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Reforming Withdrawal and Opt-Outs from the European Union: A Dual-Constituent Perspective

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Abstract

This paper engages in a normative critique of the phenomena of Member State withdrawal and opt-outs from the European Union from the perspective of the dual-constituent thesis. Opt-outs from the EU legal order are conceptualised as the retention of the constituent power of Member States to derogate from the norms of the EU constitutional order. By contrast, Article 50 TEU functions as the pooling of the ultimate sovereign authority for nationals of a a Member State to withdraw their consent to engage in the exercise of constituent power at the European level. It is argued that reform should be enacted to limit the power to opt-out to strict conditions established by the EU constitutional order. By contrast, although withdrawal may have more extensive consequences for individuals, the sovereign right to withdraw is a prerequisite for the exercise of the mixed constituent power shared by individuals in their dual roles as nationals of the Member State and citizens of the EU. Therefore, reform of withdrawal could only legitimately be enacted at the domestic level of the 'constitutional requirements' necessary under Article 50(1) TEU.

Keywords: Article 50 TEU; Brexit; Dual-constituent thesis; Opt-outs; Withdrawal.

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I. Introduction

Following the United Kingdom (UK) referendum to leave the European Union (EU) on 23rd June 2016, and the decision by the UK Prime Minister to notify intention to withdraw under Article 50 TEU on 29th March 2017, the attention of legal scholars has been directed towards the process whereby the Member State will cease to be bound by the foundational Treaties of the Union and the consequences thereof.[2] Particular focus in the literature has been placed upon the legal question of how exactly the UK fulfils the 'constitutional requirements' clause under Article 50(1) in the wake of the *Miller* decision;[3] the issue of the protection of the rights of both UK nationals in EU Member States and EU citizens within the United Kingdom during and after the withdrawal process;[4] and the legal status and effects of the draft withdrawal agreement and the related transitional period.[5] There has been a relative dearth, however, in normative critique of the operation of the Article 50 TEU clause itself.[6]

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[2] See, *inter alia*, Michael Dougan (ed), *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2017); Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (Cambridge University Press 2017); Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017); Kenneth A Armstrong, *Brexit Time: Leaving the EU - Why, How and When?* (Cambridge University Press 2017); A Lazowski, *Withdrawal from the European Union: A Legal Appraisal* (Edward Elgar Publishing Limited 2016); Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79 The Modern Law Review 1019; Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017) 54 Common Market Law Review 695; P Craig, 'Brexit: A Drama in Six Acts' (2016) 41 447; Christophe Hillion, 'Accession and Withdrawal in the Law of the European Union' <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199672646.001.0001/oxfordhb-9780199672646-e-7> accessed 1 February 2017; Bruno De Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) 55 Common Market Law Review 227; Michael Dougan, 'An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-Withdrawal 'Status Quo' Transitional Regime under Article 50 TEU' (2018) 55 Common Market Law Review 57; Christophe Hillion, 'Withdrawal under Article 50 TEU: An Integration-Friendly Process' (2018) 55 Common Market Law Review 29.

[3] For an index of the commentary on the case see 'Robert Craig: Miller: An Index of Reports and Commentary' (*UK Constitutional Law Association*, 25 January 2017) <https://ukconstitutionallaw.org/2017/01/25/robert-craig-miller-an-index-of-reports-and-commentary/> accessed 17 December 2018.

[4] See Stephanie Reynolds 'May We Stay? Assessing the Security of Residence for EU Citizens Living in the UK' in

[5] Adrienne Yong and others, 'Brexit Draft Withdrawal Agreement – Experts React' (*The Conversation*) <http://theconversation.com/brexit-draft-withdrawal-agreement-experts-react-107027> accessed 17 December 2018; Dougan, 'An Airbag for the Crash Test Dummies?' (n 2); Garner 'Citizens' Rights in the UK-EU Withdrawal Agreement: Ossifying EU Citizenship as a Juridical Status?' (*Globalcit*, 28 November 2018) <http://globalcit.eu/citizens-rights-in-the-uk-eu-withdrawal-agreement-ossifying-eu-citizenship-as-a-juridical-status/> accessed 17 December 2018.

[6] With the exception of Tore Vincents Olsen and Christian F Rostbøll, 'Why Withdrawal from the European Union Is Undemocratic' (2017) 9 International Theory 436; Philip Allott 'Article 50 Is Flawed: Could the ECJ Extend the Two-Year Withdrawal Period?' (*EUROPP*, 8 September 2018) <http://blogs.lse.ac.uk/europpblog/2018/09/08/article-50-is-flawed-could-the-ecj-extend-the-two-year-withdrawal-period/> accessed 17 December 2018; Peter Niesen and Markus Patberg 'After Brexit, the UK Should Have a Democratic Right of Return' (*LSE BREXIT*, 30 October 2018) <http://blogs.lse.ac.uk/brexit/2018/10/30/after-brexit-the-uk-should-be-able-to-re-enter-the-eu-if-it-wishes-to-do-so/> accessed 31 October 2018.

This contrasts sharply with the literature at the time of the creation of a withdrawal clause[7] in the failed Constitutional Treaty, and at the time of its eventual promulgation in the Treaty of Lisbon.[8] Returning to this initial critical perspective on the withdrawal clause in light of the ongoing experience of its first usage provides the impetus for the present contribution. In addition to Article 50 TEU, it is argued that the Protocols creating 'opt-outs' for certain Member States may also be included within the scope of the analysis. This is justified on the basis of the historical observation that the United Kingdom has been pivotal in the creation of these derogative constitutional provisions leading up to its eventual decision to withdraw. This paper does not make the general claim that there is an empirical correlation between the likelihood of a Member State withdrawing and the number of opt-outs it has secured. Instead it suffices to observe that the one Member State that has made a decision to withdraw is a state that has numerous opt-outs from the EU legal order. Furthermore, the consequences of these Protocols for both individuals and the Union's constitutional order may be perceived ex parte as equivalent to those of withdrawal.

This article will utilise and develop the 'dual-constituent thesis' of the legitimacy of the European Union constitutional order first proposed by Jürgen Habermas[9] and developed by, *inter alia*, Markus Patberg and Peter Niesen.[10] This thesis holds that a rational reconstruction of the foundational constitutional moment of the European Union leads to the conclusion that the order is constituted by individuals both in their pre-existing role as a national of a Member State, in addition to their incipient role as Citizen of the Union. In section II, the dual-constituent thesis is explicated and expanded upon to delineate the role that individuals perform in the creation and application of norms within the EU constitutional order. Principles are extrapolated for the legitimate functioning of the institutions that create and apply these norms. In section III, Member State opt-outs and withdrawal is introduced. This section seeks to explain how these legal phenomena have arisen. Opt-outs arise through the retention of constituent power by the Member States at treaty amendments through withholding their consent to bind themselves to all the sectors of the EU legal order. By contrast, the creation of Article 50 TEU to provide a constitutional means of withdrawal functioned as the pooling of the ultimate sovereign power for Member States to withdraw their consent to engage in the exercise of constituent power at the European level. The

[7] Article 59-I of the Treaty Establishing a Constitution for Europe.

[8] See, *inter alia*, Hannes Hofmeister, "'Should I Stay or Should I Go ?"—A Critical Analysis of the Right to Withdraw from the EU' (2010) 16 European Law Journal 589; Florentina Harbo Harbo, 'Secession Right – an Anti-Federal Principle? Comparative Study of Federal States and the EU' (2008) 1 Journal of Politics and Law 132; Raymond J Friel, 'Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution' (2004) 53 International and Comparative Law Quarterly 407; Jochen Herbst, 'Observations on the Right to Withdraw from the European Union: Who Are the "Masters of the Treaties"?' in Philipp Dann and Micha Rynkowski (eds), *The Unity of the European Constitution* (Springer Berlin Heidelberg 2006) <http://link.springer.com/chapter/10.1007/978-3-540-37721-4_27> accessed 30 January 2016; Allan F Tatham, "'Don't Mention Divorce at the Wedding, Darling!": EU Accession and Withdrawal after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199644322.001.0001/acprof-9780199644322-chapter-6> accessed 30 January 2016.

[9] Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity 2013); Jürgen Habermas, 'Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the Pouvoir Constituant Mixte' (2017) 55 JCMS: Journal of Common Market Studies 171.

[10] Markus Patberg, 'Constituent Power beyond the State: An Emerging Debate in International Political Theory' (2013) 42 Millennium 224; Markus Patberg, 'Supranational Constitutional Politics and the Method of Rational Reconstruction' (2014) 40 Philosophy & Social Criticism 501; Markus Patberg, 'Against Democratic Intergovernmentalism: The Case for a Theory of Constituent Power in the Global Realm' (2016) 14 International Journal of Constitutional Law 622; Markus Patberg, 'The Levelling Up of Constituent Power in the European Union' (2017) 55 JCMS: Journal of Common Market Studies 203; Markus Patberg, 'Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment' (2017) 24 Constellations 51; Markus Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte: Principles of Constitutional Politics in Supranational Polities' (2017) 23 European Law Journal 441; Peter Niesen, 'The "Mixed" Constituent Legitimacy of the European Federation' (2017) 55 JCMS: Journal of Common Market Studies 183.

principles identified in section II are applied to opt-outs and withdrawal to determine the consequences of these phenomena for individuals in their political and juridical roles. Finally, in section IV, proposals for reform of opt-outs and withdrawals are analysed in relation to their compatibility with the dual-constituent thesis. The central claim is that although withdrawal from the EU may have more extensive consequences for individuals the dual-constituent thesis can not only justify withdrawal but indeed this sovereign right for Member States is a prerequisite for the legitimacy of the EU constitutional order. For this reason, proposals for reform of the mechanisms for withdrawal could only legitimately be considered at the national level of the 'constitutional requirements' for withdrawal. By contrast, the dual-constituent thesis cannot sustain the existence of discretionary opt-outs from the EU legal order. Therefore, reform that would subject derogation to strict conditions established by the EU constitutional order is desirable to vindicate the dual-constituent role of individuals.

II. The Quadripartite role of individuals in the EU

In 'The Crisis of the European Union',[11] Habermas proposes the dual-constituent thesis. This is presented as a 'rational reconstruction'[12] and a thought experiment as to how European individuals would have chosen to constitute the European Union on the basis of its current configuration in the hypothetical situation of an original constitutional convention being held. Habermas asserts that the popular sovereignty founding the order is split at its root into a *pouvoir constituant mixte*. The new political subject of citizen of the Union is created on the basis of the need to create norms to regulate problems that arise beyond the borders of the existing constitutional states and to provide avenues for the pursuit of self-fulfilment thereto.[13] At the same time, the prevalence of sovereign states in the constitutional structure of the Union means that this original hypothetical constituent assembly would have sought to preserve the constitutional states of which they are national citizens. The purpose of this is the states' function as guarantors of the historical achievement of a particular level of 'freedom and justice'[14] that could be undermined by constituting the European polity as a sovereign federal state. Consequently, the basis upon which the present constitutional order of the European Union may be justified for individuals is that they operate as constituent subjects both as nationals of a Member States and as citizens of the Union.[15]

Markus Patberg builds upon these basic principles of equality between states and equality between citizens in the hypothetical constitutional convention to extrapolate from the dual-constituent thesis 'principles of constitutional politics in supranational polities'.[16] These principles enable the constituent process to proceed in three steps. The first is the *intra-demos* perspective and the establishment of the basic principles necessary to enable a constitutional polity to engage in the 'levelling up'[17] of constituent power. Patberg appropriates four principles formulated by Habermas.[18] To these he adds the principles of an

[11] Habermas, *The Crisis of the European Union* (n 9).
[12] Patberg, 'Supranational Constitutional Politics and the Method of Rational Reconstruction' (n 10).
[13] ibid.
[14] ibid.
[15] ibid.
[16] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 10).
[17] Patberg, 'The Levelling Up of Constituent Power in the European Union' (n 10).
[18] i. basic rights (whatever their concrete content) that result from the autonomous elaboration of the right to the greatest possible measure of equal individual freedom of action for each person;
ii. basic rights (whatever their concrete content) that result from the autonomous elaboration of the status of a member in a voluntary association of legal consociates;
iii. basic rights (whatever their concrete content) that result from the autonomous elaboration of each individual's right to equal protection under law, that is, that result from the actionability of individual rights [...]
iv. basic rights (whatever their concrete content) that emerge from the autonomous elaboration of the right to an equal opportunity to participate in political law-giving; from Patberg, 'A Systematic Justification for the EU's

autonomous right to participate in constitutional amendment.[19] The crucial final principle he formulates are the 'basic rights (whatever their concrete content) that result from the autonomous elaboration of the right to an equal opportunity to participate in revisions of the constitution *or processes of supra-state constitutional politics* that are in accordance with the system of rights'.[20]

These principles are assumed to be fulfilled[21] by the hypothetical representatives of the states in a process of mutual recognition at the next step of the *inter-demoi* perspective. The representatives would then engage in a rational discourse to determine what are the necessary conditions to enter into a collaborative process of supranational constitutional formation. Patberg extrapolates four principles relating to political autonomy, formal equality in interaction, pluralistic representation of the demoi, and discursive interaction of representatives that should shape this process.[22] This step may be regarded as the crucial point at which the constituent subjects establish the principles by which their constituted role as a political subject *qua* national of a Member State should be guided. As such, these may be regarded as an institutional framework for the ideal functioning of the institution of the EU Council of Ministers, and potentially also the functioning of the European Council.[23]

The final step is the *across-demoi* perspective whereby the hypothetical representatives engage in consideration of what further principles would be necessary to enable individuals to function as political subjects within the new cross-border demos *qua* EU citizens. Patberg extrapolates two further principles[24] relating to the political autonomy and self-determination of individuals as a supranational polity, and the formal equality of these individuals in the process of constitutional opinion and will formation.[25] These principles may accordingly be regarded as those predicative to enable the legitimate functioning of the European Parliament. They may be utilised in the analysis of both how opt-outs and withdrawal are established, the consequences thereof, and whether this is justified. Indeed, Patberg seems to argue that the retention of the constituent status of nationals of a Member State is in fact a consequence *itself* of the

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Pouvoir Constituant Mixte' (n 10) 448; quoting Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (New Ed edition, Polity Press 1997) 777.

