

Solidarity in the European Union

Problems and Prospects

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Solidarity has long been a fundamental value underpinning the project of European integration. In the ECSC Treaty of 1951, the Preamble recognized that ‘Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development’. In both the Single European Act (1986) and the Maastricht Treaty (1992), ‘solidarity’ appeared alongside ‘cohesion’ as one of the central objectives of the EC/EU. The Treaty of Lisbon not only continues this commitment but also expands it, mentioning it both as a value binding together Member States and as a value binding together the citizens of each and every Member State.¹ The text of these articles recognizes that each Member State is defined and distinguished by its commitment to social justice, and it is one of the fundamental aims of the Union to preserve such commitments ‘while’, as the Preamble to the Charter of Fundamental Rights puts it, ‘respecting the diversity of the cultures and traditions of the peoples of Europe as well

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¹ The Preamble to the Lisbon TEU commits its signatories ‘to deepen the solidarity between their peoples while respecting their history, their culture and their traditions’. Cf. Arts 2, 3, 21 TEU; Arts 67, 80, 122, 194 TFEU and again in various protocols. See also the Preamble to the Charter of Fundamental Rights.

as the national identities of the Member States and the organization of their public authorities at national, regional and local levels’.

The double commitment to preserving the national solidarity at the basis of the ‘European Social Model’ as well as deepening and strengthening solidarity across Member States has developed in reaction to widespread uneasiness with regards to the liberalizing effects of European integration—effects which are seen to reinforce rather than allay the impact of globalization and demographic change on the viability of the welfare state. This was evident already in the late 1990s with the coming of the Lisbon European Council, which sought to rebalance the internal market agenda with an ambitious project to modernize the European Social Model. But the Treaties and European Councils were not the only sites for renewed emphasis on ‘social protection’ and ‘solidarity’. The ambit of both values, and the public disquiet that has accompanied their entrance onto the European stage, has recently been growing. To see this, one need look no further than the anxiety at the heart of the Dutch and French rejections of the Constitutional Treaty, fraught debates over the drafting (and redrafting) of the Services Directive, more general discussion about ‘social services of general interest’, ‘social dumping’ (for example, *Viking*, *Laval*, *Ruffert*), ‘benefit tourism’, and the prospect (and now reality) of eastward enlargement.² Sensing danger in the growing malaise, the Commission has been quick to respond with a steady stream of new communications peppered with references to ‘solidarity’, the launching of a new ‘Social Agenda’, a draft for future development in this area (‘Europe 2020’), and myriad consultations with social partners. This is not mere rhetoric. The ECJ has now developed a

² See, eg, Grañne De Búrca, ‘Reflections on the Path from the Constitutional Treaty to the Lisbon Treaty’, *Jean Monnet Working Paper No 3/2008*); Paul Craig, ‘Competence and Member State Autonomy: Causality, Consequence and Legitimacy’, in *The European Court of Justice and the Autonomy of the Member States*, (eds.) HW Micklitz and B de Witte, forthcoming).

line of jurisprudence (in the area of competition and freedom of movement law) in which it routinely refers to ‘principles of solidarity’ to determine the proper balance between market principles and social protection objectives in EU law.³ And, to name but one further example, the Community legislator is steady at work on a new framework for health services in which the balance between market access and principles of solidarity is center stage.

Yet, despite such prolific use of ‘solidarity’, there is very little analysis of what the nature of solidarity in fact *is*, or why we should feel particularly moved by it.⁴ Referring to the convention on the ill-fated Constitution, then-Advocate General Miguel Poiares Maduro bemoans this fact and calls for a deeper reflection on the ‘criterion of distributive justice’ that should guide European reform. ‘Without such a debate’, he writes, ‘there can be no true social contract capable of legitimizing the emerging European polity and the consequences would be either a return to a less advanced form of integration . . . or, if the current model continues to be stretched, a crisis of social legitimacy which may manifest itself in increased national challenges to European policies (whose redistributive effects are not understood and accepted)’.⁵ But what kinds of principles, policies, and ideals should an affirmation of solidarity commit us to?

³ See eg Jo Shaw (ed.), *Social Law and Policy in an Evolving EU* (Oxford: Hart, 2000); G De Búrca, ed., *EU Law and the Welfare State: In Search of Solidarity* (Oxford: Oxford University Press, 2005); Eleanor Spaventa and Michael Dougan, (eds) *Social Welfare and EU Law* (Oxford: Hart, 2005).

⁴ For the Court’s own approach, see eg Joined Cases C-159/91 and C-160/91 *Poucet and Pistre v. AGF and Cancava* [1993] ECR I-637 §15 and §18; but cf. *FFSA* (Case C-244/94 *Fédération Française des Sociétés d’Assurances* [1995] ECR I-4013) and discussion in Siofra O’Leary, ‘Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union’, in *EU Law and the Welfare State: In Search of Solidarity*, (ed.) G De Búrca (Oxford: Oxford University Press, 2005).

⁵ Miguel Poiares Maduro, ‘Europe’s Social Self: ‘The Sickness Unto Death’’, in *Social Law and Policy in an Evolving European Union*, (ed.) J Shaw (Oxford: Hart, 2000), 325–49, at 347. Cf Delors: ‘[a]ny attempt to give new depth to the Common Market which neglected this social

This is not simply an empirical or legal question. We are not trying to gauge the current degree of attachment to the EU or the depth of European fellow-feeling by, for example, citing the latest poll. We are also not attempting to state the implicit rationale followed by the ECJ in its recent ‘solidarity’ jurisprudence or trying to fix what the Commission might mean by it. Rather, we want to know the answer to the more fundamental question underlying both the legal and the empirical questions: can a more demanding criterion of solidarity—beyond, say, a humanitarian minimum—conceivably apply between states and citizens of the emerging European polity? And, if so, how demanding is it? Should we, for example, aim for a truly European solidarity, in which we judge the EU according to the standards of social justice and protection traditionally thought to apply to states? If not, how do we conceive of the ‘middle ground’ occupied by the EU (between states and the international order)? Or is talk of ‘social justice’ and solidarity inappropriate at the EU level? These are, it should be clear, manifestly philosophical questions: while the answers depend on getting the law and facts right, merely legal or empirical reflection cannot provide them. But they are not *only* philosophical questions: the way in which we conceive of the future of the European project—including the balance between ‘market access’ and ‘solidarity’ in EU law, the shape and character of future reform in healthcare, pensions, public services, the boundaries of enlargement and our responsibilities to new members, and the precise balance between monetary stability and fiscal autonomy in EMU—depends on our answers to them.

One might, as a result, expect the current literature on the ‘political theory of the EU’—by which I mean the literature that aims at a normative analysis of the process, policies, laws, effects, and institutions of European integration—to address these questions. Yet, despite the

dimension would be doomed to failure’ (Delors, 1985: xviii, Delors, J (1985) ‘Preface’, in J Vandamme (ed.) *New Dimensions in European Social Policy*, ix–xx. London: Croom Helm).

rich potential of the EU as a basis for deeper reflection upon the nature of distributive justice ‘beyond the state’, this literature is strikingly narrow. Two questions dominate. The first is whether there is or is not a ‘democratic deficit’; the second whether there is or is not a ‘European identity’.⁶ These two, closely related, questions have received abundant scholarly attention in recent years. Much less attention, however, has been paid to the question of what a fully-fledged European democracy and identity should be used, ultimately, *for*.⁷ To be sure, the ‘identity’ literature makes much of the commitments of Europeans to social protection and social justice, but it is never in the context of the substantive question—are there any obligations of distributive justice among Europeans? If so, what are their grounds?—but rather the instrumental concern with enlisting general support either for deepening and widening the project of European integration or for underwriting the democratization of the EU. This is also true of some of the most sophisticated and nuanced accounts of the EU’s impact on social solidarity both within and across borders, such as Fritz Scharpf’s *Governing in Europe*, where policy recommendations aimed at preserving the ‘European Social Model’ are cast within the framework of increasing the EU’s ‘output legitimacy’.⁸ The judgment and demand is echoed in a recent article by Andrew T Williams, who complains that ‘the existing philosophy of EU law rests upon a *theory of interpretation* at the expense of a *theory of justice*’, concluding that ‘a satisfactory theory of justice needs to

⁶ The literature is extensive, but three recent surveys of the normative debates are indicative, namely H Friese and P Wagner, ‘Survey Article: The Nascent Political Philosophy of the European Polity’, *Journal of Political Philosophy* 10 (2002), 342–64; JP Olsen, ‘Unity, Diversity and Democratic Institutions: Lessons from the European Union’, *Journal of Political Philosophy* 12 (2004), 461–95.

⁷ For this point, I am indebted to Glyn Morgan, *The Idea of a European Superstate: Public Justification and European Integration* (Princeton, NJ: Princeton University Press, 2004).

