

## Habermas, Supranational Democracy and the European Constitution

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Habermas's normative vision – Strengths and deficiencies – European Union democracy as solution to global problems – Necessity of developing a European civil society – Normative ideal, functional mechanisms, empirical reexamination – Habermas's criticism of Euro-skeptics – Substance-through-procedure mode of social integration – Adequacy of procedural substance questioned – Empirical limits to Habermasian European Union democracy – 'Multi-segmented governance' in the European Union – Supranational redistribution? – Legal integration has not facilitated social integration – Scharpf, Weiler, Joerges, Schmitter – Habermas's *Sozialstaat* principles jeopardized on Union level – Structural obstacle to co-ordinated European social welfare policy – European politics will resemble *Sektoralstaat* – Participation, egalitarianism and accountability

Last year a proposed Constitution was rejected by several member states of the European Union, in part because its proponents failed to articulate a grand vision of a legally, socially and politically integrated Europe. Jürgen Habermas, Europe's greatest living philosopher, is virtually the only scholar or public intellectual to set out the requisite comprehensive vision of constitutional democracy in the European Union. This paper evaluates the strengths and deficiencies of Habermas's vision of supranational democracy in Europe. Habermas argues that the European Union will solve socio-economic problems posed by globalization, as well as capitalize on legal and cultural possibilities opened by it: on the one hand, the European Union will address the threat that increased capital mobility poses to the European welfare state; and, on the other, a constitutionally integrated Europe will generate a post-national citizenship that accommodates the multicultural dimensions of contemporary member states.

This essay demonstrates that the plausibility of Habermas's normative vision of the European Union hinges on two contradictory accounts of globalization: the

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dominant theme of his essays, the historical continuity of globalization within the history of capitalism, supports Habermas's vision of supranational constitutional-social democracy but does not portend the overcoming of exclusionist identity politics that is central to Habermas's theory of postnational citizenship. Conversely, alternate strains of Habermas's account of globalization – those that depict it as an example of historical rupture or what he once called a 'structural transformation' – raise doubts about the possibility of a supranational constitutional-welfare regime even as they render conceivable a transcendence of the elite-manipulated politics of ethnic and cultural exclusion. Empirical evidence suggests that the emerging European polity will look very different from the supranational constitutional state (*Rechtsstaat*) or welfare state (*Sozialstaat*) that Habermas describes, but rather will resemble a *Sektoralstaat*: a polity in which different policy spheres are governed by those most closely affected by or most interested in them, a development with dire implications for democratic rule, legal authority and material equality in Europe's future – ramifications not properly addressed by Habermas.

#### EUROPEAN UNION DEMOCRACY AS SOLUTION TO GLOBAL PROBLEMS

'Globalization' poses problems for progressive activists and scholars that are often framed in terms of the following two questions.

- (a) Does increased capital mobility undercut the power of states to advance social justice on a domestic level?<sup>1</sup>
- (b) Can international institutions, movements and associations advance cosmopolitan and universal schemes of rights against states that do not observe such rights with respect to minorities, women, workers, immigrants, the environment, etc.?<sup>2</sup>

However, the two questions to some extent stand in tension with or work against each other: the first is motivated by trepidation over diminished state capacity in the sphere of political economy, while the other seeks to accelerate the diminution of the state's autonomy to carry out repressive political and social policies. Habermas attempts to theorize both of these concerns in the context of the European Union, which presently serves as the best test case for a postnational politics. In essays composed since the publication of *Between Facts and Norms*, some of which have been collected in the volumes *The Inclusion of the Other* and *The Postnational*

<sup>1</sup> See, e.g., Saskia Sassen, *Losing Control?: Sovereignty in an Age of Globalization* (New York, Columbia University Press 1996).

<sup>2</sup> See, e.g., Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge, Cambridge University Press 2004).

*Constellation*,<sup>3</sup> Habermas applies the normative blueprint of the former work to contemporary historical-empirical circumstances identified with globalization.

Of course, Habermas is well equipped to confront the kind of questions raised above given previous efforts at combining moral-philosophical, social-scientific and historically grounded modes of analysis. While Habermas may have rivals in each of these separate scholarly spheres, he has been a peerless practitioner of the kind of interdisciplinary research necessary to even begin confronting a problem as multifaceted and potentially overwhelming as globalization. For instance, in contrast to John Rawls's justifications for economic redistribution and, eventually, global justice,<sup>4</sup> Habermas's efforts have seldom been entirely confined to the realm of 'the ought', but have incorporated state-of-the-art knowledge of 'the is' as well.<sup>5</sup> Habermas's 'critical theory' at its most incisive has been characterized by concern with an *ought* immanent to the *is* – particularly, a constantly and often rapidly changing *is*.<sup>6</sup>

In the essays under consideration, Habermas flirts with the identification of globalization as a structural transformation, then demurs from such a step, but ultimately proceeds as if it is in fact such a transformation, only to reverse himself in his treatment of European integration. Consistent with the two facets of globalization ((a) and (b)) laid out above, Habermas acknowledges that it entails various developments that are not strictly 'economic', for instance, intercontinental 'telecommunications, mass tourism, or mass culture ... the border crossing risks of high technology and arms trafficking, the global side-effects of overburdened ecosystems.'<sup>7</sup> But he insists that the 'most significant dimension' of global-

<sup>3</sup> See Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W. Rehg (trans.), Cambridge, Polity Press, 1996) [hereinafter BFN]; Habermas, *The Inclusion of the Other: Studies in Political Theory* (C. Cronin & P. de Grieff (eds.), Cambridge, Polity Press 1998) [hereinafter IO]; Habermas, 'The European Nation-State and the Pressures of Globalization', 235 *New Left Rev.* 46 (1999) [hereafter NLR]; Habermas, 'Beyond the Nation-State?: On Some Consequences of Economic Globalization', in E.O. Eriksen & J.E. Fossum (eds.), *Democracy in the European Union: Integration Through Deliberation?* (London, Routledge 2000) p. 29-41, [hereinafter DEU ]; Habermas, *The Postnational Constellation: Political Essays* (M. Pensky (ed.), Cambridge, Polity Press 2001) [hereinafter PC]; and Habermas, *Warum braucht Europa eine Verfassung?*, in *Zeit der Übergänge* 104-29 (2001). I cite the English translation by Michelle Everson, sponsored by the European University Institute: 'So, Why Does Europe Need a Constitution?' available at <www.iue.it/RSC/EU/Reform02.pdf> [hereinafter RSC].

<sup>4</sup> See John Rawls, *A Theory of Justice* (Cambridge, MA, Belknap Press of Harvard University Press, 1971) and *The Law of Peoples: with, 'The Idea of Public Reason Revisited'* (Cambridge, MA, Harvard University Press 1999).

<sup>5</sup> See Thomas McCarthy, *The Critical Theory of Jürgen Habermas* (Cambridge, Mass., MIT Press 1978).

<sup>6</sup> Most explicitly in Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (T. Burger & F. Lawrence (trans.), Cambridge, Polity Press 1989 (1962)) [hereinafter STPS].