[19] ibid, from Patberg, 'Constituent Power' (n 10).

[20] ibid.

[21] In terms of actual historical progress, these principles were indeed assumed in the original founding, before the progressive iteration of accession conditions culminating in the Copenhagen Criteria for accession to the Union. See 'Accession Criteria' (*European Neighbourhood Policy And Enlargement Negotiations - European Commission*, 6 December 2016) <https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en> accessed 17 December 2018.

[22] (a) the political autonomy of the members of the state demoi, whereby Constitutional decisions are expressions of the political self-determination of the citizens of the political communities involved (b) equality of the state demoi, whereby in the process of constitutional opinion and will formation, the political communities involved interact on formally equal terms; (c) pluralistic representation of the state demoi, whereby in the process of constitutional opinion and will formation, competing positions from the domestic arena are represented, and (d) discursive interaction of representatives, whereby the representatives at the supra-state level determine the content of the constitutional order on the basis of an exchange of reasons

[23] This may be mediated by a perspective which regards the European Council as not a *legislative* body that represents individuals in their constituted role as nationals of a Member State within the European Union's constitutional order, but rather a *political* body that represents individuals as nationals of a constitutional state within public international law. As such the European Council could be regarded as the representative of the Member States as constitutional legislators outside of the amendment process. This interpretation certainly provided a better fit with the process before the incorporation of the European Council as an institution of the Union at the Treaty of Lisbon when it was an *ad hoc* body meeting at diplomatic conventions. See Habermas, *The Crisis of the European Union* (n 9).

[24] (e) political autonomy of the members of the cross-border demos, whereby constitutional decisions are expressions of the political self-determination of the citizens of the (future) supranational polity, and (f) equality of the members of the cross-border demos, whereby in the process of constitutional opinion and will formation, the citizens of the (future) supranational polity interact on formally equal terms

[25] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 10).

potential for withdrawal: 'While the member states are integrated into a new political system, they retain their status as sovereign entities, in the sense that they are free to leave the constitutional order. Thus, from the standpoint of the hypothetical founders, it is rational to insist that all individuals should still participate in polity formation in the role of state citizens as well.'[26]

Habermas proposes the dual-constituent thesis specifically as a hypothetical thought-experiment in order to propose prescriptive reforms of the Union's institutions. This could pose a challenge for utilising it as a tool for the analysis of the consequences of legal phenomenon, such as the emergence of opt-outs and withdrawal clauses, within the supranational constitutional order. As Patberg details, 'constituent power merely appears as a hypothetical assumption that highlights the discursively justifiable core of the existing constitution, while the political processes in which the EU polity is shaped are not subjected to a rational reconstruction'.[27] Nevertheless, the development of Habermas' thesis through an explication of the 'levelling up' of constituent power by this author primes the ground for its application to real-world legal phenomena. Patberg argues that: 'In Habermas's account, the EU's constituent power only appears as a hypothetical assumption that abstracts from the fact that the EU polity 'is the work of political elites' However, the notion of levelling up demonstrates that political communities organized in states, which have set themselves the goal of founding (or reorganizing) a supranational democracy, can actually install a dual constituent power'.[28] As will be detailed below, the next step of disaggregating the dual-constituent thesis into a quadripartite conception reinforces this application. This recognises the historical observation that the Union's constitutional order has factually been developed by the work of the 'political elites' in the form of the executives of the sovereign High Contracting Parties.[29] It also recognises, however, that the *product* of this constitutional process has been the creation of constituted powers that both represent individuals as nationals of a Member State and citizens of the Union in the creation of norms, in addition to functioning as forums for the application of these norms and the reliance thereupon.

The dual-constituent subject of national of a Member State and citizen of the Union which are the hypothetical *original* constituent power of the Union can be disaggregated further to establish the role that these individuals play in the ordinary functioning of the Union constitutional order following the (hypothetical) exercise of *constituent* power to established *constituted* powers. The individual functions both as *political subject* in the creation of norms by the constituted legislative powers, and as *juridical object* in the application of these norms by the constituted judicial powers. Consequently, there are four distinct roles for individuals in the EU: (1) EU citizen/ political subject; (2) EU citizen/ juridical object; (3) citizen of a member state/ political subject; (4) citizen of a member state/ juridical object.

The terminology of 'subjects and objects' of EU law has been utilised by Joseph Weiler,[30] and Elaine Fahey and Samo Bardutzky.[31] The starting point for the former contribution is the establishment by the

[26] ibid, 452.
[27] Patberg, 'The Levelling Up of Constituent Power in the European Union' (n 10) 211.
[28] ibid, 209-210.
[29] Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998). However, for an alternative origin of calls for a United Europe see Altiero Spinelli and Ernesto Rossi, 'For a Free and United Europe: A Draft Manifesto' ('The Ventotene Manifesto').
[30] JHH Weiler, 'Van Gend En Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 International Journal of Constitutional Law 94.
[31] Samo Bardutzky and Elaine Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law* (Edward Elgar Publishing Ltd 2017).

Court of Justice that individuals are the 'subjects' of the EU legal order.[32] Weiler utilises the term 'objects' to criticise the potential de-politicisation deriving from this juridical empowerment of individuals: 'In the European Union with its defective democratic machinery where the individual has far less control over norm creation, direct effect has the paradoxical effect of objectifying him or her—an object of laws over which one has no effective democratic control.'[33] The nature of Bardutzky and Fahey's endeavour to 'reframe' the objects and subjects of EU law means that they investigate numerous potential iterations of these conceptualisations, including the 'object' being the law itself. One specific instance coheres with Weiler's passage quoted above: '[I]ndividuals are, or should be, both subjects (the source of the law) and objects (objects of the law). In other words, they are all *both* subject *and* object *at one and the same time*'.[34]

Bardutzky and Fahey's contribution confirms that it is the same physical individuals who are at the root of these processes, just as Habermas confirms that the dual-constituent subject does not refer to ontologically separate individuals but roles played by the same individual. The processes themselves, however, are qualitatively distinct. Although Weiler uses the term 'object' in a critical sense to describe the effects of law being applied to individuals over which they have had deficient democratic input, it will be used in a normatively neutral sense in this analysis to capture the qualitative distinction of the (adjudicative) processes by which law is applied to individuals from the (legislative) processes by which this law is created . Indeed, Weiler himself recognises[35] that the juridical architecture of the EU legal order empowers individuals as juridical objects through, *inter alia*, the preliminary reference procedure, direct standing rules, the doctrines of direct effect, primacy, *effet utile*, and *Francovich* damages. These enable individuals vindicate their own private interests against the manifestations of domestic and European constituted power. This decentralised 'legal vigilante' or 'Private Attorney Generals' role serves a powerful function in enabling them to pursue their own plans for self-fulfilment within the territory of the European Union.[36]

It may be a step too far to assert, as Mattias Kumm does,[37] that such juridical empowerment serves a *democratic* function if we wish to preserve a separation of powers between legislative and judicial institutions. Instead, we can regard this as part of the holistic claim to *self-determination*[38] by the constituent subjects. This should manifest itself through democratic legitimation in the creation of norms, and through the capacity to rely upon these norms through judicial avenues. Indeed, this claim to self-determination is the foundational principle of the second stage and third stage of the constituent process explicated by Patberg. These are qualitatively distinct processes: the former enables individuals to elect representatives who they believe will promulgate norms which will contribute to their plans for self-fulfilment. The latter enables them to effectively rely upon these norms in the execution of these plans and if necessary make legal claims for their binding application. Weiler may well be justified in his

[32] *Van Gend en Loos:* '[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'

[33] Weiler (n 30) 102.

[34] Bardutzky and Fahey (n 31) 9.

[35] 'As a socio-legal phenomenon, direct effect harnesses the *private* economic, political, and social interests of the individual in vindicating those rights to the public interest of ensuring the rule of law at the transnational level. With each individual effectively becoming in that way a "legal vigilante" of the public rule of law, an effective civil society monitoring system is put in place.' Weiler (n 30) 96.

[36] This refers to the means established in formal legal terms. In socio-economic terms the prohibitive costs of bringing challenges may mean this is not available in practice. However the recent phenomenon of 'crowd-funding' judicial challenges that are in the public interest could represent a new manifestation of the means for individuals to exercise their means of self-determination through juridical procedures.

[37] Niesen (n 10) 187.

[38] See Mark Dawson and Floris De Witte, 'Self-Determination in the Constitutional Future of the EU' (2015) 21 *European Law Journal* 371.

argument that the present structure of the Union's constitutional order does not make sufficient provision for the former means of self-determination and is misbalanced towards the latter. Indeed, such a democratic deficit provided one of the prime motivations for Habermas' proposal of the dual-constituent thesis and its utilisation to propose normative reform. However, for the purposes of this particular analysis, it suffices to establish that the role of political subjectivity in the creation of norms exists, no matter how imperfectly.

The 'subjectivity' of the former role derives from the fact that the legislative institutions of the Union which are empowered to create norms are composed of representatives who are appointed by the political subject through elections. In the case of the subject as national of a Member States, these representatives are Ministers of the national government composed in the various configurations of the Council of the EU. In the case of the political subject as citizen of the Union, these representatives are Members of the European Parliament (MEPs) who are directly elected as co-legislators. Thus the constituent subjects of Member State national and EU citizen are (now) recognised as equal political subjects through the co-equivalence of the Council and the European Parliament in the ordinary legislative procedure.

Indeed, the equality of this status can also explain some of the features of the legislative processes of the two institutions that may be regarded as unusual in a state constitutional context. In relation to Qualified Majority Voting (QMV) within the Council and the degressive proportionality of the composition of the European Parliament, Niesen argues that the Habermasian rational reconstruction reveals that 'what appears as anomaly at first sight may in fact provide the key to deciphering the normative logic'.[39] Habermas argues that 'when there are extreme differences in size between the participating states, the principle of state equality must not be invalidated by the legitimation requirement of democratic equality'.[40] This is rooted in the original position of the hypothetical constituent assembly whereby the constituent status of EU citizenship and the constituted powers of the institutions created is conditioned upon the need to retain the constituent status of national of a Member State: '*the prejudice in favour of the member states anchored in the structure of the constituent convention itself* now impacts upon the design of *all* the institutions'.[41]

Crucially, the representation of individuals as political subjects is founded upon finding an equitable balance between the principle of equality of states and the principle of equality of citizens. With regard to the elaboration of these principles in the three-stage process above proposed by Markus Patberg, the prerogative is to find a balance between the principles which inform the establishment of the political subject *qua* national of a Member State at the second stage and those that inform the establishment of the political subject *qua* citizen of the Union at the third stage. Indeed, Patberg seems to recognise this potential schism: 'In emphasizing the role of the (future) members of the supranational polity, the last step of the thought experiment seems to contradict the results of the previous step, which put the citizens of the states involved in the driver's seat.'[42] Therefore, the role of the individual *qua* political subject within the European Union is predicated upon principles underpinning the institutions that represent individuals *qua* national of a Member State and *qua* EU citizens. These principles may come into conflict with one another. The role of political subject is one of formal co-equivalence, but this equality is founded on the shifting sands of uncertain foundations as to which role takes primacy within the

[39] Niesen (n 10) 187.
[40] Habermas, 'Citizen and State Equality in a Supranational Political Community' (n 9) 177.
[41] ibid 178 (emphasis in original).
[42] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 10) 452.

constitutional order. The prospect of Member State withdrawal may lead to the conclusion the original status of Member State nationality is ultimately authoritative.