⁸ Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999).

be constructed and adopted constitutionally if EU law is to be presented as the guardian of an “ideal constitution” which possesses a coherent ethical vision for the EU.⁹

I have raised a question about cross-national justice, so one might think that the political theory literature on international *cum* global justice would have something to say. But, focused almost exclusively on the problem of global poverty and the global institutional order (as represented, for example, in the WTO, UN, IMF, and so on), it too offers few tools for answering our set of substantive questions regarding *regional* but still *international* social and political inequalities—inequalities which, moreover, do not in most cases involve the severe absolute deprivation present in the developing world.¹⁰ To my knowledge, no-one contributing to the international *cum* global justice literature has tried to outline what kinds of principles of social justice, if any, apply to the EU. So we are entering largely uncharted territory here.¹¹

It is instructive at this point to consider a private exchange between John Rawls and Philippe Van Parijs (now public) on whether principles of distributive justice apply to the EU.¹² In that exchange, Van Parijs puts a challenge to Rawls’s *Law of Peoples*. Probing Rawls’s conception of a people, Van Parijs asks what factual criteria Rawls believes bound concern for distributive justice. He worries that Rawls’s argument provides grist for nationalist mills (as in the Belgian [Walloon-Flemish] case) supporting those who would argue that, between cultural nations, only duties of assistance rather than more demanding

⁹ AT Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’, *Oxford Journal of Legal Studies* 29 (2009): 549–77, at 552.

¹⁰ Cf. Rawls’s brief remarks on ‘cooperative [international] organizations’ in John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 42–3.

¹¹ On Habermas, see below.

¹² Philippe Van Parijs and John Rawls, ‘Three Letters on the *Law of Peoples* and the European Union’, *Revue de philosophie économique* 8 (2003), 7–20, available at <<http://www.etes.ucl.ac.be/Activites/semloc/RawlsVanParijs1.R.Phil.Econ.pdf>>.

duties of distributive justice should apply. He goes on to suggest that, at best, it is the bounds of *social cooperation* rather than *national identity* that are more appropriate for bounding egalitarian concern within a Rawlsian framework.¹³ It is at this point that he asks ‘whether the emerging political entity [that is, the EU] will never be more than a conglomerate of ethnoi-demos, between which only assistance is required on grounds of justice, or whether it can constitute a poly-ethnic demos to which a more demanding conception of distributive justice can conceivably apply’.¹⁴ This is a revealing case for Rawls: forcing Rawls to confront the EU would force him to confront not only whether social cooperation takes precedence over national identity but also *what kind* of social cooperation.

Rawls’s response is, to my mind, evasive. He does not deny that the nation-state is the relevant unit of distributive concern. But nor does he explicitly affirm it. Instead, he writes as if the emphasis on the nation-state were only a matter of methodological priority, and further qualifications can be introduced for more complicated cases (that is, for multi-nation states, which Rawls believes can still count as peoples, and hence can be units within which distributive concerns matter). This is obscure: part of Van Parijs’s charge is surely to demand a justification for beginning with the nation-state at all. Why not begin, once again, with facts relating to social cooperation and leave the existence of nations to the side when discussing distributive justice? Rawls’s response is just as evasive with regards to the EU. Rawls does

¹³ Van Parijs writes: ‘the relevant factual question is then not whether there is one or more ethnoi involved (a matter of cultural distance), nor whether there currently happens to be a common demos (a matter of political institutions and of sufficiently common public space), but whether the circumstances (mobility, contact, interdependencies, etc.) are such that there *should* be a common demos—if only to enforce the requirements of justice’. I take it that this is not a statement of Van Parijs’s own position on these matters. Rather, it is his attempt to work from within Rawlsian premises to what seems like a position more consonant with Rawls’s views in both *Political Liberalism* and *A Theory of Justice*.

¹⁴ First Letter, Van Parijs and Rawls, ‘Three Letters on the *Law of Peoples* and the European Union’.

not confront the EU as it is. Instead, he asks what we should think if ‘Belgium and the Netherlands, or the two together with France and Germany, decide they want to join and form a single society, or a single federal union’. It is of course true that, *if* these countries explicitly agreed to join and form ‘a single society, or a single federal union’, principles of liberal justice would now apply to their union (just as in the case of multi-nation peoples). But even if we knew what Rawls meant by a ‘single society, or single federal union’ (a state?), no Member State in the actually existing EU has explicitly agreed to join such a single society. So the question remains: do principles more demanding than assistance but less demanding than the full extent of liberal justice apply to the EU, or not? If so, what are they, and how would we go about constructing them?¹⁵

The aim of this chapter is to clear the ground for an answer to Van Parijs and Maduro’s challenge. More specifically, I shall reconstruct and criticize three different arguments regarding how and whether solidarity, as a value, applies to the EU, and what implications each one has for our understanding of distributive justice beyond the state. The three arguments, in brief, are that (1) because the EU is a voluntary association, Member States should be held liable for the consequences of joining, and hence distributive justice concerns are irrelevant to its evaluation; (2) the EU should be transformed into a federal welfare state in order to discharge obligations of ‘post-national’ solidarity to the worst off individuals in the EU; (3) there are no obligations of solidarity across EU borders because the EU lacks an encompassing societal culture necessary for such obligations to apply. I discuss these three

¹⁵ Cf. the *Law of Peoples*, in the section on ‘cooperative organizations’ (40–3): ‘Should cooperative organizations [such as the EU] have unjustified distributive effects between peoples, these would have to be corrected, and taken into account by the duty of assistance’. Does Rawls here mean that distributive effects between peoples are unjustified if they fail to satisfy the duty of assistance, or does he mean that there are further principles of distributive justice beyond the duty of assistance (and principles of fair trade) that apply in such cases?

because they strike me as the most promising arguments currently available for thinking about solidarity at the EU level, yet I believe they all fail. While I will not outline a fully fledged alternative criterion of trans-, inter-, and intra-national solidarity here (a task I undertake elsewhere)¹⁶, I hope that the more modest aim I have set will serve to demonstrate the need for more careful, philosophical reflection on one the most important of the fundamental values animating the European project.

1 Statist solidarity

The first model of solidarity I will discuss accepts that we have obligations of social justice at the domestic level, but denies that we have any obligations of solidarity or justice beyond the nation-state. I shall refer to it, for reasons that will become evident in a moment, as *statist solidarity*.

The argument in favor of *statist solidarity* is best outlined by a transposition to the EU level of an argument made by Thomas Nagel in a seminal article entitled ‘The Problem of Global Justice’. The argument picks up, explains, and then generalizes an intuition that many have about obligations of social justice, namely that they only apply to organizations—such as the state—whose membership is *nonvoluntary*. The importance of such a conclusion to the EU, if warranted, should be clear (although Nagel does not himself draw this connection): If Nagel is right, and if the EU legal order is the product of *voluntary* intergovernmental bargaining, then Member States or their citizens cannot reasonably have a complaint in justice about the results. There are, on this view, no obligations of distributive justice or

¹⁶ Andrea Sangiovanni, *Domains of Justice* (Harvard University Press, forthcoming).

solidarity which traverse Member State boundaries other than the ones expressly agreed to by Member States. Is the argument a good one?

Nagel's argument sets out two conditions that he claims are necessary and jointly sufficient for obligations of social—and in Nagel's case, egalitarian—justice to hold among members of a norm-governed association: (1) The association in question must 'claim to speak in our name' insofar as we can rightly be considered to be, in some relevant sense, the *authors* of the norms governing the association; (2) we must be forced to comply with the norms in question; we must have, that is, no reasonable option but to comply. If one or both of these conditions fail to hold of a given association, then obligations of socio-economic justice more demanding than humanitarianism fail to hold. The two conditions, Nagel believes, also express the moral distinctiveness of the state, and serve to explain why norms of social justice do not apply at the international level. Nagel's argument is complex, so it is worth quoting him at length:

Equality as a demand of justice comes from a special involvement of agency or the will that is inseparable from membership in a political society. Not the will to become or remain a member, for most people have no choice in that regard, but the engagement of the will ... in the dual role each member plays both as one of the society's subjects and as one of those in whose name its authority is exercised. One might even say that we are all participants in the general will.

A sovereign state is not just a cooperative enterprise for mutual advantage. The societal rules determining its basic structure are coercively imposed: it is not a voluntary association. I submit that it is this complex fact—that we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e., expected to accept their authority even when the collective decision diverges from our personal

preferences—that creates the special presumption against arbitrary inequalities in our treatment by the system.

Without being given a choice, we are assigned a role in the collective life of a particular society. The society makes us responsible for its acts, which are taken in our name and on which, in a democracy, we may even have some influence; and it holds us responsible for obeying its laws and conforming to its norms, thereby supporting the institutions through which advantages and disadvantages are created and distributed. Insofar as those institutions admit arbitrary inequalities, we are, even though the responsibility has been simply handed to us, responsible for them, and we therefore have standing to ask why we should accept them.¹⁷

Let us assume that the first condition (which I will refer to as the ‘authorship’ condition) is satisfied in the case of the EU: we are rightly considered to be the authors of the norms governing the EU, which in turn claims to ‘speak in our name’ and on our behalf. An important clarification: the authorship condition is very weak. It does not apply only to legitimate democracies. Of a colonial power ‘imposed from outside’, Nagel writes, ‘it purports not to rule by force alone. It is providing and enforcing a system of law that those subject to it are expected to uphold as participants, and which is intended to serve their interests even if they are not its legislators. Since their normative engagement is required, there is a sense in which it is being imposed in their name’.¹⁸ The crucial feature of ‘authorship’, for Nagel, is that the order of rules claim to be in the interest of those who are expected to uphold it. The claim in turn triggers a demand for special justification: ‘Does the

¹⁷ Thomas Nagel, ‘The Problem of Global Justice’, *Philosophy & Public Affairs* 33 (2005), 113–47 at 128–9.