<sup>7</sup> PC, *supra* n. 3, p. 66.

ization is, in fact, the economic one.<sup>8</sup> Habermas defines economic globalization in both quantitative and qualitative terms: on the one hand, as a quantitative increase in the interdependence of national economies on industrial goods produced elsewhere, and, on the other, in terms of a qualitative change in the kind of goods exchanged.<sup>9</sup>

#### THE FORM AND CONTENT OF EUROPEAN UNION DEMOCRACY

Habermas admits that ‘more than one lesson’ can be drawn from the evolution of the European Union so far.<sup>10</sup> For instance, one might interpret the European Union as a development that actually exacerbates the problems of globalization, particularly the lack of accountability or ‘autonomization’ of bureaucracies in international organizations.<sup>11</sup> As he surveys the political situation of the Union, Habermas observes that a ‘thick horizontal net stretched over markets by relatively weak political regulations is being expanded by even more weakly legitimated authorities.’<sup>12</sup> In this light, he acknowledges the ‘dangerous legitimation deficiencies’ of the Brussels bureaucracy that is perhaps too far removed from a political base in the localities of the member states.<sup>13</sup> From this standpoint, the European Union could be deemed one of the ‘self-programming administrations and systemic networks’ at odds with ‘democratic processes’.<sup>14</sup>

Habermas predicted that European Union-enlargement would complicate things further:

the expansion of the Union to include a further twelve economically and socially heterogeneous countries has intensified the complexity of a demand for rule- and decision-making capacity that cannot be satisfied without further integration or a ‘deepening’ of the integration process.<sup>15</sup>

Thus, Habermas does not depict European Union policy as presently conducted in an unequivocally sanguine light: in particular, he complains that the harsh immigration regulations creating a ‘fortress Europe’ violate the asylum rights enshrined in Germany’s constitution.<sup>16</sup> But Habermas decides to explore more optimistic possibilities given the indeterminacy of Europe’s situation as he writes,

<sup>8</sup> Ibid.

<sup>9</sup> DEU, *supra* n. 3, p. 31.

<sup>10</sup> IO, *supra* n. 3, p. 123.

<sup>11</sup> Ibid.

<sup>12</sup> PC, *supra* n. 3, p. 98.

<sup>13</sup> IO, *supra* n. 3, p. 151.

<sup>14</sup> Ibid.

<sup>15</sup> RSC, *supra* n. 3, p. 13.

<sup>16</sup> PC, *supra* n. 3, p. 73.

and the alarming ramifications portended by globalization.<sup>17</sup> He is not willing to dismiss the possibility that the European Union can compensate for the functional losses of the nation-state in ways that do not 'snap the chain of democratic legitimation'.<sup>18</sup> Habermas understands 'the European project' as a common effort by European national governments 'to win for themselves in Brussels a degree of the interventionist capacity that they have lost at home'.<sup>19</sup>

But a potential problem with a continental, Union-centered solution to capital mobility becomes immediately apparent: *bigger* institutional structures do not automatically entail *better* adeptness at controlling global capital.<sup>20</sup> Some might contend that anything short of the 'world regime' that Habermas claims is unlikely would fail in this endeavor. But such objectives rest upon a somewhat mechanical spatial logic whereby territorial authority readily translates into economic control. Drawing upon his 'global limits' account of globalization, Habermas argues that the development of multiple continental regimes means that fewer actors might better co-ordinate common policies.<sup>21</sup> But even if he does not go about it in a crude manner, Habermas does seem to adhere to the notion that institutional size corresponds with some capacity for economic control: for instance, he claims that the size of the nation-state – smaller than the ancient empires but larger than city states – was ideal for administrative control in the early modern period.<sup>22</sup>

To be sure, Habermas does not define the nation-state solely in terms of its size; the unprecedented functional specialization of its administrative capacities remains for him a more distinctive characteristic.<sup>23</sup> Nevertheless, whether a world state or, more likely for Habermas, a 'club' of continental regimes can direct or control markets, he recognizes that they will fall short, just as did nation-states, in one important regard: 'markets, unlike polities, cannot be democratized'.<sup>24</sup> But even if continental regimes fail at the task of fully democratizing markets, Habermas presumes that their larger territorial authority and co-ordination with other supranational units will enable them to carry out the kind of regulation previously exercised by the national *Sozialstaat*.<sup>25</sup> Habermas is confident that the European Union, like nation states, can take up the task of 'correcting markets and estab-

<sup>17</sup> IO, *supra* n. 3, p. 123.

<sup>18</sup> NLR, *supra* n. 3, p. 53.

<sup>19</sup> RSC, *supra* n. 3, p. 14.

<sup>20</sup> NLR, *supra* n. 3, p. 54.

<sup>21</sup> DEU, *supra* n. 3, p. 34.

<sup>22</sup> *Ibid.*, p. 33.

<sup>23</sup> *Ibid.*

<sup>24</sup> NLR, *supra* n. 3, p. 54.

<sup>25</sup> PC, *supra* n. 3, p. 77.

lishing redistributive regulatory mechanisms', and not leave such correction and redistribution to 'markets themselves'.<sup>26</sup>

Habermas proceeds to catalogue the features that still qualify the European Union as an international organization and not yet as something approximating a sovereign state: It was established by treaty, *not* a constitution. It holds no monopoly on violence, and bears no sovereignty recognized according to domestic or international standards.<sup>27</sup> The European Parliament, a plausible vehicle of more directly-popular supranational legitimation, is equipped with only weak competences for the time being.<sup>28</sup> Habermas thinks that the European Parliament needs to draw more public attention to itself but need not necessarily assume budgetary sovereignty at this point in time.<sup>29</sup> In contrast to Giscard's proposal for a new 'European Congress' comprised of national parliamentarians, Habermas suggests that

parliamentary legitimation of the European Union would be increased were a portion of European parliamentarians *concurrently* to be members of national representative bodies or were the to date somewhat neglected 'Conference of Committee's for European Affairs' (Cosac) to breathe renewed life into the horizontal *exchange* between national parliaments.<sup>30</sup>

Despite these deficient aspects of the European Union, Habermas understands European *law* to exercise a supreme authority over nation states unlike that generated by any other international organization in the world, including the United Nations. He recognizes that the discrepancy between the non-state quality of European Union institutions and the authority of European law is one of the sources of the 'oft-bemoaned democratic deficit' in Europe.<sup>31</sup> Yet despite this situation, Habermas urges his readers not to view European institutions as *illegitimate* or even only *distantly legitimate* in the way that, for instance, the World Trade Organization is justifiably viewed. Union institutions are merely *indirectly* legitimate: the legitimacy of the European Union flows from citizens *through* the member states, and law is crucial to this process.<sup>32</sup>

Despite its non-state status, therefore, Habermas notes that the institutions of the European Union could be quite easily transformed into legitimizable state-

<sup>26</sup> NLR, *supra* n. 3, p. 56.

<sup>27</sup> *Ibid.*, p. 155. See RSC, *supra* n. 3, p. 6.

<sup>28</sup> IO, *supra* n. 3, p. 155.

<sup>29</sup> RSC, *supra* n. 3, p. 19.

<sup>30</sup> RSC, *supra* n. 3, p. 27-28 (emphasis added).

<sup>31</sup> IO, *supra* n. 3, p. 155.

<sup>32</sup> *Ibid.*, p. 155-156.

like organs: the European Parliament could function as a conventional legislature; the Commission could be converted into a cabinet; the Council of Ministers into an Upper House; and the European Court of Justice might continue to be empowered along the lines of a US or German-style constitutional court.<sup>33</sup> The 2000 Nice conference, for instance, gave the European Union Charter of Human Rights 'a proclamatory rather than binding status', but the Court of Justice references it, infusing supranational adjudication with a greater moral-political resonance.<sup>34</sup> Indeed, the treaties that established the European Community and European Union certainly left these institutional possibilities open: he notes that the first generation of European Union founders, such as Schuman, Adenauer and De Gasperi, had no problem speaking in terms of an eventual 'United States of Europe'.<sup>35</sup> Yet, he acknowledges that many of today's European elite, whether due to a 'healthy realism', 'counterproductive timidity' or 'outright defeatism', consider even the word federalism to be 'offensive'.<sup>36</sup>

But Habermas's ultimate priority in exploring the legitimacy question is not formally institutional, but rather substantively political. He claims that the European Union organs mentioned above must be 'filled with life', not just formally empowered, if they are to do more than merely 'accelerate the autonomization of bureaucratized politics'.<sup>37</sup> The risk that formal legitimacy may mask or engender substantive alienation is magnified at the supranational level given the greater distance between European Union institutions and national/local populaces.<sup>38</sup> Therefore, in addition to being 'repositioned' from a treaty organization toward a basic law-like 'Charter', the European Union must foster a sociological basis that includes a 'common practice of opinion- and will-formation'.<sup>39</sup> But Habermas does not consider whether a debate over a formal constitution may yet engender substantively social results. A European constitution would provide a 'catalyzing impetus' intensifying and directing a European civil society, public sphere and political culture towards 'convergence'.<sup>40</sup> But, Habermas here straddles notions of novelty and continuity, sometimes implying that a European people in fact *already* exists: he asserts at other moments that Europe need not attempt what the French and American revolutionaries accomplished (with various levels of bloodshed) since 'the constitutive question is no longer integral to the problems we are

<sup>33</sup> Ibid., p. 156.