The 'objectivity' of the individual in EU law arises from the fact that they are the addressees of the law application processes by the judicial institutions established by the Union's constitutional order. Habermas focuses far more attention on the creation of the legislative institutions for political subjects in the hypothetical constitutional convention. He places far less emphasis on the reasoning for why it would make 'best sense' for the hypothetical constituent subject to form the institution of the Court of Justice of the European Union. Habermas does, however, include the 'primacy of supranational law over the national law of the monopolists on the means for the legitimate use of force'[43] as the first innovation in enabling the creation of a transnational democracy. He ties this explicitly to the rational reconstruction of the dual-constituent subject by arguing that 'the subordination under European law can be understood as a result of the fact that, from the very beginning, two different subjects were involved who cooperated in bringing about a supranational political community'.[44]

This story of this subordination has already been told extensively in the dicta of the Court, and secondary commentary thereupon,[45] regarding the establishment of the crucial doctrines that enable it to fulfil its constitutional role to ensure EU law is interpreted and applied the same way in every Member State.[46] Establishing the distinct roles of individuals *qua* EU citizens and *qua* nationals of a Member State in their roles as juridical objects is harder than in their roles as political subjects. One interpretation could be that the supremacy claims of EU law, whereby even norms binding at the highest level of the Member State constitutional orders may be invalidated by EU law, means that the individual *qua* citizen of the Union and *qua* national of a Member State are not co-equivalent, but instead the former takes precedence over the latter. However, this misses the point that EU law has been created on the basis of legitimation by individuals in both their constituent roles.

The more salient distinction is between individuals as the juridical objects of EU law, and individuals as the juridical objects of their national constitutional order whereby the former role will (conditionally) take precedence over the latter in cases of conflict. The crucial caveat to this is provided by Habermas' explication of the roles of national courts: 'in their interpretation of the European treaties, [they] can conceive of themselves as legitimate guardians of the democratic legal substance of the constitutions of their respective member countries'.[47] Primacy may be legitimated by the fact that this form of law has been legitimated by other individuals *beyond* the scope of the national constitutional order, and thus for these norms to function effectively in enabling individuals to rely upon them in the territory of all the Member States they must have a uniform scope of application.

However, the judicial institutions established by the national constituent processes and the judicial institutions established by the supranational constituent processes do not operate in hermetically sealed

[43] Habermas, *The Crisis of the European Union* (n 9) 20.
[44] ibid,
[45] See Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1; JHH Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403; Karen Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice' (Seattle, WA, 1997) <http://aei.pitt.edu/2434/> accessed 7 September 2017; Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution : A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998); Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018); Justin Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 Oxford Journal of Legal Studies 328.
[46] Article 19 TEU.
[47] Habermas, *The Crisis of the European Union* (n 9) 27.

vacuums. This is ensured by the treaty provisions whereby all the courts of the Member States are empowered as courts of the Union, and the crucial innovation of the preliminary reference procedure. There is a 'symbiotic relationship' between the institutions authorised to apply norms to individuals *qua* juridical objects of the domestic legal order and *qua* juridical objects of the EU legal order. 'The member states' courts "are not alone" when confronted with the higher norm of the international treaty. The symbiotic relationship works also in the opposite direction. The European Court "needs" the national courts not only to "activate" and initiate the European norm. But also for the compliance pull issue.'[48] As opposed to the norm-creation process, which although occurring physically within the institutions in Brussels and Strasbourg has no territorial significance, a crucial issue when it comes to the application of norms is not just the objects to whom it applies, but the *territory* within which these norms will take effect. Territories within the Union in which the norms created may not be relied upon by individuals undermines the central *telos* of the process whereby individuals have been constituted as juridical objects in the foundational case-law. This raises a further point of normative significance regarding the relationship between the roles of political subject and juridical object. As Habermas outlines: 'Democratic self-government means that the addresses of mandatory laws are at the same time their authors. In a democracy, citizens are subject only to the laws which they have given themselves in accordance with a democratic procedure'.[49] Member State opt-outs mean that norms are applied to individuals as juridical objects who have not been represented by their Member State in the Council as political subjects; conversely, individuals who *have* been represented in the creation of norms will not be able to rely upon these in the territory of one of the constituent states of the Union. This creates an asymmetry in the quadripartite role of individuals.

To conclude, it is worth providing a summary of the constituent and constituent powers within the European Union. The sovereign States ('the High Contracting Parties') as constituted powers with a legitimacy base in public international law exercise their power to enter into treaties with one another whereby they constitute themselves as Member States who have the power as constitutional legislators to create the Union's constitutional order. Their constituent power has been reserved within Article 48 TEU and is reactivated in accordance with the terms of this provision. The primary obligations of these actors are to the constituent subject of their *own* nationals to the exclusion of all others. The European Council may be regarded as the representative of the sovereign States within the Union's constitutional fabric. The rational reconstruction of the dual-constituent thesis proposes a hypothetical alternative to this public international law reality in which constitutional representatives of individuals in their dual roles rather than purely sovereign state executives form the order. The Council of Ministers is a constituted legislative power deriving its legitimacy from the Treaty which has a norm-creation role that is legitimated by democratic elections in the Member States. Its primary obligation is to the political subject of *all* nationals of the Member States as realised in the principles established at Patberg's second stage of the hypothetical constituent process. The European Parliament is a constituted power deriving its legitimacy from the Treaty, and has a norm-creation role legitimated by direct elections. Its primary obligation is to the constituent subject of all citizens of the Union in accordance with the principles formulated at the third stage of the hypothetical constituent process. Finally, the Court of Justice of the European Union is a constituted judicial power deriving its legitimacy from the treaties which functions to consolidate the capacity for individuals as juridical objects to rely upon the norms that arise from the dual-legislative process.

[48] Weiler (n 30) 97.
[49] Habermas, *The Crisis of the European Union* (n 9) 14.

III. The Exercise of Constituent Power in the Creation of Opt-Outs and Withdrawal

i. Opt-Outs: The retention of constituent power of the High Contracting States

The United Kingdom, Denmark, and Ireland are the Member States which benefit from specific Protocols addended to the Treaties which enable them to opt-out from sector of the *acquis communautaire*. There are presently opt-outs from Economic and Monetary Union, the Schengen acquis, and the Area of Freedom, Security, and Justice and Common Defence and Security Policy. Protocol (No 15) of the Treaties on certain provisions relating to the United Kingdom contains the detailed provisions which enables the Member State to derogate from Economic and Monetary Union.[70] Protocol (No 16) on certain provisions relating to Denmark provides a similar opt-out from EMU for this Member State. As opposed to the United Kingdom's tailored declarations regarding the retention of the powers in the field of monetary policy[71] and the overview of the Treaty articles which do not apply to the Member State,[72] the nature of Denmark's opt-out is to place itself in the same position as the 'derogating Member States' which have not yet fulfilled the conditions for participation in EMU.[73]

Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union makes provisions for the United Kingdom and Ireland's derogation from this sector. Article 4 of the Protocol makes provisions for the two Member States to abrogate their derogation.[74] Therefore the Protocol may be understood as providing a great amount of flexibility for these two Member States in deciding whether to participate or not in the sector as opposed to the more rigid partition of the EMU opt-out. Protocol (No 20) determines in more detail the national measures which the United Kingdom is entitled to engage in as a result of the derogation, including the right to exercise control of persons at its frontiers in derogation of the Schengen norms on ensuring the gradual reduction of border checks.

Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice establishes a form of flexible opt-out whereby the Member States may decide to cooperate in certain policies on a measure-by-measure basis.[75] Either Member State may notify the President of the Council within three months after an AFSJ proposal or initiative has been proposed that it wishes to take part in the adoption and application of the measure,[76] and they may also notify their intention to accept the measure after its adoption.[77] By contrast, Protocol (No 22) on the position of Denmark provides for a complete opt-out from both Area of Freedom, Security and Justice and Common Defence and Security Policy measures. Article 4 provides for Denmark's participation in Schengen acquis measures within six months after a decision is made, but the discretion is whether to implement this measure in its national law, thus creating an obligation under international law between Denmark and the other Member States. Therefore, unlike for the United Kingdom and Ireland in AFSJ, this does not provide for Denmark's participation in the Union constitutional order, but for the replication of these effects through national and international law.

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[70] Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.
[71] ibid para 3.
[72] ibid para 4.
[73] Protocol (No 16) on certain provisions relating to Denmark, art. 1.
[74] Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union: 'Ireland and the United Kingdom…*may* at any time request to take part in some or all of the provisions of the Schengen acquis. The Council shall decide on the request with the unanimity of the members referred to in Article 1 and the representative of the Government of the State concerned'.
[75] Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.
[76] ibid art 3.
[77] ibid art 4.

A final provision of relevance to the Area of Freedom, Security and Justice is Article 10 of Title VII of Protocol (No 36) on Transitional Measures, which provided a right for the United Kingdom to decide unilaterally that acts regarding police cooperation and judicial cooperation in criminal matters cease to apply to the Member State at the expiry of a transitional period.[78] The Member State is also provided with a right to notify the Council of its wish to participate in acts which have ceased to apply to it.[79] Thus this is a form of 'wholesale' opt-out and opt-in procedure as opposed to the tailored 'retail' model of Protocol (No 21). The United Kingdom availed itself of both of these mechanisms in late 2014.

From the dual-constituent perspective, the creation of these legal Protocols should be regarded as exercises of constituent power by the respective states in international law, which are then legitimated by all of the High Contracting Parties as the constitutional legislators through the ratification of the Treaty amendments. This use of this power to carve out sectors of the EU legal order to ensure that these norms do not apply within the territories of the Member States can be understood as an extension of the function of these constitutional states as guarantors of the capacity for self-determination of their nationals into the ordinary functioning of the supranational constitutional order. Consequently, these opt-outs reveal an irritation in the 'levelling up' of constituent power whereby certain Member States contest the legitimacy of certain norms being created at the supranational level, and thus exercise their reserve constituent power as constituted powers within public international law at the time of treaty amendments. The consequences of this can be understood through considering the principles Patberg establishes for the legitimate exercise of legislative power in the Council and the European Parliament. Furthermore, the asymmetric territorial application of norms to individuals as juridical objects can be seen to undermine the equality of representation of individuals *qua* political subject in the creation of these norms.

These opt-outs may be argued to undermine the co-equivalence between individuals *qua* nationals of a Member State and *qua* citizen of the Union because individuals from an opt-out Member State are represented in the creation of norms in their latter role, but not in their former role. A further level of asymmetry is created between the individual as political subject and juridical object. For individuals who are from Member States which do not opt-out there is territory of the European Union in which they are disconnected from these norms that they have legitimated and cannot rely thereupon. For individuals who are from the opt-out Member States within the territory of other Member States they will be subjected to norms that they have legitimated in only one of their political subject personae.

There is an interesting point of historical coincidence between the creation of opt-outs and the hypothetical dual-constituent theory. The first opt-out Protocols were created at the time of the promulgation of the Treaty of Maastricht. This treaty amendment was seen as important constitutionally as it created the 'European Union' out of the previous 'European Communities', and also formally established citizenship of the Union. Indeed, the initial proposals by the Spanish delegation regarding citizenship were that this was a necessary creation to legitimate the creation of a new instance of political union.[80]

Therefore, it may be possible to draw an explicit connection whereby the contestation of the dual-constituted nature of the European Union itself, and explicitly contestation of the creation of EU citizens as a constituent subject autonomous from the nationals of the Member State, played a causal role in the

[78] Protocol (No 36) on Transitional Measures, para 4.
[79] ibid para 5.
[80] See Carlos Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29 Common Market Law Review 1137.

pursuit of opt-outs by certain Member States.[81] A counter-argument to this, beyond the hypothetical nature of Habermas' endeavour, is that this formal status, which may be regarded to be more significant as a status of juridical objectivity, is less important for Habermas than the functioning of the representative institution of the European Parliament: '[Habermas] had appealed less to the explicit entrenchment of citizen status in the text of the EU treaties than to the competences of the EP as a directly elected co-legislative institution'.[82] Direct elections to the European Parliament were introduced in 1979, and thus this may be identified as the historical date in which the hypothetical endeavour of dual-constitution may be grounded.

Nevertheless, one can situate the logic of the creation of opt-outs in relation to the hypothetical dual-constituent process. Both in the United Kingdom and Denmark around the time of the negotiation, rejection by the latter, and eventual ratification of Maastricht, arguments were forwarded by both members of the executive and the wider political parties that transferring powers to the Union in these areas would create a 'European superstate' that would undermine the sovereignty of the Member States.[83] If we apply the stages process for the hypothetical constitutional convention to the actual constitutional amendments of the order, this may be encapsulated within Patberg's principle of the pluralistic representation of the state demoi in a rejection of the outcome of deliberation between the representatives. This opened up the ground for the creation of opt-outs.

