

ARTICLE

Special Issue — Law and Political Imagination: The Perspective of Paul Kahn

Imagining Europe

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Abstract

What can the cultural study of law tell us about the European Union (EU)? How can we study the European political imagination? This paper demonstrates that the European political imagination is both composite and multifaceted. It is structured not merely by EU law but also by the constitutional orders of the EU Member States. A cultural analysis of European law must therefore include the constitutional worldviews of the Member States. In the political imagination of most of the Member States, “Europe” plays an important symbolic role. Yet since the Member States are shaped by different ‘varieties of constitutionalism’, the meaning ascribed to “Europe” is not uniform. The study of the constitutional worldviews of the Member States, however, should not come at the expense of studying the European political imagination sustained by EU institutions. This political imagination is currently undergoing a transformation. EU authority is increasingly legitimized by appealing to the “the people of Europe” and there are calls for “European sovereignty.” This emerging European political imagination transcends the dominant view of the literature where Europe is understood as a space of “post-sovereignty.”

Keywords: Constitutional imagination; European political imagination; varieties of constitutionalism; European sovereignty; cultural study of law

A. Introduction

Law, Paul Kahn tells us, is a “symbolic system that structures the political imagination.”¹ As a symbolic system, law creates a complete worldview through which we understand and give meaning to our own collective existence. If we are to understand law’s rule as the imaginative construction of a worldview, we need to approach law as a cultural system, which already is meaningful to its participants.² The cultural study of law allows us to approach legal concepts with a view to understanding their meaning within a community’s system of belief.³ The cultural study of law enquires into the character of the belief rather than its validity. It allows us to shine a light on the world sustained by the political imagination and understand it on its own terms.

What would it mean to conduct a cultural analysis of the law of the European Union (EU)? What characterizes the culture of European law’s rule? The answer to those questions is by no means straightforward because of the contested legal and political nature of the EU. Is there even such a thing as a “European political imagination”? Which community’s belief system are we

¹Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2677 (2003).

²PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 2 (1999).

³KAHN, *supra* note 2, at 3.

meant to be studying? Who is imagining Europe? If we take the EU to be a composite polity consisting of the Union and its Member States, we are necessarily addressing a “composite” system of belief.⁴ The European political imagination is structured not merely by EU law but also by the law of the all the Member States. EU citizens are by definition also citizens of one of the Member States. At least potentially, they can imagine themselves as belonging both to a Member State and to “Europe.” A cultural study of the European legal order must account for how the different worldviews interact with each other, and shape each other, if it is to reach a nuanced understanding of the European political imagination.

When the cultural study of law is applied to the EU, it quickly becomes clear that we are encountering a plurality of worldviews—a plurality of symbolic systems—which are sustained around EU law as well as the constitutional systems of the Member States. The EU is not merely characterized by constitutional pluralism but also by a plurality of constitutional worldviews, or what I have labeled “varieties of constitutionalism” in EU.⁵ Notwithstanding that all the Member States of the EU conceive of themselves as constitutional democracies, they have radically different conceptions of what that means.⁶ For that reason, the assumption cannot be that the various constitutional systems of the Member States are shaped by the same constitutional culture. A cultural study of law in the European context, therefore, also entails a study of comparative constitutional law, yet “in a new key,” in Kahn’s words.⁷ A cultural study of European law’s rule has as its task to bring to light the composite and multifaceted character of the European political imagination.

B. Beyond Eros and Civilization

Any political order, including any liberal political order, Kahn tells us, has erotic foundations: “[W]e cannot understand the character of the relationship between self and polity without first understanding love.”⁸ The attachment to a political order is not a product of interest or reason, as liberalism tells us, but rather a form of love.⁹ In political life, this love manifests itself in the citizen’s knowledge of the possibility of killing and dying for the survival of the political community.¹⁰ What is defended is not merely the territorial integrity of a polity, but also the transhistorical project of a political community. The political order defends “a way of life” for which the citizens are compelled to sacrifice their own lives.¹¹ Sacrifice, in Kahn’s account, is therefore at the foundations of the political.

Taking Kahn’s account of the political as our starting point, can we talk about the EU as a political order? For decades, the consensus in EU scholarship was a resounding “no.” Love and sacrifice are not the words commonly associated with the project of European integration: “You cannot fall in love with the single market,” as Jacque Delors put it in his address to the European Parliament in 1989.¹² The project of European integration has for the most part been described as

⁴My analysis is that the EU is a federal union of states—or what I propose we simply call a federation—which in constitutional terms is similar to the antebellum United States and the nineteenth century German and Swiss federations. See SIGNE REHLING LARSEN, *THE CONSTITUTIONAL THEORY OF THE FEDERATION AND THE EUROPEAN UNION* (2021). Whether this is a persuasive analysis or not to the reader is not of great importance to this paper. What remains the relatively uncontested baseline of analysis is that the EU consists of multiple constitutional orders that are both overlapping and interacting. See MATEJ AVBELJ & JAN KOMÁREK, *CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND* (2012). See also Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 *EUR. L. REV.* 511 (2002).

⁵Signe Rehling Larsen, *Varieties of Constitutionalism in the European Union*, 84 *MOD. L. REV.* 477, 481 (2021).

⁶See Signe Rehling Larsen, *The European Union as “Militant Democracy”?*, in *EUROPEAN CONSTITUTIONAL IMAGINARIES: BETWEEN IDEOLOGY AND UTOPIA* (Jan Komarék ed. 2023). See also Kahn, *supra* note 1, at 2692.

⁷See Kahn, *supra* note 1.

⁸PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* 9 (2009).

⁹See KAHN, *supra* note 8, at 228.