¹⁸ Nagel, ‘Global Justice’ at 129n.

order *really* serve the interests of those it claims to represent?’ And it is this demand for a special justification, Nagel claims, that requires a special, egalitarian concern for how well each subject is doing when compared with all the rest. For our purposes, this means that the authorship condition would be satisfied even if one considered the EU to be a highly undemocratic regime. It is uncontroversial that the EU purports to rule not by force alone; it claims to serve the interests of the citizens and states who are expected to uphold its norms.

The premise I will focus on in this article is the second one: associations whose membership is voluntary and whose rules are not directly enforced are not properly subject to norms of social justice.¹⁹ If this premise is correct, then talk of social justice at the EU level seems, as we said before, misplaced: it seems uncontroversial that no Member State is literally forced either to be a member of the EU or to comply with its norms. Unlike its Member States, the EU lacks an autonomous coercive apparatus with a monopoly over the legitimate uses of coercion within its borders, ultimately relying on Member States to enforce its norms. Furthermore, exit from the EU is no more difficult than exit from any international organization: although a non-negotiated withdrawal would be illegal from the point of view of international (and now EU) law,²⁰ there is little that any Member State or the EU could do

¹⁹ Nagel writes: ‘Justice applies, in other words, only to a form of organization that claims political legitimacy and the right to impose decisions by force, and not to a voluntary association or contract among independent parties concerned to advance their common interests’ (Nagel, ‘Global Justice’, 140).

²⁰ The Lisbon treaty stipulates a procedure for negotiated withdrawal requiring *inter alia* a qualified majority of other Member States. See Art 50, TEU. But even before the Lisbon Treaty, it was generally recognized (at least among international and EU lawyers) that there was no unilateral right to withdraw. See, for example, J Herbst, ‘Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?’ , *German Law Journal* 6 (2005), 1755: ‘there can be no serious doubt that, currently, there exists no unlimited right of an EU Member State to withdraw from the Union, ie without any further prerequisites and simply at the free discretion of the respective Member State, within the confines of its internal (constitutional) law provisions’. This is contested by national courts; see eg the German Maastricht and Lisbon

in the event. Should, for example, British Parliament repeal the 1972 European Communities Act while failing to successfully negotiate withdrawal (for example, by not getting the required qualified majority under the Lisbon Treaty), EU law would no longer be enforced in the UK. Other Member States would rightly claim a breach of treaty obligations, but short of (illegal) military intervention or other (illegal) retaliatory economic and political sanctions (for example, trade embargoes—which, assuming Britain had not also violated legal obligations under the GATT/WTO Treaties, would be declared illegal by the WTO’s dispute resolution panel— diplomatic restrictions, etc.), Britain would have, in practice, freed itself of its European obligations.²¹

Summarizing, we can state the argument in schematic form:

- (1) Social justice norms more demanding than humanitarianism apply to the rules and regulations of an association if and only if (a) the association claims to speak in the name of its members and to rule in their interests; and (b) membership in the association is non-voluntary and compliance with its norms directly enforced.
- (2) The EU claims to speak in the name of both its Member States and its citizens and purports to rule in their interests.
- (3) BUT: membership in the EU is voluntary and its rules and regulations are not directly enforced (the EU depends on Member States to enforce its rules and regulations).

decisions. Similarly, under international law, there is no unilateral right of withdrawal unless circumstances have significantly, unequivocally, and unforeseeably changed or unless a joint decision to implicitly grant a right to unilateral withdrawal can be inferred (*rebus sic stantibus* under customary law; see also Arts 61 and 62 of the ‘Vienna Convention’).

²¹ Cf. J Hill: ‘[A]s a practical matter if a Member State were determined to withdraw, the EEC has no sanctions that can be applied to compel lawful compliance with the Treaty. Thus, from this point of view, it really is of no consequence whether a legal right of withdrawal exists’, ‘The European Economic Community: The Right of Member State Withdrawal’, 12 *Georgia Journal of International and Comparative Law* (1982), 335.

(4) Therefore, social justice norms more demanding than humanitarianism do not apply at the EU level.

The argument fails for two reasons. First, in the sense relevant to Nagel's argument, I will argue that the EU is not in fact a voluntary organization (Premise 3 is false). But, second, I will contend that the non-voluntariness condition is anyway implausible: social justice norms can also apply to (some) *voluntary* organizations (Premise 1b is false). If Premise 1b is false, then we might ask: could the authorship condition alone be both necessary and sufficient for triggering the full panoply of social justice norms (which would mean that the full panoply of social justice norms would apply at the EU level)? I will argue that the answer is no (Premise 1a without 1b is implausible). This means that we would do better to look elsewhere for a plausible model of solidarity in the EU.

(A) Is the EU Voluntary Association, in the Relevant Sense? (Premise 3 is False)

To see why the membership in the EU and the EU legal order are in fact *non-voluntary* in the relevant sense required for *statist solidarity* to go through, we first need to understand the rationale for the premise. The rationale for Premise 1b turns on the thought that different standards apply to voluntary as opposed to non-voluntary schemes. To illustrate: suppose there is a large and important social networking site, called 'Phasebook I', which provides a tool for people to maintain contacts and exchange information over the internet. Phasebook I, however, does not allow its users to protect privacy settings, so whatever information is placed on your Phasebook profile becomes fully public. Many feel that users should be allowed to control the level of information revealed. Indeed, they feel that Phasebook's use of

information is *unjust*, and believe it would therefore be justifiable to force Phasebook I to comply through sanctions. Here it seems reasonable to say, in response, ‘if you don’t like the way Phasebook runs things, then don’t join! No-one is forcing you to join and thereby forcing you to reveal your information to the whole world.’ (If you’re not convinced that this response *is* reasonable, imagine there was another social networking site, MySpays, exactly the same as Phasebook I, except that it allows users to control access to profile information.) But now consider Phasebook II (thirty years on). Phasebook II works exactly in the same way as Phasebook I except that now membership in Phasebook II is either required in order to have access to the job market (MySpays died out long ago) or enforced through fines and in some cases imprisonment. In this case, it *does* seem reasonable to protest the injustice of making people’s private information public. Phasebook II forces people to reveal their private information to the rest of the world. Because Phasebook II bends our will into joining, because we are left with no reasonable option but to join, we have a special demand for justification that we lacked for Phasebook I—a demand that can be met only if Phasebook II meets much more stringent criteria. And, according to Nagel, in the case of associations that claim to speak in our name and serve our interests over central areas of our life and liberty, the more stringent criteria will include ones that require egalitarian concern for each person’s prospects within the association.

Notice that, in this example and others like it, the ‘voluntariness’ of an arrangement weakens the stringency of the justice norms which apply to it only if the arrangement is one of several reasonably eligible alternatives. It is only in those cases that it is reasonable to say, ‘love it or leave it!’ If the alternatives are excessively and unreasonably burdensome for the agent in question, then the arrangement is not voluntary in the relevant sense (that is, not sufficiently voluntary to significantly weaken the stringency of the demands we can

reasonably make of it). But if this is the case, then it seems clear that the EU is *not* voluntary in the relevant sense required for less demanding norms to apply: withdrawing carries large and significant costs for all of its members (for example, in market access); and the longer the membership the worse the costs (for example, given adaptation in the presence of legitimate expectations regarding market access). While it might be argued that the decision to join the EU for either the founding or acceding generation was voluntary in the relevant sense, this is certainly not the case for succeeding generations. Given that all members will eventually be members for longer than a generation, the argument would have an exceedingly narrow scope.

(B) The Non-Voluntariness Condition is Implausible (Premise 1b is False)

If I am right and if we accept the Nagelian argument, then it looks like we should be led to the *opposite* conclusion, namely that the EU—at least with respect to those Member States that have been part of the EU for at least a generation—should be subject to the same principles of social justice as have traditionally been thought to apply to states. I now want to argue that we should resist this further conclusion because the non-voluntariness condition is itself implausible.²² Without it, Nagel’s argument—and therefore its implications for the EU—collapses. Recall Phasebook I and II. In those cases, it seemed plausible to argue that what didn’t seem like an injustice in Phasebook I (where membership was voluntary) did seem like an injustice in Phasebook II (where membership was non-voluntary). It seemed plausible, that is, to argue that there exist obligations of justice in the second, non-voluntary case that do not exist in the first. But this appearance is illusory. Contrary to the Nagelian

²² I elaborate and extend the argument presented in the text in ‘The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice’ *Philosophy & Public Affairs* (2012, forthcoming).

thesis, the justice-based entitlements in the two cases remain constant, namely the justice-based entitlement *not to have one's private information made public*. So what explains our different reactions to the two cases? The difference between Phasebook I and II is that in Phasebook I we can plausibly be understood to have either tacitly or expressly *consented* to release our information by joining. (We can imagine here signing a list of 'terms and conditions' upon joining.) Phasebook's I justice-based obligation not to release our information, we say, is waived when we so consent; *volenti non fit inuria*. But it would be a mistake to claim that the obligation not to release our private information is only *triggered* when membership in Phasebook was non-voluntary. That seems to get things exactly backwards. The case is analogous to someone's waiving, say, their right to receive a state-based pension: it gets things backwards to argue that we *acquire* the right to receive a state-based pension only by virtue of the fact that we have not consented to waive it. Our not having consented to waive it satisfies a necessary condition for us to claim the pension, but it doesn't in any sense ground or otherwise qualify the content and scope of the obligation. In cases like this (and unlike promises or contracts), consent only plays a role *after* the obligations have already been defined.