A further coincidence between Habermas' explication of the dual-constituent thesis and the manifestation of opt-outs is that all three Member States opt-out to various degrees from the Area of Freedom, Security, and Justice, which is the current terminology for the former second-pillar of Justice and Home Affairs. Habermas uses these terms of 'freedom and justice' when describing the constitutional role reserved to the states. This terminological overlap may be regarded as representative of the perceived encroachment of the supranational into the roles reserved for the Member States in the ongoing constituent processes at treaty amendments. Indeed, this terminology is also explicitly linked to the constituent status of EU citizenship in the Treaties: 'The Union shall offer *its* citizens an area of freedom, security and justice without internal frontiers'.[84] If one returns to the hypothetical constitutional convention, these representatives can be regarded as dissenters within the three-stage process. The manifestation of opt-outs in the Union's supranational constitutional order are exercises of constituent power, or more accurately a reservation of the use of constituent power at the supranational level, by the representatives of individuals *qua* nationals of a Member State. This results from the perception that the constitution of power at the supranational level transcends the boundaries of the legitimate areas which should fall within the norm-creation and norm-application purview of the constituted powers of the Union's legislative institutions.

There are specific challenges to the supranational constitutional order created on the basis of the hypothetical dual-constituent thesis arising from the opt-outs. With regard to the United Kingdom and Denmark's opt-outs from EMU, the settlement of the legislative institutions that represent political subjects in their dual-roles has been undermined by the institutional fragmentation which sees the informal Eurogroup represent the states that are Members of the Eurozone.[85] This has also been

[81] See for a related argument on the end of the ideal-type post sovereign state Michael A Wilkinson, 'Authoritarian Liberalism as Authoritarian Constitutionalism' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3281320 <https://papers.ssrn.com/abstract=3281320> accessed 17 December 2018.
[82] Niesen (n 10) 187.
[83] See Stephen Wall, *A Stranger in Europe: Britain and the EU from Thatcher to Blair* (Oxford University Press 2008).
[84] Article 3(2) TEU. Emphasis added.
[85] See, *inter alia*, Uwe Puetter, 'Governing Informally: The Role of the Eurogroup in EMU and the Stability and Growth Pact' (2004) 11 Journal of European Public Policy 854.

exacerbated by the creation of the executive body of the European Central Bank which similarly is empowered to act only with regard to the Member States that are within the eurozone.[86] A further observation relevant to economic and monetary union is that both the creation processes for opt-outs and the actions of Member States derogating from EMU have increased the propensity for the High Contracting Parties to revert to the use of their constituent power in public international law to create 'satellite treaties' as a tool of European integration. The Edinburgh Decision, that bound the Member States to implementing opt-outs for Denmark after the Maastricht ratification failure, operated as an international treaty between the heads of state or government.[87] This precedent was followed for the United Kingdom's renegotiation, which was concluded as an international agreement binding between the 'heads of state or government acting within the European Council'.[88] Between these two instances, the objection of the United Kingdom during the Article 48 amendment process to the 'Fiscal Compact' despite the fact its opt-out meant it would not be bound by all of the obligations[89] contained therein, led to the conclusion of the international Treaty on Stability, Coordination and Governance. The resort to international law sidelines the supranational institutions, which have been legitimated by the dual-constituent subjects, in the creation of norms even if it explicitly assigns roles for them in the application. In particularly this may be argued to undermine the capacity for individuals *qua* EU citizens to exercise political subjectivity due to the exclusion of the European Parliament.

With regard to Denmark's opt-out from the Schengen acquis, the specific challenge is the undermining of the supranational process for the creation and legitimation of norms. The substance of these norms is the same for individuals as juridical objects within Denmark; however, they are created on the basis of the 'black box' of national and international law. This means that only individuals in their role as nationals of the state have been represented in the creation of these norms. Finally, with regard to the United Kingdom and Ireland's flexible opt-outs from the AFSJ and Schengen, the specific challenge is the retention of the constituent power of the state as a constituted power in public international law within the settled ordinary constitutional practice of the creation of legislation within the Council. This undermines the principles which underpin the functioning of this legislative assembly. The spill-over of the constituent power function is also evident in the wholesale opt-out and opt-in procedures mandated by Protocol (No 36). Bruno de Witte has highlighted the fact that these are particularly egregious from the perspective of individuals *qua* juridical objects because it enables the de-enforcement of norms that have already been promulgated and are effective within the national legal order of the opt-out Member State.[90] Furthermore, with regard to the consequences of opt-outs for individuals as juridical objects, the iterative opt-in mechanisms for Schengen and AFSJ may undermine the holistic integrity of this sector of the *acquis communautaire*. The United Kingdom and Ireland have been left with the executive discretion to opt-in to measures which they believe will support their own domestic justice and home affairs policies. Nadine El-Enany observes that 'the UK has opted-out of nearly all proposals concerning visas, borders and legal migration, but it has opted into all proposals concerning asylum and civil law and nearly all

[86] See Chiara Zilioli and Martin Selmayr, 'The Constitutional Status of the European Central Bank' (2007) 44 Common Market Law Review 355; Chiara Zilioli and Martin Selmayr, *The Law of the European Central Bank* (01 edition, Hart Publishing 2001).
[87] 'Edinburgh European Summit - Conclusions of the Presidency - December 1992' <http://www.europarl.europa.eu/summits/edinburgh/default_en.htm> accessed 17 December 2018.
[88] 'European Council, 18-19/02/2016 - Consilium' <https://www.consilium.europa.eu/en/meetings/european-council/2016/02/18-19/#> accessed 17 December 2018.
[89] 'European Commission - PRESS RELEASES - Press Release - TREATY ON STABILITY, COORDINATION AND GOVERNANCE IN THE ECONOMIC AND MONETARY UNION' <http://europa.eu/rapid/press-release_DOC-12-2_en.htm> accessed 17 December 2018.
[90] Bruno de Witte, Andrea Ott and Ellen Vos, *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing Ltd 2017).

proposals concerning illegal immigration'.[91] Many of these have been conceptualised as 'compensatory measures' that compensate the Member States removal of internal frontiers. In effect, therefore, these Member States can benefit from the added rights without undertaking the initial duties. El-Enany argues that the an opt-out Member State 'neither has to justify its asylum regime choices as reasonable, sensible, moral or defensible, nor must it compromise on its individual preferences'.[92] Accordingly the selective participation of Member States in the legislative processes of the Council can be argued to undermine the principles whereby the interests of individuals *qua* nationals are represented on the basis of an exchange of persuasive reasons.

The challenge posed by opt-outs for the dual-constituent thesis is the continuing use of constituent power by one of the High Contracting Parties to carve out a differentiated position regarding the norm-creation and norm-application processes. The argument that this undermines the equality of individuals in their role as political subjects and juridical objects motivates the considerations for reform proposals that would constrain this constituent power by limiting the capacity for Member States to opt-outs from EU law to specific conditions. These would become operative in the event that the Member States' residual function as guarantors of the freedom and security of their nationals would be threatened by participation in the supranational constitutional order.

ii. Withdrawal: The 'levelling down' of constituent power

The clause that would become Article 50 of the Treaty of Lisbon was originally proposed in the failed Treaty establishing a Constitution for Europe. A point of historical interests is that this treaty was generated through a 'European Convention'[93] rather than the paradigm of the Intergovernmental Conferences[94] that have been the vehicle for treaty amendment before and since. In addition to the representatives of the executives of the High Contracting Parties, representatives from the institutions of the European and national constitutional orders were also included. Therefore, this is the closest historical approximation to Habermas and Patberg's hypothetical constituent assemblies. However, the retention by the High Contracting Parties of the ultimate authority in concluding the treaty may suggest that they did not entirely cede their constituent power in public international law. Nevertheless, the Convention structure does provide more of an insight into the reasons for the construction of the Treaty provisions, including the withdrawal clause, through the publication of deliberations and amendment proposals by the participants.

The legitimacy of the creation of an explicit withdrawal clause was contested by certain participants in the Convention, in addition to being criticised by academic commentators after its creation. The general tenor of this criticism is that constitutionalising withdrawal undermined the integrationist *telos* of the Union of pursuing an 'ever closer union among the peoples of Europe'.[95] Ernâni Lopes and Manuel Lobo Antunes argued that 'the nature of the Union is not compatible with such an exit clause. This is why it has not been inserted in the current treaties'.[96] In a similar vein, the representatives of the Dutch government argued that 'facilitating the possibility to withdraw from the Union is contrary to the idea of

[91] Nadine El-Enany 'The perils of differentiated integration in the field of asylum' in ibid 365.
[92] ibid.
[93] 'The European Convention' <http://european-convention.europa.eu/EN/bienvenue/bienvenue2352.html?lang=EN> accessed 17 December 2018.
[94] Article 48(3) TEU.
[95] Cite preamble and Article 1 TEU.
[96] Ernâni Lopes and Manuel Lobo Antunes, 'Convention on the Future of Europe Amendment Form' <http://european-convention.europa.eu/docs/Treaty/pdf/46/46_ArtI%2059%20Lopes%20EN.pdf> accessed 17 December 2018.

European integration as set out in the preamble of the TEU'.[97] The arguments that withdrawal undermines the *telos* of the supranational constitutional order informs the reform proposals in the following section.

The predominant argument regarding the purpose of the withdrawal clause is that it would serve as a 'safety valve to reassure Member States who would always be allowed to leave, should they be uncomfortable with the integration path envisaged'.[98] The converse function of this is 'the Member States' choice *not* to leave arguably entails a form pledge to pursue the 'ever closer union' goal'.[99] Therefore, the creation of an explicit withdrawal clause may be regarded as an attempt to curtail or shackle the exercise of dissident constituent power exercised by the constituted powers of the High Contracting Parties at previous treaty amendments that had resulted in the creation of opt-outs. In this regard, the purpose of the clause may be regarded as a precautionary measure, rather than being designed with the prospect of its use in mind. One of the drafters of the clause has indeed suggested that it was never envisaged that the Article would ever be triggered by a Member State without the sanctioning measures under Article 7 TEU first being exhausted.[100]

This may also be regarded as a direct gesture towards the constituent subject of national of a Member State in an attempt to dissuade popular rejections such as that seen in the Danish referendum on Maastricht: 'It confirms that participation in the European integration process is essentially voluntary and that the continental vocation of an 'ever closer union' cannot trump its democratic foundations…that only European peoples who 'share [this] ideal […] join in [the Member States'] efforts'.[101] However, in practice of course, this did not prevent the rejection of the Treaty establishing a Constitution by the Dutch and French electorates.

The specific nexus between the pooling of the ultimate power to withdraw the authorisation to engage in constituent power in a single clause and the previous manifestations of exercising constituent power to limit the application of the constitutional order through opt-outs is explicated by Hillion: '[t]he right to withdraw may thereby be interpreted as the ultimate elaboration of constitutional devices conceived of to cater to the needs of less integrationist states'.[102] Similarly Closa argues that 'In the EU partial exits (opt-outs)…fulfilled the function of alleviating tensions within membership'.[103] Closa goes on to warn that, rather that dampening the demand for exercise of constituent power to create opt-outs, an explicit withdrawal clause may in fact encourage it: 'The newly formalised exit constructs a different voice[104] mechanism: 'voice' acquires the sense of acquiring some right for calling for the renegotiation (meaning *ex post* derogation) of the EU *acquis* and/or terms of membership in the EU'.[105]

Consequently, one may argue from the dual-constituent thesis that, rather than neutralising the possibility of the High Contracting Parties utilising their constituent power to create opt-outs at treaty revisions, the explicit formalisation of the withdrawal clause instead *displaced* the contestation that informs such

[97] G.M. de Vries and T.J.A.M de Bruijn, 'Convention on the Future of Europe Amendment Form' <http://european-convention.europa.eu/docs/Treaty/pdf/46/art46vriesEN.pdf> accessed 17 December 2018.
[98] Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' in Closa (n 2) 231.
[99] ibid.
[100] Andrew Gray, 'Article 50 Author Lord Kerr: I Didn't Have UK in Mind' (*POLITICO*, 28 March 2017) <https://www.politico.eu/article/brexit-article-50-lord-kerr-john-kerr/> accessed 17 December 2018.
[101] Hillion, 'This Way Please!' in Closa (n.2), 231.
[102] ibid.
[103] Closa, 'Introduction' in Closa (n 2) 2.
[104] Closa utilises the application of Hirschmann's 'exit, voice, and loyalty' mechanism by JHH Weiler. Crudely, one may propose an analogy between the exercise of 'voice' and the use of constituent power.
[105] Carlos Closa, 'Interpreting Article 50: Exit, Voice and … What About Loyalty?' in Closa (n 2) 212.

exercises outside of treaty amendments, and resituated it to moments of national constitutional importance. This could explain how the current Brexit situation arose in the context of a General Election rather than a treaty amendment. As Closa recognises, 'withdrawal provisions…grant legal certainty (next to facticity) to the full exit options and, because of this, also make it a more credible outcome'.[106] The creation of an explicit withdrawal clause may be regarded as the decision by the constituted powers, who are legitimated by the dual-constituent subject of member state nationals and citizens of the Union, to recognise a legal path for the repudiation of this very constituent power.

