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OF ECONOMICS AND  
POLITICAL SCIENCE ■



LSE 'Europe in Question' Discussion Paper Series

# The Liberty of the Post-Moderns? Market and Civic Freedom within the EU

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LEQS Paper No. 01/2009

May 2009





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## Acknowledgements

This paper is the draft of a chapter to appear in A. Folledsal and A. Weale (eds), *Democracy and Legitimacy in the EU*, Cambridge University Press, forthcoming. I am grateful to audiences in Manchester, Rome, London and Oslo for their comments – some yet to be incorporated in a final version. Further comments are very welcome and should be sent to the author at [r.bellamy@ucl.ac.uk](mailto:r.bellamy@ucl.ac.uk)

# The Liberty of the Post-Moderns? Market and Civic Freedom within the EU

## 1. Introduction

The four freedoms establishing the free movement of capital, labour, services and goods are central to the EU's core purposes. As such, freedom could be said to stand at the heart of the EU's legitimacy. In many respects, these freedoms are the archetypal 'modern freedoms' praised by the French political theorist Benjamin Constant in his classic lecture of 1819 on 'The Liberty of the Ancients Compared to those of the Moderns'. They are intrinsic features of a free market, whose development – in both theory and practice - as the central mechanism for regulating commercial activity Constant had witnessed. Yet, although in numerous ways these freedoms indirectly and directly enhance individual autonomy beyond the economic sphere, Constant expressed an ambivalence about modern liberty that has been echoed by many commentators on the EU concerned at its predominately market focus. For while such modern freedoms offer a range of new possibilities for individuals, they have also been regarded as undermining the civic virtue and bonds of social solidarity needed to sustain the public goods and regulations most people recognise as necessary for the efficient and equitable functioning of any human society – including the market order itself (e.g. Eriksen and Fossum 2004). Constant saw these civic qualities as attributes of ancient liberty. As a result, he thought it essential to render certain crucial elements of ancient liberty compatible with modern liberty. Almost two centuries on, those concerned by the EU's 'democratic deficit' have likewise argued that the further intensification and development of modern liberty brought about by European integration and the establishment of the single market have made some element of ancient liberty both all the more pressing and

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even harder to achieve. With a return to anything like the liberty of the ancients seeming beyond the bounds of possibility, the tendency has been to suggest that political liberty will need to be established on what could be called post-modern (because both assuming and transcending the conditions of modern liberty) foundations – a goal attributed by some to the failed Constitutional Treaty (e.g. Habermas 2001a; Balibar 2004).

In seeking to meet the contemporary challenge of combining ancient and modern liberty, Constant's earlier analysis remains instructive, not just because of its strengths but also due to its lacunas. As I shall argue below, liberal democratic states, such as the member states of the EU, can be plausibly regarded as achieving the unity of modern (liberal) and ancient (democratic) liberty Constant desired. However, in many respects they have been able to do for reasons that contradict certain of his key assumptions about the benefits of modern liberty – not least his belief that commerce would reduce the importance of cultural and ethnic identities and diminish class and other forms of conflict. As we shall see, though, these misplaced assumptions turn out to be shared by many of those advocating the establishment of democratic liberty on post-modern foundations, while some even go so far as to believe that Constant's fears about the passing of ancient liberty were unwarranted and that the EU can be a sphere of modern, non-political liberty alone (e.g. Majone 2001; Moravcsik 2002). This paper disputes both these propositions. I shall argue that there is little prospect for building such a form of post-modern political liberty or of doing without the liberties of the ancients. Consequently, we should be wary of conceiving and developing modern liberty at the EU level in ways that might undermine the role played by ancient liberty in controlling it within the member states. The EU extends market freedom in valuable ways, but as a realm of civic freedom it remains limited and potentially harmful to it.

I begin in the first section by returning to Constant's classic diagnosis of the tensions between 'ancient' and 'modern' liberty, noting their relevance to the current debate. In the second section, I explore the ways ancient and modern liberty came to be united within the nation state. As we shall see, this union involved three factors –

nationalism, social rights, and political parties - absent from Constant's analysis. The third section investigates how far we are witnessing a further deepening and expansion of modern liberty that has eroded in its turn that earlier political settlement. Here I examine the ways in which the EU and Union citizenship serve to reinforce this process of erosion, and give reasons to doubt the prospects for its offering either the framework for a new and more suitable post-national and cosmopolitan linking of civic and market freedom, or the potential for establishing anything comparable to the union of ancient and modern liberty achieved within the member states. The final section seeks to resolve this dilemma by proposing that we might conceive the EU more plausibly and appropriately as merely a mechanism for allowing the member states to adapt to the need for greater cooperation. In this respect, ancient, civic, freedom with regard to EU matters should remain firmly within the member states, with them exercising strict control over the expansion of modern, market, freedom at the EU level - especially when it is misleadingly repackaged, most notably by the European Court of Justice, in the guise of Union citizenship.

## 2. From Ancient to Modern Liberty

Contemporary discussions of the nature of liberty typically take the form of comparing differing philosophical positions, with Berlin's (1969) distinction between 'negative' and 'positive' liberty the standard - if much contested - starting point (Miller 2006). However, despite certain superficial similarities, explored below, it would be wrong to associate Constant's accounts of ancient and modern liberty with Berlin's two concepts. Constant's distinction is as much sociological as philosophical, relating these two accounts of liberty to different types of society. His claim was not so much that ancient liberty was conceptually or morally flawed compared to modern liberty, as that it was anachronistic both as a practice and in terms of people's current expectations. Whereas Berlin condemned positive liberty as inherently misconceived and totalitarian, Constant regarded ancient liberty as

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merely contingently so given the nature of modern societies. Indeed, he regarded it as both necessary and possible to rework ancient liberty in a form more appropriate to contemporary circumstances if modern liberty was not to fall prey to its own contradictory tendencies. As such, his analysis provides a suitable starting point for considering how far modern liberty has been further transformed by global commercial processes, and whether the desire to control these in the manner of even the moderns let alone the ancients is just so much wishful thinking.

