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The Member States' Constitutional Identities in Light of EU Law

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ΕΠΙΒΛΕΠΩΝ: Καθηγητής Γεώργιος Γεραπετρίτης	
ΤΡΙΜΕΛΗΣ ΣΥΜΒΟΥΛΕΥΤΙΚΗ ΕΠΙΤΡΟΠΗ: 1. Καθηγητής Γεώργιος Γεραπετρίτης 2. Αναπληρώτρια Καθηγήτρια Αικατερίνη Ηλιάδου 3. Αναπληρωτής Καθηγητής Νικόλαος Παπασπύρου	
ΕΠΤΑΜΕΛΗΣ ΕΞΕΤΑΣΤΙΚΗ ΕΠΙΤΡΟΠΗ	
Καθηγητής Γεώργιος Γεραπετρίτης	Καθηγήτρια Θεοδώρα Αντωνίου
Αναπληρώτρια Καθηγήτρια Αικατερίνη Ηλιάδου	Αναπληρωτής Καθηγητής Νικόλαος Παπασπύρου
Αναπληρωτής Καθηγητής Εμμανουήλ Περάκης	Επίκουρη Καθηγήτρια Βασιλική Χρήστου
Επίκουρος Καθηγητής Νικόλαος Σημαντήρας	

Ευχαριστίες

Η εκπόνηση μίας διδακτορικής διατριβής αποτελεί μια επίπονη αλλά συγχρόνως και δημιουργική διαδικασία που προσδοκά να συνεισφέρει κάτι νέο στο επιστημονικό της πεδίο. Φτάνοντας στο τέλος αυτής της προσπάθειας που κράτησε σχεδόν έξι χρόνια συνειδητοποιώ πως δεν θα ήταν δυνατό να πραγματοποιηθεί χωρίς την υποστήριξη ανθρώπων τους οποίους, είτε κατονομάζω είτε όχι, γνωρίζουν ότι τους οφείλω την ειλικρινή ευγνωμοσύνη μου.

Ιδιαίτερες ευχαριστίες οφείλω στα μέλη της επιτροπής επίβλεψης και της εξεταστικής επιτροπής για την πολύτιμη καθοδήγηση και τις εποικοδομητικές παρατηρήσεις τους, την Καθηγήτρια Θεοδώρα Αντωνίου, την Αναπληρώτρια Καθηγήτρια Αικατερίνη Ηλιάδου, τους Αναπληρωτές Καθηγητές Νικόλαο Παπασπύρου και Εμμανουήλ Περάκη, την Επίκουρη Καθηγήτρια Βασιλική Χρήστου και τον Επίκουρο Καθηγητή Νικόλαο Σημαντήρα. Κυρίως όμως οφείλω ένα μεγάλο ευχαριστώ στον επιβλέποντα Καθηγητή της διατριβής μου, Γεώργιο Γεραπετρίτη, που μου έδωσε απλόχερα το «εισιτήριο» γι' αυτό το ταξίδι που τώρα φτάνει στο τέλος του.

Το μεγαλύτερο ευχαριστώ ανήκει στην οικογένειά μου για την υπομονή και την ανοχή τους όλα αυτά τα χρόνια.

Abstract

Over the last couple of decades, constitutional identities have gained momentum, not only in politics, but also in law. The idea of raising identity respect to a foundational level made its debut appearance by way of a provision in the Treaty on European Union in the version put into force by the 1992 Treaty of Maastricht to receive its most elaborate formulation by the 2007 Treaty of Lisbon. The Member States' supreme courts followed suit and started appealing to their constitutional identities in an effort to defend what they idiosyncratically perceived as their deepest jurisprudential sensitivities against intrusive policies advanced by the EU. It is against these background assumptions that I have struggled throughout the entire research done for this thesis to come up with a comprehensive theory of judicial identity-review at the level of the European Union that could be powerful enough to settle any identity disputes between the EU and the Member States.

Before I do that, I first reflect on the values served by paying respect to identities and particularly constitutional identities within federal constitutional settings such as the EU's in the first place, and then I shift my analysis on how such an abstract conceptualization as a constitution's identity can be discovered and treated in actual policy-making. My analysis is essentially divided into three distinguishable areas where species of a constitution's identity can be found: Constitutional affiliations, constitutional interpretations, and constitutional amendments. These sources offer valuable insights about why there are strong reasons against constitutional change drawn from a constitution's origins, concepts, and aspirations, seen through the prism of a narrative, all of whom lend a constitution its continuing legitimacy as well as an imprint of identity.

The final Chapter of this thesis is devoted to a field I have singled out as a potential battleground between the EU and Greece's constitutional identity: Religion in the public square. Privatization of religion, by way of a clear delineation between a public and a private sphere, is only one way of settling any disputes that arise in law-and-religion controversies, and certainly a narrow one. Leaving little if any room for maneuver for these Member States (including, at least allegedly, Greece) who see things differently is probably in breach of the EU's duty to respect their constitutional identities. I conclude with a proposition that respecting the Member States' constitutional identities in the law-and-religion as well as other sensitive fields is, contrary to standard constitutional thinking, not endangering the EU law's consistent application; rather, it guards against fragmentation by sanctioning a mechanism of bounded differentiation and variation.

Abstract (in Greek)

Τις τελευταίες δεκαετίες, οι συνταγματικές ταυτότητες έχουν έρθει στο προσκήνιο τόσο της πολιτικής όσο και του δικαίου. Η ιδέα της κατοχύρωσης του σεβασμού της συνταγματικής ταυτότητας στο ανώτερο δυνατό επίπεδο έκανε την πρώτη εμφάνισή της στη Συνθήκη για την Ευρωπαϊκή Ένωση με την εκδοχή αυτής που υιοθετήθηκε από τη Συνθήκη του Μάαστριχτ του 1992, προκειμένου σταδιακά να προσλάβει την πληρέστερα επεξεργασμένη μορφή της με τη Συνθήκη της Λισαβόνας του 2007. Τα ανώτατα δικαστήρια των Κρατών-μελών ακολούθησαν και άρχισαν να επικαλούνται τις συνταγματικές τους ταυτότητες σε μία προσπάθεια να υπεραμυνθούν εκείνων των ιδιόμορφων χαρακτηριστικών των εννόμων τους τάξεων απέναντι σε ανατρεπτικές αποφάσεις που προωθούνται από την ΕΕ. Στο πλαίσιο αυτών των παραδοχών, προσπάθησα σε όλη την έρευνα που πραγματοποιήθηκε για την παρούσα διατριβή να διαμορφώσω τις βάσεις για μια ολοκληρωμένη θεωρία δικαστικού ελέγχου της συνταγματικής ταυτότητας στο επίπεδο της Ευρωπαϊκής Ένωσης που θα ήταν ικανή να επιλύσει τυχόν συνταγματικές διαφορές μεταξύ της ΕΕ και των Κρατών-μελών με επίκεντρο τη συνταγματική τους ταυτότητας.

Κατ' αρχάς, εξετάζω τη χρησιμότητα που μπορεί να υπηρετεί ο σεβασμός στις ταυτότητες και ιδιαίτερα στις συνταγματικές ταυτότητες στο πλαίσιο ομοσπονδιακών συνταγματικών μορφωμάτων, όπως είναι η ΕΕ, και στη συνέχεια μεταθέτω την ανάλυσή μου στο πώς ο ερμηνευτής μπορεί να ανεύρει το περιεχόμενο μίας τόσο αφηρημένης έννοιας όπως αυτή της συνταγματικής ταυτότητας. Η ανάλυσή μου ουσιαστικά χωρίζεται σε τρεις διακριτούς τομείς όπου υποστηρίζω ότι υπάρχουν στοιχεία της συνταγματικής ταυτότητας: στους δεσμούς που αναπτύσσει ένα σύνταγμα με το κοινωνικοπολιτικό του πλαίσιο, στους τρόπους με τους οποίους ερμηνεύεται και αναθεωρείται ένα σύνταγμα. Από αυτές τις πηγές αντλώ ένα σύνολο επιχειρημάτων που συνηγορούν κατά της μεταβολής του συνταγματικού status quo, τα οποία προερχόμενα από την ιστορική προέλευση, τις έννοιες και αρχές, καθώς και από τις προοπτικές βελτίωσης ενός συντάγματος, θεωρούμενα μέσα από το πρίσμα ενός συνεκτικού αφηγήματος, προσδίδουν σε ένα σύνταγμα τη δυνατότητα μίας συνεχιζόμενης νομιμοποίησής του και ένα μοναδικό αποτύπωμα ταυτότητας.

Το τελευταίο κεφάλαιο της παρούσας διατριβής είναι αφιερωμένο σε ένα πεδίο που έχω ξεχωρίσει ως πιθανό πεδίο σύγκρουσης μεταξύ της ΕΕ και της Ελληνικής συνταγματικής ταυτότητας: Η θρησκεία στο δημόσιο χώρο. Η ιδιωτικοποίηση της θρησκείας, μέσω μιας σαφούς οριοθέτησης της δημόσιας από την ιδιωτική σφαίρα, είναι μόνο ένας δυνατός τρόπος επίλυσης των διαφορών που τυχόν ανακύπτουν από την αντιπαράθεση του δικαίου με τη θρησκεία, σίγουρα όμως ένας τρόπος άκρως περιοριστικός. Το να αφήνουμε ελάχιστα έως καθόλου περιθώρια ελιγμών στα Κράτη-μέλη (συμπεριλαμβανομένης, όπως υποστηρίζω, της Ελλάδας) που βλέπουν τα πράγματα με διαφορετικό τρόπο, πιθανότατα παραβιάζει το καθήκον της ΕΕ να σέβεται τη συνταγματική τους ταυτότητα. Η παρούσα διατριβή ολοκληρώνεται με μια αισιόδοξη πρόταση, ότι ο σεβασμός της συνταγματικής ταυτότητας των Κρατών-μελών τόσο στον τομέα του δικαίου και της θρησκείας όσο και σε άλλους ευαίσθητους τομείς, σε αντίθεση με τη συνήθη νομική υπόθεση, δεν θέτει σε κίνδυνο τη συνεπή και ομοιόμορφη εφαρμογή του δικαίου της ΕΕ· αντίθετα, όπως προτείνω, προφυλάσσει το δίκαιο της ΕΕ από τον κατακερματισμό επικυρώνοντας ένα μηχανισμό δυνατής παρέκκλισης μεν, οριοθετημένης δε.

To G.G., for his trust

Table of Contents

Introduction

I. Setting the Scene. National Identities: From Decay to Revival

In 1983, the Anglo-Irish historian Benedict Anderson published a celebrated book entitled *Imagined Communities: Reflections on the Origin and Spread of Nationalism*,[1] in which he investigated the origins of feeling a sense of belonging to a nation as traced through different times and places around the world. However, Anderson's most-celebrated contribution has been the institution into the mainstream political and legal vocabulary of the term 'imagined communities.' *Imagined Communities* is a truly astonishing endeavor to test a theory of *constructivism* – that is, a theory that holds that international relations are made up of *ideational* components. Nation-states, for constructivists, have been erected on a number of building blocks that are commonly shared by people to varying degrees, and, in turn, the perceptions people have of their nation-states fundamentally shape international relations. Constructivism has historically been framed in juxtaposition to mainstream *materialism* that assumes that the international relations system is inherently anarchic and hence that nation-states which are materially more powerful prevail over the others.

Anderson's emphasis on the *imaginary* aspect of modern nation-states, combined with his reliance on constructivism to outline the parameters of his theory, usually feed the misleading assumption that (for him and a number of like-minded scholars) nations are *unreal*. The more accurate implication, however, to be drawn from his overall analysis of the phenomenon is that nations are just *fictional*. In Anderson's words: '... nation-ness, as well as nationalism, are cultural artifacts of a particular kind.'[2] In particular, he criticized both liberalism and Marxism for failing to acknowledge the profound affiliations nations have developed with their people since the eighteenth century. The idea of 'imagined communities' itself emphasizes the fact that nations are socially-constructed groups of people who, although they are strangers to most of the others, nevertheless see themselves as being members of a larger political community built on shared features, which – they *imagine* – form a more or less *cohesive* nation.[3] Anderson's analysis also calls attention to the fact that nationalism is fundamentally different from other *-isms*: Nobody perhaps would *die* for liberalism, Anderson seems to imply, but millions of people have died, and probably will die in the years to come, for their deeply-felt *national* emotions.[4] When people die for their nations, what is it, actually, that they die for? Anderson answers that it is an idea – hence, his depiction of

[1] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 2016).

[2] ibid, 6.

[3] ibid, 13. Here, Anderson refers to a hypothetical incident taking place in Mecca in which two pilgrims meet each other, the one coming from the Philippines, and the other from Morocco. These two strangers have never met before, which however does not prevent them from treating each other as brethren.' The reason is, Anderson argues, that there is one thing they do have in common – the Arabic language, the sacred language, that is, of all Muslims across the globe. The key assumption here is accordingly that sacred languages (and probably language more generally) were the glue keeping empires (and simultaneously religious communities) from falling apart.

[4] ibid, 9-10.

nation-states as creatures of *ideational* substance: nations are not tangible, but *cultural* communities.[5]

A few years after the publication of *Imagined Communities*, the renowned British historian Eric Hobsbawm envisaged, in a book entitled *Nations and Nationalism since 1780*,[6] the pending (as he saw it) disappearance of nations along with national *identities*. Having tracked down the root cause of the decay of nation-states in the works of 'ideologists of an era of triumphant bourgeois liberalism,'[7] he went on, much like Anderson, to derive belongingness to a nation from a 'popular proto-nationalist' soil,[8] made up of commonly held beliefs drawn, for example, from language and religion. But to Anderson's presumption that nationalism had sprung from a relatively *ambiguous* conceptualization of the nation, he famously added a prediction that:

> 'nation' and 'nationalism' are no longer adequate terms to describe, let alone to analyze, the political entities described as such, or even the sentiments once described by these words. It is not impossible that nationalism will decline with the decline of the nation-state, without which being English or Irish or Jewish, or a combination of all these, is only one way in which people describe their identity among the many others which they use for this purpose, as occasion demands.[9]

Still, in sharp contrast to Hobsbawm's predictions, nations have not entirely disappeared, nor have people stopped identifying, at least to a substantial degree, with the nation-states in which they see themselves as comfortably belonging. To the contrary, one might argue, over the last few decades nation-states have been experiencing something of a *resurgence*. Particularly in the context of the European Union and the relationship with its Member States, national *identities* have exhibited an intriguing, but nonetheless controversial, ability to animate both politicians and policy-makers, and powerful public opinion has shifted the focus from Brussels to each of the European capital cities.

In the last two chapters, which are later additions to his work, Benedict Anderson struggled to refine his arguments and relieve some of their inconsistencies. In particular, he argued that, unlike earlier nations that were forward-looking and perceived themselves as breaking *new* historical ground; younger nations (classified by him as nations that declared their independence after 1815) perceived themselves as 'awakening from sleep,' with people defining their common narratives based on a far-reaching sense of continuity with the past of nearly mythical degree.[10] Hence, the new academic field of history, which emerged in the nineteenth century, undertook to define these long-standing *cultural* attachments that held people together in their newly liberated nations, often

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[5] ibid, 9ff.

[6] Eric J. Hobsbawm, *Nations and Nationalism since 1780. Programme, Myth, Reality* (2nd ed, Cambridge University Press 2000).

[7] ibid, 38.

[8] ibid, 11.

[9] ibid, 192 (emphasis added).

[10] Benedict Anderson, *Imagined Communities* (n 1) 195.

by picking-and-choosing what was to be remembered and what to be forgotten – what was to be included, and what to be removed from the narratives they authored to mold their fledgling nations' *identities*.[11]

Throughout the turbulent twentieth century, European nation-states have experienced various transformations of their state of affairs, but also, no less, of their identities. The most recent battleground for the EU Member States' *identities*, and also one of the most profound importance for this thesis, has been the pressure exercised by the influx of large numbers of immigrants from culturally remote areas, and the emergence of an awkward sense of multiculturalism that has brought with it serious consequences. In the aftermath of bloody terrorist attacks committed by Muslim immigrants, leading European politicians attacked the whole multiculturalist project as having ended in a major defeat for their nations.[12] In fact, they shifted public attention onto their constituencies' traditional view of their own *shared* identity, by proclaiming that multiculturalism tends to overemphasize *differences* and overshadow any existing *similarities*. In a 2004 interview, then opposition leader Angela Merkel said that 'The notion of multiculturalism has fallen apart. Anyone coming here must respect *our* constitution and tolerate *our* Western and Christian *roots*.'[13] In October 2010, addressing a young wing of her governing party, she confessed that the coexistence of people from social and cultural backgrounds too remote from each other living side-by-side had not worked out well; in her own words, 'This [multicultural] approach has failed.' She then stressed an urgent need for the nearly four million Muslim immigrants then residing in Germany to work harder to integrate into their host nation.[14] To give another well-known example, Britain's Prime Minister David Cameron entered the fray over the debate over national identities in a speech delivered on 5 February 2011 at the Munich Security Conference. There, he announced the death of multiculturalism by arguing that:

> I believe the root [of terrorism] lies in the existence of this extremist ideology. I would argue an important reason so many young Muslims are drawn to it comes down to a question of *identity*. What I am about to say is drawn from the British experience, but I believe there are general lessons *for us all*. In the UK, some young men find it hard to identify with the traditional Islam practiced at home by their parents, whose customs can seem staid when transplanted to modern Western countries. *But these young men also find it hard to identify with Britain too, because we have allowed the weakening of our collective identity.* Under the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream. *We've failed to provide a vision of*

[11] ibid, 194, 197.

[12] Matthew Weaver, 'Angela Merkel: German Multiculturalism Has "Utterly Failed"' (*The Guardian*, 17 October 2010) <https://www.theguardian.com/world/2010/oct/17/angela-merkel-german-multi_culturalism-failed> accessed 14 January 2023.

[13] ibid (emphasis added).

[14] ibid.

> *society to which they feel they want to belong.* We've even tolerated these segregated communities behaving in ways that run completely counter to our values.[15]

The greater detail of what national identities are, and whether they are consistent with multiculturalism or not, is one thing. In this research, however, I focus on another – namely, on the fact that national *identities* have somehow succeeded in crossing a somewhat rigid threshold and entering the field of constitutional law, and what exactly *constitutional* identities are.

II. Overview of the Subject-matter

Over the last couple of decades, constitutional identities have gained momentum, not only in politics, but also in law. The idea of raising identity respect to a foundational level made its official debut by way of an express provision in the Treaty on European Union in the version put into force by the 1993 Maastricht Treaty, which, very ambiguously indeed, read that: 'The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.'[16] The 2007 Lisbon Treaty gave birth to the 'star' of constitutional identities by lending it a verbal formulation more elaborate than ever before:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.[17]

But it was most probably after the Member States' supreme courts followed suit and started appealing to their constitutional identities in an effort to defend their utmost sensitivities against controversial policies made by the EU that the idea reached the peak of public concern. For instance, reviewing the provisions of the Lisbon Treaty for their consistency with the *Grundgesetz*, Germany's *Bundesverfassungsgericht* (Federal Constitutional Court) powerfully declared that:

> It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration program according to the principle of conferral *and respecting the Member States' constitutional identity*, and that at the

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[15] David Cameron, 'PM's Speech at Munich Security Conference. Prime Minister David Cameron Has Delivered a Speech Setting Out His View on Radicalization and Islamic Extremism' (5 February 2011) <https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference> accessed 14 January 2023 (emphasis added).

[16] Treaty on European Union [1992] OJ C191/1, art F (1).

[17] Consolidated Version of the Treaty on European Union [2016] OJ C202/1, art 4(2).

> same time the Member States do not lose their ability to politically and socially shape living conditions on their own responsibility.[18]

These judicial developments from leading Member States, as well as the way the Identity Clause has been treated by the CJEU in its case-law are thoroughly examined in Chapter 3, entitled 'The Enforcement of the Member States' Constitutional Identities in EU Law.' After revisiting a relatively poor jurisprudential record issued by the CJEU, I demonstrate that as far back as the enactment of the founding Treaties, the Member States have been steadily denuded of their actual '*Voice*' in EU law-making in favor of an empowered supranationalism; hence, the Identity Clause presented the dissenting Member States with a mechanism enabling them to enforce a strategy of *non-compliance* toward the EU law, or what Professor J. H. H. Weiler has aptly termed as 'Selective Exit' – that is, with a means of pressing their claims of exceptions against EU law based on their constitutional identities. This theoretical viewpoint is comfortably in line with earlier judgments of both Germany's and Italy's supreme courts, as well as with what Professor Peter Lindseth has identified as a 'postwar constitutional settlement,' which sees in European integration an ongoing project of growing power delegations to the EU. Member States' courts, the argument goes, have over the years experimented with the Identity Clause and have simulated performing their *Selective-Exit* powers as a means of warning the EU against the possibility of 'crossing the (*identity*) line.' Also in Chapter 3, I tentatively propose a normative framework aiming to provide a full-fledged theory of judicial review over how identity inputs from the Member States should be treated by the CJEU. To test my theory's accuracy, I apply my proposals against the background assumptions of a number of judgments delivered by Germany's *Bundesverfassungsgericht*, and the UK's Supreme Court – the UK being an ex-Member State itself, a selection that is by no means random or irrelevant to my specific research goals.

To be sure, the Member States cannot block EU law merely by appealing to a bizarre idea without offering any tenable format for what constitutional identities *actually* look like. That is the central theme of Part I of my thesis. First, in Chapter 1, entitled 'The Value of Respect to Constitutional Identity,' I follow the path of *communitarianism* and the exceptional value attached to sharing common values within the contours of larger political communities, which in turn nurtures a set of collective identities. National identities – perhaps the most familiar genre of collective identities – have gained a bad reputation in the twentieth century, but things do not have to be this way necessarily. To the contrary, common identities have consistently, and in multiple ways, assisted the nation-states and their people in their efforts to prosper (but have also, on occasion, driven them to death). Building on people's origins, concepts and aspirations, national identities have penetrated through formal laws too, including constitutions, and have advanced a vast number of political values. In particular, respecting the Member States' constitutional identities as part of a system of checks-and-balances at the European level has been of great merit in generating a *power balance* within the EU. That balance can be achieved at various levels, which I explore in great depth in Chapter 1. A mechanism of identity respect is also able to honor diversity by

[18] BVerfG, Judgment (of the Second Senate) of 30 June 2009 - 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 - (*Lisbon* judgment), para 226 (emphasis added).

assisting pluralism; to boost accountability by enabling people to keep in check their representatives at the level closest to them – that is, of the Member States.

Next, in Chapter 2, entitled 'The Substance and Process of Constitutional Identity,' I take up the issue of how constitutional identities can be drawn out and disentangled. To do that, I tentatively rely on an excellent conceptualization of the entire idea as has been formulated by Justice Kriegler of South Africa's Supreme Court which reads that:

> Viewed in *context*, textually and historically, the fundamental rights and freedoms have a poignancy and depth of meaning not echoed in any other national constitution I have seen…. [O]ur Constitution is unique in its *origins*, *concepts*, and *aspirations*.[19]

It is exactly into that *triad,* consisting of the origins, concepts, and aspirations viewed in context with each other and with the broader socio-political circumstances, that I suggest doing a bit of digging to reveal a set of constitutional affiliations, interpretations, and amendments that offer the outlines of a constitution's identity. For instance, within constitutional interpretations one can discover a constitution's identity by either looking 'outward,' toward the socio-political context that generated a polity's *first* principles, and abroad where constitution-makers may have appealed for inspiration; or 'inward,' reflecting on how constitution-makers have succeeded (or not) in their efforts to put together consistently the raw materials they used to produce their handiwork. Within the debate over unconstitutional constitutional amendments, which is at least one hundred years old, I have found the richest source of insights for the concept of constitutional identity. It has provided me with a splendid opportunity to call attention to the fact that sometimes (our constitutions') identities have been out there all the time, having fallen into 'hibernation' in times of constitutional maintenance, but are also ready to 'wake up' when political forces rally for change over a long-established constitutional regime. As mentioned, the idea of unconstitutional constitutional amendments is an old one, and I carefully study its origins to discover the conceptual possibility of implied limits to constitutional amendments. I also discover that each constitution (usually, but not explicitly) rests on a unique *ranking* of human rights and freedoms and governmental powers, and identities usually entrench some of them by granting them a *harder-to-amend* condition as compared to others. Throughout my entire analysis, I make short excursions to actual constitutional stories, in this section over the US Flag Burning Amendment, in an effort to offer realistic examples for my theoretical assumptions.

For all these sources – affiliations, interpretations, and amendments – to lend a constitution its legitimacy and build a relationship of trust with their people, it is of profound importance to write down constitutional narratives since, as Professor Robert Cover has said, 'Once understood in the context of the narratives that gives it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.'[20] Although these narratives are often accused of overemphasizing similarities in comparison to any differences, they serve at least to place *outer* limits

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[19] Supreme Court of South Africa, *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10 [126], para 127 (emphasis added).

[20] Robert M. Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harv L Rev 5.

upon any attempts to 'reinvent' the past by way of introducing deeply-contested constitutional amendments. I conclude this chapter by acknowledging that comparative constitutionalism, too, instructs us in the value of seeking greater (self-)awareness of constitutional 'identity' and 'difference' through the adoption of an 'open-border' policy of constitutional ideas from abroad. In other words, exposure to constitutional ideas from abroad, I maintain, invites us to (re)consider, but no less to *discover*, our own constitutional identity.

In the last chapter, entitled 'Religion in the Public Square,' I explore the implications that a potential clash with EU law might have for Greece's constitutional identity in the field of religious freedoms. Such a far-reaching clash, I argue, may occur as a consequence of the CJEU's narrow-minded posture toward nondiscrimination on religious grounds and religious neutrality as manifested in a recent line of jurisprudence. I have distinguished as the center of the controversy (and have entitled the entire chapter accordingly) the theme of *religion in the public square*, because this is where two deep-rooted but equally opposing worldviews, the Judeo-Christian and the *laïque* visions, face each other. Hence, in the remainder of this chapter I explore the origins of these two mindsets with particular emphasis on how Greece's constitutional identity has, through the centuries, intertwined with religion (of Eastern Christianity). The argument is that Greek history includes nothing resembling the French centuries-old struggle with the Catholic Church that might call for the kind of privatization of religion that has dominated the French political setting since the 1789 Revolution. Following the path of getting to know how any constitution's identity unfolds, I have divided my analysis into four sections, each referring to a number of *concepts* developed in the case-law of Greece's *Symvoulio Epikrateias* (Supreme Administrative Court); the *origins* of the particular church/state relations that have been consolidated in modern Greece viewed *in context* – that is, against how (differently) these relations have been consolidated elsewhere – as well as against some *aspirations* for attitudinal (and policy) change. The inference is, first, that deeply ingrained into Greece's constitutional identity is a different vision of church/state relations as compared to a genuinely French (*laïque*) vision, one that by no means calls for the kind of aggressive case-law that the CJEU has provided; and, second, that the CJEU itself should be aware of the diversity of constitutional traditions (and *identities*) of the Member States and should accordingly treat the whole issue with enough latitude to make room within its jurisprudence for all of these traditions and identities to thrive.

III. Methodology

The key research questions I have sought to answer are the following: What value, if any, is there in respecting national, and particularly constitutional, identities? What does a constitution's identity look like, and how might someone discover it? What is the status of respect for a Member State's constitutional identity within the EU law? Is there any actual or potential manifestation of a clash between Greece's constitutional identity and EU law and under what terms might it be resolved? In the present thesis, I will strive to answer this set of questions in each of the chapters that follow.

Throughout my thesis, I have blended doctrinal analysis with a context-setting framework. I have drawn my research materials from works, both new and old, of constitutional theory and political philosophy from a number of diverse – continental European and common-law – jurisdictions. This research choice is by no means random. Part I of my thesis is mostly of a descriptive

nature; I do not intend, that is, to provide a *normative* profile of a constitution's identity, but rather a *description* of how one can get to know a constitution's identity. The underlying idea is that *identity* in general is a term derived from outside the field of constitutional law and hence its meaning cannot possibly be restricted to nationally-specific concepts. Identity is a universal term and *constitutional* identity, I argue, should accordingly have a universal (depth of) meaning too. That each state's constitution apparently has its own identity is another story that I will tell in the following chapters. Therefore, I have combined the materials I collected from a number of jurisdictions – the US, the UK, Germany and India being the most pivotal among them – to form part of a potentially universal theory of the substance and process of constitutional identity. But what in Part I is only a research choice – that is, turning to theorists from across a diversity of jurisdictions to deduce the raw materials for building my theory – becomes a necessity in Part II and especially in Chapter 3, in which I take up the issue of how the EU Member States' constitutional identities intermingle with EU law. There, I leave the borders of domestic constitutional law and shift the stage into the transnational dimension, which means investigating a European-wide literature and jurisprudence.

My overall analysis runs from the general to the particular – that is, I set out some general assumptions which I subsequently test against the facts of particular 'incidents' where constitutional identity has arguably got involved. I have pursued this methodological route intentionally. First, it is true that I explore a theme which is largely abstract and certainly obscure, which in turn requires abstract theorizing to be coupled with some 'evidence' for the concept's actual appearance. Indeed, I have deliberately avoided unnecessarily theorizing at the level of the ideal. Second, it is equally true that we need to develop 'thick' accounts of the indigenous constitutional conditions that are able to provide entry points into the origins of the subject-matter.[21] Hence, to speak about a specific constitution's identity requires a degree of familiarity with that polity's historical and socio-political conditions from which the origins of that constitution's identity spring, which I necessarily lack as far as most jurisdictions other than that of Greece are concerned. Therefore, I have taken great care in the selection of my sources for foreign jurisdictions, and in framing any assumptions about their constitutional identities. Still, in the last chapter I have more confidently reflected on Greece's constitutional identity, going to great lengths to trace its *origins*, its manifestation through a number of judge-made *concepts*, all seen through the means of a historical *narrative*. In general, I have placed strong emphasis on the historical perspective when considering any idea pertaining to a constitution's identity, both because of its explanatory operation, and also because of the need for a continuity narrative to ground any reading of a constitution.

Most aspects of the subject-matter of this research have recently experienced a boom in scholarly interest and in the number of relevant publications. Therefore, I have sought to contain my research – with a few exceptions – to developments that occurred up until the 1st October 2020.

[21] Gary J. Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 26.

IV. The Key Assumptions of this Thesis

A salient idea that pervades my overall analysis of the subject-matter is that constitutional identities operate mostly as *defensive* strategies against perceived challenges to the *status quo*; as *entrenching* mechanisms primarily focused on constitutional maintenance or *no-change*. Apparently, any appeal to constitutional *identity* – that is, any appeal to how a constitution is, as opposed to how it could be and how other constitutions are (thought to be) – is indeed redundant if there is no actual threat to constitutional matters as they stand. True, 'sleeping' insurance mechanisms, such as the ones drawn from a constitution's overall identity, 'wake up' when called upon to face some *real* challenges against the status quo. That there is such a confrontation between the forces of change and no-change, provides the most compelling evidence that constitutional identity has not yet experienced a transformation of such a magnitude as to push toward acquiescing in, if not precipitating, change. In the contrary case, that a constitution's identity or its constituent identity parts had undergone such a 'seismic' transformation that things required shaking up a bit, it is unlikely that any identity appeals would present themselves as insurmountable barriers to change.

Ireland's decades-long struggle with abortion is perhaps revealing of how appeals to a nation's constitutional identity, having entered a transformative era, sometimes make their appearance only to resist constitutional transformation, but when forces of change have fully deployed, any resistance is doomed to finally settle down. Abortion had been illegal since the enactment of the (United Kingdom) Offences against the Person Act 1861, until that act was abolished in 2013. However, against the remarkable drop in influence of the Catholic Church, the Eighth Amendment to Ireland's Constitution was inserted in 1983 to provide strong protection to the unborn. The Irish constitutional identity is well-known for its deep-rooted respect for *popular sovereignty*, and the social teachings of the Catholic Church.[22] The abortion controversy has incited a battle between the two. Deep (identity) concerns over pressures for legal change from abroad in the form of legalization of abortion were dispersed with the granting of immunity from the EEC through an ad hoc Protocol added to the Treaty of Maastricht. Thus far, any identity concerns appeared only to prohibit women from being granted abortion rights and to defend the unborn life. However, the neighboring British clinics were a constant reminder that abortion services were readily available on the other side of the Irish Sea. The focus of pro-life pressure groups then shifted to the availability of information. In particular, the Society for the Protection of Unborn Children (best known in a series of lawsuits as *SPUC*) challenged the availability of information about abortion services. In its judgment in *Attorney General v. X* of 5 March 1992,[23] Ireland's Supreme Court acknowledged a right of women to receive an abortion abroad if their life was at risk because of pregnancy, including a suicidal risk. The *Attorney General v. X* precedent resulted in no less than three proposed amendments to Ireland's Constitution that were submitted to three referenda, all held on 25 November 1992. The Twelfth Amendment, stipulating that the prohibition of abortions would apply even in cases of suicidal women, was defeated. Instead, the Thirteenth and Fourteenth Amendments were subsequently enacted and put into force to permit traveling to seek abortion services abroad, as well as to receive and impart information on such services. Since the 1990s the influence

[22] ibid, 46.

[23] Supreme Court of Ireland, *Attorney General v X* [1992] 1 IR 1.

has shifted to the side of popular sovereignty which now dominates over Catholic social teachings. Today, the entire issue has been effectively resolved through the express provisions of Article 40.3.3º of the Constitution, which was introduced by the Thirty-sixth Amendment and passed by referendum – that is, by *popular* vote – on 25 May 2018, which reads that 'Provision may be made by law for the regulation of termination of pregnancy.'[24]

Apart from its defensive effect, constitutional identity mostly operates as an *analytical* rather than as a normative tool. In other words, it is does not seek in most circumstances to provide any propositions about the *particular* direction constitutional development *ought* to pursue, following some value judgments that constitutional identity in its own right defends or not (and vice versa). In the Irish abortion story, for instance, it might have been preferable from one normative position to constitutionally entrench as much as possibly a human right, say, of the unborn fetus against a right of women to receive an abortion. Or it might have been equally preferable to pursue a different course from another value position, that is to provide women freedom to receive abortion services as they wish. Clearly, the debate is about testing the balance between the value attached to personhood as embodied in the unborn life of the fetus and the value attached to self-determination. To be sure, constitutional identity has a lot to say about such balance tests, as well as about why the scale tips to one side or the other, but offering normative arguments about the *particular* direction of constitutional developments is hardly its main purpose: Constitutional developments in Ireland (and elsewhere) did not occur *in the name of* that nation's transformed constitutional identity. But constitutional identity has been present all along and has animated constitutional evolution. Providing constitutional guarantees for a right of women to receive an abortion in Ireland has long been retarded as a consequence of forces from within the constitution that have rightly received the label of *identity*. But identity is open to change and this is exactly what occurred when the socio-political conditions were ready to push toward a radical departure from the way abortion had been treated in the past. To sum up, constitutional identity provides the conceptual framework necessary to *understand* the most shadowy parts of constitutional evolution that would remain dark and unknown using only the standard methodological and analytical arsenal. Still, constitutional identity is certainly not a foolproof discovery in the field of constitutional theory, and it is only one among a variety of analytical tools available for lawyers to disentangle the socio-political patterns that will help interpret policy outcomes.

[24] Constitution of Ireland, art 40.3.3º.

PART I

1 The Value of Respect for Constitutional Identity

I. Introduction

The determination to discern and protect the domain of a constitution's identity begs why, as part of constitutional policy, that heritage of constitutional culture should be shielded from destruction. The answer lies perhaps in what might be considered a constitution's *identity*. In this chapter, I will attempt to discover the value, if any, that may be served by respecting *identities* at various levels: personal, collective, national, and especially *constitutional*. To achieve that goal, I will start by tracing its origins in the school of *communitarianism* and the exceptional value attached by it to sharing common values within larger political communities, which in turn help shape and nurture a set of collective identities. *National* identities have received a bad name in the twentieth century, so I need first to make a rebuttal in order to drive the analysis toward the value of respecting *constitutional* identities. For one thing, common identities have consistently assisted the nation-states by offering their people strong reasons both to *live* and *die* for them. Building on people's origins, concepts and aspirations, then, national identities have somehow penetrated through formal laws, including constitutions, and have helped pursue a vast number of political goals. In particular, respecting Member States' constitutional identities as part of a system of checks-and-balances at the European level can generate a *power balance* within the EU. A mechanism of identity respect is able to honor *diversity* by assisting pluralism; to boost *accountability* by enabling the people to keep in check their representatives at the level closest to them – that is, of the Member States. These and other arguments over the values inherent in respecting the EU Member States' constitutional identities will be thoroughly elaborated in this chapter.

II. The Value of Respect for Personal and Collective Identities

Identity implies both a sense of personal reflection but also of belongingness. It is the outcome of a process of recognizing one's self, but also distinguishing that self from, and interacting with, others. As communitarian theorists put it, human identities are primarily shaped by social relations within constitutive communities.[1] We live mostly within communities that provide our lives with meaning and shape our judgments, and thus we have a strong moral obligation to nourish these particular communities, without which we would be disoriented, alienated, and even incapable of public reason.[2] People very often resist being subsumed into larger groups, especially if they were not born into them.[3] They want their exceptional identities to be acknowledged and even

[1] Daniel Bell, 'Communitarianism,' *The Stanford Encyclopedia of Philosophy* (Fall 2022 Edition), Edward N. Zalta & Uri Nodelman (eds), <https://plato.stanford.edu/archives/fall2022/entries/communitarianism/> accessed 16 February 2023.

[2] ibid.

[3] Francis Fukuyama, 'Why National Identity Matters' (2018) 29(4) J Democr 8.

celebrated, not suppressed.[4] They want to feel connected with their predecessors and know their origins.

Communitarianism, in particular, emerged during the nineteenth century as a self-conscious way of thinking about law and society.[5] The storyline is as follows. A dramatic increase in urbanization followed the first Industrial Revolution, which forced people away from their rural, family-centered lives in small towns and villages in search of work.[6] Since then, there has been an increase in personal wealth and freedom for the working classes, but the latter have also paid the price of alienation and a feeling of rootlessness.[7] Indeed, the modern post-industrial state, communitarians argue, has been exerting a stronger influence toward centralization and away from free and healthy community life.[8] Therefore, communitarian thinking in the nineteenth and twentieth centuries took the form of a reaction against the individualistic excesses of modern society that were arguably associated primarily with liberalism.[9]

Against this background, a debate has since developed, with advocates of communitarian ideas insisting on the need to defend community values against the relentless individualism of a liberal imprint.[10] A series of book publications in the 1980s, including – to name just the most remarkable – Alasdair MacIntyre's *After Virtue*, and Charles Taylor's *Philosophical Papers* series, signaled the emergence of the philosophical school of communitarianism. Their principal target was John Rawls's recent work, *A Theory of Justice* (1971), particularly his reliance on overtly abstract and universalistic ideas.[11] For instance, Michael Walzer, a notable communitarian exponent, was disappointed with Rawls's theory on the grounds that 'any such [universalistic] set [of values] would have to be considered in terms so abstract that they would be of little use in thinking about particular distributions,'[12] and called attention to the importance of community, a theme which suffered greatly from theoretical neglect.[13]

For scholars enlisted on the communitarian camp, relying on abstract reason alone to come up with a theory of justice was inherently flawed since public discourse could not have possibly

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[4] ibid.

[5] Raymond Plant, 'European Political Thought in the Nineteenth Century' in Gerald F. Gaus and Chandran Kukathas (eds), *Handbook of Political Theory* (SAGE Publications 2004); Richard Bellamy, Jeremy Jennings and Peter Lassman, 'Political Thought in Continental Europe during the Twentieth Century' in Gerald F. Gaus and Chandran Kukathas (eds), *Handbook of Political Theory* (SAGE Publications 2004).

[6] Richard Dagger, 'Communitarianism and Republicanism' in Gerald F. Gaus and Chandran Kukathas (eds), *Handbook of Political Theory* (SAGE Publications 2004) 171.

[7] ibid, 171.

[8] Raymond Plant, 'European Political Thought in the Nineteenth Century' (n 5) 384.

[9] Richard Dagger, 'Communitarianism and Republicanism' (n 6) 171.

[10] ibid.

[11] Communitarians have also targeted Robert Nozick's, *Anarchy, State, and Utopia* (1974), Ronald Dworkin's *Taking Rights Seriously* (1977), and Bruce Ackerman's *Social Justice on the Liberal State* (1980).

[12] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 8.

[13] Richard Dagger, 'Communitarianism and Republicanism' (n 6) 171.

proceeded independently of any causes arising from shared traditions and practices.[14] Both MacIntyre and Taylor argued that moral and political judgments depend on the actual language of reasons and its societal context, and hence its outcome would be *uninterpretable* if isolated from its communitarian context.[15] In Michael Sandel's words,

> justice finds its limits in those forms of community that engage the *identity* as well as the interests of the participants…. [To] some I owe more than justice requires or even permits… in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am.[16]

Liberals allegedly substituted community attachments and commitments for a conception of the self as prior to, and independent from, its environment.[17] Communitarians rejected the idea, again in Sandel's terms, of the 'unencumbered self' – that is, of an *individualistic* conception of the self that is prior to its ends and commitments.[18] Instead, they argued that people are primarily constituted *by* the communities that raise and sustain them. Another point of controversy argued by their opponents was that through abstract and universalistic conceptions, liberals had essentially pushed people into relentless privacy and neglected the necessity of fostering civic virtues and the common good.[19]

Not all communitarian theorists have perceived themselves as exercising their critique from outside the liberal team, nor have they all fueled their objections with equal force against all liberal positions without distinction. For one thing, what Rawls probably intended was not to say that the self is wholly alienated from social context, but to point out how that self might have looked like when adopting principles of justice behind a 'veil of ignorance.'[20] In addition, in emphasizing the virtues that communities cultivate, communitarians are probably underestimating the vices with which they imbue their members.[21] However, what is crucial for present purposes is that, as communitarians forcefully contended, liberals have indeed undermined such issues as belonging, identity, and community. In what follows, I will attempt to define these issues and the existing theories regarding how they should be treated, and determine their potential impact on constitutional identity.

For more than three centuries, the standard liberal answer to identity issues has been, as liberal philosophers from Locke to Mill to Rawls have argued, that political communities should tolerate

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[14] ibid, 172.

[15] ibid.

[16] Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982) 179, 182 (emphasis added).

[17] Richard Dagger, 'Communitarianism and Republicanism' (n 6) 172.

[18] ibid.

[19] ibid.

[20] John Rawls, *A Theory of Justice* (first published The Belknap Press of the Harvard University Press 1971; Columbia University Press 1999) 118ff.

[21] Richard Dagger, 'Communitarianism and Republicanism' (n 6) 172-173.

(especially minority) groups and their particularities.[22] Modern liberal states should delineate as precisely as possible an *unassailable* sphere and avoid interfering with group practices located outside that sphere.[23] Toleration, for liberals, protects the rights of individuals and encourages peaceful coexistence across identitarian lines. However, political theory over identity issues took a major shift toward the end of the twentieth century. Throughout human history, individuals have been finding themselves at odds with their societal background, but only in modern times has the view taken hold that one's inner self is *intrinsically valuable*, and the outer world is wrong and unfair in its evaluation of the inner self.[24] It is *not* the inner self, the argument goes, that has to be made to conform to society's rules, but it is society itself that needs to change and open up to toleration. In his seminal essay, *The Politics of Recognition*, Charles Taylor criticized the standard liberal thinking that reduced multiculturalism to mere tolerance as being insufficient.[25] Certain groups, he argued, need more than noninterference; they need acknowledgment – in his terms, recognition – of their particular identities.[26] This need rests on the assumption that people's well-being is closely tied with identity-formation and -preservation within communities.[27] It is not enough nowadays that I possess a clear sense of who I am if others fail to recognize it publicly or, even worse, deny it. Not just interference, in other words, but also misrecognition may cause an individual identity-related harm.[28]

In that context, it is the inner sense of oneself – one's identity – that desires *recognition*. It is not enough that I have a sense of my worth if others decline or fail to acknowledge it publicly. Because human beings naturally yearn recognition, the modern sense of one's identity evolves quickly into the familiar wave of identity politics, in which individuals call for the public recognition of their worth.[29] Such views ultimately led Taylor to argue in favor of granting groups particular rights and privileges or exemptions, designed mainly to foster not so much individual freedom as *collective* goals.[30] Doing so, he claimed, can be pivotal to fostering people's well-being if it protects a collective identity that people experience as intensely constitutive of, or at least exerting a substantial impact on, their personal identities.[31] Taylor's argument is structured around the following propositions: Providing individuals with equal respect means treating them equally; that is, defining human rights as uniformly as possible and hence enabling individuals to choose for themselves their goals and actions freely.[32] But if a considerable part of our identities is constituted

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[22] Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press 2005) 70.

[23] ibid, 70-71.

[24] ibid.

[25] Charles Taylor, 'The Politics of Recognition' in Amy Gutman (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 25.

[26] ibid.

[27] ibid, 28-32.

[28] ibid, 25.

[29] Francis Fukuyama, 'Why National Identity Matters' (n 3) 7.

[30] Charles Taylor, 'The Politics of Recognition' (n 25) 51-61.

[31] ibid.

[32] ibid, 61-73.

by social context, then our well-being depends additionally, at least in part, on community-oriented, common-good aims and actions.[33] The integrity and survival of communities that are constitutive of our identities, Taylor concludes, influence our well-being more profoundly than does the freedom of choice so strongly emphasized by liberalism.[34] This is the central philosophical proposition Taylor articulates in *The Politics of Recognition*.

Taylor's theory – which appears to embrace a *strong* multiculturalist position – mounted a critical challenge against liberal ideas. An alternative approach also departs from the importance for individuals of social context, but analyzes that importance from within the borders of classical liberalism. The theorist most associated with that *soft* multiculturalist position is the Canadian political theorist and philosopher Will Kymlicka, who, in his 1989 book entitled *Liberalism, Community, and Culture*, built up a robust argument in favor of recognizing (especially minority) group rights, deviating from Taylor's suggestions, by saying that 'it is only through having a rich and secure cultural structure that people can become aware… of the *options* available to them, and intelligently examine their value.'[35]

Will Kymlicka further elaborated his theory in a series of subsequent works by assuming two central preconditions for leading what may be thought of as a good life.[36] The first is that people should be able to live their lives according to their *own* beliefs and values.[37] The second is that people should be able to question these beliefs and values and revise or even reject them. To do this, they need to enjoy such freedoms as of speech and association.[38] In addition, they need what he calls a 'societal culture' providing its members with essential meaning.[39] To choose between multiple routes and ends, individuals need access to a *pluralist* 'cultural narrative,' which will help them discern as wide a range of options as possible. In Kymlicka's words, 'Cultures are valuable not in and of themselves, but because it is only through having access to a societal culture that people have a *range* of meaningful options.'[40] Since shedding one's own culture to live as part of another usually comes at a considerable cost, states should not compel individuals to do so.[41] On the contrary, even standard liberal states should accommodate and recognize group rights to ensure that individuals have continued access to an array of traditions and practices that they desperately need in order to live self-sufficiently.[42]

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[33] ibid, 25-36.

[34] ibid.

[35] Will Kymlicka, *Liberalism, Community, and Culture* (Oxford University Press 1989) 165 (emphasis added).

[36] Among Kymlicka's most remarkable works are *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1995); *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press 2002).

[37] Will Kymlicka, *Multicultural Citizenship* (n 36) 81.

[38] ibid, 81-82.

[39] ibid, 76.

[40] ibid, 83 (emphasis added).

[41] ibid, 85.

[42] ibid, 86.

This last claim differentiates Kymlicka's from Taylor's assumptions. Whereas Taylor conceives freedom of choice as being, at least at times, in conflict with promoting communities and the values with which people identify; Kymlicka presents the goal of fostering such communities as *instrumental* to realizing freedom of choice.[43] Kymlicka concludes then that there is a solid case to be made in favor of granting what he calls 'group-differentiated rights' insofar as these foster equality between groups without, however, threatening their members' autonomy.[44] In Kymlicka's view, 'what distinguishes a liberal theory of minority rights is… that it accepts some external protections… but is very skeptical of internal restrictions.'[45]

Many liberal theorists following Kymlicka have advanced similar arguments for state recognition of group rights. Recognition, they argue, is necessary, at least in some circumstances, to promote autonomy and freedom. Joseph Raz, most notably, emphasizes that freedom understood as meaningful choice within a rule-bound context is interpretable in light of the traditions and practices that people establish within groups.[46] But liberal thinkers across the broad spectrum of the views supported are not unanimous on whether, why, or how modern states should recognize group rights. Some, indeed, advance arguments for promoting the majority culture, based on the assumption that 'nation-building' is central to the maintenance of a liberal-democratic society, and that a nation's common identity depends on a sense of belonging that can be forged by cultivating shared values and practices.

III. The Value of Respect for National Identities

Communitarians have been placing a strong emphasis on the fact that personal identities are largely shaped by social context. A serious implication of their claim is that political communities are *valuable* in the process of collective identity-formation. Since personal identities are largely shaped by social context, communitarians argue, political communities should be actively encouraged and preserved.[47] It is only within such communities and their unique traditions and practices that individuals are nurtured with intrinsic values and common principles.[48] Members of 'value' communities share a sense of spiritual proximity to each other: By speaking the same language and sharing common history and traditions, they appear to be in a multiplicity of ways closer to one another than they are to those perceived – rightly or wrongly – as outsiders.[49]

Multiculturalism can take various forms ranging from recognition to specialized protection under the law to rights of autonomous governance for specific groups. It has already been shown that the modern perception of identity quickly transforms into what is commonly known as *identity*

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[43] ibid, 83.

[44] ibid, 87.

[45] ibid.

[46] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) 170, 175-177.

[47] Daniel Bell, 'Communitarianism' (n 1).

[48] ibid.

[49] ibid.

politics, in which individuals – alone or as members of larger groups – strive for recognition and accommodation of their perceived uniqueness. A particular view of an individual's or a group of individuals' unique character centers around *national* identity. Therefore, in what follows, I will attempt to embed the discussion of identity and identity-politics within the context of nation-states by providing some tentative answers to complex questions such as: Does a national political community have any value in the process of identity-formation? Does it offer any suggestions on the dichotomy between law and society? What causes, if any, does it serve within a transnational organization such as the European Union?

The perception of identity as an idea socially fabricated suggests that it is variable, meaning that even if people have a need of belongingness to a group, such a need can assume many different forms.[50] When the discussion comes to nation-states, one realizes that there is no fixed menu of options from which cultural commitments can be sharply assigned between lines on the map. Besides, national identities throughout the twentieth century have received a bad name because they ended up being associated with an ethnically-oriented sense of belonging, which at times proved devastating for those labeled as 'outsiders.'[51] Nevertheless, collective identities in the modern world seem enormously important and very often dominant. Specifically, it could be argued that the rise of the nation-state caused – or perhaps was caused by – the increasing dominance of collective identities over several aspects of self-definition.[52] Modern nation-states have acquired levels of loyalty and commitment to various degrees, thereby rendering them a major force in the overall process of identity-formation and hence disqualifying traditional social groupings based on caste, consanguinity, or religion.[53] Parochial ways of self-definition such as religion, language, collective myths, and ethnicity persist in shaping people's identities as well, but the enormous influence of the nation-state has tended to focus these alternative constructs into the political arena.[54] The religious wars of the sixteenth and seventeenth centuries, for instance, essentially made all religions *political*, and religious groups responded by taking their part in the political arena.[55] Similarly, with nationalism's rising influence, the common stories of various groups either have become tightly connected with national identities or have been consciously erected as a powerful means of substituting national identities for new ones.[56]

However, to the extent that other aspects of the collective identities such as religion, language, ethnicity, etc. persist in lending coherence to the relationships between social groupings and their members, these aspects are likely to overlap with national identities in the modern world of nation-states; that is, people nowadays *expect* that their sub-national identities and their national ones

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[50] Malcolm M. Feeley & Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (The University of Michigan Press 2008) 9.

[51] Francis Fukuyama, 'Why National Identity Matters' (n 3) 10

[52] Malcolm M. Feeley & Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (n 50) 10.

[53] ibid.

[54] ibid.

[55] ibid.

[56] ibid.

will, if not correspond to each other, at least interact with them.[57] Therefore, caution should not necessarily lead to the conclusion that states possess *no* identity at all. National identity based on ethnic origin may have caused the atrocities of World War II – to give but one extraordinary example. These dangers, however, did not originate from the abstract idea of national identity itself, but from an understanding of that identity which was narrow, ethnically based, intolerant, aggressive – in fewer words, 'genetically' defective.[58]

Things do not have to be this way. National identities built around liberal-democratic values may cut across divisions and offer the common thread necessary to allow diverse nations to thrive. Such an inclusive, liberal sense of national identities is prominent in maintaining a successful political order for a number of reasons. First, the absence of a strong national identity may lead a state to disintegration, civil war, or even breakdown.[59] Sharp divisions across identity lines unrestrained by centripetal forces weaken in large part a state's ability to act self-sufficiently in the fields of international relations and foreign affairs. Second, a weak national identity may adversely affect the quality of government. Absent a sense of national identity and of the solidarity that comes with it, politicians tend to favor their political allies – that is, individuals of particular subnational identity groups.[60] As a consequence, they lack the incentives necessary to serve the community's general interests. Third, national identity may foster economic development.[61] If people agree on their common belonging to a national community, they will work more effectively on its behalf.[62] Indeed, countries such as South Korea offer the best example of rapid economic growth based on feelings of belongingness. In contrast, lacking such feelings of attachment to a larger political community may function as a disincentive for working toward a common goal. Strong national identities have brought about stability and prosperity, whereas weak national identities, or even the absence of these within nation states, have been accompanied by failed economies and high levels of poverty and corruption. In contrast, states already based upon the premise of some sense of joint effort and liberated from the burden of settling division and civil strife have been better able to progress their national projects.[63]

Fourth, assimilation into the larger community, if not the result of coercion, may offer newcomers to a country greater prosperity based on the widest possible access to opportunities.[64] Thus, national identity may enhance economic development if it does not become the basis for protectionism against other nations.[65] Fifth, a strong national identity may enhance domestic social safety

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[57] ibid, 12.

[58] Francis Fukuyama, 'Why National Identity Matters' (n 3) 9.

[59] ibid.

[60] ibid.

[61] ibid, 10.

[62] ibid.

[63] ibid.

[64] ibid.

[65] ibid.

nets.[66] If individuals feel that they belong to a cohesive political community and have acquired over time high levels of trust in one another, they are more likely to support social ventures that aid their weaker fellows. In contrast, in communities divided into groups whose members feel alien to each other, people are more likely to perceive one another as competitors in a zero-sum contest for scarce resources.[67]

But what is most crucial for present purposes is that national identities are instrumental in enhancing liberal democracy itself.[68] To actually work and flourish, democracy needs something substantial. The greatest hurdle nowadays is the lack of genuine attachments and affiliations on the part of their people. Provided that the collective mindset does not take the form of blind subordination, it may enhance feelings of faith in, and attachment to, the ideas of liberal-democratic governance as uniquely enforced within national borders and save political communities when ordinary institutions fail to deliver reasonably, and therefore create despair.[69] If citizens do not believe that they are all members of a political community assisting them toward a common end, then liberal-democratic governance will sooner or later fall into decay and probably collapse.[70] However, the existence of agreement on fundamentals between people and their government cannot – and does not – automatically emerge. National identity begins with a shared commitment to the legitimacy of a nation's political system, but in no way does it end there. National identity extends into the territory of values. It crucially consists of the stories that people tell about themselves: their origins, their memories, their aspirations, etc. National identity can succeed in penetrating into formal laws and institutions that determine, for example, which language or languages will be considered as official ones.[71] As James Madison put it referring to the U.S. Constitution,

> ... [frequent appeals] to the people would carry an implication of some defect in the government, [which] would, in a great measure, deprive the government of *that veneration which time bestows on every thing*, and without which perhaps the wisest and freest governments would not possess the requisite stability….[72]

That long-term association of time and place may illuminate the reasons why a search for final authority (*Kompetenz-Kompetenz*) and the rule of recognition (*Grundnorm*) seem so important

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[66] ibid.