To see the importance of this point, we need to consider if there are cases in which strong egalitarian obligations obtain in a non-voluntary scheme that would still obtain even if membership in that scheme were voluntary, and where there is no question of consent (either because the right in question is inalienable, or because the relevant conditions for consent do not obtain). This would show that *statist solidarity* fails, and would serve to bring our discussion to a close. Such an example is ready to hand. Suppose that you are a well-to-do French immigrant living and working in the US. Imagine your move was fully voluntary: there is no plausible sense in which you could claim you were *forced* to relocate because of

economic, social, or political conditions (although by moving to the US you live a much better life than you would have had you remained in France). But now suppose you were to suffer discrimination on the job: you are not paid equal pay for equal work. You protest the injustice. Would the US government or your employer be justified in saying: ‘look, you might be right in saying that a citizen of this country who has, in the relevant sense, no choice but to remain in this country would have a claim in justice against our policy. But you are free to return to your country; since your residence in the US is fully voluntary, you have no complaint in justice against our treatment of you’? This strikes me as straightforwardly implausible. There is no relevant sense in which you have (knowingly and willingly) consented to unequal treatment (that was not part of your work contract and the policy was enacted only after you had already arrived). Non-voluntarist views at most establish that *some* obligations can be waived by consent (but who would object to that?), *not* that obligations of strong social justice arise only among individuals whose interaction is forced.

It might be retorted that, as long as she remains in the US, she *is* being coerced. If she were to break the law, she would, after all, be sent to jail. To see why this is an irrelevant sense of coercion in this context, let’s further distil the example: imagine that, if she were to break any US law she would be able, with absolute certainty, to escape back to France without suffering punishment,²³ and let us further suppose that she knows this, but she does not want or intend to break any laws. I submit that this makes no difference to our evaluation of the injustice of this case.

²³ This would be analogous to a classic highway gunman case in which we know with absolute certainty that the gun the highwayman carries isn’t loaded, and he is too weak to threaten you in any other way. When you walk away, or willingly give him your wallet nonetheless, you have not been coerced.

We can reinforce the argument by considering another case. Suppose that Barbara gets in to a number of universities. She decides to go to what is far and away the best one, University X (the others are fully adequate but not as good). Imagine further that it turns out that University X (but not other universities) only supports scholarships for students from wealthy backgrounds, and no such scholarships for poor and middle class students (the university claims that this is necessary to support a ruling elite). Suppose that, once there, Barbara protests the policy's injustice. Would it be plausible for the university to respond, 'your attendance at this university is entirely voluntary; if you don't like its policies, you are free to switch and attend one of the others. While you may be right in saying that the policy would be unjust if everyone were coerced or otherwise forced to attend *this* university, this is not the case, so stronger norms of social justice do not apply to it'? This strikes me as implausible: is the fact that her attendance to University X was voluntary in the relevant sense mean that she cannot appropriately make justice-based assessments of the university's policies as they develop over time? (Notice once again that though voluntary, she has not in any way *consented* to being unfairly treated, and, even if she had so consented, she would have been *waiving* rights that she had rather than failing to acquire them in the first place.)²⁴

The consequences for our analysis of solidarity in the EU should be clear. Even if we assume that Member States voluntarily join the EU (and voluntarily remain in afterwards), there are no grounds for denying the appropriateness of justice-based objections to the EU's

²⁴ Of course, at the limit, namely where there are an infinite number of choices, including one in which she is given everything that she could morally expect, and the transaction costs of choosing one over the other are negligible, the choice of one over another can be considered a case of tacit consent. But all I need for the example to go through is a sufficiently wide range of choices such that she is not forced to choose any one, but none of which offers an optimal solution. On the stringency of tacit consent, and why less than optimal circumstances work to make the imputation of tacit consent implausible, see A John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979).

policies, laws, and effects. To be sure, I have not yet made an argument for what the content of such standards might be or what types of relations might trigger them, but I hope to have cleared away an important argument for the conclusion that there can be *no* such standards.

One might object that the case with accession to the EU is quite different from the Barbara example (or the immigrant one). *Unlike* Barbara and the immigrant, acceding states have not only voluntarily joined the EU but also *consented* to its laws, policies, and effects, and it is for this reason that justice-based criticism is inappropriate. But when put it is this way, the objection says something that is clearly false. Acceding Member States consent to be governed by the framework of treaties constituting and regulating the EU, but they do not consent to waive any justice-based entitlements that they may have upon entering. The situation is the same with Barbara and the immigrant, who both agree to be bound by the terms of their contract and admission, but not to lay down any justice-based entitlements that they may have once they begin work. Once we more clearly distinguish voluntary membership and compliance from consent, Premise 1b collapses.

(C) Authorship Alone? (Premise 1a is Implausible)

At this point in the discussion, it may seem that we can safely push *statist solidarity* to the side. But there is one last move that a Nagelian might make to sustain the force of the argument, although in a *federalist* rather than *statist* direction. One might hold that the authorship condition is both necessary *and* sufficient for strong social justice norms to apply. This would imply, of course, that the same norms of social justice as have traditionally been applied to the state would apply to the EU, since the EU, as we have seen, clearly satisfies the authorship condition. The problem with this argument is that it is very implausible, and it is

no coincidence that Nagel (and others) have emphasized the non-voluntariness condition.²⁵

If the authorship condition alone were necessary and sufficient, then it would imply that the members of *any* organization that claims to be representative of its members would incur obligations to share responsibility for others members' educational, health, employment, pension, etc., prospects over an entire life. This would be true, that is, even of local chess and tennis clubs. Why would sharing in 'authorship' of such organizations alone create such a strong demand?²⁶

2 Postnational Solidarity

Jürgen Habermas is one of the most prominent political philosophers to write about the EU.

In this section, I want to reconstruct Habermas's arguments for what I will call *postnational solidarity*. According to *postnational solidarity*, the EU should be reorganized as a pan-European welfare state whose central purpose is to take us beyond the classical nation-state and the nationalism associated with it. I shall claim that the arguments for *postnational solidarity* all fail.

Habermas does not believe that obligations of distributive justice apply to us independently of the social and political relations in which we stand. He is not, that is, a thoroughgoing cosmopolitan: he rejects the idea that we owe distributive obligations to

²⁵ See eg Michael Blake, 'Distributive Justice, State Coercion, and Autonomy', *Philosophy & Public Affairs* 30 (2001), 257–96; Mathias Risse, 'What to Say About the State', *Social theory and practice* 32 (2006), 671–98.

²⁶ Views like Nagel's also suffer from several other flaws, the most important of which is that they cannot explain how some morally relevant features of will-bending fix and the content and scope of distributive obligations. I discuss these problems in more detail in 'The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice' and 'International Justice and the Morality of Coercion, Imposition, and Framing' in Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality', *Journal of Political Philosophy* 16 (2008), 137–64.

persons *as such*. But which social and political relations trigger the concern for social justice? For Habermas, what matters are our relations as consociates in a determinate legal association. To see why, we need to turn to Habermas's 'discourse-theoretic' understanding of basic rights.

Habermas understands distributive justice in terms of a substantive conception of *social rights*. The justification of social rights (to a decent standard of living, adequate housing, etc.) is understood as part of a more general justification of a 'system of rights', which includes the classical liberal-democratic list of civil and political rights. The argument, in brief, is this. According to Habermas, individuals who want to regulate their common life via a legitimate legal order must respect what he calls the 'democratic principle'; namely, the idea that 'only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted'.²⁷ And, in turn, the only way to institutionalize a democratic legal order is to enact social rights along with civil and political rights. This is because social rights are necessary to give *fair value* to our civil and political liberties, which in turn are necessary to enable and constitute our private and public autonomy as citizens.

In view of our discussion here, the key point is that the group of civil, political, and social rights are not binding as *external* constraints on a democratic sovereign. To understand this point, consider Habermas's ambition in Chapter 3 of *Between Facts and Norms*, namely to demonstrate how civil, political, and social rights are *constitutive* of democratic self-legislation. 'The idea of self-legislation by citizens . . . requires that those subject to law as its addressees can at the same time understand themselves as authors of the law'. But, he

²⁷ Jürgen Habermas, *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press, 1996a), 110.

continues, ‘We cannot meet this requirement simply by conceiving the right to equal liberties as a morally grounded right that the political legislator merely has to enact’. To do so would be to subordinate law to morality, a ‘move incompatible with the idea of an autonomy realized in the medium of law itself’.²⁸ To construe: the concept of law (viz., any legal system, even the most unjust) presupposes (a) that liberty is defined as the silence of the law, and (b) that laws must be made and enacted by a legislator. The concept of law presupposes, that is, both a space in which we are free to do as we like and a mode of public law-making. To be legitimate, the law must, in turn, respect the democratic principle, and hence guarantee our freedom as both authors and addressees. To meet this requirement, we must be guaranteed the capabilities required to be both ‘publicly autonomous’ *qua* co-legislators (authors) and ‘privately autonomous’ *qua* subjects (addressees). It is these capabilities (required for the realization of our legally mediated private and public autonomy) which the ‘system of rights’ guarantees. Civil, political, and social rights are therefore not *moral* rights which exist independently of law. They constrain us if and only if we share a legal order; indeed, they can only be understood *in terms of* a legal order of which we are co-authors and addressees. This is why Habermas calls them ‘juridical *by their very nature*’.²⁹ In summary: no law without democracy; no democracy without rights; and no rights without law.