¹⁰See *id.*

¹¹See *id.*

¹²Jacques Delors, President, Eur. Comm’n, Statement on the Broad Lines of Commission Policy, Address to the European Parliament (Jan. 17, 1989), in *BULL. EUR. CMTY.*, Oct. 21, 2012, at 3.

a technocratic project about commercial interest and market integration, which could not win the hearts and souls of Europeans. For example, based on Kahn's cultural study of law, Ulrich Haltern argued that EU law "lacks a willbased imagination of the political,"¹³ and for that reason "the Union's texts are merely texts and nothing more."¹⁴ Because of the complete absence of sacrifice at EU law's origins, Haltern argues, EU law "fails in carrying forward a kind of social meaning that would allow Europe to imagine itself as a one transtemporal community."¹⁵ The EU does not have erotic foundations, Haltern maintains: "The Union was not born from belief, visionary revolution, shared sacrifices, emotions, or love, but rather from the spirit of reason and enlightenment."¹⁶

A similar argument was put forward by Joseph Weiler, who described the EU as a "civilizing" force that could tame the "eros" of nationalism.¹⁷ For Weiler, this allowed for the erotic world of the political to exist, yet in a benign, "civilized" form. In Jürgen Habermas' account, the EU held out a more radical promise of permanently overcoming the "political," above all else war, by the creation of a new form of cosmopolitan constitutionalism.¹⁸ In Neil MacCormick's view, the EU represented a world of "post-sovereignty."¹⁹ Whereas this was welcomed by some scholars, other scholars saw the EU as an undemocratic force that was eroding the sovereignty of its Member States and hence the realm of the "political."²⁰ Whether the EU was viewed as an object of praise or suspicion, the dominant position remained that the EU was about reason and interests, not love and sacrifice, and hence it could not be understood in genuinely political terms: "Who will willingly die for Comecon of the EEC?," Benedict Anderson quipped.²¹

With the Russian invasion of Ukraine in February 2022, the shortcomings of the old consensus are becoming clear. The question of whether Europe represents a way of life worth dying and killing for was answered in the affirmative – by the people of Ukraine. If we want to understand the European political imagination, a promising though untraditional place to start might be to ask how "Europe" is imagined at its borders, where the significance of EU membership is understood with a greater degree of urgency.

C. From Ukraine with Love

In the last days of February 2022, the world witnessed a mass mobilization of the Ukrainian society. The Ukrainian people took up arms not only to defend their homes, livelihood, and the future of Ukraine as a sovereign country, but also to fight for a European future for Ukraine as a Member State of the EU. Ukrainians sacrificed themselves for the existence of a Ukrainian state and for a European future for Ukraine. In their own selfunderstanding, Ukrainians were fighting to defend Europe and European values from the invasion of an authoritarian state with imperial

¹³Ulrich Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 EUR. L. J. 14, 18–19 (2003).

¹⁴*Id.* at 18.

¹⁵*Id.* at 19.

¹⁶Ulrich Haltern, *On Finality*, in THE PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., 2009).

¹⁷Joseph H. H. Weiler, *To Be a European Citizen—Eros and Civilization* 4 J. EUR. PUB. POL'Y 495 (1997).

¹⁸See JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE (2012). See also JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS (2001).

¹⁹NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 123–136 (1999).

²⁰See, e.g., Dieter Grimm, *The Constitution in the Process of Denationalization*, 12 CONSTELLATIONS 447 (2005); Fritz W. Scharpf, GOVERNING IN EUROPE—EFFECTIVE AND DEMOCRATIC? (1999); Fritz W. Scharpf, *Democratic Legitimacy Under Conditions of Regulatory Competition: Why Europe Differs from the United States*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaïdes & Robert Howse eds., 2001); Martin Loughlin, *The Erosion of Sovereignty*, 2 NETH. J. OF LEGAL PHIL. 45, 58–81 (2016).

²¹BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 53 (2006).

ambitions in Europe.²² In his speech to the European Parliament, Ukraine's president Volodymyr Zelenskyy expressed the political significance of Europe for Ukraine in this way:

We are fighting for our rights, for our freedoms, for our lives, and now we are fighting for survival, and this is the highest of our motivations. But we are fighting also to be equal members of Europe. I believe that today we are showing everybody that is exactly what we are. The European Union is going to be much stronger with us, so that is for sure. Without you, Ukraine is going to be lonesome. We have proven our strength. We have proven that as a minimum, we are exactly the same as you are. So do prove that you are with us. Do prove that you will not let us go. Do prove that you are indeed Europeans. And then life will win over death; and light will win over darkness. Glory be to Ukraine.²³

Some people might dismiss the idea that Ukrainians are willingly dying for Europe as mere wartime pathos or Zelenskyy's attempt to drum up European support for Ukraine, but that would be to miss a bigger point. Zelenskyy was undoubtedly trying to secure stronger European support for Ukraine. Yet reducing Zelenskyy's speech to political strategy ignores the fact that, as all great political speeches, Zelenskyy gave expression to a core conviction of the community he represents. In his speech, Zelenskyy conveyed the Ukrainian belief that Ukrainian national sovereignty and EU membership depend on each other. To be an independent sovereign nation, Ukraine must become a Member State of the EU; to become a Member State of the EU, Ukraine must be an independent sovereign nation.

In the Ukrainian political imagination, "Europe" has played an important symbolic role in the construction of a Ukrainian national identity after the fall of the Soviet Union.²⁴ The very existence of Ukraine as a sovereign, independent country is a point of contention between Russian and Ukrainian historical narratives. This is clear from Putin's text "On the Historical Unity of Russians and Ukrainians," which has been widely understood as an integral part of the Russian justification for invading Ukraine.²⁵ The construction of Ukrainian political identity, therefore, has been constructed in opposition to the Russian narratives that Ukraine is a part of Russia, rather than an independent country.²⁶ This importantly has entailed a rejection of Ukraine's soviet heritage by portraying Ukraine as the victim of two totalitarianisms, for example, by public memorialization of the manmade Great Famine of 1932–33 that killed millions of peasants as a

²²This was expressed by Ukraine's President, Volodymyr Zelenskyy, in a speech on March 26, 2022:

I also spoke today with Polish President Andrzej Duda. Twice. About our people who found protection in Poland. And the need to strengthen our common security. Security of our states. Security for all Europeans actually. What is the price of this security? This is very specific. These are planes for Ukraine. These are tanks for our state. This is anti-missile defense. This is anti-ship weaponry. This is what our partners have. This is what is covered with dust at their storage facilities. After all, this is all for freedom not only in Ukraine—this is for freedom in Europe.