The content and operation of Article 50 TEU have been analysed extensively in the light of the United Kingdom's putative withdrawal. From the perspective of the quadripartite role of individuals in Europe, the withdrawal clause may be constructed as creating a *lex specialis* right for the executive representatives of individuals *qua* nationals of a Member State to provide notification to the institution representative of the interests of all individuals *qua* nationals, the European Council, of an intention to withdraw from the supranational constitutional order. There was debate over whether the *lex generalis* rules of public international law on withdrawal from Treaties applied before Article 50. A point that is perhaps overlooked in the analysis of the constitutionalisation of withdrawal is the fact that the condition legitimating such notification is predicated upon the fulfilment of the Member State's 'constitutional requirements' in the decision to withdraw.[107]

Contrary to certain arguments,[108] and as proven in the United Kingdom *Miller* case,[109] this does not assign ultimate jurisdiction to the judicial arbiter of the Union to determine the validity of such a decision. Instead, it represents an acknowledgment between the constituent powers of the Treaty that the legitimate arena for such a decision is the national constitutional order. This resituates the predicative conditions and decision-making power for a withdrawal from the public international law plane between High Contracting Parties, in which the reasons for withdrawal may be based upon consent between the executives of the parties[110] or assertions of a change of circumstances on the international law plane. Instead the 'constitutional requirements' condition ensures that a decision to withdraw is a manifestation of the self-determination of the constituent subjects of individuals *qua* nationals of a constitutional state. Indeed, the United Kingdom case-study provides evidence of the manifestation of this self-determination both in the role as political subjects and juridical objects; the former through voting in a popular referendum legitimated on the basis of an Act of Parliament, and the latter through the exercise of the administrative law rights of judicial review to challenge the legality of the government providing notification through executive prerogative powers without an authorising Act of Parliament. The outcome of the *Miller* case requiring such an Act of Parliament[111] evidences the mutually complementary role of individuals as political subjects and juridical objects in ensuring that decisions to withdraw are a legitimate exercise of self-determination.[112]

The provision for notification in Article 50(2) TEU may therefore be construed as a bridging clause between the domestic constitutional order and an administrative procedure for the negotiation of

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[106] Ibid 207.
[107] Article 50(1) TEU.
[108] See arguments on this point in Friel (n 8).
[109] *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[110] Article 54 of the Vienna Convention on the Law of Treaties.
[111] EU (Notification of Withdrawal) Act 2017.
[112] However one may raise legitimacy concerns over the actual exercise by the constituted power of Parliament. See 'After Article 50 and Before Withdrawal: Does Constitutional Theory Require a General Election in the United Kingdom Before Brexit?' (*Verfassungsblog*) <https://verfassungsblog.de/after-article-50-and-before-withdrawal-does-constitutional-theory-require-a-general-election-in-the-united-kingdom-before-brexit/> accessed 17 December 2018.

withdrawal that operates at the supranational constitutional order.[113] Habermas recognises the significance of this supranational process: 'the modalities which must be taken into account before the decision to leave comes into effect shows that the right of exit is not founded on a 'supreme constitutional authority beholden to no other law that its own free choice".[114] In this regard, the procedure may be regarded as the converse to the 'levelling up' of constituent power delineated by Patberg in the movement from the intra-demos stage to the inter-demoi stage of the hypothetical constitutional convention. Indeed, the operation of the constitutional requirements for a decision to withdraw may be regarded as the converse manifestation of the principle whereby Member State nationals authorise their representatives to level up constituent power in order to engage in constitutional politics. The provision of representative or direct democratic decisions on withdrawal is an autonomous elaboration of the right to *extinguish* the authorisation to 'participate…in processes of supra-state constitutional politics', with the *ex-post* or *ex-ante* operation of legal challenges to define the exact nature of the constitutional requirements operating as an assurance for individuals as juridical objects that these processes are 'in accordance with the system of rights'.[115] Thus, the notification of an intention to withdraw following a domestic exercise of self-determination by the constituent subject of state nationals may be regarded as the first step in a process of 'levelling down' or 'repatriation' of constituent power from the supranational level, and the reinstatement of a singular rather than a dual-constituent subject.

To continue the analogy with the constituent process in explicating withdrawal as an extinction of dual-constituent power, the operation of Article 50(2) TEU[116] may be regarded as loosely analogous to the *across- demoi* stage of the hypothetical constitutional convention outlined by Patberg. The withdrawal negotiations may be regarded therefore as a 'de-constitutional assembly'. The rules establishing the process whereby the European Council establishes guidelines for the negotiation of a withdrawal agreement, which forms the primary condition for a withdrawal, could be understand as corresponding to the principles Patberg details informing the hypothetical constituent process. This requires for its legitimation the consent of the nationals of all of the High Contracting Parties acting through their representative institution of the European Council. This mandate is accordingly sufficient to legitimate the roles of the Union institutions in fulfilling the procedures for withdrawal, but if this temporal framework is amended through a time-period extension this requires the reactivation of the constituent power of the European Council, as discussed below. In the guidelines issued for the negotiation with the United Kingdom the European Council defines the purpose of the negotiations as ensuring an 'orderly withdrawal so as to reduce uncertainty…and minimise disruption'.[117] In this process, the function of the European Council is to ensure that the political communities of all of the Member States are represented in formally equal terms and that the outcome of the decommissioning of the constituent status of the withdrawing Member State is conducted on the basis of an exchange of reasons.[118] A point of interest in the Brexit context relates to the initiative seized by the institutions who may be regarded as representing the individual *qua* EU citizens. The Commission established itself as the 'Union negotiator',[119] despite

[113] In support of this argument see the reasoning of the Court of Justice in Case C-621/18, *Wightman and Others*, not yet reported.
[114] Habermas, *The Crisis of the European Union* (n 9) 40–41.
[115] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 10).
[116] For detailed analysis of the operation of these provisions see Hillion, 'This way Please!' in Closa (n 2).
[117] 'European Council (Art. 50) Guidelines for Brexit Negotiations - Consilium' <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/> accessed 17 December 2018.
[118] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 10).
[119] Andrea Scorcia, 'President Juncker Appoints Michel Barnier as Chief Negotiator in Charge of the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 of the TEU' (*Malta - European Commission*, 27 July 2016) <https://ec.europa.eu/malta/news/president-juncker-appoints-michel-barnier-chief-negotiator-charge-preparation-and-conduct_en> accessed 17 December 2018.

there being no explicit reference to the institution, and the European Parliament issued a resolution with its own guidelines for the negotiations.[120]

The role of the former may be validated by the appropriation by Article 50(2) TEU of the general framework for the conclusion of international agreements under Article 218(3) TEU and is a manifestation of the residual role of the Commission as the 'guardian of the treaties'.[121] The European Parliament's role may be more explicitly regarded as representing the interests of individuals *qua* EU citizens, as evidenced by its declarations pertaining to the protection of the status and right of EU citizens *qua* juridical objects.[122] It also builds upon the minimal obligation under Article 50(2) that the European Parliament merely provides consent to the agreement, and has developed this into a full claim to be kept informed of the progress of the negotiations.[123] Through this, the principles informing the third stage of constitutional politics of ensuring the formal equality of EU citizens in the will formation processes is upheld. This is particularly salient with regard to the fact that Article 50(4) TEU explicitly precludes the participation of representatives of the withdrawing Member State from representing its nationals in issues pertaining to withdrawal in the Council and the European Council. Thus the European Parliament can continue to represent these individuals *qua* EU citizens, up to the point of the apparent extinction of this constituent status. The apparently minimal role of the institutions that represent individuals *qua* EU citizens in the decision to withdraw from the Union will be scrutinised in the reform proposals below. Indeed, the secondary condition for withdrawal of the 2-year 'guillotine clause' in the absence of an agreement means that the European Parliament may not be involved at all in the final withdrawal.

Article 50(3) TEU provides a statement of the *finalité* of the withdrawal process: 'the Treaties shall cease to apply to the State in question'. The primary temporal condition for this is established as 'the date of entry into force of the withdrawal agreement', and the secondary residual condition that is activated upon failure to fulfil this condition is established as 'two years after the notification referred to in paragraph 2'. These withdrawal conditions are further qualified by the derogative clause at the end of the paragraph: 'unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.'[124]

The purpose of the primary condition may be regarded as ensuring that the EU institutions have the chance to represent the interests of all individuals *qua* nationals and *qua* EU citizens through shaping the agenda of the agreement by which the Member State withdraws.[125] This ensures that, although the initial domestic decision may be entirely unilateral and insensitive to the interests of any individuals beyond those that the withdrawing Member State represents, the final implementation of this decision is multilateral and may preserve insofar as possible the capacity for self-determination and self-fulfilment of individuals as the remaining constituent subjects. This may be evidenced in the statements in the

[120] 'Texts Adopted - Wednesday, 5 April 2017 - Negotiations with the United Kingdom Following Its Notification That It Intends to Withdraw from the European Union - P8_TA(2017)0102' <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0102+0+DOC+XML+V0//EN> accessed 17 December 2018.

[121] Adam Łazowski, 'Be Careful What You Wish for: Procedural Parameters of EU Withdrawal' in Closa (n 2).

[122] 'Texts Adopted - Wednesday, 5 April 2017 - Negotiations with the United Kingdom Following Its Notification That It Intends to Withdraw from the European Union - P8_TA(2017)0102' (n 120).

[123] Ibid.

[124] Article 50(3) TEU

[125] For more detail on this process see Hillion, 'This way please!' and Łazowski, 'Be careful what you wish for' in Closa (n 2).

negotiating guidelines referenced above by the European Parliament[126] and the European Council[127] regarding the consequences of withdrawal for citizens.

The residual condition has been interpreted as a 'cooling off period' by comparison to other withdrawal clauses in international treaty law which provides the withdrawing Member State with an opportunity to reverse its decision before it is made final.[128] This has accordingly been forwarded as an argument in favour of unilateral revocation of notification. However, a competing purpose of this clause may be that it ensures that the Member State withdrawal cannot be delayed indefinitely by a failure to find the consensus with the Union institutions in drafting a withdrawal agreement. As such this may be regarded as vindicating the ultimate self-determination of the constituent subjects of the withdrawing state as a last resort once there has been an absolute failure to negotiate an 'orderly withdrawal'.

The fact that this period may only be extended with the agreement of this state fulfils a similar purpose. The unanimity requirement in the European Council reflects the role of this institution as the representative of each of the nationals of the High Contracting Parties as individual peoples. Indeed, this means that a more rigorous standard is applied than is necessary for the conclusion of the agreement by the Council, which is effected by Qualified Majority Voting. It may be argued that this may be justified on the basis that a decision to extend the period is such a fundamental amendment to the framework for the negotiations that was established by the European Council that it requires the legitimating consent of every High Contracting Party, whereas the conclusion of the withdrawal agreement naturally follows the course set by the guidelines, and thus the ordinary rules of representation of all individuals *qua* Member State nationals in the Council suffices.

With regard to the role of individuals as juridical objects of the EU legal order the treaties ceasing to apply to the Member State means that all individuals *qua* EU citizens will no longer be able to reply upon the primary and secondary norms within the territory of this state. This includes individuals from other Member States who have exercised their citizenship rights to move to and reside within the state that has withdrawn. The individuals who hold nationality of the withdrawing Member States revert from full subjects and objects of the EU legal order in the dual-constituent role to the residual category of juridical object without political subjectivity – the 'Third Country National'. The paradigm for the creation of norms pertaining to the legal rights of UK nationals within the Member States of the European Union and EU nationals within the United Kingdom therefore shifts from the ordinary legislative procedures of the Union in which individuals are represented as political subjects in their dual-roles back to the black-

[126]'Texts Adopted - Wednesday, 5 April 2017 - Negotiations with the United Kingdom Following Its Notification That It Intends to Withdraw from the European Union - P8_TA(2017)0102' (n 120). para 18: '"Requires the fair treatment of EU-27 citizens living or having lived in the United Kingdom and of United Kingdom citizens living or having lived in the EU-27 and is of the opinion that their respective rights and interests must be given full priority in the negotiations; demands, therefore, that the status and rights of EU-27 citizens residing in the United Kingdom and of United Kingdom citizens residing in the EU-27 be subject to the principles of reciprocity, equity, symmetry and non-discrimination, and demands moreover the protection of the integrity of Union law, including the Charter of Fundamental Rights, and its enforcement framework; stresses that any degradation of the rights linked to freedom of movement, including discrimination between EU citizens in their access to residency rights, before the date of withdrawal from the European Union by the United Kingdom would be contrary to Union law".

