of the Member State. Liberal supranationalism endorses the claims of persons to have their relation with the Union taken seriously, but it simultaneously insists on the independent co-priority of the Member States.

The normative foundations of these basic visions might be crudely summarized as follows:

Figure 2. Normative foundations of European integration.

	States	Individuals
Interests	Liberal intergovernmentalism (state interest $\equiv$ state choice)	Utopianism (individual interest, not choice)
Choices	Democracy (with peoples in place of states)	Eurostatism (individual, not state, choice)
	Liberal supranationalism (state choice and individual choice are separate but equal)	Liberal supranationalism (state choice and individual choice are separate but equal)

Liberal supranationalism therefore directs our evaluative gaze and our institutional imagination to a triune goal: citizens with liberal freedom in the Member States; Member States with liberal freedom in the Union; and citizens with liberal freedom in the Union, with each of those groups of governed entities jointly and equally choosing and pursuing the second-order values of their collective projects through the exercise of their respective political choice-rights.

### C. An Overview of Political Choice-Rights

The tools for the realization of liberal supranationalism are the political choice-rights that enable governed entities to have their will more perfectly reflected in the relevant governance relations to which they are subject, and which in various ways make governance contingent upon the will of the governed entities. These include, but are not limited to, the following, in no particular order.

*Veto rights.* Veto rights enable individual governed entities to block or preclude measures of governance. They offer a strict assurance that an act or measure will not be forced onto any governed entity without its consent, although at the cost of radically limiting the ability of the system to operate.<sup>48</sup>

*Voting rights.* Voting rights confer a share of some kind in a decisional function. Individual choices are aggregated by a social choice function, such as the majority principle.

*Rights of participation.* A wide variety of choice-rights allow direct participation by governed entities in the creation and modification of

<sup>48</sup> See, e.g., EPSTEIN, *supra* note 5, at 22 (“Let every political actor have a veto right, and political paralysis will follow.”).



governance measures. This broad category includes everything from rights to issue politically salient demands in public (for example, by assembling, publishing freely, and so on) to rights of participation in specific governance processes, such as litigation, which enable the participants to play a direct role in shaping the nature and content of governance measures.<sup>49</sup>

*Rights of initiative and activation.* Many political choice-rights empower governed entities to initiate a norm-creating or norm-amending process of some kind (rights of initiative) and/or to require a previously uninvolved institution to become an active participant in such a process (rights of activation). This is usually done in the hope that the initiated process or activated institution will then operate in a way that furthers the will of the governed entity (e.g., by bringing about a desired act of norm-creation or norm-amendment, or by blocking or prohibiting an undesired act of norm-creation or norm-amendment). Initiative and activation often go hand-in-hand, and may be accompanied by a right of participation. For example, an individual right to judicial review typically activates a new institution (a court), initiates a new governance process (litigation), and empowers the rightholder to participate in that process (as a litigant).<sup>50</sup>

*Exit rights.* Finally, bookending the set of political choice-rights is the exit right. To foreshadow a point to which we will return below, this is in an important sense the counterpart to the veto: while the veto ensures that a measure will not affect an unconsenting entity by preventing the adoption of the measure, the exit right does so by empowering the unconsenting entity to renounce the mantle of membership in the political community. Despite the fact that many leading theorists of the state have abstracted away from rights of exit,<sup>51</sup> its true significance for any liberal theory of political ordering cannot be overstated.<sup>52</sup> Included in this category are rights of partial exit: that is, rights to withdraw from some aspects of the political order in question or from some aspect of one's membership in it.<sup>53</sup>

At a very high level, it is possible to divide these categories of choice-rights along two dimensions: first, by reference to whether the choice-right is held and exercised individually, on the one hand, or

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<sup>49</sup> I have explored the role of litigation as a political process elsewhere. See Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. (forthcoming 2017).

<sup>50</sup> See *id.*

<sup>51</sup> Even John Rawls did so. See, e.g., JOHN RAWLS, POLITICAL LIBERALISM 136 n.4 (2005).

<sup>52</sup> See generally Francis, *supra* note 30.

<sup>53</sup> See Francis, *supra* note 30, at 318–19 (discussing partial exit). Partial exit is highly significant in the practice of European integration in the context of “differentiated integration.” See, e.g., Frank Schimmelfennig, Dirk Leuffen & Berthold Rittberger, *The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation*, 22 J. EUR. PUB. POL’Y 764, 772 (2015).

collectively by multiple individuals whose decisions are aggregated by a social-choice function of some kind, on the other; and, second, by reference to whether the right enables the holder(s) to exercise choice regarding a governance outcome (i.e., a governing act, measure, or decision) or regarding some aspect of a governance process.