See Volodymyr Zelenskyy, Ukr. President, Russian Troops Are Destroying Everything That Makes Us a Nation, But They Will Be Held Accountable For That, Address to the People of Ukraine (Mar. 26, 2022) (transcript available at <https://www.president.gov.ua/en/news/rosijski-vijska-znishuyut-use-sho-robit-nas-narodom-ale-za-c-73873>).

²³Volodymyr Zelenskyy, Ukr. President, Speech to the European Parliament (Mar. 1, 2022) (available at <https://www.youtube.com/watch?v=IycwCjg4f8Y>).

²⁴See generally Vjosa Musliu & Olga Burlyuk, *Imagining Ukraine: From History and Myths to Maidan Protests* 33 EAST EUR. POL. & SOC'Y 631 (2019).

²⁵See Vladimir Putin, On the Historical Unity of Russians and Ukrainians, Embassy of Russ. in the U.K. (July 12, 2021), <http://en.kremlin.ru/events/president/news/66181>; see also Harvard University, *Contextualizing Putin's "On the Historical Unity of Russians and Ukrainians,"* HARV. UNIV. UKR. RSRCH. INST. (Aug. 2, 2021), <https://huri.harvard.edu/news/putin-historical-unity>; Timothy Snyder, *Putin's Case for Invading Ukraine Rests on Phony Grievances and Ancient Myths*, WASH. POST (Jan. 28, 2022, 9:09 AM), <https://www.washingtonpost.com/outlook/2022/01/28/putin-russia-ukraine-myths/>; Timothy Snyder, *Putin's Case for Invading Ukraine Rests on Phony Grievances and Ancient Myths*, THE KYIV INDEP. (Feb. 2, 2022), <https://kyivindependent.com/opinion/timothy-snyder-putins-case-for-invading-ukraine-rests-on-phony-grievances-and-ancient-myths/>.

²⁶See generally Musliu & Burlyuk, *supra* note 24.

genocide against the Ukrainian people.²⁷ In the construction of Ukraine as “not Russia,” Europe/the EU has come to play a pivotal role. This was especially clear during the Maidan protests of 2013–14, where Europe/the EU came to represent the promise of the realization of Ukraine as a sovereign, democratic country free from Russian autocracy and imperialism.²⁸ The intuition of the Ukrainian revolutionaries of Maidan was that Ukrainian national sovereignty and EU membership depended on each other.²⁹ In the construction of Ukrainian political identity, Europe is imagined at the same time as the natural home of Ukraine, with slogans such as “Ukraine is Europe,” but at the same time as Ukraine’s end destination. Membership in the EU holds out the promise of a “return to Europe,” from which Ukraine has endured an artificial separation. For Ukrainians, the EU means more than market integration and product standards. Europe is understood in existential terms.

Ukraine gives us a stark example of the symbolic role played by “Europe” in the political imagination, yet it is by no means unique. For most of the Member States, EU membership has been an integral part of the (re)constitution of their own legal and political orders and “Europe” is an important symbol in their political imagination. This was for the most part missed by the EU literature that declared the EU to be a nonpolitical order because the view from the Member States was largely ignored. Understanding the symbolic role played by “Europe” in the political and constitutional imagination of the EU Member States is a core aim of a cultural study of law in the European context.

With twentyseven Member States, this is a daunting task. We can, however, get a broad understanding of the symbolic role played by Europe in the political imagination of most EU Member States by dividing them into three different “varieties of constitutionalism,” three different forms of constitutional imagination, which I have labelled “post-fascist constitutionalism,” “post-communist constitutionalism,” and “evolutionary constitutionalism.”³⁰ These varieties of constitutionalism are shaped by different historical experiences, which have led to the development of different conceptions of both constitutional democracy and “Europe.” I can only provide a brief sketch here.

D. “Europe” in the Post-Fascist Constitutional Imagination

The post-fascist constitutional imagination was born in Western Europe after World War Two, and it came to shape the constitutional regimes of West Germany, Italy, and later Spain, Portugal and Greece, but also the project of European integration, including both the European Economic Community (EEC) and the European Convention on Human Rights (ECHR).³¹ In contrast to the constitutional project of the republican revolutions that sought to harness the power of the people and create a stable system of checks and balances, the post-fascist constitutional project was founded on a fear of the people and concerned with permanently constraining the exercise of political power.³² Within the post-fascist constitutional imagination, the origins of the interwar

²⁷Timothy S. Snyder et al., *Politics of History in Eastern Europe*, 8 J. MOD. EUR. HIST. 141, 152–5 (2010). See also NIKOLA EVGEN’EVICH KOPOSOV, *MEMORY LAWS, MEMORY WARS: THE POLITICS OF THE PAST IN EUROPE AND RUSSIA* 177–206 (2018).

²⁸See Timothy Snyder, *Integration and Disintegration: Europe, Ukraine, and the World* 74 SLAVIC REV. 695, 703 (2015) (“The political theory that governed the actions on the Maidan was a simple one, but it was often overlooked. It had to do with a positive logic of integration. Civil society, the state, and Europe were all dependent on one another. The state needed civil society to push it toward Europe, and it needed Europe to push it away from corruption. Integration would reinforce sovereignty, and sovereignty would reinforce integration but not automatically—not without a large number of Ukrainian citizens being willing to take risks.”).