[67] See in particular Craig Calhoun, 'Social Solidarity as a Problem for Cosmopolitan Democracy' in Seyla Benhabib, Ian Shapiro & Danilo Petranović (eds), *Identities, Affiliations, and Allegiances* (Cambridge University Press 2007) 285.

[68] ibid, 11.

[69] ibid.

[70] ibid.

[71] See Rogers M. Smith, *Political Peoplehood: The Roles of Values, Interests, and Identities* (The University of Chicago Press 2015) (discussing how modern America's growing integration of a number of overlapping but divergent identities is actually in tension with American exceptionalism).

[72] James Madison or John Hamilton, *The Federalist Papers: No. 49*, 'Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention from the New York Packet. Tuesday, February 5, 1788,' <https://avalon.law.yale.edu/18th_century/fed49.asp> accessed 17 February 2023 (emphasis added).

nowadays for the EU Member States: Europeans value the integrity of their *own* constitutions not merely as a habit-of-obedience reaction but of moral commitment and *identity*.[73] That the Member States' constitutions guide their home jurisdictions across a European path testifies to the fact that their contributions in the EU rest on more than merely structuring governmental powers and the relationship between the EU and Member State authorities.[74] Constitutions are felt as encapsulating the fundamental values of our polities and this is at least allegedly, in Weiler's words, 'a reflection of our collective identities as a people, as a nation, as a state, as a Community, as a Union.'[75]

IV. The Value of Respect for Constitutional Identities

We may now turn to what is of key interest for present purposes – that is, the values served by paying respect to national constitutional identities within the transnational dimension. A successful federal constitutional experiment requires, at a minimum, that there be some recognition that the peoples of constituent units enjoy the powers to construct their *own* legal meanings.[76] This, in turn, serves a number of political goals.

By creating a governmental structure with extensive powers over individual lives in the first place, framers are unavoidably inviting abuse of that power too. One of the most profound challenges confronting constitutional democracies then is how to provide the government with sufficient power to do its job, while at the same time erecting effective barriers against the risk of abusing that power. As James Madison, in anticipation of the institutions that were to be founded by the Philadelphia Convention and to be incorporated into the U.S. Constitution, put it:

> In framing a government which is to be administered by men over men, the great difficulty is this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.[77]

From a certain perspective, no institutional device is perhaps more powerful or well-suited to achieve that goal than *structural* limitations upon governmental powers. At the level of the central government, one such device is separation of powers – that is, the creation of separate governmental branches, each having its own *source* of authority in the constitution and its own substantive *powers*. Separation of powers is inherently valued for limiting the threat of arbitrariness because it divides the government against itself and forces its different departments to share their powers

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[73] Joseph H. H. Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaidis & Robert Howse (eds), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001) 62.

[74] ibid, 62-63.

[75] ibid, 63.

[76] Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (Johns Hopkins University Press 2009) 44.

[77] James Madison or John Hamilton, *The Federalist No. 51*, 'The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments. From the New York Packet. Friday, February 8, 1788,' <https://avalon.law.yale.edu/18th_century/fed51.asp> accessed 17 February 2023.

by making the cooperative performance of all prerequisite for anything in the chain of law-making from proposing through adopting to executing the laws. Once again, in James Madison's words,

> In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.[78]

Although modern constitutional democracies demonstrate a variety of political arrangements, and legal doctrines have accordingly lost much of their accuracy; nevertheless, separation of powers persists in taking credit as the system of checks and balances most successful amongst its competitors.[79] In particular, a system of checks and balances is intended to act as a guardian over the separated governmental powers, balancing the powers of each against those of the others. The general idea is to vest each branch with the power to act on a number of policy fields and let the others check its performance.[80] Separation of powers thus ensures that every government official observes his or her political mandate, guards against fraud by other agencies, and allows for the timely correction of errors.[81] For instance, while the U.S. President – occupying the executive branch – can veto laws passed by Congress, the latter can successfully override a presidential veto with a two-thirds vote in both houses.[82] In the same vein, the U.K. Parliament has the prerogative to adopt a no-confidence vote in the government, which, in turn, is forced to dissolve the Parliament and hold elections. Consequently, each of these bodies has certain powers, but not too many, and each can respond to how these powers are exercised by the others by means of modification or repeal. In the words of John Adams, the delegate of Massachusetts in the Philadelphia Convention,

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[78] James Madison or John Hamilton, *The Federalist No. 51*, 'The Structure of the Government' (n 77).

[79] See generally Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (first published 1969; The University of North Carolina Press 1998).

[80] Maurice J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press 1967) 14 (providing the following definition of a 'pure,' as he calls it, doctrine of the separation of powers:

> … the government should be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches, there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.

ibid.

[81] ibid, 18.

[82] U.S. Constitution, art I, s 7, cl 2.

> It is by balancing each of these powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution.[83]

To be sure, federalism seems in a number of circumstances to be not a political option but a necessity caused by, as aptly stated by Professors Malcolm M. Feeley & Edward Rubin, a 'tragic compromise' that is paradigmatic of federal arrangements.[84] The main reason, the argument goes, that deeply rooted nation-states such as Europe's are sometimes driven to a certain form (or degree) of federalism – commonly known since the founding of the European Coal and Steel Community as *supranationalism* – is to diminish the possibility of future conflict among their peoples that is likely to arise from a disjunction between their strong national identities and their closeness on the map.[85] If, in contrast to the reality currently prevailing in Europe, the great majority of the population shared at least some key attributes of identity, or identity conflicts were geographically dispersed, federalism would not emerge or, having emerged in the past, would tend to disappear over time.[86] By expanding the range of political resources available for the creation and maintenance of stable governance, federalism thus provides an effective means by which such a disjunction can be successfully *relieved*.[87] In other words, federalism, and in particular EU supranationalism, helps a *healthy* competition take place between multiple sources competing for identity formation so that individuals remain peacefully involved within both their national (read: Member State) and their supranational (read: EU) commitments.[88]

Federalism then is to supranationalism what separation of powers is to a unitary government.[89] But federalism in general tends to mean *different* things to different people and that risks any efforts to come up with effective solutions to managing federal conflicts. For instance, one might want federalism to protect the constituent parts within a supranational organization as strongly as possible – to maintain these parts as viable political communities in their own right, with a high degree of popular self-identification, distinct cultural traditions, and political autonomy.[90] Or, more modestly, one might hope that federalism would provide some degree of variation and experimentation across jurisdictions and maintain a soft form of checks and balances against the central government.[91] Furthermore, some federalism strategies seek to curb the central *power*

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[83] John Adams, Letter to Richard Henry Lee, 15 November 1775 <https://founders.archives.gov/documents/ Adams/06-03-02-0163> (providing to Richard Henry Lee, delegate of Virginia, his assistance in convincing his home state of the need for independence of the American colonies against the British Crown).

[84] Malcolm M. Feeley & Edward Rubin, *Federalism* (n 50) 38-39.

[85] ibid.

[86] ibid.

[87] ibid, 15.

[88] ibid.

[89] Ernest A. Young, 'Protecting Member State Autonomy in the European Union: Some Lessons from American Federalism' (2002) 77 NYU L Rev 1620.

[90] ibid.

[91] ibid.

directly – that is, by separating what are perceived as distinct jurisdictional 'worlds.'[92] Others insist on a set of *procedural* safeguards for constituent units within a supranational entity,[93] and still others endeavor to calibrate these units by providing them with *immunity* from norms originating in the center.[94] Therefore, there are a variety of conceptual approaches to federalism and its European version of supranationalism, each of which may, in turn, shed some light on the options available to Europeans as they struggle to achieve their own power balance.

On the one hand, *power* federalism strategies – especially in the American constitutional regime – rest on the assumption that the central government necessarily *lacks* the power to act in particular policy fields. Absent such power, the authority to regulate rests with the states. But clear lines of jurisdiction have always been exceptionally *difficult* to draw and even more difficult to enforce.[95] Indeed, the world history of federalism provides plenty of reasons to be cautious about power-federalism strategies. Large part of that history focuses on the doctrine of dual federalism, the idea of 'watertight compartmentalization' between the federal and state governments.[96] *Dual* federalism ultimately splits up law's universe into two (or more) 'galaxies' along what it aspires to define (at times arbitrarily) as a precise constitutional line separating each.[97] Through time and experience, dual federalism has given way to a form of *cooperative* federalism which ultimately sought to substitute a relationship of sincere partnership – cooperation – between the federal and state governments for the apparent dysfunctions of jurisdictional line-drawing.[98] The current state of federalism worldwide, even though usually incorporating certain elements of both forms of federalism, seems more like a tug-of-war between the center and the periphery for *Kompetenz-Kompetenz* – with each level of government struggling to demonstrate itself as better able to come up with solutions characterized by innovation and success in locating them as close as possible to their constituencies.

As perhaps anticipated, such struggles usually end up being resolved in courtrooms. Courts might respond to federal conflicts by employing a variety of interpretive outlooks. For instance, they may enforce a version of dual federalism by attempting to impose what they perceive as narrow, formal rules of 'who does what.'[99] Such a judicial approach, of course, will likely reflect poorly on the values that federalism was supposed to advance in the first place.[100] Alternatively, courts might try to enforce legal doctrines that, while they do not define neatly exclusive jurisdictional zones, nonetheless provide public authorities with narrow leeway to intervene in a

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[92] ibid, 1645-1649.

[93] ibid, 1649-1660.

[94] ibid, 1660-1663.

[95] ibid, 1677.

[96] ibid, 1669-1670.

[97] ibid, 1646.

[98] See generally Robert Schütze, *From Dual to Cooperative Federalism the Changing Structure of European Law* (Oxford University Press 2009).

[99] Ernest A. Young, 'Protecting Member State Autonomy in the European Union' (n 89) 1647.

[100] ibid.

substantial range of cases.[101] Any effort to enforce federalism with as much precision as possible confronts inherent difficulties. Most prominent among them is that the value application involved in judicially-led doctrines is likely to cause courts to drift into unmapped territories where the borderline between law and politics is hard to discern and tempting to trespass.[102]

On the other hand, *process* federalism holds that the policy goals of state governments are better protected through *political* means.[103] Process federalism does not, however, focus on the idea of a sacred essence of state autonomy, rather it stresses the need for enforcing procedural safeguards within the federal political structure itself.[104] States are supposed to defend their interests within the political corners of the federal government where they are considered to be more powerfully represented.[105] Nevertheless, courts should at times intervene to compensate for possible failures of political safeguards, based on the assumption that, first and foremost, process federalism does not focus on particular policy outcomes; just as Professor John Hart Ely argued in the 1980s that judicial review within a liberal democracy is best justified by a need to *compensate* for possible defects in the political process.[106,107] In that context, courts have elaborated a number of process-oriented approaches intended primarily to prevent, or compensate for, the potential failings of federalism, most prominent among which is the exercise of a means of statutory construction widely known as 'clear statement rules.'[108]

To come up with federalism strategies able to relieve EU supranationalism of potential conflicts between the EU and the Member States, we must first distinguish the key sources of that conflict. What EU supranationalism suffers from is, pursuant to Professor Dieter Grimm's diagnosis, 'too much constitutionalism.'[109] By definition, constitutions are not capable of providing black-and-white answers to complicated questions of law and settling divisive political debates.[110] On the contrary, governmental institutions that are engaged in enforcing the abstract language typical of constitutional provisions are also charged with mediating most political and legal conflicts.[111] Or, as Professor Grimm put it, 'The function of constitutions is to legitimize and to limit political power, not to replace it. Constitutions are a framework for politics, not a blueprint for all political decisions.'[112] *Overloading* constitutional texts such as the EU Treaties with materials that are not in themselves constitutional is likely to lead to shrinking of the realm of politics. The same result

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[101] ibid.

[102] ibid, 1648.

[103] ibid, 1649.

[104] ibid.

[105] ibid.

[106] John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Harvard University Press 1980) 103.

[107] Ernest A. Young, 'Protecting Member State Autonomy in the European Union' (n 89) 1649.

[108] ibid, 1651. For a tentative application of 'clear statement rules' unto the EU context, see *infra* Chapter 3 section IV. Towards a Theory of Judicial Review of Member States' Constitutional Identities.

[109] Dieter Grimm, 'The Democratic Costs of Constitutionalization: The European Case' (2015) 21 Eur LJ 464.

[110] Beau Breslin, *From Words to Worlds* (n 76) 88.

[111] ibid.

[112] Dieter Grimm, 'The Democratic Costs of Constitutionalization' (n 109) 464.

can be produced by what Grimm considers the 'constitutionalization of ordinary law.'[113] The more that pieces of ordinary legislation are held as deriving from the constitution itself – in this case, the EU Treaties, the less politics can interfere therewith, driven either by a need to adapt to the changing circumstances or by a shift of the political forces.[114]

These 'over-constitutionalizing' tendencies are further exacerbated in regimes where courts are constitutionally empowered with resolving legal disputes without being counterbalanced by political institutions. For instance, where the weight of a human right is defined by the courts as its power to withstand a struggle with competing human rights, they judicially expand the scope of that right *by adding mass to its nucleus* – that is, by over-constitutionalizing legal materials that lack constitutional qualities. This results in the enhancement of judicial authority at the expense of political bodies.[115] In contrast, constitutionalism dictates that political bodies must primarily have authority over human rights whose normative weight is not equal to that of other human rights lying in the core of generic constitutionalism, in order to be able to change them when times change. From the EU perspective, a representative example is offered by the CJEU's evolving case-law over the binding effects of EU Directives. In contrast with Regulations, EU Directives are generally considered to bind the Member States as far as objectives are concerned without, however, commanding them to use *certain* means to achieve these objectives. However, the CJEU has recognized in certain circumstances the possibility of EU Directives having direct effect in order to warrant individual rights. As the court has laid down in its seminal 1974 judgment in *Van Duyn v. Home Office* and has ever since pursued consistently, an EU Directive has *direct effect* when its provisions are unconditional and sufficiently clear and precise and when the Member States have not transposed the Directive by the deadline.[116] As anticipated, the EU institutions were indirectly encouraged to issue more and more detailed Directives to overcome the judicially-sanctioned threshold for their provisions to count as self-standing within the Member States' jurisdictions.[117]

Over-constitutionalization became manifest when it was clear that the EU had embarked on a process of integration not only of the economy, but also of politics. The EU Treaties, then, were first overloaded with substance that would otherwise constitute ordinary law within the Member States' jurisdictions and, second, under the audacious moves of the case-law, were constitutionalized to produce the combined effect of, in Professor Grimm's words, 'a state of integration that *the citizens were never asked to agree to, but cannot either change*, even if they do not support it.'[118] Professor Dieter Grimm not only diagnosed the disease but also prescribed a medication. A possible remedy, he proposed, to the challenge of over-constitutionalizing EU law could be to *de*-constitutionalize by re-politicizing it;[119] to lift only *policy*-making into primary EU law and to

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[113] ibid.

[114] ibid.

[115] ibid.

[116] Case C-41/74 *Yvonne van Duyn v Home Office* [1974] ECR I-1337, para 13.

[117] Dieter Grimm, 'The Democratic Costs of Constitutionalization' (n 109) 469.

[118] ibid, 471 (emphasis added).

[119] ibid.

relegate *rule*-making to secondary EU law.[120] A return to politicization would involve a shift of decision-making gravity back to its original location – to the Member States acting through their governments in the Council or through their representatives in the European Parliament.[121] Such a decisional retreat would also mitigate the pressure exerted on the EU's democracy deficit.[122]

To be sure, Professor Grimm's proposals may be powerful, but they also prove to be flawed in other respects. For instance, his proposition that 'the freer a court, the more necessary it seems for politics to have the possibility of re-directing it through legislation,' although true in general terms, in the EU context is open to criticism for downplaying the fact that Member States (or their governments) may often be either unable or reluctant to defend particular values of their native constitutional cultures. In addition, his proposal to restore rule-making through secondary EU law has been accused of replacing judicial centralization with political centralization that is at least as problematic from the perspective of the Member States' autonomy.[123] The most severe criticism of Grimm's proposals, however, is that they fundamentally change the nature of the EU from a functional organization into a regulatory forum whose purposes are self-determined and thus go, from the perspective of the Member States, democratically *unchecked*.[124] What is really needed to prevent the risk of – most importantly but not exclusively – judicial tyranny on the part of the CJEU are mechanisms for co-existence and participation within the constitutional realm.[125]

Drawing on democratic theory's uneasiness toward absolute supremacy of any one final interpreter, 'interpretive pluralism,' as formulated by Professor Richard Stith in a 2008 article,[126] spells out a powerful argument for multiple interpretations of law originating from a multiplicity of governmental authorities, not one of which could possibly claim for itself, or the judgments it delivers, unqualified validity over the others.[127] Stith's intriguing analysis of interpretive pluralism rests on two fundamental assumptions. First, it stresses the need for common subordination of governmental bodies, and in particular of courts, to a common authoritative text; and, second, it argues for a decentralized power to interpret it.[128] Combining 'separation of powers [as a means of weakening] a court by restricting review [and] checks and balances [as a means of achieving] a similar result by expanding review, [by] making it mutual or coordinate,'[129] Professor Stith argues that supreme or constitutional courts should be disabled or at least discouraged from imposing their *own*

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[120] ibid.

[121] ibid, 472.

[122] ibid, 473.

[123] Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalization' (2018) 24(6) Eur LJ 358.

[124] ibid, 363.

[125] ibid.

[126] Richard Stith, 'Securing the Rule of Law through Interpretive Pluralism: An Argument from Comparative Law' (2008) 35 Hastings Const L Q 401.

[127] Gareth Davies, 'Does the Court of Justice Own the Treaties?' (n 123) 367.

[128] ibid, 367-368.

[129] Robert Stith, 'Securing the Rule of Law through Interpretive Pluralism' (n 126) 433.

interpretations of law over law's universe,[130] as well as that *more than one* court should be entrusted with interpreting law, each being responsible not just within certain, more or less precise jurisdictional boundaries, but jointly.[131] The ensuing diversity of interpretive voices will dictate, in Stith's words,

> that wherever [a need for] unity of meaning does appear, it will come through persuasion rather than through coercion.[132]

Indeed, within the interpretively pluralist condition, courts – and especially those courts located at the central government – will have a stronger motive to deliver judgments marked by the degree to which they *persuade*, rather than commandeer, their audience.[133]

Professor Gareth Davies presents interpretative pluralism as providing a promising federalism strategy, able to disentangle the over-constitutionalization dilemma by engaging both the EU and the Member States' courts. He depicts Stith's conceptualization as particularly apt to relieve power conflict within the EU supranationalism. Tracing as the primary source of conflict the failure on the part of the EU to cultivate trust among Member States, he rightly observed that 'Command alienates. Trust engages.'[134] Without challenging the fundamental principles to which the Member States have consented time and again, interpretive pluralism encourages in the EU context a *multiplicity of voices* to be heard in an orderly manner.[135] Even though such authoritative texts as the EU Treaties or the Member States' constitutions finally come to mean whatever constitutional or supreme courts say they do, it argues that the Member States' institutions should not, as a matter of principle, be altogether disqualified from challenging the CJEU's interpretations of EU law.[136] For its part, the CJEU has been perfectly aware of the need to construct a relationship of trust with its colleagues across the Member States, since successful performance of its service depends, in no insignificant degree, on sincere support by them.[137] Although in the early stages of European integration that support may have been purchased in exchange for ceding to Member-State actors a degree of judicial discretion to reshape national law on their own terms,[138] nowadays, the price resembles more the kind of active engagement in shaping EU law as is best encapsulated in the EU's duty to respect Member States' constitutional identities.[139]

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[130] ibid.

[131] ibid, 435.

[132] ibid, 434.

[133] ibid, 436.

[134] Gareth Davies, 'Does the Court of Justice Own the Treaties?' (n 123) 360.

[135] ibid, 359.

[136] ibid, 361.

[137] ibid, 367 (citing Joseph H. H. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) 26 Comp Pol Stud 510).

[138] ibid.

[139] ibid.

Interpretive pluralism thus avoids engagement with the *unending* dialectic of hierarchy between the EU Treaties and the Member States' constitutions and, instead, succeeds in putting forward an ambitious plan of how EU law can be contained without being subordinated.[140] If EU law aspires to become a vital part of European legal heritage, and of the law of the Member States, it can ensure – thanks to the interpretively pluralist formula – that European courts become more convincing in their interpretations of EU law, and that the Member States' courts become more influential on EU law's interpretations.[141] As Professor Richard Stith points out, 'Multiple rulers – in other words, interpretive pluralism – may provide a secure foundation for the rule of law.'[142] As a consequence, then, no single court, either of the EU or of the Member States, will be powerful enough to impose its vision of EU law on the rest, and pluralism of interpretive approaches to EU law will be free to survive through persuasion.[143]

Interpretive pluralism creates a *dynamic* system in which each court is relatively free to pull in multiple directions, but it is dormant forces that mediate to pull towards a much-needed consensus.[144] It encourages healthy *dialogue* between courts that helps enrich EU law with materials imported from within the Member States; it allows courts to understand each other, inform each other and respond to each other.[145] The Member States' courts, on the one hand, become more European as they take on responsibilities for rules, the European origin of which is something they have to acknowledge and honor. On the other hand, the CJEU becomes more responsive to state concerns and understandings, and is encouraged to interpret EU law with a clearer understanding of what its interpretations may actually imply.[146] Last, but of utmost importance for the present purposes, interpretative pluralism evinces that the essence of the Identity Clause as enshrined in art 4 TEU is probably that it is not always the Member States' constitutions that must be interpreted so as to suit EU law – and unconditionally so – but sometimes, and particularly under the terms of EU law itself, the other way around.[147]

Indeed, viewed through the prism of interpretive pluralism, respect of the Member States' constitutional identities appears to welcome a form of *loyal opposition* to EU law that produces a much wider range of possibilities for thinking about it. As Professor Tom Flynn points out, 'In a democracy, opposition and contestation are not pathologies to be discouraged, but rather signals of a healthy system.'[148] Adapted to serve the pluralist formula, identity respect is able to contribute to enriching EU law's interpretation with materials internal to home jurisdictions. Identity respect would ideally intervene within stage one of the preliminary reference procedure in order to persuade the CJEU into adopting an interpretation of EU law that leaves as much *space* as reasonably

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[140] ibid, 361.

[141] ibid, 365.

[142] Robert Stith, 'Securing the Rule of Law through Interpretive Pluralism' (n 126) 428.

[143] ibid, 433-434.

[144] Gareth Davies, 'Does the Court of Justice Own the Treaties?' (n 123) 374.

[145] ibid, 373.

[146] ibid.

[147] ibid, 365-366.

[148] Tom Flynn, 'Constitutional Pluralism and Loyal Opposition' (2021) 19 International J Const L 243.

possible for the referring court itself to maneuver over identity issues. Within the same setting, the CJEU is expected to accept the challenge and, within the limits set by a self-evident need for uniformity, to adapt EU law into the identity claims of the referring court. The Member States' courts will then be better able to integrate the CJEU's interpretations of EU law into their own jurisdictions and to handle identity issues as they see fit – for instance, by deferring to political institutions or taking it upon themselves. Confronted with such a mechanism of 'mutual review,' as Professor Stith concludes:

> each interpreter has a stronger motive to persuade others that its interpretation is the most plausible. The ensuing conversation will thus tend to center on and circle about the law, restraining any centrifugal forces that might otherwise cause interpreters to fly away from that which they are interpreting.[149]

Warranting identity respect through a mechanism constructed with pluralist materials serves a number of democratic goals. First, supranationalism of the magnitude that is currently in force in the EU can only succeed if one subscribes to the value of *diversity* at the central level. Europe has always been diverse, and is getting more and more so with the passage of time. The major upheavals that have marked European history testify to the importance of enabling such diverse identities as religious, cultural, linguistic, and ethnic ones to flourish. As the Preamble to the Charter of Fundamental Rights of the EU puts it:

> The Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union.... The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.[150]

Thus, embracing instead of resisting or subordinating diversity can produce great benefits for the EU. But what is the appropriate confrontation of the EU with the apparent diversity among the Member States and their peoples?

Historically, such terms as 'exclusion, 'assimilation,' and 'pluralism' were coined to define the various ways of treating diversity. Exclusionists hold that the turbulent symbiosis of differing group-members should be confronted by the 'ins,' whose commitments appear to be challenged, 'shutting the door on the outs.'[151] Assimilationists, on the other hand, approach the diverse society with a 'melting pot' ethos, and hence they welcome any newcomers, but urge them to leave their

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[149] Robert Stith, 'Securing the Rule of Law through Interpretive Pluralism' (n 126) 436.

[150] Charter of Fundamental Rights of the European Union [2016] OJ C202/393, preamble.

[151] See 'From Diversity to Pluralism' (*The Pluralism Project*) <https://pluralism.org/files/pluralism/files/ from_diversity_to_ pluralism_ 0.pdf> accessed 17 February 2023.

diversity 'at the door.'[152] Formulating his critique against such an assimilationist, 'melting-pot' ethos, which he considers as a form of 'illiberal liberalism,' Professor J. H. H. Weiler contends that:

> the 'be one of us' is often an invitation to the alien to be one of us, by being *us*. *Vis-a-vis* the alien, it risks *robbing* him of his identity. *Vis-a-vis* oneself, it may be a subtle manifestation of both arrogance and belief in my superiority as well as intolerance. If I cannot tolerate the alien, one way of resolving the dilemma is *to make him like me*, no longer an alien…. It is still a form of dangerous internal and external intolerance.[153]

The grave dangers of illiberal liberalism may have their roots in what Professor Philip Hamburger has called 'liberal theology.'[154] Liberal 'theologists' expect people to think alike, behave alike, and conclude alike about the common good.[155] Hamburger explains further that 'when pursued by a powerful majority,' liberalism can itself 'become a threat to freedom' and, ironically, even constitutionally intolerant.[156]

In contrast, the form of pluralism to which identity respect gives rise is able to operate effectively as a bridge-building mechanism in such diverse communities as the EU. But what exactly is pluralism anyway? Pluralism may sometimes be considered as coterminous with diversity, but it is not; it is rather a direct confrontation of, and a dynamic involvement with, diversity. One can watch diversity and can even 'celebrate' it, but *real* pluralism requires engagement with diversity. Neither is pluralism another form of tolerance. Despite its evident value, tolerance does *not* really require people to know anything about the others and, consequently, sometimes it relieves us of our unwillingness to come to know more – or anything – about them. In other words, tolerance may indeed command respect for diversity, but does little to defeat our ignorance of it. In a public square marked by diversity and pluralism, however, commitments are not left 'at the door.' 'Pluralism is the process of creating a society through critical and self-critical encounter with one another, *acknowledging*, rather than hiding, our deepest differences.'[157]

Indeed, pluralism highlights the fact that a successful pluralistic society is not premised on achieving agreement on every single issue, but on reaching a condition of *ongoing* debate and discussion, as heated as these may be. After all, the essence of the EU's motto, 'United in diversity,' is probably that the most critical thread binding the Member States and their peoples with the EU is a joint commitment to engage in a peaceful debate.[158] To be sure, not everyone 'at the

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[152] ibid.

[153] Joseph H. H. Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg' (n 73) 19 (emphasis added).

[154] Philip A. Hamburger, 'Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property' (2002) 12 J Contemp Legal Issues 693.

[155] ibid.

[156] ibid, 694.

[157] See 'From Diversity to Pluralism' (n 151) (emphasis added).

[158] Gareth Davies, 'Does the Court of Justice Own the Treaties?' (n 123) 373-374.

table' will agree on anything with everyone else. Pluralism involves predominantly the determination to sit 'at the table' – bringing one's own beliefs to the group, not leaving them behind. Identity respect provides such a high-profile and sophisticated organization as the EU with a viable mechanism capable of fostering diversity through pluralism by means of a judicial 'round-table,' located in-between, where the multiple Member States cannot only speak out, but also be heard of. To achieve that, the European courts need to absorb the fact that not all Member States will agree on everything with each other – hopefully so for democracy itself – but that at least there will be a real seat reserved for them at a pluralist European 'round-table' to enable them to contribute to the ongoing public discourse.

Second, identity respect operates as a *checks-and-balances* mechanism toward the EU supranationalism through a variety of means. The Member States associate with the EU in ways that, at least on some occasions, finds them in a voting minority, in juxtaposition to their condition at home.[159] To shield effectively the interests of potential minority Member States, the EU needs to take into account the fact that, 'Good governance… arises from institutions that pull toward the center, offering incentives for participation and disincentives to defect – voice, not vetoes.'[160] Identity respect indeed provides aspiring minority state agents with an institutional means to exert a powerful but also moderate influence on EU decision-making through 'dissent by diverging' – a variation on the theme that is widely known in the federalism literature as 'dissent by deciding'[161] – giving them options for policy alternatives and experimentation. The result is that the Member States are more likely to mount a political check upon the center if they are constitutionally permitted to reasonably diverge – or *maneuver* away – from norms generated at the EU level.[162] The founding fathers of the European Union probably envisioned Europeans as loyal to both their national and supranational attachments, with each level being able to become more (or less) salient to the extent that the other performed poorly or presented a threat to liberty.[163] The most effective means available for the Member States to counter-balance without compromising the reach of the EU's powers and responsibilities is by pushing their *Voice* into the EU; by identifying, within the universe of the powers that they have already delegated or will delegate in the future to the EU, normative *enclaves* of Member-State sensitivities which offer a silent but dynamic – a dormant, in American constitutional law terms[164] – barrier against the central power. Additionally, policy-making can bring better outcomes when it operates on as 'localized' a level as possible in the circumstances, so that outcomes are more closely tailored to local particularities.[165] In the present

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[159] Joseph H. H. Weiler, 'The Transformation of Europe' in Miguel Poiares Maduro and Marlene Wind (eds), *The Transformation of Europe: Twenty-five Years on* (Cambridge University Press 2017) (first published as J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale L J 2403) 81, 95.

[160] John Gerring, Thacker C. Strom & Moreno Carola, 'Centripetal Democratic Governance: A Theory and Global Inquiry' (2005) 99(4) *Am Pol Sc R* 570 (quoted by Malcolm M. Feeley & Edward Rubin, *Federalism* (n 50) 48).

[161] See generally Heather K. Gerken, 'Dissenting by Deciding' (2005) 57(6) Stan L R 1746.

[162] Ernest A. Young, 'The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System' (nyp) 35.

[163] ibid, 37.

[164] See, for example, Mark Tushnet, 'Rethinking the Dormant Commerce Clause' (1979) Wis L Rev 125.

[165] ibid, 31-32.

context, then, the Member States are better suited to evaluate the actual content of their constitutions' *identities* because they are essentially closer to the materials that lend these identities their substance.

Consequently, then, far from being a threat to the very existence of the EU, or to the integrity of its law; political and legal conflict between the EU and its Member States can sometimes be a good, useful, and justifiable occasion, serving as an animating force which – though at times painful – can shield against the possibility, however distant, that the EU's role as a bulwark against authoritarianism fails.[166] The fact that, as things are now, this is unlikely, is insignificant; authoritarianism is possible, and possibility is enough to dictate a continuous state of alarm and to encourage the design in advance of prevention mechanisms. In the adversary scenario of imperfect Member States in an imperfect EU, observers should be more cautious about submitting to an unconditional subordination of the one governmental level to the other, and even more cautious about identifying heterodox thinking with disloyalty or betrayal to the European values.[167]

Third, respect for the Member States' constitutional identities facilitates *accountability* by enabling people to keep their representatives closely in check. Indeed, a cornerstone of democratic governance is that elected official are constantly accountable to those who elected them. Accountability begins at election day, but definitely it does not end there. The notion of representative government requires that there be a continuing opportunity for the people to communicate their policy preferences with office-holders. The more local the government, then – and the closer the governmental agency to speak any *identity* concerns – the more the opportunities for channeling communication between those in office and voters. In other words, closeness tends to strengthen accountability by facilitating access. But what exactly is the relationship between stronger accountability and EU supranationalism?

The quality of democratic governance can be measured, among other parameters, by the closeness, responsiveness, and accountability of the governors toward the governed.[168] If a decision to integrate within, say, a supranational organization such as the EU was reached democratically within each of the integrated polities, the integrated result will most certainly enjoy formal (or legal) legitimacy.[169] Nevertheless, the new entity's responsiveness to the people will be less than that of the integrated polities.[170] Before integration, a majority of electors in, say, France had been able to exert decisive influence over their level of taxation, of defense, etc. After integration, however, even a large majority of the electors in France can effectively be outvoted by an alliance of voters in, say, Germany and Italy. This will be the case even as the integrating institutions include perfectly democratically-elected legislative bodies. The integrating institutions will not be

[166] Tom Flynn, 'Constitutional Pluralism and Loyal Opposition' (n 148) 244

[167] ibid.

[168] Joseph H. H. Weiler, 'The transformation of Europe' (n 159) 77.

[169] ibid.

[170] ibid.

undemocratic but will be, by way of their ability to push their peoples' *Voice* effectively within the boundaries of the integrating institutions, less democratic.[171]

That the ability of citizens in France, Germany, and Italy to influence certain policy fields will have gravely diminished after integration cannot be overstated. Of course, even within each polity the minority was already overwhelmed by majority decisions. So why argue that after (European) integration a loss of democracy necessarily occurs? The answer is that people submit to the rule of majority – or at least they do so more comfortably – within a polity to which they can perceive themselves as *belonging*.[172] This is, indeed, one of the hardest prerequisites of democratic governance: How the political boundaries within which people can accept the majority rule are set.[173] To be sure, no definite answer to that question avails itself. Nonetheless, as Professor J. H. H. Weiler suggests pointing perhaps to the deepest source of what may be properly considered as the Member States' constitutional identities,

> Long term, very long term, factors such as political continuity, social, cultural, and linguistic affinity, and a shared history determine the answer. No one factor determines the boundaries; rather they result from some or all of these factors.[174]

A sense of belonging, then, built up with identity materials seems to be the answer.

Fourth, identity respect educates both public and private actors on the value of *tolerance*. Defending the Member States' constitutional identities may on many occasions appear to be a defense of interpretive idiosyncrasies (or parochialism) presented by, say, German judges against the French.[175] In addition, there is an irony in a constitutional ethos that, while appropriately suspicious of notions of various identities, implicitly celebrates the allegedly unique identities attached to constitutions, to peoples, to *demoi* etc.[176] How then do we both respect and uphold what is good in the EU's diverse traditions and at the same time keep it under check? The answer offered again by Professor Weiler implicates the notion of 'constitutional tolerance.'[177] In the public square, the relationship to the stranger is at the core of the value of tolerance. No matter how close the EU as a whole, it is to remain, Professor Weiler powerfully contends, a union among distinct peoples, distinct political identities, distinct political communities, the key word being 'distinct.'[178] It is altogether more difficult to attain an ever-closer European Union if its component parts are to

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[171] ibid.

[172] Ernest A. Young, 'Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate' (2014) 85 U Colo L Rev 1147-1148.

[173] Joseph H. H. Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg' (n 73) 65.

[174] ibid.

[175] ibid.

[176] ibid.

[177] ibid.

[178] ibid, 67.

preserve their particular identities, if they retain their 'otherness.'[179] Herein resides the principle of constitutional tolerance. 'Inevitably,' Professor Weiler says,

> I define my distinct identity by a boundary which differentiates me from those who are unlike me. My continued existence as a distinct identity depends, ontologically, on that boundary and, psychologically and sociologically, on preserving that sentiment of otherness.[180]

Fifth, respect for Member States' constitutional identities motivates and sustains an open *marketplace of ideas*. Drawing on an analogy to markets, where superior products sell better than others thanks to competition, the marketplace of ideas 'applies' competition to subject truth to test and determine its acceptability.[181] This formulation of free-flowing ideas as part of a theory of free speech has crucial implications for federalism too. By asserting that no governmental body by itself can deliver judgments that have a comparatively higher claim for truth than others, and assuming that the free flow of ideas between different levels of government is capable of separating falsehood from fact and hence guard against authoritarianism, the form of *divergence* that identity respect enables takes on additional value to federalism.[182] Irrespective of whether federal and state actors ever think of themselves as such, they are in fact competitors.[183] By competing in what may be characterized as a political arena for the people's affection and loyalty, federal and state governments – that is, in the present context, the EU and the Member States – are better able to put forward their peoples' rights and interests.[184] U.S. Supreme Court Justice Louis Brandeis is a prominent exponent of the idea uttered in a now famous judicial metaphor presenting the American States as 'laboratories of democracy' when, in a 1932 Supreme Court opinion, he said that:

> [i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.[185]

Sixth, respect for the Member States' constitutional identities provides a much-needed alternative perspective in constitutional thinking about such dichotomies as that between law and society. Standard liberal insistence on individual rights has been traditionally inclined to exaggerate an *atomistic* outlook and downplay the undeniable values promoted by sustaining a people's sense of belonging.[186] To be sure, EU supranationalism does not necessarily compromise fundamental

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[179] ibid.

[180] ibid.

[181] See generally Todd E. Pettys, 'Competing for the People's Affection: Federalism's Forgotten Marketplace' (2003) 56 Vand L Rev 329.

[182] ibid, 333.

[183] ibid.

[184] ibid.

[185] U.S. Supreme Court, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

[186] See *supra* text to nn 5-9.

republican virtues, nor does it make a sense of belongingness undesirable or impossible. But such is human nature that the kind of distances which are impossible to reduce within a regime of European supranationalism, tend to stretch the attachments and affiliations that are instrumental to cultivating one's feeling of belonging. It almost goes unquestioned, for example, that, when the media report human disasters, the further *our* distance to the location of the drama, the greater must be the loss for the piece of news to be broadcast. Therefore, Edmund Burke's assumption in his *Reflections on the Revolution in France* still holds true in our times, that:

> To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind.[187]

In addition, identity respect cultivates a number of virtues related to active engagement with local government. Executing laws enacted centrally resembles the issuance of commands directed by one party to be obeyed by another. That the central government is democratically elected may make the experience smoother, but local enforcement of the laws that were centrally generated does not invite much by way of deliberation. On the contrary, it is face-to-face political contestation, conducted as locally as is appropriate, that makes for reflection.[188] Local government can thus become a *classroom for democracy* for its students. Alexis de Tocqueville, the renowned observer of America's eighteenth-century fledgling polity, praised the educational value in actively participating in the government of local affairs. 'The townsperson,' he famously said,

> takes a part in every occurrence in the small sphere within his reach; he accustoms himself to those forms without which liberty can only advance by revolutions; he imbibes their spirit; he acquires a taste for order, comprehends the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights.[189]

The discomfort inflicted, for example, when the municipalities do not collect and dispose of the garbage is a reason for dissatisfaction that quickly gathers attention of even the most indifferent of citizens.

The previous analysis attests to the fact that identity respect also helps strengthen the legitimacy of the EU itself. More specifically, respect for the Member States' constitutional identities operates as a confidence-reinforcing mechanism by reassuring the Member States that their distinctiveness will be respected at the EU level.[190] If identity respect does manage to perform its sophisticated

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[187] Burke E, *Reflections on the Revolution in France* (J. G. A. Pocock ed; first published 1790, Hackett Publishing 1987) 41.

[188] See

[189] Alexis de Tocqueville, *Democracy in America* (first published 1835, Alfred A. Knopf 1963) 68.

[190] George A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Colum L Rev 367.

function, it can deepen the legitimacy of the decision-making and indeed the EU as a whole.[191] As already mentioned, the process of integration brings about at least a short-run loss of democracy, while the key to compensating for that loss is to institutionalize dissent and in particular to channel it through identity respect. By welcoming its enrichment with materials imported from its Member States, the EU is better capable of gaining social (or substantive) legitimacy by living up to the *original* expectations of Europeans. For instance, large companies may be able to escape the control of anyone polity alone, but only an *integrated* polity such as the EU can regain control and regulate them effectively. In other words, the EU's concern to respond to diversity with pluralism, through the mechanism of identity respect, enhances its own legitimacy.

Thus far, I have avoided taking up the question of whether such a thing as the Member States' constitutional identities really *exists* as a prerequisite to answering the question of whether these identities are worthy of respect by the EU. That omission is by no means random. Identity respect demonstrates that federalism is, after all, a value to be pursued *in itself* independently of whether there are indeed viable political communities below the level of central government.[192] In other words, federalism can *survive* the death of diversity in general since it is worthy of respect as a value in itself. Such federalist principles as diversity and pluralism, loyal opposition to the federal government, local participation, and checks and balances have value even if people do not identify, or more often than not identify less than they used to, with their states.[193] To be sure, this is not a credible image of the European realities, but still these and other considerations offer strong reasons to care about – and seek to preserve – federalism, even as it might be shown that strong national identities have been fading over time.[194]

The strongest objection to the EU's duty to respect the Member States' constitutional identities involves a fear of *fragmentation*.[195] If the Member State agents and particularly courts, or just supreme courts, were free to diverge from EU law interpretations generated at the EU level, then they would probably do so, and would further entrench their understandings of EU law within their home jurisdictions, thereby *threatening* the uniformity of EU law or the very existence of the EU.[196] A diversity of EU law interpretations will necessarily jeopardize EU law's uniformity and effectiveness. The whole European construct, the worst scenario has it, will fall apart.[197] Such concerns are not altogether ungrounded; rather, they should be taken seriously. Indeed, without a sufficient degree of uniformity, the political arrangements underlying the EU will become unsettled, because they are manufactured so as to be conditional upon a reciprocity of obligations.[198] The nature of EU law itself evinces that it is vulnerable to experience maltreatment if left

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[191] ibid.

[192] Ernest A. Young, 'The Volk of New Jersey' (n 162) 37.

[193] ibid.

[194] ibid.

[195] See generally Koen Lenaerts, Ignace Maselis & Kathleen Gutman, *EU Procedural Law* (Oxford University Press, 2014) 245.

[196] Gareth Davies, 'Does the Court of Justice Own the Treaties?' (n 123) 366.

[197] ibid.

[198] ibid.

'unsupervised' in the hands of the Member States.[199] In addition, if human rights warranted by EU law to Member States' individuals are weakened, then public support – instrumental in earning substantive legitimacy – may shrink.[200] Last, one may argue that the EU is still a *loose* confederation that needs a powerful center to counterbalance the almost natural tendency toward fragmentation, toward disassembling into its component parts.[201]

These and other considerations have traditionally driven the CJEU's robust approach and its far-reaching moves toward dictating, from the earliest years of European integration, the fundamental principles of EU law: Supremacy, direct effect, state liability and other principles were originally invented to suit the, then fledgling, European project so that the law would not rise as an obstacle to postwar political developments.[202] The court's jurisprudential record may have been debatable from the perspective of legal principle, but it was perfectly comprehensible if viewed through the prism of historical context.[203] The Court read EU law as it made sense *then*. But what about now?

The implication is not that any concerns for the uniformity or effectiveness of EU law are now irrelevant. They are certainly relevant, now probably more than ever, as the Member States and their courts become more confident and more attentive to their national sensitivities. What has changed, however, is that no longer are such legal constructs as supremacy, direct effect, etc. capable by themselves of ensuring effective and uniform application of EU law. In other words, I claim that European courts are no longer self-sufficient as regards producing the desired outcomes.[204] Monopolistic interpretation by the CJEU no longer suits the European claims, since within an environment replete with diversity and opposition, its ability to shape a coherent whole, to lend the EU's jurisdiction its integrity, is limited.[205] In the early stages of European integration, the court's innovations were successful partly because they freed (especially lower) Member States' courts from undesirable domestic rules and outmoded hierarchies, and offered them new opportunities, and the latter in turn embraced this.[206] Nowadays, EU law is no longer experienced – at least not by everyone – as empowering, but rather as coercive, rigid, troublesome, and even unreasonable. The call, then, is to come up with a brand-new strategy to break the stalemate. The question is not whether a degree of uniformity and efficiency is still necessary for EU law – that is undeniable – but which techniques are now more appropriate to achieve that: the top-down,

[199] ibid.

[200] ibid.

[201] ibid.

[202] ibid.

[203] ibid.

[204] ibid.

[205] ibid, 367; Joseph H. H. Weiler, 'A Quiet Revolution' (n 137) 510.

[206] Gareth Davies, 'Does the Court of Justice Own the Treaties?' (n 123) 367; see also Karen Alter, 'The European Court's Political Power' (1996) 19 W Eur Pol 458.

monopolistic interpretation applied by the CJEU, or the more engaging, dynamic method of interpretive pluralism.[207] In the rest of the present thesis, I will suggest taking that latter path.

[207] Gareth Davies, 'Does the Court of Justice Own the Treaties?' (n 123) 367; Robert Stith & Joseph H. H. Weiler, 'Can Treaty Law be Supreme, Directly Effective and Autonomous—All at the Same Time?' (2002) 34 NYU Int'l L and Pol 729.

2 The Substance and Process of Constitutional Identity

I. Introduction

In this chapter, my purpose is to match a multifaceted group of sources and come up with a theory about how a constitution's identity can be drawn out. To do that, I thoroughly investigate the relationship between a constitution and its surrounding *socio-cultural* environment ('constitutional affiliations'); the ways a constitution can be *interpreted* and particularly those interpretive styles that exceed its literal wording and either implicate its overall structure or go 'outside' of it in search for ideas drawn from the polity at large ('constitutional interpretations'); and I analyze any conclusions that can be deduced from a constitution's 'resistance' against controversial amendments that are sometimes labeled as 'unconstitutional.' The idea of unconstitutional constitutional amendments is an old one, and I carefully study its origins to discover if it is conceptually possible to argue for the possibility of admitting certain *implied limits* to constitutional amendments. For all these sources – *affiliations*, *interpretations*, and *amendments* – to lend a constitution its legitimacy and build a relationship of trust with, and responsiveness to, its people, it is necessary to offer some constitutional *narratives* that help infuse a constitution's identity with a contextual outlook. In addition, I investigate whether there is such a thing as a *ranking* of human rights and principles unspecified by, but implicit in, a constitution's text that can help us distinguish between the allegedly 'timeless' from the 'ephemeral.' Is it true that 'timeless' parts of a constitution can be legitimately subjected only to repeal by a *pouvoir constituant* or are they merely raised to a normative level that makes them harder, and yet not impossible, to amend? As an introduction to this chapter, I make an excursus about a peculiar characteristic of French public law that deviates from the standard Anglo-Saxon treatment of the issue and, I argue, can be grasped only through the lens of its constitutional identity – the fact that in France there is a system of dual jurisdiction, but nevertheless the administrative courts were until recently disabled from issuing any orders to the executive branch and the administration. In concluding this chapter, I get back to the French deviation to demonstrate that it has experienced a long process of identity transformation through its exposure to policy forces from abroad. Drawing on this and other constitutional stories that I offer throughout the entire chapter, I conclude that constitutional essentialism of the type being tangible mostly through the concept of constitutional identity, is attributable to the different socio-cultural background conditions that exist between jurisdictions, a fact that by no means speaks against openness to comparative constitutionalism, but rather against importing constitutional materials from abroad without reading their 'instructions.' The subsequent analysis coupled with a number of illustrative examples from a diversity of jurisdictions denotes the key proposition that pervades my entire thesis – that constitutional identity mostly operates as an agent of *no-change*, and a *methodological* tool aimed at elucidating a set of constitutional developments that would otherwise remain remote and mysterious.

II. Foreword: The Idiosyncratic Nature of France's System of Dual Jurisdiction

Courts in France are divided into two types: courts dealing with criminal and civil law, and administrative courts. Public law is applied in the *tribunaux administratifs*, at the summit of which sits the *Conseil d'Etat*. France's system of dual jurisdiction is, in the *Conseil*'s words, 'une principe

législatif de la République.'[1] The underlying idea behind that dual jurisdiction (*contentieux administratif*), at least in theory, is that '*juger l'administration, c'est encore administrer*.'[2] The splitting of the jurisdictional universe into two clearly separated worlds extended over time to substantive law as well, giving rise to what is nowadays known as *droit administratif*. However, by discounting the particular historical and political circumstances that gave birth to *droit administratif* in France, dating to as far back as the seventeenth century, one fails to do justice to the fact that what today appears to be British, or more generally a common-law, insularity used to be, from the sixteenth through to the eighteenth centuries, commonplace in both continental European and English law.[3] The implications for the constitutional identity discourse will be uncovered in the remainder of this chapter.

In his 1856 masterpiece *L'Ancien Régime et la Révolution*, the famous French lawyer and statesman Alexis de Tocqueville, among other things, traced the origins of *tribunaux administratifs* in the French political tradition.[4] Contrary to common presuppositions, centralized administration was not the outcome of the French Revolution nor a Napoleonic innovation.[5] In seventeenth-century France, judges were accused of having formed an evil alliance with the aristocracy against the royal authority seated in Paris.[6] In effect, corrupt judges had come to interpret royal legislation *against* its intended meaning and effect and refused to enforce royal decrees.[7] Opponents thought that there was an inherent tendency toward judicial excess that could only be fought back by making the royal power immune from any substantial form of judicial scrutiny.[8] Confronted additionally with challenges of war, political and religious divisions, a serious economic downfall, and

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[1] Conseil d'Etat, Décision n° 86-224 DC of 23 January 1987, *Loi transférant à la juridiction judiciaire le contentieux des décisions du Conseil de la concurrence*, 18 ('a fundamental principle of the Republic.')

[2] Or, as *conseiller d'Etat* Henrion de Pansey, who is presumed as author of the quote, had more precisely said:

> Pouvoir par des ordonnances à l'exécution des lois à la sûreté de l'Etat, au maintien de l'ordre public, c'est administrer. Statuer, par des décisions, sur les réclamations auxquelles ces ordonnances peuvent donner lieu, et sur des oppositions que des particuliers se croiraient en droit de former à leur exécution, c'est encore administrer. On administre donc de deux manières.

Bernard Pacteau, 'Le Contrôle de l'administration. Le contrôle par une Juridiction Administrative. Existence ou non d'une Juridiction Administrative. La Conception Française du Contentieux Administratif' (2000) 53(3) Rev Admin 95. ('To enact decrees in order to execute the laws, to provide security, and to maintain public order, is to administer. To deliver justice through resolutions over the conflicts to which these decrees give rise to, and over any objections individuals believe they are entitled to invoke against execution of these decrees, is again to administer. We therefore engage in administration in two different ways' (my translation)).

[3] John Henry Merryman, 'The French Deviation' (1996) 44(1) Am J Comp L 115.

[4] Alexis de Tocqueville, *The Ancien Régime and the French Revolution* (first published 1856, Jon Elster ed, Arthur Goldhammer tr, Cambridge University Press 2011).

[5] ibid, pt II, ch 2 'Why Administrative Centralization Is an Institution of the *Ancien Régime* and Not, As Some Say, the Work of the Revolution or Empire,' 39-46 (arguing that pursuant to historical records the French governmental system was already centralized before 1789; that such a governmental system was one of few *ancien-régime* features that survived the Revolution because it was not considered as strongly associated with feudalism).

[6] ibid, pt II, ch 4, 'How Administrative Justice and the Immunity of Public Officials Were Institutions of the *Ancien Régime*,' 55-58.

[7] John Henry Merryman, 'The French Deviation' (n 3) 110

[8] ibid, 109-110.

deep social upheaval, the French King was determined to relieve his administration from what was perceived as a form of corporatism and corruption, and to hire magistrates who owed their allegiance first and foremost to himself. Unable to do away with corrupt officials, the King fought back with a competitive law system: He *invented* the *droit administratif*, and incorporated any administrative operations within the royal privilege.[9] Subsequently, to immunize his executive powers from judicial review by ordinary courts, he founded a separate judicial apparatus composed of newly appointed judges and charged it with hearing public law suits.[10] This innovation found its manifestation in the 1641 Edict of Saint-Germain-en-Laye that prohibited the *parlements* (supreme courts) and other courts from hearing any lawsuit 'which may concern the state, administration or government.'[11] The Edict further provided that the King handed down to ordinary courts the power to only act as 'judges of the life of men and the fortunes of our subjects' – that is, over civil law litigation – while reserving 'to our sole person and for our successor Kings' the power to establish rules on matters pertaining to public administration and public affairs.[12]

The *ancien régime* was a *scapegoat* of the French Revolution. Everything associated with it was painted in dark colors. Any problem could be attributed to it, any change to it could be justified as a desirable reform.[13] The *tribunaux administratifs* survived that threat, as well as the strong opposition they met from members of the party of 'total suppression,' but only in part. Along with Tocqueville, the most distinguished member of the opposition was Montesquieu who, in a chapter on the English constitution in his famous treatise *De l'esprit des lois* (1748), argued strongly against dual jurisdiction, assuming that a scheme of executive and judicial powers combined with one another paved the way toward despotism.[14] Contrary to judicially-led claims that recast courts as representatives of the King to the French 'Nation,' and vice versa, the monarchy consistently regarded its agents – including judges – as the sole *mediators* between the King, and more generally between political power, and the people – whence the principle of *juger l'administration, c'est encore administrer* also derived.[15] The notion then that to judge the administration is also

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[9] ibid.

[10] ibid, 110. Alexis de Tocqueville, *The Ancien Régime and the French Revolution* (n 4), pt II, ch 4, 'How Administrative Justice and the Immunity of Public Officials Were Institutions of the Ancien Régime,' 55-58 (arguing that courts in the *ancien régime* had been largely independent until the central government began directing a growing number of court cases away from ordinary courts in the king's interest, thus making a rule out of what used to be the exception.)

[11] Peter L. Lindseth, 'Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England' (2005) 55 U Toronto LJ 663 n 32.

[12] ibid.

[13] John Henry Merryman, 'The French Deviation' (n 3) 114.

[14] ibid, 110, quoting from *De l'esprit des lois*, pt XI, ch 6: 'II n'y a point encore de liberte… si la puissance de juger n'est pas separe de la puissance legislative et de l'executive' ('There is no liberty… if judicial power is not separated by the legislative and executive powers' (my translation)).

[15] Loi des 16-24 août 1790 sur l'organisation judiciaire. Titre II: Des juges en general, art 13 which read that:

> Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler, de quelque manière que ce soit, les opérations des corps administratifs, ni citer devant eux les administrateurs pour raison de leurs fonctions.

administration *survived* the Revolution; the political forces of the opposition, however, succeeded in their calculated efforts to include into the system of *contentieux administratif* a separation-of-powers element as part of their radical Revolutionary agenda.