Constant began his lecture by delineating modern and ancient liberty respectively. By modern liberty he meant, on the one hand, the civil liberties associated with a constitutional, commercial regime, in which the Church kept at arm's length from issues of state, and, on the other hand, the political liberties associated with representative democracy (Constant 1819: 310-11). Thus, modern liberty involves the maintenance of the rule of law and defences against arbitrary arrest or imprisonment, freedom of contract and exchange, the rights to hold property and freely to pursue one's chosen career, to compete for posts on an equal basis with others, and to worship the religion of one's choice and more generally to occupy one's days in whatever way most conforms to one's 'inclinations or whims'. It also includes the political freedoms of association and speech, and to exert influence and control over the administration, both through regular elections and other more direct political channels, such as petitions. Yet, these political rights were exercised only spasmodically and within a limited sphere. In voting for representatives, citizens exercised their sovereignty 'always only to renounce it' by handing it over to those they elected. Therefore, though modern individuals might be fiercely independent in their private lives, so far as public life was concerned they were 'sovereign only in appearance' even in the freest of states (Constant 1819: 312).

By contrast, Constant identified ancient liberty with a radical form of popular sovereignty involving all citizens collectively deliberating the nature of the public good – particularly whether to go to war (Constant 1819: 311-12). However, although this system offered in its turn a guard against arbitrary rule in public affairs, it came at a price – the total subordination of the citizen's private life to the authority of the



community. In a mirror image of modern liberty, under ancient liberty the individual was 'almost always sovereign in public affairs' yet 'a slave in all his private relations' (Constant 1819: 311). Two reasons lay behind this total sublimation of the private within the public. At the most basic level, public duties were simply so onerous as to leave no time for private life. Ancient liberty assumed a slave economy, which freed those qualified to be citizens from most economic and domestic tasks. Additionally, though, the ancients feared that any private interests might detract from a full commitment to the public interest. They regarded factionalism and corruption as the greatest threats to ancient liberty. The first arose from individuals having different views or concerns, the second from the pursuit of self-enrichment or aggrandisement. Consequently, civic virtue required a strong identification with the goals and values of the political community combined with a modest life style. Such an attachment was provided to some degree by a common ethnicity and sufficient property to give individuals a tangible stake in the community and allow them to live 'for' rather than 'off' politics. Yet, these conditions were rarely deemed sufficient. In the notoriously austere Sparta - admired by Rousseau and other later advocates of ancient liberty - citizens were largely cut off from their family and personal possessions, spending the majority of their lives in various military institutions. True, Athens was rather less severe, relying instead on numerous constitutional checks and balances, such as the use of lot to choose officials and their regular rotation. However, Constant surmised that was because the factors favouring modern liberty had already begun to impact upon its economic and social life (Constant 1819: 313, 315-16).

Modern liberty arose once the complete devotion to the public welfare demanded by ancient liberty neither proved possible nor seemed desirable or necessary; though Constant retained lingering and important doubts on this last point. He attributed this change to three main factors (Constant 1819: 314-15): the increased size of the political community; the abolition of slavery; and – in many respects the cause of each of these - the development of commerce. Within a small and relatively simple society, everyone can feel their voice counts and they can understand and play a significant part in managing the affairs of the community. As polities become larger

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and more complex, so the political importance accorded to each individual correspondingly decreases. Meanwhile, the abolition of slavery deprives citizens of the leisure required for public service: instead, they must pursue a profession to supply their needs and those of the rest of society. Underlying both these changes was commerce. Whereas ancient republics, such as Sparta, sustained, grew and increased their wealth through war, modern nations, and to some extent the more 'modern' Athens, did so through trade and industry. Unlike war, commercial activity leaves little time for politics and encourages a fierce love of private independence. 'Lost in the multitude, the individual can almost never perceive the influence he exercises'. The rewards and pleasures of public life seem negligible and trifling compared to the 'infinitely multiplied and varied means of personal happiness' commerce has made available in the private sphere (Constant 1819: 316). Consequently, commerce promotes a strong and increasing attachment to modern civil liberties and a weakening desire for, or appreciation of, the ancient political liberties.

To some extent, Constant surmised that commerce also made ancient liberty less necessary (Constant 1819: 324-25). Capital and goods become more mobile and varied and so harder for governments to tax or seize, while governments grow dependent on credit and hence to a degree subservient to commerce and less able to interfere in its operations. These circumstances mean that when political power gets exercised in an arbitrary way it both feels more intrusive and necessarily has to become so to keep the multiple speculations and activities of individuals under control. However, such total arbitrary interference and control proves far harder to achieve. Moreover, trade brings nations closer together and makes their customs and habits more similar, thereby reducing the danger of war. Though 'the heads of states may be enemies, the peoples are compatriots' (Constant 1819: 325). As a result, he thought the power of the state is further weakened, with rulers no longer able to use armed conflict as an excuse for claiming extraordinary powers and other forms of wilful and discretionary rule.

Constant's view of the beneficial effects of 'le doux commerce' was in line with advanced eighteenth and early nineteenth century opinion. However, it also mirrors the expectations of many liberals today, including certain enthusiasts for the EU. On the one hand, the hope is that states will turn from intrusive types of intervention and control, that arguably blunt individual initiative and create inefficiencies even when well motivated, to allegedly more benign forms of regulation that are respectful of human rights and autonomy, a shift often associated with the move from government to governance. On the other hand, and relatedly, commerce is seen as overcoming cultural antagonisms, both by homogenising culture to a degree and by uniting people in a common interest in peaceful and mutually advantageous wealth creation. Yet, this picture of a self-sustaining, modern commercial and civil liberty, that removes the need for ancient political liberty, proves highly questionable (Wenar and Milanovic forthcoming).