²⁹*Id.* at 695.

³⁰See Larsen, *supra* note 5.

³¹See generally Larsen, *supra* note 6.

³²For similar arguments, see MICHAEL A WILKINSON, *AUTHORITARIAN LIBERALISM AND THE TRANSFORMATION OF MODERN EUROPE* (2021); ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* (2014); Christoph Möllers, “We Are (Afraid of) the People”: *Constituent Power in German Constitutionalism*, in *THE PARADOX OF CONSTITUTIONALISM*:

breakdown is ascribed to “democratic excess,” or “hyper democracy,” in José Ortega y Gasset’s terms.³³ A core aim of the constitution in the post-fascist constitutional imagination is to prevent the people from committing “democratic suicide” by introducing an antidemocratic constitutional order via “unconstitutional constitutional amendments.”³⁴ Democracy has to be disciplined, or else its dark “totalitarian” side will prevail, either in its leftwing or rightwing incarnation: communism or fascism.³⁵

Within the post-fascist constitutional imagination, “Europe” plays an important symbolic role. The promise of “Europe” was to save the European peoples from their primarily *internal enemies*: fascism and communism. The “dark side” of democracy, with its inherent logic of mass killing, had to be vigilantly repressed.³⁶ “Europe” would be an integral part of the constitutional order created in order to save democracy from itself.³⁷ Carl Friedrich expressed this sentiment succinctly when he wrote:

[The] barbarian threat is indigenous to Europe itself. Europe has its own barbarians, as the wave of fascism and Hitlerism and related movements made amply clear . . . Hence the defense of Europe, in its spiritual tradition, is against its own perverters, wherever found. The movements for the unification of Europe were born or rather reborn in the underground of against Hitler’s empire. They draw on the strongest inspiration from a consensual conviction that only a united Europe can withstand a totalitarian lure.³⁸

This sentiment was not merely expressed by academics but also in the post-war West European constitutions. In the preamble of the German Basic Law, it is stated that the German people exercised their constituent power based on their ‘determination to promote world peace as an equal partner in a united Europe’.³⁹ Although vaguer in tone, declarations of ‘open statehood’ towards international law can also be found in several other post-war constitutions.⁴⁰ Constitutional ‘openness’ or ‘friendliness’ to European law is a core feature of the “post-fascist constitutions”⁴¹ With the creation of the EEC, as John Erik Fossum and Agustín Menéndez argue, the domestic constitutions of the core European states started to live a “double constitutional life.”⁴² In addition to their role as domestic constitutions, they took on a “new role as part of the

CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2008); JANWERNER MÜLLER, *CONTESTING DEMOCRACY: POLITICAL IDEAS IN TWENTIETHCENTURY EUROPE* (2011).

³³See JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES: AUTHORIZED TRANSLATION FROM THE SPANISH* (1932).

³⁴See YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* (2017).

³⁵See, e.g., Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417 (1937); Karl Loewenstein, *Militant Democracy and Fundamental Rights*, II, 31 AM. POL. SCI. REV. 638 (1937); JanWerner Müller, *Militant Democracy*, in *OXFORD HANDBOOK COMPARATIVE CONSTITUTIONAL LAW* (András Sajo & Michel Rosenfeld eds., 2012). On the merging of fascism and communism into two expressions of the same phenomenon, totalitarianism, in twentieth century constitutional thought, see Richard Primus, *A Brooding Omnipresence: Totalitarianism in Post-war Constitutional Thought*, 106 Yale L. J. 423 (1996). See also HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (Harcourt 1994); CARL J. FRIEDRICH, *TOTALITARIANISM* (1954).

³⁶See MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING* (2005).

³⁷See Larsen, *supra* note 6.

³⁸CARL J. FRIEDRICH, *EUROPE: AN EMERGENT NATION?* (1969).

³⁹Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/index.html.

⁴⁰In the Preamble to the French Constitution of 1946, it is declared that “subject to reciprocity, France consents to limitations of sovereignty necessary for the realization and the defense of peace.” The Italian Constitution of 1948 contains a similar statement: “Italy may consent, on equal terms with other States, to limitations of sovereignty necessary to establish an order ensuring peace and justice among nations.”

⁴¹For a discussion of “constitutional openness,” see Giuseppe Martinico, *Constitutionalism, Resistance, and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance*, 35 Y.B. EUR. L. 318, 327 (2016).

⁴²JOHN ERIK FOSSUM & AGUSTÍN JOSÉ MENÉNDEZ, *THE CONSTITUTION’S GIFT: A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION* 9–10 (2011).

collective supranational constitution.”⁴³ For these Member States, European integration cannot be seen as an alien power but is rather a part of the realization of the constitutional project that lies at the heart of the post-war reconstruction, sometimes described as “value order constitutionalism.”⁴⁴

A similar story can be told for the Mediterranean states that joined the EU in the 1980s after the collapse of authoritarianism. For Spain, Portugal and Greece, accession to the EEC was from the very beginning intimately linked to domestic constitutionmaking and statebuilding after the fall of the dictatorships.⁴⁵ The “return to Europe” was seen as pathway to liberal democracy and a way of consolidating regime change. Membership was understood as a means to domestic democratic consolidation, the “normalization” of the relationship to other European states, as well as the modernization of the economy.⁴⁶ As demonstrated by several historical studies, the applicant states interpreted EEC membership as an integral part of a transition to democracy.⁴⁷ “Europe” was invested with an idealistic yet vague meaning that was coupled to the idea of democratizing society after the dictatorship.⁴⁸ “Europe” and ‘Europeanness’ came to be a central part of the political and constitutional identities of Spain, Portugal and Greece.⁴⁹

In the case of Greece, perception of the EEC as a “guarantor of democracy” was strengthened when Greece’s application for membership under the 1961 Athens Association agreement was suspended as a consequence of the military coup.⁵⁰ The suspension of the Association agreement challenged the regime’s legitimacy and contributed to the erosion of public support for the junta in Greece.⁵¹ The symbolic impact of the EU’s intervention in Greece was lasting and European integration came to be identified with the “defense of democratic values.”⁵² In Spain, EEC membership was widely understood by the political elites as well as the population at large as a means to stabilizing the volatile political situation after the fall of the Franco regime.⁵³ “Democracy at the domestic level,” Víctor Ferreres Comella writes in his introduction to the *Constitution of Spain*, “would be more secure if it were constrained by international and supranational rules and institutions.”⁵⁴

⁴³See FOSSUM & AGUSTÍN, *supra* note 42.