Figure 3. Four categories of political choice-right.

	Process	Outcome
Individual	<p><b>Individual initiative rights</b> (e.g., right to initiate litigation)</p> <p><b>Individual activation rights</b> (e.g., right to petition for review)</p> <p><b>Participation rights</b> (e.g., expression and association; participation in litigation, notice-and-comment, and similar processes)</p>	<p><b>Veto rights</b></p> <p><b>Exit rights</b></p>
Collective	<p><b>Collective initiative / activation rights</b> (e.g., right to institutional action if a certain number of individuals so request)</p> <p><b>Collective participation rights</b> (e.g., trade union participation in labor regulation)</p>	<p><b>Most voting rights</b> (e.g., referenda, rights to vote in elections of representative public officials)</p>

These rough categories of choice-right, of course, are by no means specific to the supranational context: they would obviously play a role in virtually any liberal account of the state. But what *is* distinctive about the supranational context is that we are dealing not simply with a bilateral governing-governed relation but with a governance *triangle*, in which our concern is with the liberal credentials of the supranational order as a whole. And, crucially, the arrangements of institutions and rights in each governance relation—that is, along each side of the supranational governance triangle—have implications for the extent of liberal freedom in *other* relations. Thus, for example, there is an important sense in which the availability of Union institutions and rights, and the access of European citizens to those institutions and rights, serves to confer choice-rights upon citizens over their *national* regulatory systems.<sup>54</sup>

Many of these dynamics are familiar. It is widely appreciated, for example, that the ability to challenge domestic regulations by invoking directly effective Union rights, and the right to participate directly through litigation in the shaping of one's national regulatory

<sup>54</sup> There is an obvious resonance here with what Robert Keohane and his collaborators have called democracy-enhancing multilateralism. See Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009).

environment, promotes positive liberty in the Member State-citizen relation in precisely this sense.<sup>55</sup> Similarly, Union law protects various forms of exit right from national political orders,<sup>56</sup> and even—at least in principle—basic political rights within them,<sup>57</sup> although, as Dan Kelemen has observed, the Union has not effectively enforced this guarantee.<sup>58</sup> And, crucially, rights and institutions at the Member State level can create vital opportunities for citizens to exercise choice-rights regarding Union governance.<sup>59</sup>

On the other hand, the effect of arrangements in one relation of governance upon the liberal credentials of another relation need not always be a positive one. For example, when processes of governance are performed by Union institutions rather than their national equivalents, citizens may face a dilution of the effectiveness of their political choice-rights.<sup>60</sup> Likewise, Member States may introduce rules and practices that may narrow or restrict Union rights.<sup>61</sup> Conversely, Union rules that protect negative freedoms often restrain the positive political freedom of

<sup>55</sup> See, e.g., Erik O. Eriksen, *A State-Less Vanguard for a Rightful World Order*, in *POLITICAL THEORY OF THE EUROPEAN UNION*, *supra* note 39, at 79 (“The individual may, so to say, be in the process of being liberated from the confines of the individual nation state in Europe as institutions above the nation-state are now in place with the competence to constrain the internal willpower of the state, i.e., the power exerted over its citizens.”).

<sup>56</sup> See, e.g., Consolidated Version of the Treaty on the Functioning of the European Union arts. 45, 49, 56, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]; Charter of Fundamental Rights of the European Union art. 45, Oct. 26, 2012, 2012 O.J. (C 326) 391; Council Directive 2004/38/EC, art. 4, 2004 O.J. (L 158) 77.

<sup>57</sup> TEU arts. 2, 7 (providing for Union action in the event that a Member States is in “serious and persistent breach” of the Union values of “human dignity, freedom, democracy, equality, the rule of law and respect for human rights”).

<sup>58</sup> See R. Daniel Kelemen, *Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union*, 52 *GOV’T & OPPOSITION* 211, 223–24 (2017). In a brilliant and critical contribution, Dimitry Kochenov has forcefully developed the claim that the Union is inherently unable to act effectively to protect values, arguing that it is “built on the presumption of the Member States’ adherence to the basic values of Article 2 TEU, while being unable to police and enforce [those] values.” Dimitry Kochenov, *EU Law Without the Rule of Law: Is the Veneration of Autonomy Worth It?*, 34 *Y.B. EUR. L.* 74, 92 (2015).