<sup>34</sup> RSC, *supra* n. 3, p. 23.

<sup>35</sup> Ibid., p. 3.

<sup>36</sup> Ibid.

<sup>37</sup> IO, *supra* n. 3, p. 156.

<sup>38</sup> Ibid., p. 157.

<sup>39</sup> PC, *supra* n. 3, p. 100.

<sup>40</sup> RSC, *supra* n. 3, p. 18.

<sup>41</sup> Ibid., p. 4.

seeking to solve.<sup>41</sup> In other words, we already know what we wish to achieve and what the polity is that will achieve it. Europe needs only 'a new format to safeguard the great achievements of the nation state beyond national borders.'<sup>42</sup>

Habermas asserts that what is *most* needed to promote democracy at a supranational level is the development of 'a European-networked civil society, a European-wide political public sphere, and a common political culture.'<sup>43</sup> He insists that social movements and non-governmental organizations, *not* governments, are the best agents of a European or global integration project.<sup>44</sup> While Habermas welcomes 'the world-wide development of an informed political opinion- and will-formation [capacity]', he acknowledges that the over 350 international NGOs devoted to economic order, peace, and ecology are in no position to secure it.<sup>45</sup> If they focus their energies on states, the latter may be unable to address their concerns for the reasons sketched above; if they target international institutions such as the WTO or the UN, these associations may bring insufficient leverage to bear on these international institutions to be effective. Thus, according to Habermas's account, by developing within and focusing upon continental institutions such as the European Union, these associations can begin the process of accomplishing the goals of global justice associated with proposition (b) raised at the outset of this essay. In short, transnational associations operating outside the context of continental regimes are too weak; and the bureaucratic structures of the continental associations as they presently exist are too formal. Together, they might comprise what is for Habermas the appropriate form/content relationship for the conduct of supranational politics: 'interests currently segregated along economic, professional, confessional, ideological, class, regional and gender lines' will cohere to 'form the core of a European civil society'.<sup>46</sup>

Thus Habermas does not mechanically invoke 'civil society' to breathe life into the dormant body of integrated Europe. He does, however, wish to refine the way that a European civil society might address the problems of a postnational situation. At this point in his analysis, Habermas attempts to sort out empirical and normative concerns:

Any assessment of the chances for a European-wide democracy depends in the first place upon empirically grounded arguments. But we first have to determine the functional requirements; and for that, the normative perspective in which these requirements are justified is crucial.<sup>47</sup>

<sup>42</sup> Ibid.

<sup>43</sup> IO, *supra* n. 3, p. 156.

<sup>44</sup> DEU, *supra* n. 3, p. 37.

<sup>45</sup> Ibid., p. 35.

<sup>46</sup> RSC, *supra* n. 3, p. 19.

<sup>47</sup> IO, *supra* n. 3, p. 158.



In other words, a normative ideal, generally informed by historical and empirical factors, must be elucidated *first*. *Then* the functional mechanisms necessary to bring this about must be delineated. And *then* the resulting architecture must be re-examined empirically for its feasibility.

In this effort to sort out normative priorities, Habermas identifies four perspectives on integration: cosmopolitan, market-European, Eurofederalist and Euro-skeptic.<sup>48</sup> Cosmopolitans view the European Union as a step toward world government; a world without political demarcations. We have seen that Habermas is wary of undifferentiated formulations of such a goal. Market-Europeans understand the European Union to be nothing more than a free-trade zone, an environment for commercial exchange and little else. Habermas affiliates this view with the example of a Deutsche Bank spokesman, who can only regard as 'academic' the debate over the alternative 'state alliance' or 'federal state'.<sup>49</sup> Market-Europeans are content with arrangements established by international treaties aimed at promoting 'negative' integrative functions such as dismantling trade barriers and constructing market institutions.<sup>50</sup>

But Habermas points out that no positively integrative functions can result from treaties, except limited ecological ones; and that to successfully address the economic, social and political unintended consequences of a 'Market Europe' or a 'Businessman's Europe', a constitution is required.<sup>51</sup> In this vein, Habermas avers: the European Union 'requires a form of abstract solidarity' that cannot be generated by 'the cool calculation of individual advantage' but rather 'a consciousness of collective belonging'.<sup>52</sup> The European Union requires 'a common value orientation' rather than mere 'economic expectations'.<sup>53</sup> In his proposal for a continental federal system that serves a European-wide civil society, Habermas will reveal himself to be something of a Eurofederalist. Eurofederalists must

design a future Europe in contrast to the status quo that the market Europeans would like to see maintained; one that can stir the imagination and help to initiate a broad public debate over the common issues for different national arenas.<sup>54</sup>

Therefore, despite having stated at times that a 'constitutive moment' is not nec-

<sup>48</sup> NLR, *supra* n. 3, p. 56.

<sup>49</sup> Ibid.

<sup>50</sup> PC, *supra* n. 3, p. 79.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid., p. 18.

<sup>53</sup> RSC, *supra* n. 3, p. 7.

<sup>54</sup> PC, *supra* n. 3, p. 98.

essary, he asserts, 'the Maastricht intergovernmental agreement lacks that symbolic depth which political constitutive moments alone possess.'<sup>55</sup> But his rejoinders to Market Europeans notwithstanding, Habermas devotes most of his energy engaging the last of these approaches to integration, the Euro-skeptic perspective.

Habermas sharply criticizes Euro-skeptics – even moderate ones like Dieter Grimm<sup>56</sup> – who claim that European law is a significant threat to the sovereignty of individual European states. Habermas retorts that European law is obviously far less erosive of state sovereignty than are, for instance, the dynamics of contemporary capitalism. Replicating mid-20<sup>th</sup> century arguments for state regulation of markets, Habermas argues that the European Union will save the state from itself much as the *Sozialstaat* saved capitalism from itself.<sup>57</sup> But the semi-official manifesto of Euro-skepticism, the 'Maastricht Decision' of the German Federal Constitutional Court,<sup>58</sup> charges that the European Union need not functionally nor should normatively take on state-like characteristics. Functionally, the decision shares the view of 'intergovernmentalist' interpreters of the European Union: states lease out, or pool together, competences for specific tasks without sacrificing sovereignty.<sup>59</sup>

Normatively, as Habermas points out, the decision replicates the logic of nationalist, pre-political identity notions of democracy in the following way: it claims that there must be a concrete and homogenous European *demos* for there to be a European state or state-like entity. He argues that the 'no-demos-thesis' put forth by Euroskeptics undermines 'the voluntaristic character of a contractual nation'.<sup>60</sup> To be sure, the Maastricht Decision – which, as Habermas notes, actually contradicted earlier decisions of the German court that accepted prevailing relations between Germany and the European Union<sup>61</sup> – has proved to be more bark than bite in practice. Yet Habermas worries that the Euroskeptic perspective contributes to an emerging alliance in European member states between economic protectionism and cultural chauvinism characterized by: 'ethnocentric rejection of diversity, xenophobic rejection of the other, and antimodernist rejection of complex social conditions.'<sup>62</sup> Indeed, Euroskeptics are learning that they can make 'common cause' with the qualified supranationalism of the Market Europeans 'to

<sup>55</sup> RSC, *supra* n. 3, p. 4.