It is useful to compare Habermas’s account of social rights to Nagel’s argument for why equality is a demand of justice only among subjects of a sovereign. Habermas and Nagel both agree that civil, political, and social rights—the equivalent of Nagel’s ‘equal concern, equal opportunity, and equal respect’—only apply to citizens who share subjection to a (coercive) body of law. They also agree that it our relationship as both authors and addressees of the law

²⁸ Habermas, *Between Facts and Norms*, 120.

²⁹ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace: At Two Hundred Years’ Historical Remove’, in *The Inclusion of the Other* (Cambridge: MIT Press, 1998b), 190, emphasis in original.

that explains why principles of distributive justice apply only among members of that legal order.³⁰ Given the structural similarity between Nagel and Habermas, one would think that Habermas would also endorse Nagel's statist conclusions. Yet, quite on the contrary, Habermas has consistently endorsed a much more thorough-going cosmopolitan position on issues of global justice.

This is most evident with regards to Habermas's advocacy of a European federalism securely anchored in a pan-European constitution, which Habermas sees as the first step on the way to realizing 'an obligatory cosmopolitan solidarity'. Habermas writes: the 'form of civil solidarity that has been limited to the nation-state until now has to expand to include all citizens of the union, so that, for example, Swedes and Portuguese are willing to take responsibility for one another'.³¹ Given the structure of Habermas's justification of the 'system of rights', how does he arrive to this conclusion?

There are four arguments Habermas gives for extending the bounds of egalitarian justice beyond the state, all of which follow from his advocacy of EU federalism. I will now argue that none of these is successful.

(A) 'Politics Must Catch Up with Markets'

The first argument follows directly from Habermas's empirical assessment of the negative impact of globalization and European integration on what he calls the *Sozialstaat*, or the

³⁰ Of course, they diverge on the explanation of *how* our relations as authors and addressees generates a demand for equality. For Habermas, as we have seen, the 'system of rights' is an institutional precondition for the successful institutionalization of the 'democratic principle' (itself generated by the 'interpenetration' of the legal form with his discourse principle (D)). For Nagel, the pressure for equality is generated via the fact that state law demands our compliance, on pain of sanctions, while at the same time claiming to speak in our name.

³¹ Jürgen Habermas, 'The Postnational Constellation and the Future of Democracy', in *The Postnational Constellation: Political Essays* (Oxford: Polity Press, 2001a), 99.

redistributive-egalitarian welfare state. Habermas cites a number of familiar explanations for why globalization and integration limit the capacity of states to adjust and, most importantly, to maintain domestic commitments to egalitarian redistribution. These include: regulatory competition among states in an open economy, which causes a ‘race to the bottom’ in many areas of social policy; limitations on the capacity of states to intervene in the economy due to delegation of monetary policy to the European Central Bank (ECB), and exacerbated by the Growth and Stability Pact; limitations on state capacities to tax mobile forms of capital with predictable constraints on the generation of revenue; and so on. Gone are the days in which ‘deployment of neo-corporative negotiating systems and regulated industrial relations, mass political parties with social-structural anchoring, reliably functioning social security systems, nuclear families with inherited sexual division of labor, normalized labor relations with standardized career paths’ formed ‘the background for a more or less stable society based on mass production and mass consumption’.³² Habermas’s diagnosis is that either Europe must federate to maintain its commitments to social protection, or it must ‘eliminate the pressure of these problems by consigning them to the market’, which means, in effect, to give in to a ‘neo-liberal’ Europe prone to ‘de-differentiation, alienation, and anomie’.³³

Throughout his writings on Europe, this is the argument to which Habermas refers most often, although it is one of his weakest. Even if we grant that globalization and European integration have had a negative impact on the sustainability of *current* welfare states, it does not follow that the only solution available is a continental *Sozialstaatsverbund*. In particular, Habermas provides no evidence suggesting that well-designed domestic reform of the welfare

³² Habermas, ‘Postnational Constellation’, 87.

³³ Habermas, ‘Postnational Constellation’, 97, 83.

state, coupled with EU reform well short of ‘full harmonization of social policy’,³⁴ would be unsuccessful in harnessing the benefits of integration and globalization, while maintaining a commitment to fully fledged egalitarian redistribution. We could grant that a federation on an EU scale would be a *sufficient* condition for maintaining the European social model (itself highly questionable, given the diversity in welfare regimes across Europe).³⁵ Taken on its own, however, Habermas’s empirical argument fails to show that a federal EU is *necessary* for maintaining commitments to social solidarity.

Ample evidence for the argument that a federal EU is not in fact a necessary condition for maintaining (and even increasing) levels of social protection and spending can be garnered from recent studies of the impact of globalization on the welfare state. There is by now a quite extensive literature that demonstrates that the impact of globalization on the nation-state (increased openness to trade and investment, in part the result of the loss of capital controls, floating exchange rates, etc.) varies tremendously by regime type.³⁶ Indeed, some of the most open economies—for example, small states such as Denmark—have not only done quite well in terms of productivity growth, but have also been able to retain high levels of social spending and social protection.³⁷ Others, on the other hand, have fared much

³⁴ Habermas, ‘Postnational Constellation’, 97.

³⁵ Scharpf, *Governing in Europe*.

³⁶ Geoffrey Garrett, *Partisan Politics in the Global Economy* (Cambridge, UK: Cambridge University Press, 1998); Peter A Hall and David W Soskice, (eds.) *Varieties of Capitalism: the Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001); Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, DC: Institute for International Economics, 1997); Linda Weiss, *The Myth of the Powerless State* (Ithaca, NY: Cornell University Press, 1998); Scharpf, *Governing in Europe*; Peter J. Katzenstein, *Small States in World Markets: Industrial Policy in Europe* (Ithaca, NY: Cornell University Press, 1985).

³⁷ See eg Garrett, *Partisan Politics in the Global Economy*; Katzenstein, *Small States in World Markets: Industrial Policy in Europe*.

more poorly (for example, France and Italy).³⁸ What the literature suggests is that there is much that can be done at the domestic level to adapt to changing conditions. Furthermore, it is relevant that there is a strong correlation, even in an era of globalization, between the level of development and degree of social spending: less-developed states which have achieved higher than average growth rates recently have also increased their social spending in conjunction with this growth, just as more developed countries did previously.³⁹ By treating globalization and integration as having a uniformly and universally negative effect, Habermas makes the conclusion he endorses seem functionally inescapable, when it is nothing of the sort. Habermas's urgent call for a new welfare Europe therefore rings false.

(B) Constitutional Patriotism and Postnational Solidarity

Habermas's second argument draws on the idea of 'constitutional patriotism'. Constitutional patriotism aims to provide a basis of political unity strong enough to bind together modern societies in conditions of ethnic, religious, and value pluralism. This unity is forged out of universalist commitments to principles of justice and democracy embodied in liberal constitutions, rather than particularist attachments to shared cultures, ethnicities, languages, religions, or even territories.

Constitutional patriotism represents an alternative to nationalism that is intended to serve the same sociological functions but in a very different way. Late-eighteenth and nineteenth-century nationalism—by which Habermas means the political ideology which claims rights of self-governance for groups bound by ethnic and cultural ties, shared characteristics, a sense of belonging together, and common myths of origin—historically served an important sociological function. Disseminated through new forms of mass communication and the

³⁸ See eg Scharpf, *Governing in Europe*.

³⁹ See eg European Values in the Globalised World COM(2005).

‘educated bourgeois public’, nationalism provided a motivational spur intended to foster people’s identification with the state. Nationalism’s ideal of the citizen was based on sacrifice and loyalty: to die for one’s country and one’s people was not only an honour but also an obligation one owed to the nation personified as an objective ‘spirit’.⁴⁰ Nationalism thus became the ‘vehicle for the emergence of’ the republicanism of the so-called ‘democratic revolutions’ of the late eighteenth century.⁴¹ But Habermas is clear that there is no *conceptual* relation between nationalism and republicanism. Once nationalism has served its purpose of breaking apart the corporative ties of early modern society, and then uniting disparate groups of people under a single flag and a single ‘fate’, its connection with republicanism can and indeed should be severed. According to Habermas, ‘the modern understanding of this republican freedom can, at a later point, cut its umbilical cord to the womb of the national consciousness of freedom that originally gave it birth’.⁴² Nationalism can now be replaced, Habermas tells us, by a ‘legally mediated social integration’ established via the democratic process itself. Citizens reorient their attachments from the nation personified as an organic spirit to procedures that secure the possibility of a democratically structured ‘opinion- and will-formation’. The basis of this new attachment is the justice of the procedures, which reflect citizens’ desire to ‘regulate their living together according to

⁴⁰ See his lecture on German historiography, entitled ‘What is a People? The Frankfurt “Germanists’ Assembly” of 1846 and the Self-Understanding of the Humanities in the *Vormärz*’ in Jürgen Habermas, *The Postnational Constellation: Political Essays*, trans. M. Pensky (Cambridge: MIT Press, 2001c).

⁴¹ Habermas, *Between Facts and Norms*, 495.