⁴⁴Martin Loughlin, *The Silences of Constitutions*, 16 INT’L J. CONST. L. 922 (2018).

⁴⁵For comparative studies, see ENCOURAGING DEMOCRACY: THE INTERNATIONAL CONTEXT OF REGIME TRANSITION IN SOUTHERN EUROPE (Geoffrey Pridham ed. 1991); THE INTERNATIONAL DIMENSIONS OF DEMOCRATIZATION: EUROPE AND THE AMERICAS (Laurence Whitehead ed. 2001).

⁴⁶SPAIN AND PORTUGAL IN THE EUROPEAN UNION: THE FIRST FIFTEEN YEARS (Paul Christopher Manuel & Sebastian Royo eds., 1st ed. 2004).

⁴⁷Maria Fernanda Rollo, Alice Cunha & JeanPierre Darnis, *Introduction*, 90 CAHIERS DE LA MÉDITERRANÉE 1, 1–2 (2015). See EIRINI KARAMOUZI, GREECE, THE EEC AND THE COLD WAR, 1974–1979: THE SECOND ENLARGEMENT (2014).

⁴⁸Carlos López Gómez, *Europe as a Symbol: The Struggle for Democracy and the Meaning of European Integration in PostFranco Spain*, 10 J. CONTEMP. EUR. RSCH. 74 (2014).

⁴⁹In the case of Portugal, this was expressed in a constitutional amendment in 1989 to Article 7: “Portugal is committed to reinforcing the European identity and to strengthening the European states’ actions in favor of democracy, peace, economic progress, and justice in the relations between peoples.” See Francisco Pereira Coutinho & Nuno Piçarra, *Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution*, in NATIONAL CONSTITUTIONS IN EUROPEAN AND GLOBAL GOVERNANCE: DEMOCRACY, RIGHTS, THE RULE OF LAW 595 (Anneli Albi & Samo Bardutzky eds., 2019). See also Gómez, *supra* note 48, at 85.

⁵⁰Eirini Karamouzi, *A Strategy for Greece: Democratization and European Integration, 1974–1975*, 90 CAHIERS DE LA MÉDITERRANÉE 11, 11 (2015).

⁵¹Emma De Angelis & Eirini Karamouzi, *Enlargement and the Historical Origins of the European Community’s Democratic Identity, 1961–1978*, 25 CONTEMPORARY EUROPEAN HISTORY 439, 448–51 (2016).

⁵²Emanuel Gazzo, *Enlargement of the Community: Attitudes of Member States*, in FROM NINE TO TWELVE: EUROPE’S DESTINY 10 (JW Sneider ed. 1980).

⁵³Membership in the EU had overwhelming support in Spain. In 1985, a unanimous Congress voted in favor of accession to the EEC. See VÍCTOR FERRERES COMELLA, *CONSTITUTION OF SPAIN: A CONTEXTUAL ANALYSIS* 17 (2013).

⁵⁴See FERRERES COMELLA, *supra* note 53, at 18.

E. “Europe” in the Post-Communist Constitutional Imagination

After the fall of the Berlin wall, a new “post-communist” constitutional imagination was born in the Central and Eastern states that later acceded to the EU in the 2000s. This constitutional imagination was shaped by the shared experience of communist rule as part of the Soviet bloc. The post-communist constitutional imagination is in several respects similar to the post-fascist constitutional imagination. Importantly, post-communist constitutionalism defines itself against a memory of authoritarianism or totalitarianism. Yet in contrast to the post-fascist constitutional imagination, the post-communist constitutional imagination understands totalitarianism as a product of the invasion of foreign imperial power, the Soviet Union, sometimes in collaboration with Nazi Germany. In the post-communist constitutional imagination, communism was imposed on the people against their will. Whether this reflected historical realities or not, the communist were always “them” and not “us.”

In the post-communist constitutional imagination, there is therefore no foundational fear of the people, nor a fear of nationalism or political power. On the contrary, the end of communism came to signify the liberation of the people of its from its foreign oppressors, the joyful return of national sovereignty and the nationstate. The problem, however, was that the experience of being a nationstate had always been fragile and shortlived in Eastern Europe.⁵⁵ In fact, most of the post-communist states in Central and Eastern Europe only had a brief experience of being sovereign nationstates in the interwar period. During the Soviet Union, nationalism and national identity had been repressed as a symbol of the bourgeois world of the capitalist West. For that reason, the Central and Eastern Europe states in many cases had to invent nations for their newly independent states based not on a historical experience of being sovereign states in the past, but rather based on a politics of memory, in which the ‘virtuous nation’ had been a constant victim of foreign aggression.⁵⁶