<sup>56</sup> See Dieter Grimm, 'Does Europe Need a Constitution?', 1 *European Law Journal* (1995) p. 282-302.

<sup>57</sup> IO, *supra* n. 3, p. 158.

<sup>58</sup> See the Maastricht Decision of the German Federal Constitutional Court, 2 BvR 2134/92, 2159/92, *Europäische Grundrechte Zeitschrift* 429 (1993).

<sup>59</sup> IO, *supra* n. 3, p. 151. See Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, NY, Cornell University Press 1998).

<sup>60</sup> RSC, *supra* n. 3, p. 17.

<sup>61</sup> IO, *supra* n. 3, p. 152.

<sup>62</sup> NLR, *supra* n. 3, p. 52.

freeze the status quo of an economically integrated but still politically fragmented Europe. But the price for this status quo is paid in the coin of growing social inequalities.<sup>63</sup>

Habermas charges that Euro-skepticism carries the dangerous logic of nationalism, a logic with an unfortunate past in Europe, into debates over integration. The fact that it has any traction at all in contemporary debates over the European Union raises questions about Habermas's aspirations for post-nationalist forms of political integration. The empirical facts of increased migration flows and a more extensive multicultural composition of contemporary societies do not necessarily rule out ideological reactions to them. Moreover, in responding to both the Euroskeptics and Market Europeans Habermas manages to show that in the academic literature, neither neorealists nor neofunctionalists are correct: the state is not the *only* institution to carry-out formative politics; and market integration in and of itself will not lead to political integration.<sup>64</sup> Contra the Euro-skeptics, more specifically, Habermas reiterates liberal and social democratic criteria of what makes a 'people': neither a prepolitical substance or will, nor a common enemy, but rather a set of practices and procedures actively engaged in by citizens through which social bonds are forged. In fact, he asserts that this substance-through-procedure mode of social integration should and can obtain more readily on the supranational level than it did on the national level.<sup>65</sup>

Thus, it is not only the pathologies of the political-economic dimension of globalization – i.e., question (a) above – but, rather, a failure to address the political-cultural possibilities opened by it – those associated with issue (b) – that also concern Habermas. The European Union must simultaneously tame economic globalization and facilitate trans-national cultural interaction; in fact, the latter may be as difficult as the former. The 'neo-corporatist' tag raises the issue of whether national identities will merely horse-trade as did, labour, management and interest groups during the Fordist era, as opposed to fully deliberating and consensually agreeing upon policies collectively. While social- and citizen-solidarity have been historically limited to national boundaries,<sup>66</sup> they must now extend to 'the citizens of the Union in such a way that, for example, Swedes and Portuguese, Germans and Greeks are willing to stand up for one another'<sup>67</sup> – they must develop what Habermas calls 'transnational trust'.<sup>68</sup> Veering toward the nationalism=welfare state thesis that he resists elsewhere, here Habermas argues

<sup>63</sup> PC, *supra* n. 3, p. xviii.

<sup>64</sup> *Ibid.*, p. 98.

<sup>65</sup> IO, *supra* n. 3, p. 159.

<sup>66</sup> *Ibid.*

<sup>67</sup> DEU, *supra* n. 3, p. 34.

<sup>68</sup> PC, *supra* n. 3, p. 102.

that citizen-solidarity is necessary for 21<sup>st</sup> century social democracy: 'clearly, redistributive programs are difficult to execute politically, not least since modernization's losers no longer belong to an identifiable industrial class with a strong veto vote.'<sup>69</sup>

Habermas concedes that the majority needs to have a conscience for social justice and a belief that the disadvantaged are still members of the 'dominant political culture'.<sup>70</sup> European citizens need to be identified beyond a common passport to entail a mutually recognized common political existence that might undergird a robust common social policy.<sup>71</sup> To this end, a European civil society may require 'a common grounding in foreign languages' but *not* the imposition of one or some languages over others.<sup>72</sup> Furthermore, Habermas considers whether the problems posed by the 13 (presently 20) officially recognized languages in Europe could be met by English assuming the role of 'a working tool' or even a 'second mother tongue', as it is in the Netherlands and the Scandinavian countries.<sup>73</sup> But he warns that European *integration* must not repeat coercive national *homogenization*; or, in his terms, integration should be characterized by 'harmonization not *Gleichschaltung* ... the gradual elimination of the social divisions and stratification of world society without prejudice to cultural specificity.'<sup>74</sup> While nationalist collective belonging was 'the product of national elites' in the 19<sup>th</sup> century, today it must be produced from a 'communicative context stretching over national public spheres'.<sup>75</sup>

The kind of communication that Habermas understands as sustaining a simultaneous non-technocratic and non-xenophobic democracy will be encouraged and materially instantiated through European Union law. Habermas recognizes that law may function pathologically as a popularly inaccessible administrative code. But as he reconstructs it according to the arguments of *Between Facts and Norms*: when law is formulated within a civil society of free associations, through deliberating political publics and open parliamentary statute-making, and then ultimately enforced by an accountable executive, it is the best way of translating popular will into public policy. In fact, it is the encoded character of law that makes administrations and markets understand the otherwise spontaneous and unruly expressions of society. For Habermas, law is therefore both institutionally administrative and socially participatory because it translates popular will into government action. It is generated by public communication but also reaches back into society

<sup>69</sup> RSC, *supra* n. 3, p. 9.

<sup>70</sup> Ibid.

<sup>71</sup> PC, *supra* n. 3, p. 99.

<sup>72</sup> NLR, *supra* n. 3, p. 58.

<sup>73</sup> RSC, *supra* n. 3, p. 21.

<sup>74</sup> NLR, *supra* n. 3, p. 59.

<sup>75</sup> PC, *supra* n. 3, p. 18.

to foster the conditions of further communication.

If a European civil society is not yet fully developed, European law almost certainly is. Thus, according to Habermas's theory, law is not only the connecting tissue between an emerging European civil society and the organs of the European Union, but a potential generator of further democratic activity in the former and enhanced responsiveness by the latter. This emphasis on law is what enables Habermas to transpose the architecture of *Between Facts and Norms*, largely constructed with a nation state in mind, up to a supranational level. Law, including the 'higher' law of a constitution, is the conductor, the 'catalytic' converter, for an 'identity' that is constantly formed and re-formed through interaction and policy-making.<sup>76</sup> But what about the strong claim that national identities were formed 'precisely' along these legal-procedural lines? Is this consistent with Habermas's alternately elite- or administratively-centered account of nationalism presented earlier? One that acknowledged the power of exclusionary identities in the mobilization of popular participation?

Here it might be appropriate to question the adequacy of this conception of procedural substance in Habermas's proposal for a European civil society. How can law and the associative life of civil society really integrate the European Union now in a way that Habermas admits that nationalism *did*, and proceduralism alone *did not*, on the state level in previous centuries? The latter, after all, had precisely these procedural means at its disposal in the form of market-related associative life and the institutions affiliated with the *Rechtsstaat* – but, nevertheless, made recourse to the sinisterly 'positive' or 'substantive' attributes of nationalism. Or, at the very least, the state combined proceduralism with heavy doses of nationalism. Again, the Euro-skeptic perspective that Habermas engages in these essays reminds us that there are other problematic or unsavoury sentiments and movements already available in contemporary Europe that cynical elites might exploit.<sup>77</sup> There certainly are cynically unifying imaginaries available to potential European nationalists or culturalists or continentalists that could stymie integration – or conversely, *promote* a kind of pathologically coercive integration that Habermas would find most disagreeable. In this light, the problem of social integration may amount to something more than 'a bottleneck in the process of European unification', or a lack of 'cosmopolitan solidarity';<sup>78</sup> there may in fact occur active efforts to halt or undo the development of such non-coercive unity and

<sup>76</sup> IO, *supra* n. 3, p. 161 (emphasis added).

