
Can Supranational Law Enhance Democracy? EU Economic Law as a Market-Democratizing Project

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Abstract

This article focuses on the economic regulatory component of the current backlash against liberal democracy and supranationalism in the European Union (EU). I identify a style of economic regulation that seeks to govern markets in the interest of insiders who are framed as vulnerable to the challenges of economic globalization – what I call rearguard economic regulation. While such regulation may be useful to reinforce national cultural attachments and a sense of belonging, it also has an anti-pluralist character that threatens markets’ emancipatory orientation. By identifying this challenge, the article seeks to defend a vision of markets as contributing to the promise of democracy, by fostering a plurality of options in each sphere of life. In the European context, I argue, EU economic law may be understood as advancing the realization of such a vision of markets. Viewed in this light, supranational and, specifically, EU economic law appear not so much as ordo- (or neo)-liberal straightjackets on national democracy but, instead, as providing mechanisms for democratization of the economy and society. Such democratizing potential is attributable to (i) the pluralist outlook of the law of EU integration, which forces member states to confront the plurality of forms of economic and social life existing within the polity and being further diversified by globalization as well as (ii) the deliberative and open-ended character of EU law adjudication, which may allow for progressive re-articulations of national market regulation.

1 Introduction

In the present era of backlash, a plethora of illiberal political parties and movements challenge both liberal democracy within the nation state and rule-based systems for

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the governance of international relations at the regional and global level. Particularly vulnerable is the supranational economic order and, chiefly, its most advanced regional experiment – the European Union (EU). This article wishes to emphasize the intersection and overlap of two key targets of the backlash: the project of liberal democracy and, particularly, its pluralist institutions and the project of governing economic relations through supranational rules, as best exemplified by the law of EU integration. In the areas of overlap between these two projects, I argue, lies a project of market democratization, which steers national and transnational markets towards more plural, emancipatory and inclusive social outcomes. Such markets can make a fundamental contribution to the promise of democracy, which I here understand substantively not so much as a form of government but, rather, as a project aimed at fostering individual emancipation and material progress in the various spheres of social life.¹

To make this argument, the article first walks backwards. It starts by describing a style of economic regulation, favored by, but not limited to, populist and illiberal movements and parties – what I call ‘rearguard’ economic regulation – and the challenge that this style of regulation poses to the emancipatory potential of markets. Identifying this challenge is the starting point for articulating a normative vision of market democratization. In this vision, markets cease to be only welfare maximizing and become fora to realize the promise of democracy since they provide individuals with a plurality of options to write and rewrite the stories of their lives.²

As I argue, supranational economic law – and, specifically in the European context, the law of EU integration – can contribute to such a project of market democratization. While purely national models of market governance have tended to constrain the emancipatory and democratizing potential of markets, the transformative processes that EU law enables can unlock such potential. This possibility is the product of EU economic law’s pluralist outlook, which forces member states to confront the plurality of forms of economic and social life existing within each national society and being further diversified by globalization. Furthermore, through iterative processes of contestation, deliberation and redesign of local market institutions, EU economic law provides an institutional infrastructure that is useful to police the anti-pluralist and essentialist tendencies to which national regulation is prone, while encouraging progressive re-articulations of such regulation – a process that I construe as democratizing because it may emancipate and include more, rather than fewer, market participants. EU economic law exposes the diversity of preferences and values existing in national societies, but it is not inimical to institutions that seek to preserve particularistic attachments, if and when these institutions are made compatible with human

¹ R. Mangabeira Unger, *Democracy Realized: The Progressive Alternative* (1998), at 5 (‘the first hope of the democrat ... is to find the area of overlap between the conditions of practical progress and the requirements of individual emancipation’).

² This is what I call autonomy as self-authorship – see discussion in Section 3 of this article. I draw the concept and related language of ‘writing and re-writing one’s life story’ from the work of Hanoch Dagan. See Dagan, ‘Markets for Self Authorship’, 27 *Cornell Journal of Law and Public Policy* (2018) 577; H. Dagan and M. Heller, *The Choice Theory of Contracts* (2017); see also H. Dagan, *A Liberal Theory of Property* (2021).

rights and as much as they are not discriminatory. The article illustrates these arguments by drawing from features of the EU institutional infrastructure as well as case law of the Court of Justice of the European Union (CJEU).

Hence, contrary to accounts that picture supranational and, chiefly, EU economic law as weakening democracy by disarming national responsiveness to the popular will,³ this article suggests that supranational law can enhance democracy.⁴ Undoubtedly, I approach the two concepts animating this symposium issue – international law and democracy – in somewhat idiosyncratic terms. First, democracy is understood not so much as a form of government defined by the functioning of political institutions but, rather, as a substantive project of democratization of society and, specifically, the economy. From this perspective, democracy is neither only government by consent⁵ nor only crude popular sovereignty,⁶ and not even only a process of deliberation and reason giving.⁷ The terms democracy and democratization come to describe the aspiration to reconcile material progress and individual emancipation in the different spheres of social life. As a process of transformation in society, such democracy is not achieved through a fixed set of institutions but through constantly renegotiated ones: never fully realized, it is continuously strived for. Second, this article considers only a specific area of international law: the law of EU integration (hereinafter EU law or EU economic law), a phrase that I use to refer mostly to the free movement and competition law provisions of the EU Treaties as applied and interpreted by the CJEU, what is often called the EU economic constitution. By assembling these two perspectives, my analysis offers a novel, albeit perhaps lateral, account of how international law and democracy interact.

The aims of the article are analytical and normative. On one level, the article contributes to debates concerning the backlash against liberal democracy in Europe, by pointing attention both to the ways in which economic regulation may contribute to such a backlash and the ways in which given features of supranational economic law may allow for resistance to it. On a deeper level, the article starts to offer a re-description of EU economic law as empowering a normative vision of market democratization both inside nation states and transnationally. In such a re-description, EU

³ See, among others, Wilkinson, 'Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism', 45 *Critical Sociology* (2019) 1023; Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement', 16 *European Law Journal (ELJ)* (2010) 315. For a description and critique of the standard democratic critique of European Union (EU) law, see Neuvonen, 'A Revised Democratic Critique of EU (Citizenship) Law: From Relative Homogeneity to Political Judgment', 21 *German Law Journal (GLJ)* (2020) 867.

⁴ From this perspective, my argument is in line with accounts such as Neuvonen's, *supra* note 3, as well as de Witte, 'Integrating the Subject: Narratives of Emancipation in Regionalism', 30 *EJIL* (2019) 257 (comparing the EU style of emancipation to the one of other experiences of regional integration).

⁵ Government by consent is at the core of social contract theories. T. Hobbes, *Leviathan* (1651); J. Locke, *Second Treaty on Civil Government* (1689).

⁶ Popular sovereignty finds its first modern articulations in J.J. Rousseau, *The Social Contract* (1762).

⁷ Theories of deliberative democracy are most prominently associated with the ideas of J. Rawls, *Political Liberalism* (1991), and J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1997).

law ceases to be an ordo-liberal or neo-liberal straightjacket on the policy autonomy of the member states, which aggravates various national and transnational democratic deficits. EU law becomes an institutional infrastructure that politicizes conflict about different models of market and societal participation and contributes to the preservation and enhancement of their plurality and, ultimately, to the democratization of markets and societies.

The structure of the article is as follows. In Section 2, I identify a regulatory trend in national economic law and policy that I qualify as chiefly anti-pluralist – what I call rearguard economic regulation. I provide examples from national regulatory interventions in various EU member states and offer a common conceptualization for these interventions, including by introducing distinctions with bordering notions of economic patriotism, economic nationalism and economic populism. Section 3 describes the challenge that rearguard economic regulation poses to the ability of markets to contribute to emancipation and inclusion and, ultimately, to democratization. I frame this discussion by reference to literature in legal, social and political theory that provides normative justifications for markets based on different notions of autonomy. This literature allows me to sketch the contours of what a project of market democratization may look like. Section 4 locates the traces of the market democratization project in certain structural and substantive features of EU economic law. In so doing, it emphasizes the potential contribution of EU economic law to democracy in national societies and across the EU more broadly.

2 Rearguard Economic Regulation?

The single biggest challenge faced by liberal democracies over the last decade or so is arguably the rise of populism and its coupling with resurgent forms of nationalism. Such association is at the core of a global backlash against both the institutions of liberal constitutionalism – in particular, judicial review – and those of global governance.⁸ In Europe, the populist backlash against liberal institutions has overlapped with a backlash against EU economic institutions, mostly free movement and competition law.⁹ In this section, I draw attention to what is an underappreciated manifestation of the populist, if not illiberal, programs evoked above: their style of economic regulation. While authors have explored how illiberal populism may hamper the coherence

⁸ See Lustig and Weiler, 'Judicial Review in the Contemporary World: Retrospective and Prospective', 16 *International Journal of Constitutional Law (IJCL)* (2018) 315 (the backlash is interpreted as a response to previous waves of constitutionalization).

⁹ The most explicit statement of such projects comes from Orbán's 2014 speech on illiberal democracy. See 'Full Text of Viktor Orbán's Speech at Băile Tuşnad of 26 July 2014', available at <https://budapest-beacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>. Populism also gained ground in Western Europe, with parties like Rassemblement National (previously Front National) in France, Alternative für Deutschland in Germany and the Lega in Italy. Many commentators also interpret Brexit as a manifestation of analogous populist tendencies. For a discussion, see de Burca, 'Is EU Supranational Governance a Challenge to Liberal Constitutionalism?', 85 *University of Chicago Law Review* (2018) 337.

and effectiveness of specific areas of economic law, chiefly competition law¹⁰ and EU internal market law,¹¹ this article emphasizes how populist market governance can itself contribute to the backsliding of democracy. This line of argument, as will be further articulated, understands markets as spheres in which democracy can be realized and, hence, as the objects of legal and political choices that may hamper or enhance democracy.

The style of regulation that populists seem to favour rejects market-fundamentalist prescriptions of non-interference in the economy but is, at the same time, both different from the social democratic, welfare state kind of interventionism of previous decades and more complex than sheer protectionism. This style of regulation, I argue, is best understood as 'rearguard' because it seeks to solidify currently prevailing market arrangements and economic institutions to the benefit of insiders and/or to the detriment of variously defined outsiders. More precisely, insiders gain protection or advantage because their forms of economic participation are framed as consistent with a national culture or way of life and in turn vulnerable to the challenges of globalization, including market integration, immigration and technological change.¹² As I further show, such style of regulation also has a moralizing character insofar as it seeks to constitute worthy ways of being producers and consumers and, more broadly, of participating in the economy and society. While rearguard regulation constrains and even rejects plurality, vanguardist regulation would be unlocking the pluralizing potential of market relations, a point to which I return in the next section of this article.¹³

While I do not argue that rearguard economic regulation represents the only or dominant style of regulation employed by the populist movements mentioned above or that it is exclusive to them, I treat it as paradigmatic of their law-and-policy orientation and, more generally, of a cultural/identitarian shift in market governance across the EU and beyond.¹⁴ On such rearguard orientation, the realms of production, distribution and consumption become loci for the assertion of national identity through the entrenchment of forms of economic and social participation that are construed as

¹⁰ Bernatt, 'Illiberal Populism: Competition Law at Risk', *Social Sciences Research Network* (24 January 2019), available at <https://ssrn.com/abstract=3321719> or <http://dx.doi.org/10.2139/ssrn.3321719>.

¹¹ E.g. Varju and Papp, 'The Crisis, National Economic Particularism and EU Law: What Can We Learn from the Hungarian Case?', 53 *Common Market Law Review (CMLR)* (2016) 1647.