As we shall see, the commercial liberties of the moderns have not tempered conflicts over culture or interests – indeed, the scope they give for people to pursue partial and largely self-regarding concerns may have aggravated them in certain respects, giving added force to the traditional anxiety of ancient libertarians over factionalism. Though Constant overlooked these dangers, he did voice fears over a related problem with modern liberty many later liberals have been apt to ignore: namely, that 'absorbed in the enjoyment of our private independence, and in the pursuit of our particular interests, we should surrender our right to share in political power too easily' (Constant 1819: 326). Constant's main worry was that people might be tempted to subscribe to the eighteenth century notion of an Enlightened Despotism, where the state authorities would offer to provide for their citizens' 'happiness' through expert and efficient administration, leaving individuals free to engage in their private pursuits. He questioned the advisability of such an attitude on three main grounds (Constant 1819: 327). First, he argued that it would be a mistake to hand over political power to any group of people, no matter how well-intentioned and competent they might be, without guarantees that they would pursue the public's interest rather than their own. Indeed, he wondered how they could know where people's happiness lay better than themselves. So, some form of political

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participation was needed to hold rulers accountable to the ruled and so ensure they acted in a just and adequately informed manner. Second, he argued that one of the components of human well-being was a sense of self-development through the pursuit of higher pleasures and other similar endeavours rather than the mere pursuit of 'happiness' in and of itself. Political liberty offered 'the most powerful, the most effective means of self-development' (Constant 1819: 327). This argument is the closest he comes to aligning 'ancient liberty' to those perfectionist versions of Berlin's positive liberty that are associated with Aristotle and the civic humanist tradition. However, his third reason can be separated from this view. Participation, he claimed, also induces a sense of responsibility for, and a greater appreciation of, the public good. By 'submitting to all the citizens, without exception, the care and assessment of their most sacred interests, [it] enlarges their spirits, ennobles their thoughts, and establishes among them a kind of intellectual equality which forms the glory and power of a people' (Constant 1819: 327). Involvement in collective decision-making, Constant believed, made a people appreciate how their enjoyment of their civil liberties both related to their similar enjoyment by other people, thereby prompting a respect for the equal rights of all citizens, and depended on everyone performing their political duties and ensuring governments' remained impartial and responsive to public concerns. Along the way, people acquired a sense of pride in, and obligations towards, the equitable, efficient and effective administration of their country's affairs, and a patriotic attachment to the political institutions that made this possible.

Consequently, Constant was far from renouncing 'ancient' for 'modern' liberty. Rather, he saw the challenge to be 'to learn how to combine the two together' (Constant 1819: 327). Of course, the similarly motivated danger traditionally feared by ancient libertarians, of particular cultural or interest groups manipulating the political system for their own purposes so as to subdue other groups or to pursue their economic and social interests, remains as potent a risk as withdrawal from politics. Yet a parallel logic allows participation to offer a possible remedy for these potential problems too: they likewise can be attenuated by increased accountability to citizens as a whole and their broader appreciation of the interests of the public.

However, the practical difficulty remains of how these benefits of ancient liberty might be attained in a world transformed by modern liberty. Constant saw the representative system of government as the answer. The use of representatives simply followed from the contemporary need for a division of labour. Modern politicians inevitably lived 'off politics', but that condition could be turned to advantage by making them dependent on their employers. In his well-chosen phrase, representatives were 'hired stewards' (Constant 1819: 325-26), thereby neatly capturing the mixture of delegation and trusteeship involved. Voting in elections was sufficiently low cost to be compatible with the liberty of the moderns, yet it could still bring the advantages associated with the liberty of the ancients. These benefits included not only holding one's representative to account and incentivising politicians to govern in the interests of the ruled, but also, and most importantly, giving citizens a sense of 'intellectual equality' as equally entitled to express views on, and be considered in, political decision-making (Constant 1819: 327).

Though Constant did not explicitly note this change, and arguably failed to appreciate its importance, his association of modern citizenship with 'political equality' rather than 'self-rule' marks an important shift in the character of ancient political liberty in modern times. In the complex, pluralist societies that modern liberty brings into being, democracy can no longer be conceived as a form of popular sovereignty in which the people as a whole rule themselves, though elements of this conception may remain. Citizens have too many differing and often conflicting views and plans of life for the consensual agreement needed to talk of a popular will on any issue of potential collective concern to be likely. They have in any case handed actual decision making over to their representatives. Instead, ancient liberty now involves not collective self-rule so much as an equal say in choosing our rulers, and hence an indirect influence over the policies they are likely to adopt, within a process of majority rule that treats all views fairly and impartially (Bellamy 2007, ch. 6). Nevertheless, Constant was optimistic that participation in such elections was sufficient to generate a feeling among citizens of civic responsibility for, and patriotic pride in, the system of government on which their modern liberty depended. However, if Constant was right about the general form the union of ancient and

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modern liberty would eventually take, its emergence took longer to achieve, and by a different path, than he had imagined, while its maintenance involved cultural and social preconditions and political mechanisms at variance with his more optimistic assumptions about modern liberty.

### 3. Uniting Ancient and Modern Liberty

Contrary to Constant's expectations, commerce did not end military conflict. Representative democracy was only firmly established in Europe after two world wars and a third, cold, war. Nevertheless, the liberal democratic states that gradually emerged from the nineteenth century onwards could be said to involve precisely the marriage he desired between the two kinds of liberty. Moreover, he has been proved justified in believing that there could be no liberal (modern liberty) regimes that were not also in some meaningful sense democratic (ancient liberty) regimes too, and *vice versa*. Yet, this union arguably depended on three key factors he had not anticipated.

First, the new political form within which representative democracy emerged – that of the nation state – preserved more of the characteristics he associated with ancient liberty than he had believed possible in the modern world. The passage from ancient to modern liberty is sometimes characterised in terms of a sociological shift from community to contract. In practice, though, no state has been the product solely of a political contract between autonomous individuals exercising their modern liberties. Such contracts have been grounded in a national public culture possessing certain communitarian relations of the kind insisted on by the proponents of ancient liberty (Gellner 1983). Even if modern democracy is poorly characterised as a system of popular sovereignty, it still assumes a people with nationality providing key elements of such a collective identity. For the patriotic feelings Constant associated with participation seem as much preconditions for, as the products of, political citizenship. A shared national identity with cultural or ethnic roots has proved important in generating the trust and solidarity required to take part in and abide by collective decisions, even if they go against you (Miller 1995, ch. 3). As we saw,

Constant thought modern liberty was dissolving cultural differences and creating common tastes as well as economic bonds that were transnational in character. Yet, a desire for similar consumer products does not seem to have eroded national sentiments. Instead, the formation of demos within democratic states has gone hand in hand with processes of nation building (Rokan 1974). The resulting national cultures have possessed many of the hallmarks of ancient liberty in being created by the state, often through compulsory education programmes, and stressing a common public bond of a civic kind that was superior to and partly shaped an individual's private preferences. They also have ensured a shared language or languages necessary for a common public sphere. Meanwhile, size has remained important. The representative system can only be stretched so far, with citizens rightly feeling their vote counts for less if a political community gets too big.