<sup>77</sup> See Mark Hayes, *The New Right in Britain* (London, Pluto Press 1994); Martin Schain, 'The National Front and the Legislative Elections of 1997', in M. Lewis-Beck (ed.), *How France Votes* (New York, Seven Bridges Press 2001); Meredith W. Watts, *Xenophobia in United Germany: Generations, Modernization, and Ideology* (Basingstoke, MacMillan Press 1997).

<sup>78</sup> DEU, *supra* n. 3, p. 36-37.

solidarity.

Habermas largely overlooks this problem in these essays. There certainly are allusions to a progressively positive vision of Europe: for instance, the 'European value order' characterized by labour movements, ecclesiastical social doctrines, and social liberalism,<sup>79</sup> a value order that positions Europe as social democratic conscience and model for the rest of the world.<sup>80</sup> Habermas again makes reference to the 'fundamental structural conflicts and tensions' to which 'Europeans have reacted productively' throughout their history such that they learned 'to live with permanent conflict and to engage reflexively with their own traditions', even if this has occurred during 'the knotty course of painful and fateful developments'.<sup>81</sup> He points to Europe's ban on the death penalty and overwhelming support for an International Crimes Tribunal as proof that Europe is the home of human rights.<sup>82</sup> But for Habermas, it is precisely the 'historical experiences' and the *lessons* of nationalism that serve as the unifying principle of something *alternative* to nationalism on the European level. Europe must unite because it must *avoid* what precisely it once was.<sup>83</sup>

The 'painful learning process' typified by 'National Socialist excess' shows that Europe must integrate in a more substantive manner. Habermas asserts that

neither 'assimilation', nor simple 'co-existence' (in the sense of a shaky *modus vivendi*) are models that are suited to this history; a history that has taught us that we can create ever more abstract forms of 'solidarity with strangers'.<sup>84</sup>

In fact, according to Habermas, nationalism can be replaced as a binding substance by Europe's 'shared historical experience of having happily *overcome* nationalism'.<sup>85</sup> Appealing to the concrete historical example of national integration in Germany,<sup>86</sup> Habermas surmises, 'perhaps German federalism, as it developed after Prussia was shattered and the confessional division overcome, might not be the worst model'.<sup>87</sup> Nor might it be the best. If one dwells on this example at any length, one must confront the fact that this 'success story' was interrupted by the failure of supranationalism after World War I and the rise of Nazism in the midst of a crisis of global capitalism. It was ultimately brought to fulfillment through the impetus of a victorious enemy and in the presence of an occupying army.<sup>88</sup>

<sup>79</sup> RSC, *supra* n. 3, p. 9.

<sup>80</sup> *Ibid.*, p. 12.

<sup>81</sup> *Ibid.*, p. 22.

<sup>82</sup> *Ibid.*, p. 23.

<sup>83</sup> IO, *supra* n. 3, p. 152.

<sup>84</sup> RSC, *supra* n. 3, p. 23.

<sup>85</sup> IO, *supra* n. 3, p. 161 (emphasis added).

<sup>86</sup> PC, *supra* n. 3, p. 18.

<sup>87</sup> IO, *supra* n. 3, p. 161.

<sup>88</sup> Habermas remarks that the allied victory 'sparked' democracy in the Federal Republic, but does not consider the extent to which it *imposed* democracy: PC, *supra* n. 3, p. 47. See *ibid.*, p. xv-xvi.

## EMPIRICAL LIMITS TO HABERMASIAN EUROPEAN UNION DEMOCRACY

In this section, I will address three principal issues: (A) the extent to which the *Sektoralstaat* that the European Union is becoming can be expected to adopt *Sozialstaat*-like, legally-facilitated redistribution along the lines described by Habermas; (B) the details of the micro-segmented transnational policy-making that scholars have tried to capture with the terms infranationalism, comitology, associationalism, etc., and its ramifications for legally-facilitated discursive democracy at the European Union level; and (C) the likelihood of macro-sectoral governance for various large-scale policy spheres to which only select European member states will belong, and its ramifications for communicatively generated universal principles that Habermas claimed were previously institutionalized in national constitutions.

On the face of things, what is clear is that there will neither be an European Union federal *Sozialstaat* nor a race to the bottom that completely hollows out the welfare states of individual European Union members. The present and future reality is to be found in a much more muddled middle. Habermas places a heavy wager on the constitutionalist narrative expounded by scholars like Joseph Weiler, and so expects a continental *Sozialstaat* to emerge from legal integration and a constitutional debate/convention. Evidence suggests that, on the contrary, legal integration as described by Weiler has undermined the possibility of high levels of social protection across the European polity in most areas – but, contrary to some intergovernmentalists, not *all* of these areas. Section (B) focuses on the semi-formal, semi-public, super-specialized policy-making practices across member state borders that seem to conform superficially with Habermasian discourse-theoretical principles, while section (C) focuses on the large-scale sectors to which different sets of member states will belong, separated by fairly strict regulative divides. These three topics show that the question of governance in the European Union, and the possibility of democratizing it, is not just one of ‘multi-level governance’ but one of ‘multi-segmented governance’ as well. In this vein, the *Sektoralstaat* is characterized by both horizontal and vertical segmentation, both of which are qualitatively different from ‘industrial relations’, ‘corporatist’, ‘Fordist’, or ‘iron-triangle’ policy-making in the *Sozialstaat*. Such policy-making was supervised by constitutionally sanctioned judicial review and parliamentary oversight, while European Union policy-making is not, at least in a substantive sense.

#### A. *Supranational redistribution?*

Throughout the essays examined here, Habermas advocates something like supra-

national Keynesianism, which anticipates what Fritz Scharpf calls the pursuit and recovery at a European level – through either European Union policy or the coordinated action of the member states – of the macro-economic full-employment strategies abandoned at the state level.<sup>89</sup> Scharpf emphasizes that this is not *impossible* on the European level, but that the recent ‘institutional arrangements adopted at Maastricht and Amsterdam’ seem designed to make the development of such Keynesian, managed full-employment policies very difficult.<sup>90</sup> Moreover, a tight central bank policy like the one presently pursued at the European Union level is generally detrimental for robust employment policy. Therefore, there is not much that a European Central Bank, ‘more independent than, and as committed to price stability as, the Bundesbank’, could do for European Union-wide employment through a European monetary policy.<sup>91</sup> Further endangering the continental full-employment aspired after by Habermas, the ‘stability pact’ entailed by the Amsterdam Treaty is committed to extend this kind of fiscal discipline into the indefinite future.<sup>92</sup> Ultimately, in Scharpf’s analysis, a uniform *Sozialstaat* is impossible on an European Union level because precisely the following spheres fall within the area where both supranational and national regulation capacity is low: social policy, industrial relations, macro-economic employment policy, and taxes on mobile bases.<sup>93</sup> The Habermasian expectation that greater territorial expanse entails more robust regulatory capacity is obviously not borne out here.

But critics like Scharpf admit that Keynesian-style regulation and redistribution depends on political pressure from informed and organized publics at the continental and national level. Therefore Habermasian continental interaction within a European civil society might begin to bring about European Union social democracy. But Scharpf contends that European Union policy, despite considerable rhetoric from Brussels to the contrary, has been undermining the social citizenship necessary to exert such requisite political pressure. Put bluntly, there is no substantive social citizenship in the European Union beyond the formal civil right to enter into contractual relations, and evidence suggests that recent efforts to appear progressive in this sphere have actually favoured management and ownership. In particular, workplace participation rights, institutionalized by the 1994 Directive on European Works Councils (DEWC), are quite weak at the continen-

<sup>89</sup> See Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford, Oxford University Press 1999) p. 114.

<sup>90</sup> *Ibid.*, p. 115 n. 19.

<sup>91</sup> *Ibid.*, p. 115.

<sup>92</sup> *Ibid.*, p. 116.

<sup>93</sup> *Ibid.*, p. 117.