¹² One of the slogans of the Polish populist right is 'redistribution of prestige' from the urban elites to the supposed losers of globalization. See T. Garton Ash, 'Only Respect for the Left Behind Can Turn the Populist Tide', *The Guardian* (28 September 2017), available at www.theguardian.com/commentisfree/2017/sep/28/far-right-rightwing-nationalism-populist.

¹³ The language is freely inspired by Unger, *supra* note 1, who contrasts 'vanguardist' and 'rearguard' production systems. Unger's project of realizing democracy relies on the expansion of vanguardist production.

¹⁴ As I have elsewhere argued, in recent years, a culturalist critique of EU market integration has gained ground. See G. Tagiuri, *The Cultural Implications of Market Regulation: Does EU Law Destroy the Texture of National Life* (2018) (PhD dissertation on file at Bocconi University, Milan). See also a recent Common Market Law Review Conference, A Cultural and Identity Related Shift in European Union Law, 11 October 2019, Paris 2, Pantheon-Assas University (confirming the salience of such debates).

fitting national ways of life, prevailing local custom or even culture. ‘This is how we do things here’ emerges as a justification for legal intervention in the economy.

By way of concrete illustration, attempts to govern the digital transformation of the economy employ various rules that may fit my definition of rearguard. Many European countries, including France, Spain and Italy, for example, have deployed existing regulation or devised ad hoc rules to prevent Uber from providing its non-professional driving services in their territories.¹⁵ France attempted to do the same with Airbnb services by subjecting them to regulations applying to traditional letting agencies.¹⁶ Furthermore, various Amazon taxes and limitations on same-day delivery have been legislated, including most prominently in France, to resist the penetration of on-line retailing.¹⁷

In Italy, a recent government dominated by self-declared populist and nationalist political parties proffered numerous other examples of what may be rearguard interventions.¹⁸ The program of the Lega-M5S government included proposals for a tax on online travel agents, which would help the livelihood of smaller traditional travel agencies and local hotels.¹⁹ Following the introduction of a new form of unemployment benefit named ‘citizenship income’, members of that government announced measures to prevent the spending of such income on ‘non-essential’ leisure goods, such as electronics.²⁰ There were also initiatives to ban, as well as force the closure of, so-called light cannabis shops, which sell legal derivatives of cannabis under Italian law.²¹ Moreover, after the gradual liberalization of retail opening hours during the last decade, various proposals have been introduced for the reinstatement of Sunday and night trading bans.²²

¹⁵ These attempts have resulted in legal challenges that ended up before the Court of Justice of the European Union (CJEU). See Case C-434/15, *Asociación Profesional Elite Taxi* (EU:C:2017:981); Case C-320/16, *Uber France* (EU:C:2018:221). The Court indirectly validated the national bans.

¹⁶ See Case C-390/18, *Airbnb Ireland* (EU:C:2019:1112) (taking a different direction to the Uber cases, by qualifying Airbnb as an information society service, which is the precondition for subjecting its regulation to EU free movement obligations). Cf. Joined Cases C-724/18 and C-727/18, *Calí Apartments* (EU:C:2020:743) (an authorization scheme for Airbnb services aimed at ensuring a sufficient supply of affordable long-term rental is potentially justified as pursuing an overriding reason relating to the public interest).

¹⁷ L. Alderman, ‘France Moves to Tax Tech Giants, Stoking Fight with White House’, *New York Times* (11 July 2019), available at www.nytimes.com/2019/07/11/business/france-digital-tax-tech-giants.html. See also F. O’Sullivan, ‘Paris to Amazon: No Free Delivery to You’, *CityLab* (27 November 2019), available at <https://www.citylab.com/environment/2019/11/amazon-delivery-online-shopping-environmental-impact-paris/602674/> (the city of Paris’s statement over Amazon one-day delivery policy mentions explicitly the threat to a way of life).

¹⁸ The 2018–2019 coalition government between Five Star Movement, a centrist populist party, and League, a right-wing nationalist party (from June 2018 to September 2019).

¹⁹ See ‘Contratto per il Governo del Cambiamento’, at 51, available at http://download.repubblica.it/pdf/2018/politica/contratto_governo.pdf.

²⁰ N. Cottone, ‘Reddito di cittadinanza: Tutto quel che non si può comprare con la card’, *Il Sole 24ore* (4 October 2018), available at www.ilsole24ore.com/art/notizie/2018-10-04/reddito-cittadinanza-sigarette-gratta-e-vinci-ecco-tutto-quello-che-non-si-puo-comprare-la-card-135225.shtml?uid=AEKroGHG.

²¹ F. Prisco, ‘Salvini alla Battaglia della Cannabis: “Direttiva Contro i Negozi”, Ecco Quanto Vale il Settore’, *Il Sole 24ore* (9 May 2019), available at www.ilsole24ore.com/art/salvini-battaglia-cannabis-direttiva-contro-negozi-ecco-quanto-vale-settore-AC4e7s.

²² ‘Cosa Vogliono Fare Lega e M5S con la Chiusura dei Negozi la Domenica’, *Il Post* (7 September 2018), <https://www.ilpost.it/2018/09/07/lega-movimento-5-stelle-apertura-domenica/>.

Opening hours' regulation is a particularly good illustration of how rearguard regulation operates: it typically constrains the recourse to business practices and/or product standards in which outsiders (foreigners, local innovators, individuals and companies engaging in minoritarian forms of production and distribution) may enjoy an advantage and, in so doing, seeks to support majoritarian products, processes and standards. By reference to opening hours, the excluded outsiders would include not only the so-called modern distribution but also traders from ethnic minority backgrounds who may be willing to stay open longer hours as well as other small-scale local innovators.

Similar illustrations of rearguard regulation, and possibly ones to cause more concern, may be observed in some of the backsliding member states of Eastern Europe.²³ Hungary, for example, introduced a system whereby a part of workers' compensation could be paid in vouchers entailing a tax advantage for the employer, but such vouchers can be used only at certain stores, explicitly excluding foreign-owned establishments.²⁴ A similar approach and rhetoric animated a ban on loss-making retail chains from operating in Hungary, which coincided mostly with foreign-owned chains trying to establish their presence in the Hungarian market.²⁵ In Hungary, other market interventions contribute even more explicitly to democratic backsliding, as they seem to instrumentalize market governance to limiting freedom of speech or controlling the media. Particularly telling is Hungary's legislated nationalization of the school textbook market²⁶ or its decision to place the merger of a large number of pro-government media outlets outside of the scrutiny of national antitrust and media authorities.²⁷ Viktor Orbán's decree justified this exemption by reference to the 'strategic importance at the national level' of the new conglomerate and its role in preserving 'print media culture'.²⁸

The interventions above span very different areas of economic activity and are justified by reference to very different policy objectives. What then, if anything, draws these interventions together? As I argue, they have something in common both at the level of the regulatory techniques employed and at the level of the justifications supporting their adoption or proposal. At the level of regulatory techniques, these interventions typically seek to support locally prevailing forms of economic organization and participation by shielding them from various transformative pressures. At the level of justification, they share a cultural, if not ethno-nationalist, undertone. They

²³ Innes, 'Hungary's Illiberal Democracy', 114 *Current History* (2015) 95.

²⁴ The EU Commission targeted this system, and the CJEU found it incompatible with the Services Directive. Case C-179/14, *Commission v. Hungary* (EU:C:2016:108).

²⁵ See 'Hungary Bans Loss-Making Supermarkets', *European Supermarket Magazine* (9 December 2014), available at www.esmmagazine.com/hungary-bans-lossmaking-supermarkets/7745.

²⁶ 'Hungary Has Nationalized the Textbook Market', *The Bookseller* (20 December 2013), available at www.thebookseller.com/news/hungary-nationalises-textbook-market.

²⁷ P. Kingsley, 'Orban and His Allies Cement Control of Hungary's News Media', *New York Times* (29 November 2018), available at www.nytimes.com/2018/11/29/world/europe/hungary-orban-media.html.

²⁸ P. Gorondi, 'Hungary Exempts Pro-govt Media Firm from Competition Rules', *AP News* (5 December 2018), available at <https://apnews.com/43155967c805408282fd8c074ddabeb9>.

are discursively framed as regulating markets in response to the demands of categories of producers and consumers, whose preferences, values and ways of life are equated to those of national majorities. Such responsiveness is in turn framed as useful to preserve identity, local cultural attachments and/or social cohesion. It is the combination of such techniques and justifications that makes the rules in question potentially rearguard, as they reject innovation and experimentation as threats to a local culture.

Before proceeding, I would like to add a few qualifications for my argument as thus far presented. What I establish through the rearguard label is not a final indictment but only a *prima facie* categorization. I aim with this label to call for suspicion around an emphasis on culture in market governance as the potential indication of a threat to emancipatory markets. But any definitive normative judgment on rules such as the ones described above would require a more extensive articulation of the exact policy objectives pursued by each specific regulation as well as the instruments employed to advance these objectives. For example, as I have argued elsewhere, rules that support small businesses may be granted for pressing welfarist considerations and even be justified in the very interests of emancipation and inclusion that this article defends.²⁹ Protecting small traditional shops will be rearguard if it seeks to solidify existing economic structures so as to exclude outsiders and innovators; it will not be if the protection is accorded so as to preserve a plurality of forms of economic organization in the face of myopic market demand or in a context of rapid economic transformation such as the present one, where the monopolizing tendencies of large business may, short of regulatory intervention, seriously harm plurality and choice. As the last section of this article argues, EU law may offer an infrastructure useful to reconcile plurality and local cultural attachments by transforming rearguard regulation to the service of emancipation and inclusion.

By way of clarification, and to further spell out how rearguard regulation fits broader contemporary legal and political developments, it may be useful to discuss how I see it relating to other signifiers used to describe similar phenomena. Does rearguard economic regulation differ from, or fit into, notions of economic patriotism, economic nationalism and economic populism? In line with certain definitions of economic patriotism, rearguard regulation favours ‘social groups, or sectors understood by the decision-makers as insiders’, indeed, by enshrining ‘traditional product or process standards’.³⁰ However, while the phrase economic patriotism is typically mobilized to describe – and often also to justify – interventions supporting the competitive position of national economies in international trade,³¹ rearguard economic regulation appears to be quite disinterested in national competitiveness. As discussed, the

²⁹ Tagiuri, ‘Protecting Small Businesses in the Name of Plurality: Towards a Liberal Defense’, unpublished paper presented at Tel Aviv University’s Safra Center for Ethics 2018/2019 Colloquium (on file with the author).

³⁰ Clift and Woll, ‘Economic Patriotism: Reinventing Control Over Open Markets’, 19 *Journal of European Public Policy* (2012) 307, at 317.

³¹ See ‘Colbert Was Here’, *The Economist* (23 May 2006), available at www.economist.com/business/2006/03/23/colbert-was-here (with particular regard to French Prime Minister Dominique de Villepin’s use of economic patriotism).

insiders that rearguard regulation assists gain protection not so much because of their strategic role in the national economy but because their modes of economic participation match and shape stories about what constitutes majorities worthy of protection.