<sup>59</sup> See Bellamy, *supra* note 4, at 27 (“[E]mpowering the functioning systems of ancient liberty national electorates and parliaments so they have a more decisive voice in deciding the scope and extent of the EU and the spheres it enters will work to lessen [the democratic deficit].”); see also Peter Mair, *Political Opposition and the European Union*, 42 *GOV’T & OPPOSITION* 1, 8 (2007) (noting that as a result of separate national and European institutions, “citizens who seek to exercise control in and over the EU polity have access to two overlapping channels of political influence”).

<sup>60</sup> See generally, e.g., WEILER, *supra* note 22, at 265. See also Constant, *supra* note 6, at 314 (“[T]he size of a country causes a corresponding decrease of the political importance allotted to each individual.”).

<sup>61</sup> The most obvious example is perhaps E.U. citizenship, which is to a significant degree dependent upon the scope of national citizenship. See TFEU art. 20. However, in practice, E.U. law has much more impact on this issue than one might expect. See Dimitry Kochenov, *Rounding up the Circle: The Mutation of Member States’ Nationalities Under Pressure from EU Citizenship* (European Univ. Inst., Robert Schuman Ctr. for Advanced Studies, Paper No. 2010/23).

national citizens to make collective choices about their own regulatory environment.<sup>62</sup>

Clearly, the creation of choice-rights in any one of the three dimensions of supranational governance can have complex implications for the scope of positive political liberty on all sides of the triangle. And this is the gauntlet that liberal supranationalism throws down: the challenge of developing a system of choice-rights that optimizes positive political liberty across all three sides of the supranational governance triangle at the same time. My central contention in this Article is that this challenge is worthy of the attention of scholars and policymakers as the Union enters the next phase of its life.

### III. RETHINKING VETO AND EXIT

In the preceding pages, I have set out a basic case for positive political liberty as a first-order value of European integration (Part I) and offered a brief sketch of what that value might imply for a liberal supranational order (Part II). In this final Part, I will demonstrate the analytical fertility of liberal supranationalism by putting it to work on one very specific issue of European integration.

I will use the lens of liberal supranationalism to revisit one of the most important developments in the political structure of the Union: the surrender of the Member State legislative veto. Specifically, I will re-examine what I shall take to be the seminal account of the significance of this development—the account given by Joseph Weiler in his 1991 article *The Transformation of Europe*<sup>63</sup>—and I shall argue that liberal supranationalism highlights important dimensions of the issue that Weiler's classic treatment fails to capture.

In a nutshell, my claim will be that liberal supranationalism highlights the crucial relationship between the Member State legislative veto and a right of full *withdrawal* from the Union: a prospect that Weiler calls “total exit” and dismisses at the beginning of his analysis. In my treatment, liberal supranationalism will furnish reasons to think that exit and veto are in an important sense counterparts of one another: what was taken away in the Single European Act (SEA) with the (beginning of the) loss of the veto was in an important sense restored in the Treaty of Lisbon with the exit right in Article 50 TEU. During the period—lasting more than twenty years—in which the Member States held neither comprehensive legislative veto rights nor clear rights of withdrawal, the political morality of European integration was deeply

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<sup>62</sup> See, e.g., Bellamy, *supra* note 4, at 20 (noting that “collective ancient liberty has been undercut by [the] extension of modern liberty” in the E.U. free movement system).

<sup>63</sup> J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

compromised. And it gives grounds to speculate that the belated introduction of a unilateral exit right in the Treaty of Lisbon could constitute a step toward a second “transformation of Europe”: a decisive move along the journey from utopia to apology that liberal supranationalism invites.