In the post-communist constitutional imagination, the idea of the “return to Europe” is an important symbol. “Returning to Europe” was an integral part of the “reconstitution” of the former communist states in Central and Eastern Europe, where it came to be understood as the pathway to democracy, human rights and independent sovereign statehood.⁵⁷ In post-communist Europe, European integration was a statebuilding instrument tied to the creation of liberaldemocratic regimes after the fall of communism, but it was also intimately linked projects of nationbuilding after the fall of the Soviet Union. The post-communist revolutions were widely interpreted as “rectifying revolutions”⁵⁸ that allowed the Eastern European peoples to return to their “native” Europe from which they had been “abducted” by the communists.⁵⁹ The “reunification” of Europe allowed the peoples in the former communist states to imagine that they were returning to their “true path;” the path they had been denied when they were invaded by the Soviet Union; the path of the West. In this way, European integration was understood as a pathway that would finally allow the states and peoples of Central and Eastern Europe to realize their destiny by restoring “the region’s historical and cultural unity with the West.”⁶⁰

⁵⁵See TIMOTHY SNYDER, *THE RECONSTRUCTION OF NATIONS: POLAND, UKRAINE, LITHUANIA, BELARUS, 1569–1999* (2003); Timothy Snyder, *The Historical Reality of Eastern Europe*, 23 *EAST EUR. POLS. & SOC’YS* 7 (2009).

⁵⁶Timothy Snyder, *Memory of Sovereignty and Sovereignty over Memory: Poland, Lithuania, and Ukraine, 1939–1999, in MEMORY AND POWER IN POST-WAR EUROPE* (Jan-Werner Müller ed. 2002).

⁵⁷Snyder, *supra* note 28, at 701–2.

⁵⁸Jürgen Habermas, *What Does Socialism Mean Today? The Rectifying Revolution and the Need for New Thinking on the Left*, 1/183 *NEW LEFT REV.* 3 (1990).

⁵⁹Milan Kundera, *Un Occident Kidnappé: Ou la Tragédie de l’Europe Centrale*, 27 *LE DÉBAT* 3 (1983). In a speech to the European Parliament in 2009, Václav Havel stated: “I tend to say somewhat poetically that Europe is the ‘homeland of our homelands.’” See European Parliament Press Release, Václav Havel and Jerzy Buzek on the 20th Anniversary of Political Change (Nov. 11, 2009) (on file with European Parliament).

⁶⁰JIRI PŘIBÁŇ, *LEGAL SYMBOLISM: ON LAW, TIME AND EUROPEAN IDENTITY* 94 (2007).

The political world that the “return to Europe” was imagined to recreate was not so much a world of historical reality as a world of “national memory.”⁶¹ The dominant narrative was that the “return to Europe” would restore the centuries long tradition of sovereign, European nationstates that had been wrongfully suppressed by the invasion of hostile empires.⁶² For the post-communist states, returning to Europe meant national liberation and the return of sovereign, national democracy.⁶³ Because of the experience of being satellite states of the Soviet Union often propped up by façade constitutions, the post-communist states were keen to avoid a new form of imperialism by legal means. The nation, and national democracy, had to be protected from outside influence. As a rule, therefore, they did not constitute themselves as a “open” to international or European law.⁶⁴

From the very beginning, “Europe” was an integral part of the reconstitution of Central and Eastern Europe after the fall of communism. Nevertheless, this project is characterized by significant internal contradictions because the supremacy and direct effect of European law, not to mention the substantial structural transformation entailed by the Copenhagen criteria, threatens the idea of sovereign national democracy. Under European law’s rule, something stands above the “sovereign nation”: EU law. Perhaps for that reason, the EU was widely viewed both as a pathway and a threat to democracy in Central and Eastern Europe; a potential new form of empire.⁶⁵

F. “Europe” in the Evolutionary Constitutional Imagination

In both the post-fascist and the post-communist constitutional imagination, Europe is an important symbol that in different ways represents a means for the Member States to realize their own constitutional project. For most of the Member States, therefore, Europe is a structural part of their political imagination. There are, however, some exceptions, namely, the states shaped by what I have labelled “evolutionary constitutionalism”: the UK, Denmark, Sweden, and at least to some extent, Norway.⁶⁶ Albeit for slightly different reasons, in the constitutional self-understanding of the UK and the Scandinavian Member States, they are distinct from the rest of “Europe.” In the UK as well as Denmark and Sweden, European integration and EU law are overwhelmingly interpreted as something “alien” to the constitution, rather than a pathway to constitutional selfrealization.

In contrast to both the post-communist and the post-fascist Member States, the constitutional imagination of the evolutionary democracies is not shaped by a legal and political rupture in time that signifies a new beginning, nor are they shaped by an experience of authoritarianism or

⁶¹Tony Judt, *The Past is Another Country: Myth and Memory in Post-War Europe*, in *MEMORY AND POWER IN POST-WAR EUROPE: STUDIES IN THE PRESENCE OF THE PAST* (Jan-Werner Müller ed. 2002).

⁶²The historical experience of sovereign nationstates in Central and Eastern Europe had, in fact, been politically unstable, overwhelmingly autocratic, and shortlived, lasting merely two decades from the collapse of the European landempires after World War One to invasions by the Soviet Union and Nazi Germany. The mythical story of “returning to Europe,” however, for the most part ignored that by rewriting history around the multiple “nations,” rather than the political composite polities that actually governed Central and Eastern Europe for centuries. See e.g., Snyder, *supra* note 55.

⁶³See Snyder, *supra* note 56.

⁶⁴Many, if not most, of the Central and Eastern European countries gave themselves constitutions with a strong accentuation of both “internal” and “external” sovereignty of the nation after the fall of the Soviet Union. See, e.g., Anneli Albi, *Postmodern Versus Retrospective Sovereignty: Two Different Discourses in the EU and Candidate Countries?*, in *SOVEREIGNTY IN TRANSITION* (Neil Walker ed. 2003); Cesary Mik, *State Sovereignty and European Integration: Public International Law, EU Law, and Constitutional Law in a Polish Context*, in *SOVEREIGNTY IN TRANSITION* (Neil Walker ed. 2003).