From this perspective, the interventions considered here are also not adequately captured by the phrase economic nationalism, especially in its most current contemporary meaning that equates nationalism with protectionist neo-mercantilism.³² If it is nationalist, rearguard economic regulation is so by matching older notions of economic nationalism,³³ such as the idea that national economies should be culturally and morally coherent units. This vision of economic nationalism is most prominently associated with the writings of Friedrich List who saw economies prospering not through the division of labour but, rather, through the ‘union of labor’ that may be achieved only in ‘a cultural community conducive to it, in other words, in a nation with broadly shared cultural and moral values that foster cooperation’.³⁴

Rearguard regulation partially overlaps with, but is ultimately also distinguishable from, the way in which its main liberal proponent, Dani Rodrik, uses the phrase economic populism.³⁵ Rodrik carves out a distinction between political populism and economic populism: political populism rejects liberal constraints on democratic decision-making, and, as such, it is to be resisted; economic populism rejects technocratic constraints on the conduct of economic policy, and, as such, it may be useful. This distinction serves Rodrik to call for a rehabilitation of certain forms of economic populism, which he seems to equate with attempts to re-institute economic management through the rejection of hyper-globalization. In keeping with his notorious ‘trilemma’ – postulating the impossibility of retaining together deep economic integration (or hyper-globalization), national sovereignty and democratic politics (only any two combinations are possible) – Rodrik sees the relaxation of supranational economic discipline as necessary to restore a dose of economic policy autonomy to the hands of elected officials.³⁶ For Rodrik, such policies not only have potential economic benefits but also strategic democratic benefits, insofar as they are instrumental to resisting more dangerous forms of political populism that may lead to authoritarianism.

The historical example through which Rodrik supports his assertions is Franklin Delano Roosevelt’s New Deal, which is credited not only with leading the US economy out of the great depression but also with taming more radical demands for redistribution on the left and the limitation of political and civil rights on the right.³⁷ According

³² See R. Kuttner, ‘Steve Bannon: Unrepentant’, *The American Prospect* (16 August 2017), available at <https://prospect.org/article/steve-bannon-unrepentant> (economic nationalism as one of the key pillars of Trump’s presidency).

³³ See A. Hamilton, *Report on Manufacturers* (1791); F. List, *The National System of Political Economy* (1841).

³⁴ D. Calleo, *Rethinking Europe’s Future* (2001), at 170.

³⁵ Rodrik, ‘Is Populism Necessarily Bad Economics?’, 108 *AEA Papers and Proceedings* (2018) 196; see also Rodrik, ‘In Defense of Economic Populism’, *Project Syndicate* (9 January 2018), available at www.project-syndicate.org/commentary/defense-of-economic-populism-by-dani-rodrik-2018-01?barrier=accesspaylog.

³⁶ D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (2011).

³⁷ Rodrik, ‘Is Populism’, *supra* note 35, at 198.

to Rodrik, Roosevelt always understood New Deal measures as necessary ‘for the survival of democracy’.³⁸ Today, as then, Rodrik suggests, supranational economic institutions entrench a level of economic interdependence that is incompatible with meaningful responsiveness to the popular will, at least short of a radical translation of mass politics to the global level.

As suggested by the discussion above, Rodrik’s economic populism shares with rearguard regulation a concern for the insecurities of what are perceived to be shrinking and growingly dissatisfied majorities. But, while Rodrik’s populism mobilizes mostly socially oriented policies, redistributive in a more traditional sense, rearguard regulation arguably consists of chiefly cultural interventions. From this perspective, rearguard regulation seems in line with a shift from governing the social into governing the cultural, often associated with the rise of neo-liberalism.³⁹ In the backlash era, such a shift manifests through populists’ attempts to articulate an identity politics for those left behind.⁴⁰ Once the realm of minorities and confined to issues of language, religion and the family,⁴¹ identity politics is growingly deployed to obtain protection for majoritarian economic practices and exceptions from the laws of free movement and non-discrimination.

While liberal responses to these majoritarian demands are probably possible,⁴² some of the responses that populism articulates seem incompatible with liberalism and, for that matter, with democracy. Rearguard economic regulation can be understood as one such response. Indeed, as with most contemporary populism, the problem with rearguard regulation is that it is fundamentally anti-pluralist: it moves from the assumption that within one national polity there are largely homogeneous ethnocultural backgrounds, ways of life and conceptions of the good, coinciding with those of more or less imagined majorities.⁴³ As revealed by rearguard economic regulation, populism’s anti-pluralism comes not only in the form of explicit violations of human rights but also, and likely more often, in more subtle forms: through interventions that deliberately reduce the plurality of our options for participating in the economy and society.

³⁸ *Ibid.*, at 199.

³⁹ See Sarat and Simon, ‘Cultural Analysis, Cultural Studies and the Situation of Legal Scholarship’, in A. Sarat and J. Simon (eds), *Cultural Analysis, Cultural Studies and the Law* (2003) 1 (e.g. law ceases to be redistributive and rather manages expectations and feelings).

⁴⁰ See Y. Mounk, *The People v. Democracy: the Rise of Undemocratic Liberalism and the Threat of Illiberal Democracy* (2018).

⁴¹ The case law of the CJEU shows many examples of the set of issues to which cultural demands have more traditionally applied, including ethical issues – e.g. Case C-36/02, *Omega* (EU:C:2004:614); Case C-159/90, *Grogan* (EU:C:1991:378) – and issues of linguistic identity – e.g. Case C-379/87, *Groener* (EU:C:1989:599).

⁴² See L. Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (2015).

⁴³ J.W. Müller, *What Is Populism?* (2016), at 20 (the ‘core claim of populism is ... a form moralized anti-pluralism’); see also Mudde, ‘The Populist Zeitgeist’, 39 *Government and Opposition* (2004) 541 (populism proceeds through framing the interests of the people against those of variously defined others or enemies – typically, immigrants and elites). Cf. E. Laclau, *On Populist Reason* (2005) (claiming that politics is all about creating identities through conflict that oppose we versus them). See more generally Urbinati, ‘Political Theory of Populism’, 22 *Annual Reviews of Political Science* (2019) 111.

Contemporary populists would view these interventions as enhancing democracy by liberating market governance from pluralist and technocratic constraints; once re-appropriated as spaces for majoritarian responsiveness, their argument goes, the economy and markets can be turned to work to the benefit of the many rather than the few. To the extent that it exposes markets as the sites of political struggle rather than objects of technocratic optimization, the populist vision may indeed appear to go in the direction of democratization. But, on closer look, the democracy populists seek to insert in market governance is a very impoverished version of democracy. Such democracy, devoid of liberal and pluralist constraints, would contradict equal respect for each individual's right to self-determination, which is the foremost liberal defence of democracy as the just form of government. It would also contradict the more substantive notion of democratization that I here subscribe to as a transformative process of society via emancipation and inclusion. Rather than perfecting democracy, populism is more likely to deny democracy's emancipatory orientation.⁴⁴

Rearguard regulation contributes to this denial by turning what may be legitimate attempts at majoritarian responsiveness in market governance into essentialist strategies to define culturally and ethically consistent forms of economic participation. By entrenching certain forms of economic life – of being consumers, producers, distributors – as the worthy ones, rearguard regulation tends to marginalize, discourage, if not prohibit, minoritarian, innovative and even utopian forms of economic participation. As the next section articulates, rearguard regulation threatens markets' emancipatory and inclusive potential – markets as spaces for enhancing autonomy as well as realizing the promise of democracy.

3 Unlocking Markets' Emancipatory Potential

In this section, I expand on the challenge posed by rearguard economic regulation's anti-pluralism. Conceptualizing this challenge serves to reconstruct a vision of liberal or better democratizing markets as contributing to autonomy as self-authorship. While an anti-pluralist market regulation may hamper markets' inclusive and emancipatory potential, the unlocking of such potential is at the core of the project of market democratization. To articulate this vision, this section builds upon scholarship in legal and political theory that offers a picture of why and how markets contribute to autonomy and plurality. This scholarship shows that markets can emancipate and include: they can emancipate by giving us choice over how to participate in the economy, as producers and consumers, as well as in society more broadly; they can include by granting us access to forms of economic and social participation from which we may have been previously excluded as well as by enabling relational and cooperative pursuits.

Markets can emancipate and include, but they will not invariably do so. Indeed, my contribution in this article is in line with a tradition that views markets as historically

⁴⁴ There is a debate in the scholarship on whether populism is compatible with democracy or whether it invariably produces authoritarian outcomes. See Urbinati, *supra* note 43.

situated and heterogeneous socio-legal configurations.⁴⁵ Markets enable the voluntary exchange of goods, services, work, as well as legal entitlements (for example, debt), but as their design is the product of legal and political choices, many different market configurations are possible in each sphere of economic activity. Each one of these configurations will rely, amongst other things, on a legal infrastructure made not only of property and contract law, but also of company law, labour and consumer law, tax law, competition (antitrust) law, as well as many other laws and regulations pursuing different public policy objectives, which directly or indirectly affect the organization of markets. The content of all these rules will be one important determining factor of the kind of markets, and, ultimately, the kind of market (or commercial) societies, that will emerge.⁴⁶

Given the above, as much as law can contribute to making markets emancipatory it can also constrain their potential to emancipate. Laws such as rearguard economic regulation that significantly restrict the ability of individuals to choose from different options in various spheres of economic life – different productive or distributive or consumerist arrangements – seem to be doing just that. They disarm the emancipatory and inclusive potential of markets. The ensuing markets, rather than emancipatory, may well turn illiberal, making us less, rather than more, autonomous and free. To be sure, anti-pluralist market governance is not the only threat to the materialization of markets that lead to autonomy and self-growth, nor is it likely to be the most serious such threat. Contemporary experience suggests that dependency, exclusion and discrimination are pervasive in both global and local markets. Multinational companies from the industrialized North regularly exploit communities and resources in less prosperous parts of the world. Material obstacles to full participation in the economy are still numerous even in the rich European countries that this article mostly considers, with the increase of income and wealth inequality a major and persistent source of concern.⁴⁷

These problems are not so much the product of markets run amok. They are, as widely acknowledged in the scholarship, the product of legal and political choices that determine the features and scope of markets, their consequences as well as their likely winners and losers. Conspicuously implicated are laws and policies often described under the heading of ‘neoliberalism’:⁴⁸ corporate tax cuts and growingly regressive

⁴⁵ This tradition, or sensitivity, cuts across different disciplines and debates. In political economy, see the streams of scholarship known as historical institutionalism and neo-institutionalism: e.g. W. Streeck and K. Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economy* (2005). In sociology, see the work of Michael Callon, on which I myself build. M. Callon (ed.), *The Laws of the Market* (1998); see also N. Fligstein, *Markets, Politics, and Globalization*, (1997). In law, see most recently Dagan and Markovits (special editors), ‘The Market as a Legal Construct’, 83 *Law and Contemporary Problems (LCP)* (2020).

⁴⁶ By market society, I indicate a social order in which production, distribution and consumption are organized around voluntary exchange, involving some degree of competition and the use of money.

⁴⁷ See T. Piketty, *Capital in the XXI Century* (2014).

⁴⁸ See, e.g., W. Streeck, *How Will Capitalism End? Essays on a Failing System* (2016). The literature on neoliberalism is extensive, and the scope of the term is contested within the said literature. For critical and historical appraisals, see D. Harvey, *A Short History of Neoliberalism* (2005); Q. Slobodian, *Globalists: the End of Empire and the Birth of Neoliberalism* (2018). Many critiques of EU law and policy are centred

tax systems; the erosion of labour protection and de-unionization; the de-funding of welfare states and public service provision; more generally, the entrenchment of private law regimes that favour capital and big business over workers and consumers.⁴⁹ These laws and policies constitute just as many obstacles to what I describe as the project of market democratization: they steer markets away from their emancipatory ideal by accentuating dependency and exclusion.

All this is to say that rearguard economic regulation is only one of many obstacles that can be observed and/or envisioned to the materialization of markets that emancipate, empower and include rather than divide, discriminate and make dependent. Still, my claim is that the challenge posed by rearguard regulation is particularly insidious and urgent to address. I put emphasis on this challenge rather than on the more obvious and possibly more concerning one posed by 'neoliberal' law and policy for two reasons. First, anti-pluralist, rearguard market governance is a regulatory trend that has received relatively little attention in both public discourse and academic debate, while, as argued above, it is paradigmatic of the present backlash era. Second, considering the challenge posed by rearguard regulation is fruitful because it exposes markets and market regulation not so much as objects and instruments of technocratic optimization but, rather, as political battlegrounds where and through which democracy can advance and backslide.