#### A. *The Lost Veto*

The basic story of the transition from unanimity to qualified majority rule in the Union legislative process is a familiar one. In the famous Luxembourg Compromise of 1966, the Member States agreed to proceed by unanimity in the Council, granting each Member State what amounted to an individual legislative veto.<sup>64</sup> This arrangement defused a political crisis but—of course—it significantly encumbered the legislative process. That encumbrance was manageable while the Union was relatively small and integrative efforts focused on the elimination of border measures, but in order to realize the single market’s ambitions with respect to behind-the-border measures—the elimination of internal regulations with unpalatable discriminatory or protectionist effects—it was clearly necessary to liberate the lawmaking process from the strictures of unanimity rule.<sup>65</sup> Answering this need, the central impact of the SEA was the end of the understanding that unanimity would govern in the Council.<sup>66</sup> Today, while decision-making is still dominated by consensus, the majority principle and not the unanimity rule sets the terms upon which that consensus is built.<sup>67</sup>

The leading account of the deeper significance of the breaking of the veto for the normative foundations of European integration remains Joseph Weiler’s immensely influential *The Transformation of Europe*. One of the core contributions of that work was the insight that the willingness of the Member States to accept the “constitutionalization” of Union law in the 1960s and 1970s, as well as the growth of its substantive and institutional reach, was facilitated by and in some sense a function of the significant increase in Member State control over

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<sup>64</sup> See, e.g., Teasdale, *supra* note 19. As Dimitry Kochenov has rightly and helpfully reminded me, my account here ignores the pre-1966 history, including the original vision of the legislative process. In an important sense, the progressive breaking of the Luxembourg veto, beginning with the SEA, represents a step *back* toward that original vision. A fuller treatment than I can furnish here would address the entire arc of this history.

<sup>65</sup> See, e.g., KENNETH A. ARMSTRONG & SIMON J. BULMER, *THE GOVERNANCE OF THE SINGLE EUROPEAN MARKET* 16–27 (1998).

<sup>66</sup> See, e.g., Teasdale, *supra* note 19, at 575 (“In practice . . . the Luxembourg Compromise effectively died with the Single European Act.”).

<sup>67</sup> See, e.g., Frank M. Häge, *Coalition Building and Consensus in the Council of the European Union*, 43 *BRIT. J. POL. SCI.* 481 (2012); Christina Zimmer et al., *The Contested Council: Conflict Dimensions of an Intergovernmental EU Institution*, 53 *POL. STUD.* 403 (2005).

Union lawmaking during the same period.<sup>68</sup> Weiler set out this thesis as an example of the Hirschmanian principle of cross-elasticity between “voice” and “exit.”<sup>69</sup> Specifically, he identified Member State control over decision-making as a form of “voice,” and the practical ability of Member States to disregard Union law as a type of “selective exit.”<sup>70</sup> Drawing on Hirschman’s insight that greater rights of voice can reduce the demand for exit (and vice versa), Weiler identified the emergence of the Member State veto in the Luxembourg Compromise, as well as the empowerment of intergovernmental institutions like the European Council and the Committee of Permanent Representatives, as critical augmentations of voice that facilitated Member States’ acceptance of the foreclosure of opportunities for selective exit. The result was a delicate equilibrium: Member States’ enhanced power over the legislative process furnished the “political conditions that allowed [them] to digest and accept the process of constitutionalization.”<sup>71</sup> Weiler largely set the question of withdrawal from the Union—so-called “total exit”—to one side, on the ground that the concept was “not particularly helpful, or at least it does not profit from legal analysis.”<sup>72</sup>

It followed from Weiler’s analysis that the shift to qualified majority voting disrupted the equilibrium and created a situation of heteronomy.<sup>73</sup> With legislative deliberation under the shadow of the majority vote instead of the veto,<sup>74</sup> the peoples of Europe were pitched into a majority-rule system even though it remained an uneasily “open question whether the necessary shift in public loyalty to such a redefined [i.e., Europe-wide] boundary has occurred.”<sup>75</sup>

### B. *A Liberal Supranationalist Perspective*

Weiler’s analysis was illuminating and influential, and nothing that I will have to say will contradict or undermine it on its own terms. My claim is rather that liberal supranationalism brings out parts of the picture that are hidden in Weiler’s account. In particular, liberal

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<sup>68</sup> Weiler, *supra* note 63, at 2426–30.

<sup>69</sup> See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

<sup>70</sup> Weiler, *supra* note 63, at 2412, 2424.

<sup>71</sup> *Id.* at 2428–29.

<sup>72</sup> *Id.* at 2412.

<sup>73</sup> *Id.* at 2462 (“What puts the Community and its Member States in a new ‘defining’ situation is the fact that the Foundational equilibrium, . . . seems to be shattered. Unlike any earlier era in the Community, and unlike most of their other international and transnational experience, Member States are now in a situation of facing binding norms, adopted wholly or partially against their will, with direct effect in their national legal orders.”).

<sup>74</sup> *Id.* at 2461.