[127]'European Council (Art. 50) Guidelines for Brexit Negotiations - Consilium' (n 117)., para 8: '"The right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people. Agreeing reciprocal guarantees to settle the status and situations at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be a matter of priority for the negotiations. Such guarantees must be enforceable and non-discriminatory."

[128] See Carlos Closa, 'Is Article 50 Reversible? On Politics Beyond Legal Doctrine' (*Verfassungsblog*) <https://verfassungsblog.de/is-article-50-reversible-on-politics-beyond-legal-doctrine/> accessed 21 September 2018.

box of international law and national law measures in which individuals can only be represented in the creation of norms within the territory of the state of which they are political subjects.

The question has been posed of whether a Member State's withdrawal automatically leads to the loss of the status of citizenship of the Union for its nationals, and thus the extinction of this constituent role.[129] This is the assumption that the representatives of the Union and the United Kingdom have proceeded upon in the current Brexit context. This is based upon the textual argument that Article 50(3) TEU stipulates that 'the Treaties shall cease to apply to the state in question'. Article 20 TFEU and Article 9 TEU of these treaties establish that '[E]very person holding nationality of a Member State shall be a citizen of the Union'. Therefore, the conclusion derived from these two premises is that upon the treaties no longer applying to a Member State, those who hold its nationality will no longer hold citizenship of the Union.

This presumption has been challenged in the context of legal proceedings brought before the Amsterdam District Court asking for a preliminary reference to the Court of Justice of the European Union.[130] Although the decision to refer the case was overturned on appeal on the basis of the issue being 'insufficiently concrete', the argument is relevant to determining the consequences of withdrawal for the constituent status of EU citizenship. The case may also lead to a conclusion that there is a relevant distinction to be drawn concerning the preservation of the status as one of juridical objectivity as opposed to its preservation as one of political subjectivity. The presumption that will be relied upon in considering reform proposals is the status quo of the loss of political subjectivity. The issue of whether there is a *legal* obligation as opposed to a *political* obligation to ensure the continuing capacity for individuals who have held EU citizenship or who have resided in a withdrawing territory to rely upon EU law norms has been rendered moot by the comprehensive protection of the rights to move and reside in the draft withdrawal argument.[131] The fact that the agreement has not accordingly protected the political rights of Article 22 TFEU to vote in municipal and European Parliament elections could suggest that withdrawal leads to the loss of the status of EU citizenship as one of political subjectivity, even if there is an obligation to uphold the rights bestowed upon individuals as juridical objects. Unless and until this is challenged again in a judicial action when the issue does become sufficiently concrete, the default assumption is that the withdrawal of a Member State leads to the extinction of the constituent status of citizenship of the Union for those holding nationality of that Member State. This will be the presumption upon which consideration of the proposals for reform will proceed in the next section.

IV. Reform proposals

i. Opt-Outs: The Creation of a 'Declaration of Incompatibility' Clause

[129] See Martijn van den Brink and Dimitry Kochenov, 'A Critical Perspective on Associate EU Citizenship after Brexit' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3175318 <https://papers.ssrn.com/abstract=3175318> accessed 17 December 2018.

[130] C/13/640244 / KG ZA 17-1327 of the Rechtbank Amsterdam of 7 February 2018 – NL: RBAMS: 2018:605, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605. For an English translation, see Jolyon Maugham, 'Decision of the District Court in Amsterdam' (*Waiting for Godot*, 13 February 2018) https://waitingfortax.com/2018/02/13/decision-of-the-district-court-in-amsterdam; see also comment at Oliver Garner, 'Does Member State Withdrawal from The European Union Extinguish EU Citizenship C/13/640244 / KG ZA 17-1327 of the Rechtbank Amsterdam ("The Amsterdam Case")' (*European Law Blog*, 19 February 2018) http://europeanlawblog.eu/2018/02/19/does-member-state-withdrawal-from-the-european-union-extinguish-eu-citizenship-c13640244-kg-za-17-1327-rechtbank-amsterdam-the-amsterdam-case.

[131] See Garner, 'Citizens' Rights in the UK-EU Withdrawal Agreement: Ossifying EU Citizenship as a Juridical Status?' (n 5).

A crucial initial point with regard to the reform of opt-outs is consideration of the fact that the amendment procedure itself may need to be amended in order to restrict the constituent power of a Member State to create Protocols to derogate from EU law. In the present model of Treaty amendment, in which the only legitimating factor that acts as a constraint on the constituent power of the states is the requirement of state consent, there is no way of legally constraining the creation of opt-outs except through the diplomatic means of the other Member State executives refusing to accept these Protocols in negotiations. The only democratic input for individuals *qua* nationals beyond the representation by their executive would be the refusal to ratify this treaty in representative or direct democratic procedures at the domestic level. This can be argued to fall short of the principles at the second stage of the hypothetical constituent process regarding constitutional decisions being expressions of self-determination of the political communities involved, and that such representation is pluralistic in representing competing positions from the state demoi. This has been evidenced by trenchant critique of opt-out formation by opposition parties that can only be expressed through decisions to accept or reject the ratification of a Treaty.[132] This does not represent a true opportunity for will formation because in the case of opt-outs the contestation may be precisely against decisions not to bind the state to obligations created in the Treaty, and thus the remedy of rejecting the Treaty itself is self-defeating.

Concordantly, the only democratic input for individuals *qua* citizens to reject these opt-outs would be through the European Parliament refusing to consent to the Treaty amendment in accordance with its role under Article 48 TEU. It may therefore be argued that the present procedure for constitutional amendment within the European Union does not sufficiently enable individuals in their dual-constituent role to exercise their self-determination through representative institutions. The fact that there are no means for individuals *qua* citizens to debate the proposal of opt-outs through representatives and instead are faced with a choice only to accept or reject the whole Treaty in which they are contained can be argued to fall short of the principles whereby constitutional decisions are expressions of the political self-determination of individuals *qua* EU citizens, and that in these decisions citizens interact on formally equal terms.

Patberg concludes his explication of the principles for supranational politics by proposing reforms to the amendment procedures: 'the executive-centred mode of EU treaty making should be replaced with procedures and institutions that enable the citizens to exercise constituent power, that is, to shape the supranational polity without the involvement of constituted powers'.[133] To fulfil this role, he proposes a permanent periodically elected constitutional assembly at the EU level consisting of two 'chambers' each composed of representatives elected from different lists and by different national and European constituencies. The purpose of this is to include different channels of representation that 'would allow the citizens to determine the common good from the standpoints of Member State citizens and EU citizens'.[134] Such a reform of the constitutional amendment procedure would see the extinction of the constituent power of the state as a constituted power in international law, or at least its reallocation and limitation purely to decisions to withdraw from the Treaty structure, as will be discussed below. This would accordingly restrict the decision to opt-out from EU law from an exercise of constituent power of the state and reallocate it to decisions of the dual constituent assembly.

Consequently, the argument for reforms of the legal phenomena of opt-outs can utilise this device of a permanent constitutional assembly to engage in a further level of 'rational reconstruction' to engage in the question of asking what such an assembly would decide would provide the best sense and strike the best

[132] See Wall (n 83).
[133] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 10) 453.
[134] ibid.

balance between individuals in their role as national citizens and EU citizens with regard to enabling Member States not to apply certain norms of the EU legal order within their territory. This re-situation of Habermas' hypothetical original constituent assembly in the processes of amendment of the constitutional treaties is expressly envisaged by Patberg: 'while I have developed these normative standards through the thought experiment of a process of founding, they apply to processes of reform as well'.[135] Consequently, the principles developed by Patberg may be applied to analyse whether proposals for the reform of opt-outs would be accepted by a hypothetical permanent constitutional assembly.

The most radical reform proposal would be to abolish opt-outs entirely. This was proposed in critique of the Maastricht Protocols at a time when it was still believed that these would operate only as a form of 'temporal differentiation'[136] before the centripetal effects of integration would take hold.[137] More recently, this has been repeated by the President of the European Commission: 'My hope is that on 30 March 2019, Europeans will wake up to a Union where we stand by all our values. Where all Member States respect the rule of law without exception. Where being a full member of the euro area, the Banking Union and the Schengen area has become the norm for all.'[138] Of course in reality such an eventuality would require a constitutional decision by the individuals *qua* nationals of Denmark and Ireland, without predicting the situation of the United Kingdom, in order to revoke these opt-outs. If one utilises the hypothetical device of the constitutional assembly, it may be argued that the representatives of the nationals of these Member States could forward compelling reasons for why the complete abolition of the possibility of opt-outs might undermine the capacity for self-determination of the individuals they are representing.

With regard to the real-world example of Ireland's opt-out from the Schengen zone, the argument would be made that it is fundamental for the guaranteeing of the freedom and security of the citizens of the state that the prior arrangements of the Common Travel Area of free movement established with the United Kingdom are preserved, in order to ensure that no hard border is established between Northern Ireland and Ireland. After this state's withdrawal, Ireland could find itself in an analogous albeit less dramatic situation that Cyprus finds itself in with regard to the occupation of Northern Cyprus and hence its incapacity to participate in the Schengen acquis. These constitute elaborations of the principle whereby the content of the constitutional order is determined on the basis of an exchange of genuine reasons. With regard to the Danish situation, the reversal of opt-outs is predicated upon the constitutional provision in Article 20 of the Constitution whereby decisions to transfer powers to the supranational level must be mandated by a referendum. A hypothetical assembly could forward the argument that a decision to entirely abolish the opt-outs from EMU, AFSJ, and CDSP at the Union level would violate the principle whereby Article 20 functions as an autonomous elaboration of the right of individuals to participate in revisions of the constitution or processes of supra-state constitutional politics. Therefore, it may be concluded that the complete abolition of opt-outs would not uphold the dual-constituent process of constitutional revision, and therefore a proposal would need to be elaborated that would respect both the genuine reasons why Member States may perceive that they need to opt-out from EU law, in addition to the national constitutional requirements that are necessary to be fulfilled to reverse such decisions.

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[135] ibid.

[136] Alexander CG Stubb, 'A Categorization of Differentiated Integration' (1996) 34 JCMS: Journal of Common Market Studies 283.

[137] Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 Common Market Law Review 17.

[138] 'European Commission - PRESS RELEASES - Press Release - PRESIDENT JEAN-CLAUDE JUNCKER'S State of the Union Address 2017' <http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm> accessed 17 December 2018.

The endeavour would therefore be to find a proposal that enables Member States to derogate from EU law in situations in which this is perceived to be necessary, but that ensures that such opt-outs do not undermine the capacity for individuals to exercise self-determination as political subjects and juridical objects. Fritz W. Scharpf has made a proposal for a generalised mechanism enabling Member States to opt-out from EU law. By contrast, R. Daniel Kelemen has made an argument for a situation in which opt-outs could be granted to Member States as a means of preserving the supremacy of EU law.[139] Whereas the former is grounded in the political norm-creation process, the latter focuses on the need for opt-outs in the juridical processes of the application of norms. An attempt will be made to synthesis these two contexts in a proposal for a generalised opt-out mechanism that a hypothetical constitutional assembly could endorse.

Similarly to Habermas, Scharpf proposes his ground-rules for a multilevel European democracy as arising from a hypothetical scenario. Rather than an imagined past foundational moment, however, Scharpf envisages an imagined future scenario of a major future crisis that disrupts the present foundations of European integration. As part of his six ground-rules for a refoundation of European democracy, Scharpf proposes a complex regime of Member State opt-outs that would resituate the capacity to opt-out from primary treaty revisions to the ordinary secondary legislative process. First he outlines that rule that individual Member States should have the right to opt out from ordinary legislation.[140] This is qualified by a further rule that legislation may be proposed that excludes opt-outs, but this must be adopted by an absolute majority in Parliament and by a qualified majority in the Council.[141] Scharpf proposes his rules with the purpose to 'enlarge, at the same time, the action spaces of national and European political processes'.[142] This goal to 'facilitate political action and opportunities for politicisation and democratic accountability at the European level' is balanced against the need to 'respond to *demoi-cratic* aspirations for Member State autonomy'.[143] As such the potential for national opt-outs would seek to protect the 'legitimate diversity' of Member States that would be opened up to contestation by a move to simple majority in the legislative process. The exception whereby legislation can be proposed in which opt-outs are not possible may be regarded as an attempt to preserve the uniformity of EU law for individuals as juridical objects where this is considered essential, as opposed to the present situation established in the ECJ case-law where the default position is uniformity with derogation being the exception.