In the twilight of the *ancien régime*, administrative law experienced a series of substantial reforms, but these essentially reflected a realization that the legitimate exercise of political power depended on the perceived impartiality of justice and oversight over the administration.[16] Post-Revolutionary reforms, in particular, included the enforcement of separation-of-powers mechanisms that *disabled* judges from issuing regulations, questioning administrative rules, orders or other instruments, and reviewing the lawfulness of how public officials performed their duties or compelling them to perform their duties In the way circumscribed.[17] The resulting vacuum was going to be filled by establishing a section of the *Conseil d'Etat* and later of the lower *tribunaux administratifs* that today resemble very much a high administrative court and administrative courts of first instance respectively. By establishing the *Conseil d'État* in the constitution of Year VIII and later granting it jurisdiction over the domain of *contentieux administratif*, Napoleon envisioned 'un corps demi-administratif, demi-judiciaire, qui réglera l'emploi de cette portion d' arbitraire nécessaire dans l' administration de l'État….'[18] Without such a judicial body, Napoleon acknowledged that his administration would fall into disrespect. As Merryman points out, '… the administrative tribunals and the Conseil d'Etat are formally separate from the (ordinary) judiciary and are formally part of the executive power … the separation of powers is formally observed, while the legality of French executive/administrative acts receives the sort of 'judicial' review of legality that democratic justice everywhere requires.'[19] Separation of powers additionally required the legislature's protection against the judiciary. This meant that judges could not legislate by way of making their jurisprudence applicable to future cases, but it also meant that they could not question the validity or modify the true meaning of legislation.[20]

Therefore, post-Revolutionary developments prolonged the division of jurisdictional worlds, together with their separate courts, as a means of loyally serving the French nation's 'general interest,' but these were notably coupled with a 'judge-proofness' – still discernible to a certain

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<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000704777/> accessed 20 September 2022. (Law of 16-24 August 1790 on the organization of justice. Title II: Judges in general. Article 13. 'Judicial functions are distinct and remain forever separate from administrative functions; judges may not, on fear of forfeiture, interfere in any way whatever in the activities of administrative officials nor subject them to judicial proceedings with respect to their functions' (my translation)).

[16] John Henry Merryman, 'The French Deviation' (n 3) 114.

[17] ibid, 111.

[18] Pelet de la Lozère, *Opinions de Napoléon sur Divers Sujets de Politique et d'Administration*, *Séance du 4 mars 1906* (Firmin Didot frères 1833) 191; quoted by Peter L. Lindseth, '"Always Embedded" Administration: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance' in Christian Joerges, Bo Stråth & Peter Wagner (eds), *The Economy as a Polity: The Political Constitution of Contemporary Capitalism* (University College London Press 2005) 121 ('a half-administrative, half-judicial body [to] regulate the exercise of that portion of arbitrary power necessarily belonging to the administration of the state' (my translation)).

[19] John Henry Merryman, 'The French Deviation' (n 3) 111.

[20] ibid.

degree up to the present – to suit the powerful assertions of a theory of separation of powers.[21] My purpose here, however, is not to delve more deeply into the legal innovations produced by the French Revolutionaries, but to strongly emphasize the idea that these (and similar) innovations are comprehensible by no other means than by resorting to what I will describe in the remainder of this chapter as a constitution's *identity*.

III. Defining What a Constitution Is

The question of identity, and in particular of a constitution's identity, presents challenging intellectual problems. But before engaging in further analysis of the content of any specific constitution's identity, I will first seek to determine a constitution's essential features so that when we are confronted with these features as are incorporated into a particular legal document, we can properly attach to that document a constitutional label. The reason for the endeavor is quite simple. The most important obstacle when theorizing about constitutional identity is *generic*. There are indeed established criteria that enable us to determine the existence of a liberal constitution that have primarily to do with the degree of arbitrariness in the management of public affairs. From here, however, it is enticing to present any constitutional step forward as a threat to generic constitutionalism and in particular to the commitments a polity may perhaps associate with its own constitution's identity, when what is really fought against is not the demise of constitutionalism, nor of constitutional identity, but rather a controversial constitutional policy.[22]

What counts as a constitution has changed dramatically throughout the entire history of constitutionalism. Pre-Enlightenment constitutions, for example, typically included all or at least several of the following features: a description of political arrangements, a series of common ends and commitments, a set of longstanding conventions that ensured at least a degree of political orderliness. In most circumstances, constitutions integrated a compilation of formal but usually disconnected texts and informal but deep-rooted unwritten traditions.[23] But it was the state constitutions in the former British colonies of North America that paved the way toward a brand new paradigm in constitutional law: A formally sanctioned written text that both created and most importantly *empowered* governmental institutions, but that at the same time *curtailed* it, and that emerged from 'choice and reflection,'[24] was at the time a profound idea.[25]

An important component of the Enlightenment critique against the supremacy of religion was the belief that humans themselves were responsible for their own destinies. Reason dictated that political communities could largely command their collective destinies as long as their common

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[21] ibid, 109.

[22] Gary J. Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 19.

[23] Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (Johns Hopkins University Press 2009) 16.

[24] Alexander Hamilton, *Federalist No. 1*, 'General Introduction' <https://avalon.law.yale.edu/18th_century/fed01.asp> accessed 4 October 2022.

[25] Beau Breslin, From Words to Worlds (n 23) 17.

institutions were properly designed and enforced.[26] Enduring political establishments could be achieved through careful planning. That philosophy helps explain the pervasive use of conventions as instruments to both create and enact constitutionally authoritative texts. A constitutional convention provided individuals from a diverse set of socio-political backgrounds with exceptional opportunities to partake in authoring their common political creed and consequently provided their handicraft – their constitution – with a degree of unprecedented legitimacy. Last, and most relevant for present purposes, it helps explain the differentiation between the fundamental and the routine political arrangement – that is, between *constitution*-making and ordinary *law*-making, as well as between a body assigned to be the *constitution*-maker and a body assigned to be the ordinary *law*-maker.[27]

In addition, the entire constitutional enterprise rests on a crucial assumption that constitutional charters, while differing dramatically as to how effectively they guide political arrangements, do not differ considerably in their primary ambitions. Most operative constitutional documents that subscribe to constitutionalism are grounded on a set of similar, essential components, even if these finally produce a diverse mix of political arrangements which in turn produce even more diverse political outcomes.[28] Components of pivotal importance for liberal-democratic constitutions, features that make these constitutions *constitutionalist* are, first, that their various sections are designed to *define* and subsequently to *curtail* the governmental power and, second, that they are *authoritative* – that is, that their audience, both the political institutions they create and the population at large that created them, are determined to observe the vast contours of their wording.[29]

However, Professor Gary J. Jacobsohn, drawing on Edmund Burke's insights on constitutions 'as embodiments of unique histories and circumstances,'[30] emphasizes that a constitution is something that evolves through time and place to suit the different conditions and habits of a people, thus acquiring a qualified responsiveness to entrenched cultural norms that is revealing of a constitution's identity.[31] We should then, as Professor William F. Harris II suggests, reflect on how we – that is, the addressees of a constitution – *associate* with it and what its implications are for our commitments and actions ('affiliations' or 'attachments'). Second, we should investigate how we *enforce* it ('interpretations') and, third, how and to what extend we are permitted to *change* it ('amendments'). Indeed, just as we receive profound insights about the substance of a constitution by asking how it binds us and what its bindingness means for us; just as we perpetuate its substance by developing a set of interpretive methods; so also do we come to know its identity by revisiting how it has changed in the past and by reflecting on what terms it can change in the future.[32]

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[26] ibid, 18.

[27] ibid, 19.

[28] ibid, 7.

[29] ibid, 23.

[30] Gary J. Jacobsohn, Constitutional Identity (n 22) 76.

[31] ibid, 77.

[32] William F. Harris, *The Interpretable Constitution* (Johns Hopkins University Press 1993) 170.

In what follows, then, I will take up in turn each of these three levels of analysis – *affiliations*, *interpretations*, and *amendments* – to trace the parameters of the developmental process that is central to identifying a constitution's identity. Throughout the entire analysis, I will rely primarily on the most comprehensive but largely unknown definition offered so far, by Justice Johann Kriegler who, dissenting in South Africa's Supreme Court judgment in *Du Plessis*, said that

> Viewed in context, textually and historically, the fundamental rights and freedoms have a poignancy and depth of meaning not echoed in any other national constitution I have seen…. [O]ur Constitution is unique in its origins, concepts and aspirations.[33]

In other words, South Africa's constitution – any country's constitution – has an identity of its own that is made known by its *beginning* ('origins'), its *middle* ('concepts'), and its *destination* ('aspirations'), understood within the unity of a *narrative* ('viewed in context … historically').[34] My preference for Justice Kriegler's definition rests on a double assumption. First, besides its apparent success in its grasp of the essence of a constitution's identity, a point that will be argued in further detail later, that particular definition effectively guards against the danger of either being overloaded with too much or being left with too little substance. Thus, it promotes an understanding that, as Rogers Brubaker and Frederick Cooper have put it, '"[I]dentity"… tends to mean too much (when understood in a strong sense), too little (when understood in a weak sense), or nothing at all (because of its sheer ambiguity).'[35] Second, it enables me to locate the component parts of the definition within a *tripartite* analysis of a constitution's 'affiliations, interpretations, amendments.' In other words, I will seek to approach the concept of a constitution's identity by searching for that constitution's origins, concepts, and aspirations as contextualized within its set of affiliations, interpretations, and amendments.

IV. Constitutional Affiliations: How we Associate with a Constitution

Every understanding of collective identities seems to revolve around a particular set of assumptions. First, collective identities presuppose the availability in the public square of a *discourse* that helps distinguish the bearers of identities, usually by way of criteria of ascription, with the effect that some people are acknowledged as group members and others not ('social conception').[36] The availability of social conceptions requires in turn a substantial degree of consensus over how to identify those to whom they will be applied. This consensus usually involves a set of convictions toward a group's members, of which at least some elements have a *normative* background: they

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[33] Supreme Court of South Africa, *Du Plessis and others v De Klerk and another* [1996] ZACC 10 [126], [127] (holding that South Africa's 1993 Interim Constitution is not enforceable neither over actions that preceded it nor over disputes between private parties).

[34] *Du Plessis and others v De Klerk and another* (n 33) [127]; Gary J. Jacobsohn, *Constitutional Identity* (n 22) 91.

[35] Rogers Brubaker and Frederick Cooper, 'Beyond "Identity"' (2000) 29 Theory and Society 1.

[36] Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press 2005) 66-67.

offer predictions of how group members will *actually* behave based on prior expectations about how they *should* behave.[37] Second, there is a tendency toward internalization of identity markers as part of larger groupings. In determining my identity, I fit my life story into *larger* stories: of a town, of a people, of a nation etc. ('identification').[38] Third, a crucial component of collective identities is the existence of patterns of behavior toward group members so that they are treated at least sometimes *as such*. 'Treatment-as' may sometimes be considered as an illegitimate discrimination, but equally often it may be thought of as an act of justice.[39] Therefore, if an identity classification is associated with a social conception about group membership, group members themselves identify as such, and sometimes they are treated as such too, then we have a paradigm of collective identities that resonate on moral and political life. That they matter for moral life results from the fact that people shape, evaluate, and run their lives (sometimes) driven by their identities.[40] That they matter in political life results from the fact that they figure prominently in the treatment of group members by others, and from the fact that how others treat one will determine one's success or failure in running one's own life.[41]

Shifting now to the political arena, identity can be thought of from the perspective of political science as embodying two central aspects. First, it entails a notion of *self-understanding*, a sense of who one is, of one's social standing, and how one is prepared to act. Second, it entails a sense of connectedness; an emotionally-run sense of *belongingness*, involving both a felt solidarity with the group members and a deeply-felt differentiation from outsiders.[42] From a social science perspective, identity is best viewed as a tangible offspring of social systems that vary in their degree of perplexity and engagement. Once identity is handled through a social-science prism, it becomes evident that peoples' identities are vastly shaped and perhaps even determined by their social environment. Such prominent philosophers as René Descartes, Immanuel Kant, and John Locke may urge us, each from the perspective of their own discipline, to view ourselves as isolated, but social science based on Husserl's phenomenology or Heidegger's existentialism acknowledges that identity is powerfully constructed too by the groups that claim individuals from their very birth, imbue them with a set of common beliefs and ideas, and embrace them as the context of their adult lives.[43] In fact, these philosophers further argued that social context itself even determines the extent to which people view themselves as individuals at all and/or as group-members as well.[44]

Analyzing how political communities organized along the lines of nation-states acquire their identities, Professors Anthony D. Smith and David Miller have distinguished a number of criteria

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[37] ibid, 67.

[38] ibid, 68.

[39] ibid, 68-69.

[40] ibid, 69.

[41] ibid.

[42] Ernest A. Young, 'The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System' (nyp) 21.

[43] Malcolm M. Feeley & Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (The University of Michigan Press 2008) 8.

[44] ibid.

that bespeak the existence of distinct *national* identities. First, members of national political communities admit each other as compatriots, and believe they *share* characteristics of a certain kind;[45] second, nationality or citizenship is an identity that embodies *historical* continuities – at least to a certain extent;[46] third, national identity is an active component engaging with resolutions taken by a nation state *autonomously*;[47] fourth, a political community that forms a nation state occupies a particular place on the *map*;[48] and last, members of such political communities share an exceptional public *culture*.[49] We might then distinguish in Smith's and Miller's nationalistic analyses a distinction between (allegedly) *inherited* or unalterable characteristics implicating geography, history, and culture; and *attitudinal* characteristics uniting the members of political communities – connectedness and membership.[50] An analysis of identity attachments along the lines of liberal nationalism may in our days sound, at least, parochial, but what we can keep as instrumental for our present purposes is that people more often draw on a *mix* of both inherited and acquired characteristics to feed and sustain their commitments and affiliations to political communities. Still, a constitution's identity is deeper (and richer) than a good copy of a particular nation's identity. Indeed, as perfectly encapsulated by Professor Michael J. Perry,

> Both as a description of our [American] practice and as a prescription for the continuance of the practice, the [U.S.] Constitution also consists of premises that, whether or not any generation of 'We the People' meant to establish them in the Constitution… have become such fixed and widely affirmed and relied upon (by us the people of the United States now living) features of the life of our political community that they are, for us, constitutional bedrock – premises that have, in that sense, achieved a virtual constitutional status, that have become a part of our fundamental law, the law constitutive of ourselves as a political community of a certain sort.[51]

Constitution-makers may apply a number of resourceful identity strategies. In that context, we can identify a multiplicity of interactions between constitutional identities and social relations. First, a deeply *constitutive* approach, one associated with what may be thought of as inspired by the idea of 'constitutional determinism,' reflects an understanding of the constitution as both the source out of which both legal and social relations within a political community spring

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[45] David Miller, *Citizenship and National Identity* (first published 2000, Polity Press 2005) 22.

[46] ibid, 23.

[47] ibid, 24.

[48] ibid; Anthony D. Smith, *Nationalism. Theory, Ideology, History* (Polity Press 2001) 9.

[49] David Miller, *Citizenship and National Identity* (n 45) 24; Anthony D. Smith, *Nationalism. Theory, Ideology, History* (n 48) 11.

[50] Ernest A. Young, 'The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System' (nyp) (n 42) 28-29.

[51] Michael Perry, 'What is 'The Constitution'?' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 2001) 107.

('*invention*').[52] A 'constitutional determinism' approach thus holds that a constitution *precedes* the identity-formation of the body politic; it is the constitution itself that gives that identity its manifestation. As Richard Robinson put it, '[a] city could not change its constitution without committing suicide.'[53] The expressionists view constitutions and particularly the preambles to constitutions as instruments through which a nation declares the invention of itself. 'To compose a polity in a certain way,' Professor William F. Harris II says, 'by writing it down in a published document, is to acknowledge that it could have been different in the absence of writing.'[54] Nevertheless, to the extent that expressivism finds in such proclamations as those embedded in more or less isolated constitutional provisions the essence of their identities, it often asks that language carry more weight than it could or should.[55] The 'birth certificate' then of a polity by means of its subordination to an authoritative text such as a constitution is misleading insofar as it implies the idea that a legal document is by itself capable of bringing into the political universe some legal product whose identity is discernible in the mere fact of its existence. The flipside of that deterministic approach, however, is a widespread suspicion of efforts to invent the components of a constitution's identity out of theoretical *fiat*.[56]

Second, one may think of constitutions as formal declarations of a struggle to discover and write down a code of 'laws' that are treated as being already 'out there' ('*discovery*'). In other words, a 'constitutional indeterminacy' approach means that what is constitutive of collective identities seems to be rooted more in extra-constitutional sources such as religion, culture etc. than in the language of a formal legal document.[57] Pursuant to the discovery theme, the real constitution is a condition of the body politic *antecedent* to its government. Just as every individual finds a number of options for development influenced, but also circumscribed, by their environment that has pushed them to pursue one course rather than another, the same holds for constitutions as well. Constitutions, too, are pushed by extra-constitutional forces to pursue one course rather than another, thus depicting more faithfully the identities of those who triggered those driving forces in the first place. This is how Thomas Paine, the English-born political philosopher writing in the late eighteenth century, envisioned a constitution. He was not pleased with the notion of government as identified almost exclusively with *limited* government. 'A constitution,' he held, 'must exist independently of the government it creates; it must be antecedent to it.'[58] As the renowned author of the 1867 *The English Constitution*, Walter Bagehot, once said,

> The mystic reverence, the religious allegiance, which are essential to a true monarchy, are imaginative feelings that no legislature can manufacture in any people.

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[52] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 91-98.

[53] Richard Robinson, *Aristotle's Politics: Books III and IV* (Clarendon Press 1995) 10 quoted by Gary J. Jacobsohn, Constitutional Identity (n 22) 8.

[54] William F. Harris, *The Interpretable Constitution* (n 32) ix-x.

[55] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 12.

[56] ibid, 98-103.

[57] ibid, 9. *But* see Kwame Anthony Appiah, *The Ethics of Identity* (n 36) 64.

[58] Thomas Paine, 'The Rights of Man' in Sidney Hook (ed), *Common Sense: The Rights of Man, and Other Essential Writings of Thomas Paine* (New American Library 1984) 154.

> These semi-filial feelings in government are inherited just as the true filial feelings in common life.[59]

The 'constitutional indeterminacy' approach then yields exceptional value to all these materials that, *inherited* from the past, are integrated into a constitution's whole, hence lending it its identity.

More plausibly, the truth lies somewhere in the *middle*, with constitutional identity being essentially a unique *combination* of parts *both* invented and discovered. Just as neither the *discovery* approach that goes too far indeed by excluding creativity from identity-formation, nor the *invention* approach that overstates creativity resulting in a decontextualization by excluding interaction with facts outside of oneself, is self-sufficient when applied to personal identities;[60] the same holds true for constitutional identities: they exist neither, in Professor Gary J. Jacobsohn's words, 'as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered.'[61] If the opposite were true, either of two options would stand out. First, constitution-makers were able to – and actually did – construct identity *ex nihilo* in embracing a particular constitutional pattern and mandating its ratification and enforcement through an authoritative document. Second, constitution-makers established an identity by writing down in law a specific way of life expressive of a *preexisting* substance unique to a nation's experiences. Without more information both possibilities are doomed to fail the 'identification test,' because they suggest that a constitutional identity may be seen as the outcome either of theoretical *fiat* or the outcome of a fixed legacy.[62] To the contrary, *inventive* endeavors are ubiquitous in constitutional projects and hence a constitution's identity is traceable through uncovering its makers' posture toward the people at large. In a similar vein, an agonizing *discovery* takes place in all constitutional projects as well, with the implication being that where the identity is a good copy of the polity's actual condition rather than a reproach to it, a constitution's identity is more closely aligned with extra-legal parameters.[63]

The fact that constitutions typically include a number of inventions and discoveries by their authors of aspects of identity generates serious implications. First, a constitution acquires its identity through *experience*.[64] What a constitution becomes can never be considered strictly separated from its past or from the attitudes of the wider political community to which it is intended to apply.[65] As the eighteenth-century Scottish philosopher Thomas Reid put it, 'Continuous

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[59] Walter Bagehot, 'The English Constitution. Chapter I. The Cabinet' in Paul Smith (ed), *Bagehot: The English Constitution* (Cambridge University Press 2001) 4.

[60] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 92.

[61] ibid, 7.

[62] ibid, 121. *But* see Beau Breslin, *From Words to Worlds* (n 23) 31, who maintains that looking to foundational events serves a dual purpose of realizing both the destruction of the status quo *ante* and the birth of a new world representing a brand-new set of political commitments.

[63] ibid, 31.

[64] ibid, 7.

[65] ibid, 81.

uninterrupted existence is… necessarily implied in identity.'[66] For one thing, a constitution's specific language may imply a commitment on the part of its authors and subsequent interpretive agents to *invent* in the name of their constituents a political identity, but until *discovered* in their past or present political performance, the enterprise will remain semi-finished.[67] The Aristotelian dichotomy between the constitution and social relations[68] within a polity requires that one withhold judgments about identities *until* it has been firmly confirmed that the written inventions or discoveries of constitution-makers are, respectively, comprehended by, or resonate in, the collective mindset of the body politic.[69]

Accordingly, then, constitutional identities are properly conceived as being the outcome of a *process* rather than a fixed or static thing. A constitution's words are only an introduction to the larger, most intriguing chapter of its identity which, in addition to the content of any particular provision or principle, incorporates the people's most firmly-held convictions. But moreover, as Professor Anne Norton once said:

> No text, however transcendent, is unmarked by its time. No text, however abstract, speaks to all circumstances. For all these reasons there will be disjunctions between what is said to be and what is, between a people and its Constitution.[70]

Or as the late Professor Ivo D. Duchacek reminds us of the words of André Malraux, the French novelist and Minister under de Gaulle's administration, 'Face to face with the unknown, some of our dreams are no less significant than our memories.'[71] Constitutional identities are therefore incrementally erected on top of longstanding *traditions*, but at the same time they are built up out of *reprocessed* and recombined elements to come up with new or updated political ideas that better encapsulate the people's convictions 'here and now.'

That constitutions should be seen as movies rather than as images further demonstrates that their identities too emerge dialogically through the dimensions of time and place. Entrenched in a constitution's character is a condition of an 'unending dialectic' or, in Anne Norton's words, 'of

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[66] Thomas Reid, *Essays on the Intellectual Powers of Man. Essay III. Of Memory. Chapter IV. Of Identity* (first published 1785, Cambridge University Press 2011) 371. In particular, the eighteenth-century Scottish philosopher challenges the proposition that identity can be defined, but what he does not challenge is that we can know:

> ... that identity supposes an uninterrupted continuance of existence. That which has ceased to exist cannot be the same with that which afterwards begins to exist; for this would be to suppose a being to exist after it ceased to exist, and to have had existence before it was produced, which are manifest contradictions. Continued uninterrupted existence is therefore necessarily implied in identity.

[67] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 10.

[68] Politics of Aristotle, bk III, pt III (Benjamin Jowett tr) <http://classics.mit.edu/Aristotle/politics.3. three.html> accessed 12 February 2023 ('The sameness of the state consists chiefly in the sameness of the constitution, and may be called or not called by the same name, whether the inhabitants are the same or entirely different').

[69] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 10.

[70] Anne Norton, 'Transubstantiation: The Dialectic of Constitutional Authority' (1988) 55 U Chi L Rev 467.

[71] André Malraux, *Antimémoires* (1967) quoted by Ivo D. Duchacek, 'National Constitutions: A Functional Approach' (1968) 1 Comparative Politics 93-94 (Duchacek's translation).

[continually] becoming and overcoming;'[72] a condition ubiquitous in constitutional arrangements, but obscured by the appearance of deep-rootedness typically associated with legal codifications and in particular with constitutions.[73] On all occasions, the constitution's text is a *point of departure* for approaching its identity, but hardly ever could it be its place of destination too. More telling is its multifaceted – its historical, political, social, cultural, etc. – background, that illuminates the operation of powerful forces playing out to produce the specific constitutional outcome. But at the same time, interpretive communities should be warned against using a constitution's background as a screenshot, but be encouraged to take a glimpse through the prism of 'law and something' considerations of how constitutional identities take their shape and change through time and place.[74]

Political forces already at play at the foundational moment of constitution-making often infuse *inconsistencies* (or defects) into those constitutions right from the start. In other words, essential concessions at the time of founding produce contradictions that affect a constitution's 'inner unity' and coherence, even before any subsequent amending is entitled to intervene to the same direction.[75] Another source of early inconsistencies is associated with the fact that a constitution must take, at least in some circumstances, a militant position against people's identities with a view to fostering overarching principles such as peaceful coexistence. But still a constitution's militancy or its founders' resort to concessions must not veer too far away from their people's identities. If, for example, for reasons of political expediency, the government's structure, created by itself, is so strange to the governed that its terms are hardly comprehensible by them, then the complicated structure will most probably fail to withstand the test of time and pressure and will eventually fall apart.[76]

On the other hand, constitutional identities may bespeak the insertion into the constitution's text of *aspirational* elements that seem to be at odds with the polity's prevailing conditions.[77] A constitutional document reveals implicitly or explicitly the kind of polity it seeks to become. Inevitably, contradictions within a specific set of principles, or between these principles and the societal background, will generate efforts to achieve greater consistency. Thus, all constitutions one way or another are confronted with the problem of disharmony; the distance between the normative and the existential, between what *is* and what *should* be. This distance may exist within the constitution itself; or in its relationship to the surrounding society. But in either case it represents an effort on the part of constitution-makers to stimulate change.

The fact that disharmony – that is, contradictions induced from the very start of a constitutional project – is an integrated feature of constitutionalism more generally highlights an important

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[72] Anne Norton, 'Transubstantiation: The Dialectic of Constitutional Authority' (n 70) 463.

[73] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 27.

[74] William F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Johns Hopkins University Press 2007) 479.

[75] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 60.

[76] Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 11.

[77] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 128.

element of constitutional identities. Conflicts within and around a constitution operate as a prerequisite for change, and efforts to reduce or make them disappear are not only undesirable but also doomed to fail. It is constitutional *disharmonies* that infuse some uncertainty into the future of constitutional identity, but that also lend it its valuable dynamism.[78] Constitutional conflict rests on the assumption that a constitutional text may yield much more conflict than it aspires to eliminate, but additionally that one of its celebrated virtues is its ability to frame the institutional management of conflict.[79]

Thus, a constitutional document integrates a mix of commitments and aspirations that are demonstrative of a polity's past, as well as of the operations of various forces within that polity that struggle to guide it towards the future.[80]

V. Constitutional Interpretations: How a Constitution Is Enforced

As already mentioned, the *discovery* approach takes constitutionalism to be a depiction of social relations within a polity. Pursuant to that approach, then, a constitution's text must necessarily be only a starting point in the broader quest for its identity. In contrast, the *invention* approach calls for a heightened attention to constitutional arrangements as finally integrated within the particular legal document. The *dialogical* process in the determination of constitutional meaning, as well as the disharmonies imbued into the document, combine to create a complicated outcome that is hardly intelligible by recourse to a constitution's words alone.

More often than not, a constitutional text fails, by design or accident, to provide its addressees with unequivocal guidance by offering black-and-white answers to more or less hard constitutional questions. Then, the only viable solution seems to be to either look 'outward,' toward that diverse socio-political context that generated the polity's overarching principles in the first place, or even abroad where pioneers or 'discoverers' might have 'traveled' for inspiration;[81] or to turn 'inward' and reflect on how the 'inventors' produced a coherent artifact constructed out of authoritative words.

The idea of reading the constitution so as to include meanings that arise from its own terms, from its structure, express or limited, or from outside its four corners but implicit in the overall political setting that it establishes, has received over the years multiple formulations both in judicial opinions and elsewhere. In *Palko v. Connecticut*, for instance, the U.S. Supreme Court was confronted with whether the Fifth Amendment's prohibition of double jeopardy should be applied or not to the States through the Fourteenth Amendment. The facts involved a criminal defendant, Frank Palko, who had been convicted for *second*-degree murder in the first place, but after appeal exercised by his prosecutors pursuant to a Connecticut law he received a death penalty upon being

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[78] ibid, 104.

[79] Beau Breslin, *From Words to Worlds* (n 23) 89.

[80] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 7.

[81] See *infra* section VI. Comparative Constitutionalism: Constitutional Identity and Change from Abroad

found guilty of *first*-degree murder, which he then appealed before the Supreme Court on the grounds that the U.S. Constitution's prohibition of double jeopardy equally applied to the States through the Fourteenth Amendment's Due Process Clause.[82] After investigating past opinions that rejected the application of Bill of Rights guarantees to the States in such fields as jury indictment and self-incrimination, as well as contrasting opinions that applied these same guarantees in such fields as freedom of speech and the press, freedom of religion etc., Justice Benjamin N. Cardozo writing for a near-unanimous court traced within this line of jurisprudence a 'rationalizing principle.' Pursuant to that principle's terms, the Fourteenth Amendment incorporated only these rights which were 'of the very essence of a scheme of ordered liberty,' and which were 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'[83] By holding such rights as the 'freedom of thought and speech' as applicable to the States through the assistance of the Due Process Clause, Justice Cardozo essentially acknowledged that they form 'the matrix, the indispensable condition, of nearly every other form of freedom.'[84] In contrast, the U.S. Constitution's guarantee against double jeopardy was not fundamental enough to be applied against the States through the Fourteenth Amendment and hence the court finally affirmed Palko's conviction.[85] In a similar vein, Justice William O. Douglas wrote in his dissent in *Poe v. Ullman* that the state invasion of the 'innermost sanctum of the home' by means of criminalizing the use of contraceptives constitutes 'an invasion of the privacy [which right of privacy] is implicit in a free society… [and] emanates from the *totality* of the constitutional scheme under which we live.'[86,87]

Should interpreters attracted to textualism confine themselves to analyzing the constitutional document clause-by-clause (*clause-bound interpretivism*) or should they look at the charter in its entirety (*textual structuralism* or *systemic interpretation*) seeking what Justice Douglas called

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[82] U.S. Supreme Court, *Palko v. State of Connecticut* 302 U.S. 319, 320-322 (1937) (Butler, J. dissenting).

[83] ibid, 325 ('... immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states…. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' ibid, 324-325 (citations omitted)).

[84] ibid, 327.

[85] *Palko*'s finding that the U.S. Constitution's prohibition of double jeopardy did not partake of the essence of the constitutional scheme so as to be applied through the Fourteenth Amendment against the States was later overruled in *Benton v. Maryland*, 395 U.S. 784 (1969).

[86] U.S. Supreme Court, *Poe et al. v Ullman, State's Attorney* 367 U.S. 497, 521 (1961) (emphasis added) (holding that a Connecticut law that prohibited using contraceptives and giving medical advice on how to use them amounts to a breach of the U.S. Constitution's Fourteenth-Amendment guarantees against deprivation of life and property without due process of law; Justice Douglas argued in his dissent that the Bill of Rights in its entirety should be applicable to the States because 'The safeguards enshrined in it are deeply etched in the foundations of America's freedoms.' *ibid*, 516).

[87] U.S. Supreme Court, *Estelle T. Griswold and C. Lee Buxton v. Connecticut*, 381 U.S. 479 (1965) (finding that the U.S. Constitution warrants the freedom of married couples to buy and use contraceptives without governmental interference) ('We deal with *a right of privacy older than the Bill of Rights* – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.' *ibid*, 485-486 (emphasis added)).

'constitutional scheme?'[88] In *Federalist 40*, James Madison had used similar terms to make his case for structuralism:

> There are two rules for construction, dictated by plain reason, as well as founded on legal axioms. The one is, that every part of the expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end. The other is, that where the several parts cannot be made to coincide, the less important should give way to the more important part; the means should be sacrificed to the end, rather than the end to the means.[89]

Professor William F. Harris II, in his 1993 book entitled *The Interpretable Constitution*, has explored both avenues and has provided valuable thoughts into the search for a constitution's identity. After rejecting a form of interpretivism associated with written or clause-bound textualism, and also non-interpretivism – that is, the imposition of the interpreter's free-standing moral beliefs – Professor Harris introduced an additional option by pointing to the distinction between focusing on the constitutional document itself and looking *beyond* it, specifically toward the overarching principles that pervade the polity in large which the founders have envisioned or have given rise to.[90] Harris presents the distinction between looking 'inward' and 'outward' as in effect constituting an interpretive *continuum* rather than a dichotomy.[91]

Positivism, on the one hand, dwells on words and clauses, whereas *structuralism* on designs conceived as compositions.[92] On the other hand, *immanence* circumscribes a constitution's meaning within the document or very close to it, whereas *transcendence* draws a number of implications from within the larger political community.[93] Combining all these four alternate routes with each other, Professor Harris sketched a quadrant interpretive figure: First, 'immanent positivism' simply focuses on words. Second, 'immanent structuralism' focuses on the structure of the document; it looks for broader patterns but ones restricted within the document or closely to it, but elevates them to a place where meaning is derived from how words are arranged and from other *internally* generated principles that succeed in cohering the various parts of the document into a meaningful whole.[94] A renowned exponent of the 'immanently structuralist' approach was the U.S. Supreme Court Justice Joseph Story who famously said that '[The most important interpretive

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[88] *Poe et al. v Ullman, State's Attorney* (n 86) 521.

[89] James Madison, *The Federalist No. 40*, 'The Powers of the Convention to Form a Mixed Government Examined and Sustained (18 January 1788)' <https://guides.loc.gov/federalist-papers/text-31-40> accessed 17 September 2022.

[90] William F. Harris, *The Interpretable Constitution* (n 32) 128.

[91] ibid.

[92] ibid, 144.

[93] ibid.

[94] ibid, 148.

principle is to seek the] exposition which best harmonizes with [the constitution's] design, its objects and its general structure.'[95] We are, said Justice Story in more detail,

> in the first instance, to consider, what are its nature and objects, scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts.[96]

That approach is prescient of the German *Bundesverfassungsgericht*'s presuppositions in the *Southwest Case* alluded to later in this chapter.[97] The downside of structuralism, however, is its uneasiness with open-ended clauses: Confined within a circumscribed universe, structuralism must appear to be self-sufficient to resolve questions that arise within it, without any need to go outside.[98] To constitute is to take different parts and shape them into a coherent whole. To constitute, then, implies the act of constructing a single identity from distinct parts. When a constitution is born, the hope is that the text will unite diverse individuals and give everyone a common foundation on which to live.[99] It is a constitution's prescription for wholeness, for its quality as an overall scheme, that lies behind the compelling interpretive inclination to harmonize its provisions, although they may seem, on their surface, to conflict with each other; as well as behind the proposition that a constitution itself cannot be self-contradictory and should be read pursuant to an interpretive principle that it is – must be – coherent.[100] Structuralism presents its own difficulties. First, *abstract* conceptions such as 'inner unity' present formidable barriers to constitutional interpretation. It is usually possible to discern a constitution's goals, but these are typically expressed in lofty, abstract terms. The problem lies less in singling out objectives than in persuading others what *specifically* those objectives require. Second, constitutionalism and democracy often compete, further shrouding 'inner unity.' Any answer to the question will be hotly contested. Third, structuralism forms the horn of an interpretive dilemma that is guilty of *circularity*: To understand the whole document, one must understand its parts; to understand the parts, one must understand its entirety.[101]

Third, 'transcendent positivism' echoes what is best known in the common-law world as 'construction' – that is, it emphasizes, in the words of the nineteenth-century American jurist Francis Lieber:

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[95] Joseph Story, *Commentaries on the Constitution of the United States* (1833), vol 1, 325; quoted by William F. Harris, The Interpretable Constitution (n 32) 148.

[96] ibid, 149.

[97] See *infra* section V. Constitutional Interpretations: How a Constitution Is Enforced.

[98] William F. Harris, *The Interpretable Constitution* (n 32) 157.

[99] Beau Breslin, *From Words to Worlds* (n 23) 37-38.

[100] William F. Harris, *The Interpretable Constitution* (n 32) 189.

[101] William F. Murphy, *Constitutional Democracy* (n 74) 473.

> the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text – conclusions which are in the spirit though not the letter of the text.[102]

It is a means of deriving political values and constitutional principles understood as lurking beneath the document's surface with a view to filling in any existing lacunae producing imperfections or insufficiencies.[103] 'Transcendent positivist' claims are anchored unto specific parts of the document but also projected out of it, operating as if they were positively enumerated, as long as they were 'out there' to discover. This interpretive mode is therefore dangerous to a large degree, but unavoidable. Still, even though of a transcendent nature, to remain a valid member of the class of 'positivist' interpretation, it must stay attuned to the constitution's actual wording.[104]

Fourth, in the context of 'transcendent structuralism,' it is the external environment from which compelling inferences should be drawn. The political, not the linguistic, context is seen as the interpretive target with a view to settling constitutional controversies.[105] As the U.S. Supreme Court Justice William O. Douglas put it, certain values 'emanate from the *totality* of the constitutional scheme under which we live.'[106] Nevertheless, these values are not overtly transcendent as to elevate to the status of natural law or natural rights, but are restrained within the four corners of real political communities.[107] This interpretive style calls for a non-documentary but still bounded theorizing about fundamental principles and rests on the premise that sometimes in judicial cases a valid constitutional appeal should more properly be made to a body of principles inherent in the form of the polity which the constitutional document, as a whole, sustains but not necessarily in precisely preconceived detail.[108] In other words, Professor Harris considers 'transcendent structuralism' as presuming that constitution-makers just put to their handicrafts their tags and drew their *silhouettes*; 'we,' as a constitution's now-living audience, are the only ones able, and entitled, to fill in their substance by discerning the names and shapes of such principles as 'due process' or 'citizenship,' that represent whole political theories whose precise content and implications are left to 'us' to determine based on the circumstances of our place and time.[109] Just as we need a foundational theory of politics to come to terms with the question of the constitution's original authority, we also need a foundational theory of writing to come to terms with the constitution's underlying genre.[110]

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[102] Francis Lieber, *Legal and Political Hermeneutics: Or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and Authorities* (1880) 44; quoted by William F. Harris, The Interpretable Constitution (n 32) 150.

[103] William F. Harris, *The Interpretable Constitution* (n 32) 151.

[104] ibid, 152.

[105] ibid.

[106] U.S. Supreme Court, *Poe et al. v Ullman, State's Attorney* (n 86) 521 (emphasis added).

[107] William F. Harris, *The Interpretable Constitution* (n 32) 153.

[108] ibid, 154.

[109] ibid, 155.

[110] ibid, 171.

Writing about the U.S. Constitution, Professor Harris contends that the meaning of the text is to be found in the character of its project, not in its dry and isolated sentences.[111] For the Federalists,[112] on the one hand, the text's meaning was in the project as a whole design – under Harris's typology, they were 'transcendent structuralists.'[113] For the Anti-Federalists, on the other hand, it was to be determined by the free-standing clauses of the document – they were 'immanent positivists.'[114] The very fact of the constitution's ratification did not – because it should not – bring its architects into direct confrontation with the issue of which genre it should be authorized to represent. The ensuing *peace* between the overlapping styles of interpretation helped enrich the American constitutional discourse – an outcome of interest for foreign jurisdictions too.[115]

A similar line of argumentation comes from Professor Ronald Dworkin's *concepts/conceptions* dichotomy. Back in 1932, the U.S. Supreme Court Justice Benjamin N. Cardozo had inserted into constitutional thinking an interpretive idea that lay barely between originalism and contemporary 'ratification': translating founders' *concepts* without being bound by founders' *conceptions*. His exact words were:

> [The founders'] beliefs to be significant must be adjusted to the world they knew. It is not in my judgment inconsistent with what they would say today or with what today they would believe, if they were called upon to interpret 'in the light of our whole experience' the constitution that they framed for the needs of an expanding future.[116]

Professor Dworkin elaborated further on Cardozo's 'whole experience' theme by stressing the need that interpreters aim not only at such abstractions as justice and fairness but also at the more concrete demands raised by integrity.[117] When interpreting law, judges should strive to perceive the legal universe as if it were created by a *sovereignty* speaking with a single voice and writing with a single hand.[118] Dworkin holds coherence more generally to be not only a political virtue in itself – deriving from justice, fairness, and due process of the law – but also to be sovereign.[119] For the American philosopher, a polity that embraces coherence into its law-making process has a

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[111] ibid.

[112] In late nineteenth-century America, the Federalists formed a conservative political party adorned by such figures as John Adams, Alexander Hamilton, James Madison, John Jay, John Marshall and others which supported the creation of a strong federal government. In contrast, the Anti-Federalists led by Patrick Henry of Virginia opposed empowering centralized administration at the level of the federal government.

[113] William F. Harris, *The Interpretable Constitution* (n 32) 172.

[114] ibid.

[115] ibid.

[116] U.S. Supreme Court, *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (upholding a Minnesota law enacted in an effort to alleviate the consequences of the Great Depression on the grounds that the U.S. Constitution permits restraining private rights in furtherance of the public interest in case of emergency) (Justice Cardozo's unpublished opinion quoted by William F. Murphy, *Constitutional Democracy* (n 74) 480.

[117] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 164-167, 219-224.

[118] ibid, 218, 225.

[119] ibid, 217, 219.

better case for successfully achieving substantive *legitimacy*.[120] One might conceive, he then concludes, of a constitutional principle such as secularism, or of a constitutionally entrenched human right such as freedom of speech, as echoing and laying down philosophical principles (of church-state relations, and of political liberty respectively) of sufficient *latitude* with which any subsequent constitutional development – either in the form of an amendment or of an updated interpretation – must at least *roughly* conform.[121] But the concepts/conceptions split also implies that a development differing from the specific conceptions prevailing at the founding may still be legitimate in later chapters of a nation's constitutional history if it is *responsive* to contemporary conceptions while keeping itself within the broad parameters of the original philosophy that produced it.[122] Last, Dworkin emphasizes another interpretive aspect to which I will immediately allude – that to understand how interpretive barriers operate in shaping constitutional identities requires serious engagement with the *narratives* that encapsulate a polity's fundamental principles.

Fidelity to a constitution requires *faith* in a constitution.[123] The level of faith is largely influenced by the narratives we tell about constitutional endeavors. The argument can be framed in the following terms. As any text is crucially determined by context, and as both are open-ended and subject to transformation over time and diversity between places, the constitutional subject must, motivated by a pressing need to overcome any of its deficiencies, avail itself of constitutional discourse to construct a consistent *narrative* that it can locate in constitutional identity, and then communicate it to the people at large.[124] Just as it is fallacious to believe that personal identities can be abstracted from the larger narratives of which they are part, the same holds for constitutions too: What is better or worse for one depends upon the character of that narrative that provides the constitutions' 'lives' with consistency. From the perspective of a political community, there are common narratives, what Jean Jacques Rousseau, for instance, has called a 'civil religion,'[125] within which the struggle to achieve consistency provides an exceptional identity to the constitutional enterprise.[126] As Ronald Dworkin once said:

> [Law] serves some interest or purpose or enforces some principle – in short… it has some point – that can be stated independently of just describing the rules that make up the practice.[127]

Concluding on the perennial question of how one interprets the constitution when resolving a delicate constitutional controversy, Dworkin answers that a lawyer must, first, *embed* his or her

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[120] ibid, 191-192.

[121] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 135.

[122] ibid, 134-136.

[123] Jack M. Balkin, *Constitutional Redemption. Political Faith in an Unjust World* (Harvard University Press 2011) 2.

[124] Michel Rosenfeld, *The Identity of the Constitutional Subject* (n 76) 41.

[125] See *infra* Chapter 4.

[126] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 90.

[127] Ronald Dworkin, *Law's Empire* (n 117) 47.

particular analysis within, second, an overall interpretive *narrative* that, third, *binds* the wide range of legal materials into, fourth, a *story* capable of earning respect.[128] To declare then that something is the law is not merely to say that someone who is authorized to make the law pursues a particular outcome.[129]

The late American Professor Robert Cover has produced a prominent essay analyzing the significance to be attached to constitutional narratives for understanding law.[130] He maintained that the normative universe is held together by the operation of interpretive forces – some small and private, others strong and public.[131] These forces play out to determine what law means and what law will be. If there existed two jurisdictions with identical legal principles and identical patterns of forces operating to generate legal outcomes, the latter outcomes would nonetheless differ essentially if, in one of these jurisdictions, the principles were generally venerated while in the other they were treated by many as fundamentally unjust.[132] Veneration comes, at least to a degree, from the narratives of legal meaning that political communities themselves create and feed. The people at large construct such stories that not only represent their particular collective conceptions of the law, but also place their communities within the context of a larger narrative.[133] Professor Cover termed the writing of legal narratives as an act of 'jurisgenesis' and characterized the act of writing as 'jurisgenerative.'[134] He then concluded that

> No set of legal institutions exists apart from the narratives that locate it and give it meaning. Once understood in the context of the narratives that gives it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.[135]

Embedded within constitutional narratives are both *descriptive* and *normative* components – stories that remind us who we are and where we are heading.[136] Some polities, for instance, have experienced a feudal or a colonial past, or have undergone bloody revolutions or dramatic reforms; others have recognized that regime change has occurred as a consequence of such forces as industrialism, military coups, revolutions, post-Enlightenment rationalism, etc.[137] The constitutional discourse should then build upon an authoritative text which necessarily must be placed in its actual context, taking into account the relevant factual and normative constraints. A representative

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[128] ibid.

[129] Sanford Levinson, *Constitutional Faith* (Princeton University Press 2011) 75-76.

[130] Robert M. Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harv L Rev 4.

[131] ibid, 7.

[132] ibid.

[133] ibid, 23.

[134] ibid, 11.

[135] ibid, 4, 31.

[136] Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford University Press 2017) 152.

[137] Beau Breslin, *From Words to Worlds* (n 23) 31.

example of how narratives operate in a nation's process of identity-formation is derived from the historical evolution of trial by jury In the United States.

In 1961, the U.S. Supreme Court Justice Hugo Black wrote that:

> [The denial of trial by jury] led first to the colonization of this country, later to the war that won its independence, and finally, to the Bill of Rights.[138]

That proposition may sound to contemporary Americans like an overstatement especially if evaluated in isolation from its multifaceted context; but reading it along the lines of a constitutional narrative of America's political heritage can lead to a different conclusion. Indeed, the spark that ignited the American Revolution was nothing more than a criminal trial held on 4 August 1735 in the colony of New York.[139] John Peter Zenger, publisher of the *New York Weekly Journal*, was charged for having criticized the British Governor, William Crosby, for removing Justice Lewis Morris from the bench.[140] The Governor was outraged and had Zenger arrested and imprisoned for seditious libel.[141] After addressing the jury in dramatic tones, Andrew Hamilton, Zenger's attorney, argued that since the things Zenger was accused he had published were actually true – which was after all for the jury, not the judge, to determine – they could not be libelous at the same time; and finally Zenger was acquitted *against* the instructions of the judge.[142]

Colonists used courts largely to challenge and resist British legislation that they believed was unjust.[143] The Navigation Acts, for instance, were principal members of the class of the most disturbing laws for American colonists. The central provision of the Navigation Acts – which were formally enacted as part of mercantilist policies – was that no goods grown or manufactured in America (or in Asia and Africa too) were permitted to Britain except if transported in British vessels.[144] The American colonies produced a great deal of the same goods that Britons produced such

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[138] U.S. Supreme Court, *Cohen v. Hurley*, 366 U.S. 117, 139-140.

[139] Ralph L. Crosman, 'The Legal and Journalistic Significance of the Trial of John Peter Zenger' (1938) 10 Rocky Mntn L Rev 267 (quoting Gouverneur Morris, a signatory of both the Articles of Confederation and the U.S. Constitution, who had said of Zenger's acquittal that it '... was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America.')

[140] Dennis Hale, *The Jury in America: Triumph and Decline* (University of Kansas Press 2016) ch 1, 'The Common-Law Jury in England and the Colonies'; Ralph L. Crosman, 'The Legal and Journalistic Significance of the Trial of John Peter Zenger' (n 139) 260.

[141] Ralph L. Crosman, 'The Legal and Journalistic Significance of the Trial of John Peter Zenger' (n 139) 260.

[142] Dennis Hale, *The Jury in America* (n 140) ch 1, 'The Common-Law Jury in England and the Colonies'; Ralph L. Crosman, 'The Legal and Journalistic Significance of the Trial of John Peter Zenger' (n 139) 267.

[143] ibid; Larry D. Eldridge, 'Truth and Seditious Speech in Colonial America, 1607-1700' (1995) 39(3) Am J Legal Hist 337 (investigating 1,244 libel prosecutions to demonstrate that early colonial authorities struggled to maintain law and order in no insignificant degree by prosecuting seditious words).

[144] (United Kingdom) Act for increase of Shipping, and Encouragement of the Navigation of this Nation 1651; Charles H. Firth & Robert S. Rait (eds), *Acts and Ordinances of the Interregnum, 1642-1660* (His Majesty's Stationery Office 1911) 559-562 <http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum> accessed 21 February 2023. As part of the series of the Navigation Acts, the following acts were also enacted: 1660 Act for the Encouraging and Increasing of Shipping and Navigation; 1663 Act for the Encouragement of Trade 1673 Act for the Encouragement of the Greenland and Eastland Trades; 1696 Act for Preventing Frauds and Regulating Abuses in the

as tobacco, sugar, cotton and indigo, and continued to do so well into the nineteenth century. As a consequence, colonial production and commerce suffered heavily from the protectionism sought after by the Navigation Acts. As expected by policy-makers in Britain, ship-owners charged extraordinary fees to transport colonial goods to Britain.[145] After decades of economic decline and merchant abuses, the Navigation Acts could hardly if at all be pursued, and colonists could do nothing to fight back but *break* the law: Eventually, they shifted to using their own ships and to trading directly.[146] British authorities arrested the offenders, but colonial juries, much like their counterparts in the Zenger case, followed suit and denied conviction.[147] Britain responded by taking away the right to trial by jury itself – in manifest disregard for the fact that that particular right had been first affirmed in the 1215 Magna Carta,[148] and was later reaffirmed in the 1689 Bill of Rights.[149] Indeed, the UK Parliament finally passed in 1774 the Intolerable (or Coercive) Acts that limited colonial juries, along with the range of the class of citizens eligible to serve as members of those juries, and provided the British judges with extensive powers over jury selection.[150] In the same year, the founding father of the U.S. Constitution, John Adams, said that:

> Representative government and trial by jury are the *heart* and *lungs* of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.[151]

With the passage of time, trial by jury became a peaceful means of resisting colonial rule and later a central claim of American Revolutionaries. For one thing, the Continental Congress cited the denial of 'the accustomed and inestimable privilege of trial by jury, in cases of both life and property.'[152] In 1776, the charges against King George III in the American Declaration of

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Plantation Trade; 1733 Molasses Act; 1764 Sugar Act; 1764 Currency Act; 1765 Stamp Act; 1766 Revenue Act; 1767 Free Port Act.

[145] Larry Sawers, 'The Navigation Acts Revisited' Econ Hist Rev (1992) 45(2) 262-263, 270-275.

[146] ibid, 271.

[147] Dennis Hale, *The Jury in America* (n 140) ch 2, 'The Republican Jury.'

[148] Magna Carta 1215, cl 39: 'No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, *except by the lawful judgment of his equals* or by the law of the land.' Godfrey Rupert Carless Davis, *Magna Carta* (British Museum 1963) 23-33 (emphasis added).

[149] (United Kingdom) Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights) 1689: '... whereas of late years partial corrupt and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason which were not freeholders… And thereupon the said Lords… declare… [t]*hat jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders*….' <https://avalon.law.yale.edu/17th_century/england.asp> accessed 23 September 2022 (emphasis added).

[150] David Ammerman, *In the Common Cause: American Response to the Coercive Acts of 1774* (University Press of Virginia 1974) 7.

[151] C. Bradley Thompson (ed), *The Revolutionary Writings of John Adams* (Liberty Fund 2000) 55.

[152] 'A Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms' (1775) <https://avalon.law.yale.edu/18th_century/arms.asp> accessed 27 September 2022.

Independence involved 'depriving us in many cases, the benefits of trial by jury.'[153] When the U.S. Constitution was finally drafted in 1787, it enshrined trial by jury in criminal cases but not in civil ones.[154] That this specific omission was considered as one of the fledgling constitution's most severe flaws is clearly demonstrated by the fact that through the Massachusetts Compromise it finally made it into the U.S. Constitution through its Seventh Amendment.[155] Still, what is clearly missing from the constitutional narrative of trial by jury in the American constitutional setting is its present dimension, its ongoing ability to serve the political circumstances of twenty-first century American democracy – its continuing capacity to mirror the contemporary American constitutional identity.

Nevertheless, the narrational technique of interpreting (constitutional) law is not just a pseudonym for the now-voguish tendency to interpret law in 'law and something else' contexts such as in 'law and history' or 'law and society.' Its value rests not just on pointing to the historical circumstances that helped shape a specific textual formulation that is still in force until now; but on pointing to what the past has made *available* to the present and what *barriers* it has erected against future developments.[156] The constitutional outcome is a combination of the operation of a multiplicity of forces. Along the way there have been efforts by framers, but primarily by successive generations, to 'reinvent' the past.[157] The constitutional narrative, however, places *outer limits* on contemporary 'reinventions,' and a dialogical relationship ultimately determines the essence of constitutional identity.[158] The process will be open to possibilities, but modifications cannot be boundless; constitutional ambitions are necessarily constrained by what a constitution's identity has effectively foreclosed to future generations.[159]

A. Constitutional Aspirations I: How a Constitution Can Change

To aspire is to seek perfection in substitution for what one presently has. A constitution is a codification of rights and obligations as well as of aspirations that are institutionally secured by means

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[153] The American Declaration of Independence, 4 July 1776 <https://www.archives.gov/founding-docs/declaration-transcript> accessed 21 February 2023.

[154] The U.S. Constitution, art III, cl 3 reads that:

> Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

[155] The Seventh Amendment to the U.S. Constitution reads that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[156] Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press 2007) 223: 'An adequate sense of tradition manifests itself in a grasp of those future possibilities which the past has made available to the present."

[157] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 112.

[158] ibid, 103.

[159] ibid, 99.

of subsequent generations being free to amend.[160] The incorporation of political aspirations into a constitution instead of their realization from the start by way of entrenchment of certain provisions is in part attributable to the fact that constitutions on most occasions rest on political moderation and compromise.[161] The changing conditions may subsequently call for modifications in human rights and obligations and in the particular design of institutions, as well as in the ways that these institutions interact with each other and with other public agents, but, as Professor Gary J. Jacobson points out, 'the transient character of formal arrangements will still reflect the larger purposes and principles that are the underlying theme of constitutional identities.'[162] Or as Beau Breslin remarked:

> [A] written constitution requires some awareness of its heritage and tradition; the polity's evolving aspirations will be deemed legitimate only if they account for the promises that were made at earlier moments in time.[163]

Robert Cover once said that, 'A norm is a present world constituted by a system of tension between reality and vision.'[164] In other words, a constitution is not simply a screenshot of the attitudes prevailing at a particular point in time and space nor is it an uninspiring collection of dry and empty provisions. Its continuing ability to mirror a genuine identity is closely tethered to the promises made by its authors, which illuminate what is widely acknowledged as the 'spirit' of the document.[165] These promises are sometimes easily discernible, as in the case of sections aptly entitled 'preambles,' and 'introductions.'[166] Sometimes, they are dormant or less noticeable, especially when they are hiding behind the more technical instrumentalities and the mundane words typically employed to frame law provisions more generally, but that makes them no less worthy of respect.[167]

Modern constitutions sometimes explicitly indicate battles a polity will fight in the future, and in doing so they incorporate aspirations for the polity. They envision a brighter political future and if opportunity comes, they assist in realizing political goals.[168] Political aspirations are perhaps nowhere more visible than in constitutional preambles. Constitutional preambles are peculiar statements. Framed in lofty language and filled with promises for a better future, they precede the technicalities of the constitutional text.[169] They appear first and may be considered the most

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[160] ibid, 106.

[161] ibid, 78.

[162] ibid.

[163] Beau Breslin, *From Words to Worlds* (n 23) 49.

[164] Robert M. Cover, 'Foreword: Nomos and Narrative' (n 130) 9.

[165] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 48.

[166] Beau Breslin, *The Communitarian Constitution* (Johns Hopkins University Press 2006) 201.

[167] Beau Breslin, *From Words to Worlds* (n 23) 46.

[168] ibid, 47.

[169] ibid, 50.

allusive part of modern constitutions.[170] After all, preambles are typically that portion of a constitutional draft where framers feel freer to go 'wild' and proclaim emphatically what they perceive as their fledgling polities' paramount aims, including those deemed exceptional or controversial.