<sup>75</sup> *Id.* at 2473–74.

supranationalism suggests that it might have been a mistake—or at least a missed opportunity—to have dismissed “total exit” so quickly. For “total exit” may have been precisely the solution to the problem that Weiler identified as arising from the lost veto.

To see why, it is crucial to understand what makes the veto special from the perspective of liberal supranationalism. A veto is not just a choice-right, it is what I have called an *individual* choice-right over *outcomes*.<sup>76</sup> By this I mean that the veto conditions each measure of Union governance on the unilateral consent of each veto holder. By contrast, as noted above, most other types of choice-right in a political order (including voting rights, participation rights, rights to activate institutions, and so on) are either *collective* rights or *process* rights (or both), connected to governance outcomes in a more attenuated and indirect fashion.

The veto’s unique counterpart in this respect—the other major category of unilateral choice-right over outcomes rather than processes—is the true exit right.<sup>77</sup> Like the veto, an exit right empowers the governed entity to make a unilateral choice between subjection to a governance relation and renunciation of it. Actual contemporaneous consent becomes the predicate of the governance relation. By contrast, the possibility of mere noncompliance (i.e., what Weiler calls “selective exit”) does not have this effect: it leaves the normative basis of the governance claim intact, and provides no resources for denying the normativity of the governance relation.

A liberal supranationalist perspective would therefore imply that the sacrifice of the legislative veto caused a loss of a foundational element of the political autonomy of the Member States in a distinctive way that could have been, but was not in fact, offset by the contemporaneous creation of a genuine exit right within the Union legal order. (Famously, of course, the original Treaties contained no such right, and the weight of academic opinion favored the view that none was conferred by general international law.<sup>78</sup>) Accordingly, with the erosion of the legislative veto, the Union entered a period of more than two decades—between the entry into force of the SEA in 1987 and the

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<sup>76</sup> See *supra* Section II.C and Figure 3.

<sup>77</sup> See Francis, *supra* note 30, at 333.

<sup>78</sup> See, e.g., Raymond J. Friel, *Secession from the European Union: Checking Out of the Proverbial “Cockroach Motel”*, 27 *FORDHAM INT’L L.J.* 590, 627 (2003) (“Legally the doctrine of supremacy, allied with the absence of a specific clause authorizing secession, renders State withdrawal theoretically impossible.”); J.H.H. Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, 20 *ISR. L. REV.* 282, 287 (1985) (“It would appear . . . that orthodox legal analysis would confirm, in the context of the EEC, Feinberg’s general conclusion against the automatic right of unilateral withdrawal.”); John A. Hill, *The European Economic Community: The Right of Member State Withdrawal*, 12 *GA. J. INT’L & COMP. L.* 335, 357 (1982) (“[A] right of member state withdrawal does not exist in the EEC.”).

entry into force of the Lisbon Treaty in 2009—in which the independent liberal freedom of the Member States was deeply compromised. This was a significant development *away* from the apologetic accommodation that liberal supranationalism commends: it was a regrettable move away from apology and toward utopia.

With the special connection between veto and exit in mind, we can now follow Weiler by shifting gears from normative to positive analysis, in order to ask what effect we might expect this sacrifice of Member State political autonomy to have in the other relations that constitute the supranational governance triangle. And, in this respect, one essential change was that, following the loss of the veto, national executives held no clear unilateral choice right (in the Union-Member State relation) that would serve as a focus of *domestic* responsibility (in the Member State-citizen relation) for European governance outcomes. To be sure, during this period many of the Member States' other choice-rights were augmented: for example, Member States' powers to participate in comitology and to choose among differentiated levels of integration underwent rapid expansion and development during this time.<sup>79</sup> But what was lost was the clear sense in which Union governance of each Member State and of European citizens was directly contingent upon the individual consent of the Member State itself. An autonomy deficit had arisen.

In this sense, the twenty-two years between the loss of the veto and the creation of the exit right were characterized by a fuzzy form of collective irresponsibility among national executives for Union governance outcomes. Among other things, this made it not just possible but easy for national governments to play a two-level game, disclaiming responsibility for unpopular Union measures while claiming credit for popular ones and for “concessions” extracted from Europe. There is no doubt that such behavior, including strategic distortions of the truth, was often observed in practice.<sup>80</sup> Domestic politicians became remarkably adroit at keeping European policy issues outside the sphere of domestic political responsibility.<sup>81</sup> This weakening

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<sup>79</sup> See, e.g., Schimmelfennig, Leuffen & Rittberger, *supra* note 53, at 769; Jens Blom-Hansen, *The Origins of the EU Comitology System: A Case of Informal Agenda-Setting by the Commission*, 15 J. EUR. PUB. POL'Y 208 (2008).