⁶⁵See JAN ZIELONKA, *EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EUROPEAN UNION* (2006).

⁶⁶Norway is not an EU Member State, but it is part of the European Economic Area (EEA). For a discussion of the constitutional implications of EEA membership for Norway, see ERIK ODDVAR ERIKSEN & JOHN ERIK FOSSUM, *THE EUROPEAN UNION’S NON-MEMBERS: INDEPENDENCE UNDER HEGEMONY?* (2015).

totalitarianism. On the contrary, in their constitutional self-understanding, the evolutionary democracies are founded on a long, “unbroken” tradition of civilized government.⁶⁷ In the evolutionary constitutional imagination, the people is neither feared, as in the post-fascist constitutional imagination, nor is the nation seen as a victim of history, as in the post-communist constitutional imagination. The people is on the contrary seen as a benign power that for the most part has succeeded in realizing its transhistorical identity through its institutional expression in a sovereign Parliament. The evolutionary democracies therefore have “political” conceptions of their constitutions, at the heart of which lies the idea that nothing can stand above or beside the sovereign will expressed by Crown in Parliament.⁶⁸ In the evolutionary constitutional imagination, democracy is understood as a procedural framework for decisionmaking rather than a substantive theory for a democratic “content” in the form of fundamental rights or human dignity. The post-fascist vision of the “substantial” democracy by the judicial protection of human rights is largely viewed with incomprehension or even as a possible “threat” to constitutional democracy expressed by the sovereign will of Parliament.⁶⁹

That this is the case for the UK is well known. Yet the Scandinavian states are characterized by a similar constitutional imagination, albeit for somewhat different reasons. In Scandinavia, the post-war political imagination is built by social democrats rather than Christian democrats, which sets it apart from its continental neighbors.⁷⁰ Importantly, this means that Scandinavia is shaped by a different historical interpretation of the twentieth century, which attributes the interwar breakdown and World War Two not to the “excess of democracy” but rather the “excess of the market” leading to economic inequality. Following that interpretation, democracy should therefore not be constrained but rather protected via social and economic policies that as a minimum could limit the impact of economic crises. In contrast to the “conservative human rights revolution” that shaped the reconstitution of post-WWII continental Europe, the ideology that emerged in Scandinavia firmly believed in the “primacy of politics” over law.⁷¹ The social democrats looked upon human rights and natural law philosophy as an *impediment* to democracy rather than a vehicle for it.⁷² EU law, therefore, is perceived as an external legal order that erodes the constitutional autonomy of its Member States and as a potential threat to democracy at the domestic level.

G. The Rise of “European Sovereignty”

An important task of the cultural study of law in the European context is to shine a light on the worldview sustained by the political imagination of the Member States in order to understand the

⁶⁷For the special case of Denmark, which despite occupation did not have a “totalitarian” experience during World War Two, see Phil Giltner, *The Success of Collaboration: Denmark’s Self-Assessment of Its Economic Position After Five Years of Nazi Occupation*, 36 J. CONTEMP. HIST. 485 (2001).

⁶⁸See Adam Tomkins, *In Defence of the Political Constitution*, 22 OXF. J. LEG. STUD. 157 (2002). See also RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007).

⁶⁹In recent years, however, several Scandinavian scholars have expressed their unease about this form of “unchecked democracy,” calling for an increase of the power of the judiciary. See Jens Elo Rytter & Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms Symposium: Nordic Juristocracy*, 9 INT’L J. CONST. L. 470 (2011); NICLAS BERGGREN, NILS KARLSON & JOAKIM NERGELIUS, *MAKT UTAN MOTVIKT: OM DEMOKRATI OCH KONSTITUTIONALISM [UNCHECKED POWER: ON DEMOCRACY AND CONSTITUTIONALISM]* (1999).

⁷⁰See sources cited *supra* note 32. See also Signe Rehling Larsen, *Constitutional Pathways in Scandinavia*, in *THE LEGITIMACY OF EUROPEAN CONSTITUTIONAL ORDERS* (Marco Dani, Marco Goldoni, & Agustín José Menéndez, eds., Edward Elgar Publishing forthcoming 2023).

⁷¹See, e.g., SHERI BERMAN, *THE PRIMACY OF POLITICS: SOCIAL DEMOCRACY AND THE MAKING OF EUROPE’S TWENTIETH CENTURY* (2006); MARCO DURANTI, *THE CONSERVATIVE HUMAN RIGHTS REVOLUTION: EUROPEAN IDENTITY, TRANSNATIONAL POLITICS, AND THE ORIGINS OF THE EUROPEAN CONVENTION* (2017).

⁷²Johan Strang, *The Other Europe? Scandinavian Intellectuals and the Fragility of Democracy in the Wake of World War II*, 17 J. MOD. EUR. HIST. 500 (2019); JOHAN ÖSTLING, *SWEDEN AFTER NAZISM: POLITICS AND CULTURE IN THE WAKE OF THE SECOND WORLD WAR* 205 (2016).

place “Europe” occupies within them. However, that should not come at the expense of understanding the political imagination sustained at the European level, by European institutions and EU law.