<sup>94</sup> Wolfgang Streeck, ‘Citizenship under Regime Competition: The Case of the “European Works Councils”’, in Klaus Eder & Bernhard Giesen (eds.), *European Citizenship between National Legacies and Transnational Projects* (Oxford, Oxford University Press 2001) p. 122, 128.



tal level and help to undermine strong social rights regimes at the national level.<sup>94</sup> Despite initial high expectations for social rights in Europe, Wolfgang Streeck argues that the latter were progressively weakened in a succession of policy arrangements over the history of the Community and Union (from harmonization to incorporation to co-ordination).

Thus, despite the expectations of the supranationalists with whom Habermas is allied normatively and empirically, legal integration has not facilitated social integration but only market integration. This result is also somewhat different from the ones predicted by intergovernmentalist scholars who emphasize the general weakness of the European Court of Justice. The Court has been sufficiently strong to push market-promoting legal integration further than many forces in the member states would like. Thus, like intergovernmentalist scholars, Scharpf shows that the European Court of Justice is too weak to promote positive integration that would create substantive social policy, but that it is much *stronger vis-à-vis* member states than intergovernmentalists recognize at promoting a neo-liberal, business friendly, negatively integrated European market. But how did the supranationalist scholars miss this development for so long, and why is Habermas immune to these commonly expressed reservations today?

Weiler, in particular, draws explicit attention to the dual legal/political or negative/positive paths of integration, conceding that supranational constitutionalization is only one integrative path, while intergovernmental state co-ordination on substantive matters is the other equally important path. Weiler is attentive to *both* supranational negative integration (through treaty-compliance guarded and enforced by the Commission and the European Court of Justice) and intergovernmental positive integration (through the near unanimous agreement of the Council of Ministers, with the participation of the European Parliament).<sup>95</sup> But probing a little more deeply into his work raises the question whether the supranationalist position is sufficiently attuned to the intimate *interplay* of these two tracks, such that the story of European integration has not really been the either/or at any particular time of European Court of Justice supranational supremacy v. member state supremacy that Weiler tells. Weiler's work scarcely reflects the fact that the Court's behavior at its most powerful has actually facilitated the more neo-liberal of member state interests, and therefore has not acted *substantively* 'supranational' at all.<sup>96</sup>

Generally, Weiler does not confront the fact that legal integration has not laid

<sup>95</sup> See J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays* (Cambridge, Cambridge University Press 1999) p. 16, cf., 96, 319. This is judiciously discussed by Scharpf, *supra* n. 89, p. 50.

<sup>96</sup> In only scant moments of his account does Weiler even hint that Court-driven harmonization of an internal market was obviously neo-liberal in philosophy and effect. See, e.g., Weiler, *supra* n. 95, p. 189, referring to the legacy of the Cassis de Dijon case.

the groundwork for substantive social integration, but may in fact have made the latter impossible within the member states who then might co-ordinate a European wide social policy, or at least compile a menu of social policies that might have any vitality at all. Weiler remarks how use of Article 235 (presently 308) EC 'opened up practically any realm of state activity to the Community, provided the governments of the Member States found accord among themselves.'<sup>97</sup> The problem is that where there was such Community action and member state accord, a race to the bottom ensued that undermines the social conditions of substantive, positive integration in social policy. Unlike Scharpf, for instance, Weiler interprets this process, if not its result, as a good thing.

But lacking social policy at the European level, policies that 'protect' welfare state measures at the member state level are a necessity for the civic and social health of these countries, a necessity undercut by the anti-protectionism of European Union law. Weiler concedes that European Court of Justice judicial review represents a 'problematic' extension of jurisdiction into 'areas of social regulation'. But it is problematic for him on *formally* democratic grounds alone – i.e., member state citizens should have some input into or oversight over this process. But Weiler does not find it problematic on the *substantively* democratic grounds that European Court of Justice adjudication is helping to exacerbate regulatory competition among member states that in turn guts crucial aspects of their welfare arrangements. In his more optimistic essays of the early to mid-1990s, Weiler seems to assume that functional spillover from formal or negative integration to substantive or positive integration has already taken place and requires only conventional political access for national populaces to render them democratic.<sup>98</sup> While there is evidence that member state welfare arrangements will not be totally dismantled, there is sufficient data to concern anyone like Habermas who anticipates a preservation of high Fordist protection levels, or even *higher* levels, as a result of further European integration.

### B. *Microsectoral governance*

There are two main approaches to rendering European Union policy-making (depending on one's perspective) more legitimate, democratic and/or progressive: the first, which we observed Habermas advocate above, would further empower the European Parliament, while the second circumvents the European Parliament almost altogether, and emphasizes instead European Union committee arrangements and the comitological, infranational and/or associational policy-making process

<sup>97</sup> *Ibid.*, p. 60.

<sup>98</sup> On the failure of functional-formal integration to spillover into substantive-positive integration, see Philippe C. Schmitter, *How to Democratize the European Union ... And Why Bother?* (Lanham, Rowman and Littlefield 2000) p. 88.

that is conducted through them. The main problem for Habermas's approach is the fact that the European Parliament is no conventional parliament and may not be plausibly converted into one. Habermas envisions an eventual expansion of European Parliament's power and transposes up to the European level expectations about the traditional interaction of legislatures and civil societies within nation states. He advocates the development of a trans-national, European-wide, civil society via the proliferation of communication technologies within Europe. Through such communicative action Habermas claims that an increasingly more powerful European Parliament can be made responsive to citizens of Europe, and make law on that basis. However, besides premature institutional presumptions about the development of the European Parliament, Habermas does not address the literature on European telecommunications that does not necessarily support his expectations about a communicatively-democratic continental public sphere.<sup>99</sup> Again, in Habermas's model, the European Union will eventually look like a continental version of a liberal-parliamentary democracy. But just as his expectations for European law and social democracy were seriously at odds with the empirical literature on the European Court of Justice, his aspirations for a European civil society/European public sphere/European parliament relationship are not especially well founded. Discursively-active transnational associations *are* impacting European Union policy, as we will see below, but their institutional focus is not the European Parliament, but rather the committee system organized under the Commission. Whether this 'new associationalism' in Europe can approximate the achievements of national civil societies that Habermas brilliantly delineated in his *Public Sphere* book – especially with respect to legally-facilitated self-government – is the pressing question.

Looking beyond the European Parliament, scholars focused on infranational/comitological/associational policy-making in the European Union assume that parliamentary practices no longer control policy processes in the way that they did in the 20<sup>th</sup> century, let alone the 19<sup>th</sup> century parliamentary model. Svein Andersen and Tom Burns, for instance, forsake the European Parliament as an institutional target for progressive politics and promote what they call 'post-parliamentary governance', claiming that European Parliament Euro-elections do not predictably influence European Union policy; and that European Union gover-

<sup>99</sup> See Stephen D. Krasner, 'Global Communications and National Power: Life on the Pareto Frontier', 43 *World Politics* (1990/91); Hamid Mowlana, *Global Communication in Transition: The End of Diversity?* (London, Sage Publications 1996); and Wayne Sandholtz, 'Institutional and Collective Action: The New Telecommunications in Western Europe', 45 *World Politics* 2 (1993).