<sup>80</sup> See, e.g., Mattias Kumm, *Why Europeans Will Not Embrace Constitutional Patriotism*, 6 INT'L J. CONST. L. 117, 131–32 (2008) (noting the national “incentive, when called to account, to take credit for everything good that happens on its watch while blaming on Europe, and the need to compromise, everything that goes badly”); Mancini, *supra* note 46, at 41 n.61 (“Member State governments use the Union as a scapegoat.”); Philippe C. Schmitter, *Imagining the Future of the Euro-Polity with the Help of New Concepts*, in GOVERNANCE IN THE EUROPEAN UNION 121, 150 (Gary Marks et al. eds., 1996) (“Sending intractable issues abroad to Brussels and blaming it for the need to implement unpopular policies at home has become a standard feature of European politics.”).

<sup>81</sup> See, e.g., Mair, *supra* note 59, at 12–13 (“[W]ith few exceptions, political leaders dealing



in citizens' power to use national politics to vindicate their political autonomy with respect to the Union had a further consequence: it threw a harsh spotlight on the inadequacy of citizens' autonomy in their *direct* relations with the Union. Citizens' own political choice-rights in the citizen-Union relation were—and remain—highly imperfect: the directly elected European Parliament has never escaped its secondary role as the “editor, not the author, of European laws,”<sup>82</sup> and rights to participate in Union governance processes directly (through litigation and so on) are more theoretical than genuine for the great majority of persons.<sup>83</sup>

It follows that the introduction of the exit right in 2009 in Article 50 TEU restored a vital form of political autonomy to Member States in the Union legal order. The decision to remain within, or to leave, the European sphere of governance—the decision upon which the applicability of all Union law to state and citizen is conditioned—is now squarely and publicly within the legal and political rights of each Member State. This restores an individual outcome choice-right to the Member State vis-à-vis the Union: a right which can in turn, like the veto, provide a focus of political responsibility for the Member State government vis-à-vis its own citizens.

This can be expected to have at least three salutary consequences. First, the exit right makes the two-level game much more dangerous for national governments: fueling resentment toward Europe (and claiming domestic credit for the benefits of integration) risks creating a political constituency around withdrawal and stimulating the development of a domestic opposition motivated to “take back control” from the putative despotic European overlords.<sup>84</sup> Second, national governments now have a much sharper incentive to ensure that the exercise of the Member State's choice-rights in the Union-Member State relation accords with and channels domestic politics. In a world where domestic governments must accept foundational responsibility for European decisions and

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with Europe choose to contest elections on issues in which those elections cannot prove decisive, and to exclude those issues on which the elections can prove decisive. . . . In my reading . . . the giant [of national politicization of European policy] is not only sleeping, but has been deliberately sedated, so that Jack—in the shape of the mainstream parties—can run up and down the European beanstalk at will.”).

<sup>82</sup> Kumm, *supra* note 80, at 129.

<sup>83</sup> See, e.g., Eriksen, *supra* note 4, at 37 (“European citizens do not have proper rights, nor do they have the ability, to make the laws that affect them.”).

<sup>84</sup> This is arguably just what happened to the British Conservative Party. Having stoked anti-European feeling for decades, the Party leadership found itself forced by its own backbench parliamentarians into calling the Brexit referendum, and the rest is history. See, e.g., Elizabeth Rigby & Kiran Stacey, *Conservative Backbenchers Defy Cameron*, FIN. TIMES (Oct. 25, 2011), <http://www.ft.com/cms/s/0/2856a460-fe3c-11e0-a1eb-00144feabdc0.html>; Nicholas Watt, *David Cameron Rocked by Record Rebellion as Europe Splits Tories Again*, GUARDIAN (Oct. 24, 2011), <http://www.theguardian.com/politics/2011/oct/24/david-cameron-tory-rebellion-europe>.