⁴² Jürgen Habermas, ‘Citizenship and National Identity’, in *Between Facts and Norms* (Cambridge: MIT Press, 1996b), 295. See also Habermas, ‘Nation, the Rule of Law, and Democracy’, 131–3.

principles that are in the equal interest of each and thus can meet with the justified assent of all'.⁴³

This new basis of civic solidarity centered on a constitution, which is only now beginning to take shape (very imperfectly) across Europe, is also under threat from globalization. Habermas writes, as 'nation-states increasingly lose both their capacities for action and the stability of their collective identities, they will find it more and more difficult to meet the need for self-legitimation'.⁴⁴ The limits on the scope of state action imposed by cultural, economic, and social globalization (exacerbated by the EU) strain the basis of civic solidarity in each Member State. As older forms of national 'homogeneity' weaken (for example, with increasing immigration), cultural communication across borders increases, social inequalities grow, and post-war commitments between capital and labor fray, the resources available for a 'social integration based on mutual understanding, intersubjectively shared norms, and collective values' dwindle, and along with it a commitment to joint redistribution.⁴⁵ Whereas in the first argument, globalization worked to undermine the welfare state at an institutional level, according to this argument, it works to undermine it at a *sociological* level.

Habermas recommends a revived constitutional patriotism at a *European* level to overcome the solidarity deficit at the domestic level.⁴⁶ He argues that the EU provides an opportunity to revive 'an interest in and a particular affective attachment to a particular ethos: in other words, an attraction to a particular way of life' necessary to replenish the reserves of

⁴³ Habermas, 'Citizenship', 496.

⁴⁴ Habermas, 'Postnational Constellation', 80.

⁴⁵ Habermas, 'Postnational Constellation', 83.

⁴⁶ See also Justine Lacroix, 'For a European Constitutional Patriotism', *Political Studies* 50 (2002), 944–58 and Richard Bellamy and Dario Castiglione, 'Lacroix's European Constitutional Patriotism: A Response', *Political Studies* 52 (2004), 187–93.

social solidarity sapped at the national level.⁴⁷ Against those who claim that a *demos* is impossible at an EU level, Habermas counters that such an affective attachment can be centered on a European Constitution, itself rooted in common European experiences of conflict and cooperation, which ‘have acted as a spur toward the decentering of perspectives; as an impulse toward critical reflection on, and distancing from, prejudices and biases; as a motive for the overcoming of particularisms, toward tolerance and the institutionalization of disputes’. This political culture will represent a common ‘egalitarian universalism’, which ‘can ease the transition to postnational democracy’s demanding contexts of mutual recognition for all of us’. He continues; ‘we, the sons, daughters, and grandchildren of a barbaric nationalism’.⁴⁸ If national and democratic forms of collective identity emerged (in the eighteenth and nineteenth centuries) from local and dynastic identities through ‘a painful process of abstraction’, why, Habermas asks, should this process be ‘doomed to come to a final halt just at the borders of our classical nation-states?’⁴⁹

I have two simple counter-arguments to this line of reasoning. First, either (a) the argument depends on the empirical premise that Member States are no longer able, institutionally, to sustain commitments to social protection domestically or (b) it can stand independently. If (a), then the argument from constitutional patriotism is redundant or, if not redundant, then it collapses into a form of the first argument already discussed. If (b), Habermas gives us no reason to believe that a *European* constitutional patriotism will be, as a sociological matter, any more successful than a *domestic* constitutional patriotism in

⁴⁷ Jürgen Habermas, ‘Why Europe Needs a Constitution’, *New Left Review* 11 (2001b), 5–26, at 8.

⁴⁸ Habermas, ‘Postnational Constellation’, 103. For similar passages, see also Habermas, ‘Nation, the Rule of Law, and Democracy’, 152; Habermas, ‘Does Europe Need a Constitution? Response to Dieter Grimm’, 161; Habermas, ‘What Is a People?’, 18–19.

⁴⁹ Habermas, ‘Why Europe Needs a Constitution’, 16.

motivating people to sustain egalitarian forms of redistribution. Habermas's point here seems to be that the ghosts of nationalism past can best be exorcised at the supra-national level, since the possibility of a reversion to ethnocentric nationalism is less likely at that level. But, if this is the idea, then a European constitutional patriotism would either come too early or too late. If it is true that ethnic nationalism is still lurking, then a European constitutional patriotism will come too early, since nationalist feeling will preclude a move to a European federation. And if it is not true that resurgent ethnic nationalisms would preclude the emergence of a European federation, then the call for a European constitutional patriotism comes too late, when the nationalist ghosts are fading anyway.

This leads me to my second point. It seems that general support for constitutional patriotism should, if anything, lead one more naturally to support *euroscpticism* rather than federalism. Consider, for example, Michael Howard, ex Leader of the Conservative Party in Britain. In a 2004 speech in Berlin, he tried to rein in the aspirations of European federalists like Habermas and Joschka Fischer: 'We in Britain came through the war with our national institutions strong. When we seek to preserve those institutions, we are defending a constitutional settlement that has survived great stresses and strains and which continues to work well and be understood by people in Britain. To undermine these institutions and ways of life, whether they have developed uninterrupted over hundreds of years or only recently re-emerged, and which are seen as legitimate by their people, would be an act of folly'. Howard is concerned that further integration would unjustifiably corrupt British constitutional practices; he is not worried that 'Europe' will destroy the legacy of Shakespeare and Shaftesbury, dismember the Anglican Church, or make French the national language. What worries him is that the EU will undermine the principles, practices, and ideals implicit in Britain's unwritten constitution. In an allusion to the particularly *constitutional* upheavals of

1641, 1649, 1653, 1660, and 1689, Howard avers: ‘What is proposed is perhaps the biggest change in Britain’s constitutional arrangements since the seventeenth century’.⁵⁰ It would be misleading to claim that Howard is an ethnic or even ethnocultural nationalist. In these passages, he is the very image of a constitutional patriot. So the puzzle remains: why does Habermas believe that a defense of constitutional patriotism commits us to further European integration?

(B) Cosmopolitanism, Human Rights, and Constitutional Patriotism

Perhaps the answer to this question can be found by turning to the *object* of patriotic attachment. If the object of the patriot’s allegiance are values, including human rights, whose ‘mode of validity . . . points beyond the legal orders of nation-states’, then it might be argued that, in affirming one’s own constitutional order, one implicitly also affirms (albeit only potentially) a cosmopolitan order.⁵¹ And if this is true, then it might also be true that we have an obligation to integrate with other states *on the way* to such a truly cosmopolitan order, where we can feasibly do so without dissolving our commitments to joint redistribution. The EU, in this argument, would form precisely such a Kantian focal point. Transforming the EU into a federation would become a demand of ‘cosmopolitan solidarity’. This third argument for expanding the bounds of egalitarian justice beyond the state is much more explicitly normative and abstract than the first two we have considered, and returns us to Habermas’s derivation of the ‘system of rights’ from the ‘interpenetration’ of law with the discourse principle. Recall that we wondered how Habermas’s insistence that the ‘system of rights’ was

⁵⁰ All passages from Michael Howard’s speech, entitled ‘A New Deal for Europe’, delivered to the Konrad Adenauer Stiftung in Berlin, Thursday, 12 February 2004.

⁵¹ Robert Fine and Will Smith, ‘Jürgen Habermas’s Theory of Cosmopolitanism’, *Constellations* 10 (2003), 469–87, 190.

‘juridical *by its very nature*’—which included his rejection of a moralized conception of human rights *external* to a constitutional-legal order—could lead him anywhere but to a statist conclusion similar to Nagel’s. Here we have the beginning of an answer.

As we have seen, the structure and content of human rights cannot be understood apart from their being embedded in legal systems of adjudication and protection. This is not simply a conceptual point. To treat human rights as if they existed prior to legal orders, and positive legal norms as if they were simply dressed up moral norms invites, Habermas argues, a dangerous moralization of international relations.⁵² Habermas therefore accepts the ‘kernel of truth’ of the argument made famous by Carl Schmitt, namely that ‘an *unmediated* moralization of law and politics does in fact break through those protective zones that we want to have secured for legal persons for good, indeed moral, reasons’.⁵³

But he resists the conclusion Schmitt draws: ‘It is a mistake to assume that this moralization can only be prevented by keeping international politics free from law and the law free from or purged of morality’.⁵⁴ Rather, the opposite is true. By submitting the international order to the rule of law, we ensure that all ‘unmediated’ moral claims are filtered through legal procedures designed to protect the accused and to submit claims to public, indeed multilateral, evaluation. As in the domestic case, such ‘filtering’ gives decision outcomes a rebuttable presumption of rational acceptability, and hence legitimacy. This

⁵² Carl Schmitt of course famously inveighed against liberalism for presuming to speak in the name of all of humanity, and in the process trying to deny the political distinction between friend and enemy. In so doing, liberalism invites the most inhuman of all wars. In wars which are fought on behalf of humanity, the enemy is denied his dignity *qua* opponent. If he rejects the norms and standards of all of humanity, then he must be *necessarily* inhuman, no better than an animal. He deserves no recognition or standing, only a ‘total annihilation’. See Carl Schmitt, *The Concept of the Political*, (ed.) G. Schwab (Chicago: University of Chicago Press, 1996).

⁵³ Habermas, ‘Kant’s Perpetual Peace’, 199.

⁵⁴ Habermas, ‘Kant’s Perpetual Peace’, 199.