Through time, however, preambles are not only perceived by outside observers as reflecting a constitution's aspirations, but are also tailored by framers specifically to do so. Constitution-makers have increasingly begun to include on purpose in their preambles some reference to their polity's troubled past and their political visions for a better future.[171] On some occasions, these references even rise to the level of a constitutional narrative describing in more detail the nation's past sufferings or its rich legacy.[172] Moreover, preambles also announce the nation's pride in having overcome such difficulties.[173] A number of preambles also include statements of self-determination.[174] All three of these common themes incorporate aspirational connotations: they depict a polity struggling to achieve its highest ambitions.[175] Last, the verbal expansion of modern preambles is a manifestation of a rising attitude within constitutional engineering more generally that considers a constitution's text to be the ideal location to declare resistance to political miseries.[176] Contemporary framers, and perhaps the people at large, appear to have substantially more faith in the power of a constitution's text as a public statements in driving constitutional politics.[177]

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[170] ibid.

[171] ibid, 52-53. See, for example, the Preamble to Cambodia's 1993 Constitution which reads that:

> WE, THE PEOPLE OF CAMBODIA
>
> Being the heirs of a great civilization, a prosperous, powerful, large and glorious nation whose prestige radiated like a diamond;
>
> Having endured suffering and destruction and having experienced a tragic decline in the course of last two decades;
>
> Having awakened to stand up with resolute determination and commitment to strengthen our national unity, to preserve and defend Cambodia's territory and its precious sovereignty and the prestige of Angkor civilization, to build the nation up to again be an "Island of Peace" based on a liberal multi-party democratic system, to guarantee human rights and the respect of law, and to be responsible for progressively developing the prosperity and glory of our nation.
>
> WITH THIS RESOLUTE WILL
>
> We inscribe the following as the Constitution of the Kingdom of Cambodia: …

<https://www.constituteproject.org/constitution/Cambodia_2008?lang=en> accessed 11 October 2022.

[172] Beau Breslin, *From Words to Worlds* (n 23) 53.

[173] ibid.

[174] ibid.

[175] ibid.

[176] ibid, 55.

[177] ibid.

Despite their potential, however, preambles usually lack the standard normative and interpretive gravity that is more readily acknowledged in the main chapters of constitutional documents.[178] Indeed, rarely, if ever, are preambles actually used and even more rarely are they cited as authoritative sources of legal meaning.[179] Courts, particularly, approach constitutional preambles more as 'mission statements' than as standard legal provisions.[180]

But before we dismiss preambles altogether as mere rhetoric, we should consider not so much their potentiality in generating strict rules of construction but in empowering the interpretation of the constitution in its entirety, what was earlier alluded to as 'transcendent structuralism.' Indeed, one can argue that their almost absent normativity combined with a dynamic interpretive power are what lend constitutional preambles their instrumental value in revealing the larger political philosophy embedded within the constitutional project as a whole. As the U.S. Supreme Court Justice Joseph Story once said:

> It is an admitted maxim in the ordinary administration of justice, that the preamble of a [constitution] is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the [text].[181]

If a polity wants to declare its posture over a constitutional issue of higher importance, doing so through the preamble presents itself as an ideal solution.[182] Preambles serve as important civic lessons too.[183] Insofar as constitutions signal the end of a regime and the establishment in its stead of a new one, and the aspirations of a brand new constitutional design are inevitably pervaded by past misfortunes, preambles (of which a paradigmatic example is the Preamble to the 1791 French

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[178] ibid, 52.

[179] U.S. Supreme Court, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding a Missouri law that placed limits on the use of state funds for abortions).

[180] Beau Breslin, *From Words to Worlds* (n 23) 52.

[181] Joseph Story, *Commentaries on the Constitution of the United States* (1833), vol 2, 18; quoted by Beau Breslin, *From Words to Worlds* (n 23) 50.

[182] Beau Breslin, *From Words to Worlds* (n 23) 52.

[183] ibid, 52-53.

Constitution[184]) serve both as markers of a troubled past and of the political aspirations embraced by the founders.[185]

B. Constitutional Aspirations II: When a Constitution Cannot Change

Amendments present perhaps the richest source of inspiration for insights about constitutional identities. We might see an amendment as a brand-new chapter in an evolving constitutional endeavor.[186] The adoption of an amendment might indeed demonstrate a turn in what the constitution actually means to the people. Perhaps the easiest way of unearthing what is meant by the term 'amendment' is to think of it as a legal outcome unable to derive from the whole body of legal stuff.[187] Therefore, as Professor Sanford Levinson points out:

> to describe something as an amendment is at the same time to proclaim its status as a legal invention and its putative illegitimacy as an interpretation of the preexisting legal materials.[188]

Accordingly, then, how well it fits what is hereby marked as a constitution's identity will be a factor in assessing its legitimacy.[189] If the lack of fit is such as to either call into doubt whether the amendment has deteriorated generic constitutionalism itself – '*first*-order amendment defects' related to constitutionalism in general – or to lead one to believe that a key element of the constitutional scheme has been neglected – '*second*-order amendment defects' related to constitutions in particular – then the legitimacy of the whole enterprise is called into question.[190]

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[184] France's *Constitution* of 3 September 1791 read that:

> The National Assembly, wishing to establish the French Constitution upon the principles it has just recognized and declared, abolishes irrevocably the institutions which were injurious to liberty and equality of rights. Neither nobility, nor peerage, nor hereditary distinctions, nor distinctions of orders, nor feudal regime, nor patrimonial courts, nor any titles, denominations, or prerogatives derived therefrom, nor any order of knighthood, nor any corporations or decorations requiring proofs of nobility or implying distinctions of birth, nor any superiority other than that of public functionaries in the performance of their duties any longer exists. Neither venality nor inheritance of any public office any longer exists. Neither privilege nor exception to the law common to all Frenchmen any longer exists for any part of the nation or for any individual. Neither jurandes nor corporations of professions, arts, and crafts any longer exist. The law no longer recognizes religious vows or any other obligation contrary to natural rights or the Constitution.

<https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-de-1791> accessed 18 September 2022.

[185] Beau Breslin, *From Words to Worlds* (n 23) 53.

[186] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 69.

[187] Sanford Levinson, 'How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press 2001) 16.

[188] ibid, 17.

[189] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 69.

[190] ibid.

Challenges to constitutional identities may fall into 'hibernation' in times of constitutional maintenance. But when voices combine to rally for constitutional change, then identity issues 'wake up.' The alarming event usually presents itself through a debate between friends and foes of constitutional transformation. To be sure, constitutionalism is about limits and aspirations. Much like criminal codes, constitutions do not usually guide us over the course of our future actions but rather over the chain of our prohibitions; they do not tell us what we are permitted to do but what we are prohibited from doing. Perhaps, then, the most critical moment of constitutional engineering occurs when the drafters are confronted with the complicated issue of how much freedom to *grant* and how much to *withhold* from any prospective agents of constitutional amendments.[191] Indeed, barriers to change are intended by design to immunize an established identity from future assaults by blocking the removal of these parts, without which it would allegedly become something very *different*, and would experience some kind of 'metamorphosis.'[192] More generally, because constitutions are designed to provide stability to a newly constituted polity, framers are inclined to curtail the power of future generations to 'destroy' what they created.[193] This is precisely the underlying cause behind constitutional entrenchment by way of a list of unamendables. When the framers bar future agents from 'touching' certain parts of their handiwork, they are in effect doing nothing less than establishing an 'insurance policy' in favor of a particular identity against a set of conflicting future identities that are thought to be inconsistent with its embedded *identity*.[194]

The fact that the door to constitutional amendments is foreclosed when explicit provisions so command is perhaps uncontroversial, although there is a rising tendency by a number of scholars to argue against such textual barriers' definitiveness when the people at large drive constitutional evolution in a different direction.[195] Nevertheless, based on an assumption that a constitution is by itself capable of providing those committed to its deterioration with the lawful means to achieve their objectives,[196] as well as on the fact that that exact assumption has found its actual realization in the form of the Nazi terror, there has been a multiplicity of voices arguing in favor of additional, implied limitations on the power to enact constitutional amendments.

The theoretical conceptualization of a distinct possibility of implied limits to constitutional amendments dates as far back as 1893, when Professor Thomas M. Cooley famously declared that an amendment should:

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[191] ibid, 35.

[192] ibid, 69.

[193] Beau Breslin, *From Words to Worlds* (n 23) 44-45.

[194] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 6.

[195] Akhil Reed Amar, 'Philadelphia Revisited: Amending the Constitution Outside Article V' (1988) 55 U Chi L Rev 1043 (arguing that the Article V amending process of the U.S. Constitution does not prescribe the only legitimate mechanism to amend the constitution).

[196] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 17.

> be in harmony with the thing amended, so far at least as concerns its general spirit and purpose. It must not be something so entirely incongruous that, instead of amending and reforming it, it overthrows or revolutionizes it.[197]

By the early twentieth century, the idea that the route to constitutional change should be foreclosed in case of conflict with a constitution's identity had become widespread enough for the American lawyer William L. Marbury to proclaim in a 1919 *Harvard Law Review* article that 'it may be safely premised that the power to "amend" the Constitution was not intended to include the power to *destroy* it.'[198]

On the other side of the Atlantic, the historical roots of Germany's *Verfassungsidentität* as a theoretical foundation of a theory of implied limits to constitutional amendments can be traced back within German constitutional thought to at least the adoption of the *Reichsverfassung* in 1871 signaling the unification of the German *Länder*.[199] The German Empire was founded on 18 January 1871, in the aftermath of three successful wars led by Prussia.[200] From its origins, the empire was ruled pursuant to a constitution designed earlier by Otto von Bismarck, the Prussian Prime Minister, to govern the North German Confederation. The constitution, passed as a law by Parliament on 16 April 1871, empowered the chancellor and monarch with supreme decision-making authority. The *Reichsverfassung* was a federal constitution. The *Kaiser* was in charge of the armed forces, controlled foreign policy, and appointed the *Kanzler*. The latter was in charge of the government and controlled the *Bundesrat*.[201] The *Bundesrat*, an upper house representing twenty-five previously sovereign *Länder* but dominated by the largest among them, Prussia, introduced laws to the lower house, the *Reichstag*, and had power to approve them.[202] In theory, the *Reichstag*'s ability to reject any law proposals seemingly lent it considerable power; however, the *Reichstag*'s power was actually circumscribed by the government's heavy reliance on taxes paid by both the *Länder* and by the *Reichstag*'s need to approve the military budget.[203]

Constitutional interpretation during the *Reichsverfassung* era was dominated by Paul Laband's (1838-1918) legal positivism.[204] The theories of both Laband and his opponent, Otto von Gierke (1841-1921), were part of a more general wave during the nineteenth century within the humanities

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[197] Thomas M. Cooley, 'The Power to Amend the Federal Constitution' (1893) 2 Mich LJ 188.

[198] William L. Marbury, 'The Limitations Upon the Amending Power' (1919) 33 Harv L Rev 225. *But* see Wm. L. Frierson, 'Amending the Constitution of the United States. A Reply to Mr. Marbury' (1919-1920) 33 Harv L Rev 659 (emphasis added).

[199] Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and The Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14(2) International J Const L 413.

[200] Mary Fulbrook, *A Concise History of Germany* (first published 1990, Cambridge University Press 2000) 129.

[201] ibid, 129, 131.

[202] ibid, 131.

[203] ibid.

[204] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Duke University Press 2012) 14.

to simulate the methods of natural science.[205] Both schools rejected any arguments that conceived the law as derived from transcendent origins: Laband's school insofar as it saw the law as driven by human nature, and von Gierke's school insofar as it derived the law from a concept of a 'spirit of the nation' (*Volksgeist*) in its historical outlook.[206] For Laband, all extra-legal parameters had no relevance at all for legal analysis.[207] The legal positivist sought to introduce a value-free way of generating legal outputs and explaining their substantive content. His lifelong goal was the 'purification' of law from politics.[208]

After the adoption of the 1871 Constitution, Laband took the chance to offer a comprehensive method of reading constitutions that both appeared reasonable enough and helped sustain the constitutional status quo as well. The contemporary legal system, Laband argued, was a self-sufficient basis for examining nearly all legal disputes.[209] Only by taking out politics and focusing on the legal aspects of each case could one grasp the legal 'truth.'[210] His discussion excluded all references to sovereignty and history.[211] In addition, a constitution for Laband did not determine the actual content of a statutory instrument but only laid out 'the formal *process* by which the state's will could come into being.'[212] Just as the English Constitution of the nineteenth century, the *Reichsverfassung* created a law-making process without in any way delimiting the *substance* of the law-making power.[213] The statute reflected the state's will – that is, it was the 'objectified word of the legislature,' whereas human rights did not 'stand above' the state's will.[214] An ordinary law, that highest illustration of the state's will, could curtail or even inhibit human rights.[215]

In the law and society context, Laband said with reference to the divergence between the law's word and deed that:

> Just as the *foundations* and the façade of a building can remain unchanged, while on the *inside* the essential alterations are undertaken; so also the constitutional construction of the empire shows, on an external examination, the same architectural forms and lines as at the time of its erection. Whoever penetrates to the inside, however, sees that it is no longer the same as it was at the start, that it has been altered and extended according to other needs and views, and that in the process

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[205] ibid.

[206] ibid.

[207] ibid, 16.

[208] ibid.

[209] ibid, 19.

[210] ibid.

[211] ibid.

[212] ibid, 24.

[213] ibid.

[214] ibid, 31.

[215] ibid.

> much has appeared that does not really fit with the original plan and that does not fully harmonize even with itself.[216]

Both the façade and foundation of Laband's constitutional building remained in place. Why, by his theory's terms, they should do so, however, remains unclear. But Professor Peter C. Caldwell answers, following the logic of the vivid metaphor but with the benefit of hindsight, that there had to be some obstacles to 'renovation' that were *inherent* in the structure of a constitution.[217] The unusual *openness* of the *Reichsverfassung* to change through the ordinary enactment of statutory instruments must have necessarily been accompanied by some idea of formal *barriers*, more than just with respect to the law-making *process*.[218]

It is true that the Empire's constitution did not provide for a special body empowered to propose and adopt amendments to it. Such a body was considered by the constitution-makers as redundant since the constitution itself was not viewed as a product of a distinguished – supreme – form of popular sovereignty.[219] Viewed in essence as a piece of ordinary legislation, ordinary legislative bodies, too, were considered as competent enough to adopt amendments to the constitution.[220] The constitution did not include express substantive limits to constitutional amendments either. As a consequence, constitutional lawyers agreed almost unanimously that there were *no* constitutional *provisions* that could or should be kept *beyond* the reach of the amending hand: its provisions in their entirety were treated as subject to modification or repeal through ordinary Acts of Parliament,[221] restrained only by slightly more onerous procedural thresholds.[222]

Nevertheless, there were lonely voices of academics who argued that certain constitutional provisions, including constitutional principles, should be kept beyond the Parliament's amending power. In particular, the German politician and jurist Georg Meyer (1841-1900) maintained that the contractual nature of the 1871 constitution should exclude the *federal* principle from the amendment capacity of the legislature, which meant in effect that the power balance between the *Länder* could not be significantly altered without unanimous agreement between them and the federal authorities.[223] Although the theoretical arguments framed in favor of implied limits to constitutional amendments were based upon respect for the *Reichsverfassung*'s federal principle and thus could be considered as uniquely related to the particular needs of time and place, the rationale

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[216] Paul Laband, *Die Wandlungen in der Deutschen Reichsverfassung* (originally printed in the *Jahrbuch der Gehe-Stiftung zu Dresden 1895*) 151 quoted by Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 38 (emphases added).

[217] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 38.

[218] ibid.

[219] Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and The Idea of Constituent Power' (n 199) 414.

[220] ibid.

[221] ibid.

[222] Germany's *Reichsverfassung* of 1871, arts 78(1); 78(2).

[223] Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and The Idea of Constituent Power' (n 199) 415.

behind them echoed the constitutional identity discourse that would later explode.[224] Both were built upon distinguishing, *first*, between constitutional provisions as fundamental or not and, *second*, between the *constitution*-making and *law*-making authorities.

The decisive move away from statutory positivism and its particular vision of parliamentary sovereignty would be made only after the Bismarckian political system had collapsed on 9 November 1918.[225] The new Germany that emerged was a parliamentary republic. If interpreted in light of then prevalent idea of positivism, the new constitution would reaffirm the institution of a parliamentary democracy.[226] However, observers from both corners of the political spectrum expressed fears of 'parliamentary absolutism.'[227] Legal positivism would lead to a doctrine of parliamentary sovereignty unrestrained by human rights limitations introduced into the document.[228] Therefore, delegates ultimately agreed on the need for a means of counter-balancing parliamentary sovereignty by means of a president popularly elected and equipped with the power to disperse the *Reichstag*.[229] On the other hand, the requirement of *Reichstag*'s confidence to the government including the chancellor warranted unity but also curbed the presidential authority.[230] The outcome looked like a twofold parliament with a lower house securely instituted against a powerful president, both based on popular sovereignty.[231]

The *Weimar* Constitution then in force contained in its art 76 the rules applicable for amending its provisions: A revision would be valid if at least two-thirds of the *Reichstag*'s members were present and two-thirds of those present voted favorably.[232] In case of objections by the *Reichstag*, the President could deliver the bill to the people through referendum, for which a majority of

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[224] ibid.

[225] Mary Fulbrook, *A Concise History of Germany* (n 200) 160; Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 64.

[226] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 64.

[227] ibid.

[228] ibid.

[229] Mary Fulbrook, *A Concise History of Germany* (n 200) 160; Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 67.

[230] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 67.

[231] ibid.

[232] Germany's *Reichsverfassung* (known as the *Weimar* Constitution), art 76 which provided that:

> The constitution can be amended by legislation. However, resolutions of the Reichstag in favor of an amendment of the constitution are effective only if two-thirds of those present consent thereto….

whoever voted was sufficient.[233] Besides such formalities, there was no substantive limit on what the people through their representatives were able to amend in the constitution.[234]

In addition to the *Weimar* Constitution's silence on the matter, most constitutional lawyers agreed too that there were no substantive limits to constitutional change.[235] They based their arguments on the text as well as on a deep-rooted assumption that the *Reichstag* was *both* a constitution- and a law-maker at the same time.[236] Just as in the imperial era, the *Weimar* Constitution did not provide for a special body to carry out constitutional amendments, there was therefore no distinguished *constituent power* or, to put it differently, *constituting* and *constituted* powers were one and the same.[237] As Peter C. Caldwell aptly points out:

> While the constitutional system had to presuppose the democratic conviction and willingness of citizens to work within the bounds of parliamentary democracy, it could not outline the substantive unity of the cultural whole in advance. For statutory positivists, the Constitution was not superior to the legislature but at its disposal. The sovereign was ever present, a potential pouvoir constituant capable of taking the polity in *whatever direction* the nation deemed best.[238]

Against this background was it, however, that anti-democratic law professors, most notably Carl Bilfinger (1879-1958) and Carl Schmitt (1888-1985), each using different theoretical formulations, developed their now well-known theories of implied limitations to constitutional amendments. Bilfinger based his theory on the assumption that a constitution is a closed universe.[239] As he put it, ordinary law-making bodies are not authorized to turn the constitution 'upside down.'[240] Any alteration whatsoever of the constitution could not be properly considered as a constitutional amendment.[241] The legislature, for its part, had the duty to preserve the core of the constitution.[242] Bilfinger later refined his theory, arguing that realizing a constitution's essence leads one to agree

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[233] The *Weimar* Constitution, art 74 which provided that

> The Reichsrat may protest against laws passed by the Reichstag… In case of such protest the law is referred back to the Reichstag for further consideration. If then the Reichstag and the Reichsrat cannot agree, the President… may, within three months cause the matter in dispute to be submitted to the popular vote….

[234] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 69.

[235] Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and The Idea of Constituent Power' (n 199) 417.

[236] ibid.

[237] ibid.

[238] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 69 (emphasis added).

[239] Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and The Idea of Constituent Power' (n 199) 418.

[240] ibid.

[241] ibid.

[242] ibid.

that *not all* constitutional provisions are subject to amendment. A constitution that allows its own abrogation, its legal destruction, he concluded, is *not* a constitution proper.[243]

In his 1928 treatise entitled *Constitutional Theory*, Schmitt argued that a constitution is the outcome of an extraordinary power – constituent power – through a politically enhanced will.[244] In contrast to Kelsen's theory, which left considerable room for dynamic interplay between law and society, Schmitt's idea of an 'absolute will' forestalled any investigations of a possible relationship between a divided society and state corporatism by stressing the alignment of law and society.[245] He insisted that some homogeneous elements had essentially to lurk beneath the nation, be it religion, class, or race.[246] Once the German Emperor disappeared, Schmitt continued, without being replaced by an equally qualified substitute, only two elements remained: the political accord based on a putative act of *original* arrangement deemed as *prior* to the constitution; and the civil institutions created by the supreme law-making agent, the *Reichstag*.[247] The latter was no longer limited by a monarch; hence, it had to be viewed as – merely but essentially – limited by the supreme force of the *constitution*-maker. For Schmitt, it was the will of a constituent power, not the act of an ordinary law-maker, that provided validity to the constitution.[248] That proposition led him to reject a law theory that totally ignored any substance as a potential barrier to the law-making authority.[249] Writing disapprovingly about the way the *Weimar* Constitution had been interpreted, he pointed out what is now a famous quote about the class of politically controversial constitutional amendments:

> A purely formal concept of law, independent of all content, is conceivable and tolerable.'[250]

Thus, raising the problem of the outer substantive borders of a constitutional amendment and law more generally meant, in effect, proposing limits to what the legislature was authorized to do.[251]

In the same context, however, he acknowledged that it would be unrealistic to think that a constitution reflects the conscious choices of the people down to its *last* detail.[252] The 1918 revolution, for example, led to the creation of the *Weimar* Constitution which expressed Germans' conscious selection of a democratic, republican, and federal state, committed to the rule of law and

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[243] ibid.

[244] Carl Schmitt, *Constitutional Theory* (first published in German as *Verfassungslehre*, Duncker und Humblot 1928; Jeffrey Seitzer tr & ed, Duke University Press 2008) 62-66.

[245] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 102.

[246] ibid.

[247] ibid, 104.

[248] Carl Schmitt, *Constitutional Theory* (n 244) 64, 125ff.

[249] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 104.

[250] Carl Schmitt, *Legality and Legitimacy* (first published in German as *Legalität und Legitimität* (Duncker und Humblot 1932); Jeffrey Seitzer tr and ed, Duke University Press 2004) 20.

[251] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 104.

[252] ibid, 105.

parliamentary democracy.[253] The nation, as he put it, had decided against workers' councils in favor of parliamentary democracy and civil rights.[254] It would be wrong, he concluded, to treat such fundamental norms as having the same normative weight as those provisions which handled rather mundane constitutional substance. Were the *Reichstag* to pass any laws against that 'basic decision,' it would have committed, in Schmitt's own conviction, illegitimate 'apocryphal acts of sovereignty.'[255] In other words, it would be wrong to define a constitution as the numerical sum of its stipulations, all of which are equal to each other, and to further assume that all of these provisions are equally subject to any kind of influence through amendment. Even though a constitution, such as the *Weimar* Constitution, seemed to permit indistinguishably for the amendment of all of its provisions, certain principles should be kept away from formal abrogation through amendment. An amendment to the constitution is valid, Schmitt contends,

> only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.[256]

To hold otherwise would be to defend a usurpation of the constituent power of the people by a single political party.[257]

In sharp contrast, Hans Kelsen (1881-1973) deliberately rejected any political or historical influences upon his theory of constitutionalism. He refrained from developing a substantive theory of law that would fundamentally restrict legislative authority as Schmitt preferred. Law-making, for Kelsen, was not substantially dissimilar from administration or justice.[258] Higher-level norms defined the geography within which lower officials were free to maneuver.[259] Each level of authority except at the top and at the bottom contained a portion of determination.[260] Kelsen's theory of law did not consider on purpose the question of how state institutions were limited by extra-legal parameters. As a 'pure' theory of law, not only in name but also in substance, it emphasized the formal aspects of a legal norm and the borders set for lower officials, not what was closed off inside.[261]

If law asks to consider political values as well as social context, what Schmitt considered bound the political community together into coming up with a constitution, then lawyers will find themselves forced to grapple with arguments that may ultimately prove politically and constitutionally suspect. Without a doubt, both Rudolf Smend (1851-1913) and Hermann Heller (1891-1933) fell victim to controversial views. But their arguments, even those that echoed proto-fascist, were part

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[253] Carl Schmitt, *Constitutional Theory* (n 244) 77-78.

[254] ibid, 87-88.

[255] ibid, 55; Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 106.

[256] Carl Schmitt, *Constitutional Theory* (n 244) 150.

[257] ibid, 77-82, 147-158.

[258] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 106.

[259] ibid.

[260] ibid.

[261] ibid.

of a radical redirection of constitutional law towards a theory of (a specific relationship between) law and society; a theory, in particular, that laid the foundations for the democratically oriented constitutional theory of post-1949 Germany.[262] In combination with Schmitt's reliance on popular sovereignty as the normative force behind the protection of fundamental constitutional norms, they framed the notion of a 'militant democracy,' which would be further elaborated in post-war constitutional thought in Germany and elsewhere.

In his 1928 treatise entitled *Constitution and Constitutional Law*, Rudolf Smend argued that the state was a social structure that was constantly integrating and reintegrating the individuals into it.[263] Smend viewed integration as the quintessence of a constitution, as a 'unifying vision,' a 'core process,' and the 'core substance of public life.'[264] More than a system for assembling social forces towards a common goal, the state was a real 'association of wills,' a 'meaningful unity of real, spiritual life, of spiritual acts.'[265] Insofar as the state for Smend was a 'spiritual life-community,' any 'compartmentalization' between state and society would ultimately prove – in concert with the Aristotelian *polis* – to be in vain.

Hermann Heller advocated in his work a national community grounded on a sense of duty and mutual respect.[266] A sense of *Wirbewusstsein* (being part of a community) was a precondition for the legitimacy of any rules and, in particular, legislation.[267] He found an abstract solution to the problem of compromising the state with the nation by assuming that all political systems rest on homogeneity.[268] The institution's will, Heller argued, was limited not only formally by its legal input – as set by a higher-level institution – but also by extra-legal and the social fabric.[269] Moral considerations, in particular, served as basic, unwritten norms typically shared by community members. These 'basic principles of justice' (*Rechtsgrundsätze*) made up a real, not merely imagined, popular will.[270] But as soon as Heller developed a kind of Rousseauian 'general will,' he denied its omnipresence. Whereas a state was essentially more than just a number of laws, it could not be reduced down to a single popular will, since every part constituting a 'people' represented a multiplicity of conflicting wills.[271] Although the people might roughly share certain notions of right and wrong, these notions were not, as yet, final. It was the duty primarily of the law-makers, over time, to dynamically translate these 'basic principles of justice' into tangible legal outputs (*Rechtssätze*); into, that is, positive law.[272]

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[262] ibid, 121.

[263] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 123.

[264] ibid, 124.

[265] ibid.

[266] ibid, 127, 129-130.

[267] ibid, 130.

[268] ibid.

[269] ibid, 131-132.

[270] ibid.

[271] ibid.

[272] ibid, 131-132.

Constitutional interpretation, Smend argued, required more than just theorizing on the abstract level of some distant and isolated norms as to that of collective identity-formation.[273] The essence of constitutional law could not be derived from the constitutional text alone, but also from social performance that infused it with meaning.[274] Against the limited understandings of statutory positivists, Smend argued that human rights should be viewed as incorporating fundamental values commonly shared by the members of the community viewed in nationalistic terms.[275] He used as an example art 118 of the *Weimar* Constitution which protected the individual right to express one's opinion 'within the limits of the general statutes.'[276] 'What does "general statutes" mean?' he asked. From a formal viewpoint, it means 'approved according to a procedurally correct statute'; thus 'general' was either redundant, since all laws are general, or an incomprehensible addition.[277] Generality meant for Smend the more general socially embedded values warranting free deliberation on such issues as morality, public order, and national security.[278] General statutes were those that preceded in their normative weight over art 118 and over the constitutional text more generally because the more general value they entrenched was held supreme over, and embracing, freedom of conscience.[279] The actual ranking could only be obtained by examining the nation's history.[280] The 'truth' of the constitution was to be found 'out there,' not just in vague words.[281]

The end of the *Weimar* Republic came as Schmitt had predicted in his 1932 *Legalität und Legitimität*. It was the dead end of a long debate between legal positivists (Gerhard Anschütz, Richard Thoma) and their opponents (Carl Schmitt, Erich Kaufmann, Rudolf Smend).[282] Schmitt and like-minded scholars maintained that amendments should be limited by a constitution's 'fundamental political decision' contained in its core principles. For Anschütz and Thoma, on the other hand, that core did not suffice to block constitutional change; instead, all could be (and ultimately were) abolished by a *Reichstag* vote. Their resulting positions in 1933 were, at the very least, bizarre: Anschütz, who – judging from his arguments – was supposed to have accepted Hitler's *Ermächtigungsgesetz* (Enabling law) as constitutionally legitimate, rejected it on political

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[273] ibid, 134.

[274] ibid.

[275] ibid.

[276] The *Weimar* Constitution, art 118 read that:

> Every German is entitled within the limits of the general law freely to express his opinions by word of mouth, writing, printing, pictorial representation, or otherwise…. There is no censorship, but the law may otherwise provide as regards cinematographic performances. Legislative measures are also permitted for the purpose of combating base and pornographic publications….

[277] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 134-135.

[278] ibid.

[279] ibid.

[280] ibid.

[281] ibid.

[282] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 107-116.

grounds.[283] Schmitt, on the other hand, who was supposed to have rejected it as unconstitutional, accepted it on political grounds.[284]

The founders of the 1949 West Germany's *Grundgesetz* struggled a great deal to avoid the horrible mistakes of their predecessors by restraining the role of referendums, containing presidential powers, abolishing the power of parliament to disable the government, and asserting the primacy of fundamental human rights over both the legislative and executive powers.[285] The end of the story should not, however, obscure the lasting significance of the thorny issues it raised. These issues still persist as leading constitutional issues of the *Grundgesetz* and they reflect contemporary debates in the United States and elsewhere too.[286] John Rawls, for example, suggests in *Political Liberalism* that an amendment can only entail 'adjusting basic constitutional values to changing political and social circumstances,'[287] and adjusting 'basic institutions in order to remove weaknesses that come to light in subsequent constitutional practice.'[288] The search for a constitution's origins, or for constitutional exclusivity, can be found in such assertions made in the U.S. as that the constitution's foundations lie in a pre-legal homogeneity of the American people, in a set of common values, or the Christian religion.[289]

The German constitutional discourse on constitutional essentialism has somehow crossed the Atlantic, but the exceptional difficulties in amending the U.S. Constitution embedded within the procedural requirements of Article V, and hence the reduced possibility of seeking, through the onerous device of formal amendment, any means available to threaten the constitution's identity, did not, at the time, favor a generalized debate over the idea of implied limitations to constitutional amendments. Nevertheless, it was a German scholar, Dietrich Conrad, who is responsible for the migration of that idea to another continent, Asia, and in particular to India, which molded what is now widely known in India and elsewhere as a constitution's 'basic structure.'[290] Dietrich Conrad was Professor at the South Asia Institute of the University of Heidelberg, Germany.[291] The Nazis must have exerted a dramatic impact on Conrad's character, not least on his academic mindset as a result of their far-reaching misuse on the *Weimar* Constitution's emergency provisions.[292] In February 1965, invited to deliver a lecture at the *Banaras Hindu* University, he mentioned for the first time in the Indian subcontinent that it was both possible and desirable to argue for imposing

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[283] ibid.

[284] Ellen Kennedy, *Constitutional Failure. Carl Schmitt in Weimar* (Duke University Press 2004) 20.

[285] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 175.

[286] ibid, 141-142, 175-176.

[287] John Rawls, *Political Liberalism* (Columbia University Press 1996) 238.

[288] ibid, 239.

[289] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (n 204) 175.

[290] Dietrich Conrad, 'Limitation of Amendment Procedures and the Constituent Power' (1966-1967) Indian Yrbk Intl Aff 375; 'Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration' (1977-1978) Delhi L Rev 1.

[291] Abdul Ghafoor Noorani, *Constitutional Questions and Citizens' Rights: An Omnibus Comprising Constitutional Questions in India and Citizens' Rights, Judges and State Accountability* (Oxford University Press 2006) xii.

[292] ibid, xiv.

implied limits on the power to amend a constitution.[293] Drawing on his nation's bitter experiences with the Nazis that taught him and his fellow Germans that *process* is unable by itself to warrant *substance* in constitutional law as elsewhere, he emphasized in dramatic overtones the perils of a constitution being subject to easy and unrestrained amendation. Professor Conrad argued that:

> It is the duty of the jurist… to anticipate extreme cases of conflict, and sometimes only extreme tests reveal the true nature of a legal concept. So, if for the purpose of legal discussion, I may propose some active amendment laws to you, could it still be considered a valid exercise of the amendment power conferred by Article 368 if a two-thirds majority change Article 1 by dividing India into two States of Tamilnadu and Hindustan proper?[294]

Therefore, he concluded, in the *absence* of express limits or even *in addition* to these, there had to be certain *implied* limits to constitutional amendments as well, outsourced from what he labeled as a constitution's 'basic structure,' thus designating a core or essence of the constitution that should be shielded from the power to amend.

To be sure, in upholding, in its 1965 *Sajjan Singh* judgment,[295] a presumed power to amend any constitutional provision whatsoever, India's Supreme Court firmly acknowledged that *any* part of the document is amendable, but in sowing the seeds for revising its bold position in the near future, it moved a considerable step forward by holding that:

> It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, *rewriting* a part of the Constitution; and if the latter, would it be within the purview of Article 368?[296]

In his 1965 lecture, Professor Conrad had presciently wondered if the amending power could have been used to produce such an outstanding result as to redirect to the President, on the advice of the Prime Minister, the power to amend the constitution.[297] Americans, too, had grappled before the Civil War with that same controversial possibility of amending their constitution's amendment clause; I will investigate the outcome of their confrontation with such a threatening possibility more closely later in this chapter.

Sajjan Singh was reversed a couple of years later when in *Golaknath* a thin majority of 5-4 justices ruled that any duly enacted amendments were *unable* to render constitutionally entrenched

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[293] ibid, xiii.

[294] ibid, xiii.

[295] Supreme Court of India, *Sajjan Singh v. State of Rajasthan*, 1965 AIR SC 845.

[296] ibid, paras 55-56 (emphasis added). See also Supreme Court of India, *Shankari Prasad Deo v. Union of India*, AIR 1951 SC 458.

[297] Swapnil Tripathi, 'Remembering Professor Conrad: The Genius Behind the Basic Structure Doctrine' <https://thebasicstructureconlaw.wordpress.com/2020/04/24/remembering-professor-conrad-the-genius-behind-the-basic-structure-doctrine/> accessed 21 February 2023.

human rights unenforceable.[298] Confronted with the critical issue of what the word 'amend' actually meant, Chief Justice K. Subba Rao, delivering the judgment for the court, said that 'Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights,'[299] based on the understanding that 'Fundamental rights are given a transcendental position under [India's] Constitution and are kept beyond the reach of Parliament.'[300] Since, in other words, the Parliament could not, pursuant to art 13 of the Constitution, enact any laws that would violate its Part III human rights provisions, a constitutional amendment, too, enacted by the same body – the Parliament – as an ordinary law, could not be held free to tamper with these same human rights provisions. Therefore, all constitutional amendments which would be found in the future to be in conflict with human rights provisions should essentially be declared void.

Golaknath had provided India's Prime Minister Indira Gandhi with a perfect issue for her electoral campaign. Her victory translated into the passage of no less than four constitutional amendments, one of which – the Twenty-fourth – explicitly overturned the *Golaknath* court, in effect granting to Parliament the power to adopt amendments that were immune from judicial review.[301] In its judgment in *Kesavananda* considered as India's 'Marbury v. Madison,'[302] the Supreme Court reaffirmed the parliamentary power to amend any constitutional provision *including* human rights provisions, but loudly dismissed a putative parliamentary power to place any amendments *beyond* judicial review.[303] Thus, the court partly reversed *Golaknath*, but narrowly asserted its own institutional power to *invalidate* any amendment that would be found to be in defiance of the constitution's 'basic structure.'[304] The 'basic structure' doctrine that was at the core of the *Kesavananda* court considered certain features of the constitution as to be so essential to the integrity of the constitutional project as a whole as to claim immunity from radical modification. Based on the understanding that it is impossible in the name of constitutional amendment to destroy what it is to be refined, the court reaffirmed its power to invalidate any constitutional amendment whose enactment would result in no less than a wholesale revision of constitutional essentials.[305] Therefore, the court designated itself as the final arbiter of constitutional entrenchment, able to nullify

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[298] Supreme Court of India, *L. C. Golaknath and others v. State of Punjab and Anr.*, 1967 AIR SC 1643.

[299] ibid.

[300] ibid.

[301] The Constitution (Twenty-fourth Amendment) Act 1971 (amending art 13 and art 368 of India's Constitution to read respectively that:

> ... (4) Nothing in this article shall apply to *any* amendment of this Constitution made under article 368' and '(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal *any* provision of this Constitution in accordance with the procedure laid down in this article….

(emphasis added)).

[302] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 54.

[303] Supreme Court of India, *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.*, AIR 1973 SC 1461.

[304] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 54.

[305] ibid, 55.

the outcome of even the exercise of amendment power.[306] But judges were also careful enough as not to ground their daring conclusions on natural law which was known to have been employed in India in the past to obstruct any efforts for greater equality;[307] in other words, they seemed determined to avoid the risk to constitutional values derived from the inconclusiveness and hence the unreliability of natural law and natural rights by way of rejecting a human rights-based barrier to first-order constitutional change.[308]

India's Supreme Court Justice Rohinton Fali Nariman, a member of the court panel that delivered the opinion for the majority in *Kesavananda*, later shared an anecdote which had the attorney showing up before the court with no other authorities but Professor Conrad's 1965 essay on the theory of implied limitations to constitutional amendments.[309] The power of Conrad's arguments is demonstrated by the fact that the *Kesavananda* precedent has been followed by few modifications until today. Its progeny has found its loudest declaration in *Minerva Mills Ltd. v. Union of India*[310] in which the Supreme Court, confronted with a governmental takeover of a failed industry and the stipulations of the Forty-second Amendment which provided that 'No amendment… shall be called into question in any court on any ground,'[311] in the words of Justice Chandrachud, held that:

> Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity.[312]

On the other side of the Atlantic, Americans would not avoid an encounter with the possibility of incorporating into their venerable constitution a number of amendments of dubious 'constitutionality' on at least two occasions. First, the proposed Thirteenth Amendment, introduced into the House in 1861 by Rep. Thomas Corwin of Ohio, sought to diminish the possibility of any future amendment that would enable Congress to interfere with slavery in the States. In particular, the 'Corwin Amendment' as it became known ever since read that:

> No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic

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[306] ibid.

[307] ibid.

[308] ibid.

[309] Swapnil Tripathi, 'Remembering Professor Conrad: The Genius Behind the Basic Structure Doctrine' <https://thebasicstructureconlaw.wordpress.com/2020/04/24/remembering-professor-conrad-the-genius-behind-the-basic-structure-doctrine/> accessed 16 October 2022.

[310] Supreme Court of India, *Minerva Mills Ltd. and others vs Union of India and others*, AIR 1980 SC 1789.

[311] The Constitution (Forty-second Amendment) Act 1976.

[312] Supreme Court of India, *Minerva Mills Ltd. and others vs Union of India and others*, AIR 1980 SC 1798.

> institutions thereof, including that of persons held in labor or service by the laws of the said State.[313]

The Corwin Amendment has been of lasting legal and political significance because it exhibited an unprecedented attempt to use the very Article V of the U.S. Constitution to guarantee forever a constitutional issue from subsequent Article V amendments. During congressional debates at the House, Reps. Kilgore and Stanton assumed that, if the Corwin Amendment was ratified by the States, it would be mandatory, effectively disqualifying later generations from amending the constitution with a view to abolishing slavery.[314] In contrast, Rep. White considered the term 'amendment' as preventing a 'plenary, omnipotent, unlimited power over *every* subject of legislation.'[315] Rep. White, in effect, rejected the Corwin amendment for unduly disrespecting the powers of the American States under a federalist regime to control 'property and domestic institutions.'[316] Rep. Boutwell, himself a supporter of the amendment, agreed with Rep. White and further suggested that Article V did not sanction the enactment of amendments that would establish slavery insofar as that would be in tensions with the purposes of the constitution as embedded in its Preamble.[317] It was, however, during debates at the Senate that that issue became the subject of heated controversy. Sen. Bigler said that the Corwin Resolution was a mere declaration; Sen. Clingman called it a 'mere nullity' because future generations would be perfectly capable of amending it by three fourths of the States.[318] On the other hand, Sen. Douglas, a fierce opponent of the Resolution, claimed that:

> [after the ratification of the Corwin Amendment] it will not be in the power of any number of States, short of a unanimous vote, ever to interfere with the question of slavery in the States.[319]

Once ratified, he argued, the Corwin Amendment would 'be just as sacred as' the final clause of Article V that declared that 'no State, without its consent, shall be deprived of its equal suffrage in the Senate.'[320] Sen. Mason, in contrast, proclaimed that only 'the power which makes a Constitution can unmake it,'[321] subscribing thus to the idea that amending Article V along the lines of the proposed Amendment would be equal to 'unmaking' the constitution. Thus, politicians that debated the Corwin Amendment were enlisted in each party based on whether they saw amending

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[313] The (second proposed) Thirteenth Amendment to the U.S. Constitution, <https://constitution.congress.gov/browse/essay/intro.3-2/ALDE_00000026/> accessed 16 October 2022.

[314] Cristopher A. Bryant, 'Stopping Time: The Pro-Slavery and Irrevocable Thirteenth Amendment' (2003) 26 Harv J L & Pub Policy 521-522.

[315] Sanford Levinson, *Constitutional Faith* (Princeton University Press) 19 (emphasis added).

[316] ibid.

[317] ibid.

[318] Cristopher A. Bryant, 'Stopping Time: The Pro-Slavery and Irrevocable Thirteenth Amendment' (n 314) 531.

[319] ibid.

[320] ibid.

[321] ibid, 532.

the amendment clause as limited to the level of *law*-making (*amendment*-making) or as rising to the level of *constitution*-making.[322]

But the key issue that bothered the Congressmen concerned constitutional *authority* and in particular whether law-makers acting under Article V's process bore the same institutional power to bind future generations as the founding fathers who had convened in 1787 in Philadelphia. To be sure, Professor A. Cristopher Bryant answers in the negative. The 1787 delegates had extraordinary powers, greater than the more ordinary powers exercised by the state legislatures when acting under the Article V procedures.[323] The 1787 convention lifted constitutional politics to the level of a *revolution*, whereas Article V conventions are ordinary or at least they are lower on the scale of 'ordinariness' as compared to the 1787 conventions.[324] That same revolutionary power, so apparent at the moment of ratification of the U.S. Constitution, cannot legally prevent future generations from acting on the same authority to repudiate the existing constitution and create a new one.[325] But in such circumstances, the constitution-makers *cannot* claim their legitimacy based on the terms defined by the old regime; instead, they act outside the realm of routine amendment and produce a constitutional product tested *only* against popular sovereignty.[326] The Corwin Amendment could not bring about constitution-making results – that is, could not dress itself up with the clothes of *pouvoir constituant* – because its authors had not relied upon such a heavy-loaded power for its insertion, but upon conformity with the usual Article V requirements.[327] For one thing, it is true that Article V is itself silent on the issue of whether a future ratifying convention is free or not to amend substantively or procedurally the rules enshrined therein for that same constitution's amendment. The implication may be that anything not explicitly prohibited is in effect permitted. The better implication, however, for Professor Bryant and for most constitutional law scholars, would be that a powerful background presumption – one speaking against using Article V to constrain a future generation's use of Article V – made the *express* prohibition of such amendments actually *redundant*.[328]

Americans would again contemplate the spectrum of a controversial constitutional amendment when the Flag Burning Amendment saga broke out in the 1990s. Congress had already, in the wake of the 1960s protests against the war in Vietnam, enacted the first Flag Protection Act of general application.[329] For the next couple of decades, the U.S. Supreme Court would successfully

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[322] ibid.

[323] ibid, 535.

[324] ibid, 536.

[325] ibid.

[326] ibid.

[327] ibid.

[328] ibid, 537.

[329] 18 U.S.C. § 700 which provided that:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both….

resist any juncture of having to review the flag legislation. It was against this framework that the Supreme Court heard *Johnson*.[330] Johnson had participated in a protest against the Reagan administration in which he set an American flag on fire,[331] and hence he was charged for having desecrated a venerated object in breach of a Texas statute.[332] The Texas Court of Criminal Appeals reversed the ruling.[333] Relying on the *West Virginia Board of Education v. Barnette* case-law,[334] the court considered Texas's allegedly overarching public interest in preserving the flag as a unifying symbol to be insufficient as to compromise Johnson's First Amendment rights. In particular, it held that:

> Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent. If the State has a legitimate interest in promoting a State approved symbol of unity, that interest is not so compelling as to essentially license the flag's use for only the promotion of governmental status quo.[335]

The case was finally heard by the Supreme Court which by a thin majority of 5-4 affirmed the reversal, ruling that the flag protection laws of no less than forty-seven American States as well as the federal law itself could not be applied to a flag-burning that was part of a public demonstration.[336] Texas failed to substantiate a compelling state interest because the purpose of the law was in fact to prevent citizens from sending 'harmful' messages that 'cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists.'[337] This interest, the court held, violated a

> bedrock principle underlying the First Amendment... that the Government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable.[338]

<https://uscode.house.gov/statviewer.htm?volume=82&page=291> accessed 2 October 2022.

[330] U.S. Supreme Court, *Texas v. Johnson*, 491 U.S. 397 (1989).

[331] Texas Court of Criminal Appeals, *Johnson v. State*, 755 S.W.2d 93 (Tex. Crim. App. 1988).

[332] ibid.

[333] ibid.

[334] 319 U.S. 624 (1943); Texas Court of Criminal Appeals, *Johnson v. State*, 755 S.W.2d 96 (Tex. Crim. App. 1988).

[335] Texas Court of Criminal Appeals, *Johnson v. State*, 755 S.W.2d 97 (Tex. Crim. App. 1988).

[336] U.S. Supreme Court, *Texas v. Johnson*, 491 U.S. 397 (1989).

[337] ibid, 413.

[338] ibid, 414.

Thus, the court concluded that Texas could not criminally punish an individual for burning the American flag as a means of political protest, because the 'Government may not prohibit expression simply because it disagrees with [the] message,' regardless of the 'mode one chooses to express [that] idea.'[339] The court then concluded that the 'principles of freedom and inclusiveness that the flag best reflects'[340] would be reaffirmed by its resolution:

> We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.[341]

The judgments triggered a stormy reaction on the part of the Congress by way of enactment of the 1989 Flag Protection Act.[342] The primary purpose of the law was to remove any language already used in the law that the courts might conceivably find disrespectful of free speech rights. Since both the majority and minority opinions in *Johnson* had acknowledged the legitimacy of a governmental interest in safeguarding at least the physical integrity of the flag to a certain degree, the only option available for the Congress was to shift the focus from against desecration on against threatening the flag's physical integrity. The Flag Protection Act came into effect on 28 October 1989. On that same date, protesters were arrested for violating the new Act this time. The Supreme Court, again split by 5 to 4, ruled that the 1989 Flag Protection Act could not be constitutionally applied to a flag-burning during a public protest.[343] Both Houses of Congress resorted to the ultimate legal avenue presented to them to shield the American flag – a constitutional amendment – but failed to pass by the required two-thirds vote an amendment to the Constitution that would have empowered the Congress to enact legislation intended to safeguard the physical integrity of the flag.[344] If, however, the proposed amendment had successfully been incorporated into the U.S. Constitution, how would the Supreme Court deem it from the perspective of its constitutionality?

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[339] ibid, 416.

[340] ibid, 397.

[341] ibid, 420.

[342] Flag Protection Act of 1989, Pub. L. 101-131 (H.R. 2978 (101st Congress)) which provided that:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

<https://www.congress.gov/101/statute/STATUTE-103/STATUTE-103-Pg777.pdf> accessed 2 October 2022.

[343] U.S. Supreme Court, *United States v. Shawn D. Eichman*, 496 U.S. (1990) 319 (holding that a governmental interest in protecting the American flag did not outweigh the individual right to interfere with that symbol through expressive conduct).

[344] The text of the proposed Amendment as introduced into the House of Representatives read as follows:

> Article –
>
> SECTION 1. The misuse or desecration of the symbol, emblem, seal, or flag of the United States is not protected speech under the first amendment to the Constitution of the United States.

The possibility that a constitutional amendment may be found to be unconstitutional sounds at least absurd. The very idea that an amendment, proposed and ratified according to the outstanding formalities as laid out in a constitution, could be unconstitutional sounds at least absurd, and inconsistent with the fact that every constitutional provision – in this case, an amending provision lacking any textual prohibition of future amendments – must have certain normative effect. On the other hand, a constitution without some limits against amendment, including or not the power to amend its specific amending provisions, carries with it the risk of *self-contradiction* – that is, a constitution that is used as a device for maintenance of the status quo, turns into a device for compromising that actual condition – a stable, *constituted* governmental structure – that it is designed to preserve.[345] These and other issues occupied the debates that began immediately after the Flag Burning Amendment came up as (a potential and then as) an actual response to Supreme Court decisions, splitting representatives from a multiplicity of related disciplines over whether there are any implied limits on what constitutional amendments can be permitted to generate.

Reflecting on the circumstances of the 1789 French Revolution, the eighteenth-century British statesman and renowned conservative philosopher Edmund Burke said that 'A state without the means of some change is without the means of its conservation.'[346] But, as Professor Walter Murphy added, '*some* change is not the same as *any* change.'[347]

C. Towards a Theory of Unconstitutional Constitutional Amendments

For liberal-constitutional democracies, the standard tension between popular sovereignty and limits on governmental power has been addressed, first, through sovereignty-based arguments that argue in favor of limitations on the popular will, as well as of the existence of a *superior* manifestation of democratic power – a *constituent* power.[348] This is the power that represents nothing less that the people itself in foundational moments and which is activated (only, for some theorists) on these occasions when the formal process of constitutional transformation at its highest possible

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SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

SECTION 3. The misuse or desecration of the symbol, emblem, seal, or flag of the several States is not protected speech under the first amendment to the Constitution of the United States.

SECTION 4. The legislatures of the several States shall have power to enforce this article by appropriate legislation.

H.R. 304 (101st Congress).

<https://www.congress.gov/bill/101st-congress/house-joint-resolution/304/text> accessed 16 October 2022.

[345] Mark E. Brandon, 'The 'Original' Thirteenth Amendment and the Limits to Formal Constitutional Change' in Sanford Levinson (ed), *Responding to Imperfection* (Princeton University Press 1995) 215.

[346] Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Hackett Publishing 1987) 19.

[347] Walter F. Murphy, 'Merlin' Memory: The Past and Future Imperfect of the Once and Future Polity' in Sanford Levinson (ed), *Responding to Imperfection* (Princeton University Press 1995) 68 (emphasis added).

[348] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 38.

degree is initiated.[349] As Professor Gary J. Jacobsohn said, 'The amending power has the curious status of having one foot in and one foot out.'[350] But to convey a real message, awareness of the fact that *pouvoir constituant* differs in its magnificence from *pouvoir constitué* must necessarily be accompanied by a list of subject-matters that their enactment through law rises to the level of *pouvoir constituant* and of a different set of subject-matters that fail to reach that level. Perhaps it perfectly suits the circumstance what Edmund Burke once said, – that:

> No arguments of policy, reason of state, or preservation of the constitution, can be pleaded in favor of [the position… that laws can derive any authority from their institution merely and independently of the quality of the subject-matter].[351]

In *Kesavananda*, for instance, India's Supreme Court held that the amendment power was limited by the constitution's basic structure. In *Minerva Mills*, the same court held that:

> Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute one. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot… expand its amending power so as to acquire for itself the right to appeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.[352]

The judicial outcome was that the amendment power is substantively limited, not merely by express textual formulation but by implication too, as well as of its very nature.[353]

Acceptance of the necessity, or the inevitability, or the other way round, of constitutional changes is *no* evidence about the desirability and the technical and the substantive validity of any specific amendment application. A constitutional amendment may be considered as debatable in its substance in either of two ways. First, the amendment it presages could 'shake' the *essentials* of constitutional governance at large, at the core of which sits the rule of law. Second, the amendment it presages could materially modify or deny a *fundamental* commitment that has been central to the nation's self-understanding. As earlier pointed out, one can read an amendment as a new chapter in an ongoing constitutional story. Its outsourcing from an authority properly called a constituent power and its manufacturing of a product that is in perfect conformity with certain

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[349] ibid.

[350] William F. Harris, *The Interpretable Constitution* (n 32) 182.

[351] Edmund Burke, 'Tracts Relating to Popery,' in Robert Brendan McDowell (ed), *The Writings and Speeches of Edmund Burke, Vol. IX, I: The Revolutionary War, II: Ireland* (Oxford University Press 1991) 1765.

[352] Supreme Court of India, *Minerva Mills Ltd. & others vs Union of India & others*, AIR 1980 SC 1798, 240.

[353] Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 153.

procedural guidelines does not greatly indicate how well it is integrated within the overall constitutional project; how perfectly it matches with the constitution's overall identity.

The common argument propounded by Americans in favor of unlimited amendment possibilities rests on the assumption that the terms of the U.S. Constitution's Article V – or of any nation's constitutional amending clause that lacks any textual qualifications – are definitive. A failure of, or a lacuna in, a constitution to directly address a particular subject can mean different things. One interpretation of constitutional 'silence' is reflected in U.S. Supreme Court's Chief Justice Marshall's posture in favor of establishing a federal bank even in the absence of enabling words in the U.S. Constitution:

> [The Constitution's] nature… requires, that only its great outlines should be marked….[354]

To bring about its intended effects, the constitution should not 'partake of the prolixity of a legal code.'[355] A different approach to constitutional silence is adopted by Justice William O. Douglas in his opinion in *Griswold v. Connecticut*:

> We deal with a right of privacy *older* than the Bill of Rights – *older* than our political parties, *older* than our school system.[356]

Here what has been left unwritten – a right of privacy within marriage – is due to its historical load. If Marshall's 'unwrittenness' explains why 'minor ingredients which compose… [important] objects' need not be 'designated,' Douglas's opinion would prompt us to accept constitutional appreciation of important ingredients whose importance, in contrast, can be better appreciated in their 'unwrittenness.'[357]

Therefore, the brevity of a constitutional charter explains why it is reasonable enough to argue for both an inclusive and an exclusive effect at the same time as produced by textual silence in a way that would be much more difficult to argue were we speaking of an extended constitution such as exists, for example, in India.[358] Where, in other words, a constitution is uncompromising in its attentiveness to detail, textual silence cannot reasonably enough be interpreted as meaning inclusiveness.[359] Indeed, the lack of attention to detail in a constitution that is otherwise thoughtful of matters of much less significance suggests that exclusion is a more rational conclusion.[360] To sum up, brevity of a constitutional (and generally of a legal) text combined with an unqualified

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[354] U.S. Supreme Court, *McCulloch v. State of Maryland*, 17 U.S. (1819) 316.

[355] ibid, 407.

[356] U.S. Supreme Court, *Griswold v. Connecticut*, 381 U.S. 479 (1965), 486 (emphasis added).

[357] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 227.