cannot simply dismiss them as an act of heteronomous governance from “Brussels” against which the nation is powerless, a national government has every incentive to ensure that its conduct in the Union sphere does not drift too far from domestic majority politics, including by creating rules and practices within the domestic sphere that open the Member State’s own use of its European choice-rights to citizen participation.<sup>85</sup> Third, the creation of an exit right improves the incentives of Member State governments to develop the *direct* political choice-rights of individual citizens (*qua* European citizens) in the citizen-Union relation, in order to reduce political pressure that would otherwise organize around opposition to the Union as a whole.<sup>86</sup> To put it in Hirschmanian terms, conferring increased European voice upon citizens helps to alleviate pressure for European exit that would otherwise offer ready ammunition to political opponents at the national level.<sup>87</sup>

It does not seem fanciful to suggest that Brexit illustrates several facets of this analysis. First, it demonstrates the extent to which a loss of political autonomy—combined with the two-level political game, which has nowhere been practiced by national politicians with more enthusiasm or success (or with more media cooperation<sup>88</sup>) than in the United Kingdom—can over time engender tremendous resentment of the Union.<sup>89</sup> Second, it demonstrates that an explicit exit right can provide a powerful point of organization for domestic political opposition, even when every major political party is united in support of continued Union membership.<sup>90</sup> Third, the extraordinary success of the rhetoric of “take back control” suggests that positive political liberty

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<sup>85</sup> The most famous example is probably the system of Danish parliamentary mandating. See Erik Damgaard & Asbjørn Sonne Nørgaard, *The European Union and Danish Parliamentary Democracy*, 6 J. LEGIS. STUD. 33, 42 (2000).

<sup>86</sup> See, e.g., Mair, *supra* note 59, at 6–7 (“Once we cannot organize opposition in the EU, we are then almost forced to organize opposition to the EU.”).

<sup>87</sup> See HIRSCHMAN, *supra* note 69, at chs. 1–4, 9.

<sup>88</sup> See, e.g., Peter Anderson, *A Flag of Convenience? Discourse and Motivations of the London-Based Eurosceptic Press*, in EUROSCPTICISM: PARTY POLITICS, NATIONAL IDENTITY AND EUROPEAN INTEGRATION 151 (Robert Harmsen & Menno Spiering eds., 2004); Adam Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 EUR. L. REV. 523, 523 n.2 (2012).

<sup>89</sup> The history of the United Kingdom’s peculiarly tortured relationship with Europe has often been told. See, e.g., STEPHEN GEORGE, AN AWKWARD PARTNER: BRITAIN IN THE EUROPEAN COMMUNITY (1998); BENJAMIN GROB-FITZGIBBON, CONTINENTAL DRIFT: BRITAIN AND EUROPE FROM THE END OF EMPIRE TO THE RISE OF EUROSCPTICISM (2016); KEITH ROBBINS, BRITAIN AND EUROPE 1789–2005 (2005).

<sup>90</sup> National referenda have demonstrated this too. See, e.g., Simon Usherwood & Nick Startin, *Euroscepticism as a Persistent Phenomenon*, 51 J. COMMON MKT. STUD. 1, 8–10 (2013) (“There is no doubt that referendums have served to increase the salience of EU-related issues at crucial moments in the Union’s development, allowing a Eurosceptic triumvirate of political parties, non-party groups and media to galvanize support and to gain legitimacy for the anti-EU cause.”).

may not be just a theoretically appealing premise, but a value with real-world purchase that citizens do in practice desire and pursue—and that if the demand for autonomy is stifled *within* the order, it will coalesce around a rejection of the order *in toto*.<sup>91</sup> Finally, Brexit itself seems likely to enhance and sharpen the dynamics that I outline above. By very graphically demonstrating that withdrawal is a genuine and present possibility for every Member State of the Union, the Brexit process is indelibly marking the exit right onto the consciousness of European governments and citizens alike. By its sheer visibility, Brexit makes the Article 50 exit right more salient, and promotes what I have called the “exit legitimacy” of the Union.

#### CONCLUSION: TOWARD A SECOND TRANSFORMATION?

My claims in this short Article have been few and simple. In Part I, I argued that positive political liberalism offers an appealing normative basis for European integration. In Part II, I roughly outlined a framework—which I called liberal supranationalism—that, at least in a fully developed version, would offer a blueprint for the reformation of the Union in obedience to the demands of positive political liberalism. And in Part III, I showed that liberal supranationalism can provide a fertile source of analytical insight, using it to highlight the under-appreciated way in which exit rights serve as a substitute for the lost veto in the European legal order.