In the remainder of this section, I bring in work from legal and political theory that helps to build a vision of emancipatory and inclusive markets: a vision of how markets can contribute to our free and democratic societies and what the project of market democratization is. As this literature shows, markets' emancipatory and democratizing potential is linked to their ability to multiply our possibilities for meaningful economic and social participation, which is precisely what rearguard regulation seeks instead to constrain. According to the notion of liberalism upon which my vision of emancipatory markets is grounded, free individuals need a plurality of options from which to pick to write the stories of their lives.⁵⁰ This approach understands freedom as autonomy and, more precisely, autonomy as self-determination or self-authorship. This is a thick notion of autonomy, typically associated with positive liberty, in contrast with thinner or flattened notions of autonomy as sheer independence or non-interference, which, by following the distinction introduced by Isaiah Berlin,⁵¹ are closer to negative liberty. A liberal polity committed to this kind of autonomy must provide citizens with a range of valuable pursuits from which to choose in authoring their lives.

on its neo-liberal bias. See Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', 21 *ELJ* (2015) 572. Recent scholarship also explores neo-liberalism's effects in areas not traditionally seen as economic. See, e.g., Isailovic, 'Gender Equality as Investment: EU Work-Life Balance Measures and the Neoliberal Shift', *Yale Journal of International Law* (forthcoming).

⁴⁹ K. Pistor, *The Code of Capital* (2019).

⁵⁰ See Dagan and Heller, *supra* note 2, at 68 (attributing this notion of autonomy to the political philosophy of Joseph Raz). See J. Raz, *The Morality of Freedom* (1988).

⁵¹ See Berlin, 'Two Concepts of Liberty', in H. Hardy (ed.), *Liberty* (2002) 166.

For such autonomy to exist, plurality, not only in the abstract but also in the plurality of concrete possibilities, must be available.

Markets are the key social institution through which the above plurality is provided and through which individuals become self-determining in the above sense. While, in both popular and scholarly discourse, markets are often seen as guarding neo-liberal notions of non-interference or understood as welfarist devices to increase prosperity,⁵² an understanding of markets that is linked to thicker notions of autonomy has a long pedigree in the history of political thought. Political theorist Lisa Herzog traces the key moments of this history back to the writings of thinkers as different as Georg Wilhelm Friedrich Hegel and Adam Smith.⁵³ As she explains, these authors are at the core of a broadly understood liberal tradition that construes markets as conducive to a free social order.⁵⁴ Pictured by such tradition, markets deliver both negative and positive freedom.

The core negative freedom that markets deliver is the ability to do with one's property what one wishes to do, which is also the freedom to buy and sell what one wants.⁵⁵ While such ability is not all there is to freedom, this negative component is key also to thicker notions of freedom; it is the pre-condition to exit from traditional, if not coerced, life paths, a point to which I return. Positive freedom is the thicker notion of freedom that I here call self-authorship: the ability for individuals not simply to do what they want but also to make authentic and meaningful choices about how to live their lives.⁵⁶ In commercial society, individuals become able to escape tradition and coercion as well as to pursue life projects that they have themselves defined, enlist others in such projects and revise and reverse them.

As explained by private law theorist Hanoch Dagan, the core mechanisms through which markets contribute to self-authorship are mobility and plurality.⁵⁷ Mobility is enabled chiefly through exit; through the alienation of resources, investment in new projects as well as work, markets allow us to exit family, city and even polity. Property and contracts can be designed and regulated so as to enable us to choose to leave the professions, communities and lifestyles that class, geography and tradition had assigned to us, a choice that must exist for us to speak of a self-authored life. In turn, the fact that we are free to leave makes the choice of those who stay also more meaningful, and those who stay, thanks to enhanced opportunities for exit, may be seen as becoming more autonomous.

Plurality is the ability of markets to expand the options from which individuals can pick in the authoring of their lives. Markets foster plurality by enabling us to pursue projects of our own choosing and to enlist others in these projects. Furthermore, markets foster plurality by encouraging experimentation: they invite us to find out for ourselves what lives best suit us. Such markets afford us multiple channels to write and

⁵² For more on this distinction, see Dagan, *Markets for Self Authorship*, *supra* note 2, at 582.

⁵³ L. Herzog, *Inventing the Market: Smith, Hegel and Political Theory* (2013).

⁵⁴ *Ibid.*, at 9–10.

⁵⁵ *Ibid.*, at 120.

⁵⁶ *Ibid.*, at 122.

⁵⁷ Dagan, *Markets for Self-Authorship*, *supra* note 2, at 584.

rewrite the stories of our lives through work, consumption, investment and cooperative and socially oriented projects. Indeed, markets do not only offer us solitary pursuits, but typically make our pursuits reliant on the engagement of others. As Dagan notes, this means that markets not only work through exit but also through entry and may be conducive to thin and even thick communities.⁵⁸ As such, market-enabled plurality not only emancipates but also includes. This last point is worth stressing because the vision of market emancipation that I am trying to sketch does not rely on – it actually rejects – extreme forms of individualism.

Of course, we can foresee obstacles to the realization of such autonomy-enhancing markets. As Herzog explains, both Hegel and Smith were aware of the risk that commercial society would push individuals to pursue ‘inauthentic’ desires – in particular, by falling victim to a narrow-minded pursuit of profit so as to finance mindless consumerism.⁵⁹ Both thinkers, however, were optimistic about the ultimate ability of commercial society to overcome this problem; indeed, because a profit-driven life is only one of the many lives that markets make available. As Herzog explains, ‘one of the reasons why they [Smith and Hegel] endorse commercial society is that it makes possible a wide range of different ways of life and the pursuit of different values – the kind of variety and plurality Mill cherishes’.⁶⁰ This plurality would be conducive to lives dedicated to the arts, politics and cooperative and altruistic enterprises of various sorts, among others, and lives in which even purely commercial pursuits are imbued with relational, communitarian and also political ideals. More and more, the choices that markets enable are not limited to our productive or consuming lives: what was implicit in the classical writings summoned above, which is made explicit in today’s mass consumer and digital society, is that markets are also spaces to define, redefine and negotiate identities and lifestyles, irrespective of backgrounds and starting points.⁶¹ Markets multiply our ways of being producers and/or consumers, distributors and, growingly through the possibilities of the digital world, content creators, authors and the like.

One other obstacle to the realization of autonomy-enhancing markets – one that cannot adequately be addressed here but must be mentioned – is the tendency of existing market arrangements to increase inequality.⁶² By way of their distributive consequences, markets may undermine the very autonomy they promise because the inequalities they produce are so large and pervasive as to make meaningful economic participation the prerogative of the few rather than the many.⁶³ Most states committed to autonomy-enhancing markets respond to this problem through redistributive corrections in the form of tax and transfer regimes, which are at the basis of the

⁵⁸ *Ibid.*, at 586.

⁵⁹ Herzog, *supra* note 53, at 122, 125.

⁶⁰ *Ibid.*, at 130.

⁶¹ See A. Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age* (1991).

⁶² For a discussion of the mechanisms, see Dagan *et al.*, ‘The Law of the Market’, 83 *LCP* (2020) i, at xiv.

⁶³ Herzog, *supra* note 53, at 120 (as acknowledged by most contemporary political theorists, any market freedom would require some form of redistribution to be meaningful at all).

contemporary welfare state. Moreover, as recent scholarship shows, distributive concerns may be addressed not only through *ex post* corrections but also through the design of more inclusive and fair private law regimes.⁶⁴ Redesigned market institutions could produce a more even initial distribution of resources, thus making us better able to take advantage of the opportunities for self-authorship that markets have to offer and able to do so on a more equal footing. Critics of neo-liberalism rightly draw our attention to the erosion of the redistributive and welfare state as well as the entrenching of private law regimes that increase inequalities to the benefit of big business and the very rich. As clarified, my focus on anti-pluralism does not wish to detract from such concerns but, mostly, to complement them.

Finally, another set of obstacles to market-induced autonomy is captured by the term ‘commodification’. Critics of commodification warn that certain goods that are important for leading autonomous lives may be corrupted by their commercialization.⁶⁵ This concern stems from the observation that market mechanisms continue to expand beyond the economy: from production, distribution and consumption, where they would belong, to spheres of life supposedly previously governed by less calculative logics such as education, health care, romantic relations, friendships and the arts. Debates on commodification point to pressing questions concerning the appropriate limits of the market, which are clearly beyond the scope of this article. The market vision that I defend here, however, may appease the more radical concerns about commodification: if it is true that there is not one, but, rather, multiple, market logics, then different market arrangements can be designed for the different goods transacted, including arrangements that entail a limited degree of commodification.⁶⁶

As already suggested, and as confirmed by the foregoing discussion on obstacles to autonomy, markets that are conducive to mobility, plurality and experimentation – emancipatory markets – are not the product of any innate human inclination to production or transaction – Smith’s predisposition ‘to truck, barter and exchange’.⁶⁷ Rather, they are the product of particular social and legal arrangements and, specifically, of a liberal law of the market that would foster the above mobility, plurality and experimentation. While the precise contours of what such a law of the market would look like are outside of the scope of this article, I want to stress one element that is important to my argument.

Any liberal law of the market must support and help reproduce robust choice about how to participate in markets as producers, consumers and beyond. Emancipatory markets require pluralism of the social and economic arrangements structuring them: institutions that foster what Dagan and Heller call intra-sphere multiplicity – the idea

⁶⁴ Pistor, *supra* note 49.

⁶⁵ See, e.g., Anderson, ‘The Moral Limitations of Markets’, 6 *Economics and Philosophy* (1990) 179. These arguments typically start from the assumption that different spheres possess different and irreconcilable normative logics. See M. Walzer, *Spheres of Justice* (1983). See more broadly M.J. Sandel, *What Money Can’t Buy: The Moral Limits of the Market* (2012).

⁶⁶ See M.J. Radin, *Imperfect Commodification* (2001) (‘imperfect commodification’ seeks to defend some space for markets over contested commodities but under carefully regulated regimes).

⁶⁷ A. Smith, *The Wealth of Nations* (1776), book 1, ch. 2, at 17.

that in each sphere where markets and contract have a bearing (for example, work, consumption, housing, business, investment as well as the family) we need to be able to choose from among different arrangements, different modes of engaging others in our own pursuits, where in keeping with pluralism each arrangement will imbue different assemblages of values.⁶⁸ Intra-sphere multiplicity requires institutional pluralism: not only enough types of property and contract but also, I would add, standards of product and process so as to allow for participation in every sphere of economic life in adherence to a plurality of preferences and values.

The resulting plurality of the forms of economic participation is not in the exclusive interest of those who already subscribe to minoritarian forms. It also increases the autonomy of those who comfortably partake in the majoritarian arrangements because in the discovery of diversity we may decide to try something new, change the path and rewrite our life story.⁶⁹ Moreover, when confronted with a plurality of options, we may also decide that our habitual ways of life are worth sticking to and even worth defending from change. These observations speak to the intuition that we may not be able to imagine alternative ways of life or value the ones we already have until diversity is exposed. Institutional pluralism serves to remove those obstacles to economic participation that are 'rooted in the limits of the individual imagination'.⁷⁰ Alongside a welfare state, and socio-economic rights that contribute to removing material obstacles to economic participation, institutional pluralism is essential to a liberal law of the market.