[358] India's Constitution, as is currently in force after being amended for the last time on 10 August 2021 after the enactment of the 105th Amendment, consists of 395 Articles, 12 Schedules, and 3 Appendices; see <https://legislative.gov.in/sites/default/files/COI_English.pdf> accessed 2 October 2022.

[359] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 227.

[360] ibid.

language in its amendment clause may lead to a presumption that its framers had either not anticipated, or not intended to imply, any restraints toward successive generations in modifying their handiwork. In contrast, an overloaded constitution – one that, in Marshall's words, 'partake[s] of the prolixity of a legal code' – may perhaps indicate that its provisions are relatively easier to amend – free from any implied reservations. Still, acceptance (or not) of the relative easiness in enacting an amendment to a constitution does not make the momentum for exploring that constitution's identity go away; it just makes the task considerably more troublesome.

In any case, interpreters should avoid the risk or temptation of viewing an amendment clause either as a free-standing command or as a parallel constitution within the constitution.[361] Either one subscribes to the proposition that a constitution empowers unlimited alteration of its provisions, or one is troubled by the possibility of turning a constitution inside out and that on its own terms – a proposition that becomes logically puzzling in the absence of a powerful theory to the contrary;[362] it would probably be wiser to keep *all* options open and adapt oneself and one's interpretive preferences to the circumstances (and claims) of each time and place. In case of *lengthier* constitutions, for example, a more advisable route would be to remove any implied barriers from around the amendment power, leaving the political branches free to amend – albeit to varying degrees, and balancing their power by succumbing to a stronger judiciary able to even nullify amendments of vexed constitutionality. In the opposite case, where constitutions are much *shorter* – so silence can hardly be considered very much conclusive – and impose a heavier amendment process, the wisest course is perhaps to submit to the possibility of unlimited amendment power and leave the issue pursued within the territory of politics.

What, then, do scholarly proposals to impose implied limits to constitutional amendments rest on, and what objections have they faced? Professor Walter Murphy is enlisted in the chorus of scholars who have forcefully argued in favor of notable limits to amendment power, even if such limits are wholly absent from the constitution's text, or even in addition to written ones. Murphy, in effect, distinguishes between amendments, revisions, and transformations.[363] He contends that changes that reconstruct a polity into a new political establishment 'would not be amendments at all, but revisions or transformations,' what he calls constitutional 'conversion,'[364] implying perhaps that taking these routes must be subject to some burdens heavier than these accompanying the more ordinary amendments. Murphy attributes the divergence between 'reforming' and 're-forming' a constitution to the degree of respect owed to a constitution's identity,[365] and is probably reminiscent of Justice Khanna's suggestions in *Kesavananda* that:

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[361] William F. Harris, *The Interpretable Constitution* (n 32) 172.

[362] ibid, 176.

[363] Walter F. Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995) 177.

[364] ibid.

[365] Walter F. Murphy, 'Slaughter-House, Civil Rights, and Limits on Constitutional Change' (1987) 32 Am J Juris 17.

> The word 'amendment' postulates that the old constitution survives without loss of its identity, despite the change, and continues even though it has been subjected to alterations.[366]

Or of the eighteenth-century Law Professor and Chief Justice of the Michigan Supreme Court, Thomas Cooley's, that:

> [An amendment] must be in harmony with the thing amended, so far at least as concerns its general spirit and purpose, [and] it must not be something so entirely incongruous that, instead of amending or reforming it, it overthrows or revolutionizes it.[367]

Likewise, according to Professor Richard Albert, constitutional 'dismemberment' entails a radical departure from one or more of a constitution's highest commitments.[368] A dismemberment is incompatible with a constitution's present framework insofar as it seeks to bring about a far-reaching purpose: to disassemble and, in particular, to rework one or more of its essential features – its entrenched human rights provisions, its underlying structure, its embedded identity.[369] A routine amendment does not come nowhere near that conception of dismemberment because, properly defined, it keeps the amended document perfectly in line with its current identity, human rights provisions, and structure.[370] In the scheme drawn by Albert, then, we can reconceptualize a constitutional 'dismemberment' as occupying the middle ground that cut across the spectrum of constitutional change – as something more than an ordinary amendment but less than a brand-new constitution.[371]

Professor Walter Murphy once said that:

> The goal of a constitutional text must… be not simply to structure a government, but to construct a political system, one that can guide the formation of a *larger* constitution, a 'way of life' that is conducive to constitutional democracy. If constitutional democracy is to flourish, its ideals must reach beyond formal governmental arrangements and help configure, though not necessarily in the same way or to the same extent, most aspects of its people's lives.[372]

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[366] Supreme Court of India, *Kesavananda Bharati v. State of Kerala*, 1973 SC 1485.

[367] Thomas M. Cooley, 'The Power to Amend the Federal Constitution' (n 197) 117.

[368] Richard Albert, *Constitutional Amendments* (n 353) 84.

[369] ibid.

[370] ibid, 85.

[371] ibid.

[372] Walter F. Murphy, 'Civil Law, Common Law, and Constitutional Democracy' (1991) 52 La L Rev 129 (emphasis added).

In the same context, he cites approvingly Germany's *Bundesverfassungsgericht* ground-breaking findings in its *Südweststaat* (Southwest State) case,[373] to recommend pursuing coherence through structural interpretation as a compelling means of overcoming the drafters' carelessness, compromise, or deliberate inconsistencies that might have made it into their handiwork.[374] As the German court specifically held citing approvingly the Bavarian *Verfassungsgerichtshof*'s (Bavarian Constitutional Court) finding:

> A single constitutional provision cannot be seen as being isolated and be interpreted on its own. It forms part of a community of meaning with the other constitutional provisions thus representing an integrated unit. *Certain constitutional principles and fundamental decisions result from the overall constitutional structure, to which individual constitutional provisions are subordinate.* By inference from its art 79(3), the *Grundgesetz* rests on that very assumption. The *Bundesverfassungsgericht*, therefore, agrees with the Bavarian *Verfassungsgerichtshof* in its finding that: 'That a constitutional provision itself may be null and void, is not conceptually impossible just because it is a part of the constitution. There are constitutional provisions that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void, because they contravene those principles.'[375]

The main body of Murphy's arguments rests primarily on the assumption that a constitution is essentially oriented around the value of human dignity, which circumscribes what amendments can be permitted into the document. To elaborate his suggestions, Professor Murphy builds his propositions upon a *ranking* of human rights based on *natural law* presuppositions. His thinking unfolds as follows. Constitutionalism relies on human worth. Essential for the legitimacy of a liberal-constitutional regime is free consent. Consent, however, is not able to cure everything. To

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[373] BVerfG, Judgment of 9 September 1951 (*Südweststaat*) <https://www.servat.unibe.ch/dfr/ bv001014.html#Opinion> accessed 17 October 2022 (temporarily suspending a planned referendum on the creation of a 'Southwest *Land*' as part of the territorial reorganization of the West German *Länder* Baden, Württemberg-Baden, and Württemberg-Hohenzollern). See generally Gerhard Leibholz, 'The Federal Constitutional Court in Germany and the "Southwest Case"' (1952) 46(3) Am Pol Sci Rev 723.

[374] Walter F. Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995) 178.

[375] BVerfG, Judgment of 9 September 1951 (*Südweststaat*), [76] - [77] (emphasis added) ('[76] Eine einzelne Verfassungsbestimmung kann nicht isoliert betrachtet und allein aus sich heraus ausgelegt werden. Sie steht in einem Sinnzusammenhang mit den übrigen Vorschriften der Verfassung, die eine innere Einheit darstellt. Aus dem Gesamtinhalt der Verfassung ergeben sich gewisse verfassungsrechtliche Grundsätze und Grundentscheidungen, denen die einzelnen Verfassungsbestimmungen untergeordnet sind. Das Grundgesetz geht, wie sich insbesondere aus Art. 79 Abs. 3 ergibt, ersichtlich von dieser Auffassung aus. Das Bundesverfassungsgericht schließt sich daher für seine Auslegung der Auffassung des Bayerischen Verfassungsgerichtshofs an, der ausgeführt hat: [76] "Daß eine Verfassungsbestimmung selbst nichtig ist, ist nun nicht schon um deswillen begrifflich ausgeschlossen, weil sie selbst Bestandteil der Verfassung ist. Es gibt Verfassungsgrundsätze, die so elementar und so sehr Ausdruck eines auch der Verfassung vorausliegenden Rechts sind, daß sie den Verfassungsgesetzgeber selbst binden und daß andere Verfassungsbestimmungen, denen dieser Rang nicht zukommt, wegen ihres Verstoßes gegen sie nichtig sein können."' (my translation)).

be sure, it cannot legitimize a totalitarian or an authoritarian government. A jurisdiction that repudiates human worth cannot point to consent as the source of its legitimacy, for what is a worthless jurisdiction is not a jurisdiction proper and can possess no legitimacy whatsoever.[376] Next, Professor Murphy discerns limitations to constitutional amendment arising from natural law precepts, irrespective of their express – at best thin – grounding in the document or not.[377] He contends, for example, that the Irish, French, and even the American constitutions may contain some traces of natural-law elements that necessarily drive the interpretive communities in each nation to grant them some practical effect.[378] Constitutional amendments that would abolish or curtail the values inherent to a scheme of constitutional democracy are, both the bench and the academy alike would presumably agree, undesirable, if not invalid.[379] When a liberal-constitutional regime consciously, and seriously violates its overarching system of fundamental principles, it lapses into self-denial, and suffers a growing loss of legitimacy.[380]

If reduced to its component parts, Murphy's theory appears to do little more than point to the fact that, as a matter of natural law, a constitution cannot by its textual terms alone supply legitimacy to constitutional amendments that would bring about such sweeping changes as to abolish an old polity and create a new one in its stead. Viewed candidly, Murphy's abstractions attest to both their limited feasibility and their conceptual *flaws*. Perhaps as part of a general suspicion toward transcendental interpretive moves, opponents maintain that to the extent that a constitution is an invention that seeks to make a real difference, its existence must change rules compared to those that would apply in its absence.[381] It is not a conceptual necessity, as Murphy implies, that to operate efficiently, a constitution must be infused with validity sources located 'over and above' as in natural law precepts[382] To ask in a Hartian manner that a constitution be predicated on an exogenous source of validity is to propose that its specific words do *not* really matter –what matters is their external generator.[383] In mounting his critique against Murphy's natural law inclinations, Professor William F. Harris II contends that a constitution's writtenness is not of no consequence as Murphy's analysis appears to imply.[384] Why, Harris wonders, write down a constitution in the first place if 'real' rights – known under the rubric of 'natural rights' – exist independently of it, fully knowable and applicable before the amending hand sets forth developments in the opposite direction?[385]

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[376] Walter F. Murphy, 'Merlin' Memory: The Past and Future Imperfect of the Once and Future Polity' (n 374) 180.

[377] ibid, 180-181.

[378] ibid, 180-181.

[379] ibid, 178.

[380] ibid.

[381] ibid.

[382] ibid.

[383] William F. Harris, *The Interpretable Constitution* (n 32) 130.

[384] ibid.

[385] ibid.

Another well-known opponent of theories of implied limits, Professor John Vile, attacks Murphy's contention that implicit in a constitutional document there are certain overarching principles of the kind that trump conflicting constitutional amendments. 'This argument,' he writes,

> would be more compelling if one could assume that the Constitution expressed a single set of coherent principles, laid down once and for all by divine decree.[386]

Vile further attacks Murphy's proposals of grounding implicit limitations on natural law precepts. Murphy accepts the notion that existing natural law principles are placed above the constitution's literal terms – that is, they are ascribed an *extra*-constitutional status – but if, Vile argues, non-interpretive judicial review – that is, judicial review based on extra-constitutional sources – is itself problematic, then relying on courts to rule against controversial constitutional amendments on grounds of *extra*-constitutional arguments is *doubly* problematic.[387] To be sure, Vile's view, that because a constitution is evolutionary in nature one can trace no patterns of overarching principles in it, is at least debatable. Discussing the Flag Burning Amendment, Professor Vile admits without any hesitation that such an amendment would be unwise and contrary to the sweeping warranties typically bestowed to free speech, but, if proposed and ratified in full observance of the process laid down in Article V, it would have been as valid as any other part of the constitution.[388] In other words, Vile probably submits to Carl Schmitt's famous declaration that 'A purely formal concept of law, independent of all content, is conceivable and tolerable.'[389]

Professor Sandford Levinson and others also disagree with the idea of implied limits to constitutional amendments, but avoid Murphy's trust in natural law by emphasizing the notable contestability of fundamental values enshrined in a constitution. Drawing on a wide disagreement regarding what counts as 'essence' or 'foundation' that must be preserved at the inevitable cost of sacrificing allegedly peripheral values, Levinson implies that 'constitutional essence' is whatever people subscribing to constitutionalism happen, at a certain point in time and space, to endorse as such.[390] Constitutionalism, for Levinson, and hence a constitution's identity is not a fixed system whose development came into focus by a finite sequence of circumstances.[391] Both A and not-A can be equally true descriptions of what constitutionalism, or constitutional identity, is about.[392]

The U.S. Constitution, Levinson contends, is a linguistic system that has helped Americans generate an exceptional form of political discourse that has allowed them to deal with almost every

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[386] John R Vile, 'The Case against Implicit Limits on the Constitutional Amending Process' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995) 200.

[387] ibid, 201.

[388] ibid, 202.

[389] See *supra* section V. Constitutional Interpretations: How a Constitution Is Enforced

[390] Sanford Levinson, *Constitutional Faith* (n 129) 153.

[391] ibid.

[392] ibid.

political issue imaginable.[393] Within constitutionalism there is nothing unsayable in a constitution's language, even if some things will sound strange and 'off-the-wall.'[394] It is accurate, he argues, to stress an element of 'fluidity' in the constitution, meaning that (particularly, the U.S. Constitution) 'genetically' resists any kind of finality of its stipulations, even though many would go to great lengths to find such finality it either text or the judgments of the Supreme Court.[395] 'For me,' Levinson declares,

> signing the constitution commits me not to closure but only to a process of becoming and to taking responsibility for constructing the political vision toward which I strive, joined with others. It is therefore less a series of propositional utterances than a commitment to taking political conversations seriously.[396]

The contestability of fundamental values and the requisite capacity of a constitution to accommodate a pluralism of beliefs and convictions, as an argument against implied limitations to constitutional amendments, derives from reasonable dispute about the core features of a constitution. The comparative importance and ranking of constitutional provisions is debatable, and so is the identity of the constitution if we refrain from searching for any powerful textual manifestation of hierarchy that could assist us in prioritizing one provision over another. Melissa Schwartzberg thus appropriately responds to the scholarly disagreement on the relevance of constitutional values that:

> efforts at restricting the boundaries of constitutional amendments are bound to be challengeable, and reasonable people are likely to disagree about what constitutes an unalterable principle.[397]

It is a benefit, not a weakness, the argument goes, of constitutionalism that a constitution's textual indeterminacy privileges no particular mindset or life plan, because this in turn preserves what Heather K. Gerken has aptly characterized as 'the ongoing contestability of constitutional law.'[398]

In contrast, Professor Stephen Macedo argues that some parts of a constitution are more important than others, and an amendment that had such parts abolished would be 'unintelligible and revolting from the perspective of the Constitution as a whole.'[399] According to Macedo's list of unamendables:

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[393] ibid, 191.

[394] ibid.

[395] ibid.

[396] ibid, 193.

[397] Melissa Schwartzberg, *Democracy and Change* (Cambridge University Press 2007) 147.

[398] Heather K. Gerken, 'The Hydraulics of Constitutional Reform: A Skeptical Response to our Undemocratic Constitution' (2007) 55 Drake L Rev 937.

[399] Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford University Press 1990) 183; quoted by Charles A. Kelbley, 'Are There Limits to Constitutional Change – Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality' (2004) 72 Fordham L Rev 1514.

> The first freedoms of speech and the press, the requirement of warrants for police searches, the right to confront witnesses, and to a trial by jury, even the elaborate procedures required to amend the Constitution, all these provisions and more represent basic structural commitments to institutionalizing a process of free and reasonable self-government.[400]

Although Macedo's claim of human rights and freedoms as intrinsic to constitutional self-government fails to do justice to future perspectives that may prompt us to consider anew whatever view we currently have about which such rights and freedoms are intrinsic and which are not, his list of principles is at least tenable.

From within the group of opponents, Professor Jed Rubenfeld argues that the very principle that lends a constitution its legitimacy – the enduring presence of representative self-government over time – requires at a minimum that the people are constitutionally empowered to reject any part of their constitution whose commitments they hold to be no longer their own.[401] Thus, 'written constitutionalism requires a process not only of popular constitution-writing, but also of popular constitution-*re*writing.'[402] In a similar vein, Professor Christopher L. Eisgruber argues that:

> [A] constitutional procedure that enables people to entrench good rules and institutions will also enable them to entrench bad rules and institutions. A people must have the freedom to make controversial political choices, and that freedom will necessarily entail the freedom to choose badly.[403]

Last, Professor Evangelos V. Venizelos in a 1984 essay has advanced similar arguments about the conceptual possibility of admitting certain implied limits to constitutional amendment in the context of *Greece's* Constitution.[404] His line of thinking runs as follows. The precursor amendment clauses provided for the possibility of amending only those provisions that were not fundamental based on an inherently vague and largely controversial distinction between a group of fundamental and non-fundamental constitutional provisions.[405] In contrast, now-effective art 110 of Greece's 1975 Constitution left out such an apparently defective distinction and provides that:

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[400] ibid.

[401] Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press 2001) 174.

[402] ibid (emphasis added).

[403] Cristopher L. Eisgruber, *Constitutional Self-Government* (Harvard University Press 2001) 120.

[404] Evangelos V. Venizelos, *Τα Όρια της Αναθεώρησης του Συντάγματος 1975* (Paratiritis 1984).

[405] For instance, art 108 of Greece's 1952 Constitution provided that: 'Revision of the entire Constitution is prohibited. The provisions of the present Constitution, which determine the regime as that of a crowned democracy as well as its fundamental provisions, shall under no circumstances be revised. The non-fundamental provisions of the Constitution may be revised whenever Parliament by two thirds of all its members calls for a revision by a special act which shall specifically designate the provisions to be revised and which shall be voted on two occasions removed from each other by at least one month….' See Amos J. Peaslee, *Constitutions of Nations. Volume III. Europe* (3rd ed, Springer 1974) 426.

> The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4 and 7, 5 paragraphs 1 and 3, 13 paragraph 1, and 26.[406]

The question, then, arises which are those particular provisions that determine the form of government as a 'Parliamentary Republic,' and whether there are any *additional* provisions that, although omitted from art 110(1)'s list of unamendability, nonetheless should be treated as being *beyond* the reach of future amendment. Professor Venizelos contends that first and foremost art 110 refers to arts 1(1) and 1(2) as determining the particular government setup by it – that is, its 'form' (*μορφή*) and 'basis' (*βάση*) respectively.[407] However, the highest constitutional safeguard provided for by art 110(1) is by no means restricted to the *lofty* stipulations included in such provisions as the aforementioned ones.[408,409] As Venizelos put it, it would be technically invalid if such an open reference to the 'form' and 'basis' of government as a 'Parliamentary Republic' were replaced by a dry reference to arts 1(1) and 1(2) *alone*. Rather, what is secured from the amending hand is indeed, he argues, something *broader* – that is, the government writ large (*πολίτευμα*) which essentially includes, for Greece, the abolition of the monarchy as its pillar, as well as the indirect selection of the President of the Republic;[410] but also *narrower*, since it is the *particular* government setup by Greece's Constitution – a unique blend of characteristics made up of a multiplicity of constitutional ingredients – that is placed beyond the power of future amending agents.[411] In Venizelos's own words,

> Sketching a set of limits to constitutional amendment rests, on the field of interpretation, on searching for all those elements that make up that government's profile [*τη φυσιογνωμία του πολιτεύματος*]. Or, put adversely…, for all those elements that if amended or abolished would bring about an outcome transformative of that government's profile, thereby crossing the amending line circumscribed by art 110(1).[412]

Those elements 'that make up a government's *profile*' – probably another word for what is herein examined as a constitution's *identity* – will be discovered by delving into the conceptual framework, but mostly into the historical content of popular sovereignty; hence, they should be considered as integrating within a tightly-held group of provisions 'all those institutions, proceedings,

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[406] Constitution of Greece (rev. 1986; 2001; 2008; 2019), art 110(1) <https://www.hellenicparliament.gr/UserFiles/8c3e9046-78fb-48f4-bd82-bbba28ca1ef5/THE%20CONSTITION%20OF%20GREECE.pdf> accessed 27 February 2023. The English translation of Greece's Constitution provided by the Hellenic Parliament leaves out the word 'basis' (*βάση*) that is included in the original Greek text of the clause ('Οι διατάξεις του Συντάγματος υπόκεινται σε αναθεώρηση, εκτός από εκείνες που καθορίζουν τη *βάση* και τη μορφή του πολιτεύματος, ως Προεδρευόμενης Κοινοβουλευτικής Δημοκρατίας …') (emphasis added).

[407] Evangelos V. Venizelos, *Τα Όρια της Αναθεώρησης του Συντάγματος 1975* (n 404) 55.

[408] ibid, 56.

[409] Art 1 of Greece's Constitution provides that: '1. The form of government of Greece is that of a parliamentary republic. 2. Popular sovereignty is the foundation of government.'

[410] Evangelos V. Venizelos, *Τα Όρια της Αναθεώρησης του Συντάγματος 1975* (n 404) 63-64.

[411] ibid, 83.

[412] ibid, 83, 91 (my translation).

safeguards, and generally all those constitutional provisions related to the historical development, the political rally, the theoretical and ideological refinement, and the constitutional formulation of popular sovereignty.'[413] In addition, there is a distinct 'core or essence' of the constitution that uniquely colors its government's profile, and is made up of a set of intertwined provisions which, although they are by no means quintessential in calibrating the conceptual or historical formulation of popular sovereignty, nonetheless amending or even abolishing them may constitute a violation of that 'core or essence.'[414] In other words, amending or abolishing those provisions, which are not yet part of the 'heart' of popular sovereignty (or of another bedrock principle of the constitution), might produce 'interpretive inconsistencies' that would be *incomprehensible* if the constitution were *not* seen in its entirety.

The preceding analysis drives Professor Venizelos to the conclusion that next to arts 1(1) and 1(2) the following constitutional provisions should be treated as *impliedly* excluded from the amending power: Art 1(3) (providing a largely standard to popular sovereignty as deriving from the people and operating for the people and nation),[415] arts 120(3) and 120(4) (calibrating popular sovereignty by providing that any act intended to usurp the powers under this constitution shall be prosecuted after the restoration of normalcy; as well as endowing the task of guarding the constitution against its enemies to 'the patriotism of Greeks'),[416] art 50 (providing a constitutionally-sanctioned presumption against the powers of the President of the Republic and in favor of Parliamentary powers).[417,418] Therefore, Professor Venizelos, too, should be enlisted in the chorus of scholars who submit to an interpretive style closely related to what was alluded to earlier as 'immanent structuralism' (and to a lesser degree 'transcendent structuralism') – that is, to a style of interpretation that favors such a reading of a constitution that would enable extracting those of its provisions that, although they are not expressly picked out us unamendable, nonetheless should be treated so in order to prevent any interpretive inconsistencies that would be generated if the amendment project proceeded in *disregard* of certain implied limits to the substantive powers at its disposal.

VI. Comparative Constitutionalism: Constitutional Identity and Change from Abroad

A constitution can only succeed in translating word into something constitutionally 'real' by reaching enough stability against too-frequent appeals to the people for amendments. For James Madison, one should not 'deprive the government of that veneration that time bestows on every

[413] ibid, 86 (my translation).
[414] ibid, 88.
[415] ibid, 89 (noting that the interpretive dilemmas caused by the reference to the 'nation' might favor its future deletion).
[416] ibid, 89-90.
[417] ibid, 90.
[418] For another group of constitutional provisions excluded from the reach of the amending power, see Evangelos V. Venizelos, *Τα Όρια της Αναθεώρησης του Συντάγματος 1975* (n 404) 91-105.

thing.'[419] However, it is precisely by investigating these exact occasions that constitutional change, formal or not, is precipitated that we deduce our deepest insights about a constitution's identity.[420] In our days, a driving force – perhaps the most energetic of all – toward constitutional evolution comes from abroad.[421] Comparative constitutionalism then turns up as a valuable source of deliberation about a constitution's identity, if only because a polity can earn much deeper self-understanding through its openness to, and confrontation with, foreign nations.

The concerns that have led people to object to making use of imported materials have predominantly centered around the fact that foreign ideas can undermine domestic efforts to produce or sustain one's *own* constitutional identity.[422] For one thing, constitutionalism rests on a complicated relationship between identity and diversity that at times it appears insecure to search for any particular identity (or difference) as being intrinsic to a particular constitutional setting. Because of this, and because, by definition, constitutional identities vary significantly from place to place, it is highly questionable if constitutional ideas can successfully survive direct transplantation from abroad.[423]

For universalists, on the one hand, constitutional essence would be much the same for all. In terms of their essentials, all constitutions pump from a well of uniform, or at least closely related, norms. For particularists, in contrast, each constitution is related to an unparalleled mix of conditions and circumstances. Constitutional outcomes are difficult to reproduce abroad, since exceptionalism can be expressed either by a constitution's particular provisions or by unique interpretations of provisions that on their surface look much the same as their foreign counterparts. Last, to the extent that particularistic interpretation will resort to extra-constitutional norms, the latter will most probably be formulated in accordance with the values and principles of their home audience rather than with those of foreign observers.[424]

Comparative constitutionalism should therefore focus more deeply on how the free circulation of constitutional ideas from abroad is able to influence the home stock of valued political and legal assets. No doubt, conflicts are obvious in varying degrees from a place to another, but disharmony is more generally inherent in constitutionalism by way of a distance dividing a constitution from its societal background, as well as between parts integrated into a single constitutional document.[425] That is also the broader context whence the initiative to explore constitutional possibilities

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[419] James Madison, *The Federalist No. 49*, 'Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention (5 February 1788)'<https://avalon.law.yale.edu/18th_century/fed49.asp> accessed 2 October 2022.

[420] William F. Harris, *The Interpretable Constitution* (n 32) 170.

[421] See generally Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2007).

[422] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 137.

[423] Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press 1994) 14.

[424] Michel Rosenfeld, *The Identity of the Constitutional Subject* (n 76) 6-7.

[425] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 149. See also Michel Rosenfeld, *The Identity of the Constitutional Subject* (n 76) 10 who holds that constitutions rest on a paradox inasmuch as they must at once be alienated from, and congruent with, the very identities that make them workable and coherent.

from abroad derives. Therefore, search for unity of meaning with foreign assistance shows itself as a central part of constitutional politics.

Going abroad may actually result in advancing a nation's *self-understanding* too. Many of the political aspirations found in a constitution, express or otherwise, which combine to form its identity, are made up of 'dreams' that are probably shared by others too and that perhaps are involved in a global stock of political visions we have come to associate in general with constitutionalism.[426] Thus, by realizing that our constitutional goals are not so different from those of others brings us before the challenging task of *seating* the universal into the particular instead of struggling to split them up so neatly as if they represented distinct political 'worlds' which cannot but be mutually exclusive.[427] That task counsels, among other things, keeping ourselves *open* to opportunities of illumination from abroad but simultaneously sustaining our care to screen these opportunities through the *prism* of regional variation and differentiation.[428] What is crucial then is to embrace constitutional borrowing, but in a principled manner. To do so, law-makers and judges alike should apply a developmental approach in relation to their home constitutionalist agenda in order to conveniently transpose the dictates of the ideal into the actual, thereby transforming a polity's constitutional identity.

Ireland's grapple with abortion law since the 1990s presents an illustrative example of how a progressive constitutionalist impetus from abroad is able, after translated into the native constitutional language, to bring about 'painless' constitutional evolution. Popular sovereignty in Ireland enjoys a quasi-religious position in constitutional law.[429] More broadly, popular sovereignty has been long-respected as a bedrock principle of the post-independence Irish polity, signaling a major shift from British constitutionalism that held – and continues to hold until our days – popular sovereignty as bound up with representative institutions rather than with the people directly.[430] No wonder, then, that in Irish constitutional law, the people's power to amend their constitution is *nearly unlimited* in terms of its subject-matters, scope, and the substance of the amendments that can be effectuated by referendums.[431] Ireland's Supreme Court, for example, has invoked popular sovereignty on several occasions as grounds for rejecting various arguments invoking the inviolability or immutability – put differently, the *unamendability* – of certain principles and provisions, even of natural-law origin – another Irish constitutional shibboleth.[432]

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[426] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 112.

[427] ibid, 170.

[428] ibid.

[429] Eoin Daly, 'Translating Popular Sovereignty as Unfettered Constitutional Amendability' (2019) 15 Eur Constitutional L Rev 183.

[430] ibid, 184.

[431] ibid.

[432] Eoin Daly, 'Translating Popular Sovereignty as Unfettered Constitutional Amendability' (n 429) 185. See also Supreme Court of Ireland, *Finn v. Attorney General* [1983] IR 154 (dismissing an appeal to invalidate the proposed Eighth Amendment based on the assumption that the right to life of the unborn was already warranted pursuant to the constitution by holding that the court lacked any institutional power to review Bills including those amending the constitution, but only enacted laws; Supreme Court of Ireland, *Slattery v. an Taoiseach* [1993] 1 IR 286 (holding that the court lacked any power to interfere with the outstanding power of the people to amend their constitution.)

The cornerstones of Ireland's abortion saga are, in particular, the following: Abortion was illegal under the (United Kingdom) *Offences against the Person Act 1861*, in force until as recently as 2013.[433] However, at a time of decline in the influence of Catholic teachings and of changing moral attitudes, Ireland's Supreme Court affirmed in its 1973 judgment in *McGee* a right to birth control by means of use of contraceptives.[434] In response, the Eighth Amendment was inserted into the constitution by referendum held in 1983 to provide as strong a shelter as possible to the unborn.[435] Increased concerns over pressures for change from abroad were relieved with the granting of immunity from possible EEC overruling through an *ad hoc* Protocol added to the Treaty of Maastricht.[436] But the neighboring Britain was a constant reminder that abortion services were readily available in clinics across the Irish Sea. The focus then shifted to the availability of information. Since the 1980s, the Society for the Protection of Unborn Children (known in lawsuits as *SPUC*), a UK-based anti-abortion lobby group, challenged the dissemination of information about abortion services, and in 1989 Ireland's Supreme Court barred student unions from distributing such information on abortion services lawfully available in Britain.[437] In its judgment in *Attorney General v. X* of 5 March 1992, the court established the right of a woman to an abortion performed abroad if her life was at risk because of her pregnancy, *including* a suicidal risk.[438] The *Attorney General v. X* jurisprudence resulted in the proposal of no less than three amendments to Ireland's Constitution that were submitted to three referenda, all held on 25 November 1992. The Twelfth Amendment, pursuant to which the prohibition on abortions would apply even in cases of suicidal pregnant women, was defeated. Instead, the Thirteenth and Fourteenth Amendments were subsequently enacted and put into force to permit traveling to receive abortion services abroad, as well as to receive and impart information on such services as lawfully provided abroad. Today, the issue has been settled by the terms of Article 40.3.3º of Ireland's Constitution, introduced by the

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[433] (United Kingdom) Offences against the Person Act 1861; repealed by the (United Kingdom) Protection of Life During Pregnancy Act 2013.

[434] Supreme Court of Ireland, *McGee v. The Attorney General* [1973] IR 284.

[435] The subsection inserted after section 3 of Article 40 read that:

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

The Eighth Amendment of the Constitution Act 1983 <https://www.irishstatutebook.ie/eli/1983/ ca/8/enacted/en/html> accessed 17 October 2022.

[436] Protocol annexed to the Treaty on European Union and to the Treaties establishing the European Communities which provided that:

> The High Contracting Parties have agreed upon the following provision, which shall be annexed to the Treaty on European Union and to the Treaties establishing the European Communities: Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11992M%2FTXT> accessed 2 October 2022.

[437] Supreme Court of Ireland, *The Attorney General (SPUC) v. Open Door Counselling* [1988] IR 593; *Attorney General (S.P.U.C.) v. Open Door Counselling Ltd* [1986] 12 JIC 1902.

[438] Supreme Court of Ireland, *Attorney General v. X* [1992] IESC 1, [1992] 1 IR 1.

Thirty-sixth Amendment passed by referendum on 25 May 2018, which reads that 'Provision may be made by law for the regulation of termination of pregnancy.'[439]

In Ireland, public opinion transformed in a way that *outpaced* what ultimately appeared a set of parochial stipulations couched into the nation's supreme law.[440] When voters cast their ballots allowing the Thirty-sixth Amendment incorporated into their constitution, legitimizing abortion and repealing the Eighth Amendment, they were merely *affirming* a social transformation that had been growing for decades beneath the level of law. In line with its audience, Ireland's constitutional identity experienced a *metamorphosis* too. While the Trinitarian cast of the document is still in its place, it has become less 'Catholic' in its content and implications.[441] The divine foundations of the document are not immutable, but establish a compelling presupposition in favor of conventions deeply ingrained in Ireland's constitutional experience that cannot be overcome by a routine demonstration of the people's current inclinations.[442] Throughout its overall jurisprudence, but particularly in its abortion case-law, Ireland's Supreme Court defended the amendments by rejecting arguments about the existence of a constitutional identity that was somehow immune from potential 'threats' by the people.[443] At the same time it did not jump to a wholesale rejection of natural-law precepts that were (and are) so visible in the constitution. In *McGee*, for example, the Supreme Court was able to secure a right – birth control – that was in line with global trends in human rights jurisprudence, not as a matter of privacy or conscience, but as a matter of vindication of *family*, thus appealing to its more conservative audience and invoking the Catholicism-inspired provisions of the constitution.[444] Thus, Ireland's Catholic and (directly) democratic commitments represent an ongoing if antithetical constitutional tradition.

Professor Eoin Daly places stronger emphasis on the Irish Constitution's democratic commitments to infer that:

> insofar as the [Irish] Constitution has a normative 'identity' based on popular sovereignty, this is not associated with *any* of its substantive principles – whether concerning democratic rights or otherwise – but only with the procedural mechanism through which the Constitution is adopted and amended.[445]

In other words, in Professor Daly's opinion, it appears that included into Ireland's constitutional identity is not the constitution's Trinitarian cast, but its reliance on popular sovereignty – also of

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[439] The Thirty-sixth Amendment of the Constitution Act 2018, <https://www.irishstatutebook.ie/eli/2018/ca/36/enacted/en/html?q=Thirty-sixth+Amendment> accessed 17 October 2022.

[440] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 252.

[441] ibid, 265.

[442] ibid, 266.

[443] ibid.

[444] ibid, 193.

[445] Eoin Daly, 'Translating Popular Sovereignty as Unfettered Constitutional Amendability' (n 429) 186 (emphasis added).

natural-law origin – as evident in a series of constitutional amendments.[446] However, to the extent that Irish constitutional law had embraced both fading elements of *divinity* and a strong persistence of *popular sovereignty* that together intermingled into a textual template that formed common part of its overall identity, that identity has been under constant *pressure* from both within and abroad to surrender to the winds of change blowing against the Irish society, lest the distance between word and 'world' should pave the way for a constitutional crisis.[447]

Foreign ideas and judicial precedents migrated and entered the arena of Irish constitutional contestation among identity-shaping forces and were processed accordingly.[448] In particular, the *SPUC* controversy was referred for a preliminary ruling to the EU Court of Justice, which delivered its judgment in what came to be known as the *Grogan* litigation in which it finally rejected the application and halted the controversy.[449] The reason why *Grogan* was constitutionally and politically welcome in Ireland was not – or at least not exclusively – because anti-abortion law itself represented a domain which was considered as belonging to Ireland's core identity – after all, subsequent amendments witness to the contrary; but because a CJEU judgment invalidating Ireland's anti-abortion law was not considered to proceed from the right place, or to be the most apposite way of effectuating such sweeping changes into Irish constitutional law.

A. The Cultural Objection to Constitutional Borrowing: The Problem of 'Translation.'

An immediate reaction to constitutional borrowing is to counsel caution against any integration of imported materials into the native constitutional ecosystem. A widely held belief is that a constitution is deeply-rooted in the way of life of the people it governs which in turn creates a formidable barrier to any attempts of transplanting legal foreign legal stuff.[450] One aspect advocating against cross-cultural assimilation of constitutional categories is the problem of 'translation;' simply put, the inability or at least the trouble in deeply specify critical legal conceptions whose meaning is culturally contingent.[451] Public law, the argument goes, rests on an *intellectual* relationship with its constituency.[452] This historical bond between public law and a particular polity wrestles with the idea of automatic transplantation from one nation to another. Therefore, if a polity's collective mindset differs seriously from that of polities that request a constitutional 'loan,' the option to blindly trust a foreign creditor rests on the weakest possible normative foundations.[453] Even if the two polities are not exceptionally different, decision-making in general emanates from a complex

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[446] ibid.

[447] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 330.

[448] ibid, 202.

[449] CJEU, Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-4685.

[450] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 140.

[451] Frederick Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy* (Duke University Press 1994) 367.

[452] ibid.

[453] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 206.

set of social, political, cultural, historical etc. backgrounds, of which foreign judges are largely, if not wholly, ignorant when considering their judicial options.[454] The U.S. Constitution, for example, in embracing certain political ideas that provided definitional content to the American nation, is constitutive of, not constituted by, the societal setting – *it* is the American nation's 'birth certificate.' Thus, at least at face value, its provisions, including their underlying values and overarching principles, may have been culture-proof insofar as their transplantation abroad is concerned – but who would argue that that proposition holds true still in our days? Other polities, by contrast, are often more influenced by such features as ethnicity, race, religion, or language – that is, by *extra*-constitutional forces that have, at least allegedly, preceded the nation's declaration through its subjection to a constitution – in order to establish a firm basis for 'national unity, identity, and membership.'[455]

The process of combining that complex set of social, political, cultural, historical etc. backgrounds, is most *visible* in what Professor Frederick Schauer has aptly called the 'cultural contingency of constitutional categories.'[456] Every constitutional author needs to find the right words to frame the normative categories he or she seeks to entrench through law.[457] Even though the hurdles to overcome are no less great when constitutions speak in relatively precise terms, the phenomenon usually grows with linguistic indeterminacy.[458] For instance, a constitution's provision specifying the age necessary to hold public office or vote is capable of inducing an understanding of its normative boundaries that is *not very different* from the boundaries set through mere reliance on the literal or technical meaning of the language itself.[459] In contrast, where the constitutional words chosen are *less determinate* to articulate as precise a meaning as possible, as is often the case for example with human rights provisions, then the possibilities of understanding the normative depth of constitutional categories by counting on universally-shared conceptions over the meaning of the constitutional words themselves diminish significantly.[460]

Professor Schauer points to constitutional provisions entrenching *free speech* worldwide as exemplary of the cultural implications that the phenomenon he describes incur. Although many constitution-makers have opted for relatively unqualified language and through transgressing the borders of their home jurisdictions they often choose the same words, enforcement of free speech is subject to requirements that *vary* significantly through time and place.[461] No constitution specifies the normative borders of freedom of speech, press, and opinion with anything resembling the plain language that the same constitutions typically employ to define such rights or structures as, say, criminal process.[462] Although it is common to attribute the high degree of, say, American free

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[454] ibid.

[455] ibid.

[456] Frederick Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (n 451) 353.

[457] ibid, 353-354.

[458] ibid, 356.

[459] ibid, 355.

[460] ibid, 356.

[461] ibid, 359.

[462] ibid.

speech at least in part to the seemingly unqualified language of the First Amendment to the U.S. Constitution, that allegation is refuted throughout much of the rest of jurisdictions around the world where *equally unqualified language is successfully employed to justify stronger limitations*.[463] Precisely because the comparative project of normative precision has been universally defeated in the field of free speech rights, divulging the essence of such constitutional categories as 'free speech' (or nondiscrimination etc.) must come from other sources than even the closest reading of the constitution's text alone.[464]

Since a literal reading of the broad language typically attached to culturally sensitive constitutional provisions is unlikely to generate meaningful guidance about what is constitutionally entrenched and what is not, a judge or a lawyer if confronted with the task of determining whether a fact falls within the ambit of a particular constitutional provisions or not must then turn to alternatives. First, insistence on treating words at face value may, for a variety of reasons, mutate into some form of *blind* respect for the constitution's text.[465] For instance, the U.S. Constitution is, for many, a source of veneration – not least for the innovations it introduced, both domestically and abroad thanks primarily to its age and apparent success.[466] As Michael J. Perry put it,

> Both as a description of our practice and as a prescription for the continuance of the practice, the Constitution also consists of premises that, whether or not any generation of 'We the People' meant to establish them in the Constitution… have become such fixed and widely affirmed and relied upon (by us the people of the United States now living) features of the life of our political community that they are, for us, constitutional bedrock – premises that have, in that sense, achieved a virtual constitutional status, that has become part of our fundamental law, the law constitutive of ourselves as a political community of a certain sort.[467]

The statement may be perfectly true for the U.S. Constitution; its value, however, is primarily in illuminating why each constitution worldwide, throughout all of its evolutionary stages, from design to interpretation to enforcement should be sensitive to the exceptional historical and cultural circumstances that gave birth to it in the first place. Canadian lawyers, Professor Schauer explains, might have used American arguments in a number of public debates, not necessarily because they are well-founded or rest on the same background assumptions, but because doing so is convenient: American arguments are well known and easy to access due to the presence of a neighboring and intimate constitutional ethos immediately to the South.[468] But seeking such interpretive guidance does not do justice to each constitution's *identities*.

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[463] ibid.

[464] ibid.

[465] ibid, 363.

[466] ibid, 361.

[467] Michael Perry, 'What is "The Constitution"?' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 2001) 107.

[468] Frederick Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (n 451) 363.

Second, constitutional categories can grow internally within the decision-making bodies of the relevant jurisdictions. Scholars of legal change such as Niklas Luhmann, Gunther Teubner and others have emphasized the growing self-sufficiency – 'autopoiesis' is the term they coined – of legal systems in generating policy outcomes. They contend that law, not unlike other civil institutions, increasingly turns in on itself, growing and applying methodologies that take on a life of their own.[469] *Autopoiesis* originally means self-production and demonstrates how legal systems are becoming self-reproducing organizations.[470] The key assumptions of autopoietic law are the following: First, a jurisdiction is constantly generating legal outputs entirely out of itself; it reproduces by its own means. Second, a legal system settles and revises the preconditions of its own validity. Third, politics, morality, and the public discourse at large do have an impact on the legal machinery, but not to the point of prescribing the validity of legal outcomes.[471]

In its stronger version, the 'autopoietic' argument would be that legal systems come to treat their own maintenance as a value in itself, independent of the values that these systems were *initially* intended to serve.[472] In its weaker version, legal systems keep pursuing their founding values, but increasingly treat these values through the prism of their own self-standing values.[473] For instance, free-speech decision-making in the United States has taken on some of these features, at least in the weaker form.[474] Such authorities as J.S. Mill's *On Liberty*, Milton's *Areopagitica*, Justice Holmes's dissenting opinion in U.S. Supreme Court's judgment in *Abrams v. United States*[475] have received canonical status, several judicial decisions and doctrines have become entrenched, particular styles of argument have dominated, and, over time, safekeeping and maintenance of such authorities has increasingly been treated as an *end in itself* rather than as a means to something larger as probably envisioned by the polity's supreme authority – its Constitution.[476] Insofar as this inclination despite its vagueness is real, we might be able to come to grasp the outlook of such

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[469] ibid. See generally Richard Lempert, 'The Autonomy of Law: Two Visions Compared' in Gunther Teubner (ed), *Autopoietic Law – A New Approach to Law and Society* (first published 1988, De Gruyter 2011).

[470] Richard Lempert, 'The Autonomy of Law' (n 469) 153.

[471] Gunther Teubner, 'Introduction to Autopoietic Law' in Gunther Teubner (ed), *Autopoietic Law – A New Approach to Law and Society* (first published 1988, De Gruyter 2011) 3-10.

[472] Frederick Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (n 451) 364.

[473] ibid.

[474] ibid.

[475] U.S. Supreme Court, *Jacob Abrams, et al. v. United States* 250, U.S. 616. Justice Holmes famously said in his dissenting opinion:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.... The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out….

ibid, 630.

[476] ibid.

constitutional categories by delving into the socio-cultural circumstances conditions influencing the institutions in which they are embedded.[477]

Refuting these alternative avenues, Professor Schauer defends the position that constitutional categories rest ultimately on *cultural* prerequisites; that they are living screenshots of socio-political circumstances that vary with time and place.[478] An illustrative example of how different socio-political conditions may generate divergent political outcomes – though couched in similar (usually vague) constitutional language – is demonstrated by the contrastive degree of constitutional protection granted to Nazi (and generally hate) speech in the United States compared with Germany. Although few American scholars would argue that free speech includes Nazi speech too, the common argument was that of the 'slippery slope.'[479] Most American scholars would argue that free speech by, say, Democrats is member of the same constitutional class of free speech as when uttered by Nazis, such that limitations to the latter would present a risk of possible future limitations to the former.[480] For instance, the *Skokie* litigation involved a right of the National Socialist Party of America to march in Skokie, Illinois, a village with a large population of Jews, many of them survivors of the Holocaust.[481] The district court issued an injunction prohibiting the Nazi defendants from demonstrating and displaying the swastika on 1 May 1977 and the Illinois Supreme Court, on appeal, denied the petition against the injunction. The defendants filed an application before the U.S. Supreme Court which ruled that the display of the swastika is protected speech pursuant to the terms of the First Amendment Free-Speech Clause.[482] Thus, by paving the way for Nazis to march in what would become known as the *Skokie affair*, the ruling is witness to the existence of a cultural category that (at least) includes within the universe of American constitutional *identity* both Democratic and Nazi speech – that is, both *standard* speech and *non-standard* (including hateful) forms of speech.[483] In sharp contrast, Germans are nowhere near as anxious about the possibility of, for example, *Die Grünen* being limited in the future as an overlooked consequence of limiting the neo-Nazi *Nationaldemokratische Partei Deutschlands* in the present.[484] The 'slippery slope' argument, in other words, lacks within German constitutional law the splendor it enjoys within its American counterpart.

One can cite numerous examples from the American free-speech jurisprudence that bear witness to the fact that sometimes the same constitutional words are likely to produce differing judicial outcomes if they are related to culturally sensitive constitutional categories. For example, religious freedom and nondiscrimination on religious grounds have combined to generate a contrasting treatment of Islamic headscarves between the Anglo-Saxon and the continental European

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[477] ibid.

[478] ibid, 365.

[479] ibid, 365-366.

[480] ibid, 366.

[481] Supreme Court of Illinois, *Village of Skokie v National Socialist Party of America*, 69 Ill. 2d 605 (Ill. 1978) 373 N.E.2d 21.

[482] U.S. Supreme Court, *National Socialist Party of America v Village of Skokie*, 432 U.S. 43 (1977), 44.

[483] Frederick Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (n 451) 366.

[484] ibid.

tradition.[485] On the one hand, the facts in *EEOC v. Abercrombie & Fitch, Inc*. concerned a practicing Muslim, Samantha Elauf, who applied for a job at Abercrombie & Fitch in Tulsa, Oklahoma, and after an interview she was denied the job because she wore a *hijab*, which the manager classified as an attire that was inconsistent with the company's 'Look Policy.' The latter was interpreted as prohibiting all headwear worn by staff, religious or not. The Equal employment Opportunity Commission (EEOC) filed a suit against Abercrombie & Fitch Inc. on behalf of Elauf, asserting that Abercrombie's refusal to appoint her mounted to a discrimination-against on grounds of religion, which was in breach of Title VII of the Civil Rights Act 1964.[486]

The Oklahoma District Court ruled in favor of the EEOC, but the ruling was reversed on appeal upon holding that an employer cannot be held liable for failing to accommodate a religious practice if they lack any *actual knowledge* of his or her need for accommodation. The EEOC then petitioned for certiorari before the Supreme Court. Title VII's Section 2000e-2 reads that:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[487]

The disputed issue then before the Supreme Court was if the employer needs to be *actually* cognizant of a need for accommodation in order for the stipulations of Title VII prohibition to apply?

Justice Antonin Scalia, who wrote for the majority of the court, rejected the *actual-knowledge* proviso proposed by Abercrombie. But most tellingly for present purposes, the court also rejected Abercrombie's allegation that it should limit the meaning of 'religion' as a nondiscrimination ground under Title VII to religious *belief* only. Instead, the court held, 'religion' includes one's religious *practice* too, and so religious practice (read: religious *attire*) is one of those secured features that employers are obliged to accommodate. No doubt, an employer is entitled to adopt a general no-headwear policy, but the policy must essentially be adapted to an employee's or an applicant's need for religious accommodation. As the court said,

> ... Title VII does not demand mere neutrality with regard to religious practices – that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual… because of such individual's' 'religious observance and practice.' An employer is surely entitled to have, for example, a no-headwear policy

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[485] See extensively *infra* Chapter 4.

[486] Kristin Richards, 'EEOC v. Abercrombie & Fitch Stores, Inc.: Religious Discrimination' (2016) 41 Okla City U L Rev 53.

[487] 42 U.S. Code § 2000e–2.

> as an ordinary matter. But when an applicant requires an accommodation as an 'aspec[t] of religious… practice,' it is no response that the subsequent 'fail[ure]... to hire' was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.[488]

On the other hand, the Court of Justice of the European Union, though aware by way of express cross-reference of the American *Abercrombie* precedent, issued a ruling that a no-headwear policy over any signs of religious or philosophical beliefs did not rise to the level of directly discrimination-against. Applying very much the same constitutional language, which read that 'direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on… grounds [of religion or belief],'[489] the court found that the neutrality policy referred to the wearing of visible signs of political, philosophical or religious beliefs and it covered any manifestation of such beliefs *without any distinction*.[490] Therefore, it found no direct discrimination since there was no evidence that the neutrality policy in question was applied differently to the applicant, Samira Achbita, compared with any other employee.[491]

The differentiated treatment of religious-accommodation claims by the Anglo-Saxon and continental European tradition is probably attributable to what Professor Frederick Schauer coins as 'the cultural contingency of constitutional categories.' As Schauer concludes,

> If my perceptions are correct… and if those perceptions are somewhat generalizable…, then it appears that the prelegal instantiations of terms like 'political' and 'free speech' [or 'nondiscrimination' on religious grounds] *will vary dramatically from culture to culture*. Insofar as courts have the responsibility of filling in such general terms based on theories of what constitutional provisions are designed to do, some of the cultural differences will be ameliorated. But where the differences are particularly great, the cultural differences seem likely to be reflected in judicial perceptions as well…. Thus, if the interpretation of broad but still constitutionally relevant categories like 'political speech' will vary significantly with cultural history and national variation, then that delineation may indicate that there are likely to be pressures militating *against* the cross-cultural assimilation of constitutional categories. In obvious and important ways, constitutions deal with centrally important social and political subjects. Thus, it should come as no surprise that necessary constitutional categories contain the kinds of political and social

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[488] U.S. Supreme Court, *EEOC v. Abercrombie & Fitch Stores, Inc*, 575 U.S. 768.

[489] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, art 2(2)(a).

[490] CJEU, Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] OJ C151/3, para 30.

[491] ibid, paras 31, 44.

> presuppositions that will vary from country to country, just as the categorial status of Nazis varies between the United States and the Federal Republic of Germany…[492]

From the preceding analysis, we can discern some interesting patterns about the complicated relationship between a constitution and its socio-cultural background. First, cultural attachments and commitments can provide *moral* foundations for a diverse set of political practices worldwide.[493] In East Asian societies influenced by Confucianism, for example, it is a common assumption that children are morally compelled to take care of their elderly parents.[494] By way of policy-making, that assumption forces the government to provide what is necessary for the realization of that particular obligation.[495] The public discourse (along with the ensuing public policies) focuses on whether that obligation can be best effected by means of a legal instrument that compels children to provide for their parents or by means of indirect measures such as tax relief that assist easier at-home care for the elderly.[496] Second, cultural commitments influence the *justification* of human rights. In line with arguments put forward by communitarians, it is often argued that justifications for particular arrangements valued by liberalism should not be made liable to the kind of *abstract* universalism that is typical of standard Western political thought.[497]

Third, different political communities may value and hence *rank* human rights differently, and this matters when rights conflict.[498] Even when they have to enforce similar, if not the same, legal words upon a set of similar circumstances, they end up coming to different conclusions about the human right which is to prevail and to be sacrificed. The reason for this variation across jurisdictions is that they often attach contrasting meanings to the same words based on their diverse *historical* and *cultural* circumstances. U.S. citizens, for example, may be more ready to forgo a social or economic right in favor of a civil or political right: if the constitution does not really provide universal health care regardless of income, then that very right can be reduced – a condition that is attributable to the fact that Americans attach greater importance to the class of civil and political rights.[499]

Borrowing from abroad is therefore conditional upon thoroughly performing a 'background check' into both the borrower and the creditor. When the French, for instance, exported their structures of dual jurisdiction across Europe to help shape what is now securely established in a number of Western European states enlisted in continental European law as their standard judicial system,

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[492] Frederick Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (n 451) 367 (emphasis added).

[493] Daniel Bell, 'Communitarianism,' *The Stanford Encyclopedia of Philosophy* (Fall 2022 Edition), Edward N. Zalta & Uri Nodelman (eds) <https://plato.stanford.edu/archives/fall2022/entries/communitarianism/> accessed 16 February 2023.

[494] ibid.

[495] ibid.

[496] ibid.

[497] ibid.

[498] ibid.

[499] ibid.

they did not include any *guidelines* about how it actually works. That has caused, and continues until our days to cause, problems in European nations with limited legal resources and fragile institutions, whose histories include nothing resembling the historical evolution of dual jurisdiction in France as encapsulated in the conflict between the French King and the provincial *parlements*.[500]

Does or should the problem of 'translation' mitigate the possibility of there being any trans-culturally or trans-nationally available concepts, that remain much the same in the eyes of people with different, to use John Rawls's formulation, 'comprehensive views' of the world and of the common good? Supporters of comparative constitutionalism assume that using foreign law *dialogically* – here, a synonym for *critically* – eliminates the restraints of context.[501] In other words, *how* judges (or politicians) choose to use foreign sources matters much more than *whether* they let themselves be instructed by them in the first place. In *McGee*, for example, Justice Walsh's opinion managed to remain sensitive to native needs and assertions by following a constitutional path that granted an expansive field of freedom without obscuring the nation's rootedness in Catholicism.[502] To the extent that a right of privacy as developed in the American jurisprudence and elsewhere was going to become a source for inspiration toward change in Ireland too, it should necessarily be *adjusted* to the native legal environment.[503]

B. The Juridical Objection to Constitutional Borrowing: The Worries of Judicial Activism.

The geographical expansion of jurisdictions whence constitutional inspiration may be drawn tempts mostly judges to press for a dominant role in the overall process of adapting constitutional meaning to the commands of time and place.[504] This development allegedly undermines the authority of courts. Judges will most probably expand the range of their constitutional vision in order to calibrate outcomes whose legitimacy might be defeated if kept withing the borders of more or less conclusive but in any case, of native legitimacy sources.[505] Judges operate as policy-makers, searching for foreign advice on the greatest means available for resolving policy-issues which, properly conceived, is beyond their institutional reach.[506]

The technique of citing foreign decisions, comparativists argue, is, in principle, independent of activism or restraint. However, as Professor E. E. Schattschneider rightly points out, appeals to

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[500] See *supra* section II. Foreword: The Idiosyncratic Nature of France's System of Dual Jurisdiction

[501] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 207.

[502] ibid, 208.

[503] ibid.

[504] ibid, 205.