Second, a community of interest among citizens has been additionally buttressed by a social contract promoting a degree of reciprocity in economic relations (Offe 2000: 67-8). Market rights have been supplemented and constrained by social rights in exchange for a willingness to work and pay taxes. Constant tended to see commerce as spreading social harmony as well as cultural homogeneity, yet its operations have been attended by considerable conflict generated by the large inequalities it promotes in patterns of ownership and income (Marshall 1950; Barbalet 1988). These social differences proved particularly unsettling given that property remained a requirement for full political citizenship for some time. Furthermore, the dropping of the property qualification made other civic duties that demonstrated a similar commitment to and stake within the community even more important. As I noted, commerce did not replace war, and the extension of the duty to fight to all adult males in the two world wars provided a major impetus for the mass enfranchisement of the non-propertied (Mann 1987). Contemporaneously, an entitlement to public systems of social assurance and education emerged as the mark of citizenship, allowing the enfranchisement of all citizens by offering an alternative to propertied wealth for ensuring a citizen could act and think independently without being dependent on particular private interests. In the process, class conflict was attenuated sufficiently to be containable within the democratic system. However, in

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return participation in the economy, at the very least through being available for work if able to do so, became both a legal requirement and an expectation of one's fellow citizens for those seeking the full social and political benefits of citizenship. This expectation that a universal entitlement to social welfare will be reciprocated by everyone's doing their bit to contribute to the welfare of others when they can, obtains support in its turn from citizens feeling they belong to a national political community. Again a degree of commonality helps both to create a social bond and increase confidence that one's fellows will act justly by you if you act justly towards them.

Finally, the process of combining the disparate views of millions of citizens and bringing them to bear on representatives, while avoiding both factionalism and clientalism, has depended on the development of political parties defined by ideology or programmes rather than patronage networks or the narrow interests of their members, and obliged regularly to compete for power in free and open elections (Lipset and Rokkan 1967). Parties play a crucial role in the 'modern' form of 'ancient' liberty by channelling the pursuit of private interests in a more public direction, and making political participation cost effective in terms of time and effort. Electoral competition forces parties to construct coalitions of different interests and unite them behind a programme of government in order to obtain a majority. As a result, different private interests are forced to accommodate each other and seek common ground, and so come, in part at least, to shape their demands in terms of a broader and more public interest. Parties also helped to further simplify electoral choice for citizens. Parties economise on the time citizens have to give to informing themselves about both the merits and failings of their potential and actual rulers and the views of their representatives and fellow citizens, with whom they also negotiate on their behalf. Mutual criticism by rival parties brings the electorally salient information out into the open, while party discipline controls and vets representatives. Meanwhile, party competition only tends to work well when those involved are not additionally divided by ethnic, religious, linguistic and cultural divisions or overly polarised by class conflicts: conditions provided by a common nationality and social rights. For these factors prevent politics becoming zero-sum



and allow ideologically or programme based parties to unite very diverse groups around a number of mutually intersecting concerns that cut across cultural and class cleavages. At the same time – as Constant noted – political participation helps give citizens a sense of responsibility for and control over these policies, with electoral pressures serving to shape national political culture and the social system. Our confidence that the laws treat those subject to them in an equitable manner is strengthened through their being open to contestation through fair political processes in which each citizen's vote is treated with a reasonable degree of equal concern and respect.

Therefore, though contemporary representative democracies are liberal-democratic, with the ancient liberty of political participation modified by the modern liberties of freedom of choice, the exercise of autonomous judgement about how to lead one's life, and the separation of public and private, their practices are shaped by cultural bonds Constant believed destined to disappear, social bonds he had not imagined as either possible or necessary, and political mechanisms of a kind he could not anticipate. All three factors serve to constrain the operation of modern liberty in various ways in order to render them compatible with a commitment to collective decision-making. Part of the difficulties with establishing any degree of ancient liberty within the EU arises from the fact that the continued unfolding of modern liberty appears to have done little to abate the importance of the first, while potentially making the second and third increasingly problematic.

Far from national and cultural differences decreasing, they have become ever more significant. Thus, multinational states, such as Britain, Belgium and Spain, have begun to fragment along linguistic, religious and ethnic lines, and been subject to increasing calls for self-government on the part of territorially concentrated minority groups and, in certain cases, even secession (Kymlicka 2001: 212-13). Cultural criteria have if anything increased in importance for those seeking access to citizenship from outside, with many states enfranchising non-resident co-nationals while remaining reluctant to grant full citizen rights to resident aliens (Joppke 2001). By contrast, welfare settlements have been under pressure since the 1980s from governments

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influenced by New Right thinking, with global markets often invoked as having helped promote such neoliberal policies. Despite some modest retrenchments, though, social rights have remained remarkably robust in the face of such onslaughts and there is little evidence that globalisation has forced a reduction in welfare spending in order to maintain international competitiveness, though some restructuring has taken place (Hay 2007: 130-31, 143-50). However, what remains strong is the view that welfare forms part of a contract between citizens which involves duties as well as rights. Whether justified or not, citizens have demanded governments pursue policies that guard against putative welfare 'scroungers' and have been sensitive to 'economic' immigration if that is felt to detract from the employment opportunities available to existing citizens or to place additional burdens on social services such as housing, hospitals, schools without any compensating gain in tax revenue towards their maintenance and improvement (Pattie, Seyd, and Whiteley 2004). Meanwhile, all advanced democracies are witnessing a slow but steady decline in electoral turn out, along with a shift towards more focussed – and in certain respects more privatised and factional – forms of political participation, as party membership has declined even more rapidly than voting (Hay 2007: 12-16). Citizens appear to see politics increasingly through the lens of modern rather than ancient liberty. It is the mechanism through which private interests are pursued and individual rights upheld. There has been a commensurate rise in consumer groups and single issue movements, particularly in areas such as consumer rights, and the increased resort to the law by those with the resources to do so (Pattie, Seyd, and Whiteley 2004). At the same time, there has been a move towards the sort of depoliticisation Constant feared as citizens have come to distrust politicians and the political process. Ever more areas of public life have been handed over to 'expert' regulatory bodies of one kind or another that claim to govern on the basis of the 'public interest', yet with few if any mechanisms for ensuring accountability to the public (Hay 2007: 91-95).