Rearguard regulation poses a particularly insidious challenge to emancipatory markets, precisely because it denies institutional pluralism. In keeping with the rear-guard logic, there is one right way of producing, consuming and distributing in each economic sector. Intra-sphere multiplicity commands instead that many different ways be offered to citizens. This does not mean that choice should never be curtailed. As acknowledged by the very scholarship I draw upon, the imperatives of intra-sphere multiplicity are not absolute: multiplicity is in the interest of autonomy so that it should be possible to curtail it every time it seriously risks undermining autonomy.⁷¹ This would imply that standardization and hard-core regulation of process and product standards should not be out of the question when such instruments are to serve autonomy and emancipation. This could be the case in the face of behavioural, political economy or cultural constraints that would, short of regulation, significantly curtail the ability of individuals to participate in markets in ways that enhance their opportunities for self-authorship.⁷²

All in all, the literature surveyed above offers a vision of emancipatory markets that is based on a thick notion of autonomy – autonomy as self-authorship. In the

⁶⁸ Dagan and Heller, *supra* note 2, at 69, 97.

⁶⁹ This resonates with Hannah Arendt's notion of freedom as 'new beginnings' and the ability to do the unexpected. Cf. H. Arendt, *The Human Condition* (1998).

⁷⁰ Dagan and Heller, *supra* note 2, at 67.

⁷¹ *Ibid.*, at 127.

⁷² *Ibid.*, at 127–134.

remainder of this section, I want to suggest that such liberal or emancipatory markets – markets that are designed to foster plurality, mobility and experimentation in the interest of emancipation and inclusion – may also contribute to democracy. First of all, a liberal law of the market along the lines sketched above would contribute to democracy's emancipatory *telos*, which is grounded in democracy's equal respect for individual rights to self-determination. Second, markets that are designed to be inclusive and emancipatory would contribute to the diffusion of a level of material progress large enough to liberate people from immediate needs, which in turn may allow for fuller forms of democratic participation.⁷³ Lastly, the plurality of the ways of organizing markets and participating in them I here defend would contribute to democracy by way of its conduciveness to conflict, reflection and deliberation over the best ways of organizing markets, their appropriate limits and, more broadly, what markets are good for. This last observation resonates with what has been described in the scholarship as a vision of 'democratic markets', which are democratic insofar as they are designed to favour contestation over who exercises authority in market relations as well as in market design more broadly.⁷⁴

The striving for emancipatory and democratic markets, through iterative destabilization and adjustment of the institutions that support them, can be conceived as a project of market democratization. According to such vision of market democratization, markets are constantly redesigned to be more conducive to autonomy and self-growth, through institutions that unlock more rather than less of the emancipatory potential many liberal thinkers have ascribed to them.⁷⁵ As I further articulate in the next section, democratizing markets requires opening up existing market institutions and habitual forms of economic participation to contestation and experimentation. This process points to what Mangabeira Unger has called vanguardism, an outlook that fosters constant innovation through the destabilization of solidified habit, practice and hierarchies – the opposite of what rearguard economic regulation seeks to do. Such an outlook ultimately points to what Unger defines as a 'practice of repeated and cumulative institutional reconstruction', which he sees as the only viable alternative to either conservative resignation to the *status quo* or revolution.⁷⁶

In this section, I have shown that markets are one social sphere in which democracy can be realized and, by implication, in which democracy can backslide. This idea may seem intangible if we understand democracy only as a set of procedures to organize collective decision-making on an egalitarian basis. But it may become clearer if democracy is understood as having in-built liberal and pluralist constraints and, even more so, if it is understood as a substantive project of reconciliation of individual freedom, material prosperity and egalitarian outcomes in society. Such a vision of democracy

⁷³ This resonates with Rawls' notion of 'property owning democracy'. J. Rawls, *Justice as Fairness: A Restatement* (2001).

⁷⁴ Dagan *et al.*, *supra* note 62, at xiv; see also Kreitner, 'Voicing the Market: Extending the Ambition of Contract Theory', 69 *University of Toronto Law Journal* (2019) 295.

⁷⁵ See the discussion in Herzog, *supra* note 53, at 160ff.

⁷⁶ Unger, *supra* note 1, at 74.

not only draws explicitly from the work of Unger, but it also resonates with recurring projects that in different contexts have sought to democratize the economy and society ahead of political institutions.⁷⁷ In North America, such impetus has imbued visions of a commercial society of autonomous and yet cooperative individuals such as imagined by Thomas Paine⁷⁸ and described by Alexis de Tocqueville;⁷⁹ it also resonates in the pragmatism of John Dewey,⁸⁰ which inspires contemporary thinking on democratic experimentalism,⁸¹ including Unger's. In Europe, and especially in Germany, various progressive projects of the last century, including labour law, developed under the explicit heading of the democratization of the economy.⁸²

The market is the sphere within which most hopes and fears over the possibility of democratization of society concentrate. Markets disrupt, destabilize and create inequalities, which may prevent democratic participation. Markets empower, diversify, make us autonomous and allow for values to be negotiated and discovered as well as identities to be formed and reformed, features that point to more mature and fuller forms of democratic participation. As the next section argues, both structural and substantive features of EU economic law may contribute to the project of market democratization.

4 EU Economic Law Can Be Market Democratizing

The previous section has defended the contribution that liberal or democratizing markets – be it as a reality or as an aspiration – make to democracy. Such markets confront individuals with different options for shaping their productive and consumption identities. For example, they enable us to make a living through various types of work, through business ownership or through the new hybrid modes of generating income offered by the digital economy (such as participation on platforms that allow, for instance, to create and monetize content, resell consumer goods or rent out parts of our homes); to be consumers of foreign, unusual products, locally produced and traditional ones or both; to be business owners who innovate and experiment or who pride themselves on their traditional craft and custom or both; and, more generally, to organize our private and social lives according to many different models. This is a sketch of the pluralism of the forms of economic and social participation that I have celebrated in this article.

⁷⁷ *Ibid.*; see also R.M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (2nd edn, 2004) (defining an 'empowered democracy').

⁷⁸ T. Paine, *Common Sense* (1776) (developing a *doux commerce* argument). On Paine's contribution to democracy as 'a commercial republic of free individuals', see J. Miller, *Can Democracy Work?* (2018).

⁷⁹ A. de Tocqueville, *Democracy in America* (1835–1840).

⁸⁰ J. Dewey, *The Public and Its Problems* (1927).

⁸¹ Dorf and Sabel, 'A Constitution of Democratic Experimentalism', 98 *Columbia Law Review* (1998) 267.

⁸² H. Sinzheimer, *Ein Arbeitstarifgesetz. Die Idee der sozialen Selbstbestimmung im Recht* (1916). See Teubner, 'Transnational Economic Constitutionalism in the Varieties of Capitalism', 1 *Italian Law Journal* (2015) 219 (emphasizing Sinzheimer's contribution to the collective labour contract as an element of economic democracy in the Weimar constitution).

This section argues that both substantive and institutional features of the law of EU integration make such law able to contribute to the kind of pluralism described above and, ultimately, to the project of market democratization. My argument here is conceptual rather than empirical, meaning that I seek to provide a new understanding of generally agreed upon features of the structure and process of EU law. To do so, I rely on evidence concerning the effects of EU law in national societies as it emerges in both the case law and the scholarship. My analysis in this section of the article contributes to debates about the democratic nature of EU law and positions itself against an influential critique of EU law as harming democracy in the member states.⁸³ By conceptualizing EU economic law as market democratizing, however, I do not wish to advance the claim that EU market integration is a self-sufficient project, nor do I wish to deny that EU economic law comes with costs and that it may be disempowering in specific areas. My re-conceptualization points at a normative possibility, perhaps a promise, which exists within EU law. Whether such a promise is realized is a historical and empirical question that remains beyond the scope of this article.

As the evidence and debates presented in this section will reveal, a tension between rearguard and vanguard, particularism and pluralism, is not a unique feature of the present backlash era but, rather, a longer-term and arguably pervasive dynamic in the relationship between the member states and the EU. EU integration and its law have often advanced through litigation over rules that may fit my definition of rearguard. Indeed, while rearguard economic regulation points to a new phenomenon in the present backlash era, the regulatory techniques that it employs are not new. As shown by the kind of cases that end up before the CJEU, product regulation, selling arrangements, licensing schemes and the regulation of professions are pervasive in the member states.⁸⁴

Many of these rules probably originated in corporatist arrangements – the law of professional organizations and guilds – as embodied in both public and private regulation. As such, these rules can be understood as remnants of pre-modern law, something that resonates with what Weberian accounts define as substantive law, in contrast with the formal law of liberal private law codifications.⁸⁵ In the post-war, such rules have come to coexist and interact with the new legal orientation of the welfare state,⁸⁶ what in German legal scholarship has been referred to as ‘rematerialized law’, a term that sought to capture the challenges that instrumental legal intervention may pose to abstract and general rules that protect individuality.⁸⁷ The pervasiveness

⁸³ See Somek, *supra* note 3; Wilkinson, *supra* note 3.

⁸⁴ E.g. Case C-120/78, *Rewe-Zentral (Cassis de Dijon)* (EU:C:1979:42); Case C-178/84, *Commission v. Germany (German Beer case)* (EU:C:1987:126). See also Case C-145/88, *Trofaen* (EU:C:1989:27); Joined Cases C-267/91 and C-268/91, *Criminal Proceedings against Bernard Keck and Daniel Mithouard (Keck)* (EU:C:1993:905).

⁸⁵ Teubner, ‘Substantive and Reflexive Elements in Modern Law’, 17 *Law and Society Review (LSR)* (1983) 239, at 244 (substantive rationality characterized the purposive, goal-oriented law existing before the legal codification of the late 18th century; formal rationality characterized the law of the 19th and much of the 20th century, general and abstract, disinterested in outcomes and procedurally fair).

⁸⁶ H. Micklitz, *The Politics of Justice in European Private Law* (2018).

⁸⁷ Teubner, *supra* note 85, at 240.

of such forms of regulation severely obstructed national markets, which, as a consequence, were likely to be very distant from the ideal of institutional pluralism defended in the last section of this article. National constitutions, through judicial review systems protecting individual rights, provided a check on the essentialist and exclusionary tendencies to which national regulation is prone, but domestic constitutional discipline was not enough to deal with the integrative pressures of growingly diversified societies.⁸⁸

Either by accident or design, the law of EU integration has offered an infrastructure to deal with these pressures, which has resulted in a transformative process of national markets and societies. As I show, the law of EU integration can discipline the inward-looking and rearguard tendencies of national regulation, while forcing member states to articulate their interventions in ways that are more outward looking and progressive – even perhaps vanguardist – in a synthesis that may resolve the conflict described above between formal and substantive law.⁸⁹ Hence, while the law of EU integration has often been understood as narrowly deregulatory and, ultimately, as a driver of homogenization of national markets and societies, I argue that its impact on national and local markets is best understood as a process of pluralization, which is an essential component of the project of market democratization.

EU economic law may be particularly well placed to take on this pluralizing role because it is conducive to contestation of traditional market arrangements, deliberation over the objectives pursued and instruments employed by these arrangements as well as experimentation of innovative and hybrid market solutions.⁹⁰ Indeed, the law of EU integration destabilizes habitual ways of organizing markets at the local level, which forces member states in internal market cases, as well as firms in competition law cases, to articulate why their favoured market arrangements are valuable or worth defending. Furthermore, the member states typically need to avoid reference to both cultural and protectionist (purely economic) reasons and to show that their rules are compatible with the pluralist constraints that govern a supranational polity built upon the elimination of discrimination based on nationality such as the EU, which means showing that the national rules are non-discriminatory and proportionate or at least showing a willingness to make them so.