‘cosmopolitan transformation of law’ follows from the fact that human rights, while juridical in structure and content, have a universal justification, a ‘validity claim’, that transcends all borders and boundaries: ‘Human rights fundamentalism is avoided not by renouncing the politics of human rights, but only through a cosmopolitan transformation of the state of nature among states into a legal order’.⁵⁵

If Habermas grants Schmitt the idea that human rights should not be conceived as *moral* rights—if we accept, with Habermas, that human rights are ‘juridical by their very nature’—then I do not see the force of his claim that we have an obligation to embed the enforcement of human rights in a system of cosmopolitan law. To whom do we owe this obligation? If the answer is that we owe this obligation to those (either actually or potentially) subject to human rights violations, then they clearly have a moral claim and right to have the international legal order extended to them. And if they do have such a moral right, then we might reasonably wonder what the basis of this right is. I see no other answer to this question, within a Habermasian framework than the one he is trying to resist; namely, that those at risk are entitled to have their human rights protected *even if they do not yet form the basis of a legal order*. In responding to Schmitt, Habermas is therefore caught on the horns of a dilemma. He can either accept that we have an obligation to extend a cosmopolitan order to all human beings. But human rights, on this view, would be *external* to any system of law, and hence his conception of the ‘internal relation’ between rights, law, and democracy would fail. Or, on the other hand, he could accept that basic rights only hold within the bounds of legal orders, in which case there would be no obligation to extend the bounds of solidarity beyond the nation-state.

⁵⁵ Habermas, ‘Kant’s Perpetual Peace’, 201.

(C) The Democratic Deficit

Habermas's fourth argument for a European federation is the most straightforward. Beginning from the premise that the EU is a legal order, and that legitimate law requires democracy, one could argue that the EU must be democratized. Once democratized, social rights would need to be extended equally to all European citizens to ensure the fair value of civil and political liberties. Habermas writes:

At present, legitimacy flows more or less through the channels of democratic institutions and procedures within each nation-state. This level of legitimation is appropriate for inter-governmental negotiations and treaties. But it falls short of what is needed for the kind of supranational and transnational decision-making that has long since developed within the institutional framework of the Union and its huge network of committees. It is estimated that European directives already affect up to 70 per cent of the regulations of national agencies. But they lack any serious exposure to a timely and careful public opinion or will-formation in those national arenas that are today alone accessible to holders of a European passport.⁵⁶

We need not doubt that the EU could benefit (in legitimacy terms) by more open and transparent procedures (for example, Council meetings) as well as a more active (and truly European) 'public sphere'. But why must *any* legal order—regardless of its particular character, scope, functions, etc.—trigger the full panoply of rights, controls, and institutions typical of a constitutional state? While we can (for the sake of argument) concede Habermas's claim that a *comprehensive* legal system typical of a modern state requires the legitimacy conditions he outlines, it is not clear why less comprehensive legal systems, including the EU (but also international law more generally), should meet the same

⁵⁶ Habermas, 'Why Europe Needs a Constitution', 14.

demanding standards. This is all the more true if we take into account the fact that European institutions specialize in areas—anti-trust prosecution, central banking, various forms of social regulation—which are already delegated to non-majoritarian institutions domestically. Seen from this point of view, it is not at all clear that domestic non-majoritarian institutions are any more constrained by public ‘opinion- and will-formation’ than European institutions. Indeed, in many cases, especially given the wide range of ‘veto points’ and checks and balances at the European level, the opposite often seems to be the case.⁵⁷

The point stands even if we concede that more needs to be done to make the EU responsive and accountable to European publics (not to mention domestic non-majoritarian institutions).⁵⁸ Even if we make this concession, the move from ‘law’ to ‘democracy’ to ‘social rights’ is still too quick. If Habermas’s central argument for an egalitarian distribution is an instrumental one—strong social rights are required to sustain the fair value of civil and political liberties—then, in the view of the limited capacity of European institutions, it seems far-fetched to argue that until pan-European egalitarian justice is secured, civil and political liberties will remain insecure. While the argument has force at a domestic level, where there is a legal order securing the full range of collective goods and services, criminal law, torts, etc., it has less force at an EU level. Because of the different range of authority exercised by EU vis-à-vis national institutions, EU citizens are, to put it starkly, much more vulnerable to

⁵⁷ See A Moravcsik, ‘In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union’, *Journal of Common Market Studies* 40 (2002): 603–24; Giandomenico Majone, *Dilemmas of European Integration: the Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2005); Giandomenico Majone, ‘The Common Sense of European Integration’, *Journal of European Public Policy* 13 (2006), 607–26, at 618ff.

⁵⁸ See eg Andreas Føllesdal and S. Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, *Journal of Common Market Studies* 44 (2006), 533–62, and Richard Bellamy, ‘Still in Deficit: Rights, Regulation, and Democracy in the EU’, *European Law Journal* 12 (2006), 725–42.

domination as a result of *intra*-Member State inequalities than *inter*-Member State ones. Of course, if Habermas could show that democratizing the EU *required* expanding its range of competences, including its budget, then he could argue that pan-European egalitarianism would have to follow. But increasing the accountability and responsiveness of EU institutions does not require increasing its range of competences or expanding its budget. Habermas's argument that the 'form of civil solidarity that has been limited to the nation-state until now has to expand to include all citizens of the union, so that, for example, Swedes and Portuguese are willing to take responsibility for one another', once again, fails.⁵⁹ There is no argument available along Habermasian lines that demonstrates that the EU must be transformed into a federal *Sozialstaatsverbund*, or that distributive justice extends beyond the borders of the nation-state.

3 Solidarity as fraternity

The third model of solidarity, like the statist one, also challenges the idea that obligations of distributive justice and solidarity can extend beyond the nation-state, but in a very different way. The most plausible versions of the argument for *solidarity as fraternity* take one of two forms, both of which are variants of liberal nationalism. The first and most common version emphasizes the link between trust and nationality; the second, more nuanced version emphasizes the link between collective agency and nationality.

According to the first form of the argument, distributive justice cannot be realized with a motivational basis in a sense of fellow-feeling. David Miller, for example, asks: 'What can motivate people to make the sacrifices that distributive justice requires, whether this takes the

⁵⁹ Habermas, 'Postnational Constellation', 99.

form of supporting parties that promise redistribution, or simply behaving in a fair way in their everyday lives?’ Miller continues, there ‘is a wealth of evidence that shows that people are more willing to make such sacrifices the more closely they feel themselves tied to the likely beneficiaries of their actions’. Joint redistribution requires, that is, a ‘common identity or common values’.⁶⁰ The reason people are more willing to make sacrifices to others with whom they share an identity is that ‘ties of community are an important source of . . . trust between individuals who do not know one another’.⁶¹ Without such mutual trust, we cannot be sure that others will be prepared to return the benefits which we provide through our sacrifices, should we come to need them. Miller’s most striking and well-known claim is that the *only* viable source for such a common identity in modern societies is shared *nationality*:

In states lacking a common national identity . . . politics at best takes the form of group bargaining and compromise and at worst degenerates into a struggle for domination. Trust may exist within the groups, but not across them.⁶²

In summary, distributive justice requires solidarity, solidarity requires mutual trust, and mutual trust requires a common identity grounded in a shared nationality.⁶³ The extension of the argument to the EU, given these premises, is straightforward: because the EU lacks a

⁶⁰ David Miller, ‘The Left, the Nation-State, and European Citizenship’, *Dissent* 45 (1998), 47–51 at 48.

⁶¹ David Miller, *On Nationality* (Oxford: Oxford University Press, 1995), 92.

⁶² Miller, *On Nationality*, 92.

⁶³ Notice that, according to this argument, shared nationality is a necessary condition of solidarity but not a sufficient one (eg the US). The explanation is obvious: the disposition to aid the worst off requires a sense of justice which is independent of merely sharing a common identity or nationality. While there are national identities which define themselves in terms of their commitment to solidarity, solidarity is not a constitutive feature of national identity as such.

common national identity, distributive justice cannot apply at that level. The argument has many adherents, including Streeck, Scharpf, Offe, and Grimm.⁶⁴

It is, however, implausible as it stands. First, *solidarity as fraternity* is a purely instrumental justification of liberal nationalism. It does not say that citizens have good reason to restrict the scope of egalitarian concern to those with whom they share a national identity. Rather, it simply asserts that, as a matter of *fact*, the bounds of egalitarian concern only extend thus far and no further. But if we accept that feelings of national fellow-feeling and solidarity are not simply urges, like nausea and hunger, but judgment-sensitive attitudes, then they must also be responsive to reasons. From a first-person perspective, we can always ask: while it may be true that my fellow compatriots feel no inclination to trust non-nationals, and that they therefore do not support extending the bounds of egalitarian concern to them, why should *I* believe that relations of shared nationality constitute *good grounds* for restricting the scope of distributive justice in this way? The argument just canvassed squarely begs this question, which is the question we are ultimately interested in.⁶⁵

The first form of *solidarity as fraternity* has a further and deeper weakness. The empirical premise on which the argument relies is false: it is not true that shared culture or nationality or even common identity is necessary for the existence of mutual trust. While it is true that a common identity (though not necessarily a national one) increases the chances of successful cooperation, there are many other circumstances which favor the formation of mutual trust in the absence of such a common identity. For example, a wide range of studies

⁶⁴ Claus Offe, 'The Democratic Welfare State in an Integrating Europe', in *Democracy Beyond the State? The European Dilemma and the Emerging Global Order*, (eds) MT Greven and LW Pauly (Lanham, MD: Rowman & Littlefield, 2000); Scharpf, *Governing in Europe*; W Streeck, 'Neo-Voluntarism: A New European Social Policy Regime?', *European Law Journal* 1 (1995), 31–59; D Grimm, 'Does Europe Need a Constitution?', *European Law Journal* 1 (1995), 282–302.