[505] ibid, 208

[506] ibid.

foreign law are usually related to challenges to overcome the status quo.[507] Assuming that all courts resort to inspiration from abroad as a tool for change, assessment of the desirability or of the necessity of doing so must not overlook the differentiation between multiple constitutional contexts.[508] To the extent then that the juridical objection involves some concerns over the most appropriate use of institutional power, evaluating the outcome of legal transplantation will call for an in-depth analysis of the particular conditions of each 'lending' polity.[509]

The best general defense against turning to foreign sources focuses on why to turn to such sources in the first place.[510] However, there are also forces pointing to exactly the opposite. One of these forces is a desire to *learn* from others to develop one's own self-understanding.[511] How much a jurisdiction converges (or not) with the universalism will vary in accordance with the native constitutional ethos.[512] Large-scale integration of foreign jurisprudence within a transitional regime, for example, might not serve the cause of developing one's own self-understanding if such self-understanding has not yet loaded over some years – in a regime, that is, in search for its own identity.[513] Much will depend on the aspirational aspect of the predominant constitutional ethos. On the one hand, a confrontational charter – a 'militant' constitution in Professor Jacobsohn's terminology – may, in view of its less deferential way of standing vis-à-vis the status quo, profit from openness toward foreign influence.[514] On the other hand, a less confrontational document, one which has taken a more comfortable position between the ideal and the real, would be less interested in integrating foreign materials.[515] In either case, the ensuing constitutional project will be to bring clarity and unity – coherence – to the polity by settling any tensions between contrary aspirations.[516]

One means to achieve that goal would be by employing a 'purposive' judicial interpretation conducted on a high level of abstraction.[517] Lifting the level of abstraction is a familiar interpretive strategy to expand judicial capacity beyond its legitimate borders and in particular the scope and

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[507] Elmer E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (Dryden Press 1975) X.

[508] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 210.

[509] ibid.

[510] ibid, 155.

[511] ibid, 141.

[512] ibid, 102.

[513] ibid, 102.

[514] ibid, 22.

[515] ibid, 22-23.

[516] ibid, 151.

[517] Michel Rosenfeld, *The Identity of the Constitutional Subject* (n 76) 109 who says that:

> … reaching higher levels of abstraction through alignment of similarities along a metaphorical interpretive path plays an important role in framing constitutional rights and in defining constitutional identity.

range of human rights particularly of poorly conclusive manifestation.[518,519] The urge to relieve constitutional disharmony is rarely ideologically neutral: The driving force presses from the particular to the universal.[520] Yet, even when particularism is uprising, its success often depends on how intelligent it is in treating principles that are grasped on 'a high level of abstraction' and then are properly (re)processed.[521] A constitutional agenda transplanted on a deeply fractured society has the potential to boomerang, particularly if done in a sloppy way.[522] Indeed, relying on a high level of abstraction to set a particular constitutional agenda may fuel the anxiety of the body politic that the guidance from abroad is one *unrepresentative* of, or alien to, them.[523] Politicians and judges alike should be attentive to facts on the ground. As Michael Walzer points out:

> [T]here are no principles [beyond a basic respect for human rights] that govern *all* the regimes of toleration or that require us to act in *all* circumstances, in *all* times and places, on behalf of *a particular* set of political or constitutional arrangements.[524]

To sum up, the goal of self-improvement argues for an open-border policy both at constitution-making and on later constitutional occasions. As Professor Gary J. Jacobsohn aptly put it, 'Open…

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[518] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 315.

[519] See also U.S. Supreme Court, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) 121 (rejecting a challenge to a California law that presumed that a married woman's child was a product of that marriage, holding that due-process rights of a man who claimed to be that child's real biological father had not been breached). Justice Antonin Scalia, delivering the plurality opinion for a 5-4 divided court panel, wrote at footnote 6 that:

> … We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, JUSTICE BRENNAN would choose to focus instead upon 'parenthood.' Why should the relevant category not be even more general – perhaps 'family relationships'; or 'personal relationships'; or even 'emotional attachments in general?' Though the dissent has no basis for the level of generality it would select, we do: *We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.* If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.

U.S. Supreme Court, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) 127-128 (emphasis added). Justice O'Connor, with whom Justice Kennedy joined, concurred:

> in all but footnote 6 of JUSTICE SCALIA's opinion… [based on an understanding that] [t]his footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area.

U.S. Supreme Court, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) 132.

[520] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 157.

[521] ibid.

[522] ibid, 153.

[523] ibid.

[524] Michael Walzer, *On Toleration* (Yale University Press 1997) 2-3 (emphasis added).

does not necessarily mean unmonitored.'[525] There is in principle nothing inconsistent in properly rejecting and embracing foreign legal inputs.[526] Comparative constitutionalism does two things. First, it emphasizes the degree to which all liberal-constitutional democracies represent a number of features of which some are *exceptional* to a polity and others are widely assumed as commonly *shared* attributes of universal constitutionalism.[527] Second, it demonstrates that *how* foreign materials are integrated is much more important than the outright acceptance or rejection of comparative constitutionalism itself.[528]

'Looking abroad without bringing anything back home' may be helpful in some circumstances, if only to raise awareness of constitutional identity and 'difference.'[529] Engagement with legal voices from abroad invites us to (re)consider which features of our native constitutional story are exceptional and which are – to be sure – fundamental, but to constitutionalism more generally.[530] As courts calculate the relevance of such materials to judge a particular case, their focus should be drawn to the possible side-effects that bringing them back home might cause against first- and second-order constitutional provisions.[531] In any case, exposure to diverse political and constitutional contexts from abroad, and expanding the scope of law resources, multiplies the options available for both policy-making and judicial resolution.[532]

Now is the ideal place to return to the French innovations that were introduced in the context of their system of dual jurisdiction. As already pointed out, the French Revolutionaries did not strive to defeat dual jurisdiction as an evil legacy of the monarchical period, but rather they recast that legacy in order to suit more conveniently their updated commitments, and to do so they resolved to make law 'judge-proof.'[533] Indeed, they tended to reinterpret history in terms that were as much pleasant to the Revolutionary program as possible. Legal concepts that had long persisted as part of the European *jus commune* could now be revised as being contrary to the Revolutionary remodeling.[534] As Professor John Henry Merryman said, 'This gave the French Revolutionary program a claim to timeless universality and encouraged its adoption wherever in the world the Democratic Revolution spread.'[535] It also encouraged a tendency to ignore or to misrepresent pre-Revolutionary European legal achievements.[536]

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[525] Gary J. Jacobsohn, *Constitutional Identity* (n 22) 141.

[526] ibid, xiv.

[527] ibid, 22.

[528] ibid.

[529] ibid, 201.

[530] ibid, 211.

[531] ibid.

[532] ibid, 203-204.

[533] John Henry Merryman, 'The French Deviation' (n 3) 109.

[534] ibid, 114

[535] ibid.

[536] ibid.

Like the American Revolution, the French Revolution was a great event in world history. It excited the imaginations and ignited the hopes of reformers and revolutionaries around the world and, as they came into power, many of them were boosted to reproduce the French revolutionary program.[537] As Merryman points out:

> Nations whose histories had included nothing resembling the French parlements thus embraced a powerful doctrine that was the product of specific conditions in pre-Revolutionary France.[538]

With the disappearance of European common law, the distance between the English law and the continental European law became greater.[539] Consequently, what in our days appears to be at best a British insularity – or at least exceptional to the common-law family of judicial systems – was, from the sixteenth through to the eighteenth centuries, largely *shared* among the English and continental European law.[540]

Perhaps the direst of all implications of law's judge-proofness had been the rejection of any effect whatsoever of a judicial decision beyond the particular case at hand.[541] The doctrine of *stare decisis*, so pivotal in common-law jurisdictions, was specifically rejected.[542] But courts both in France and in nations that imported the French product without prior notice of its historical, political, social etc. depth of meaning were sooner or later confronted with overwhelming difficulties. The unworkability of such conventional reactions as *référé législatif* soon became evident, and finally French courts were given the power to do what was elsewhere a standard practice – to *interpret* the law.[543] Predictably, then, the focus shifted to deliberation.[544] The legislature, for its part, was put under the pressing demand of having to provide a rule for *every* conceivable action.[545] Every lawyer knows that to be beyond human capabilities, but that was a popular demand of the politics of the time.[546] The result was that French courts in effect cited legal codes or other law authorities as the seeming basis for their decisions even though these provisions often were too abstract in language or too remote in their terms to lead the judges to particular results in the cases

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[537] John Henry Merryman, 'The French Deviation' (n 3) 111.

[538] ibid.

[539] ibid, 115.

[540] ibid.

[541] ibid.

[542] ibid, 112.

[543] ibid.

[544] ibid.

[545] ibid.

[546] ibid.

brought before them.[547] That result caused a fragile relationship between the rule of law and justice, and did little to help judges do what '[seemed] reasonable, fair and effective in their work.'[548]

But contrary to expectations, however rational a theory of separation of powers may have seemed, the French practice of integrating judge-proofness within a long-established system of dual jurisdiction has found it necessary ever since to *return* to a more balanced distribution of institutional power of the kind that had previously existed throughout Europe and continues to exist in England and elsewhere up to the present.[549] In Merryman's words:

> Some formal signs of the effort to make the law judge-proof remain, but their substance has dwindled under the pressure of necessity and the natural tendency of lawyers to do what seems reasonable, fair and effective in their work…. If we look at what French courts (including the *Conseil d'Etat* and the *tribunaux administratifs*) do, rather than how what they do is disguised in separation of powers apparel, the similarity with the legal process in England (and in pre-Revolutionary France) is obvious.[550]

Indeed, since at least *Conseil d'État*'s judgment in *Cadot*,[551] awareness had grown of the fact that within a liberal-constitutional democracy 'judicial' review by parliament or government ministers could not survive. To be sure, constitutional 'relics' have survived for a long time, but against universal pressures toward more standard notions of rule of law and justice, the French version of separation of powers has been *only formally* observed.[552] The happy result of the alignment of French particularism with pressures from abroad has been that, over the course of the twentieth century, France's administrative justice has earned its reputation as a powerful guardian of human rights vis-à-vis the government.

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[547] ibid, 113.

[548] ibid, 115.

[549] ibid.

[550] ibid.

[551] Conseil d'État, Décision n° 66145 of 13 December 1889, *Cadot* (deeming itself competent to hear the application in disregard of the fact that no law provided the *Conseil* with jurisdiction over the case, by making a major but not unexpected step away from the law then in force, pursuant to which the *Conseil d'Etat* was permitted to hear any application before it that was against an administrative measure if the law specifically said so) <https://www.conseil-etat.fr/decisions-de-justice/jurisprudence/les-grandes-decisions-depuis-1873/conseil-d-etat-13-decembre-1889-cadot> accessed 18 October 2022.

[552] John Henry Merryman, 'The French Deviation' (n 3) 113.

PART II

3 The Enforcement of the Member States' Constitutional Identities in EU Law

I. Introduction

In the previous chapter, I have investigated a triad of sources from which a constitution's (*any* constitution's) identity can be drawn out from a perspective purely internal to a jurisdiction. In this chapter, I will turn to the European perspective of the issue and explore how the EU Member States' constitutional identities can be respected pursuant to the terms of EU law. I begin by searching the poor case-law of the CJEU for any evidence of a theory of identity respect. Then, I go as far back as the enactment of the founding Treaties to discover the origins of the EU law's Identity Clause. In particular, I argue that the Member States have been steadily denuded of their actual '*Voice*' in EU law-making in favor of an empowered supranationalism; hence, the Identity Clause has been inserted into the Treaty on European Union in its Maastricht version to provide the dissenting Member States with a mechanism of *non-compliance* of EU law – that is, with a means of appealing on their constitutional identities to press their claims of exceptions against the EU. This theoretical viewpoint is almost perfectly couched on earlier judgments of both Germany's and Italy's supreme courts, as well as on what has been theoretically identified as a 'postwar constitutional settlement,' which sees in European integration an ongoing project of growing power delegations to the EU. Most importantly, I propose a normative framework aiming to provide a theory of judicial review over how identity appeals from the Member States should be treated by the CJEU and then I test if my proposals are feasible against the background assumptions of a number of judicial opinions drawn from Germany and the UK (pre-Brexit). In this chapter, constitutional identity presents itself as a mechanism that is primarily *defensive*, particularly against intrusive policies run by the EU, as well as *methodological*, since it helps shed ample light on 'resistance norms' that would otherwise remain largely obscure.

II. The CJEU's Case-law on Art 4(2) TEU

The relationship between EU law and Member States' constitutional law is one of the most contested issues dominating the European public discourse. As with any debate involving both European integration and Member States' sovereignty, the discussion usually turns to how the Member States may save as many of their constitutional sensitivities as possible without simultaneously disturbing further EU integration. The answer, at least allegedly, may be found in the provisions of the Identity Clause as enshrined in art 4(2) TEU (Lisbon version), which reads that:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State,

> maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.[1]

In its debut appearance into the EU Treaties as art F (1) TEU (Maastricht version), the Identity Clause provided that:

> The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.[2]

The 1997 Amsterdam revision erased the last clause of the sentence, and art F(3) TEU (Amsterdam version) now provided that 'The Union shall respect the national identities of its Member States.'[3] The Identity Clause reappeared as art I-5(1) of the failed Treaty establishing a Constitution for Europe in a version almost identical to that of the later Lisbon Treaty. In particular, art I-5(1) read that:

> The Union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. it shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.[4]

Prior to the Lisbon Treaty, the CJEU had not directly interpreted any of the older versions of the Identity Clause in any coherent way. One might ascribe this poor jurisprudential record to the fact that the pre-Lisbon Identity Clause was excluded from the list of Treaty provisions subject to the CJEU's jurisdiction.[5] Nonetheless, I will start this chapter by making what Professor Frederick Schauer deems to be a common mistake for students of constitutional law – that is, by revisiting older and recent cases contested in the Court of Justice of the European Union – assuming that these 'will invariably be located at the edges rather than at the *center* of the phenomenon being discussed,'[6] but I do so not without any purpose. Indeed, I actively seek to uncover that the Identity Clause as conceived by the CJEU lies largely at the *edges* rather than at the center of the idea of constitutional identity as it is discussed herein. Still, that endeavor is not without some merit since, as Schauer continues, 'Edges may at times become centers, and centers may become edges….'[7]

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[1] Consolidated Version of the Treaty on European Union [2016] OJ C202/1, art 4(2).

[2] Treaty on European Union [1992] OJ C191/1, art F (1).

[3] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1, art F (3).

[4] Treaty establishing a Constitution for Europe [2004] OJ C310/1, art I-5(1).

[5] Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 5.

[6] Frederick Schauer, 'Community, Citizenship, and the Search for National Identity' (1986) 84 Mich L Rev 1507-8 (emphasis added).

[7] ibid, 1508.

First, in *Anita Groener*,[8] a Dutch woman was refused for a working post as a lecturer at a Dublin college on the grounds that she did not speak any Irish.[9] Groener argued that her rejection amounted to no less that a restriction on her right of free movement of workers warranted by art 45(1) TFEU.[10] The CJEU held that EU law did not prohibit the adoption of policies intended to promote a Member State language which is both a national and an official language.[11] In addition, the requirement that school teachers in Ireland speak Irish cannot be considered as being disproportionate to the goal pursued, nor as unnecessarily biased against citizens of other Member States, and as a consequence the application was dismissed.[12]

In *Grogan*,[13] the key issue was the Irish Constitution's provision of a 'right to be born' for fetuses which essentially made illegal both conducting or receiving an abortion as well as assisting a woman to travel abroad to receive an abortion.[14] However, student groups started providing women with such information as about how to travel to the UK and receive lawfully an abortion there and were subsequently prosecuted.[15] The defendants argued that the EU Treaties established a right of free movement to obtain services, including a freedom to receive and impart information about such matters as abortion services, notwithstanding the relative moral contentiousness of the issue. Therefore, in tension appeared to be two opposing rights and freedoms – one national, protecting the unborn fetus, and one supranational, providing a freedom to receive and impart information including information about abortion services lawfully provided abroad. The CJEU acknowledged that abortion is a service within art 57 TFEU (ex art 50 TEC) and people were free to travel abroad to receive such services. Still, the court was able to maneuver to circumvent a deeply controversial issue and offer some reasons more easily digestible for the Irish constituencies by holding that:

> Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practiced legally…. [T]he link between the activity of the students associations of which Mr. Grogan and the other defendants are officers and medical terminations of pregnancies carried out in clinics in another Member State is too

[8] CJEU, Case C-379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR I-3967.

[9] ibid, paras 1-9.

[10] ibid, para 9.

[11] ibid, para 18.

[12] ibid, para 19.

[13] CJEU, Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-4685.

[14] (United Kingdom) Offences Against the Person Act 1861, ss 58 and 59; reaffirmed in the (Ireland) Health (Family Planning) Act 1979, s 10.

[15] *Grogan* (n 13), para 9.

> tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of art 59 of the Treaty.[16]

The constitutional traditions of the EU Member States provide a diverse and at times unavoidably incoherent source of EU law. The result is that the CJEU, in experimenting with these sources, necessarily builds its own more or less subjective opinion as to whether a human right is in or out of EU law and how it must be interpreted. Member States' constitutional traditions can present themselves as a pool of fragmented inputs for human rights jurisprudence. Whatever the case, where a human right is found to be respected only in a few Member States, or to be respected in a particularistic way, the thrust is usually to keep human rights protection fragmented across the EU. The 2004 *Omega Spielhallen* case provides a telling example for these hypotheses.[17]

In *Omega*, the CJEU paid loudly its respect to the exercise of discretion by Member States to a certain degree, due to historical sensitivities and cultural differences among them. The facts concerned the commercial development of a laser gun, which included 'playing at killing' games.[18] Omega was a German company operating a laser installation known as a 'laser drome,' inspired by Star Wars. Bonn's municipal authorities issued a prohibition on the operation of games involving firing at human targets. This game was charged for being an infringement on human dignity as protected by art 1(1) of *Grundgesetz*.[19] The CJEU held that EU law does not stand in the way of Member State prohibitions against economic activities that simulate homicidal acts in order to warrant public policy based on the understanding that a 'playing at killing' activity is an affront to human dignity.[20] What stands out from *Omega* from the perspective of the constitutional identity discourse is, on the one side, that Member States do not lack any power – albeit to a limited extent – to determine the span of reasons of public policy that can qualify as a legitimate basis for restricting EU fundamental rights and freedoms on their territory, setting aside that the outcome may be look like a kind of asymmetrical human rights protection across the EU. On the other side, it was the CJEU that first put together the facts on the ground into their broader socio-political *cadre* in order to come up with a plausible judicial outcome.

The CJEU considered the subject-matter as belonging to a sphere properly but limitedly left to the Member States. Thus, it may be thought, at least on its surface, that, rather than unifying, or cohering, the system of rights-protection across the EU, Member States' constitutional traditions may in fact be responsible for *separating* them, and appear to perform not as prerequisites for the legitimacy of EU acts, but as Member State *defenses* against EU acts; justified if and insofar as they promote the public interest – a rather curious reversal indeed of the standard function of human rights to protect their holders against governmental action. In this case they are pleaded as

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[16] ibid, paras 20, 24.

[17] CJEU, Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609.

[18] ibid, para 5.

[19] ibid, para 32.

[20] ibid, para 41.

Member State excuses for limiting the reach of EU law in their territory, and function much like the ECtHR's concept of a margin of appreciation granted the ECHR Member States.

Relatedly, CJEU's Advocate General Miguel Poiares Maduro introduced in *Michaniki* the *Omega* line of analysis to refine and elevate it.[21] The facts in *Michaniki* concerned the exhaustive list of qualifications necessary to participate in public procurement as provided for in Directive 93/37/EEC,[22] which was purportedly in conflict with a provision inserted into Greece's Constitution in 2001 disabling legal personalities engaged in the media from taking part in public procurement.[23] The CJEU acknowledged that Member States are free to add to the Directive's list of qualifications what they think is associated with such public-policy issues as transparency and equality before the law of all potential participants.[24] Still, the court found the challenged provision of Greece's Constitution as going too far to bear on the scale of proportionality,[25] but ultimately muted the fact that the addition had been raised to the level of constitutional law by recalling as usual that:

> [I]t is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of national law with Community law or to interpret national law. The Court is, however, competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it.[26]

The CJEU thus found no incompatibility in the abstract between public procurement and the media.

The CJEU may have side-stepped the issue of Member States' constitutional identities that was honored in AG Maduro's opinion,[27] but for present purposes we owe some closer attention to Maduro's analysis of the matter. The Advocate General turned his analysis away from the issue of

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[21] CJEU, Case C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [2008] ECR I-09999. For a thorough analysis of the judgment's key issues, see Vasiliki Kosta, 'European Court of Justice Case C-213/07, Michaniki AE v. Ethniko Simvoulio Radiotileorasis, Ipourgos Epikratias' (2009) 5 Eur Constitutional L Rev 501.

[22] Council Directive (EEC) 93/37 on the coordination of procedures for the award of public works contracts [1993] OJ L199/54, arts 30-32.

[23] *Σύνταγμα της Ελλάδας* (Greece's Constitution) [1975], art 14(9).

[24] *Michaniki* (n 21), para 49.

[25] ibid, para 63. What weighted most for the CJEU was that at the basis of Greece's Constitution provision was:

> an *irrebuttable* presumption that the presence amongst the tenderers of a contractor who is also involved in the media sector is necessarily such as to impair competition to the detriment of the other tenderers.

ibid.

[26] ibid, para 51.

[27] CJEU, Case C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [2008] ECR I-9999, Opinion of AG Maduro, paras 30-33.

balancing legitimate interests against each other, and commenced a new debate on constitutional identity. He argued that identity respect essentially involves some recognition of bedrock values and principles of Member State origin that are related mostly to the specific range and scope of constitutionally enshrined rights and interests, thus according Member States an amount of discretion to define what constitutes their *nation-specific* legitimate interests; in Maduro's own words:

> The preservation of national constitutional identity can also enable a Member State to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement.[28]

AG Maduro explicitly referred to the *Omega* (and *Groener*) court in order to transpose its key legal underpinnings into its progeny by using a paradigm to point to the components of the Identity Clause in a coherent and comprehensible manner.[29] Notwithstanding the final outcome, Maduro was successful in grasping the underlying substance of the Identity Clause and the general parameters of a mechanism to enforce it. However, because neither *Omega* nor *Michaniki* presented the factual grounds typical of what the Identity Clause, according to the conception endorsed herein, is really about, they do not enable observers to be sure of where the boundaries of the Identity Clause actually lie. In analyzing the *Sayn-Wittgenstein* and *Runevič* judgments below, it will be possible to realize the benefit of the AG's shift of paradigm, and to discuss the parameters of the art 4(2) TEU's device more in-depth.

Michaniki, but more importantly *Omega,* was narrowly connected to the CJEU judgment in *Melloni,*[30] although here, too, constitutional identity is not expressly referenced. Stefano Melloni was an Italian businessman who, after being prosecuted for bankruptcy fraud, escaped his home jurisdiction by fleeing to Spain.[31] Although being aware of his scheduled trial before the Italian courts, Melloni opted to be represented by his lawyers all the way up to the Supreme Court.[32] Melloni was finally arrested in 2008 after being sentenced to ten years of imprisonment in Italy.[33] Faced with an extradition request, he argued before the Spanish authorities that, if the request was carried out, he would not be entitled to a retrial as a consequence of his *in absentia* conviction and thus his extradition to Italy should be made conditional upon acknowledgment of his right to appeal-against before the Italian courts.[34] The *Audencia Nacional* (High Court) dismissed his arguments, based primarily on the fact that his defense rights were not violated since he had been convicted *in absentia*, but not unrepresented.[35] The *Tribunal Constitucional* (Constitutional Court), to which he subsequently appealed, overturned the prior judgment. The court's reading of

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[28] *Michaniki* (n 21), Opinion of AG Maduro, para 32.

[29] ibid, fns 34-35.

[30] CJEU, Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] C114/12.

[31] ibid, para 13.

[32] ibid, para 17.

[33] ibid, para 14.

[34] ibid, para 16.

[35] ibid, para 17.

art 24(2) of Spain's Constitution, as demonstrated in its established case-law, required that the extradition of a person convicted in their absence should be made conditional on their right to challenge their conviction anew, setting aside the fact that they may have been represented before the court.[36] A preliminary question was then requested by the CJEU regarding the fact that art 4a(1) of the Framework Decision on the European Arrest Warrant (EAW FD)[37] did not provide for the possibility of refusing extradition on the grounds of a right to retrial in case of *in absentia* convictions.

The CJEU held that the EAW Framework Decision only allowed an executing state to refuse the surrender of persons convicted in their absence only if, first, they were ignorant of the schedule of their trial or they were not but voluntarily waived their right to attend it, being perfectly aware of the possibility that they might be convicted in their absence; and, second, they were not defended by means of representation by a lawyer, whether appointed by the accused themselves or by the state.[38]

But the most crucial question involved whether the executing state had any power, derived from art 53 CFREU or elsewhere, to extend deeper guarantees to the criminally accused ones than that which EU law had already afforded through its enactment of the EAW FD provisions.[39] The CJEU's answer was as effortless as possible and to an extent in contradiction to the *Omega* and *Michaniki* courts: Interpreting art 53 CFREU as conferring upon the Member States a power to deviate from EU law in order to deliberately afford their citizens more generous constitutional protection would seriously jeopardize EU law's principles of primacy and effectiveness.[40] The CJEU's findings are perfectly in concert with precedent: Whenever EU law embarks into harmonizing human rights protection in a specified policy field such as that of extradition in criminal cases, Member States are disqualified from granting a higher standard of safeguards, even such as raised to the constitutional level and nurtured by deep-rooted observance by national judicial authorities. *Melloni* might be appraised as engaging the normative predicate of the Identity Clause – that is, the legal necessity to search for Selective-Exit strategies in the first place in policy fields approximate to Member States' sensitivities. Still, the *Melloni* reference has failed to demonstrate in the multifaceted fashion illustrated in Chapter 3 if these Member States' sensitivities were indeed present in the context of any safeguards for the accused to ensure trial attendance, as well as what these sensitivities specifically looked like within the terms of a nation-specific narrative. I will search for the missing parts of that narrative in a case which, although it never made it to Luxembourg, nonetheless still holds as the most representative example of what the content of the Identity Clause is really about: the *HS2*.[41]

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[36] ibid, para 20.

[37] Council Framework Decision (EU) 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, art 4a(1).

[38] *Melloni* (n 30), para 42.

[39] ibid, para 55ff.

[40] ibid, para 63.

[41] See *infra* section VI. UK Constitutional Identity: Towards Placing Member-State Qualifications to the Primacy of EU Law.

Prior to the Lisbon Treaty, the CJEU had not judged explicitly upon the Identity Clause, at least, not in a comprehensive manner. Post-Lisbon, in contrast, EU law observers have been witnessing the dramatic growth of constitutional identity jurisprudence, but still the court's identity jurisprudence does not look like a *fait accompli*. As a consequence, after referring to post-Lisbon CJEU case-law on art 4(2) TEU, I will attempt to unpack the mysteries surrounding the Identity Clause's enforcement in the European context.

Both *Sayn-Wittgenstein* and *Runevič-Vardyn* evince that art 4(2) TEU can be successfully raised by Member States to elicit deviations from free movement rights and freedoms with respect to matters of civil status which fall within their exclusive jurisdictions. *Sayn-Wittgenstein* is a judgment delivered in response to a request for a preliminary ruling from Austria's *Verwaltungsgerichtshof* (Supreme Administrative Court).[42] The facts were the following: Ilonka (Fürstin von) Sayn-Wittgenstein, an Austrian citizen, was adopted by a German and took her father's surname which included a nobility title (*Fürstin von* (Princess of.))[43] This was found to be unlawful, nearly fifteen years after the addition of the title to her surname, as it was allegedly in violation of Austria's 1919 Law on the Abolition of Titles of Nobility.[44] As a consequence, Austrian authorities changed her surname on the civil register by removing the title of nobility, and this was challenged before domestic courts.[45] Sayn-Wittgenstein maintained that, as a German resident and as an adoptee of a German citizen, she was entitled to official recognition by Austrian authorities of her adoptive surname, including the nobility title, under which she held her German driving license among other things.[46] In contrast, the Austrian position was that her surname was unlawful under national law and that the German authorities had misapplied the law by according recognition to her title of nobility without applying the Austrian rule.[47]

The CJEU held that a personal (sur)name comprises a constitutive element of their identity and private life that is warranted pursuant to art 8 ECHR's right to respect for private and family life, home and correspondence.[48] It further held that a failure to recognize all elements of a (sur)name by public authorities after a long period of time has passed, may amount to a breach of the rights and freedoms enshrined in art 21 TFEU as such a failure would ultimately compel a person to use a multiplicity of (sur)names across the various EU Member States.[49] Accordingly, then, the CJEU investigated whether there were any justifications for such a rights limitation. The court deemed Austria's contention – that constitutional values, such as equality of treatment, had the challenged law on the abolition of nobility included into the corpus of constitutional law – to imply public policy considerations.[50] The CJEU admitted that whereas justifications based on public policy

[42] CJEU, Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693.

[43] ibid, para 20.

[44] ibid, para 25.

[45] ibid, para 26.

[46] ibid, paras 30-31.

[47] ibid, paras 32-34.

[48] ibid, para 52.

[49] ibid, para 71.

[50] ibid, para 81ff.

must generally be construed narrowly and be relied upon 'only if there is a genuine and sufficiently serious threat to a fundamental interest of society,'[51] there still existed a considerably broad margin of appreciation left to the Member States.[52] In this regard, the CJEU held that changing the surname of the applicant to abide by the terms of the law on the abolition of the nobility, which reflected Austria's past struggle with, and present commitment to, equality formed a legitimate basis for justifying restrictions of EU fundamental rights and freedoms.[53] Hence, the court concluded, there was no violation of art 21 TFEU.[54]

The CJEU's judgment in *Sayn-Wittgenstein* has earned momentum for two reasons: First, it helped clarify that art 4(2) TEU is a qualification – albeit an 'easy' and 'quiet' one – of the supremacy (or primacy) of EU law insofar as the CJEU referred to the obligations *derived* for the EU institutions by the Identity Clause, namely to actively respect national constitutional identities. Second, it embarked on a project of authoring a shortlist of features that can be drawn from the EU law's inherently vague terms as belonging to the Member States' constitutional identities, by mentioning – as the list's first ever member – 'the status of the State as a Republic.'[55]

On 2 June 2016, the CJEU delivered its judgment in *Bogendorff von Wolffersdorff*.[56] Nabiel Bagadi, a German citizen, changed his surname after adoption to Peter Nabiel Bogendorff von Wolffersdorff. Bagadi later moved to Britain, acquired British citizenship and voluntarily changed his full name to *Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff*.[57] The German authorities declined to recognize his new full name on the grounds that it included titles of nobility – *Graf* and *Freiherr* – which were prohibited by the German constitutional law.[58] The *Weimar* Constitution, directly, and the post-War *Grundgesetz*, by implication, both outlawed the previous practice of delivering titles of royalty and nobility, and mostly the ensuing privileges and immunities, to an individual, a family or their heirs.[59] But, as the *Grundgesetz* provided, hereditary titles acquired prior to its enactment were still permitted as part of a surname (eg the aristocratic parts *von* and *zu*), and these surnames could then be handed down legitimately to one's heirs, but by no terms were they taken as to denote the royal or noble status of their bearers.[60] Thus, in Germany there is still a number of people holding royal and noble titles as part of their surnames, but these are only shibboleths bequeathed to them by their ancestors.

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[51] ibid, para 86.

[52] ibid, para 87.

[53] ibid, para 94.

[54] ibid, para 95.

[55] ibid, para 92.

[56] CJEU, Case C-438/14 *Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe* [2016] OJ C287/8.

[57] ibid, para 15

[58] ibid, para 23.

[59] ibid, paras 3-4.

[60] *Verfassung des Deutschen Reichs* (Constitution of the German Reich (The *Weimar* Constitution)), art 109; in force pursuant to *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law of the Federal Republic of Germany) [1949], art 123(1).

The facts in *Bogendorff von Wolffersdorff* differ from those in *Sayn-Wittgenstein* from at least two perspectives in a way that may have implications for the constitutional identity considerations of each case. First, in *Sayn-Wittgenstein*, the Austrian constitutional law opted for a blind abolition of both new and old nobility titles, whilst in *Bogendorff von Wolffersdorff* only new nobility titles were outlawed.[61] Second, both the German and Austrian constituencies must have shared a common experience of bitter misgivings in sanctioning titles of royalty and nobility, but intriguingly to a differing extent as demonstrated by the fact that the two jurisdictions generated differentiated constitutional outcomes. In delivering its judgment in *Bogendorff von Wolffersdorff*, the CJEU first referred to the 1994 ECtHR's judgment in *Stjerna*,[62] in which the ECtHR found that there are indeed undisputable reasons urging an individual to seek to change their (sur)name and, therefore, public authorities are prohibited from dismissing a request for changing one's (sur)name merely because the change has been driven *by choice*.[63] Still, as expected, restrictions can be imposed on the individual's right to change their (sur)name insofar as these are intended to foster a legitimate cause such as the public interest.[64] The most important point made by German authorities, the CJEU held, was that the German rules on the abolition of nobility titles, and thus the refusal to recognize new such titles, were part of German public policy and intended to ensure equal treatment of all people before the law.[65] Such an objective, as pertaining to public policy considerations, can be considered as capable of justifying a restriction on the individuals' freedom to change their (sur)name voluntarily, and thus of their freedom of movement, only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[66] But what made things even more complicated was that within the German jurisdiction there were citizens still holding royalty and nobility titles, as a consequence of hereditary rule, without being subject to any interference by the public authorities, unlike the rest who could not possibly acquire such titles by choice. The CJEU wondered how that kind of differentiated prohibition on acquiring and maintaining royalty and nobility titles could have possibly contributed in bringing about the constitutional goal supposedly sought after – that is, equality before the law.[67] However, after it had identified all of the relevant parameters, the court handed over the case to the referring national court to deliver its judgment, concluding that:

> [T]he authorities of a Member State are not bound to recognise the name of a citizen of that Member State when he also holds the nationality of another Member State in which he has acquired that name which he has chosen freely and which contains

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[61] *Bogendorff von Wolffersdorff* (n 56), para 64

[62] ECtHR, *Stjerna v Finland* (1994) App no 18131/91 (ECHR, 25 November 1994) (holding that legal requirements can be established for changing one's surname to realize public policy goals, but the invocation of reasons of inconvenience on the part of the applicant cannot withstand any judicial scrutiny; still, national authorities are better placed to assess the relevant claims).

[63] *Bogendorff von Wolffersdorff* (n 56), para 56.

[64] ibid, para 65.

[65] ibid, para 61.

[66] ibid, para 66.

[67] ibid, para 77.

> a number of tokens of nobility, which are not accepted by the law of the first Member State, provided that it is established, which it is for the referring court to ascertain, that a refusal of recognition is, in that context, justified on public policy grounds, in that it is appropriate and necessary to ensure compliance with the principle that all citizens of that Member State are equal before the law.[68]

Next, the applicant in *Runevič-Vardyn*[69] was born in Vilnius as a Lithuanian citizen of Polish ethnic origin. The Polish version of her full name as it appeared in formal documents issued by the Polish authorities was (forename) *Małgorzata* (surname) *Runiewicz*. The Lithuanian version of her full name as it appeared in Cyrillic characters on her birth certificate was (forename) *Malgožata* (surname) *Runevič*. In 2007, she married Łukasz Paweł Wardyn, a Polish citizen. On the marriage certificate issued by the Lithuanian authorities, the husband's full name *Łukasz Paweł Wardyn* appeared in its Lithuanian form *LUKASZ PAWEL WARDYN* in Roman capital letters, without using Polish characters, whereas his wife's full name appeared as *MALGOŽATA RUNEVIČ-VARDYN*, that is, using Lithuanian characters which did not include the letter *W*. After unsuccessfully submitting a request that her full name appear on the birth and marriage certificates in its Polish form, she appealed to court.[70]

The CJEU held that the right to move and reside freely across the EU Member States and the right not to be discriminated-against may be applicable to any inconvenience caused by a refusal on the part of national authorities to amend the form of appearance of one's full name in official certificates issued by those same authorities.[71] Despite the fact that rules pertaining to civil status are typically rest with the Member States' exclusive jurisdictions, Member States must nonetheless, when exercising their own powers, observe EU law and in particular with the freedom of moving and residing freely across the territory of the EU.[72] The court specifically referred to art 22 CFREU which obliges the EU to respect its rich cultural and linguistic diversity. According to the court, safeguarding the official language by imposing rules governing the spelling of that language, which are also defended as components of their national identities according to art 4(2) TEU, can constitute, in principle, a legitimate cause able to justify restrictions on the rights of freedom of movement and residence provided for in art 21 TFEU.[73] If the refusal to amend the form of appearance of the applicants' names causes 'serious inconvenience' to them and/or their family, the Member States court should decide whether such a refusal deviates from the proper equilibrium between the Member States' interests concerning their official national language and

[68] ibid, para 84.

[69] CJEU, Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECR I-03787.

[70] ibid, paras 15-28.

[71] ibid, para 76.

[72] ibid, para 63.

[73] ibid, para 86.

traditions, and rights of nondiscrimination-against of the claimants on grounds of their nationality in exercising their freedom of movement and with respect for their private and family life.[74]

On 16 April 2013, the CJEU delivered its judgment in *Anton Las*.[75] The contested issue in *Anton Las* concerned a decree of Flanders, one of the three Belgian federal units, which required all cross-border working contracts to be drafted in Dutch, Flanders's official language.[76] The CJEU was charged with resolving the issue whether such a measure was consistent with the freedom of movement of workers as guaranteed by art 45 TFEU. The court held in particular that, while the above measure could have been justified by the objectives proposed by the Belgian government – a mix of reasons ranging from the protection of an official national language and of employees through to the effective supervision by central authorities – nevertheless the obligation imposed was found to be disproportionate and thus contrary to EU law.[77] What *Las* has added to the CJEU's case-law is that now it is not just the promotion of a single *national* official language of a Member State that deserves identity-respect, but even one of a specific *federal* unit of a Member State. The court identified the disproportionality on the fact that the penalty for not writing down a working contract in Dutch was nothing less than the nullity of that contract, thus undermining that the parties to a cross-border contract might be ignorant of Dutch.

The CJEU argued that, in general, EU law does not prohibit domestic measures that safeguard or even favor one, or multiple, official languages. It recapped that the EU is obliged to respect its Member States' linguistic diversity.[78] Pursuant to its findings in *Runevič-Vardyn*, the court also held that the respect for such linguistic diversity derives from the wider respect that the EU is obliged to accord to the national identities of its Member States according to art 4(2) TEU.[79] This reference is remarkable. Indeed, the court found that:

> According to the fourth subparagraph of art 3(3) TEU and art 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. In accordance with art 4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those States.[80]

Thus, *Anton Las* is noteworthy for a couple of reasons: First, because it held that the Member States' laws, independently of their nation-wide or purely regional ambit, are free under EU law to enforce obligations upon private agents intended to foster the use of official language and, second, because it signifies a more general trend towards acknowledging by EU law itself the value of sub-national communities. Indeed, there is a deep link between sub-national autonomies and

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[74] ibid, para 94.

[75] CJEU, Case C-202/11 *Anton Las v PSA Antwerp NV* [2013] C164/3.

[76] ibid, paras 9-15.

[77] ibid, para 25.

[78] ibid, para 26.

[79] ibid.

[80] ibid, para 26.

language. This is apparent in Belgium, but can also be traced in Spain and particularly in Catalonia, the Basque Country or certain parts of Italy. It is important to emphasize that although the recognition of Dutch as an official language of Belgium takes place at national level, the obligation to use this language to write down the employment contracts has its origin in a regional law, one whose validity was basically upheld by the CJEU, even though its precedence in this particular case was not. While the EU was, pursuant to the international law dogma, at first blind to any existing sub-national constituent parts of the Member States, this is now changing. In addition, the CJEU has started to revise its posture toward sub-national entities and adjusted its case-law so as to make room for at least some particularities, as best illustrated by the *Re Azores* case.[81]

Last, but not least, is the judgment delivered by the CJEU in *Coman* on 5 June 2018.[82] Adrian Coman was a Romanian citizen who in 2010 married Robert Hamilton, a US citizen, in Brussels. Upon their request for information on the process and further conditions under which Robert Hamilton could be granted permission to reside in Romania as Adrian Coman's husband, they were informed that Hamilton was disqualified, since the Romanian *Codul Civil* (Civil Code) had yet to provide for same-sex marriages. This led the couple to bring an application before Romanian courts.[83] An argument presented by the applicants was that the *Codul Civil* was unconstitutional since its failure to recognize same-sex couples as entitled to perform a marriage violated a number of constitutional provisions.[84] Romania's *Curtea Constituţională* (Constitutional Court) made a reference for a preliminary ruling to the CJEU, asking whether EU law compels a Member State, to which a same-sex couple relocates, to treat them as married – although that treatment is prohibited by national law – and consequently grant them family reunification rights.[85]

EU law allows EU citizens to move and reside freely across the Member States. Directive 2004/38, which applies to all EU citizens who move to a Member State other than their homeland, provides that they and their family members, are entitled to move and reside freely in another Member State, and lays down the conditions necessary for exercising that right.[86] The Directive's art 2(2) provides a list of family members who possess these entitlements including 'the spouse' of an EU citizen but stops short of further defining if a 'spouse' can be a person of the same sex too.[87] The question for the court was then whether members of a same-sex marriage should (or could) be properly treated as 'spouses' under EU law and hence be granted family reunification rights. The CJEU held that the failure of a Member State to recognize, for the purpose of granting family reunification rights, the same-sex marriage performed between an EU citizen and a third

[81] CJEU, Case C-88/03 *Portuguese Republic v Commission of the European Communities* [2006] I-07115.

[82] CJEU, Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] OJ C104.

[83] ibid, paras 9-17.

[84] ibid, para 14.

[85] ibid, para 17.

[86] Council Directive 2004/38 (EC) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

[87] ibid, para 33.

country citizen in another Member State during the EU citizen's residence therein, should be considered as a barrier to the freedom of movement.[88] Following the standard line of thinking prevailing in its free-movement case-law, the court proceeded to investigate potential justifications. It held that to hold a Member States obligated to typically recognize a same-sex marriage for the *purpose* of granting family reunification rights,

> does not undermine the national identity or pose a threat to the public policy of the Member State concerned [since] such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex.[89]

The court then concluded that a measure which amounts to an obstacle to free movement may be justified only if and insofar as it is consistent with the fundamental rights guaranteed by the CFREU, such as the right to respect for private and family life,[90] but stopped short of a more thorough analysis of the issue of whether private and family rights are afforded, pursuant to EU law, to same-sex couples.

III. The post-World War II Proliferation of Selective-Exit powers: The 'Birth Certificate' of the Identity Clause

In light of the previously examined judgments of the CJEU, it is apparent that the court has yet to develop a comprehensive theory of judicial review as far as the EU's duty to respect Member States' constitutional identities is concerned. In what follows I will attempt to decode the role of the Identity Clause by revisiting the historical circumstances under which it came up on the surface and was inserted in the Maastricht Treaty. In my survey, I draw heavily on Weiler's Exit/Voice explanation of the relationship between the EU and its Member States as well as on Lindseth's portrayal of European integration as an open chapter in an ongoing delegation of regulatory power toward the EU's supranational institutions. Weiler's contribution, on the one hand, uncovers the political impetus that has pushed the Member States to introduce the Identity Clause into the Maastricht Treaty; whereas Lindseth's analysis, on the other hand, adds the general parameters of a legal device necessary for implementing identity respect.

In the aftermath of World War II, millions of people were dead and millions more injured.[91] Thousands of cities, towns and villages across Europe were completely destroyed by bombings, leaving thousands of refugees and displaced persons across Europe. The European economy had collapsed, with almost 70% of its industrial infrastructure destroyed. Economic recovery throughout the world varied, though in general it was most vigorous in the United States, which produced

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[88] ibid, para 40.

[89] ibid, paras 46, 45.

[90] ibid, para 51.

[91] See generally Michael Geyer and Adam Tooze (eds), *The Cambridge History of the Second World War, vol 3: Total War: Economy, Society and Culture* (Cambridge University Press 2015).

roughly half of world's overall industrial output. The legacy of the war also included an expanding influence of the Soviet Union into eastern Europe and the global shift in power from Western Europe to two superpowers – the United States and the Soviet Union – that would soon confront each other in what is known as the Cold War. The United States sought to promote an economically robust and politically united Western Europe in order to contain the communist threat. This goal was realized using such instruments as the European Recovery Program which encouraged European integration. In a speech delivered at Harvard on 5 June 1947, the U.S. Secretary of State George C. Marshall proposed an ambitious plan to grant massive amounts of financial aid to war-torn European nations for their reconstruction, and to purchase raw materials and food.[92] The 'Marshall Plan,' as it became known, was intended to bring about economic and political stability, but Europeans themselves were primarily responsible themselves for organizing the institutional apparatus for channeling the American funds.

The idea of European integration had already appeared two decades ago in a speech delivered on 24 July 1929 by the French Foreign Minister Aristide Briand who proposed founding an organization which would gather European nations together in a 'federal union' to get over the turmoil. In a speech addressed to the members of the League of Nations two months later, on 9 September 1929, he said that:

> Among peoples who are *geographically* grouped together like the peoples of Europe there must exist a kind of federal link… Evidently the association will act mainly in the *economic* sphere… but I am sure also that from a political point of view, and from a social point of view, the federal link, *without infringing the sovereignty of any of the nations taking part*, could be beneficial.[93]

As perhaps anticipated, such a radical idea as that of a 'United States of Europe' met with suspicion from European governments. It was only in the midst of World War II that Britain's leader, Sir Winston Churchill, publicly suggested founding a 'Council of Europe' in a BBC radio broadcast.[94] The Council of Europe was configured at the Congress of Europe held at the Hague in 1948. The competing approaches were pooled together through the adoption of a Committee of Ministers to represent governments, and a Consultative Assembly to represent parliaments. The Council of Europe's dual structure, combining elements both *inter-governmental* and *inter-parliamentary*, was later to be copied, not only for the North Atlantic Treaty Organization and the Organization for the Security and Cooperation in Europe, but for the European Communities as well. The Council of Europe formally came into existence on 5 May 1949 through the enactment of the Treaty of London, and focused primarily on values – human rights and democracy – rather than on the economic sphere. Still, it prompted great hopes of further integration even though at

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[92] The 'Marshall Plan' speech at Harvard University, 5 June 1947 <https://www.oecd.org/general/themarshallplanspeechatharvarduniversity5june1947.htm> accessed 22 October 2022.

[93] Richard Nelsson (comp), 'Aristide Briand's plan for a United States of Europe – archive 1929' (*The Guardian*, 5 September 2019) <https://www.theguardian.com/theguardian/from-the-archive-blog/2019/sep/05/aristide-briands-plan-for-united-states-of-europe-september-9> accessed 19 October 2022 (emphasis added.)

[94] Derek W. Urwin, *The Community of Europe: A History of European Integration since 1945* (Longman 1995 2nd ed) 29.

the time it was not envisaged as a forum where sovereign nations were bound by any sense of supranational commitments.

The process of European integration formally began with the Schuman Declaration delivered on 9 May 1950, named after the French Foreign Minister Robert Schuman. Its primary purpose was to render 'war between France and Germany… not merely unthinkable, but materially impossible.'[95] Historians have discerned more sophisticated purposes as well. Germany, for instance, aimed at normalization after the Nazi nightmare by anchoring the Federal Republic firmly into the West.[96] For France, there was the postwar urgency of gaining better access to German resources, thereby saving the Monnet Plan, the cornerstone of postwar French modernization.[97] In legal terms, the Schuman Declaration set in motion a process of power delegation to allow the Monnet Plan's public-welfare goals to be realized at the supranational level, as it became apparent that these goals – national reconstruction – were not realizable domestically.[98]

The impetus for a European Coal and Steel Community (ECSC) was driven by Jean Monnet as the lowest common denominator for the two rival nations, France and Germany, to agree upon, with a vision of further expanding their cooperation into more policy fields in the future. Six nations, France, Germany, Italy, and the Benelux countries – Belgium, the Netherlands, and Luxembourg – created the ECSC as 'a first step in the federation of Europe.'[99] From that seed has emerged over half a century of expanding centralization in Europe. The ECSC created a free-trade area for a number of key economic and military resources: coal, coke, steel, scrap, and iron ore.[100] For the ECSC's daily management, the Treaty established a High Authority to administrate, a Council of Ministers to regulate, a Common Assembly to run the policy-making, and a Court of Justice to interpret the Treaty and resolve any disputes.[101] A series of further international instruments, based fundamentally on the ECSC model, led eventually to the creation of the European Union.

The Schuman Declaration signaled a crucial break with governance on the national level in Western Europe.[102] In the original French proposal, the High Authority was intended to operate as an autonomous regulatory agency that would both possess normative power delegated from national parliaments and be liberated from national legitimation authorities.[103] In opposition were primarily the United Kingdom and the Benelux.[104] The latter would accept a governing board

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[95] The Schuman Declaration in Paris, 9 May 1950 <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en> accessed 21 February 2023.

[96] Peter L. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-state* (Oxford University Press 2010) 92 (citing Alan S. Milward, *The Reconstruction of Western Europe 1945–51* (University of California Press 1984) 475).

[97] ibid.

[98] ibid.

[99] The Schuman Declaration in Paris, 9 May 1950 (n 95).

[100] Treaty establishing the European Coal and Steel Community (Paris, France; 18 April 1951).

[101] ibid.

[102] Peter L. Lindseth, *Power and Legitimacy* (n 96) 98.

[103] ibid, 98.

[104] ibid, 98-99.

comprised of public figures designated by the member governments, as well as a consultative committee that would represent the civil society.[105] In addition, they agreed on the establishment of a Council of Ministers that would politically oversee the governing board, as well as of a Court of Justice.[106] France, on the other hand, was only willing to concede on the issue of establishing a quasi-parliamentary assembly empowered, not to adopt regulations, but only to control the process in a more limited fashion by way of checking on the administration of the whole enterprise rather than its policy-making.[107]

Therefore, what culminated as the Treaty of Paris was a political settlement between France and the Benelux reflecting, first, the *autonomous* character of the ECSC and, second, its subjection to *oversight* by the Member States' executives.[108] In that context, it has been argued that the negotiations over the ECSC's governing institutions revolved around a crucial question about the nature of *supranationalism* – itself a term invented by Monnet – which focused on the High Authority's legitimacy and ideal supervision.[109] On the one side, there was Monnet who advocated that the source of the High Authority's powers were national parliaments – the source of sovereign powers domestically as well.[110] The High Authority's legitimacy flowed from the parliamentary transfer of sovereign power, which meant that oversight should ultimately rest upon the ECSC's Parliamentary Assembly. On the other side, there were the Benelux countries, which asserted that, since the High Authority assumed its competences through an international instrument reached by national executives, it was accountable exclusively to the latter.[111]

Professor Peter Lindseth argues that each of these seemingly conflicting strands which showed up during the ECSC negotiations were perfectly compatible with each other and have ever since been traceable in the heart of what he considers as 'the postwar constitutional settlement.'[112] On the national level, the ECSC was built on a *traité-cadre*, a form of enabling law involving delegations of regulatory power to supranational institutions. Although an act of parliament was still necessary for such delegations to go through, any similar framework laws, once adopted, shifted to oversight by national executives alone, who were already considered pursuant to the terms of national constitutional law to be responsible as overseers of national administration for domestic issues.[113]

Professor Lindseth distinguishes a further unique characteristic of the ECSC system. What national executives really sought and finally achieved with the institutionalization of a Council of Ministers was, in many respects, an indirect extension of the considerable policy-making

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[105] ibid.

[106] ibid, 99.

[107] ibid, 100.

[108] ibid.

[109] ibid, 103.

[110] ibid.

[111] ibid, 104.

[112] ibid.

[113] ibid, 104.

autonomy they enjoyed at home against parliamentary oversight.[114] In other words, they sought and managed to liberate themselves of national-level parliamentary interference with the law-making process in specific fields – the coal and steel industries for starters.[115] The most intriguing fact, however, is that national executives assumed their powers under art 95 ECSC, the Treaty's *Necessary and Proper Clause*, to expand their regulatory reach to issues related to, but properly lying *outside* of, the coal and steel markets; free from onerous parliamentary procedures and subject only to a unanimity rule (of, at the time, just six partners) in decision-making.[116] Things would change dramatically in the years to come, when the Member States realized that a unanimity rule in decision-making ultimately led to indecision.

Last, the ECSC negotiations also manifested the near-impossibility of separating the allegedly technical domain from the political one.[117] The European Defense Community fiasco of 1954 would warn Europhile politicians that the more overtly political the policy-field to integrate, the more cautious they should be about their delegation ambitions, and the stronger the political demands for tight control by national agents.[118] The lessons learned would be tenaciously followed during the forthcoming EEC negotiations.

Soon after the fiasco of the European Defense Community, Belgian politician Paul Henri Spaak was tasked by the 1955 Messina Conference to report on a customs union.[119] In 1956, Spaak led the Intergovernmental Conference on the Common Market and Euratom, which paved the way for the subsequent 1957 Treaty of Rome. On 25 March 1957, the six ECSC member states signed two Treaties that established the European Atomic Energy Community (Euratom)[120] – which was designed to facilitate cooperation in atomic energy – and the European Economic Community (EEC).[121]

The EEC created a common market intended at eliminating as many obstacles to the free movement of goods, services, capital, and labor as possible, the prohibition of most public policies or private agreements with anti-competition effects, a common agricultural policy (CAP), and a common external trade policy. The EEC Treaty required Member States to eliminate any relevant domestic laws and regulations. In particular, it radically restructured tariff and trade policies by eliminating internal tariffs.[122] It also required that governments eradicating regulations favoring their national industries.[123] The EEC Treaty called for common rules on anticompetitive activity and

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[114] ibid, 105.

[115] ibid.

[116] ibid.

[117] ibid, 106.

[118] ibid, 108.

[119] Derek W. Urwin, *The Community of Europe* (n 94) 74.

[120] Consolidated Version of The Treaty establishing the European Atomic Energy Community [1957] OJ C327/1.

[121] Consolidated Version of the Treaty establishing the European Economic Community [1957] OJ C340/173.

[122] John Gillingham, *European Integration, 1950-2003. Superstate or New Market Economy?* (Cambridge University Press 2003) 53.

[123] Derek W. Urwin, *The Community of Europe* (n 94) 79-80.

for common inland transportation and production standards.[124] Last, it created the European Social Fund, which was intended to boost working opportunities by facilitating workers' flexibility.[125]

The EEC shared with the ECSC a common 'operating system': a Commission, a Council of Ministers, a Parliamentary Assembly, and a Court of Justice.[126] To consult the Commission and the Council of Ministers on a broad range of policies, the EEC Treaty created an Economic and Social Committee.[127] In 1965 the EEC signatories agreed on the Brussels Treaty which merged the EEC and Euratom Commissions and the ECSC High Authority into a single European Commission, and so also with the Councils of Ministers.[128] The EEC, Euratom, and the ECSC – referred to collectively as the European Communities – were later to become the EU's primary institutions.