⁸⁸ See C. Thornhill, *A Sociology of Constitutions* (2011) (interpreting constitutionalization and human rights supranationalism as responses to the integrative pressures coming from within national societies). This resonates with Ely's theory of judicial review. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1982).

⁸⁹ See Wiethölter, 'Materialization and Proceduralization in Modern Law', in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (1986) 221 (envisioning proceduralization as resolving the conflict between formality and materialization). Cf. Kennedy, 'Comment on Rudolf Wiethölter's "Materialization and Proceduralization in Modern Law"', and "Proceduralization of the Category of Law", 12 *GLJ* (1985; reprinted 2011) 474.

⁹⁰ Emphasizing the experimentalist character of EU law and governance, see the contributions in C.F. Sabel and J. Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (2010); see also Y. Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (2020).

The above features of EU law adjudication offer opportunities to rearticulate both the objectives and the instruments of national and local market rules. In such rearticulations, the actual or original reasons motivating each regulation may have little bearing, as member states are encouraged to look for more broadly agreed upon, progressive and inclusive justifications for their regulation. Consider, by way of illustration, the German beer purity law case.⁹¹ The European Commission targeted a German law allowing the marketing of beers produced only according to one traditional recipe. Germany tried to justify its rule by reference to consumer protection and health rather than to more plausible cultural reasons.⁹² Some scholars have attributed the choice of avoiding cultural arguments to the strictures of internal market adjudication, which they consequently interpret as leading to inauthentic deliberations by obscuring the real motivations of national regulation.⁹³ But such strictures can also be read as encouraging the member states to redefine the goals of regulation in ways that make these goals acceptable to a wider audience. From this perspective, EU law adjudication may culminate in minimizing the exclusionary, protectionist and rear-guard effects of national regulation, a point to which I return later in this article.

More broadly, the destabilizations of local market arrangements that EU law triggers become moments of reflection on whether the existing arrangements are still worth defending in the face of transforming economic realities, such as those driven by changing consumer and business behaviour, globalization and technological change.⁹⁴ Different publics in the member states become aware that the economic arrangements that national regulation entrenches exclude some categories of consumers or producers. These categories are typically already present and active in the national economy, but their interests and identities are obscured by national regulation – they exist as native or local outsiders. New awareness concerning their interests and identities may lead to the integration of these local outsiders, through reform or the termination of the arrangements that excluded them.

The processes sketched above can be conceptualized as contributing to market democratization on two levels. First, and most importantly for my argument, I can point to a substantive process of market democratization: markets are democratized substantively as a result of the enforcement of EU economic law, which fosters more diverse market institutions, able to emancipate and include a greater array of market participants. Second, democratization extends to the decision-making processes through which markets are designed, thanks to institutions that favour contestation of existing arrangements and deliberation over their desirability, in conversations that feature input from EU institutions, national and local authorities, as well as the representatives of business and consumers. The two dimensions are strictly related:

⁹¹ *German Beer case*, *supra* note 84.

⁹² On this point, see Davies, 'Internal Market Adjudication and the Quality of Life in Europe', 21 *Columbia Journal of European Law (CJEL)* (2014–2015) 289.

⁹³ *Ibid.*

⁹⁴ On this point, see Svetiev and Tagiuri, 'The Opportunities and Dislocations of Technological Change: EU Law as a Coping Mechanism', 24 *CJEL* (2018) 612.

democratizing the design of markets results in more democratic market relations and structures. Both dimensions in turn contribute to the process of societal democratization described in the previous section. In the remainder of the article, I first develop the claim that the law of EU integration fosters the pluralism of our forms of economic participation and then focus on the deliberative and open-ended character of EU law adjudication.

A The Pluralist Outlook of EU Economic Law

As I argue in this sub-section, EU law may steer markets towards more robust institutional pluralism. Such a possibility is to be attributed to the market-opening outlook of supranational economic law *à la* the EU that engenders the recognition and possible accommodation of the many different forms of economic participation existing in each national society. To visualize how EU law may be conducive to such plurality, key features of the law of EU integration are worth recalling as well as debates concerning their interpretation and effect.

The Treaty of Rome envisioned the construction of a European common market where goods, workers, services and capital could circulate freely across national borders.⁹⁵ This common market was to be created through four constitutional-level prohibitions outlawing national measures that may hamper intra-community trade as well as through competition law provisions that prevent private firms from creating obstacles analogous to those created by state action. The judge-made principles of supremacy⁹⁶ and direct effects⁹⁷ made free movement provisions hierarchically superior to national law and directly applicable by national judges without need for implementation. These features have rendered EU law meaningfully supranational and, thus, actionable by private actors (companies, consumers, workers) against national rules and market arrangements that infringe upon their free movement rights. In the EU's decentralized system of enforcement, national judges are primarily competent to resolve such challenges, while the preliminary reference procedure (Article 267 of the Treaty on the Functioning of the European Union [TFEU]) enables the CJEU to answer questions about the interpretation of EU law that national judges may raise.⁹⁸ This mechanism is conceived to guard the coherence of the EU legal system. In turn, it allows for the framing of local controversies as EU law problems and gives these controversies visibility across the Union.

The model of market integration here described has come to be known as 'integration through law'.⁹⁹ Such integration is seen as chiefly negative because it advances by eliminating regulatory restraints on trade as well as distortions on competition rather than by adding homogeneous rules at the EU level, which is known as positive

⁹⁵ Treaty Establishing the European Economic Community 1957, 298 UNTS 3.

⁹⁶ Case C-6/64, *Flaminio Costa v. ENEL* (EU:C:1964:66).

⁹⁷ Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (EU:C:1963:1).

⁹⁸ Treaty on the Functioning of the European Union (TFEU), OJ 2016 C 202/47.

⁹⁹ M. Cappelletti, M. Seccombe and J.H.H. Weiler, *Integration through Law: Europe and the American Federal Experience, A Political, Legal and Economic Overview* (1986) vol. 1, book 1.

integration. While praised by many as propelling integration in the face of frequent political impasse, the remarkably supranational character of ‘integration through law’ has generated anxieties around the ability of member states to preserve idiosyncratic economic models and societal arrangements.¹⁰⁰ In particular, the idea of negative integration was feared to channel the project of unifying European markets towards a narrowly deregulatory path.¹⁰¹

Some historical developments in the CJEU case law on free movement of goods aggravated such anxieties. Let us recall that the EU Treaties prohibit not only tariffs and quotas but also, through Article 34 of the TFEU, national measures having equivalent effects to quotas. The CJEU has generally interpreted these prohibitions broadly.¹⁰² Most significantly, in *Cassis de Dijon*, the Court established that even non-discriminatory measures – regulations that are ‘indistinctly applicable’ to imports and local products alike – could constitute obstacles to free trade.¹⁰³ The Court subsequently limited the scope of applicability of *Cassis* through its *Keck* decision, establishing that selling arrangements, unlike product rules, would fall outside of the scope of the prohibition of Article 34.¹⁰⁴ But the *Keck* distinction has proven unstable,¹⁰⁵ and the rationale of *Cassis* has continued to provide the EU with an attractive model for market integration. Through both judicial and legislative interventions, the EU has extended the *Cassis* paradigm to other areas of free movement law beyond goods.¹⁰⁶

Cassis has been viewed as materializing an ordo-liberal and then neo-liberal version of the European economic constitution insulating free markets and competition from the interferences of national politics, irrespective of its impact on intra-community trade.¹⁰⁷ According to this view, *Cassis* affirmed a constitutional or economic due-process interpretation of the EU Treaties, and, in so doing, it replaced more conservative international trade law (anti-protectionist) interpretations prevailing in previous

¹⁰⁰ See, among others, Weiler, ‘The Transformation of Europe’, 100 *Yale Law Journal* (1991) 2043.

¹⁰¹ See, e.g., Scharpf, ‘Democratic Policy in Europe’, 2 *ELJ* (1996) 136.

¹⁰² Case C-8/74, *Procureur du Roi v. Dassonville* (EU:C:1974:82).

¹⁰³ *Cassis de Dijon*, *supra* note 84.

¹⁰⁴ *Keck*, *supra* note 84.

¹⁰⁵ Spaventa, ‘Leaving Keck Behind? The Free Movement of Goods after the Rulings in *Commission v. Italy and Mickelsson and Roos*’, 34 *European Law Review* (2009) 914.

¹⁰⁶ See Case C-33/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* (EU:C:1995:411). See Nicolaïdis, ‘Kir Forever? The Journey of a Political Scientist in the Landscape of Mutual Recognition’, in M. Maduro and L. Azoulai (eds), *Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010) 447.

¹⁰⁷ Ordo-liberalism and neo-liberalism share an aspiration to shield economic freedoms and competition from political interference and democratic politics. The two concepts, however, have very different histories and conceptual scopes. On ordo-liberalism, see F. Böhm, ‘Privatrechtsgesellschaft und Marktwirtschaft’, 17 *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* (1966) 75; see also E.J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* (2004) (presenting a vision of the European economic constitution based on ordo-liberal principles). For a discussion of the genealogy of these concepts and their role in defining the transnational economic constitution, see Teubner, *supra* note 82, at 220 (identifying a competition between an ordo-liberal ‘decentralized, middle class influenced, competitive market under State supervision’ and a model of economic democracy based on social-democratic principles).

phases of integration.¹⁰⁸ Specific concerns targeted the mechanism through which *Cassis* effectuated market integration – namely, the principle of mutual recognition, pursuant to which goods that have been lawfully marketed in one member state should be admitted into any other member state without restrictions. Mutual recognition was feared to make negative integration self-sufficient by allowing the internal market to deepen and widen in the absence of harmonization. Furthermore, while it appeared respectful of national diversity, it was feared that mutual recognition would become one more driver of homogenization by triggering a deregulatory race to the bottom among the member states.¹⁰⁹

More recently, in line with a critical turn emerging in EU legal studies,¹¹⁰ *Cassis* has become the object of further critical scrutiny as the symbol of an over-extended and over-constitutionalized EU law that would harm national systems of social protection,¹¹¹ quality of life in the member states¹¹² as well as, more broadly, social and institutional diversity.¹¹³ The critique has extended to the principle of direct effect and the overall structure of the law of integration insofar as it allows individuals to challenge the democratically legitimated law of their own national polities.¹¹⁴ From this point of view, the democratic deficit originally diagnosed for the EU as a whole would be imported into national societies through the strictures of the internal market. As a way to preserve diversity in the Union, as well as rescue democracy, a scaling back of the EU integration project has seemed necessary to many, together with a stricter and clearer division of competences between the member states and the Union.¹¹⁵

The scope of the present contribution does not allow for an exhaustive discussion of the conceptual possibilities entailed in *Cassis*, let alone its empirical effects on national markets. Still, I would like to sketch one conceptualization for the law of EU integration after *Cassis* that allows for the interpretation of it as democratizing. As I argue, negative, which is deregulatory, is not a satisfactory descriptor for the model of integration that *Cassis* established. A more accurate understanding of this model describes it as pluralizing: pluralizing the market arrangements and modes of market participation that are available in each national society. Such pluralization is at the core of my vision of market democratization, a vision that is in sharp contrast with the above characterization of *Cassis* as constitutionalizing neo-liberal market discipline in

¹⁰⁸ For a discussion of competing interpretations for this shift, see M. Poiares Maduro, *We the Court* (1998), at 2; see also R. Schütze, *From International to Federal Market: The Changing Structure of European Law* (2017) (conceptualizing a shift from an international to a federal model of market integration).

¹⁰⁹ See Barnard and Deakin, *Market Access and Regulatory Competition*, Jean Monnet Program Papers (2002), available at www.jeanmonnetprogram.org/archive/papers/01/012701.html.

¹¹⁰ 'The Critical Turn in EU Legal Studies', Editorial Comments, 52 *CMLR* (2015) 881.