At the moment, the European political imagination is undergoing a transformation at the center. The multiple crises Europe has faced in the last decade has led to a strengthening of the power and authority of EU institutions, not merely vis-à-vis its Member States but also with regard to the projection of Europe in a geopolitical sense. Notwithstanding that the power exercised by EU in response to the Covid19 crisis and now in response to the Russian invasion of Ukraine far exceeds what was imagined possible a decade ago, many European leaders remain convinced that the power and authority of the EU still needs to be strengthened. This has led to a recasting of the foundations of EU authority with a much stronger accentuation of Europe as an autonomous political existence. EU power and authority is increasingly exercised in the name of the people of Europe and there are increasing calls for European sovereignty.⁷³

This emerging political imagination of a sovereign Europe governing on behalf of the people of Europe has internal dimensions in shoring up the power and authority of European institutions within Europe. During the Eurozone crisis, for example, the European Central Bank started to describe itself as a representative of the people of Europe, rather than merely the central bank of the common currency.⁷⁴ However, calls for European sovereignty has at least as much to do with the assertion of European geopolitical autonomy in response to the erosion of the American military guarantee of European security, and the emergence of Russia and China as more direct threats to European security. In his 2018 State of the Union address, Jean Claude Juncker argued that “[g]eopolitics teaches us that the time has come for European sovereignty, for Europe to take its destiny into its own hands.”⁷⁵

It is the emerging political imagination of European sovereignty that justifies the EU’s wideranging sanctions against Russia, which includes sending lethal weapons to Ukraine, and granting all Ukrainians temporary residency status in the EU, with the right to live and work, and access social service benefits.⁷⁶ In her address to the European Parliament Plenary session on the Russian aggression against Ukraine, Commission President Ursula von der Leyen said:

This is a moment of truth for Europe. Let me quote the editorial of one Ukrainian newspaper, the Kyiv Independent, published just hours before the invasion began: “This is not just about Ukraine. It is a clash of two worlds, two polar sets of values.” They are so right. This is a clash between the rule of law and the rule of the gun; between democracies and autocracies; between a rulesbased order and a world of naked aggression. How we respond today to what Russia is doing will determine the future of the international system. The destiny of Ukraine is at stake, but our own fate also lies in the balance. We must show the power that lies in our democracies; we must show the power of people that choose their independent paths, freely

⁷³For an overview of the discourse on European sovereignty, see Ségolène Barbou des Places, *Taking the Language of “European Sovereignty” Seriously*, 5 EUR. PAPERS 287 (2020); Thomas Verellen, *European Sovereignty Now? A Reflection on What It Means to Speak of “European Sovereignty”*, 5 EUR. PAPERS 307 (2020).

⁷⁴Hjalte Lokdam, *We Serve the People of Europe: Reimagining the ECB’s Political Master in the Wake of Its Emergency Politics*, 58 J. COMMON MKT. STUD. 978 (2020).

⁷⁵Jean-Claude Juncker, Eur. Comm’n President, State of the Union Address: The Hour of European Sovereignty, (Sep. 12, 2018) (on file with EU Parliament).

⁷⁶Directorate General for Communication, Information for People Fleeing the War in Ukraine, EUR. COMM’N (Apr. 19, 2022), https://eu-solidarity-ukraine.ec.europa.eu/information-people-fleeing-war-ukraine_en.

and democratically. This is our show of force. Today, a Union of almost half a billion people has mobilized for Ukraine.⁷⁷

The sanctions against Russia will come at significant price for Europe and European citizens, and to justify that, Ursula von der Leyen addressed “the people of Europe” directly:

I am well aware that these sanctions will come at a cost for our economy, too. I know this, and I want to speak honestly to the people of Europe. We have endured two years of pandemic. And we all wished that we could focus on our economic and social recovery. But I believe that the people of Europe understand very well that we must stand up against this cruel aggression. Yes, protecting our liberty comes at a price. But this is a defining moment. And this is the cost we are willing to pay. Because freedom is priceless, Honorable Members. This is our principle: Freedom is priceless.⁷⁸

The discourse of European sovereignty is an unambiguously political discourse that is willing to defend a European way of life. The calls for “European sovereignty” represent a new emerging European political imagination that goes beyond the post-fascist imagination of Europe as the representation of a “post-sovereign” world.⁷⁹ In this emerging European political imagination, Europe is in competition with other superpowers. To do that, Europe must relearn “the language of power.”⁸⁰ A cultural study of European law’s rule has at its task to shine a light on the emerging worldview of “European sovereignty.”

H. Conclusion

What does it mean to live under the rule of European law? What is the significance of being part of “Europe”? This article has demonstrated that the European political imagination is both composite and multifaceted. It is composite because the European political imagination is sustained not merely by EU law but also by the constitutional orders of its Member States. It is multifaceted because the EU is characterized by different “varieties of constitutionalism.” This paper shows that “Europe” plays an important symbolic role in the political imagination of most of its Member States. For most of the Member States, living under European law’s rule is integral to the realization of their own constitutional projects. In the “post-fascist” Member States, “Europe” holds out the promise of saving the European peoples from committing “democratic suicide.” “Europe” protects the European peoples from their internal “totalitarian” enemies: Fascism and communism. In the “post-communist” Member States, “returning to Europe” was understood as the path to democracy, human rights and independent statehood after the fall of communism. For Ukrainians, this remains the promise of Europe today. In the Ukrainian political imagination, Ukrainian national sovereignty and EU membership are understood as mutually dependent. Only in the “evolutionary” Member States is “Europe” absent as a constitutional symbol. The European political imagination, however, is not only sustained around the constitutional orders of the Member States, but also from the “center”, from European institutions. This political imagination is currently undergoing a transformation. EU power and

⁷⁷Ursula von der Leyen, Eur. Comm’n President, Speech at the European Parliament Plenary on the Russian Aggression Against Ukraine, (Mar. 1, 2022), (transcript available at https://ec.europa.eu/commission/presscorner/detail/en/speech_22_1483).

⁷⁸See *id.*

⁷⁹Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993).

⁸⁰European External Action Service, *Embracing Europe’s Power*, EUR. UNION EXTERNAL ACTION (Oct. 2, 2022), https://www.eeas.europa.eu/eeas/embracing-europe%E2%80%99s-power_en.

authority is increasingly exercised with direct appeals to the “people of Europe” and there are calls for “European sovereignty.” This is an openly political discourse that transcends of the view of Europe as a place of “post-sovereignty.”

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