⁶⁵ For more on this argument, see Sangiovanni, *Domains of Justice*, Chapter 3.

demonstrates that relationships of sustained reciprocity (whether specific or diffuse) can generate and reproduce relations of trust.⁶⁶ This is unsurprising: continued and positive interaction under a generally recognized system of norms promotes trust that people will continue to comply in the future. This effect is enhanced, in turn, when it is possible to build reputations—when knowledge of people’s past willingness to contribute is widely available. In such cases, reputation functions as a signal of trustworthiness. In none of these cases is a common identity a necessary condition for the existence of the mutual trust required for stable patterns of generalized reciprocity.

But even if we concede that the thorough-going relations of solidarity typical of egalitarian welfare states cannot be sustained at the European level for the reasons given by *solidarity as fraternity*, there is no reason given why weaker relations of solidarity that are more demanding than humanitarianism but less demanding than full equality cannot develop at the European level. Indeed, if it is true that sustained relations of generalized reciprocity can generate mutual trust independently of common identity, and if it is true that such mutual trust is required for solidarity, then there seems to be at least a *prima facie* case why such weaker relations of solidarity could in fact develop, given the right conditions. The argument that norms of distributive justice and solidarity cannot apply at the European level because there is no sense of shared identity grounded in a common nationality therefore fails.

The second, more nuanced argument for *solidarity as fraternity* focuses on the link between nationality and collective agency. The argument turns on the idea that principles of distributive justice can only apply to persons who together constitute a viable collective political agent. According to this second version of the argument, there are a number of

⁶⁶ See eg K. Binmore, ‘Reciprocity and the Social Contract’, *Politics, Philosophy & Economics* 3 (2004), 5–35 and the useful survey in E Fehr and U Fischbacher, ‘The Nature of Human Altruism’, *Nature* 425 (2003), 785–91.

conditions which a ‘people’ organized for collective political agency must meet before principles of distributive justice can apply to it. I will use Pettit’s recent interpretation of Rawls’s argument in the *Law of Peoples* to make the point. Pettit writes:

a people will be organized for agency ... in a manner that goes precisely with its having a well-ordered structure. This involves continuous interaction between a[] ... representative government and a[] ... responsive citizenry. The members of any well-ordered people will be party to certain shared ideas that are capable of being articulated into a theory of justice. And they will control the government that represents them, they will constitute it as their representative to the extent that the government is ordered or regulated by those common reasons, and by the corresponding conception of justice.⁶⁷

When a ‘people’ meets these conditions, it can be considered a collective agent proper. This is because, in these circumstances, a ‘people’ (1) has shared goals that the group pursues, and has procedures (not necessarily formal) for their selection, revision, and promotion; (2) it will act ‘under the guidance of a body of judgments that members authorize as common property’; and (3) it displays ‘a modicum of rationality’ (to avoid, for example, familiar inconsistencies given by the nature of collective decision-making).⁶⁸ The key condition for the liberal nationalist is (2). The liberal nationalist makes the further claim that persons which are a ‘party to shared ideas [and common reasons] that are capable of being articulated into a

⁶⁷ Philip Pettit, ‘Rawls’s Peoples’, in *Rawls’s Law of Peoples: A Realistic Utopia?*, (eds) R Martin and DA Reidy (Oxford: Blackwell, 2006), 48.

⁶⁸ Pettit, ‘Rawls’s Peoples’, 46, 8. On Pettit’s conception of collective agency, see Philip Pettit, *The Common Mind* (Oxford: Oxford University Press, 1993); cf. Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000); Michael Bratman, ‘I Intend That We *J*’, in *Faces of Intention*, (ed) M Bratman (Cambridge: Cambridge University Press, 1999); J David Velleman, ‘How to Share an Intention’, *Philosophy and Phenomenological Research* 57 (1997), 28–49.

theory of justice' must share what Miller calls 'a public culture'—a shared fund of beliefs, values, attitudes, and ritual observances which together are constitutive of nationality.⁶⁹

Once again, no shared nationality, no distributive justice; no pan-European national identity, no pan-European distributive justice.

There are at least two reasons why collective agency of this sort is necessary and sufficient for principles of distributive justice to apply. First, for the exercise of political authority in the name of distributive justice to be legitimate, directives must be capable of acceptance by those subject to them. The directives must, that is, not only track *common* interests but also *shared* goals and reasons. (Two people going on vacation to Greece *together* have a *shared* aim; two strangers on the same boat who happen both to be going to Greece on vacation merely have an aim *in common*.) The argument under consideration says that this justification can be successful only if it can be cast in terms of reasons widely available in the public political culture, including the political texts and traditions central to it. If there is no fund of shared reasons available or if the regime is not accountable to them, then the regime (even if it acts, say, to maximize the prospects of the worst off) can only be legitimate if all parties unanimously agree on the outcome.

Second, publicity—the idea that justice must not only be done but must also be seen to be done—is also a fundamental requirement of legitimate authority. The shared reasons there are must not only motivate policy but must also be known to motivate policy. But publicity, the argument goes, cannot be realized in the absence of a shared institutional system of rules and procedures ensuring both a 'modicum of rationality' and responsiveness to shared reasons. Coordinated and accountable political institutions create circumstances in which

⁶⁹ Rawls can be interpreted as making a similar claim. See Rawls, *The Law of Peoples*; Van Parijs and Rawls, 'Three Letters on the *Law of Peoples* and the European Union'.

governing regimes can be relied on to act on shared reasons rather than on reasons serving merely special or private interests (for example, those of a ruling class). In the absence of a responsive institutional structure for making decisions, and given normal time constraints as well as the complexity of government policies for any citizen, directives cannot be known to reliably track shared reasons, and so cannot act either legitimately or *a fortiori* justly.

Both of these rationales for making this kind of collective political agency a condition for the application of principles of distributive justice more demanding than humanitarianism seem to me correct.⁷⁰ The mistake in the argument lies in the further, specifically liberal nationalist, premise which states that *only* nations, and therefore *not* the EU, are capable of the collective agency required for distributive justice to apply. After all, the EU—and, I would add, other international institutions such as the WTO, UN, and so on—do have a unified system of institutions which ensures both a ‘modicum of rationality’ and the selection and pursuit of shared goals; furthermore, the operation of each one, over time, has produced a fund of shared reasons (rooted in texts, traditions of argument, and so on) which can serve as a basis of both support and criticism. In the EU case, the fund is surely much thinner than at the domestic level, but there is enough there from which to construct a conception of solidarity adequate to the type of social cooperation made possible by the EU (recall the texts and debates with which we began this paper). It is important to emphasize, moreover, that this shared fund need not represent any consensus on values or beliefs. The shared fund of reasons could be constituted, for example, by a typical, recurring, and characteristic set of *disagreements* (just as it can at the domestic level). So, while the argument could be used to show that principles of distributive justice more demanding than humanitarianism cannot

⁷⁰ Indeed, although I cannot show this here, I believe they can be marshaled in support of the practice-dependence thesis.

apply to ‘the global institutional order’ writ large (which is not organized as a collective agent of the relevant type), it cannot be used to establish the conclusion intended, namely that principles of distributive justice cannot apply to the EU.

4 Conclusion

In this chapter, I have reconstructed and rejected three strategies for answering our initial question regarding the nature of solidarity at the EU level. The aim, as I said in the introduction, was to demonstrate the need for more careful philosophical reflection on one of the fundamental values underpinning the EU, and to clear the ground of some of the most promising views currently available. One might naturally wonder at this point what a plausible alternative might look like. We can, I believe, draw several conclusions from our discussion. A plausible account of European solidarity should not begin with the EU’s capacity (or incapacity) to coerce its members and citizens, with the depth and richness of European identity or fellow-feeling, or with the democratic quality of European institutions. Rather, the most plausible view will begin with the special character and nature of European social, political, legal, and economic *cooperation*, or, to put it another way, with the special character and nature of the *public goods* generated by participation in European institutions. On this view, it is our relation as participants in the maintenance and reproduction of such public goods (rather than our relations of as subjects of coercion, bearers of an identity, or democratic citizens) that trigger stronger social justice norms, which are in turn interpreted as demands of *reciprocity*. To make this plausible, much more would need to be said regarding what this reciprocity involves and among whom it applies. We would also need to provide a precise characterization of the public goods generated by European cooperation, and, more

generally, an account of the point and purpose of the EU against which we can make sense of the idea of a fair return. If, for example, we conceive of the EU as a way for Member States to enhance their domestic problem-solving capacities in an era of globalization, while indemnifying each other against the risks and losses associated with pooled decision-making authority, then what would count as a fair allocation of those risks? To what extent should Member States and their citizens share in the economic and social fate of their fellow members and citizens? I cannot hope to provide a satisfactory answer to these questions here.⁷¹ But I do hope to have at least made the questions raised, and the lines of inquiry traced, interesting ones.

⁷¹ I answer this question in Sangiovanni, *Domains of Justice*, Part III; see also ‘Solidarity in the European Union’ *Oxford Journal of Legal Studies* (forthcoming).