¹¹¹ Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"', 8 *Socio-Economic Review* (2010) 211.

¹¹² Davies, *supra* note 92.

¹¹³ E.g. Somek, 'Europe: Political, Not Cosmopolitan', 20 *ELJ* (2014) 142; Chalmers, 'The Unconfined Power of European Union Law', 1 *European Papers* (2016) 405.

¹¹⁴ Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy', 12 *IJCL* (2014) 94.

¹¹⁵ E.g. Somek, *supra* note 113; see also G. Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (2014).

the member states. If this view of EU law constitutionalizes anything, it is openness and deliberation in the resolution of conflict between different forms of economic organization and social participation. This is something that resonates with Gunther Teubner's vision of the transnational economic constitution as a 'constitution of collisions between different production regimes in the varieties of capitalism'.¹¹⁶

Let me clarify that the pluralization that I envision is not only a product of the exercise of free movement rights in the form of exit. The option of leaving one member state to settle where prevailing conceptions of the good or ways of life better align with our own is an important way in which EU law multiplies our options for participating in the economy, but it is not all there is to EU law-induced pluralization.¹¹⁷ The role that I emphasize for EU law is one in which previously excluded categories might gain opportunities for meaningful participation inside their own nation states; local outsiders could see their voices enhanced, not just their exit options.¹¹⁸ As such, pluralization is a transformative process of national markets and societies, which encourages hybridization rather than specialization and path dependence. This process of pluralization is arguably also a process of de-essentialization as it comes to question dominant or official narratives about how national or local majorities live their lives, an outlook that seems particularly apt to counter the essentialist strategies of contemporary populism.

The possibility of such a pluralization derives from the fact that EU integration proceeds through constant destabilizations of habitual modes of organizing markets and participating in them at the local level, typically through the challenges of actors that adopt alternative or innovative models of economic participation. Local modes of organizing markets can be framed as obstacles to free movement and thus become objects of scrutiny and deliberation through comparison with other existing models and arrangements. Member states will need to provide objective reasons for the entrenchment of such economic arrangements, reasons that are typically accepted only when considered to be rational, salient and tailored enough to justify the application of such local market rules and regulations also to foreign business and their products. As I further discuss in the next sub-section, these destabilizations do not always result in a demise of the local rules, but they may allow for their rearticulation in ways that make them more inclusive.

Directly contributing to pluralization is also the much-maligned principle of mutual recognition. Mutual recognition opens up the local economy to products differently made or to service providers differently qualified, and yet it does not require member states to stop applying their preferred regulation to national producers, nor does it require local firms and consumers to give up their favoured productive or distributive arrangements. Consider again the German beer case. Despite a ruling clearly allowing foreign beers to escape the local purity laws, Germany chose to continue applying the

¹¹⁶ Teubner, *supra* note 82, at 221.

¹¹⁷ See F. de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law', 50 *CMLR* (2013) 1545.

¹¹⁸ This resonates with Hans Micklitz's notion of access justice. Micklitz, *supra* note 86.

law to its local beers. Hence, mutual recognition diversifies, but it does not destroy the specificity of local production and consumption patterns when such patterns are participated in and salient enough to command loyalty in the face of competition.

The above observations are in line with scholarship that explicitly links supranational law to democracy. As argued by Christian Joerges and Jürgen Neyer, for example, supranational institutions are there to ‘tame the failures of the nation state’ insofar as it does not take into account ‘foreign identities and their interests’.¹¹⁹ On this view, democratic constitutionalism in its purely national dimension is unable to internalize the effects that national law and policy produce on the interests of foreigners.¹²⁰ But, as has been noted, national law repeatedly fails to take into account local identities and interests as well, typically, as I aim to show, those of innovators, outsiders or minorities.¹²¹ As a consequence, supranational law is shown to be a powerful corrector also of purely domestic failures of democracy.

Indeed, as exposed by the case law of the CJEU and, specifically, by preliminary references, EU law destabilizations are often activated by nationals, not foreigners, and more specifically by individuals or firms who are excluded from the dominant economic or social arrangements entrenched by state regulation. Among these individuals and firms, one is likely to find importers trying to escape national rules imposing an additional (dual) burden on their businesses, such as in the famous *Dassonville* and *Cassis* cases,¹²² as well as consumers that, after having purchased goods abroad, were burdened by their own national regulation when trying to use the foreign goods at home.¹²³ We would also find innovators turned transgressors and local firms experimenting with new business models and practices often prohibited by the national regulation. Such is the case of the Sunday trading saga that was activated by British gardening and do-it-yourself stores trying to tap into growing consumer demand for Sunday shopping.¹²⁴ As illustrated by various other cases, set to benefit are not only

¹¹⁹ See Joerges and Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology’, 3 *ELJ* (2002) 273, at 294.

¹²⁰ J. Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (2012), at 68 (subscribing to an idea of democracy for which ‘citizens who are affected by a regulation should also be those who decide on its content’); see also Neyer, ‘Justice, Not Democracy: Legitimacy in the European Union’, 48 *JCMS* (2010) 903. Cf. Somek, ‘The Darling Dogma of Bourgeois Europeanist’, 20 *ELJ* (2014) 688; Somek and Wilkinson, ‘Unpopular Sovereignty?’, 83 *Modern Law Review* (2020) 955 (criticizing the all-interests-affected principle).

¹²¹ This point was made by Poiães Maduro, *supra* note 108. More recently, see Nauvonen, *supra* note 3, at 876 (critiquing the standard democratic critique of EU law for not problematizing enough the distinction between insiders and outsiders). For Neuvonen, the focus on democratic externalities ‘leaves unaddressed the question of negative democratic internalities – that is, of harm caused by factual, even if not formal, disenfranchisement within bounded national democracies’. See also de Witte, *supra* note 4, at 266 (EU integration as emancipatory against oppression ‘in the name of ethnos’).

¹²² For example, both *Dassonville*, *supra* note 102, and *Cassis de Dijon*, *supra* note 84, were activated by importers.

¹²³ Case C-50/85, *Schloh v Auto Controle Technique* (EU:C:1986:244).

¹²⁴ See H. Micklitz, *The Politics of Judicial Cooperation in the EU* (2009), at 44 (‘even though the local authorities won the Euro-law battle, the use of Article 28 (ex Article 30) had long-term effects which were finally determinative of the Sunday traders’ victory in the overall war’). A similar structure also appears in preliminary references concerning fixed book price laws that were challenged by supermarket chains and other local discounters. See, e.g., Case C-229/83, *Leclerc v. Au blé vert* (EU:C:1985:1).

large businesses but also small-scale innovators.¹²⁵ More generally, EU law supports the claims of citizens with minoritarian lifestyles and preferences, such as consumers of newly emerging products and/or services provided through innovative business models¹²⁶ and, potentially, even citizens with utopian aspirations trying to negotiate the contours of, and carve space for, their alternative lifestyles within national societies.

As the above cases illustrate, the destabilizations that EU law enables reveal the diversity of economic arrangements existing within the Union. But, more fundamentally, they reveal the diversity of the forms of economic participation already existing within each national society, a diversity often concealed by state attempts to entrench majoritarian arrangements such as through rearguard regulation. From this perspective, even contestations that are resolved in favour of the member states (think of the Sunday trading cases) may contribute to pluralization because they reveal how society is changing or diversifying as well as because they activate processes that may lead to reforming or abandoning certain arrangements even short of enforced deregulation.

A powerful objection against the largely benign picture of EU law that I have here painted points to the fact that local outsiders are able to frame their interests as EU free movement rights only when these interests align with those of multinational business and help effectuate seamless transnational markets.¹²⁷ This view suggests that those groups to benefit from the destabilizations that EU law enables would be powerful outsiders rather than marginalized ones: large-scale innovators, disruptors, tech-savvy consumers – the transnational few rather than the local many.¹²⁸ Furthermore, as critics may note, the framing of a question as a problem of EU law requires sizable material and intellectual resources, which again may favour business interests over diffused ones. These objections voice valid concerns. But, while the scholarship has documented the large political influence of big business in shaping the integration process,¹²⁹ there does not seem to be conclusive empirical or historical evidence that EU-induced pluralization has benefited big business disproportionately. To the contrary, the case law, as well as various socio-legal investigations, reveals stories in which EU law aligns with, and supports the interests of, vulnerable market players as well as diffused interests.

One powerful such story emerges in the *Aziz* case, wherein mortgage owners in post-austerity Spain are able to rely on EU law to resist the foreclosure claims of local

¹²⁵ Case C-254/98, *Schutzverband gegen unlauteren Wettbewerb v. TJ-Heimdienst Sass GmbH* (EU:C:2000:12) (concerning an Austrian rule limiting sales on rounds at home, challenged by an Austrian grocery retailer that had organized a system of home delivery of frozen food).

¹²⁶ See *Airbnb Ireland*, *supra* note 16.

¹²⁷ E.g. Bartl, *supra* note 48.

¹²⁸ This resonates with Somek's, *supra* note 113, evocative description of 'accidental cosmopolitans'. See also G. Davies, 'How Citizenship Divides: The New Legal Class of Transnational Europeans', 4 *European Papers* (2019) 675. Cf. Azoulay, 'Dialogues – On Dubious Parallels: The Transnational Europeans and the Jews. A Note on Gareth Davies' Article', 5 *European Papers* (2020) 279.

¹²⁹ E.g. S. Laurens, *Lobbyists and Bureaucrats in Brussels: Capitalism's Brokers* (2018).

banks, claims that were being facilitated by the Spanish national law.¹³⁰ Take also the Port of Genoa case,¹³¹ as reconstructed by Tommaso Pavone.¹³² The decision in question liberalized port-unloading services in the Italian port city, services previously reserved by law for the local dockworkers' union. The outcome in this case is shown to have relied not so much on the mobilization of big business as on EU-minded lawyers capable of assembling the support of a diversity of local actors, including a general population growingly dissatisfied with the existing arrangements. One of the most egregious instances of EU law-induced liberalization can be read not as a victory of capital over labour but, rather, as ending 'the arrogance of a monopoly endangering the public good'.¹³³

Another set of more radical objections would turn down the emancipatory offer of EU free movement rights *tout court* because of the purely private nature of such rights.¹³⁴ Since they are assigned based on specific economic identities, free movement rights are seen as permanently being out of reach for some vulnerable categories – for example, economically inactive individuals who are unable or unwilling to work – a concern that seems to be confirmed by certain decisions of the Court on the free movement of persons.¹³⁵ But, more fundamentally in the eyes of their critics, the private nature of EU free movement rights makes them apolitical and, thus, unable to meaningfully enhance democracy.¹³⁶ While it is not possible to adequately address or describe these critiques within the scope of this article, I would like to agree with Päivi Neuvonen in the observation that to deny the emancipatory potential of rights in the name of their private nature is to rely on a growingly untenable distinction between the public and the private.¹³⁷ As the vision of emancipatory markets that I have presented in this article suggests, markets are not only spheres of private self-expression. The project of market democratization is also precisely about ensuring that markets stay politicized so as to accommodate a multiplicity of forms of participation, including forms that do not rely on a narrow definition of productive capacities – for example, cooperative and solidaristic ventures, radical and utopian forms of consumerism or creative and artistic pursuits.

¹³⁰ Case C-415/11, *Aziz v. Catalunyacaixa* (EU:C:2013:164); see also Case C-618/10, *Banco Espanol de Credito v. Joaquin Calderon Camino* (EU:C:2012:349) (in these cases, the home owners/borrowers are protected by Council Directive (EEC) 93/13 on unfair terms in consumer contracts, OJ 1993 L 95, 21.4.1993, p. 29–34. See Svetiev, 'The EU's Private Law in the Regulated Sectors', 22 *ELJ* (2016) 659, at 669.