Between the ECSC and the EEC Treaties there was, however, a crucial but invisible difference. The power balance in the EEC formally shifted into the hands of the Council of Ministers, which assumed final authority in most areas of supranational law-making.[129] Throughout the negotiations, any reference to supranationalism as a federalist-like ideal behind the Community structure would be strenuously *avoided* in favor of politically less suspect ideas such as that of functionalism.[130] Instead, it was a sense of supranationalist enthusiasm that formally accompanied the vast amounts of power delegations to the Community level.[131] Therefore, Member States recognized that certain institutions – primarily the European Commission and a Court of Justice – would be necessary, not as pillars of a federal Europe, but as guardians of the narrowly defined policy fields of economic integration granted the EC institutions through the Treaty of Rome.[132]

However, these early stages of European integration were not unmarked by a set of paradoxical developments. Legal scholars, on the one hand, characterized the period from the ECSC Treaty until roughly the mid-1970s as one in which the European Communities developed with unparalleled enthusiasm toward more and more supranationalism, whereas political theorists as one leading toward more and more intergovernmentalism.[133] Professor J. H. H. Weiler attempted to overcome the paradox in a famous 1988 Yale Law Journal essay.[134] Transposing Albert Hirschman's theory of Exit/Voice equilibrium in economics and politics into the European legal and political

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[124] ibid, 80.

[125] ibid.

[126] ibid, 81-84.

[127] ibid, 82.

[128] Treaty establishing a Single Council and a Single Commission of the European Communities (Merger Treaty) OJ P152/2.

[129] Peter L. Lindseth, *Power and Legitimacy* (n 96) 110.

[130] ibid.

[131] ibid.

[132] ibid, 111.

[133] Joseph H. H. Weiler, 'The Transformation of Europe' in Miguel Poiares Maduro and Marlene Wind (eds), *The Transformation of Europe: Twenty-five Years on* (Cambridge University Press 2017) 8 (first published as Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale L J 2403).

[134] Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale L J 2403.

context,[135] Professor Weiler suggested convincingly that the EU's foundational period was marked by the closure of what he termed 'Selective Exit' producing negative consequences for Member States' 'Voice.'[136]

In Hirschman's theory, *Exit* is the mechanism of leaving an organization in case of unsatisfactory performance, whereas *Voice* is the mechanism of intra-organizational improvement and retrieval.[137] In general, increased organizational input for *Voice* relieves the pressure for *Exit* output and can lead to more productive means of self-correction. Adversely, the closure of *Exit* leads to calls for enhanced *Voice*.[138] Hirschman's formulation, Weiler suggests, may be equally applicable to membership behavior in any organization, including a supranational organization *par excellence*, the European Communities.[139] From the European perspective, 'Total Exit' is equal to withdrawal, Brexit being its only example so far; 'Selective Exit' implies selective derogation from Community rules. Weiler's proposition is that the closure of both Total and Selective *Exit* has called for empowered *Voice*. Did that shift to empowered *Voice*-inputs actually follow within the ongoing European project? My own proposition throughout the remainder of this chapter is that that shift has been realized by means of the inception and use of the Identity Clause.

To sum up, the paradox centers around the fact that Member States did not, in any obvious way, resist supranational institutions becoming more and more empowered. The Weilerian solution to the paradox, I argue, coupled with Lindseth's presentation of the primarily delegational nature of supranational institutions, has direct implications for the emergence of the Identity Clause's Maastricht and subsequent versions. Now, I will return to Weiler's analysis of how Member States ended up with a complete lack of *Exit* outputs without being compensated with stronger *Voice* inputs; a situation that, I contend, ultimately led them to a political move, that is to push toward the insertion into the Maastricht Treaty of the Identity Clause as a *Voice*-empowering mechanism.

Starting in the early stages of European integration, and continuing well into the 1970s,[140] the CJEU delivered a series of landmark judgments which rendered the relationship between Community and Member State law indistinguishable from similar relationships within a federal state.[141] In a judgment delivered as early as 1963 in the case of *Van Gend en Loos*, the CJEU declared that Community law is directly effective within its Member States. Direct effect means that both the primary and, under certain conditions, the secondary Community law shall be applied in judicial cases before national courts if they are sufficiently clear and precise, and do not require

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[135] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 9 (referring to Albert O. Hirschman, *Exit, Voice, and Loyalty Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1972.)

[136] ibid, 10.

[137] Albert O. Hirschman, *Exit, Voice, and Loyalty. Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970) 30ff.

[138] ibid, 88-92.

[139] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 9.

[140] ibid, 10. The constitutionalization of the European legal order may be an ongoing project pending until our days, but most essential constitutional principles of EU law were already in place if not yet perfectly elaborated during as early as well the 1970s.

[141] ibid.

implementing measures by national authorities.[142] *Van Gend en Loos* concerned a customs duty imposed on the importation of *urea formaldehyde* from Germany into the Netherlands, contrary to Community law on the free movement of goods.[143] A preliminary reference was made by a Dutch court about whether Treaty provisions could be directly invoked by a private litigant before a national court.[144] The normal presumption of public international law has traditionally been that it is the Member States' constitutions that are responsible for determining both the way and the extent to which they are able to domesticate their international obligations, notwithstanding the possibility of international instruments intending to bestow rights directly to individuals.[145] The typical remedy under public international law would be an interstate claim only.[146]

But public international law concepts were not good enough for the CJEU. In its landmark decision, the court argued that the Community objective of establishing a common market implied that at stake was, 'more than an agreement which merely [created] mutual obligations between the contracting states.'[147] As the CJEU has now famously declared:

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[148]

A more modest position would have been sufficient for resolving the case at hand,[149] but the CJEU – substantiating its reasoning on the preliminary reference procedure and the place of the individuals within the Treaty system – sought to make a loud declaration of Community law's differentiation from ordinary international law instruments.[150] The shift to the individuals who willingly but silently assumed the role of 'guardians' of Community law's consistency through the dramatically increasing numbers of litigation,[151] coupled with the principle of supremacy (or primacy) of

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[142] ibid; Stephen Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 170.

[143] CJEU, Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 00001.

[144] ibid.

[145] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 11.

[146] ibid.

[147] *van Gend & Loos* (n 143), para II.B.

[148] ibid.

[149] Stephen Weatherill, *Law and Values in the European Union* (n 142) 171.

[150] ibid.

[151] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 11.

Community law declared by the court a year later, would make Community law permeate into national law 'for real.'

Unlike most federalist constitutional settings, the EU Treaties have never included an express manifestation of a Supremacy Clause.[152] The vacuum left by governments was going to be filled by the CJEU in its landmark judgment delivered in 1964 in the case of *Flaminio Costa v. ENEL*.[153] The ruling in *Costa/ENEL* was on a preliminary reference made by an Italian court. The claimant, *Costa*, was an Italian citizen who possessed an amount of shares in the Italian electricity company.[154] To oppose Italy's efforts at nationalizing it, he asserted that the creditor for his bill was still *Edisonvolta*, a private company, rather than its successor nationalized company, *ENEL*.[155] Costa argued that that nationalization violated the EEC Treaty provisions.[156] The Italian *Corte costituzionale* (Constitutional Court) insisted on the traditional rule of statutory interpretation of *lex posterior derogat priori* which favored the later-in-time statute of nationalization over the earlier EEC Treaty provisions.[157]

Although the CJEU found that the claimant had no standing to sue the Italian government based on a Treaty provision which was not, under the *Van Gend en Loos* test, directly effective and thus could not be directly invoked by individuals; it did hold that Community law prevails over national law, even if the latter was subsequently enacted. The formulation of its now well-known argument ran as follows:

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[152] *But* see Declaration 17 concerning primacy [of EU law] as part of the Declarations annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 which reads that:

> 17. Declaration concerning primacy
>
> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.
>
> The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):
>
> 'Opinion of the Council Legal Service of 22 June 2007
>
> It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/641) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.'

Consolidated Version of the Treaty on European Union OJ C326/346 (citation omitted.)

[153] CJEU, Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR I-587.

[154] ibid, pt I, ECR I-588-589

[155] ibid, pt II, ECR I-589.

[156] ibid.

[157] ibid.

> As opposed to other international treaties, the Treaty instituting the EEC has created its own order, which was integrated with the national order of the Member States the moment the Treaty came into force; as such it is binding upon them. In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the Member States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves. The reception, within the laws of each Member State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the Member State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity.
>
> …
>
> It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.[158]

To be sure, in *Costa/ENEL*, too, the CJEU could have certainly circumscribed its reasoning within the borders of public international law to reach a fair resolution for the dispute. But it did not – and very much so on purpose. The consequence was that, through judicial *fiat*, Community law underwent a 'metamorphosis' and became domesticated into the Member States' jurisdictions merely by virtue of the entry into force of its Treaty provisions. Meanwhile, under the CJEU's own terms, it did not depend for its entry into force on national constitutional law over which, the court would later find, it is also supreme.[159]

Supremacy (or primacy) and direct effect of Community law are cornerstones of the European structure, but would not really serve their cause if Community institutions in the first place lacked

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[158] ibid, ECR 594.

[159] CJEU, Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 3 ECR 1134 (holding that Community measures or their effect within the Member States' jurisdictions cannot be judged against the level of protection of human rights afforded by that Member State's Constitution); see also CJEU, Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 (reaffirming that EU law takes precedence over Member State law even if that is subsequently enacted and further holding that all Member State courts – not least lower ones – are under an obligation to apply EU law even at the cost of setting aside any contrary legal obligations of their native jurisdictions, notwithstanding the fact that national constitutional law may reserve such powers for a constitutional or supreme court); CJEU, Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 (holding that besides that the EU Directives could not be interpreted as creating obligations for individuals, Member States' courts are nevertheless under an obligation to ensure fulfillment of the result envisaged by such Directives, in the particular case at hand by interpreting national law such as to preclude any other grounds of nullity of contracts other than that provided by the EU Directive itself).

any powers necessary to fulfill their obligations. The issue of implied powers emerged in 1970 when the CJEU in *ERTA* held that the Treaty provisions should be interpreted as implying an external treaty-making power that could not have possibly been deduced by their wording alone.[160] The key facts were the following.[161] Negotiating a position for an international agreement, Member States were convinced that the proposed European Agreement concerning the work of crews of vehicles engaged in international road transport (*ERTA*) rested with the Member States' jurisdiction. The European Commission sued the Council before the CJEU for breach of Community law. The court read between the lines of the Treaties and came up with a rule of interpretation under which powers to act would be implied in *favor* of the Community if that was necessary for achieving the legitimate goals pursued by it.[162] To reach its conclusion, the CJEU presupposed an obligation to pay due respect to 'to the whole scheme of the Treaty no less than to its substantive provisions,'[163] leading up to the proposition that external treaty-making powers 'may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.'[164] In no uncertain terms, the CJEU also said that:

> to the extent to which [EC] rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the [EC] institutions, assume obligations which might affect those rules or alter their scope.[165]

The court thus tied inseparably the permissible range of Community law with the exigencies of its (external) performance.

ERTA's central point was the determination of the CJEU to substitute the typical interpretive rule of public international law under which treaty provisions are to be interpreted as much as possible to minimize any potential clash with state sovereignty for a teleological approach of constitutional origin favoring mostly Community powers.[166] Slowly, but decisively, the CJEU embarked upon a project of developing a jurisprudence that would restrict Member States' power to act at national level on policy fields shared with the EU. In a series of judgments delivered during the 1970s, the CJEU adopted two doctrines that complemented implied powers. In a number of policy fields, the CJEU held, Community powers were *exclusive*, which meant that the Member States lacked any power whatsoever to act independently of them, whether or not their exercise of power actually conflicted with – and thus would later be rendered void under the supremacy of –

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[160] CJEU, Case C-22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECR 263.

[161] *ERTA* pt I, ECR 265-266.

[162] ibid, para 17.

[163] ibid, para 15.

[164] ibid, para 16.

[165] ibid, para 22.

[166] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 14.

Community law or not.[167] In other policy fields, Community powers, insofar as they were enacted into laws, barred – ie, they *preempted* – any Member State action under certain conditions specified by CJEU's jurisprudence.[168] The ramifications of the doctrine of implied powers combined with exclusivity and preemption were, as Weiler put it, that, 'Where a field had been preempted or [was] exclusive and action [was] needed, the Member States [were] pushed to act jointly;'[169] but with 'jointly' in the 1970s being equal to 'unanimously' among 9 and toward the end of the decade among 12 Member States.

Judicial 'constitution-building,' with supremacy, direct effect, and implied powers as its pillars, would not be easily digested by Member State agents if power at the Community level could have gone unchecked. Therefore, the CJEU was driven to assert its own power of reviewing Community law for violation of human rights, adopting as the criteria for its review – absent a Community Bill of Rights – those derived from the constitutional traditions of Member States as well as from international human rights instruments to which these same Member States were signatories.[170] There was, in addition, a call for cooperation with the Member States' courts, which could swallow much more easily the whole constitution-building enterprise if it appeared to be conditional upon some standard of human rights protection.[171] Member States had already begun in a series of judgments dating as far back as the 1970s to declare that they could go so far as to even invalidate Community law if it failed to exhibit human rights protection to a comparable level over the standards afforded by national constitutional law. This line of jurisprudence will be further analyzed later.[172]

One may protest, Weiler admits, against the idea that that quadruple set of constitutional doctrines is indeed unique to a federalist polity. International law is after all supreme over national law, direct effect or at least self-execution is not a device wholly unknown to it, and implied-powers also presents an interpretive tool frequently applied by it. What has been unique to European integration during the foundational period was that Community law provided both its self-enforcement and the requisite judicial remedies.[173] The ability of either the European Commission or of individual Member States to bring an action against each other for breach of Community law obligations within a mandatory and exclusive forum for the settlement of such disputes sets, Weiler argues, the Community apart from most ordinary international organizations.[174] The defects of the system of judicial review at Community level were remedied to a large extent by the collaboration between the Community and the Member States' courts through a preliminary ruling requested by the latter, the consequence of which collaboration was nothing less than their fusion into a 'unitary'

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[167] Stephen Weatherill, *Law and Values in the European Union* (n 142) 24.

[168] ibid.

[169] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 15.

[170] ibid, 15-16.

[171] ibid, 16.

[172] See *infra*.

[173] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 17-18.

[174] ibid, 18.

system of judicial review.[175] Professor Weiler concludes that the constitutionalization of Community law, combined with the system of judicial remedies, built up a truly self-sufficient regime at the Community level, relieved from the strictures of state responsibility so reminiscent of standard international law. With those features excised, Community law would become something really 'new.'[176]

The closure of *Exit* as a consequence of the judicial constitutionalization of the EC Treaties meant that Community obligations were 'for real.' Ever since the foundational period, Member States have found it difficult, if not impossible, to avoid their Community obligations. As already pointed out, however, if the *Exit* option is shut, the need for *Voice* strategies grows. Indeed, Member States responded to the seismic events of the period by finally recovering Community decision-making, especially after the 1965 Empty Chair Crisis.[177] There are some possible explanations for the developments that occurred during that period. It might be argued, for example, that the CJEU's wild moves toward the constitutionalization of the Community legal order intended to counterbalance the perceived dangers presented by intergovernmentalism. In other words, integrating the legal developments at the supranational level was a reaction against the disintegrating effects of the political developments.[178] Second, the CJEU's jurisprudence would ultimately succeed or fail depending on its reception by the Member States' supreme or constitutional courts.[179] The real question then is why national courts were that responsive to the new judicial architecture built up incrementally by the CJEU even though they – apparently, at least – had much to lose as well from the constitutionalization of the Community legal order.

But the most important development of the period was that since international law was 'real,' in the sense of being mandatory not only on, but also within, the Member States, and since there were effective judicial mechanisms to enforce it, decision-making suddenly *mattered* so much and, this, it had to remain within the reach of Member States themselves.[180] This intriguing development within the Community in its foundational period was accompanied by the strengthening not of the Member States in general but of their executives in particular.[181] The transformations in the decision-making process meant that it was not simply the Voice of Member States that was empowered, but the Voice of their *governments*.[182] Thus, the Treaty itself sowed the seeds for the democracy deficit – should there be one – by making the executive branch the legislature *par excellence* in the Community.[183] The net result was that Member States' executives ended up, or more reasonably earned their place in, legislating at the Community level, often beyond any

[175] ibid, 19.

[176] ibid, 22.

[177] ibid.

[178] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 25.

[179] ibid, 16.

[180] ibid, 26-27.

[181] ibid, 30.

[182] ibid, 31.

[183] ibid.

tangible form of parliamentary control.[184] But most crucially, the introduction of Qualified Majority Voting (QMV) as the standard voting rule would threaten the ongoing *Voice*-retrieving campaign.

In the 1970s and 1980s, the EEC enlarged to include the United Kingdom, Ireland, Denmark, Spain, Greece, and Portugal. That period's political and economic encounters included an oil crisis and new forces over the global competition as the United States began exercising more liberal policies in international trade.[185] The oil crisis in particular exposed a Community that was unable to develop a common position.[186] The Single European Act represented (SEA) a big step toward the goal of facilitating a common Community Voice by empowering the European Council, a body comprised by the leaders of all Member States. The Council of Ministers was understood as the executive branch of a government whereas the Council's president was also known as the 'president of the EC.' Thus, not only did the SEA introduce far-reaching institutional changes, it also pulled toward the political integration of Europe. Hence, the SEA signaled a big step forward toward establishing what is now held as the European Union.

The most fascinating aspect of the SEA was the timetable it set for establishing a common market in 1993.[187] To achieve that goal, the SEA expanded the issues for which the Council could come to decision by a qualified majority instead of unanimity. This made decision-making much easier and meant that the frequent delays inherent in the quest for unanimity among the then 12 Member States could be circumvented. Unanimity was abandoned regarding any laws that were part of the project to establish the single European market, with the exception of issues of taxation, free movement of persons and rights and interests of workers.[188] The SEA may have been instrumental in the institutional efforts to cope with the changing nature of the Community after it had embraced so many new members, but its downside was crucially that it made the Community less accountable to the Member States by making it easier for the EU (*read*: Member State governments) to pass a law without agreement of (or concessions from) all.

During that same period, however, there was another legal development lurking below the surface: The principle of enumerated powers as a barrier to EC material jurisdiction (absent Treaty revision) nearly extinguished.[189] The constitutional revolution of the 1960s, as already mentioned, depended on a community of trust in which the CJEU and Member States' courts assumed complementary roles.[190] That relationship began to fade away when the CJEU, during the 1970s and 1980s, gradually abandoned the assumption that the EC jurisdiction should be limited to its Treaty-

[184] ibid.

[185] Derek W. Urwin, *The Community of Europe* (n 94) 160.

[186] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 32.

[187] Derek W. Urwin, *The Community of Europe* (n 94) 236.

[188] ibid, 232.

[189] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 36.

[190] ibid, 55.

designated policy fields.[191] As Koen Lenaerts put it, 'There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.'[192]

Professor Weiler has discerned a number of categories of what he calls 'jurisdictional mutation,' that is, the result of substantial developments in the division of competences without any resort to Treaty amendment whatsoever.[193] Besides 'extension' which in combination with 'incorporation' refers to creating a judge-made higher law for the Community and applying it to Member States acts,[194] as well as 'expansion' which is the most radical form of jurisdictional mutation and hence the easiest receiver of constitutional identity allegations;[195] 'absorption' presents perhaps the most serious battleground of the identity discourse. *Absorption* is a kind of jurisdictional mutation which takes place, intentionally or not, when the Community institutions, in exercising substantive legislative power conferred on the Community, penetrate certain policy fields lying outside the Community's explicit jurisdictions.[196] Professor Weiler refers to the facts in the CJEU's paradigmatic decision in *Casagrande* where at dispute was whether the children of migrants, who were admitted to schools under the same conditions as the children of native workers, were also entitled to exactly the same educational benefits.[197] By addressing the legal question as if it were 'in an *empty* jurisdictional space with no limitations on the reach of Community law,'[198] the court held that:

> it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect… [national] measures taken in the execution of a policy such as that of education and training.[199]

The court's holding may be that Community measures are sufficiently capable to absorb and subsume national measures, even in policy areas over which the Community wholly lacks any power to act. But one cannot help being suspicious over the risk of finding themselves engaged in a vicious circle by wondering if it was the Community measure that penetrated any Member State policy fields otherwise withheld; or if it was the national measure that penetrated any EU policy fields otherwise delegated. As I will demonstrate later, difficulty, if not impossibility, in line-drawing is perhaps an inherent defect of non-unitary governmental systems.[200] Consequently, instead of thinking how to overcome the difficulty, it would be more astute to live with the difficulty, and

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[191] ibid, 57.

[192] Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' [1990] 38 Am J Comp L 220.

[193] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 38.

[194] ibid, 38-40; 44-45.

[195] ibid, 45-51.

[196] ibid, 40.

[197] CJEU, Case C-9/74 *Donato Casagrande v Landeshauptstadt München* [1974] ECR 773.

[198] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 42 (emphasis added).

[199] *Casagrande* (n 197) para 12.

[200] See *infra* section IV. Towards a Theory of Judicial Review of Member States' Constitutional Identities.

with its consequences, and struggle to treat any burgeoning disarrays otherwise than through line-drawing attempts.

In light of the Member States' immediate response to the constitutional transformation of the EC during the previous period by restoring control of Community governance, and the fact that a careless approach to enumeration would indeed seem to have resulted in a reinforcement of the Community at the expense of the Member States, we would expect that strict enumeration would persist as sacrosanct.[201] But it was not. We may identify a couple of reasons why the principal agents of European integration were not engaged in any vigorous defense of the status quo. First, the momentum of the 1970s was directed at a range of secondary policy fields such as environmental policy, consumer protection, energy, and research. Although these did not alarm the Member States because of their reduced significance (at the time), each of them required 'wild' of the Necessary and Proper Clause and represented part of the brick-by-brick demolition of the wall circumscribing Community and Member State competences.[202] Second, if the governments could monitor each legislative act, from inception through adoption and then implementation, why would they resist a system in which any existing guarantees against unchecked jurisdictional mutation nearly disappeared?[203] Quite the opposite: they had abundance of reasons to transfer more and more powers to the Community level to escape the limitations of their Parliaments.[204]

On top of these developments, the Member States entered a brand new post-SEA era, one in which they faced perfectly binding norms (both *on* and *within* the Member States), often adopted more or less against their will but, more often than not, by determined Member States' executives.[205] Dissenter Member States, confronted not only with the powerful constitutional 'weight' of measures adopted against their will, itself a by-product of their shift to QMV, but also with the operation of that normativity in a vast number of areas of policy fields, lacked any possible avenue to channel out their potential disagreement, other than through recourse to strategic non-compliance, or what Weiler has aptly termed as *Selective Exit*.[206] If the *Voice*/*Exit* equilibrium was suffering because of a serious decline in the Member States' individual *Voice*, the pressure clearly forced a shift to strategies of *Exit* which in the Community context – with the dramatic exception of Brexit – means selective (dis)application rather than wholesale abandonment.[207] In my view, this narrative describes best the circumstances prevalent during the 1990s that ultimately led, on the one hand, the Member States' governments to insert into the Maastricht Treaty the Identity Clause – ie a Selective-Exit *option* – and, on the other hand, the Member States' courts to start declaring the possibility of constitutional-identity exceptions to EU law – ie to exercise a Selective-Exit *right*.

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[201] Joseph H. H. Weiler, 'The Transformation of Europe' (n 133) 36.

[202] ibid, 53.

[203] ibid.

[204] ibid.

[205] ibid.

[206] ibid, 70.

[207] ibid, 72.

With the Treaty on European Union, put into force by the Treaty of Maastricht in November 1993, the Member States appeared to be embarking on a far-reaching endeavor to boost the powers of Community institutions. Maastricht enhanced the powers of the European Parliament.[208] It established mechanisms whereby the Member States were able to develop policy coordination in such diverse areas as environment, education, health and consumer protection, social affairs, technology, border control, immigration, and anti-crime.[209] It committed the Member States into working jointly in an effort to establish a common foreign and security policy.[210] But most importantly, it pointed to a roadmap and a timetable for qualified Member States to achieve Economic and Monetary Union (EMU) by the end of the 1990s.[211]

As already shown, the development of the EU Treaties has been a story of selective power delegations by the Member States' governments to the Commission. At the same time, however, the Treaty-based system of delegating powers to supranational institutions is a blunt instrument.[212] When signing the Treaties, governments could not have possibly predicted what consequences precisely their provisions and, most importantly for my present purposes, the new decision-making rules they established will produce, or exactly how the Commission will behave when exercising these new powers.[213] Still, what is predictable is that once certain powers have been conferred through Treaty delegations, they are unlikely to be reversed in subsequent reforms, as at least one Member State (especially of the minority group) will probably feel that it benefits from the new Commission powers. This leads to long-term 'unintended consequences' caused by the delegations granted by the Member States and the bureaucratic direction taken by the Commission.[214] However, the history of Treaty reform in the EU – since at least the Maastricht Treaty onwards – suggests that Member States' governments have learned from their mistakes. As a result, in Maastricht, Amsterdam and Nice, governments were less enthusiastic to withdraw agenda-setting in sensitive policy areas, and revised the law-making process to constrain the agenda-setting powers of the Commission in those areas where policy initiative had already been handed over to the Commission.[215] What is crucial, however, for present purposes is that simultaneously they sought to calibrate certain sensitive sides of policy fields already delegated by introducing the Identity Clause. The fear on the part of Member States' governments about a sweeping supranational

[208] Derek W. Urwin, *The Community of Europe* (n 94) 253.

[209] ibid.

[210] ibid, 252.

[211] ibid, 255-256.

[212] Simon Hix, *The Political System of the European Union* (2nd ed, Palgrave Macmillan 2005) 34.

[213] ibid.

[214] ibid, 34-35.

[215] ibid, 35. See for example Derek W. Urwin, *The Community of Europe* (n 94) 253, who points out that during negotiations the Dutch presidency put forward a more radical vision for a federal Europe and proposed the transfer of more powers to the EU. Such proposals were certainly what some Member States – for example, France – might have actually wished, but generated protest by several of the rest of the Member States.

organization was tempered by the introduction of such principles aimed at safeguarding Member States as the principle of respect for their constitutional identities.[216]

The Member States' courts had decades before grasped the need to introduce such Selective-Exit means as presented by the Identity Clause as a potential defense against delegation's unintended consequences over issues of domestic sensitivity. First, the *Bundesverfassungsgericht* (Federal Constitutional Court) has acknowledged in its decision of 18 October 1967 that:

> The Community itself is neither a state nor a federal state. It is a gradually integrating Community of a special nature, an 'interstate institution' in the sense of art 24(1) of the Basic Law to which the Federal Republic of Germany – like many other states – has 'transferred' *certain* sovereign rights… A new public authority was thus created which is *autonomous* and *independent* with regard to the state authority of the separate Member States. Consequently, its acts have neither to be approved ('ratified') by the Member States nor can they be annulled by them. The EEC Treaty is as if it were the constitution of this Community.[217]

Shortly after, in its now-famous 1974 *Solange (I)* judgment, the German court held that EU law could not have possibly been recognized as supreme as long as – *solange* – the EEC failed to sufficiently warrant human rights at a level comparable to that warranted by the *Grundgesetz*,[218] since human rights in particular represented a cornerstone of the German federal constitutional scheme.[219] However, it was a couple of decades later that the *Bundesverfassungsgericht* added the first critical qualification to the European construction. The *Grundgesetz*, it found, only allowed transferring *Hoheitsrechte* (sovereign powers), not *Souveränität* (sovereignty) itself.[220] In other

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[216] Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) 41 Brook J Int L 497.

[217] BVerfG, Judgment of 18 October 1967 - 1 BvR 248/63, 1 BvR 216/67; quoted by Karen J. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (Oxford University Press 2001) 78 (author's translation; emphasis added.))

[218] BVerfG, Judgment of 29 May 1974 - 2 BvL 52/71 (*Solange I* judgment) (English translation provided by The University of Texas at Austin, School of Law, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588> accessed 13 November 2022.

[219] Stephen Weatherill, *Law and Values in the European Union* (n 142) 235.

[220] BVerfG, Judgment of the Second Senate of 12 October 1993 - 2 BvR 2134/92, 2 BvR 2159/92 - (*Maastricht* judgment), para 109:

> The Member States have established the European Union in order to perform some of their duties and to exercise some of their sovereignty *jointly*. In the resolution which they passed at Edinburgh on 11 and 12 December, 1992…, the Heads of State or of Government which belong to the European Council stressed that independent and sovereign States have, within the framework of the Maastricht Treaty, resolved, of their own free will and in accordance with existing treaties, to exercise some of their powers *jointly*. Accordingly, the Maastricht Treaty takes account of the independence and sovereignty of the Member States, in that it imposes an obligation upon the European Union to respect the national identities of its Member States…, and grants the European Union and the European Communities specific powers and responsibilities only, on the basis of the principle of *limited* individual powers….

(citations omitted; emphasis added.) See also BVerfG, Judgment (of the Second Senate) of 30 June 2009 - 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 - (*Lisbon* judgment), para 226:

words, only specifically circumscribed regulatory powers – *Hoheitsrechte* – were free to delegate to the EU, whereas *Souveränität* writ large was not as it rested with deeply-rooted bodies constituted at the national level which bodies were – much to the exclusion of anyone else – only able to lend German public authorities their legitimacy.[221]

Italy's *Corte costituzionale* (Constitutional Court) took up the course of building incrementally a case-law of Selective-Exit strategies against EU law. *Corte costituzionale* had a long run before finally succumbing to the EU law principles of supremacy (or primacy) and direct effect.[222] The court's European expedition comprised four discernible evolutionary stages as Barsotti, Carozza, Cartabia and Simoncini have identified – each roughly corresponding to resistance, accommodation, surrender, and counter-limits. First, due to the dualist nature of Italian constitutional law, EU Treaties have long been considered to be equivalent to ordinary Italian legislation.[223] The result was that they were subject to repeal by subsequent Italian legislation that lay at the same rank in the hierarchy of laws pursuant to the standard principle of *lex posterior derogat legi priori*. Thus, due to its dualism, Italian constitutionalism was not duly prepared to accommodate either principle of EU law supremacy or direct effect.[224] Stage 1 then was substantially marked by the facts in *Costa/ENEL* (nationalization of electricity industry), where the court held that, contrary to what the CJEU had introduced in *Costa/ENEL*, EC law did not prevail over subsequent Italian legislation.

During the stage 2 involving accommodation, *Corte costituzionale* smoothed its sharp case-law by introducing the concept of *controlimiti* (limitations of sovereignty) as originating in art 11 of Italy's Constitution. In *Frontini* (implying for the first time the idea of *controlimiti*), it held that the Italian institutions have limited their sovereign powers in favor of the EC institutions, albeit within the limited policy fields circumscribed by the EC Treaties.[225] It concluded that any 'aberrant interpretation' of the Treaty by which Community institutions might claim an 'unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man' would compel the court to 'control the continuing compatibility of the Treaty with the aforementioned fundamental principles.'[226]

> It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration program according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape living conditions on their own responsibility.

[221] Peter L. Lindseth, *Power and Legitimacy* (n 96) 155, n 98.

[222] Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford University Press 2016) 208.

[223] ibid, 206.

[224] ibid.

[225] Corte costituzionale, *Frontini v Ministero delle Finanze*, Judgment of 18 December 1973 (no. 183/1973) [1974] 2 CMLR 372, 389.

[226] ibid. See also Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in Global Context* (n 222) 212.

At Stage 3, the *Corte* was confronted with the question of who was the ultimate domestic guarantor of EU law supremacy, *Corte costituzionale* itself or even lower national courts? The CJEU had already answered in *Simmenthal* that lower national courts too were empowered to submit any question about the interpretation of Community law to the CJEU,[227] which came as a shock in Italy, with its highly centralized judicial apparatus.[228] The *Corte*'s insistence on considering the conflict as a constitutional one, focusing on a clash between EU law and the Italian Constitution's *European Clause* of art 11, as well as one ultimately judged by itself, rested on the assumption that EU law and national law were parts of separate jurisdictions.[229] It was not until 1984 and its decision in *Granital* that the court accepted that EU law is supreme, irrespective of whether it precedes or follows any conflicting part of the Member State legislation, as well as that (even lower) national courts may benefit from the assistance offered through the preliminary reference procedure without the need for the *Corte*'s formal authorization to do so.[230]

Stage 4 has been marked by the inception and application of the concept of *controlimiti*. *Controlimiti* were first adopted in *Frontini* and were later refined in *Fragd* as

> [the ability to] verify, through the constitutional control of the executing law, that any norm of the Treaty, in the manner in which it is interpreted and applied by the institutions and by the Community organs, is not in conflict with the fundamental principles of our constitutional order or not mindful of the inalienable rights of the human person.[231]

In other words, EU law takes precedence over conflicting national law including – according to CJEU's *Internationalle Handelsgesellschaft* – even constitutional law, but with the fundamental exception of core principles of the national constitution – most importantly human rights guarantees – which the *Corte* treats as *controlimiti* against EU law.[232] When later the CJEU filled in the gap in the field of human rights guarantees,[233] a number of Member States' constitutional courts

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[227] CJEU, Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 21.

[228] Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in Global Context* (n 222) 213.

[229] ibid.

[230] Corte costituzionale, *Granital*, Judgment of 8 June 1984 no. 170. See also Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in Global Context* (n 222) 213; the same authors, however, later on (214) admit that after a subtler reading of *Granital* one may conclude that national rules found to be contrary to EU law remain in full force in the national jurisdiction besides the fact that from EU law perspective they are absolutely disqualified.

[231] Corte costituzionale, *Frontini*, Judgment of 27 December 1973 no. 183; Corte costituzionale, *Fragd*, Judgment of 21 April 1989 no. 232.

[232] Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in Global Context* (n 222) 215.

[233] CJEU, Case C-29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECR 419 (resolving a human rights case based on an assumption that when an act of the EU is addressed to all the Member States, a uniform interpretation as well as a uniform application is needed, hence prohibiting the court from considering the impugned act in one of its versions in isolation but rather in accordance with the intention of its authors in the light of all its language versions available); Case C-4/73 J. *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491; Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 (holding that human rights

reiterated the *controlimiti* doctrine as a means of shielding their constitutional identities, especially at the time of the debate surrounding the proposed but defunct European Constitution.[234]

After *Internationalle Handelsgesellschaft* had been announced, the *Bundesverfassungsgericht* may have eased its requirements of EU-level protection of human rights, but the *solange*-test did not disappear entirely. In fact, it stated that since the possibility of running a constitutional review to treat the underenforcement of human rights at EU level as compared to national standards was rather diminished, it reversed its position: It would not intervene because now human rights at the EU level were afforded comparable protection to that secured by the *Grundgesetz*, but only *solange* (as long as) the EU institutions secured that same level of protection.[235]

In *Brunner*, best known as its *Maastricht* judgment, Germany's *Bundesverfassungsgericht* conducted a constitutional review directed against the ratification of the Treaty of Maastricht based on its alleged inconsistency with the *Grundgesetz*. Although any reference to a term reminiscent of constitutional identity is wholly absent, that particular underlying idea is certainly what has animated the jurisprudential line of thinking.[236] The court's loudest proclamation was that:

> … the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty,[237]

adding that such an interpretation would produce nothing binding on and within the German jurisdiction.[238] In contrast to the CJEU's insistence on its own authority over the exercise by the EU of its exclusive powers,[239] the German court clung to a strategy of monitoring judicial outcomes that were suspect of producing something resembling an amendment. Most crucially, the *Bundesverfassungsgericht* declared that:

> What is decisive is that the democratic bases of the European Union are built-up in step with integration, and that as integration proceeds a thriving democracy is also maintained in the member-States. An excess weight of functions and powers within

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form an integral part generally of law and particularly of EU law and observance of which the court will ensure; that the court is bound to secure human rights under EU law drawing inspiration from the constitutional traditions of the Member States in order to ensure that any measures that are incompatible with human rights as these are recognized by the Member States' constitutions and constitutional traditions are incompatible with EU law too).

[234] Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in Global Context* (n 222) 215.

[235] Stephen Weatherill, *Law and Values in the European Union* (n 142) 235.

[236] ibid, 155, 171-172, 181; see also Monica Claes & Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' [2015] 16(4) Germ LJ 922.

[237] BVerfG*, Manfred Brunner and others v. The European Union Treaty,* 2 BvR 2134/92, 2 BvR 2159/92, Judgment of 12 October 1993, BVerfGE 89, 155, (*Maastricht* judgment) [1994] 1 CMLR 57, para 99 [1994] 1 CMLR 105.

[238] ibid.

[239] Stephen Weatherill, *Law and Values in the European Union* (n 142) 237.

> the responsibility of the European federation of States would effectively weaken democracy at national level, so that the parliaments of the member-States could no longer adequately provide the legitimation for the sovereign power exercised by the Union.[240]

The latest chapter of the *Bundesverfassungsgericht*'s bark-but-not-bite struggle with the EU Treaties was authored in its *Lisbon* judgment.[241] There the Court filled the operational lacuna it largely left in its *Maastricht* judgment and constructed a mechanism of identity review intended as both a barrier to European integration and a standard for reviewing secondary EU law vis-à-vis Germany's constitutional law.[242] In particular, it proclaimed that not all things can be permitted to occur in the name of the EU but, quite understandably, it refrained from giving any clue about what it had in mind as not permitted. For one thing, European integration may not necessarily violate the Member States' constitutional identities; the threat, in Professor Stephen Weatherill's words, is

> … not simply the structural issue of the terms on which the EU may be empowered, but a line beyond which no empowerment, however reliably it may be drawn, is permitted because of damage done to Germany's constitutional identity.[243]

What is of the utmost importance though is that the court successfully identified and singled out a number of policy fields as particularly vulnerable to identity threats – namely, criminal law, law enforcement within the Germany territory and deployment of military force abroad, the budget, social policy as well as

> decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities.[244]

To be sure, the *Lisbon* judgment leaves the impression of a constitutional identity largely nebular – which is not necessarily a bad thing – and calculatedly so, but compensates for that obscurity by espousing a higher threshold for finding an identity breach as prerequisite for judicial review, a threshold lifted to the level of a sufficiently serious and manifest transgression of Germany's *Verfassungsidentität*.[245]

So far, I have demonstrated that Weiler's arguments about the *Exit*/*Voice* equilibrium in European governance may offer an exegesis of the political impetus that animated the Member States' governments in inserting the Identity Clause into the Maastricht Treaty and hence opening up a

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[240] *Maastricht* judgment (n 237), para 43 [1994] 1 CMLR 88-89.

[241] *Lisbon* judgment (n 220).

[242] Monica Claes & Jan-Herman Reestman, 'The Protection of National Constitutional Identity' (n 236) 922.

[243] Stephen Weatherill, *Law and Values in the European Union* (n 142) 237 (emphasis added).

[244] *Lisbon* judgment (n 220), para 252. See also Monica Claes & Jan-Herman Reestman, 'The Protection of National Constitutional Identity' (n 236) 925.

[245] *Lisbon* judgment (n 220), para 136ff.

Selective-Exit avenue which however they did not cross. That route would be explored by the Member States' courts. To uncover the legal mechanism set up by these courts, I will now turn to Lindseth's theory of a 'postwar constitutional settlement' which depicts European integration as a set of chapters within an overall still-ongoing project of increased power delegations to the EU. The Member States' courts, the argument goes, have experimented with the Identity Clause and have simulated Selective-Exit rights as a means to curb the extent of powers delegated to the EU.

European governance is not as *sui generis* as conventionally supposed. As Professor Peter Lindseth points out, European governance is not erected on a set of institutions neatly separated from national legitimating mechanisms.[246] Instead, he argues that European integration has, since its inception, converged around the legitimating mechanisms of what he calls the 'postwar constitutional settlement of administrative governance.'[247]

Whereas over the last half century the geographical scope, organizational complexity, and regulatory reach of European supranational institutions have grown significantly; over the same period, the constitutional legitimacy of European governance – its sense of comprising a political community self-sufficiently capable to rule its constituents through political institutions founded toward that end – has remained remarkably weak, at least relative to the nation-states that comprise it.[248] To account for the disconnect between supranational growth and continuing attachment to national institutions, Lindseth proposes that European governance as a whole, including such institutions as the EP and the CJEU, should be properly understood as an extension to the supranational dimension of administrative governance on the national level.[249]

European integration scholars have striven to reconcile the nature of democracy and constitutionalism away from representative government on the national level, often utilizing abstract values in order to bring supranational governance within their needs.[250] Despite scholarly reconceptualization, however, Europeans are probably not yet prepared to experience European governance in such innovative terms. 'Legitimacy, unfortunately,' Lindseth argues,

> is not solely a question of what is conceptually possible…. If that were so, then scholarly solutions to the myriad of constitutional challenges in the EU could be unproblematically translated into institutional and legal reality, without being filtered through a complex process of political, social, and cultural contestation on the national level.[251]

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[246] Peter L. Lindseth, *Power and Legitimacy* (n 96) 2.

[247] ibid.

[248] ibid, 6.

[249] ibid, 15.

[250] ibid, 7.

[251] ibid, 11 (quoting Peter L. Lindseth, 'Weak Constitutionalism - Reflections on Comitology and Transnational Governance in the European Union' (2001) 21 Oxford J Legal Stud 163).

European integration is therefore best understood as a supranational manifestation of the broader historical process of diffusion and fragmentation of regulatory power that marks modern governance.[252]

The first episode in the story of regulatory diffusion and fragmentation dates back to the nineteenth-century ascendance of centralized elected assemblies which became the core institutions of representative government in democratizing the nation-states of the North Atlantic. The next episode included a realization from the late nineteenth through to early twentieth century that these (parliamentary) assemblies, along with more traditional governmental bodies such as executive and judicial, were no longer able to deal with modern problems or to confront the challenges that modern industrial and post-industrial society posed.[253] From the European perspective, the political turmoil of the interwar period forced European nation-states to undertake reconstruction responsibilities to an unprecedented degree. In other words, they were forced to transition from warfare state to welfare state, to a new form of governance securely founded on a larger pattern of public duties. That new form of governance was, Lindseth argues, the *administrative governance*.[254] Over the course of the 1920s and the 1930s, it became clear that fundamental changes in the constitutional distribution of powers would be necessary. Parliaments, partly because of their onerous proceedings, would need to hand over large part of their lawmaking powers to the executive and in due course to technocratic agents, much as they did during the war in the field of national defense and security.

At the same time, however, these developments should be measured against the fact that after World War II there was an overwhelming mistrust of the executive, which was seen as the bulwark of many autocratic regimes that had just collapsed.[255] Not just in (defeated nations like) Germany, but also in France, Britain, and the United States, people were witness to a series of far-reaching concentrations of lawmaking (and quasi-judicial) authorities in the executive branch. A number of 'enabling acts' – mostly notorious under the rubric of *Ermächtigungsgesetz* – would have essential powers transferred to the executive in an effort to effectively address the perceived crises of the time including inflation, currency stabilization, economic depression, etc.[256] In the same context, art 48 of the Weimar Constitution, initially held to empower the *Kanzler* only to fight civil strife, evolved into an excuse to the exercise of wide-ranging lawmaking powers.[257] That development led German constitutional theorists such as Heinrich Triepel and Fritz Poetzsch to argue that these acts – *Rechtsverordnungen* – were subject to control by the *Reichstag* as well as to judicial control, and in general they were remarkably critical of the constitutionality of unbounded delegations to the executive.[258] Carl Schmitt, that famous exponent of the executive dominance against the legislature in interwar Nazi Germany, reasoned that there was a wide gap between parliamentary

[252] ibid, 2.

[253] ibid, 38.

[254] ibid, 62.

[255] ibid, 63.

[256] ibid, 64.

[257] ibid.

[258] ibid; see *supra* Chapter 2 section V. Constitutional Interpretations: How a Constitution Is Enforced

democracy and the evolution of public life which essentially pressed not for the legislature's deliberation over abstract norms, but for the executive's resolution of concrete problems.[259] In a later essay of 1944, Schmitt realized the dangers of unchecked delegations and this time he cited with approval Triepel's efforts in the early 1920s.[260] However, postwar Europe would not abandon – as it has not until our days – delegation as a form of governance altogether. Instead, the challenge was to exercise power delegations successfully within the context of liberal-democratic institutions.[261] It is not at all accidental that it is during that very political and constitutional occasion that identity concerns have started to emerge as possible barriers against uncontrolled changes to the constitutions.

The process of 'postwar constitutional settlement' both in Europe and elsewhere would not be exclusively driven by functional needs; instead, it would seek some degree of balance and responsibility, two elements woefully lacking in Schmitt's conceptions from the 1930s.[262] To be sure, delegation was, and still is, both legitimate and constitutionally desirable for certain purposes. These include such concerns as related to the parliamentary time, the technical nature of regulatory subject matters, the need for flexibility in the face of unforeseen contingencies, and even the need for regulatory experimentation.[263] But at the same time a legal and political formula was needed for the legitimation of the delegated powers which should involve some combination of parliamentary oversight of administrative agencies, ministerial responsibility, and corporatist participation in regulatory decision making, as well as some form of judicial review.[264]

The 'postwar constitutional settlement' consisted of the following elements: First, there were significant adjustments to the authority of Parliaments to delegate part of their lawmaking powers. Elected assemblies lost their preeminence in norm production; while the executive and administrative spheres gained a much greater role in the production of norms pursuant to general 'framework laws.'[265] Second, parliamentary oversight gave way to oversight by the leadership of the chief executive.[266] Third, an 'internationalist' ethos pervaded Western Europe's postwar constitutions, several of which included provisions that authorized the delegation of certain powers to international organizations.[267] Fourth, postwar technocratic planning under the hierarchical authority of the executive depended above all on legislative delegation.[268] Fifth, Western European

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[259] Peter L. Lindseth, *Power and Legitimacy* (n 96) 71 (citing Carl Schmitt, *Une Étude de Droit Constitutionnel Comparé: L'Évolution Récente du Problème des Délégations Législatives. In Introduction à l'Étude du Droit Compare: Recueil d'Études en l'Honneur d'Edouard Lambert* (first published 1936, Sirey 1938) 205).

[260] ibid, 73.

[261] ibid.

[262] ibid, 74.

[263] ibid, 75.

[264] ibid.

[265] ibid.

[266] ibid.

[267] ibid, 75.

[268] ibid, 76.

constitutions became gradually more and more suspicious of unchecked delegations, which during the interwar period had allowed their polities' devolution into dictatorship.[269]

In France, for example, what became known as the 'law of August 17, 1948,' was used to circumvent the outright constitutional prohibition of delegations. The law ingeniously redefined the distinction between statutory law and regulations, thereby declaring that a whole range of matters previously understood to be within the legislature's ambit were now seen as 'by their nature' actually of regulatory character.[270] One of the committee members charged with the responsibility of introducing the bill into the National Assembly was Robert Schuman, who was thus closely involved with building the postwar administrative structure at home before he took up the cause of transmitting it supranationally.[271]

In some sense, as the French precedent demonstrates, a major imperative of the postwar constitutional settlement appeared to be to *depoliticize* the making of policy.[272] The desired depoliticization, however, depended less on a real transformation of political questions into technical ones than on their displacement unto the executive and administrative realms, without having their nature essentially changed.[273] Difficult questions, such as those pertaining to the balancing of competing interests, allocation of scarce resources, and choosing among potentially competing values, were still present, only now in the executive and administrative rather than legislative forums. Thus, the demand for depoliticization offered an ideological cover-up for the new regime.[274] Policy choices would no longer be legitimized through a parliamentary vote, but would instead depend on public support for the government of the day and, perhaps more importantly, on the faith placed on the person of the chief executive.[275]

Over the decades, administrative agents came to enjoy a significant degree of functional independence from political oversight as a consequence of organizational complexity, if not also of legally sanctioned power.[276] There was thus a rational-choice logic behind a rise in the scrutiny of judicial review because agency autonomy undermined the capacity of hierarchical political control and thus created a need for an alternative means to ensure compliance with constitutional legitimacy.[277] This observation would prove all the more important from the European perspective, since judicial review of the EU's outer limits – in the form of constitutional identity review – which was then the by-product of governmental overreach at the supranational level, would be the only viable alternative.

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[269] ibid, 77.

[270] ibid, 78.

[271] ibid, 79.

[272] ibid, 81.

[273] ibid, 82.

[274] ibid.

[275] ibid.

[276] ibid, 85.

[277] ibid.

Indeed, the functionalist trend of increased power delegations soon migrated into the realm of international relations. The academic impulse came from David Mitrany, who suggested that functional pressures would eventually transcend the national boundaries, just as separation of powers had before them, in a way that might promote new forms of pragmatic international cooperation.[278] Animating postwar constitutions in Western Europe was a desire for national reconstruction as well as an 'internationalist spirit,' which would manifest itself in constitutional provisions that explicitly authorized power delegations to international organizations in the interest of peace.[279] This openness reflected both an aspiration to protect a new class of human rights and a New Deal-type faith in the possibilities of international organizations as ideal problem-solvers.[280] Despite the lack of explicit textual basis, a constitutional rationale emerged over the course of the 1950s and 1960s that justified both supranational delegations and an idea of supremacy doctrine. This rationale – derived from the treaty making authority of national executives – is comfortably interpretable in light of Lindseth's 'postwar constitutional settlement.'[281]

The need to address a number of new regulatory challenges presented by urbanization, industrialization, and the globalization of markets in goods, capital, and labor, forced the Western European nation-states to begin delegating regulatory powers outward (toward supranational institutions) and downward (toward the executive and administrative branches) over the course of the second half of the twentieth century.[282] European governance may thus be viewed as a further development in the course of that historical process of diffusion and fragmentation – delegation – of normative powers.[283] The postwar constitutional settlement reflected a rethinking of the nature and scope of executive power, the role of an emergent class of political agents – the technocrats – and the proper function of the legislature and the judiciary in vindicating the values of representative democracy in an era of increasing diffusion and fragmentation of lawmaking capabilities.[284]

Among the central assumptions of the now-dominant narrative is the idea that the EU has, in Professor Neil Walker's words:

> … passed a threshold of authoritative capacity and normative penetration beyond which its structures require a direct rather than indirect and state-mediated mandate from those who fall within its jurisdiction.[285]

Lindseth argues that that legitimation may not be located in the elections of the EP, in the deliberations of the EC, or the judgments of the CJEU, but rather in the enabling EU Treaties themselves, and ultimately in national constitutional provisions and processes enabling the enforcement of

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[278] ibid, 69.

[279] ibid, 75.

[280] ibid, 153.

[281] ibid, 154.

[282] ibid, 16.

[283] ibid, 17.

[284] ibid.

[285] Neil Walker, 'A Constitutional Reckoning' (2006) 13 Constellations 148.

European norms in national orders.[286] The difference here, in constituting a political community from ground zero, is that when a people constitutes public authority in the first place it is *unrestrained* with the possible exceptions of human rights limitations; when, in contrast, already constituted bodies of representative democracies do not enjoy that unrestrained power, *they are only allowed to make laws, not lawmakers*.[287] Constitutive bodies have to remain the center of governing powers, at least in some historically and culturally recognizable sense.[288]

Supranational bodies such as the CJEU, the EP, and the EC seem inherently inadequate for the purpose of providing democratic and constitutional legitimation.[289] They are not seen as embodying or demonstrating the undisputed ability of a political community to (self-)rule itself with the assistance of institutions particularly constituted toward that end.[290] The decisions of the Member States' supreme courts of the last couple of decades are not interesting simply because they suggest how,

> from a national constitutional perspective, the Court of Justice is just one more EU institution that, in principle, could act ultra vires under the color of interpreting the Treaty.[291]

Rather, they are exemplars of a type of *cultural resistance* to the perceived inadequacies of European integration in terms of democratic and constitutional legitimacy as classically perceived.[292] The reservation on the part of the *Bundesverfassungsgericht* of the so-called *Kompetenz-Kompetenz* has, by its terms, been designed to preserve core values of German democracy in the face of the EU's evident functional demands, a task that the CJEU has shown unwillingness to undertake.[293] National oversight mechanisms have been developed to overcome what is best understood not as a democracy deficit but as a *disconnection*, in Lindseth's assumptions, in European governance, that is a disconnection between supranational regulation and its utmost grounding in national legitimacy sources.[294]

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[286] Peter L. Lindseth, *Power and Legitimacy* (n 96) 19.

[287] ibid.

[288] ibid, 20.

[289] ibid, 28.

[290] ibid.

[291] Mattias Kumm, 'Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 Eur L J 530.

[292] Peter L. Lindseth, *Power and Legitimacy* (n 96) 28.

[293] ibid, 30.

[294] ibid, 31.

IV. Towards a Theory of Judicial Review of Member States' Constitutional Identities

In what follows I will sketch the outlines of what I suggest as a candidate theory of judicial constitutional identity review. As Elke Cloots has predicted:

> [We] are at the dawn of a new era of thought. An era in which the traditional, contending paradigms are modified, if not dismissed, and in which innovative theoretical schemes are put forward, which search for attainable and attractive common ground between the old rivals.[295]

For instance, various approaches to European integration are now, as dictated by such Treaty provisions as art 4(2) TEU, labeled as 'identity centric.' This means that EU law integrates reasons for contestation against itself on constitutional grounds, whilst also facilitating narrowing the range of application of EU secondary law.[296]

Lying behind such propositions is an idea of constitutional pluralism that rests on both a descriptive and a normative basis which treats the legal systems of the EU and its Member States as being rearranged in a heterarchical order where no one system is normatively superior to the other. Constitutional pluralism, since its inception by Neil MacCormick in his seminal article entitled *Beyond the Sovereign State*,[297] has been highly controversial; but recent political developments, including pluralist invocations by aberrant EU Member States such as Prime Minister Viktor Orbán's Hungary and their courts, have put both its descriptive accuracy and its normative desirability under unprecedented pressure.

A few observers might adopt Professor R. Daniel Kelemen's radical proposal to abandon constitutional pluralism altogether; his proposition that Member States and candidates for membership should both embrace *unconditionally* EU law's principles and most importantly its supremacy over national law; or that Member States' supreme courts should:

> remedy the situation [of conflicts] by compelling their government either to amend their constitution, or seek to change the EU legal norm involved by working through the EU political process, or, if necessary, to withdraw from the Union altogether.[298]

Much more reasonable, however, would be to reject such absolute proclamations in favor of EU law's unqualified supremacy on the grounds that they fail to faithfully describe a political or institutional reality now prevalent (and desirable) in EU governance.[299] Indeed, the post-Lisbon

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[295] Elke Cloots, *National Identity in EU Law* (n 5) 126.

[296] Neil Murphy, 'Article 4(2) TEU: A Blow to the Supremacy of Union Law' (2017) 20 Trinity CL Rev 95.

[297] Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 (1) Mod L R 1-18.

[298] R. Daniel Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) 23(1) Maast J Eur & Comp L 140.

[299] Tom Flynn, 'Constitutional Pluralism and Loyal Opposition' (2021) 19 International J Const L 262.

versions of the Identity Clause, though seeming at first sight to be somewhat loosely drafted, bespeak key notions of pluralism and constitutionalism, as well as functional references to the Member States' jurisdictions.[300] In what follows I will attempt to rescue the relationship between EU law and Member States' law within the environment of interpretive pluralism by building up an effective mechanism of enforcing art 4(2) TEU's Identity Clause.

Before turning to the proposed identity review device, I will briefly describe the most fundamental propositions pervading the kind of pluralism which is termed as interpretive. Interpretive pluralism, as formulated by Professor Richard Stith and transposed into the European context by Professor Richard Davies, has been touched upon previously, but to restate the important points, it preaches the desirability of multiple interpretations of law originating from a multiplicity of sources, including one located at multiple jurisdictions, not one of which could possibly claim for itself and its decision-making outcomes unqualified validity over the others.[301] Stith's conceptualization of interpretive pluralism rests, first, on the need for common subordination of multiple governmental bodies and courts to a single authoritative text and, second, for a decentralized power to interpret it.[302] Within the universe of twenty-seven Member State jurisdictions, all courts will be engaged with interpreting EU law, each being responsible not just within certain, more or less exact, boundaries but jointly.[303] The ensuing diversity of interpretive inputs will, in Stith's prediction, lead to a condition 'that wherever [a need for] unity of meaning does appear, it will come through *persuasion* rather than through coercion.'[304] Now I will turn to the specifics of a potential identity review mechanism.