All three of these developments pose a challenge for the development of a system of representative democracy at the level of the EU. If national sentiments remain strong for defining political membership and the boundaries of the political community,

then how can the EU compete with such allegiances? Likewise, if social rights are rooted within national systems of welfare, how can they be disembedded without potentially further weakening the bonds of reciprocity among citizens that sustain them? Finally, without the support of pan-European cultural or social bonds, how can a European party system develop and politics avoid becoming the preserve of myriad pressure groups and depoliticised administrative bodies? A number of commentators have argued that the EU can meet these challenges by building a new form of post-national politics that takes as its starting point the ways the liberties of the post-moderns are transcending the context of the nation state (most prominently Habermas 2001b: ch. 4; see too Beck and Grande 2006). They note that the nation state model is coming under pressure from immigration and international markets, claim it is losing capacity to provide for its citizens' economic and physical security, observe its poor record with substate groups, such as indigenous peoples and minority nationals, and warn of the dangers of conflict with other states. In what follows I shall explore and criticise these proposals as being based on false premises and likely to bring about the very consequences their proponents seek to avoid.

Some of these arguments suggest states are too weak, others that they are too strong. In fact, there is little evidence of any withering away of the state. Not only has state expenditure as a share of GDP grown within most advanced liberal democracies, but also this increase is correlated with the degree of openness a state has to trade and foreign direct investment. In other words, globalisation has not reduced the capacity or centrality of the nation state. Despite pressures to satisfy financial markets with regard to inflation and public deficit levels, governments retain a significant degree of policy autonomy (Hay 2007: 143-50). True, there is greater regional economic integration – especially within the EU (Hay 2007: 139-41). But the nation state still remains the central locus of power and democratic decision-making. That is not to deny that states cannot operate in an entirely autonomous fashion, that the economic, social and political life of states is highly interconnected and requires often intense cooperation between them, and that this interconnectedness has given rise to an array of international agreements and bodies of which the EU is among the most complex and developed. However, it suggests the key motivation for democracy

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beyond the state may not be the weakness so much as the continued strength of states and their on-going capacity to harm those not included within the demos – be they aspirant citizens or the citizens of other states, whose interests domestic decision-making processes may fail adequately to take into account. However, I shall argue that we can best meet this concern not by seeing the EU as foreshadowing the replacement of the union of ancient and modern liberty found in the member states, something it is unlikely to be able to accomplish due to the absence of the three factors indicated above, but by conceiving it as a means for sustaining that union and overcoming its deficiencies in the conditions of contemporary globalising societies where we need more and better cooperation between states and a heightened humanitarian concern for their impacts.

## 4. The Liberty of the Post-moderns? The Case of EU

### Citizenship

As I noted at the outset, the EU could plausibly be portrayed as having the ‘liberty of the moderns’ at its core given the centrality it accords the promotion of the free movement of labour, capital, goods and services within its sphere. Although these four freedoms have had a primarily commercial purpose, they have gradually become associated with a broader understanding of individual liberty appropriate to a globalising world. In particular, they have been increasingly linked to the notion of equal treatment and the absence of discrimination on grounds of nationality (Article 12 EC) or ‘sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation’ (Article 13 EC). This concern with equality was also initially tied to discrimination in the economic sphere in areas such as employment and pay. However, successive judgements of the European Court of Justice (ECJ) can be regarded as seeing this commitment in broader terms, as an implicit component of any legal system that seeks to take individual rights seriously. A number of commentators have argued that with the introduction of the status of Union citizenship in the Maastricht Treaty, the potential exists for reading these four

archetypal modern liberties in ways that might provide the basis for a 'deterritorialised' cosmopolitan or postnational citizenship, that 'diasaggregates' rights from national citizenship (Benhabib 2008: 46-47; Kostakopoulou 2008). Indeed, in a series of cases, the Court has come to read the four freedoms through the lens of Article 18 EC, giving every Union citizen the right to move and reside freely in the territory of other member states. In what follows, I want to suggest that to the extent that is true, it sacrifices civic to market freedom. In themselves, these 'modern liberties' provide no adequate basis for a viable system of ancient liberty, with all the problems Constant warned of in such a scenario.

Of course, in certain respects Union citizenship is ill-suited to the purposes cosmopolitans and post-nationalists seek to fashion for it. Notoriously, from a cosmopolitan perspective, it is restricted to citizens of a member state and has been designed to 'complement and not replace national citizenship' (Article 17 (1) EC). Moreover, with the exception of the right to vote in elections to the European Parliament, the EU itself does not provide citizens with goods or services through EU funds or agencies. Rather, what EU citizenship offers is access on a par with national citizens to engage in economic activity with, and enjoy the services and benefits provided by, another member state. As such, it is only activated through a citizen moving to, or trading with, another member state through the exercise of the four freedoms. So, Union Citizenship does not offer a form of dual citizenship with the EU *per se*. Instead, it makes all citizens of member states of the EU potential dual citizens of all the other member states. Even so, formally at least, important 'limitations and conditions' exist that protect to some degree the privileges of national citizenship. The 1990 Residence Directives, later repealed and incorporated into Article 7 (1) b and c of Directive 2004/38, together with certain provisos of what are now Articles 39, 43 and 49 EC, restrict the right of residence to those engaging in economic activity or possessing adequate funds not to become a burden on the national system of social assurance and covered by sickness insurance. The four freedoms also do not apply in areas that are 'wholly internal' or involve restrictions based on public policy, security and health (*Uecker*). I believe these restrictions can be justified and will return to their defence below. Recently, though, they have been

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implicitly and explicitly challenged by ECJ rulings to the effect that Union citizenship offers a Treaty based, directly effective right of its own. It is these decisions and the associated claim that 'Union citizenship is destined to be the fundamental status of nationals of the member states' that certain theorists have seized on as marking a progressive transition to a cosmopolitan or postnational form of citizenship.