¹³¹ Case C-179/90, *Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA* (EU:C:1991:464).

¹³² Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa', 53 *LSR* (2019) 851.

¹³³ *Ibid.*, at 877.

¹³⁴ As observed by Neuvonen, *supra* note 3, at 871, the key contention of the democratic critique of EU law is that 'the promise of individual empowerment through transnational rights and freedoms is a poor replacement for political emancipation'. She attributes this critique mostly to Alexander Somek. See, e.g., Somek, *supra* note 120.

¹³⁵ E.g. Case C-333/13, *Elisabeta Danó and Florin Danó v. Jobcenter Leipzig* (EU:C:2014:2358). Note that this is a concern shared by Neuvonen's, *supra* note 3, revised democratic critique of EU citizenship law.

¹³⁶ E.g. Somek, *supra* note 120.

¹³⁷ Neuvonen, *supra* note 3 (questioning the public/private distinction mainly from a feminist perspective).

All in all, as this sub-section has argued, deregulation is better interpreted as pluralization. EU law opens up new opportunities for meaningful economic participation for categories of consumers and producers that national regulation is prone to exclude, including smaller and vulnerable market players. EU law, however, does not wipe out the existing national arrangements altogether: such arrangements become the object of public deliberation and typically survive alongside the new opportunities that EU law creates. By exposing diversity and fostering robustly plural market settings and institutions, EU economic law can emancipate and include more, rather than fewer, market participants, thus contributing to market democratization. As the next sub-section shows, this propensity of EU economic law also depends on the dialogic, deliberative and non-outcome determinative nature of EU law adjudication.

B The Dialogic, Deliberative and Non-Outcome Determinative Character of EU Law Adjudication

This sub-section emphasizes a few more features of the law of EU integration that contribute to the project of market democratization. As already suggested, the contestations and destabilizations that EU law enables are not always decided against the member states. Such destabilizations are open-ended, and their open-endedness is imputable to what I refer to as the dialogic, deliberative and non-outcome determinative characters of EU law. Such characters may be conceptualized as leading to more inclusive and democratic processes of market design.

The ability of EU law adjudication to be responsive to interests beyond a narrow focus on the internal market has been articulated with different accents in the scholarship: some authors have emphasized the socially oriented nature of internal market law;¹³⁸ others, its majoritarian orientation;¹³⁹ others still, most significantly for my argument, the deliberative and experimentalist features of EU law adjudication, including specifically in market governance.¹⁴⁰ Viewed in this way, EU law provides the discursive platforms for deliberation over the best ways to organize markets, through institutions that allow problematizing the conventional justifications offered in defence of national market arrangements and, ultimately, rearticulating these arrangements in ways that may better serve emancipation and inclusion. Such possibilities rely on the input of various actors: firms and consumers of different kinds, local government and EU institutions.

¹³⁸ E.g. Azoulai, 'The ECJ and the Duty to Respect Sensitive National Interests', in M. Dawson, B. de Witte and E. Muir (eds), *Judicial Activism at the European Court of Justice* (2013) 167; Damjanovic, *The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy*, 50 *CMLR* (2013) 1685.

¹³⁹ Poiarés Maduro, *supra* note 108 (majoritarian here means that the Court favours the solution favoured by a majority of member states).

¹⁴⁰ Gerstenberg, 'The Justiciability of Socio-Economic Rights, European Solidarity, and the Role of the Court of Justice of the EU', 33 *Yearbook of European Law* (2004) 245 (referring to the absence of a final decider in judicial review). See more broadly Gerstenberg and Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe', in C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (2002) 289; see also Svetiev, *supra* note 90.

Two features of EU law adjudication support my argument here. The first concerns EU law's decentralized system of enforcement as combined with the nature of the preliminary reference procedure and the use of proportionality analysis. As scholars have noted, this combination makes the decisions of the CJEU 'non-outcome-determinative'.¹⁴¹ For example, the CJEU typically indicates how proportionality could apply but leaves the actual judgment to the referring court. Such a dialogic dynamics empowers processes of deliberation where the effects of regulation are discussed in different fora, and alternative models of organizing markets are exposed and discovered. Emerging is an open and dialogic framework rather than a hierarchical one, which may be conducive to innovative and hybrid solutions to the governance of markets.¹⁴² The dialogic and open-ended nature of this system of enforcement also relies on the natural malleability of economic regulation, which may come about as a result of a specific set of objectives but may take on different meanings and functions over time and also become increasingly challenged because of how the rules have been implemented in practice.

Take, for example, retail regulation and the protection of small shop owners. The Commission targeted national retail licensing schemes designed to assist small retailers, which required a specific authorization for the opening of larger stores, requiring instead no licence for the opening of smaller stores.¹⁴³ The CJEU clarified that such rules could be justified insofar as they pursue urban planning considerations and/or protect the consumer interest for a wide choice of retail channels. But, as I have elsewhere shown, the way the rules were implemented in various member states tended instead to protect stable market demand to the benefit of powerful incumbents like local supermarket chains.¹⁴⁴ The deliberations that EU law induces concerning such rules open up possibilities for redesigning them in ways that better serve interests such as the survival of small traditional businesses and, ultimately, consumer choice. Under the influence of EU law, entry regulation schemes, which may *prima facie* fit my definition of rearguard, are rearticulated in ways that minimize their exclusionary and rearguard effects.

A second feature of internal market adjudication that contributes to its openness is again attributable to *Cassis*. *Cassis* expanded not only the kinds of measures that encroach upon free movement rights and are in need of justification but also the list of mandatory public interest reasons that states may have recourse to in order to justify their measures. As Olivier Gerstenberg and Charles Sabel write in this regard, 'the point of *Cassis*, accordingly, was to unfreeze the EC's constitutional development by expanding the class of legitimate social reasons to include general-clause-like

¹⁴¹ Gerstenberg, *supra* note 140.

¹⁴² Svetiev and Tagiuri, *supra* note 94.

¹⁴³ E.g. Case C-400/08, *Commission v. Spain* (EU:C:2011:172).

¹⁴⁴ Tagiuri, *supra* note 14. I found this to be the case in relation to the French and Italian rules: while deliberately introduced to assist vulnerable small retailers and family businesses, the authorization schemes were often implemented so as to shield local supermarket chains from foreign competition.

“way-of-life-reasons” – and thus to broaden the scope of, to dynamize and to adapt to changing realities and public sensibilities, the process of constitutional balancing’.¹⁴⁵

As a last observation, I would like to suggest that these two features of the operation of EU law render it able to accommodate value frameworks that are also very far from any narrow internal market rationality. As I have argued elsewhere, various decisions of the CJEU signal that internal market adjudication is not inhospitable to concerns about social cohesion or identity at the local level.¹⁴⁶ The Court is open to the possibility that local regulation may need to entrench locally prevalent market arrangements because such entrenchment preserves local cultural preferences or strengthens social cohesion. Such an approach emerges in cases such as the Sunday trading saga and, more recently, in cases on the governance of the digital economy¹⁴⁷ and multiculturalism,¹⁴⁸ cases involving rules and arrangements that may fit my definition of rearguard. However, EU law as interpreted by the Court draws a clear line, not to be crossed, where culturally responsive interventions become exclusionary, racist or otherwise illiberal.¹⁴⁹ Hence, EU economic law emerges as a strong defensive tool for resistance to the anti-pluralist or exclusionary character of rearguard regulation, while offering opportunities to unveil, better define or rearticulate the genuine concerns that national regulation may seek to assist, including culturally salient concerns.

All in all, as the above discussion suggests, the vision of market democratization to which EU law contributes is not another form of technocracy. It is not technocracy because markets are not to be optimized nor simply regulated on the basis of ‘an all-interests affected’ principle.¹⁵⁰ Rather, markets emerge as the sites of political struggle where different interests, ways of life and identities are negotiated and discovered. Their governance responds not only to narrowly defined functional goals but also to culturally salient concerns. From this point of view, a key component of EU economic law’s market-democratizing potential lies in its ability to arbitrate conflicts between cultural responsiveness and pluralism. While EU law’s pluralist outlook tends to unlock the emancipatory and inclusive potential of markets, it is not a radical form of pluralism that is insensitive to concerns for cultural belonging and solidarity at the local level. As such, the promise of market democratization of EU economic law may contain the seeds of transnational forms of citizenship that are respectful of, and build upon, local cultural attachments.¹⁵¹

¹⁴⁵ Gerstenberg and Sabel, *supra* note 140, at 329.

¹⁴⁶ Tagiuri, ‘EU Law and National Belonging: Appeasing Insiders while Resisting Nationalism’, *Revue Trimestrielle de Droit Européen* (2018) 743.

¹⁴⁷ Case C-434/15, *Asociación Profesional Elite Taxi* (EU:C:2017:981); Case C-320/16, *Uber France* (EU:C:2018:221).

¹⁴⁸ Case C-157/15, *Achbita v. G4S* (EU:C:2017:203); Case C-188/15, *Bougnauoui v. Micropole* (EU:C:2017:204).

¹⁴⁹ E.g. *Bougnauoui* (EU:C:2017:204); see also Case C-54/07, *Firma Feryn* (EU:C:2008:397).

¹⁵⁰ *Cf.* Somek and Wilkinson, *supra* note 120.

¹⁵¹ Weiler, ‘To Be a European Citizen – Eros and Civilization’, 4 *Journal of European Public Policy* (1997) 495 (the *Eros* of national belonging is both constrained and preserved by the *civilization* of supranational membership). See more recently Azoulai, ‘The (Mis)Construction of the European Individual: Two Essays on Union Citizenship Law’, European University Institute Working Paper no. 2014/14 (2014).

5 Concluding Remarks

This article has dealt with markets and their governance as battlegrounds for the advancement and retrogression of democracy. As I have tried to show, the rise of populism co-opts markets for what may be defined as broadly cultural interventions through the deployment of regulation designed to appease the demands of majorities – what is framed as democratic responsiveness. But rearguard regulation’s anti-pluralist and moralizing outlook risks depriving markets of their emancipatory potential, which is the potential to enhance autonomy as self-authorship, the ability to write and re-write the stories of our life. The emancipatory potential of markets is instead unlocked by institutions that defend robust choice over how to participate in the economy and society. The ensuing multiplicity is prone to be also democratizing because it opens up opportunities for meaningful economic and social participation to previously excluded categories of citizens.

The project of democratizing markets, and, through them, society, is never realized once and for all. Market democratization relies on the constant destabilization and redesign of market institutions. The law of EU integration is able to contribute to this project. Thanks to both institutional and substantive features, EU law forces member states to confront the diversity of the forms of economic and social life existing within each national polity. Furthermore, EU law provides spaces for discursive disruption and deliberation over the desirability and effectiveness of national regulation, which points to more inclusive processes of market design. As I have also suggested, there are indications that EU law’s pluralist outlook is not radical, but responsive. In the ability to keep together pluralism and some responsiveness to local cultural attachments and identitarian concerns, there seems to be the most valuable meaning of market democratization. Such ability may provide the preconditions for the emergence of truly transnational forms of citizenship in the EU.

Rearguard regulation exposes markets as fora for political struggle and reveals their propensity to be politicized and ultimately democratized. If it is a threat, rearguard regulation also reminds us of the reasons why emancipatory markets are worth defending and, by implication, why supranational constraints such as those imposed by EU law are worth defending. EU supranational economic law is certainly not a self-sufficient project to ensure the democracy of our markets and societies. But re-descriptions that emphasize EU law’s pluralizing and democratizing potential seem necessary to imagine forms of supranational integration that enhance, rather than constrain, democracy.