From the dual-constituent perspective, it may be argued that the proposal to enable Member State opt-outs as the default possibility in the norm-creation process underplays the principle of equality between individuals *qua* nationals of a Member State and individuals *qua* EU citizens. As such, this could be regarded as undermining Patberg's principles at the third stage of the *inter-demoi* perspective. In this process of will formation the 'citizens of the (future) supranational polity'[144] would not interact on formally equal terms because *after* the majority vote by the representatives of individuals *qua* EU citizens in the European Parliament the ultimate prerogative as to whether the norms will be adopted and applied reverts back to the constituent power of the Member State operating in the Council. Indeed, this retention of the constituent power for representatives as the default position would also undermine the principles underpinning the functioning of the Council.

[139] R Daniel Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) 23 Maastricht Journal of European and Comparative Law 136.
[140] Fritz W Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 European Law Journal 384, 401.
[141] ibid.
[142] ibid 404.
[143] ibid 400.
[144] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 10).

This may be explained by the 'demoi-cratic' perspective[145] Scharpf takes that underplays the significance of the constituent role of the autonomous subject of EU citizen. Indeed he distinguishes this explicitly from Habermas' dual-constituent thesis.[146] The prioritisation of the nationals of the Member State as the sole constituent subject of the Union's constitutional order, and thus the legitimacy of action at the European level being predicated purely upon ensuring the self-determination of individuals in this role legitimises a system in which opt-outs are a default. However, Scharpf himself recognises that this could undermine the position of individuals as political subjects *qua* citizens of the Union: 'As different majorities are likely to form in different issue areas, they would not necessarily strengthen the sense of common identity and the democratic legitimacy of the European polity'.[147] A constitutional perspective on the European Union which emphasis the co-equivalence of individuals as nationals of the Member States and as citizens of the Union could not legitimately allow for a system whereby Member State retain the power to opt-out from legislation as a default position in the legislative process. If one combines Patberg's hypothetical constitutional assembly with Scharpf's hypothetical refoundational moment then a proposal for unilateral default Member State opt-outs would not be accepted.

Kelemen makes his own proposal for the reforms of the processes whereby opt-outs may be created in relation to the juridical processes of clashes between national constitutional courts and the European Court of Justice in the application of EU law norms. Therefore, rather than preserving the autonomy of individuals as political subject of the supranational constitutional order, this concerns the role of national constitutional courts in preserving the autonomy of individuals as juridical objects and political subjects *qua* national of a Member State. Kelemen argues that the primacy of EU law means that the only remedy available to national constitutional courts in cases when acts of EU institutions threaten constitutional identity is to declare their state's continued membership in the European Union unconstitutional.[148] He argues that '[T[his approach would compel governments to either amend their constitutions, to work through their EU political process to change the EU legal norms in question or secure an opt-out or, if necessary, to withdraw from the Union altogether'.[149]

This approach may be argued to show more deference to the fundamental constituent role of EU citizenship for individuals because, rather than opt-outs functioning as a default position in the creation of norms, they would only be available in the event that the application of EU law norms threatened the capacity for states to fulfil their residual function of guaranteeing the means for self-determination of individuals in the domestic constitutional sphere. The problem, however, is that although the other remedial measures have clear procedural routes, there is no generalised procedure whereby a Member State could secure an opt-out. Outside of Treaty amendments, the only context in which we have seen the potential for the creation of opt-outs is the United Kingdom renegotiation in February 2016. Even beyond the normative problem of such attempts to utilise international law to pre-bind the constituent power within the Union, the actual creation of opt-outs was prospectively envisaged in the agreement as occurring at the next Treaty amendment. Therefore, below a reform proposal will be forwarded which could see the creation of such a generalised opt-out mechanisms by the hypothetical constitutional assembly.

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[145] On the difference between the dual-constituent perspective and the demoi-cratic perspectives see Niesen, 'Mixed Constituent Legitimacy' (n 10).

[146] Footnote 51 of Scharpf (n 140).: 'In this regard, demoi-cracy differs from the position of Habermas… He also asserts a dual identity of individuals as citizens of their respective states and of the Union, but in his view this dualism justifies majoritarian democracy at the European level in order to break the strangle- hold of intergovernmental veto players under present rules of the Community Method.'

[147] ibid, footnote 56.

[148] Kelemen (n 139) 149.

[149] ibid.

Such a mechanism would function as a final resort after the application of strict conditions. This would be tied to Article 4(2) TEU and the protection of the identity of national constitutional orders. Habermas recognises the importance of this provision in the protection of individuals *qua* Member State nationals: '[the national courts] are authorised (as entailed by Art.4, para. 2) to safeguard the inviolability of those national constitutional principles which are constitutive for democracy and the rule of law in the respective Member States'.[150] The trigger would be a Member State actor making the claim that a particular sector of EU law violates the capacity of individuals *qua* nationals to exercise their individual and collective self-determination in the creation of norms so as to enable the pursuit of individual and collective self-fulfilment in the application of and reliance upon norms.

This would function as a 'declaration of incompatibility' of EU law with national constitutional identity. This would attempt to reform Article 4(2) TEU from a provision that is merely declarative of 'respect' for the 'national identities, inherent in their fundamental structures' of the Member States. Instead, Article 4(2) TEU would be reframed as providing jurisdictional competence for the apex courts of the Member States to engage in review of the compatibility of EU law with national constitutional identity in situations in which a characteristic fundamental to the demarcation between the national and the supranational is allegedly breached. This would connect the development of constitutional identity review developed in the national constitutional orders with the Union's constitutional order.

Crucially, in order to avoid the lacuna of EU law not being applied in all of the Member States, the reformed Article 4(2) TEU would not empower national courts to refuse to apply EU law. Instead, the provisions would provide a means for a national constitutional court to send a 'declaration of incompatibility' with constitutional identity to the ECJ when it is called upon to disapply a provision of national law. This is inspired by section 4 of the United Kingdom's Human Rights Act 1998,[151] which enables UK courts to send a declaration of incompatibility of a provision of primary law with a right protected in the European Convention of Human Rights. This is available when the limits of the section 3 duty that 'legislation…must be read and given effect in a way which is compatible with the Convention rights' are reached. This interpretative duty is analogous to the acrobatics that national courts have had to engage in to ensure that they respect the primacy of EU law. The declaration of incompatibility in the Human Rights Act preserves the Parliamentary Sovereignty of the UK legislature which rules out judicial disapplication of statute; in the same manner, the Article 4(2) declaration of incompatibility would seek to preserve the primacy of EU law in the face of constitutional identity challenges.

A gradient of responses to a declaration of incompatibility may be envisaged. In the first instance, a declaration could cause the case to be referred back to the ECJ as a kind of 'reverse preliminary reference' for the Union's constitutional court to determine whether the particular case may be adjudicated in such a way that the constitutional identity of the Member State in question is preserved.[152] If such an adjustment of limits by the Union's court is not possible, in a second instance the declaration of incompatibility could trigger a fast-track ordinary legislative procedure, if the provision is one of secondary law, or a fast-track procedure for the amendment of primary law. This would function analogously to the 'Remedial Orders' provided for in Schedule 2 of the Human Rights Act, which accords the power to amend primary legislation in the event of incompatibility. [153] Finally, if no consensus can be reached by either the Union legislative institutions or the Member States in their role as the 'secondary constituent power' in amending the Treaties, the final solution could be a provision which enables the Member State in question to

[150] Habermas, *The Crisis of the European Union* (n 9) 27.
[151] Human Rights Act 1998, s.4.
[152] This would be a formalisation of the informal back-and-forth between the Italian Constitutional Court and the Court of Justice of the European Union in the *Taricco* cases.
[153] Human Rights Act 1998, Schedule 2.

derogate from the particular Union norm in question. This would mimic the substantive consequences of the current procedure by which the United Kingdom, Denmark, and Ireland have secured opt-outs.

Such mechanisms could be created through additions to existing provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Within the former, a sub-paragraph could be added to Article 4 TEU with wording such as: 'In a situation in which a Member State executive, legislative, or judicial actor believes that the safeguarding of national identity provided by Article 4(2) TEU is threatened, they may have recourse to a 'declaration of incompatibility' with EU law. This declaration will institute judicial proceedings on the claimed incompatibility before the Court of Justice of the European Union. If the claimed incompatibility is still present following this decision, the simplified revision procedure contained within Article 48 TEU will commence. If the Member States cannot agree to an amendment of the treaties which resolves the claimed incompatibility, a procedure will be commenced to enable the Member State to derogate from the particular sector of EU law.'

This general constitutional provision to enable opt-outs as a last resort when all other constitutional avenues have been exhausted could be supplemented by specific amendments to the Treaty on the Functioning of the European Union. This would make the declaration of incompatibility that would be the first step in a potential opt-out available for the judicial, executive, and legislative branches of the governments of the Member States. A provision could be addended to the Article 267 TFEU preliminary reference procedure in order to provide a competence to national courts to send a declaration of incompatibility along with the questions of reference to the CJEU in order to prevent them taking recourse to the route of finding the EU law inapplicable within the national constitutional order.

In addition to this judicial mechanism, a further provision may be added to Article 263 TFEU to the effect that the Court of Justice will have the jurisdiction to review the combability of Union legislation and acts of the institutions with the national constitutional identity of the Member States in addition to the legality of the acts. The 'privileged' position of Member State governments within the second paragraph of Article 263 TFEU means that they would be able to bring such challenges to the court. Finally, an analogous provision could be added to Protocol (No 1) on the role of national parliaments in the European Union. Article 3's provision for national parliaments to send a reasoned opinion on non-compliance of a draft Union legislative act with the principles of subsidiarity and proportionality could be supplemented with the capacity to send an opinion that the draft legislative act is not compatible with national constitutional identity.[154] This could then be supplemented at the national level by a mechanism whereby the national parliament can induce the government to make a claim under Article 263 TFEU. Such a role for national parliaments could imbue substance to the claim in Article 4(2) TEU that the Union 'respect(s) the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.'

The normative argument is that a 'declaration of incompatibility' procedure could provide the function of not only providing a final means for the resolution of constitutional identity crises, but also as a means of submitting the executive discretion of Member States to opt-out from EU law to conditions that are explicitly enshrined in the national and European constitutional orders, specifically, that the constitutional identity of the Member State would be compromised if it were forced to apply the EU law measure in

[154] However for the potential negative consequences of the empowerment of national parliaments in the EU constitutional order see Federico Fabbrini and Katarzyna Granat, "Yellow Card, but No Foul": The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 Common market law review 115.

question. Restricting the capacity for a Member State to opt-out to such a condition would ensure that individuals in their role as EU citizens may only see a limitation on the territory in which EU law norms apply in the event that such application would threaten the self-determination of individuals in their roles as nationals of a particular Member State.

ii. Withdrawal: reforming unconditionality and unilaterality

Radical proposals for reform of the withdrawal process relate to two dimensions of the operation of Article 50 TEU: its unconditionality and its unilaterality. The former considers the setting of conditions at the Union level by the hypothetical constituent assembly, and the latter considers the representation of all those holding the constituent status of EU citizenship in the process of decision, rather than only those who hold the constituent status of nationality of a Member State contemplating withdrawal. These proposals will be explicated below before being subjected to critique on the basis of their (in)compatibility with the dual-constituent thesis.

These first proposal may be deduced from the criticisms of the withdrawal clause offered by Hauke Brunkhorst,[155] and Tore Vincents Olsen and Christian F. Røstboll.[156] These build upon the criticisms that the withdrawal clause would undermine the purpose of 'ever closer union' advanced during the Convention. These criticisms are predicated upon the significance of citizenship as a constituent status. The former argued at the time of the initial creation of a withdrawal clause that its use would be 'inadmissible because regardless of their national citizenship the citizens of the European Union have rights within the whole territory of the European Union, and thus in all of the member countries'.[157] The latter contribution develops this position to argue that the United Kingdom's decision to withdraw was undemocratic. They advance the thesis of the 'all affected status principle' whereby 'people whose status as free and equal is mutually dependent ought to be included and remain in common democratic decision-making.'[158] On this basis, they conclude that unilateral decisions to withdraw do not live up to this principle because 'they exclude people from participating in a decision that affects their status as rights holders and co-rulers, and hence, they do not rule themselves.'[159]

If one attempts to extract a prescriptive reform from Røstboll and Olsen's criticisms, beyond the absolute abolition of the potential for withdrawal, it would seem to be an argument that the exercise of deconstituent power should be shackled to strict conditions: 'our argument is not directed at the right to withdrawal but concerns the democratic credentials of its use. Regarding the latter, we do not deny that there might be conditions under which the right could be used as a remedy against domination, but only that normally this is not the case'.[160] This also resonates with Hofmeister's argument before the first use of Article 50 that 'withdrawal should only be possible under exceptional circumstances that would need to be clearly defined'.[161] Therefore, this remedy against 'domination' may be understood in the same terms as the proposal for the reform of opt-outs explicated above. Indeed, one could make an argument whereby withdrawal could only be made available as a very last resort in the event of a complete failure to resolve a situation in which a Member State has claimed that their constitutional identity and the capacity

[155] Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (MIT Press 2005).
[156] Olsen and Rostbøll (n 6).
[157] Brunkhorst (n 155) 167–8.
[158] Olsen and Rostbøll (n 6) 11.
[159] ibid 27.
[160] ibid.
[161] Hofmeister (n 8) 599.

for individuals *qua* nationals of that Member State to exercise self-determination has been violated by the participation in the supranational constitutional order.