<sup>100</sup> See Svein S. Andersen and Thomas R. Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study of Post-Parliamentary Governance', in Svein S. Andersen & Kjell A. Eliassen (eds.), *The European Union: How Democratic Is It?* (London, Sage 1996); Svein S. Andersen and Tom R. Burns, *Societal Decision-Making: Democratic Challenges to State Technocracy* (Aldershot, Dartmouth 1992).

nance is characterized by a complex overlapping of regulative apparatuses instead of straightforward preference inputs and legal outputs centered on a legislature.<sup>100</sup> Weiler, a severe critic of infranational policy-making,<sup>101</sup> defines it as: ‘meso-level’ norm creation and governance, in which mid-range European and national officials interact with various private and semi-public players (e.g., administrations, departments, private and public associations, and certain, mainly corporate, interest groups) in European committees and through the ‘comitology’ process.<sup>102</sup> National interest is much less important than technical expertise in infranationalism, concerned as it is with ‘the miasma’ of health and safety standards, the harmonization of telecommunications policy, and international trade rules.<sup>103</sup>

But Christian Joerges shows that member state interests are still preserved in the division of labour between sub-Commission *agencies* and *committees*: European *agencies* do not decide independently about policies such as market access or product licensing for firms but merely gather policy-relevant information. As he explains, ‘their semi-official status opens [agencies] up to manifestly private and social interests, and strengthens a technocratically apolitical self-perception.’<sup>104</sup> The committees, on the other hand, ‘are supposed to operate as controllers and agents not just of technocratic requirements but also of the political and normative dimensions of the completion and administration of the internal market.’ This explains why they are called ‘mini-Councils’, fora where the logic of market integration has to be made compatible with member state social regulatory concerns and interests.<sup>105</sup>

Under the eyes of the Commission, public-private ‘networks’ or ‘Euroquangos’ develop in specialty spheres where interested parties effectively shape ‘the normative outcomes of the process’.<sup>106</sup> In short, according to Weiler, infranationalism

<sup>101</sup> Weiler provides an excellent summary of infranational processes but unfortunately never really proposes how they might be subsumed under his constitutionalization thesis – but, as mentioned above, his more recent writings may suggest that he has forsaken the latter completely. On infranationalism generally, see Alexander Ballmann, ‘Infranationalism and the Community Governing Process’, in J. Weiler (ed.), *Certain Rectangular Problems of European Integration* (Project IV/95/02, Directorate for Research, European Parliament, 1996); and Christian Joerges, ‘Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance’ in Christian Joerges & Ellen Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford, Hart 1999) p. 3-17.

<sup>102</sup> Weiler, *supra* n. 95, p. 98, 273.

<sup>103</sup> *Ibid.*, p. 272.

<sup>104</sup> Christian Joerges, ‘“Deliberative Supranationalism” – Two Defences’, 8 *European Law Journal* 1 (2002), p. 145.

<sup>105</sup> *Ibid.*

<sup>106</sup> Andersen and Burns, *The European Union and the Erosion of Parliamentary Democracy*, *supra* n. 100; Weiler, *supra* n. 95, p. 278.

<sup>107</sup> Weiler, *supra* n. 95, p. 285.

involves 'transnational interest groups, governance without (State) government, empowerment beyond national boundaries.'<sup>107</sup> What is noticeable in these descriptions is how principles of neutrality, objectivity and detachment are explicitly sacrificed to those of interested access and technical precision. As a result of an unprecedented level of social complexity and policy-making intimacy, for instance, the principle that the ones *most* interested in a policy should *not* be those making the policy, or at least not the *only* ones to do so, is abandoned for ostensibly more informed and purportedly better representative policy-making. Many deem this a new enlightened, educable and persuadable form of technocracy in which European regional, local and OMC (Open Method of Co-ordination) authorities require experts to 'revisit assumptions' and consult with a wide range of affected parties to formulate the most effective policies serving the best interest of those most concerned.

The goal of this enlightened technocracy is mutual correction of policies by policy-makers and policy-takers but it intentionally excludes the wider European public. Further, by encouraging states and actors to share information and experiences concerning 'best practices' and by promoting 'innovative approaches', recent treaty provisions promote a more 'deliberative' approach to policy-making.<sup>108</sup> Thus, these scholars have witnessed something like a socio-political miracle: according to them, infranational European Union governance combines what was thought to be highly inefficient in practice, open deliberation, with what was thought to be its exact opposite, efficiency. But is this deliberation the kind that Habermas's conceived as widely accessible to the whole public in the reconstructed *Sozialstaat* model of his later work, or even the more insulated, exclusionary and elitist kind that he located within the bourgeois public sphere of the 19<sup>th</sup> century *Rechtsstaat* in *Public Sphere*?

Joerges goes to greater lengths than most infranational advocates at finely explaining why comitology might be considered more deliberative and more publicly accountable than bureaucratic operations under the *Sozialstaat*.<sup>109</sup> Joerges emphasizes how the networks that make policy within the infranational framework foster quasi-organic, 'epistemic communities' that are accountable to European Parliament observation and, 'at least sporadically, by a critical public, too'.<sup>110</sup> But this literature does not make substantive comparisons and contrasts between

<sup>108</sup> Scharpf, *supra* n. 89, p. 159.

<sup>109</sup> Joerges, *supra* n. 104, p. 148-149. Although for an account of the deliberative dynamism at least some regulatory agencies in the US, especially in their formative stages, see Daniel P. Carpenter, *The Forging of Bureaucratic Authority: Reputations, Networks, and Policy in Executive Agencies, 1862-1928* (Princeton NJ, Princeton University Press 2001).

<sup>110</sup> Christian Joerges, 'The Law in the Process of Constitutionalising Europe' <<http://www.tamilnation.org/conflictresolution/countrystudies/europe/eriksen.htm>> reprinted in Erik Oddvar Eriksen, et al. (eds.), *Developing a Constitution for Europe* (Taylor & Francis, 2004) p. 13, 42 n. 88.

the effective equity of deliberative practices in infranational governance and, say, collective bargaining in the *Sozialstaat*; or between the force of legislative oversight in the national *Sozialstaat* and within European Union arrangements; or the actual transparency of the nation state committee system and the Brussels comitology model. Such substantive comparisons and contrasts would be more convincing than triumphalist rhetoric that harkens the dawn of new administrative age signaling an unqualified advance in political and social justice.

Put boldly, there is a power myopia in this socio-political vision.<sup>111</sup> The potentially coercive power of majorities may indeed be mitigated by these associational arrangements, but not the issue of disproportionate power of unequal access *within*, or no access at all *to*, these policy-making fora, problems to which certain aspects of old-style critiques of ‘pluralism’ on a national level may be applied today.<sup>112</sup> In his mature works, Habermas focuses on deliberatively enabled law as a means of addressing these asymmetries of power within the *Sozialstaat*. In *Between Facts and Norms*, Habermas tantalizes ‘identity politics’ critics with the requirement that those persons most affected by policies must participate discursively in its formulation. But Habermas never elaborates to what extent those most affected should have provenance over these policy spheres with the result that accessibility to the broader public diminishes. Because in *Between Facts and Norms* Habermas operates within the framework of national constitutions – constitutions that institutionalize communicatively agreed upon principles – specific policy spheres and the actors within them have some legal and administrative connection to the general public.

The following principles apply to *all* citizens in Habermas’s *Sozialstaat* model: the generality and neutrality of law, the necessity of general material welfare, and wide public observation of and participation in policy-making. But these are jeopardized on the European Union level because both the micro-policy of infranationalism and, as we will *see* below, the macro-policy of welfare, environmental and other spheres will have formally separate publics. And it is far from clear whether formal constitutionalism, about which Habermas is so enthusiastic, can address the ‘accessibility’ and the ‘broader public’ issues.

### C. *Multiple policy Europes*

Infranational governance, which makes plain the problem of inequitable access and a general public, already exists in fact. We now move to a macro-policy ar-

<sup>111</sup> See Schmitter, *supra* n. 98, p. 36.