At the heart of my argument is the basic proposition that the presence of strong individual autonomy rights—such as a Member State exit right—can have a significant impact on the normative and positive implications of whatever systems of political cooperation are built on top of them. This insight provides an opportunity to revisit some of the most familiar and fundamental understandings of the integration process. For example, it has become an article of faith in European integration that majority rule is only sustainable within a relatively homogeneous *demos*.<sup>92</sup> That may very well be true if we mean an *irrevocable* commitment to majority rule, but it is not at all clear why it should hold if a decision to live under majority rule is a contingent, and continuously voluntary, choice made by autonomous citizens and

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<sup>91</sup> See J.H.H. WEILER, *To Be a European Citizen: Eros and Civilization*, in *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION*, *supra* note 17, at 324, 329 (“But once [Union was] achieved, once you remove the moral imperative and it’s politics as usual with the frustrating twist that in Europe you cannot throw the scoundrels out at election time. So you try and throw the whole construct out.”).

<sup>92</sup> See, e.g., MAJONE, *supra* note 37, at 207 (“Only in such a polity are majority decisions considered legitimate and hence accepted also by the outvoted minority.”).

autonomous political communities. For liberal supranationalism implies that majoritarian government in the Union may be acceptable if it is an ongoing, continually reviewed practice of cooperation, safeguarded by strong individual exit rights. Indeed, the very contingency of political membership in such an enterprise might have the salutary effect of causing members of the majority to internalize the preferences of the minority: tyranny is less likely when the majority must balance its own policy preferences against a countervailing preference not to drive the minority out.<sup>93</sup>

In closing, I want to indulge the speculation that embracing liberal supranationalism might lead us to contemplate a second “transformation of Europe.” Weiler chronicled the first transformation, in which a radical expansion of the demands that the Union made of the Member States was accepted by the Member States in exchange for increased political autonomy in the form of expanded Member State choice-rights, including, most prominently, the veto.<sup>94</sup> Weiler further pointed out that the loss of the veto marked the end of the delicate balance that made this transformation possible. My own suggestion is that liberal supranationalism might help define the next move to equilibrium, in which the autonomy of the Member States is restored with the exit right, and in which the increased role of the Union in the political lives of *citizens* is accepted by those same citizens in light of a dramatic expansion of their own political choice-rights. The ambition of such an effort would be a retrenchment of the Union away from utopian claims of value and interest, and toward a genuinely apologetic grounding in the choice-rights of Member States and citizens. For the reasons explored in Part I, a second transformation of this kind would represent a major improvement in the political morality of European integration.

On this view, the future of the Union need not turn on whether the citizens and Member States of Europe have absorbed a sufficient “habit” of obedience to the Union, nor even whether the peoples of Europe have been adequately socialized to recognize themselves as members of a cross-border political community joined by bonds of Habermasian “civic solidarity.” Rather, the central question would be whether, as independent political choosers, citizens and Member States will each in fact make the continually renewed choice to coexist in a Union that substantially protects the rights of individual citizens and individual Member States to be the authors of their own destinies, and to determine freely whether those destinies will be shared or separate. Not democratic solidarity and social we-feeling, but positive political liberty

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<sup>93</sup> This is for much the same reason that exit rights for citizens help to protect against government oppression. See Francis, *supra* note 30, at 302, 347–48.

<sup>94</sup> See *supra* Section III.A.

and political I-choosing, by both citizens and Member States, would be the first-order foundation of such a Union. This need not turn the European project into a selfish, rational-choice neoliberal dystopia: in fact, quite to the contrary, by laying emphasis on the choice of the European peoples to stick together notwithstanding the pains and burdens of doing so, it would surely burnish the moral achievement of European integration.<sup>95</sup>

There is no reliable way to tell whether a genuinely liberal supranationalism is possible in Europe, or how far citizens and Member States would, in fact, choose to participate in such a Union, but the limits of utopianism are becoming painfully clear. My own view is that Europe can and should continue to struggle forward along the road from utopia to apology, and that—even if it means a smaller Union—this is the path most likely to lead it back to its former status as an object of pride, loyalty, and acceptance for European citizens. In this sense, it is by becoming truly apologetic in political structure that the Union can best hope to regain its former utopian charm. This is the challenge that awaits Europe: it is the challenge of liberal supranationalism.

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<sup>95</sup> See, e.g., J.H.H. Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 54, 68 (Kalypso Nicolaidis & Robert Howse eds., 2001) (“I compromise my self-determination . . . as an expression of . . . tolerance. . . . [Actors in the Member States] accept [European integration] as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities.”).