In a series of cases, the Court has increasingly argued that the restrictions protecting national citizenship have to be applied in a 'proportional' manner (*Baumbast*) that do not deprive Union citizens of a right to move and reside that exists independently of their pursuit of any economic activity (*Chen*), thereby creating new rights for non-workers (*Sala, Trojani*), students (*Grzelczk*) and job-seekers (*Collins*), weakening public interest derogations that excluded non-nationals from certain public service jobs (*Marina Mercante Espagnola*), and altering what could be considered a 'wholly internal' matter (*Avello, Chen*). In a parallel move, the Court has also questioned the previous understanding that the state provision of healthcare and education are not 'services' in the commercial sense of Articles 49, 50 EC, but legitimately correspond to the democratically decided collective preferences of the citizens of each of the member states, reflecting national financial priorities and other public interest considerations (e.g. *Humbel*). As such, these services had not been subject to the prohibition on restrictions of the freedom to provide services. However, decisions such as *Swartz, Kohll, Geraets-Smits, Mueller-Faure*, and *Watts* have undermined this reasoning by allowing individuals to escape national processes of rationing these goods by shopping for alternatives elsewhere in the Union.

In various ways, these decisions uncouple the rights of individuals freely to pursue their personal goals and interests on an equal basis to others either from economic participation within and a contribution to, or membership of and identification with, the polity in which one resides. Consequently, many citizenship rights, including access to important social and economic benefits, have been disassociated not just from political citizenship, or ancient liberty, but also from what we have seen have become the standard prerequisites for obtaining the same: namely, an economic stake in the fortunes of the state, membership and a degree of identification with it,

and political participation in shaping and sustaining the goods that it provides its citizens. This process has produced what Seyla Benhabib has called the disaggregation of citizenship (Benhabib 2008: 46-47), whereby the synthesis of ancient and modern liberty achieved within the nation state has been pulled apart as the 'liberties of the moderns' have become detached from the three factors we identified as linking them to the 'liberties of the ancients'. Instead, the 'liberties of the moderns' have become the trigger of themselves for access to certain 'ancient liberties': notably, the ability to vote and stand in local and European elections when residing in another member state, and admission to social benefits that hitherto have been both privileges of political citizenship and part of their foundation.

From different perspectives, such moves have been welcomed by both cosmopolitans and post-nationalists. Cosmopolitans contest what they regard as the moral arbitrariness of borders, arguing against the exclusionary nature of state centred citizenship (Carens 1987; Nussbaum 1996). Even though many, if not all, these rights apply only to EU nationals rather than all non-citizens resident within a member state, and to that extent are unsatisfactory, cosmopolitans are apt to regard any deterritorializing and denationalizing of citizenship as a step in the right direction. However, there is a split within the cosmopolitan camp over what universal obligations we owe to all humans, and the mechanisms that might be necessary to uphold them. Libertarians see the liberties of the moderns in largely negative terms, as merely necessitating the removal of barriers that interfere with free exchanges between individuals (Kukathas 2003: 572). On this view, there was little need for Union citizenship as a social or political status – it was sufficient to uphold the four freedoms as inherent aspects of a 'common market', avoiding welfare and political rights as creating potential distortions with its free operation while supporting the possibility of economic migration from poor to rich countries as consistent with a genuinely free market in labour. By contrast, more socially minded cosmopolitans have argued that rich countries also have more positive obligations towards the poor (e.g. Pogge 2008). Theorists differ as to how far these extend, but most contend some redistribution is warranted given that the wealth of the rich depends in part on their

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having exploited the resources of the poor and deployed their superior bargaining position to gain favourable terms of trade.

The quandary confronting social liberals, though, is that the institutional capacity for securing the libertarian, market-reinforcing view of the liberties of the moderns is far greater than that for implementing the market-correcting view they favour. As Fritz Scharpf has noted (1999: 54-58), ever since *Cassis de Dijon* the ECJ has effectively constitutionalised free competition within the EU, overriding the political judgement of national legislatures on the reasonableness of their environmental, health and safety, and other regulations whenever it felt they lacked an adequate public interest defence. The opening up of the full range of public services to competition, so that Union citizens may choose from a range of providers, is simply an extension of this logic. Yet, this possibility potentially undermines the social contract within each of the member states without establishing any at the EU level. For example, the decision in *Watts* simply enables those citizens who are sufficiently mobile and proactive to seek a given health treatment in another member state to jump the waiting lists and other restrictions that national services employ to prioritise the spending of limited resources among different kinds of health care (Newdick 2006). As such, it certainly enhances the 'modern liberty' of those citizens able to take advantage of this option. But, given that national budgets are not infinitely elastic, their doing so may be at the expense of the health or other social needs of many of their fellow citizens. Moreover, these other individuals are not in a position to contest such Court decisions through the political system. Instead, their collective ancient liberty has been undercut by this extension of modern liberty.

Similar dilemmas attend the ability of Union citizens to access social rights in another member where they are residing irrespective of whether they are working or not. Seyla Benhabib has suggested that social liberals should welcome this development as reflecting a cosmopolitan duty of 'hospitality' that, in time, ought to enable migrants from poor countries to gain access to the social rights of wealthier states (Benhabib 2008: 22-23, 36). Certainly, many of the negative rights associated with market-reinforcing liberties can be seen as fairly straightforward extensions of



humanitarian duties not to unduly interfere or exploit others and to uphold basic rights. Yet, it remains debateable how far a humanitarian duty to relieve suffering can be extended into an entitlement on the part of non-citizens to move to another country and claim social rights equivalent to those given to citizens. At the very least, it seems reasonable to insist they assume citizenship and take on the equivalent duties.

The difficulties of extending positive rights on the basis of free movement are both normative and practical. Normatively we incur such obligations to our fellow citizens through being associated with them within a given political system that possesses the capacity to determine and compel obedience to the rules governing our social and economic interactions with each other. Through the exercise of our ancient liberties we are co-responsible for these rules, and so have a mutual obligation to ensure they operate in as equitable and impartial manner as possible. We also help sustain them through our economic activity and taxes. However, if we can claim these rights without incurring the related obligations, say by forcing my fellow citizens to pay for a service in another country that as a result of collective decisions in which I could and probably did participate is unavailable or less available to me in my country of full citizenship, then this social and political compact is undone. Meanwhile, citizens do not exist in such relations with non-citizens. International organisations – even highly developed ones such as the EU – have limited powers and are authorised not by citizens directly but by their states. They are voluntary agreements to pursue certain circumscribed common purposes for the mutual benefit of the parties concerned. Cosmopolitans are sometimes inclined to suggest that we should create global institutions capable of treating all individuals equally, given that membership of any given state is a mere accident of birth - and even, somewhat contentiously given its continued intergovernmental character and manifest democratic failings, to view the EU as demonstrating the possibility of such schemes (e.g. Held 1995: 111-13, 254-55; Cohen and Sabel 2006). However, this proposal confronts the normative problem of already existing states. As a matter of consistency, our enjoyment of the rights of citizenship may imply a duty to ensure that everyone can also enjoy this right. Yet, the right of everyone to be a citizen of

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some state does not entail that we all must be citizens of a global state or federation of states. Indeed, the continued role played by national political cultures in defining the boundaries of citizenship, and the problems of establishing effective political mechanisms within large scale, multinational political systems, suggests the attempt to do so would be ill-fated (Nagel 2005).