<sup>112</sup> A point that, to be fair, Schmitter himself acknowledges: he notes that what is missing from the associational account of the ‘gradual and uneven accumulation of organizationally privileged access is a general and systematic practice of equalizing access to these rights and obligations for all the organized interests.’ *See* *ibid.*, p. 35.

rangement that is not yet a reality but that experts insist is the only feasible way for the European Union to compensate for a globalization- or integration-related diminishing of problem-solving or market-correcting capacities within the member states. It also raises similar issues of equitable access and protection throughout the European polity. What most appropriately gives the *Sektoralstaat* its name is the fact that in the future different member states will only sign on for certain levels of regulation or particular policy arrangements depending on the policy sector in question. As Schmitter foresees it,

instead of a single Europe with recognized and contiguous boundaries, there would be many Europes: a trading Europe, an energy Europe, an environmental Europe, a social welfare Europe, even a defense Europe, and so forth.<sup>113</sup>

For our purposes here I will focus on environmental Europe and social welfare Europe, two components of what Schmitter calls the European *consortio* or *condominio*.<sup>114</sup>

As we saw from Scharpf's analysis in sub-section (A), welfare policy and process-related environmental standards were rendered most vulnerable by regulatory competition among member states as well as by negative integration. Furthermore, attempts to legislate higher protection levels in these spheres at the European Union level are the ones most likely to be blocked in the Council. As a response, Scharpf also envisions the 'differentiated integration' of multiple policy Europes as 'facilitating European action in the policy areas of high problem-solving salience and divergent national interests.'<sup>115</sup> First off, even if European member states could overcome regulatory competition and obstructionist Council votes, there is a structural obstacle to a co-ordinated European social welfare policy: stark differences among the member states' administrative practices, policy patterns, industrial relations protocols and welfare institutions. For instance, there is a vast chasm between the service-intensive, welfare state model that prevails in the Scandinavian member states, and the transfer-intensive model characteristic of the Continental states: the former is tax-based and obviously gendered (aiming at the replacement of lost services traditionally provided by mothers, wives and daughters), while the latter, so-called 'Bismarkian' model, is wage-based, and seeks to compensate male breadwinners in circumstances of injury, unemployment and old age.<sup>116</sup> Other important differences obtain among the member states: health care is publicly provided in Britain and Scandinavia, but, on the continent, while publicly paid for, health care is privately provided.<sup>117</sup>

<sup>113</sup> See *ibid.*, p. 18.

<sup>114</sup> See *ibid.*, p. 17.

<sup>115</sup> Scharpf, *supra* n. 89, p. 169.

<sup>116</sup> *Ibid.*, p. 80-81.

<sup>117</sup> *Ibid.*, p. 82.

Scharpf foresees a 'structural transformation of European welfare states', in other words, a co-ordinated institutional reform of national welfare states at the European level in which countries will be grouped according to levels of development and institutional styles.<sup>118</sup> He proposes that European welfare states be corralled into institutional 'families' that share 'specific historical roots, basic value orientations, solution concepts, and administrative practices, and whose path-dependent evolution has required them to cope with similar difficulties in comparable ways.'<sup>119</sup> Thus, countries conforming with Scandinavian, Continental and Anglo-Danish models can be grouped together as 'family types' and encouraged to harmonize their welfare modes and institutions amongst themselves. The internal reform strategies internal to each family might pursue, according to Scharpf,

a combination of employment-intensive forms of tax-financed basic income support with health insurance systems and (funded) pension schemes that will be financed through individual contributions, part of which will be mandated by law, and subsidized for low-income groups.<sup>120</sup>

While this will preserve welfare capacities within member states, it will also insure differences in style that inevitably corresponds with inequalities of protection. What kind of Habermasian polity could tolerate different levels of welfare that necessarily impacts on the opportunities of citizens to participate communicatively in matters of common and public concern?

Similarly, the other extremely vulnerable and highly contentious policy regimen, environmental regulation, will likely be advanced through differentiated regulation. Scharpf favours non-uniform standards for environmental process regulations and emission standards, resulting in a 'two-tiered Europe'.<sup>121</sup> While it might be possible to have a single product-related standard in Europe – since consumers observe, feel and care about the way products affect the environment – process related regulation increases the cost of products without the effect on the environment being tangible for consumers. But two different levels of process-related protection at two different levels of cost would insure both better environmental protection throughout the European Union and limit the extent to which less efficient member states will be disadvantaged by environmental reforms.<sup>122</sup> Scharpf insists that it allows less developed countries to establish 'common standards at lower levels of protection and cost that would still immunize them against the dangers of ruinous competition among themselves.'<sup>123</sup>

<sup>118</sup> *Ibid.*, p. 180.

<sup>119</sup> *Ibid.*, p. 182.

<sup>120</sup> *Ibid.*, p. 181.

<sup>121</sup> *Ibid.*, p. 171-172.

<sup>122</sup> *Ibid.*, p. 174.

<sup>123</sup> *Ibid.*



While this is clearly an advance over a race to the bottom in process-related environmental regulations, as with differentiated standards of social protection, it raises questions about the relationship of all to each within the European polity – a polity in which Habermas would have us believe each citizen could become equal consociates under the law. It is clear that his transposed *Sozialstaat* model of constitutional social democracy needs to be re-thought in terms of the policy segmentation and industrial sectoralization that obtains and will continue increasingly to obtain under the European Union *Sektoralstaat*.

## CONCLUSION

In the immanent critique strains of this paper, I have suggested that by minimizing the traumatic nature of previous transformations of the nation state and overestimating the accomplishments of the *Sozialstaat*, Habermas may too readily accentuate the feasibility of a kind of perfected state at the European level; he may render too plausible the development of a ‘continental regime’ to elevate, *aufheben*, as it were, the best of the nation state, while shedding its excessive tendencies. Habermas’s account of the history of the state exhibits a tension between continuity and discontinuity that provides no clear reason why one should expect that the transition to supranational citizenship and economic regulation will be as, or any more, continuous than was the transition from the 19<sup>th</sup> century *Rechtsstaat* to the 20<sup>th</sup> century *Sozialstaat* configuration. This problem is particularly acute because the more pessimistic possibility outlined by Habermas conforms with a conception of historical change reminiscent of Habermas’s earlier and more empirically-grounded work such as *Public Sphere*; work that analyzed the previous transformation in terms of large-scale historical discontinuity. Yet without substantive justification, Habermas chooses to carry out the bulk of his analysis in these essays on the European Union with the conceptual apparatus that he developed in later work, such as *Communicative Action*, which biases his account in favour of less wholesale, less drastic and potentially less intimidating historical change within modernity.

By setting out something less than an empirically- and historically-informed normative framework for a postnational future Habermas’s work on the European Union shares widespread assumptions with many theoretical engagements with the prospect of democracy in Europe. Most speculation about supranational institutions – optimistic and skeptical – tend to reify some aspect of the nation state that used to be problematic or contested, and deploy it as evidence for the development of a certain vision of socio-political arrangements under supranational developments. On the one hand, supranationalists posit something approximating a constitutional-social democracy at the continental level, while, on the other,

intergovernmentalists predict a persistence of state treaty negotiations as the core of future European politics. Evidence suggests, as I show in the external thrust of my critique, that European politics will look very different than what is presupposed by either of these models, and, instead, will resemble what I call a *Sektoralstaat*: a polity in which different policy spheres are governed by those most closely affected by or most interested in it, and that this will have serious ramifications for democratic rule, legal scope and material equality in Europe's future – ramifications not necessarily well met by the Habermasian paradigm in the following ways.

The *Sektoralstaat*: (1) dismisses or at the very least downgrades the participation or 'say' of those *less* affected but still *concretely* affected by a policy; (2) virtually abandons the participation of or sanctioning by the polity at large through either constitutional or statutory law; and (3) tolerates different levels of social protection and redistribution throughout, what in this case is somewhat ironically named, the 'Union'. For these reasons, the *Sektoralstaat* model emerging in Europe raises the issue of dissonance between the functioning of multifarious policy sub-groups and the rights and interests of the larger public in a way perhaps never before observed in European democratic theory and practice. They highlight the way in which participation, egalitarianism and accountability, and the feasibility of their legal facilitation, will be the mission of democratic theory in Europe, and the world, in the coming century. In the spirit of the critical theory of Habermas's *Public Sphere*, this mission demands efforts at reviving and refining our notions of history and historical change as we approach and evaluate democracy in a supranational present and future.