With regard to the implementation of such a proposal through reform of the treaties, a mechanism complementary to the provisions for limiting the creation of opt-outs could be envisaged. This would serve the purpose of positivising within the Treaties Kelemen's argument that, if necessary, Member States should withdraw in the event of a fundamental constitutional conflict. This would necessitate an amendment of the conditions for withdrawal in Article 50(1) being exclusively fulfilment of the 'constitutional requirements' of the Member State's constitutional order. This necessary condition to ensure that the decision is an exercise of self-determination by individuals *qua* nationals would be supplemented by the complementary 'constitutional requirements' of the Union's constitutional order to preserve insofar as possible the self-determination of individuals *qua* EU citizens. This would be achieved through limiting the possibility of the revocation of the constituent status of EU citizenship and the contraction of the constitutional territory in which it is effective to a last resort. The wording to achieve this could be along the lines of the following: 'A Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements and the constitutional requirements of the European Union. The latter are fulfilled if the Member State has demonstrated an incompatibility posed by its Membership of the Union to its national identity inherent in its fundamental structures, political and constitutional as stated in Article 4(2) TEU'.

An alternative to subjecting the decision by nationals of a Member State to strict conditionality would be to expand the scope of those who are entitled to make a decision. The former proposal may be argued to protect the self-determination of individuals *qua* EU citizens as juridical objects by ensuring that the scope of the legal rights bestowed upon them by European integration may only be limited or rescinded as a last resort to preserve the self-determination of individuals *qua* Member State nationals. On the contrary, the latter proposal may be argued to fulfil this goal through emphasising the role of EU citizens as political subjects in the contraction of their status as juridical objects. Rather than predicating this transformation on the fulfilment of prior conditions, such a transformation of the scope of the constituent status of citizenship could be legitimated through the democratic consent of all those who hold it. A recent European Citizens Initiative request entitled 'EU wide referendum whether the European citizens want the United Kingdom to remain or leave!' has attempted to realise the substance of this proposal. However, the Commission decided to declare the initiative inadmissible as the matter falls outside of the EU's field of competence.[162] Therefore, the realisation of such a proposal would necessitate an amendment of primary law whereby a decision to withdraw would need to be legitimated not only by individuals *qua* nationals of that state through fulfilment of the 'constitutional requirements', but also by all individuals *qua* EU citizens including those who are not nationals of the Member State that is contemplating withdrawal nor are resident within it. It should be noted that Olsen and Røstboll reject that the enfranchisement of all individuals *qua* EU citizens in a decision to withdraw would legitimate the process on the basis that 'even a multilaterally agreed decision to allow an individual nation to withdraw from the EU is undemocratic because of its detrimental consequences for future democracy'.[163]

The representation of all individuals *qua* EU citizens regardless of nationality could be achieved through representative democracy with the European Parliament being a necessary decision-maker in the Article 50 TEU process. The participation of national parliaments would be more problematic on the basis that

[162] 'European Commission - PRESS RELEASES - Press Release - European Citizens' Initiative: European Commission Declares as Inadmissible Request for EU Referendum on the United Kingdom Remaining or Leaving' <http://europa.eu/rapid/press-release_IP-18-6581_en.htm> accessed 18 December 2018.
[163] Olsen and Rostbøll (n 6) 27.

their main representative interest would be towards individuals in their role as nationals of a Member State. This would represent the political vindication of the judicial dicta that EU citizenship is a status of political and legal equality throughout the territory of the Union. It would also recognise the negative effects of a withdrawal for the nationals of remaining Member States due to the change of status within a former territory of the Union. One could envisage that if a decision to withdraw were dependent upon the consent of all EU citizens then the government proposing withdrawal would be incentivised to protect the rights of these individuals in order to secure their support. This would vindicate the normative democratic principle of 'all affected status' interests being represented.[164] Furthermore, one could envisage a different means of connecting back to the opt-out provision contained above whereby if a decision is made to withdraw nationally but a decision to withdraw is not made by all EU citizens this could be a condition to trigger the declaration of incompatibility and opt-out procedure.

From the dual-constituent perspective, it could be argued that the criticisms which form the basis for the proposals to subject withdrawal to conditions and to enfranchise all EU citizens in the process are predicated upon an understanding of the legitimation of the Union that over-emphasises the importance of the status of citizenship of the Union. Indeed, Røstboll and Olsen argue that 'if the conditions of citizens are determined by factors beyond the control of national (state) institutions, the value of self-determination is seriously reduced…under current conditions, sovereign self-determination is illusory and hence not a cogent idea'.[165] This ignores the fact that although the conditions of citizens as political subjects and juridical objects are indeed determined beyond the exclusive boundaries of the national constitutional orders, the levelling up process means that this is not beyond the control of these institutions. Instead they are the crucial co-player in the process. Furthermore, it may be suggested that these criticisms conflate EU citizenship as a role of juridical objectivity and a role of political subjectivity. The normative premise of the argument is a conceptualisation of the status as one of absolute equality. This reflect the judicial construction of the status as one of juridical objectivity. However, it misses the point that at the level of political subjectivity there is not absolute equality due to the different Member State nationalities underpinning acquisition of the status.

The potential for a Member State to withdraw from the European Union may be regarded as one of the key tenets in the dual-constituent thesis as explicated by Jürgen Habermas and developed by Peter Niesen and Markus Patberg. The retention of the capacity for individuals *qua* Member State nationals to exercise their self-determination to disengage from the process of levelling-up constituent power is perhaps the ultimate means of ensuring that the freedom-guaranteeing function of the constitutional state is not undermined by European integration. As Habermas explicates: '[A]lthough the Union was not founded for a definite duration, every member state is free to *regain* the degree of sovereignty it enjoyed before joining the Union'.[166] For this reason, it would seem that reform proposals which would seek to constrain the potential of withdrawal to conditions agreed up at the supranational level or to predicate such decisions upon the exercise of political subjectivity of all individuals *qua* EU citizen are not compatible with the thesis. Indeed, it would seem that even if such conditions have been promulgated in accordance with the principles proposed for such hypothetical constitutional assemblies they would still undermine the entire basis of *pouvoir constituant mixte*: 'Entry and exit would still be matters to be decided by each Member State autonomously. There is no contradiction in demanding, on the one hand, that procedures for shaping the EU polity should conform to the standard of dual constituent power and insisting, on the other hand, that the Member States have the right to unilaterally decide whether they want to (continue

[164] ibid.
[165] ibid 20.
[166] Habermas, *The Crisis of the European Union* (n 9) 40.

to) be part of the EU. Nothing in the rational reconstruction of polity formation implies that the *pouvoir constituant mixte* should become the final authority on the question of membership'.[167]

Crucially, therefore, it may be concluded that the dual-constituent thesis recognises that the final authority on the question of membership is the primordial constituent subject of 'national of a constitutional state', and the principles that determine the exercise of this final authority are those at Step 1 of the hypothetical constitutional convention. Specifically, we may understood Patberg's statement above as recognition that the principle that enables the 'levelling up' of constituent power at the domestic level must also enable the 'levelling down' of this power, through the operation of the 'constitutional requirements' of Article 50 TEU. This principle is the predicate upon which the deliberations of the representatives of Member State nationals and EU citizens is legitimated. Therefore, to subject the operation of the 'levelling down' of constituent power to conditions established at the supranational level, or to enfranchise individuals beyond the original constituent subjects who have legitimated the 'levelling up', would violate this initial premise upon which supranational integration may be legitimated.

Indeed, Niesen and Patberg's own proposals for reform may be argued to fall foul of this interpretation of withdrawal as a process of the 'levelling down' of constituent power. They recommend that 'Article 50…be amended to allow for the re-entry of former Member States, by referendum or act of parliament, or, if this cannot be achieved, by providing an identical re-entry clause in the withdrawal agreement'.[168] The normative basis for this is that the current configuration of Article 50(5) whereby a Member State that withdraws can only re-apply for membership through the accession procedures of Article 49 TEU undermines the self-determination of that state's nationals: 'its citizens will not have a definitive say in the outcome as they do now. They will be treated as petitioners, not co-sovereigns, no different from the nationals of first-time applicants'.[169] Therefore, this proposal may be argued to re-frame the position of withdrawal in relation to the constituent process. It is not as a process of the 'levelling-down' of constituent power so as to ensure that Member State nationals retain the rights to reign-in constituent power exclusively to the domestic constitutional level. Instead Article 50 would function as a means of holding the constituent power of individuals *qua* EU citizens temporarily in abeyance which may be reactivated through an exercise of self-determination by the national political subject. As the piece concludes, 'Former EU citizens would not fall back to the status of third-country nationals but encounter current EU citizens as co-citizens 'on stand by".[170] This challenges the notion that the 'levelling up' of constituent power as an act that can be completely extinguished by the domestic constituent subject.

To conclude it may be suggested that the only reform proposals to the withdrawal process that ensure that the residual capacity for self-determination of Member State nationals is not indefinitely constrained would be those that take place at the domestic constitutional level. These would aim to ensure that the 'constitutional requirements' which determine the levelling down of constituent power are set in such a way that individuals are fully aware that the implications of a decision to withdraw is the revocation of their ability to engage in the construction of the supranational constitutional order as both political subjects and juridical objects. The proposals above to establish conditions for withdrawal and the enfranchisement of all individuals *qua* EU citizens could be accordingly repurposed for the domestic level.[171] I would argue that it would be desirable for all Member States to clarify both their procedural

[167] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 10).
[168] Niesen and Patberg, 'After Brexit' (n 6).
[169] ibid.
[170] ibid.
[171] This draws upon Oliver Garner 'Why All Member States Should Clarify Their Constitutional Requirements for Withdrawing from the EU' (*Verfassungsblog*) <http://verfassungsblog.de/why-all-member-states-should-clarify-their-constitutional-requirements-for-withdrawing-from-the-eu/> accessed 1 February 2017.

conditions for how the constitutional requirements would be fulfilled, and also the substantive condition that would justify a decision to withdraw. The former process could draw inspiration from permanent domestic law provisions such as the Canadian Clarity Act of 2000[172] which sets the procedure for the secession of Quebec. The latter could draw inspiration from the clarification of the conditions for Germany's continuing commitment to European integration established by the German Constitutional Court[173] and enshrined now in the conditional commitment in Article 23(1) of the Basic Law.[174] This would ensure that the legal uncertainty that shrouded the processes for triggering Article 50 in the United Kingdom is avoided. This ensures that individuals are able to exercise their self-determination with complete clarity regarding the reasons why and methods for how a withdrawal decision would be made. A desirable component of the procedure for withdrawal would be to reform this into a dual-process. This means that not only would individuals be called upon to decide as nationals of a Member State to revoke that membership, but also they would be called upon as citizens of the European Union to expressly revoke this constituent status. This would ensure that individuals are fully aware that the consequences of their decisions are not only the withdrawal of their state from a treaty on the international plane, but also the extinction of their constituent capacity to determine the nature and functioning of a supranational constitutional order.

V. Conclusion

Opt-outs and withdrawal present distinctive challenges to the constituent subjects of European integration. It may be concluded that reform proposals to shackle the constituent power of Member States to opt-out from EU law at treaty amendments may be justified precisely because Member State nationals retain the discretion to decide to withdraw. Therefore, it would be illegitimate to impose conditions on the exercise of this right at the supranational level if we take the role of the constitutional states as guarantors of freedom seriously. Reform proposals would therefore be limited to the domestic level. Consequently, although nationals of the Member States and citizens of the Union may be co-equivalent in the functioning of the constitutional order, the latter status is necessarily unstable due to its dependence upon the former. The only way to concretise European citizenship as an autonomous means for self-determination would be through a process of constituent emancipation from the current dual-constituent status quo.[175]

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[172] An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c. 26Assented to 2000-06-29

[173] Judgement on 30 June 2009, *Bundesverfassungsgericht*, BVerfG, 2 BvE 2/08.('*Lisbon'* judgment), para. 244 'European integration may neither result in the system of democratic rule in Germany being undermined (a) nor may the supranational public authority as such fail to fulfil fundamental democratic requirements (b)'; para. 249 'European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understandings as regards culture, history and language and which unfold in discourses in the space of as political public that is organised by party politics and Parliament'.

[174] Basic Law for the Federal Republic of Germany, Article 23(1) 'With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.'

[175] For the contours of such a proposal, see Oliver Garner, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status' [2018] Cambridge Yearbook of European Legal Studies 1.