Post nationalists have attempted an ingenious solution to this dilemma (Habermas 2001b; Erikson and Fossum 2004). They claim international law must conform to the 'democratic principle' to be legitimate by incorporating the preconditions for political accountability within it. In essence, they seek to make the liberties of the moderns the foundations of the liberties of the ancients. On the one hand, they argue that private autonomy requires social as well as the standard civil rights for its exercise. On the other hand, they contend that these self-same rights are the basis for, and can only be legitimised through, democratic processes. In this way, modern and ancient liberties go hand in hand as mutually entailing each other. At the same time, rights can thereby offer an alternative basis for democratic citizenship to membership of a national political community, making possible its extension to the European and potentially the global level. Unfortunately, there are a number of problems with this thesis – some indicated by Constant.

Both logically and empirically this linking of private and public autonomy is too neat. As Constant noted, there is at the very least a tension between the time and effort that has to be devoted to politics and the pursuit of one's private activities. True, it might with some justification be argued that in the circumstances of social life private autonomy depends on public regulation. However, this raises the problem that the private autonomy of different citizens may often clash, as may their views as to the appropriate public rules and goods needed to uphold and foster it. Such conflicts reflect their differing preferences and moral values, and the general difficulties that attend identifying and agreeing on what count as good outcomes and the best ways to secure them given the complexities and openness of most social processes. Indeed, R. P. Wolff (1970) showed many years ago how for public policies and laws to be expressions of the autonomous will of the people as a whole either

requires an implausible account of collective agency or an ethical naturalist account of 'real freedom' of the kind standardly objected to by liberal critics of 'positive' freedom. Indeed, many theorists who adopt this approach have a tendency to compile such extensive lists of the rights and policies needed to secure the pre-conditions of democratic autonomy that one wonders what would remain for citizens actually to decide democratically (e.g. Held 1995: 153-56, 190-201). Such accounts seem entirely circular – they obtain a spurious democratic legitimacy for their preferred list of rights by so defining democracy that it inherently involves them, so that any democratic consideration of their normative importance and practical implications becomes at best unnecessary at worst self-contradictory. These conceptual problems become all the more manifest when one considers how the functional and cultural diversity of modern societies multiplies the various spheres of life, each with their different guiding values and priorities, and the plurality of moral codes and valuations of different individuals and groups of people operating within and between them. These processes are themselves the result of modern liberty, yet they increase the potential for tensions and conflicts between the diverse activities of citizens and make convergence on the preconditions for private and public autonomy even less likely. To these difficulties need to be added those linked with the very territorial extent of the proposed post-national political communities. As we saw, Constant noted how size matters – diminishing the impact any citizen feels he or she may make on collective decision-making and the identification they may have with their fellow citizens.

What leads a given group of people to coalesce around a particular constitutional settlement would appear to be less its intrinsic merits and more the presence of the three factors I identified earlier as facilitating the exercise of ancient liberty in the modern world. The problem is that none of these factors appears to have much support at the EU level (Bellamy 2008). Eurobarometer surveys consistently indicate that less than 10% of EU citizens have a strong sense of identification with the EU, with only around 50% feeling even a weak attachment – and that strongly secondary

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to their local and national identities.<sup>1</sup> Opinion polls also show little support for the EU taking responsibility for welfare. Issues relating to socio-economic rights, in so far as they involve health, welfare and education, all have a low Euro-legitimacy, with 65 % or more of European citizens regarding these as exclusively national responsibilities. Finally, when it comes to the take up of EU level political rights, the figures are similarly disappointing. Average turn out in elections to the European Parliament run at below 50% and in many countries are as low as 25%. The number of citizens exercising their right to vote in other member states is even lower. According to a Commission study of 2002, the proportion of non-national EU citizens even bothering to register to vote ranges from just 9% in Greece and Portugal to 54.2% in Austria. A report on the 2004 EP elections noted that while around 343 million EU nationals voted within their own state, only 6.5 million citizens did so in a host state.

Far from generating democratic citizenship, the political liberties pursued post-modern Union citizens are of a markedly individualistic rather than a collective kind (Scharpf 2009: 8-10). They consist of special interest and single issue groups and court actions that typically seek benefits for the individuals themselves and their supporters, while transferring the costs onto others (Warleigh 2006; Kroger 2008; Harding 1992) They promote rather than counterbalance the pathologies ancient libertarians since Rousseau have feared attend modern liberty – such as factionalism and rent seeking (Olson 1974). In the process, they risk undermining the balance between ancient and modern liberty achieved within the working liberal democracies of the member states. As Scharpf has recently noted (2009: 23-24), a prime case in point – highlighted in the UK by the strikes in January 2009 in protest at the use of Italian and Portuguese workers at Total's Lindsey oil refinery, is the ability of service providers under the Posted Workers Directive and Article 49 EC to bring their own labour regimes. As ECJ decisions in *Viking*, *Laval* and *Rueffert* have shown, this right allows them to ignore national or local collective bargaining agreements concerning terms and conditions – the only requirements a host state

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<sup>1</sup> Figures here and in the next paragraph come from Eurobarometer 60, 62, 67.

may impose are minimum wage and health and safety regulations. As in the decisions giving Union citizens access to public services and social transfers in other member states, the politically forged bonds of reciprocity created through established patterns of ancient liberty get sacrificed to extensions of modern liberty.

Certain analysts have suggested that the legal regulation required to uphold the market rights that form the EU's core business is both uncontroversial, given that it is Pareto-efficient and reflects common interests, and best administered by expert, technocratic bodies that are immunised from potentially distorting political interferences (e.g. Majone 2001; Moravcsik 2002). Such matters are of low electoral salience and often depoliticised even within the member states. However, this argument raises Constant's main worry regarding the 'liberty of the moderns': namely, that individuals will be tempted to delegate their safe-keeping to 'Enlightened' rulers promising to act on behalf of public utility. As he noted, this scheme has three main weaknesses, two of which are particularly pertinent here. First, regulators have no incentive to respond to the concerns of the public, and no effective mechanism for gathering information on what those concerns may be. Constraining the access of the general public raises the risk of regulators being 'captured', or unduly influenced, by certain sectoral groups, and producing policies that are inequitably and possibly inefficiently partial to those interests (Coen and Thatcher 2005). Second, there is a danger that citizens will lack a sense of ownership of these regulations, disputing their point even when they are in their own interests, and become alienated from those who uphold them. Even if often unjustified, widespread complaints about unnecessary interference by a burgeoning Brussels bureaucracy, reflected in a decline in identification with EU policies, sit ill with the view that civic engagement is unnecessary for the EU's legitimacy so long as the 'outputs' provided by the independent technocracy are themselves legitimate. Meanwhile, it is disputable precisely how uncontentiously win-win market-making regulatory policies are – even taking into account the compensation offered by the Social Fund and other mechanisms to overcome short-term costs for particular groups. Certainly, many of these theorists acknowledge that redistributive policies require more democratic legitimacy than purely regulative ones, even if not all social

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liberals do (Majone 1996: 294-96; Scharpf 1999: 2, 6-13). For in these cases it is likely to prove even harder to get citizens to buy into the provision of public goods that may appear *prima facie* to conflict with their personal exercise of their modern liberties.

## 5. Re-uniting Modern with Ancient Liberty in the EU

Are these quandaries unavoidable – have the liberties of the moderns simply undercut the liberties of the ancients? I submit the dilemma proves less intractable if we cease to think of the EU as a proto-supra- or post-national institution destined to replace the member states, and see it instead as an advanced inter-national organisation that sustains the nation state. After all, one of its main achievements has been to stabilise the new democratic regimes of formerly authoritarian states such as Spain, Portugal and Greece, and hopefully to perform the same service for the new members from the former Soviet bloc. It has also, in Will Kymlicka's phrase, 'tamed' certain potential harms of nation based states (Kymlicka 2008). The most notable aspect of this 'taming' has been the end of antagonism between states within the European area, even allowing for the peaceful separation of the multinational Czechoslovakia into two nation states. Although regional policy is weak, a framework exists for minority nations within the member states to gain powers of self-government, and as I noted that process has increased across the EU. Inter-state cooperation has also enabled states to have arrangements for tackling the negative externalities of their domestic economic behaviour most particularly with regard to the environment. Meanwhile, EU rules have served to overcome discrimination on the basis of nationality within and between states. However, as I remarked they have achieved this result less by the creation of EU level rights and more by promoting the reciprocal recognition of each states rights so that Union citizens moving to another member state may compete on the same terms as that states citizens.

We have seen that the difficulties come when union citizenship undermines such reciprocity and allows individuals to attain the rights of citizenship without

performing the requisite duties. A 'social Europe' cannot be created at the EU level because the collective identification among European peoples and the democratic mechanisms needed to give such an identity voice – namely political parties – do not exist and show very little prospect of coming into being. In any case, each of the member states already has its own internal systems of social justice for which its citizens are co-responsible through their equal participation within majoritarian systems of democracy. In this situation, EU level action will only be legitimate to the extent the wealth and survival of these states depends on cooperation with other states. However, it is not necessary – indeed inappropriate – to establish ancient liberty within the EU to provide such agreements with democratic legitimacy. Rather, it will be sufficient that the citizens of each member state are satisfied that this is an area where interaction and cooperation is desirable or necessary – for example in order to set fish quotas so fishing will be sustainable or to promote trade. From this perspective, while attempts to produce a postmodern democratic liberty at the EU level seem bound to deepen the 'democratic deficit', empowering the functioning systems of ancient liberty national electorates and parliaments so they have a more decisive voice in deciding the scope and extent of the EU and the spheres it enters will work to lessen it (Mair 2007).

Both the failed Constitutional Treaty and the Lisbon Treaty envisaged such a role. For example, Article 8 C of the Lisbon Treaty affirms how 'national parliaments contribute actively to the good functioning of the Union' – a role potentially strengthened through the protocols requiring that national parliaments receive Commission consultation documents and draft legislative acts, and giving them the right to offer a reasoned opinion on whether these measures comply with the principle of subsidiarity. However, such measures remain comparatively weak and peripheral. To really give national parliaments and their citizens a voice we need them and not just the European Parliament to discuss the Commission's annual programme and to force Ministers to defend their positions with regard to it. National Parliaments rather than the ECJ also need to be the final arbiters over whether a European measure breaches subsidiarity the competence of the EU. In such circumstances, the key role in EU decision-making of the European Council and

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the Council of Ministers would have greater legitimacy and a clear rationale exist for why they are in effect of far more importance for the democratic credentials of the EU than the European Parliament. This arrangement would reinforce democratic accountability within the EU far more than any strengthening of the European Parliament could do. For as we have seen, there are no adequate mechanisms for a transnational European will formation. Instead, citizens still focus on their member states as the primary locus of political cooperation and participation. The authority of the EU is lent to it indirectly by its component parts. A system that reinforces national democratic accountability would reaffirm the role of the EU as an international Union of nation states rather than a proto-state in the making. Most importantly, it would reconnect the liberty of the moderns, which is so enhanced by the EU, to the liberty of the ancients, which remains mainly located at the national level.

## 6. Conclusion

The liberties of the moderns have supplanted the liberties of ancients since at least the eighteenth century. While there is much to welcome in this development, as Constant noted there are also dangers that in so doing they risk undermining themselves. In certain respects, we saw liberal democratic states as securing a union of the two of the kind Constant desired, with each balancing the other. However, the further extension of modern liberty brought about by the EU has begun to erode this union at the member state level without providing any compensating arrangement at the European level. I have suggested that the prospects of any such European union of ancient and modern liberty are remote. Instead, we should see the EU as a mechanism for preserving the democratic, welfare nation states that are its component parts. The best means for ensuring this is the case is to make them the democratic controllers of the shape and scope of the EU.



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