First, the Identity Clause is EU law and, second, it applies to policy fields delegated to, and in general legitimately exercised by, the EU. Thus, it is within the EU, not the Member States', powers to determine at least the general framework and broader parameters of identity review. One implication of the Identity Clause's European 'identity' is that the EU bodies, and in particular the CJEU, are properly seated to elaborate and refine, deriving ideas from the rich and diverse constitutional traditions of the Member States, on how constitutional identity is knowable – to trace its sources and define its materials; as well as to develop a judicial test for settling any disputes that may arise as a consequence of invoking the Identity Clause against the rest of European values and principles on an equal-terms basis. A different attitude toward the Identity Clause's proper location would confuse things exponentially, since each of the EU and the Member States' courts would present their idiosyncratic claims over identity issues, or perhaps a claim derived from the most powerful among them – perhaps the *Bundesverfassungsgericht* would be a predominant candidate – thus driving toward conceptual mist and *threatening* the equality of Member States before the EU Treaties. In addition, consistent with constitutional pluralism and its derivative form of interpretive pluralism as hereby adopted, the proposed mechanism offers a valuable allocation of

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[300] Neil Murphy, 'Article 4(2) TEU: A Blow to the Supremacy of Union Law' (n 296) 97.

[301] See *supra* Chapter 1.

[302] Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalization' (2018) 24(6) Eur LJ 367-368.

[303] Richard Stith, 'Securing the Rule of Law through Interpretive Pluralism: An Argument from Comparative Law' (2008) 35 Hastings Const LQ 435.

[304] ibid, 434. See also Klemen Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014) 102-125.

reason-giving responsibilities between the EU and Member State authorities. For one thing, distinguishing between *ultra vires* review and *constitutional identity* review bears witness to the reason-giving reality in European governance. After the Member States transferred substantial jurisdictions to the EU, the *Bundesverfassungsgericht* developed its *ultra vires* review as a monitoring device for how they were exercised at the EU level, but it was subsequently tempered through the requirements of a preliminary ruling and the finding of a manifest and structurally significant transgression of the conferred powers. Thus, whereas *ultra vires* review sought to block the EU from exercising its powers located at the borderline, identity review sought to bind the EU institutions into exercising powers clearly conferred with respect for what constitute the Member States' constitutional identities, but certainly not to disqualify the EU institutions from exercising those powers altogether.[305]

Third, both the 'identity' part and the 'respect' part of the Identity Clause are subject to shared interpretations and enforcement by the EU and Member States' authorities. Hence, the EU is entitled to define at least the *periphery* of the Identity Clause by determining its general framework – its theoretical shape – as well as the materials out of which it is built – and the ultimate limits of where its confrontation with adversary forces and the general parameters of judicial review can drive EU law. On the other hand, the interpretation of the second half of the 'identity' part, located within these borders conveniently or not, rests primarily with the Member States to ascertain. In the same fashion, as I will explore later, the 'respect' part will also be shared in its enforcement between the EU and Member States' institutions as dictated by such matters as interdependence, physical and mental proximity of Member States' institutions to the object of their adjudication, and multilevel cooperation.[306]

Fourth, political procedures at the EU level are not self-sufficient to exercise a monopoly in enforcing the Identity Clause. As demonstrated earlier, the CJEU's wild moves during the 1970s against the enumerated powers, as well as a parallel process of jurisdictional spill-over that Jean Monnet himself had long ago anticipated, it would later emerge, met with the expansion of QMV as a standard voting procedure in the 1980s. Member States introduced QMV particularly in a number of policy fields as part of their effort to restore their political control over market integration. Put differently, Member States reacted to ('lawmaking' by) the CJEU by resorting to 'political' legislation – that is, to legislation enacted through acts of the Council, not judgments of the CJEU – even at the risk of, or perhaps underestimating the consequences of, being pushed into the minority on a vote.[307] Without any doubt, certain Member States' governments must have found this possibility disruptive in particular corners of their law, but what is crucial is that despite their initial concerns for expanding QMV, the Member States finally surrendered, at least at certain

[305] Christian Calliess, 'Constitutional Identity in Germany: One for Three or Three in One?' in Christian Calliess C, Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2021) 174.

[306] Armin von Bogdandy & Stephan W. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) CML Rev 1431, who trace particular implications for EU law's supremacy from its Lisbon version and particularly one providing an understanding beyond the absolute positions of both the CJEU on the one side, which insists on unqualified supremacy of EU law, and that of most Member State courts, on the other side, which stick to a doctrine of qualified supremacy or primacy of EU law.

[307] Peter L. Lindseth, *Power and Legitimacy* (n 96) 149.

degree, depending on the political expediency of the matter and opportunistic withdrawal to judicial 'lawmaking,' since the entire structure was so functionally suited to the task of monitoring the Member States' compliance with their supranational obligations.[308] Resorting to a comfortable case-by-case adjudication to overcome the complex ways in which national rules might collide with free movement turned out to be an effective way to avoid, at least initially, the more cumbersome political process of identifying domains for harmonization and then fighting for a difficult consensus to remove those impediments.[309] To sum up, the Member States' governments had at their disposal either taking over the reins of European integration through political means, running the risk of drifting into an unsuccessful QMV or even a unanimity vote; or simply acquiescing to the CJEU for furtherance of the cause of integration through the more uncontroversial judicial means. But the fact remains that these developments offered a mechanism by which Member States' executives could, under the pretense of integration, effectively enforce legislative decisions on national institutions – most notably their parliaments.[310] Therefore, they should be rejected as possible candidates for undertaking identity review responsibilities.

There is one last danger which pushes toward nonpolitical remedies. Most participants in federalism debates agree that the system works best when process-oriented values – subsidiarity being the primary example – are enforced through political not standard legal (judicial) guarantees.[311] Of course, judicial review becomes necessary to prevent the erosion of the federal *balance* if political checks fail. As Professor J. H. H. Weiler has suggested, Member States in the foundational era were ready to accept the process of constitutionalization of the EU – mostly the CJEU's refusal to enforce strong limits on central power – because they were confident enough in the existence of political checks on possible threats to their autonomy.[312] Threats, however, do not always come from the ever-suspect EU institutions – that is, from *vertical* aggrandizement; from European integration originating from the center. There are also *horizontal* aggrandizement incidents where possible threats to Member State autonomy originate in the differing policy preferences of some or all of the rest of the Member States.[313] When policy preferences differ, and one state – for whatever reason – may wish to impose its preferences on the others, it might find it tempting and convenient to impose itself through the central (read: *EU*) government. Thus, where the pressure for more centralization comes from peripheral policies,[314] the remedy will most probably come from nonpolitical agents.

Fifth, judicial process at the EU level is not self-sufficient to exercise a monopoly in enforcing the Identity Clause either. Since its establishment, the CJEU has failed to identify itself as anything

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[308] ibid, 159.

[309] ibid, 150.

[310] ibid, 151.

[311] Ernest A. Young, 'Protecting Member State Autonomy in the European Union: Some from American Federalism' (2002) 77 NYU L Rev 1682.

[312] ibid, 1682.

[313] See for example Federico Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' (2014) 32 Berkeley J Int'l L 64, who describes a possible set of circumstances that could engage the attempt of a Member State to impose its policy preferences to another.

[314] Ernest A. Young, 'Protecting Member State Autonomy in the European Union' (n 311) 1684.

more sophisticated than a mere 'engine of integration,' or to decode the judicial dimensions of the 'postwar constitutional settlement.'[315] Unlike national courts which have always been accustomed to their constitutionally mandated role of reviewing domestic legislation on grounds of the legitimacy of the delegation involved, the CJEU has never really perceived that its principal role is one of checking and remedying – by perhaps limiting – the normative autonomy of the EU institutions, because of their lack of any legitimacy of their own.[316] Rather, it has gone to great lengths to provide considerable autonomy – including its own – in its effort to develop a mechanism for policing the Member States' commitment to integration – that is, it sought to promote the cause of integration at *any* cost.[317] The CJEU's approach is sharply contradictory to the established role of courts of unitary governments in the postwar constitutional settlement, not to say of courts of federal governments – the U.S. Supreme Court being the prime exemplar.[318] Thus, organizational behavior combined with calls for interpretive pluralism dictate that judicial enforcement of the Identity Clause should not rest exclusively with the CJEU's adjudication.

Sixth, judicial bodies within federal systems should, in general, exercise decisive influence in enforcing the Identity Clause. In contrast to judicial processes at the EU level, the Member States' courts are – at least since the end of World War II – accustomed to hearing (nationally oriented) challenges to legislative instruments delegated to administrative agents, due to breach of constitutional limitations – substantive or not – on the transfer of authority.[319] Thus, Member State, as opposed to EU, courts have acquired the habit of obedience in policing the borders of delegation in the interest of other principles than merely of more and more supranationalism.[320] However, the Member States' judiciaries do not simply take advantage of their legal expertise in conducting a routine limits-review to delegation. The Member States' mechanisms, that is, do not only bridge the national and the supranational; they *frame*.[321] They define, in terms of political and legal culture, the normative boundaries for the exercise of legitimate authority while also establishing mechanisms to scrutinize policy-making within those boundaries.[322] Consistent with the administrative character of EU governance, domestic oversight mechanisms are first and foremost legitimating 'engines' operating to restore the *connection* between the EU and its Member States, making it easier for them to put forward their identity claims, fostering reason-giving, and enhancing accountability.[323]

Seventh, in order to construct a legitimacy test of judicial identity-review outcomes, I presuppose that the normative environment most hospitable to accommodating, and most comprehensive in performing, identity review is art 267 TFEU's preliminary reference procedure. In addition, I

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[315] Peter L. Lindseth, *Power and Legitimacy* (n 96) 133.

[316] ibid.

[317] ibid.

[318] ibid.

[319] ibid, 134.

[320] ibid.

[321] ibid, 24.

[322] ibid.

[323] ibid, 25.

rely primarily on what Professor Miguel Poiares Maduro has termed 'horizontal and vertical coherence.' Critical factors include, whether Member States' court decisions are grounded in persuasive argumentation within the corpus of common European and international legal standards; serious engagement with EU law and with the CJEU's case-law; and whether or not the decision depicts its jurisdiction as one Member State among many – co-equal to all the others – consistent with the equality of Member States before the EU Treaties.[324] Balancing the tendency towards differentiation against the need for unity requires resorting to such criteria as: the number of Member States affected in the event of identity-based differentiation being granted, the time distance between adopting an EU act and the first recorded identity-based deviation, the overall structure of the EU act etc.[325] Anita Schnettger, for example, contends that a balance must be struck between, on the one hand, not excluding too much when defining the EU general framework and, on the other hand, not integrating too much from the Member States' perspectives.[326]

Notwithstanding the EU courts' authority to define the general parameters of treating the Member States' identity concerns, the responsibility for pointing to *specific* identity content within their jurisdictions should be held as approximately resting with the Member States for several reasons. On the one hand, national authorities in general, and judicial institutions in particular, should be properly assumed to have, if not exclusive, then better access than the CJEU to the facts that lie at the heart of whatever constitutional identity concerns exist.[327] For example, the presence or absence of attributes constitutive of identity can be revealed by exploring each Member State's historical and jurisprudential records as well as public debates.[328] Most importantly, however, judges sitting in Luxembourg lack both the physical and intimate relationship with their object of adjudication that the Member States' judges – at least arguably – superfluously enjoy.[329]

The Member States' responsibility has certain implications though. First, a domestic public discourse about the normative basis, content, and legal consequences of constitutional identity considerations is instrumental in revealing that such identity really exists. The EU may be held responsible for paying respect to national constitutional identity only if and insofar as Member States are able to name it as precisely as possible and to offer coherent legal arguments.[330] Such an ability on the part of Member States is clearly predicated on an assumption that there is domestically a more or less extensive public debate that treats certain issues as specifically related to

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[324] Tom Flynn, 'Constitutional Pluralism and Loyal Opposition' (n 299) 246.

[325] Anita Schnettger, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism' in Christian Calliess C, Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2021) 34.

[326] ibid, 19.

[327] Elke Cloots, *National Identity in EU Law* (n 5) 145.

[328] See *supra* Chapter 2; Elke Cloots, *National Identity in EU Law* (n 5) 145.

[329] Elke Cloots, *National Identity in EU Law* (n 5) 146.

[330] Anita Schnettger, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism' (n 325) 21.

constitutional identity. Second, the Identity Clause could not conceivably be an instrument for expanding a Member State's constitutional identity beyond what that identity domestically is.[331]

The next issue concerns the appropriate use by the CJEU of identity inputs from the Member States. Indeed, the CJEU may find itself confronted with conflicting perceptions of constitutional identity presented by the domestic authorities before it.[332] Under one view, the CJEU should defer to the government petitioning before the Court.[333] Under another view, it should defer to the referring (constitutional or supreme) court's motion for a preliminary ruling,[334] or to directly democratic institutions such as the Parliament.[335] The power balance and the ensuing equilibrium thus far achieved favor the proposition that the most critical identity inputs derive from the referring Member States' courts, subject only to the reservation that if the Member States' judicial position is indeterminate or in general ineligible, the CJEU should search for alternative interpretive sources to ideally postpone the issue or avoid it altogether.[336]

A cursory glance at the CJEU case-law reveals that the court feels more comfortable in its role as identity-abiding than as identity-finding.[337] Another technique to demonstrate its sensitivity towards identity issues is through limiting the range of application of EU law as well as in the definitions it provides to certain Treaty concepts.[338] These jurisprudential facts, coupled with the fact that as a matter of EU law the CJEU itself is bound by the principle of subsidiarity to respect the Identity Clause, could lead us to argue that the court should, as a general rule, defer to identity inputs from the Member States' courts, its deference being conditional upon the requirement that invoking identity should be within the general framework it has circumscribed itself.[339]

Eighth, respect for Member States' constitutional identities may be enforced through what are known especially in the American constitutional theory as 'resistance norms.' The drafters of the EU Treaties designed the EU so as to govern such far-reaching policy fields as tariffs and customs comprehensively, but also anticipated that the regulatory comprehensiveness would be limited to the subject matters they named in the Treaties. Put differently, it was beyond their expectations that EU law would unleash excessive amounts of preemptive effects on the Member States' law

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[331] ibid, 22-23.

[332] See for example the facts in CJEU, Case C-399/09 *Marie Landtová v Česká správa socialního zabezpečení* [2011] ECR I-5573.

[333] CJEU, Case C-188/10 & C-189/10 (Joined Cases) *Aziz Melki & Sélim Abdeli* [2010] OJ C221/14.

[334] Armin von Bogdandy & Stephan W. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (n 306).

[335] Mattias Kumm & Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) 3(2-3) International J Const L.

[336] *But* see Elke Cloots, *National Identity in EU Law* (n 5) 150.

[337] ibid, 74, who points out that throughout its overall identity jurisprudence the CJEU has mostly acknowledged that the Identity Clause is a legitimate objective capable of justifying restrictions on the free movement of persons.

[338] ibid, 75.

[339] ibid, 78-79; Gráinne de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) J Com Mar St 222, 226, 229-234.

spilling-over to nearly most policy fields previously exercised by the Member States alone.[340] Still, fears of power imbalances were not wholly unimaginable; to the contrary, the very fact that at their home jurisdictions too it was near-impossible to precisely distinguish between the different spheres of jurisdiction especially within dual-federalist regimes was not unknown. Dual federalism, or divided sovereignty, as distinct from cooperative federalism, refers to a political arrangement in which power is divided between different levels of governments across – more or less – clear-cut jurisdictional lines.[341] But just as dual federalism gradually declined and eventually eroded in the United States and elsewhere, so too, Professor Ernest A. Young contends in a 2002 article, did enumeration fail to impede the dramatic expansions of EU powers against the Member States.

Dual federalism is perhaps genetically defective; clear demarcation of powers and competences is deemed to failure.[342] Life is too complicated for law to neatly regulate it across straight lines.[343] The world seems to grow more and more interrelated, rather than less, and policy fields that once seemed distinct from each other – such as education policy and international trade – will continue to intersect.[344] Therefore, dual federalism's failure to offer a viable basis for dividing regulatory powers between different governmental levels highlights more generally the limited capabilities of formal, subject matter arrangements as the operating system of a balanced federal regime and *par excellence* the EU. Education will always interplay with commerce,[345] domestic regulation on foreign policy etc. If that conclusion is correct, then any efforts to shield a certain amount of constitutional essentialism of the EU Member States through some form of enumerated powers at the EU level is vain.[346] This conclusion holds all the more true if we consider that where precise delimitation is found to be incapacitating decision-making at EU level, hardly would a Treaty provision discourage the EU executives – that is, the Member States' governments – from common

[340] Ernest A. Young 'Protecting Member State Autonomy in the European Union: Some from American Federalism' (n 311) 1670.

[341] ibid.

[342] ibid, 1677.

[343] ibid, 1670.

[344] ibid, 1677.

[345] See for example the facts in *Casagrande* (n 197).

[346] ibid, 1670.

action by resorting to a convenient interpretation of EU law or to the assistance of its Necessary and Proper Clause,[347] in their efforts to bring about the desired policy outcomes.[348]

The most important means employed by courts in the United States and elsewhere to settle federal/state conflicts involve conventions typically used to interpret ambiguous statutes. First, *constitutional avoidance* is a legal doctrine of American constitutional law, according to which federal courts are advised to refuse to rule on a constitutional issue if the case can be perfectly resolved *without* involving constitutional thinking. When a federal court is confronted with the task of ruling on statutory, regulatory, or constitutional grounds, it should seek to resolve it by relying as much as possible on non-constitutional grounds, according to the U.S. Supreme Court's instructions.[349] Second, the U.S. courts have adopted a form of *clear statement rules*, which means in effect that they will not interpret a statute in a way that would bring about a particular result not expressly and unequivocally intended by its authors. If courts are to interpret a statute in order to bring about a particular result, it should be clear from the text of that statute itself. This particular rule of construction, therefore, rests principally on an understanding that a judicial outcome should be sought after only if and insofar as the statutory text says or implies so in no uncertain terms.[350]

To be sure, both the avoidance canon and clear statement rules have raised strong objections. Constitutional avoidance has been criticized, for instance, for its purported failure to faithfully reflect the legislative body's actual preferences when unable but to offer constitutionally doubtful statutes.[351] Narrow construction of a statute in order to avoid a constitutional doubt amounts, its critics argue, to a constitutional decision in its own right and expands the relevant constitutional provision beyond its legitimate warrant.[352] However, critiques arguing for resolving conflicts in favor of federal powers by invoking a federal principle of supremacy rest on a misunderstanding which perpetuates an outdated *binary* model of judicial review. The latter view holds that a court

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[347] See art 352(1) TFEU which reads that:

> If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

[348] Ernest A. Young 'Protecting Member State Autonomy in the European Union: Some from American Federalism' (n 311) 1677.

[349] U.S. Supreme Court, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (holding that Congress did not exceed its constitutional powers by selling excess electricity to consumers; the case is well-known for elaborating for the first time the doctrine of 'constitutional avoidance' but it turned out that finally the court did not manage to avoid ruling on the constitutional controversy brought before it).

[350] Ernest A. Young, 'Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review' (1999-2000) 78 Tex L Rev 1604-1609. See generally William N. Eskridge Jr. & Philip P. Frickey, 'Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' (1992) 45 Vand L Rev 593.

[351] Ernest A. Young, 'Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review' (n 350) 1553.

[352] ibid, 1550.

is supposed to interpret a constitutional provision or a set of constitutional provisions in order to yield a single constitutional line that federal or state government can cross by no means.[353] Every governmental action on the 'good' side of the line is unqualifiedly valid. The courts are supreme with respect to governmental activity that seems to cross the constitutional line to the 'bad' side, and their decisions must be overruled by courts on constitutional terms. As previously argued, such a judicial strategy insisting on 'invalidation norms' is inherently flawed and more and more often deemed to failure.

Enforcing 'invalidation norms' as a model of judicial review of federal/state conflicts may be the most familiar model of judicial review, not the least so for the CJEU too;[354] but it is hopefully not the only one. In the context of what Professor Ernest A. Young has called 'resistance norms,' constitutional norms may be more or less elastic, without being unduly fluid, depending on the *circumstances*.[355] As the American lawyer James Harvie Wilkinson III said:

> There are few absolute principles in law. Those principles that appear to be absolute are, in reality, presumptions which may be overcome in appropriate circumstances.[356]

Acquaintance with the terminology may be rare, but its application by courts is not completely unknown. For example, the U.S. Constitution's Commerce Clause has been interpreted as embodying a structural norm barring states from *discriminating* against or *burdening* the flow of interstate commerce.[357] According to Professor Young, nondiscrimination of the Commerce Clause functions as an 'invalidation norm,' whereas its 'burden' alternative functions more as a 'resistance norm.' The United States may *never* discriminate against each other in matters of interstate commerce – that is the essence of the 'invalidation norm' adopted. In contrast, they can regulate commerce in a way that incidentally burdens interstate commerce 'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits';[358] such a finding points directly to the application of a 'resistance norm.' Super-majorities too imposed by constitutional provisions for certain extraordinary subject matters offer another example of 'resistance norms.'[359]

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[353] ibid, 1594.

[354] ibid.

[355] ibid.

[356] J. Harvie Wilkinson II., 'Toward a Jurisprudence of Presumptions' (1992) 67 NYU L Rev 907.

[357] U.S. Constitution, art 1, s 8, cl 3 which reads that 'The Congress shall have power… To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; ….'

[358] Ernest A. Young, 'Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review' (n 350) 1595; U.S. Supreme Court, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 179 (1970) (holding that the power of the States to enact laws affecting interstate commerce is limited by the extent to which it places an undue burden on private companies).

[359] Ernest A. Young, 'Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review' (n 350) 1595.

In both circumstances, constitutional law does not wholly stand in the way of governmental action by putting an insurmountable 'bright-line' obstacle – it just makes governmental action *harder*.[360]

In addition, clear statement rules combined with a strategy of constitutional avoidance are capable of resolving potential federal/state clashes by functioning at a normative level as to push interpretations in directions that reflect public values. Herein perhaps lies a broader manifestation of the *changing nature of public law* in an era of complex administrative governance. No longer will the focus be primarily on clear-line analyses of validity or invalidity; rather, public law has been shifting, the argument goes, toward a balancing system based on resistance norms, designed primarily to raise the costs of decision making by imposing additional reason-giving burdens without necessarily drawing bright lines.[361] Although no doubt building on earlier traditions, public law has shifted away from straightforward inquiries 'toward the allocation of burdens of reason-giving' in diffused and fragmented regulatory systems.[362] As with any radical transformation, a reconciliation is obviously desirable, involving a balancing of functional calls for change with the need for the ensuing changes to be seen as legitimate in a culturally and historically recognizable sense.[363] The evolution in the nature of public law toward a system of reason-giving rather than outright validity or invalidity is an extension of a broader effort towards reconciliation, pitting the complex socio-political realities of modern conceptions of legitimacy against those still associated particularly with institutions of representative government, primarily on the national level.[364] The challenge is to compromise the functional reality with the apparently continuing attachment to the nation-states as the center of legitimacy in Europe.[365]

Transferring those interpretive solutions of federalist imprint from abroad depends on a more basic question: What do we want federalism to achieve in Europe? On the one hand, we might prefer a stronger version of federalism, one that would help preserve the Member States as powerful enclaves of political autonomy. Citizens are left free to keep identifying with their governments which in turn would enjoy enough freedom to pursue radically a variety of policies and to dissent from norms derived from the European center.[366] On the other hand, we might prefer a more moderate federalist version that would offer some space for limited distinctiveness at the Member State level, despite simultaneously realizing that most citizens will probably see themselves primarily as citizens of a Member State, not the EU. Member States would preserve their capacity to experiment with a variety of policy outcomes to achieve the goals set at the EU level and to engage in competition with one another in a number of hotly contested policy issues such as in the definition of marriage, the legitimacy of physician-assisted suicide etc. Member States'

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[360] ibid, 1596.

[361] Peter L. Lindseth, *Power and Legitimacy* (n 96) 197.

[362] ibid, 22.

[363] ibid, 224.

[364] ibid.

[365] ibid, 253.

[366] Ernest A. Young, 'Protecting Member State Autonomy in the European Union: Some from American Federalism' (n 311) 1724.

governments would check central power in Brussels not through disobedience but by providing alternatives to a relentlessly more uniform political ethos.[367]

This sort of approach might offer some value for European affairs for several reasons. First, it is designed for issues arising out of parallel jurisdictions in which both the center and the periphery struggle to exercise their own powers based on considerably inconclusive Treaty provisions. A system of clear statement rules would relieve some of the line-drawing pressure off the EU and Member States' courts by reducing the number of cases in which jurisdictions should be clearly demarcated at any cost.[368] Second, the process-oriented aspect of clear statement rules fits well within the architecture of the EU's lawmaking process.[369] Third, European courts seem to be familiar with the teleological moves that a system of clear statement rules apparently involves.[370]

Thus, the notion of 'resistance norms' offers an effective alternative solution to the fundamental problem of establishing a power balance between EU law and the Member States' claims of constitutional essentialism encapsulated in the name of 'constitutional identity.' Central to a process of reconciliation, a resistance norm, in addition to recognizing the necessity of functional change, seeks to limit that change both politically and legally in light of inherited cultural conceptions of legitimate governance.[371] But rarely do oversight mechanisms block the exercise of delegated powers outright; rather, they simply serve to increase the costs to each agent using that power.[372] Member States' courts recognize the requirements of effective administration at the supranational level. But they also take seriously integration's purported foundation in representative democracy on the national level and seek to preserve it in a constitutionally *meaningful* way notwithstanding the functional demands pertaining to delegation. This is the essence of the struggle for reconciliation over administrative governance since the postwar decades that has now shifted to the supranational dimension of European integration.[373] On the other hand, however, adopting such a judicial strategy requires that the CJEU reflect more deeply on, and probably revise by enriching, its interpretive quiver. The CJEU's teleologically-oriented jurisprudential record reveals that for the EU courts to use brand new interpretive rules as a form of process federalism would require a significant shift in how they perceive their own role: The EU courts should realize that they are *keepers* of a power balance rather than mere engines of integration.[374]

Transposed into the European legal environment, an effective judicial strategy of paying respect to Member States' constitutional identities would appear as follows. A Member State (supreme or constitutional) court refers a preliminary question to the CJEU over a perceived clash between EU law and national law which necessarily involves a likely breach of constitutional identity.

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[367] ibid.

[368] ibid, 1713.

[369] ibid.

[370] ibid, 1714.

[371] Peter L. Lindseth, *Power and Legitimacy* (n 96) 47.

[372] ibid, 48.

[373] ibid, 187.

[374] Ernest A. Young, 'Protecting Member State Autonomy in the European Union: Some from American Federalism' (n 311) 1717.

Confronted with its duty to interpret EU law, the CJEU, in addition to ensuring respect for EU law's integrity and uniformity, may, depending on the circumstances, apply either of two courses of action. On the one hand, it should pursue some form of constitutional avoidance. In particular, it should avoid ruling on the most 'superfluous' level of EU law – that is, involving primary EU law and its general principles – and resolve the case on sub-constitutional – usually statutory – grounds. On the other hand, if proper construction of secondary EU law to bring about a compromise with national constitutional identity is impossible, then EU courts should apply a clear statement rule under which legislative intent at EU level is necessary to turn down any allegations of disrespect toward national constitutional identity. Absent such intent, the EU act should be declared void but without the EU institutions being disenfranchised to surmount the reenact – but this time making clear their intention to act in disregard of Member States' constitutional identities.

National legitimating mechanisms do much, it must be mentioned, to reconcile Europe and the nation-state but they can never do so fully. For this reason, in the context of integration, it is becoming increasingly clear that Member States cannot relinquish their jurisdiction located at the outer borders of delegation where it collides with their core constitutional identity.[375] At these very outer margins, then, mere legitimation must shift at least theoretically from resistance to invalidation – that is, resistance norms must give way to validity norms – with the purpose of preserving some semblance of constitutional democracy on the national level.[376]

From the outset, Jean Monnet underestimated the need for supranational delegations to be legitimated through national legitimation mechanisms.[377] He gambled on the willingness and decisiveness of national executives to acquiesce in a supranational system grounded primarily on technocratic autonomy which he viewed as functionally necessary to overcoming the impediments (and sometimes disastrous perils) of national sovereignty.[378] Both Monnet and Professor Walter Hallstein, first president of the EEC Commission, believed that the process of integration, once commenced in certain limited domains, would, first, necessarily spill-over into other domains according to its own inexorable logic (*Sachlogik* in Hallstein's terms). Both also hoped that over time the existence of supranational institutions and processes would promote a shift in popular loyalties away from national institutions to the supranational level.[379] Back in 1988, Weiler had predicted that, either the collapse of the foundational equilibrium would constitute a destabilizing act of such dimensions that it would endanger the very constitutional *foundation* on which European integration had been founded; or that acceptance of Community discipline may have become a *reflex response* of the Member States (and their peoples). At present, the best one may expect from popular loyalties is that they pervade silently but forcefully the supranational judicial dialogue of identity issues and somehow relieve any need to trigger the exercise of Selective-Exit mechanisms.

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[375] Peter L. Lindseth, *Power and Legitimacy* (n 96) 267.

[376] ibid.

[377] ibid, 92.

[378] ibid.

[379] ibid, 93.

Based on the previously analyzed theory of judicial review, I will test throughout the remainder of this chapter the general guidelines of identity review against a set of EU Member States' supreme court judgments, each of which offers valuable insights into both the judicial apparatus to be applied and the notion of constitutional identity itself as has been elaborated in Chapter 2.

V. Germany's Constitutional Identity. The 'Outright Monetary Transactions' Preliminary Reference Saga.

The story begins with the economic crisis that exploded in late 2009 when several eurozone Member States were unable to serve their sovereign debts or to bail out their overburdened banks.[380] In a press release of 6 September 2012, the European Central Bank (ECB), determined to 'do whatever it takes,'[381] in its President Mario Draghi's words, and to offer 'unlimited support' to rescue the euro currency, announced that it considered launching a program of Outright Monetary Transactions (OMT).[382] Most probably intended to serve as a tranquilizer to capital markets, rather than as a formal instrument of monetary policy, the OMT program involved purchasing, in secondary markets, bonds issued by troubled eurozone Member States insofar as they received financial assistance provided by the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM) and successfully observed their commitments.[383] In addition, the ECB decided, in September 2014, to initiate an asset-backed securities purchase program (ABSPP),[384] and in January 2015 the ECB expanded it so as to include a secondary markets public sector asset purchase program (PSPP),[385] as later confirmed by its Decision (EU) 2015/774 of 4 March 2015.[386] In particular, in the context of the OMT program, the central banks of the Member States, in quotas

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[380] See generally Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press) 11-14.

[381] Mario Draghi, President of the European Central Bank & Vítor Constâncio, Vice-President of the European Central Bank, Press Conference of 2 August 2012 <https://www.ecb.europa.eu/press/pressconf/2012/html/is120802.en.html#qa> accessed 25 November 2022; European Central Bank, 'Monetary policy decisions,' Press Release of 2 August 2012 <https://www.ecb.europa.eu/press/pr/date/2012/html/ pr120802.en.html> accessed 25 November 2022

[382] European Central Bank, 'Technical features of Outright Monetary Transactions,' Press Release of 6 September 2012 <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 25 November 2022 (announcing the technical features of a program of Outright Monetary Transactions aimed at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy.)

[383] European Central Bank, 'Technical features of Outright Monetary Transactions' (n 382).

[384] European Central Bank, 'Monetary policy decisions,' Press Release of 4 September 2014 <https://www. ecb.europa.eu/press/pr/date/2014/html/pr140904.en.html> accessed 25 November 2022; Mario Draghi, President of the European Central Bank, Press Conference of 4 September 2014 <https://www.ecb.europa.eu/press/pressconf/2014/html/is140904.en.html> accessed 25 November 2022. See also European Central Bank, 'ECB announces operational details of asset-backed securities and covered bond purchase programmes,' Press Release of 2 October 2014 <https://www.ecb.europa.eu/press/pr/date/2014/html/pr141002_1.en.html> accessed 25 November 2022; European Central Bank, 'Technical Annex I. ECB announces operational details of asset-backed securities and covered bond purchase programmes' of 2 October 2014 <https://www.ecb.europa.eu/press/pr/date/2014/html/pr141002_1_Annex_1.pdf> accessed 25 November 2022.

[385] European Central Bank, 'ECB announces expanded asset purchase programme,' Press Release of 22 January 2015 <https://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html> accessed 25 November 2022.

[386] Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme [2015] OJ L121/20.

reflecting their shares in the ECB's capital key, in association with the ECB, might, within a fixed timetable, purchase outright marketable debt securities from eligible parties on the secondary markets.[387] These purchases, known as quantitative easing (QE), were instrumental to the ECB's primary goal of maintaining price stability and were intended to 'support economic growth across the Euro area and help the Eurozone return to inflation levels below, but close to 2%.'[388]

As strongly anticipated, some eurozone Member States were unhappy with these developments. From a number of quarters – legal, political, and economic – came warnings against the far-reaching implications that the OMT program might cause and of the dire consequences that the ECB's controversial policies might exert on the Member States' internal economic and fiscal policies.[389] In 2013, a number of prominent Germans including the right-wing politician Peter Gauweiler and Germany's *Bundesbank*, brought an action before the *Bundesverfassungsgericht* challenging OMT's compatibility with EU law as well as with German constitutional law.[390] The applicants argued in particular that the ECB had sidestepped its Treaty mandate by announcing a program that, if strictly scrutinized, appeared to operate in the field of economic policy which was prohibited by EU law, not of monetary policy – the only kind of policy actually permitted by EU law.[391] They also blamed the OMT program for breaching the Treaty prohibition of monetary financing.[392]

Applying what it had designated in a series of earlier judgments as an *ultra vires* test, the court's immediate reply was to consider the OMT program illegitimate under EU law.[393] But, for the first time ever, the most powerful Member State court took a pause and pursued a different course of action by deciding to suspend and request a preliminary ruling from the CJEU. In the court's daring

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[387] European Central Bank, 'Technical features of Outright Monetary Transactions' (n 382).

[388] Mario Draghi, President of the European Central Bank & Vítor Constâncio, Vice-President of the European Central Bank, Press Conference of 2 August 2012 (n 381).

[389] For a miscellaneous analysis of the various issues that emerged before and after the *Bundesverfassungsgericht*'s request for a preliminary reference on the OMT program, see the contributions in (2015) 16(6) German Law Journal Special Issue 1317-1796.

[390] BVerfG, Judgment of 14 January 2014 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (*OMT I* judgment).

[391] ibid, paras 5-15.

[392] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 123 which reads that:

> 1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favor of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.
>
> 2. Paragraph 1 shall not apply to….

[393] ibid, pt B, s II 'Interpretation of Union Law by the Federal Constitutional Court,' paras 55-100. In particular, the German court reasons on the illegitimacy of the OMT program under EU law in pt B, s II, sub-ss '1. Transgression of the European Central Bank's Mandate,' paras 56-83, '2. Violation of the Prohibition of Monetary Financing of the Budget,' paras 84-94, '3. Irrelevance of a Reference to a "Disruption to the Monetary Policy Transmission Mechanism,"' paras 95-98.

maneuver, the CJEU was supposed to either declare the OMT program contrary to EU law, or to provide a more limited interpretation of it, one pursuant to the EU Treaties as they were read by the *Bundesverfassungsgericht* itself consistently with German constitutional law.[394] The court also provided some guidelines as to what that limited interpretation of the OMT program should be so as to fit comfortably with Germany's *Verfassungsidentität*. In the court's own words:

> In the view of the Federal Constitutional Court, the OMT Decision might not be objectionable if it could, in the light of Art. 119 and Art. 127 et seq. TFEU, and Art. 17 et seq. of the ECB Statute, be interpreted or limited in its validity in such a way that it would not undermine the conditionality of the assistance programs of the European Financial Stability Facility and the European Stability Mechanism, and would only be of a supportive nature with regard to the economic policies in the Union. This requires, in light of Art. 123 TFEU, that the possibility of a debt cut must be excluded, that government bonds of selected Member States are not purchased up to unlimited amounts, and that interferences with price formation on the market are to be avoided where possible.[395]

The ECB is responsible under the EU Treaties to run the monetary policy for the eurozone area, and its powers are relatively narrowly defined in the Treaties.[396] This condition, however, has dramatically developed in recent years, as the ECB was forced by an unprecedented series of economic events to resort to at least the announcement of *nonstandard* measures to fight back against the sovereign debt crisis. The OMT program was precisely intended to form part of that group of measures.[397] The underlying idea has been that the ECB will buy governmental bonds from troubled eurozone Member States when nobody else buys them, or their yield is too high, thus disqualifying the debtor Member States from covering any interest payments on new bonds, and thereby running the risk of economic default. From a legal perspective, the EU law prohibits the ECB from acquiring governmental bonds directly, as that would amount to monetary financing, or becoming a direct borrower of last resort to a Member State. Instead, the ECB was inclined to buy governmental bonds in the *secondary* market – that is, from third parties that had already purchased these bonds directly from Member States – rather than from each Member State directly. To be sure, the ECB had already applied similar policies in the past, but this time it inserted an additional element of conditionality, as the Member State that were in need of rescue were under an obligation to have already sought financial assistance from the EFSF or the ESM, and be complying with any conditions set thereupon – such as various macroeconomic reforms negotiated between the Member

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[394] ibid, pt B, s II, sub-s 4 'Possibility of an Interpretation in Conformity with Union Law,' paras 99-100.

[395] ibid, para 100 (citations omitted).

[396] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Ch 2 Monetary Policy' arts 127-133; Consolidated Version of the Treaty on European Union, Protocol (No. 4) on the statute of the European System of Central Banks and of the European Central Bank [2016] OJ C 202/230.

[397] Mario Draghi, President of the European Central Bank & Vítor Constâncio, Vice-President of the European Central Bank, Press Conference of 2 August 2012 (n 381).

States and the *troika*, the European Commission, the ECB, and the International Monetary Fund (IMF).[398]

The *OMT reference* case was upsetting for a variety of reasons. For instance, although not yet actually enforced, the mere announcement of the OMT program played large part in saving the eurozone from the abyss, and offered an intelligent defense strategy against similar threats in the future.[399] A finding of illegitimacy, or subjecting the OMT program to such conditions that would undermine its force, could have threatened any feasible prospect of recovery. In addition, in its first ever preliminary reference, the *Bundesverfassungsgericht* used needlessly bold language that might poison any intent for judicial dialogue. There was apparently a covert propensity for conflict between the two courts, with unpredictable consequences for the final outcome. Most prominently for present purposes, the *OMT* reference engaged Germany's *Verfassungsidentität* which enables us to reflect more generally on constitutional identity and in particular on matters pertaining to both its substance and process.

First, the *Bundesverfassungsgericht* held any challenges against the OMT program by itself as being inadmissible, based on the understanding that the Member States' courts are allowed to review the legitimacy of domestic acts *only*.[400] In particular, it further found that EU acts can only be *indirectly* reviewed as 'preliminary questions,' either when they constitute the normative basis for subsequent domestic acts, or insofar as they raise questions regarding the limits of European integration.[401] The court may have rejected any arguments against EU acts themselves, but it did hear the complaints mounted against the government's inertia to challenge the OMT program.[402] The court's reasoning is as follows. The EU Treaties, as well as any future changes to them, are conditional upon any limitations imposed by the *Grundgesetz* against amendments to itself too. In other words, any express limitations to constitutional amendments are simultaneously limitations to European integration. Indeed, art 79 reads that:

> Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in arts 1 and 20 shall be inadmissible,[403]

whereas art 20 reads that:

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[398] European Central Bank, 'Technical features of Outright Monetary Transactions' (n 382), 'Conditionality.'

[399] This is a fact that even the *Bundesverfassungsgericht* itself acknowledges; *OMT I* judgment (n 390), para 98.

[400] *OMT I* judgment (n 390), paras 95-100.; see also C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECR 04199, paras 11-20.

[401] Mehrdad Payandeh, 'The OMT Judgment of the German Federal Constitutional Court. Repositioning the Court within the European Constitutional Architecture. Case Note' (2017) 13 EuConst 407.

[402] *OMT I* judgment (n 390), pt B, s I, sub-s 3 'Obligations to Act and not to Act of German Authorities,' paras 44-54.

[403] *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany) [1949], art 79, s 3.

> (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.
>
> (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice….[404]

EU law, then, cannot interfere, by way of a categorical provision included in the primary or more probably the secondary EU law or any interpretations thereof, or even by way of a future amendment of EU law, with what the *Grundgesetz* picks out as belonging to its identity. Any EU act that engages with *Verfassungsidentität* is, *from the outset*, inapplicable in Germany insofar as it scratches the surface of a constitutional territory, that the *Bundestag* itself is barred from crossing by way of an amendment to the *Grundgesetz* or of a furtherance of European integration.[405] If any delegations to the EU that were originally legitimate but were later enforced in a way that contradicted the *hands-off* identity policy, these would amount to no less than a set of *ultra vires* acts that could not help but be declared void by the *Bundesverfassungsgericht*.[406] Prior to invalidation, however, the CJEU must be provided with the opportunity to (re)interpret any piece of EU law that seems to fit uncomfortably with the *Verfassungsidentität*, before the German court is called to deliver on the EU measure's validity within the domestic jurisdiction.[407]

Applied now to the facts of the *OMT* reference, part of Germany's *Verfassungsidentität* is that the *Bundestag* must be able to reach any resolutions on revenue and expenditure *autonomously* against the rest of the eurozone area Member States. Germany's *budgetary autonomy* disables the *Bundestag* from being subjected to the kind of automatism that the OMT program rests strongly upon with respect to purchasing bonds or granting benefits which are essentially removed from its overall influence without being effectively bound to a strict conditionality.[408] No permanent device can be established to consent to a set of far-reaching, non-predefined liabilities, or to approve large-scale financial assistance without the *Bundestag* being able to investigate, deliver on, and sanction each of them *independently*.[409]

In the *OMT* reference, then, the *Bundesverfassungsgericht* seized the opportunity to elaborate more carefully on the outlines of the *Identitätskontrolle* it holds itself responsible to conduct. Art 79(3) shields the principles laid down in arts 1 and 20 (human dignity and basic constitutional principles including democracy) from the possibility of constitutional amendment and therefore enlists them, in the court's own list, into the *Verfassungsidentität*. With reference to the OMT program, it is specifically the *Bundestag*'s budgetary powers that are at stake and that form part of the constitutional identity of Germany due to their relationship with democracy writ large. To be

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[404] ibid, art 20, ss 2-3.

[405] ibid, para 27.

[406] ibid.

[407] ibid.

[408] ibid, para 28.

[409] ibid.

sure, the court's findings are weak from some perspectives. For instance, the court fails to do justice to the fact that there are insurmountable barriers in any attempt to strictly separate the monetary policy from the fiscal or economic policy; undeterred by such barriers and definitely confident enough to dig deep into the case, it inspects what would otherwise lie on the heart of the ECB's expertise, thereby running the risk of exceeding its judicial mandate and crossing the line of expert decision-making.[410] Moreover, the court's elaboration of such abstract ideas as democracy and the rule of law in its efforts to offer grounds for the *Verfassungsidentität* is deeply problematic because it overloads them with near-mythological attributes.[411] Last, the court's analysis is also flawed in that it insists on a distinction between identity review based on EU law and its twin review based on German constitutional law, which by resting on the idea that *Identitätkontrolle* is *immune* from any balancing against contrasting values and principles of EU law is, to understate the issue, unintelligible.

Still, the *Bundesverfassungsgericht* has grasped well the general parameters of identity-review's operating system. First, *Identitätskontrolle* must, subject to an undisputed cause of *Europafreundlichkeit*, depend on some finding of a serious interference with *Verfassungsidentität*. Second, the court offers some guidance about what it requests by way of a (re)interpretation of EU law to drop the *Identitätsverletzung* claim, thus enabling the CJEU to follow suit (or not). Third, it is finally inclined to submit a preliminary reference to the CJEU, in the hope that the latter will take the route of adjustment. But there is something missing: The *Bundesverfassungsgericht* stops short from engaging in a deeper analysis of, or providing some compelling arguments about, its *Verfassungsidentität*; from naming those exceptionally German ingredients which combined and, to quote once more Justice Kriegler's formulation, 'viewed in context, textually and historically, … have a poignancy and depth of meaning *not echoed in any other national constitution* I have seen….'[412] Throughout the last part of this chapter I will search for the missing parts in a pre-Brexit judgment delivered by the UK Supreme Court in a case entitled *R (on the application of HS2 Action Alliance Limited) (Appellant) v. Secretary of State for Transport and another (Respondents)*, which is at least allegedly delivered on the most original piece of an (ex-)Member State's constitutional identity.

VI. UK Constitutional Identity: Towards Placing Member-State Qualifications to the Primacy of EU Law.

Among the thorny issues that preceded the decision of the United Kingdom to join the EEC was whether the primacy of its law, as it was derived from the EEC Treaties by the CJEU and which candidate Member States were required to accept, would spell the end of the genuinely British doctrine of parliamentary sovereignty. There were voices of politicians such as Sir Robin Turton's,

[410] Mehrdad Payandeh, 'The OMT Judgment of the German Federal Constitutional Court. Repositioning the Court within the European Constitutional Architecture. Case Note' (n 401), 410.

[411] ibid, 416.

[412] See Chapter 3 (emphasis added).

on the one side, who said that 'We are abolishing Parliament at Westminster and transferring its powers to Brussels.'[413] Or Geoffrey Rippon's, on the other side, who maintained that:

> By accepting the directly applicable [EEC] law and… the jurisprudence of the European Court… the [European Communities] Bill provides the necessary precedence. In relation to statute law, this means that the directly applicable provisions ought to prevail over *future* Acts of Parliament in so far as they might be inconsistent with them [despite which] … nothing in the Bill abridges the ultimate sovereignty of Parliament.[414]

Parliamentary sovereignty was first developed as a UK law concept in a series of judicial cases during the seventeenth century.[415] It has traditionally been understood to imply that the parliament is free to enact laws on any policy field it picks out, and that the acts of parliament preside over subordinate legislation, regulations, or common law rules. In the seventeenth-century *Case of Proclamations*, Chief Justice Sir Edward Coke proclaimed that he doubted the royal lawmaking supremacy since the King had only the privileges and powers that the law accorded him and thus, he was unable to create new offenses in law.[416] The issue of parliamentary sovereignty has been framed in terms of the extent of authority that the parliament holds, and whether there are any sorts of laws that the parliament *cannot* pass. The nineteenth-century British lawyer A. V. Dicey famously said that 'Neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim that the other to be considered a supreme law.'[417] The traditional Diceyan posture identifies three derivative principles of parliamentary sovereignty. First, the parliament is the supreme lawmaking body that can enact any laws on any subject matter.[418] In that context, parliamentary sovereignty is seen as a constitutional principle that rests on explicitly legal terms: It is a purely legal principle with legal implications, addressed to the public authorities within each jurisdiction about how (far) they are permitted to perform their duties and responsibilities in accordance with the laws passed by the parliament.

Second, the parliament cannot bind its successors.[419] Some constitutional theorists assume a parliamentary power to entrench under strict conditionality specific parts of legislation so as to bind future parliaments. However, the constitutional orthodoxy in Britain (and elsewhere) is that there is no *legal* limit on the laws that the parliament can pass, but any such limits, if they really

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[413] HC Deb 28 October 1971, vol 823, col 974.

[414] HC Deb 15 February 1972, vol 831, col 278 (emphasis added). See also Prime Minister of the United Kingdom, *The United Kingdom and the European Communities* (Cm 4715, 1970-1971).

[415] See generally Jeffrey Goldsworthy, *The Sovereignty of Parliament. History and Philosophy* (Oxford University Press 1999), esp 51ff.

[416] *The Case of Proclamations* [1610] EWHC KB J22. See also *R v Hampden* [1687] 3 State Tr 825; *Godden v Hales* [1686] 11 St Tr 1166; *Dr. Bonham's Case* [1610] 8 Co Rep 114; *Day v Savadge* [1614] Hob 85.

[417] Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (first published 1885, 2nd ed MacMillan 1886) 133.

[418] ibid, 36.

[419] ibid, 61.

exist and are enforceable, are first and foremost *political*.[420] When domestic laws are found to be in contradiction, in particular, with international law provisions, the latter are by no means, in the UK's dualist legal system, binding against the Parliament unless the Parliament itself enacts a statute to bring it into effect.[421] International law, that is, is unable to invalidate *ipso facto* any contrasting domestic laws. To avoid any clashes between international law, if properly integrated through acts of parliament, and national law, UK courts generally follow the principle that the parliament *did not intend* to legislate inconsistently with international law. If however interpretation cannot bring about the most favorable results, the courts dictate that international law provisions at least not be subject to repeal by implication, but only by express statutory provisions – that is, they enforce a rule of construction reminiscent of its American counterpart of clear statement rules.[422]

Third, the rest of legislative outputs remain firmly within the domain of politics.[423] Any background assumptions that might have led the MPs to vote for or against a Bill have been traditionally understood to stay away from courts' responsibilities. In other words, it is not for a court of law to investigate why the UK Parliament has been led to pass a law, or has refrained from doing so. Such political considerations do not have any impact on the validity or authority of the parliament. As Professor A. V. Dicey best put it:

> The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors.[424]

As long as the Parliament is constitutionally unrestrained in what it can pass in the form of a statute, it is *sovereign*.[425] What courts are supposed to do when confronted with interpreting and applying a statute on the facts of the case before them is a different matter.

In the UK, the 1972 European Communities Act (ECA), which entered into force as Britain prepared for accession to the EEC in 1973, served as the requisite bridge between the UK law and EU law by instructing UK judges to apply EEC law, as interpreted from time to time by the CJEU, as well as by facilitating the enactment of secondary legislation in order to implement EU laws within the UK.[426] Back then it may have been predicted that, with the passage of time and the

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[420] ibid, 66-67.

[421] High Court of England, *Cheney v Conn* 1968 1 All ER 779 (holding that statutes enacted by Parliament could not be declared void on grounds of illegality, thereby restating the principle of Parliamentary sovereignty; in more detail, the court held that if a goal pursued through an Act of Parliament is invalid, then juridical remedy must be directed not to invalidating the law as illegal, but to dealing with that purpose).

[422] See *supra* section IV.

[423] Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (n 417) 67.

[424] ibid.

[425] But see Martin Loughlin & Stephen Tierney, 'The Shibboleth of Sovereignty' (2018) 81 MLR 989, who oppose the standard position by arguing that sovereignty has become a *shibboleth* in British constitutional law.

[426] Stephen Weatherill, *Law and Values in the European Union* (n 142) 230.

development of the European Communities, 'The legal concept of parliamentary sovereignty… [would] drift away into the shadowy background from which it emerged,'[427] but until that time did actually come, a way had to be found to enable both doctrines of parliamentary sovereignty and of primacy of EEC law to coexist peacefully. UK courts were ready to interpret domestic legislation that was ambiguous in such a way as to ensure it complied with obligations undertaken at EU level.[428] But did the ECA 1972 actually secure the primacy of EEC law without bringing any constitutional innovation? Or was it that the 'Parliament,' in Lord Justice Salmon's words, '… [could still] enact, amend, and repeal *any* legislation it [pleased]?'[429] *including* the ECA 1972 itself.

For decades after the UK's accession to the EEC, and despite the enactment of the ECA 1972, the standard view was that the parliament had unlimited powers, and could not bind its successors either as to substance or as to the manner and form in which laws were enacted. It was generally accepted that the parliament could repeal or amend earlier legislation, not only expressly but also *impliedly*, including UK laws transposing European regulations, and that this scenario would actually occur if later legislation was found to be inconsistent with what had been enacted in the past prior to the UK's accession to the EEC.[430] However, there was some authority for recognition of a class of constitutional statutes that pressed for nothing less than a differentiated treatment over the possibility of *implied* repeal or modification.

First, in *Factortame*, British judges provided an occasion for rigorous exploration of the extraordinary claims presented by the EU law. The House of Lords (Appellate Committee), equipped with a CJEU's preliminary ruling, which held that the British courts possessed under EU law the power to grant interim relief in a process against the Crown (independently of the fact that UK laws did not grant any such power explicitly),[431] had then to decide whether to exercise that power on the facts before it. Their Lordships considered the case apt to grant interim relief. In Lord Bridge's words:

> There is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights

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[427] Francis A. Trindade, 'Parliamentary Sovereignty and the Primacy of European Community Law' (1972) 35 Mod L Rev 401-402.

[428] Court of Appeal of England and Wales, *Macarthys Ltd v Smith* [1981] 1 QB 180 (ordering the fulfillment of the CJEU's judgment in Case C-129/79 following a rejection by a UK court of a claim that UK law could be interpreted in light of, and overridden by, EU law); House of Lords, *Garland v British Rail Engineering* [1983] AC 751 (referring a request for a preliminary reference to the CJEU in a case of nondiscrimination on grounds of sex); see also Stephen Weatherill, *Law and Values in the European Union* (n 142) 231.

[429] Court of Appeal of England and Wales, *Blackburn v. Attorney General*, [1969] 8 CMLR 100, 119 (emphasis added) (rejecting a claim that Britain's decision to join the EEC amounted to an illegitimate surrendering of Parliamentary sovereignty).

[430] Paul Craig, 'Constitutional Identity in the United Kingdom. An Evolving Concept' in Christian Calliess & Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) 291.

[431] CJEU, Case C-213/89 *R v Secretary of State ex parte Factortame* [1990] ECR I-2433. The preliminary ruling was requested by a High Court, *Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692 (*Factortame I)*.

> under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.[432]

However, Lord Bridge was cautious enough to ground his decision *not* on EU law's terms itself but on native sources – that is, the ECA 1972.[433] Lord Bridge treated the ECA 1972 as if it directed the British courts to override any rule of national laws, whether prior or subsequent, found to be inconsistent with any directly enforceable rules of EU law.[434] This was so not *just* because the CJEU said so, *but* because the ECA 1972 said so.[435] To sum up, at least two implications stand out. First, British courts are forced by UK law to interpret even subsequently enacted legislation based on a background assumption that that legislation be read as *intended* to meet the requirements of EU law. Second, UK laws, whether prior or not, will be disqualified insofar as they conflict with EU law.

The *Factortame* innovations were later recalibrated in *Thoburn* in which Lord Justice Laws inserted into the UK constitutional law a concept which literally amounted to a transformation of its *identity*.[436] He held that the common law had underwent a modification of the standard concept of sovereignty by integrating some exceptions to the doctrine of implied repeal. Only *ordinary* statutes were free to impliedly repeal. In contrast, what he termed 'constitutional statutes,' – statutes governing the relationship between the state and its citizens in some overarching manner, or dealing with human rights – were not subject to repeal by implication – at least, not in the more relaxed way that that same doctrine was applied over ordinary statutes.[437] The repeal or disqualification of a constitutional statute could only occur if there were some form of *clear statement rules*, that is 'express words in the later statute, or… words *so specific* that the inference of an actual determination to effect the result contended for was *irresistible*.'[438] The ECA 1972 that included the terms of the primacy of EU law in the event of a clash with UK law was considered to be such a 'constitutional statute,' whose provisions were thus immunized against repeal or modification by mere implication.[439] *Thoburn*'s further implication was that the constitutional relationship between the UK and the EU was not to be decided by the CJEU's jurisprudence, which through the assistance of the institutional power it possessed by itself *could not* have possibly

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[432] House of Lords, *R v Secretary of State for Transport, ex parte Factortame* [1991] 1 AC 603 (*Factortame II*), 659.

[433] Stephen Weatherill, *Law and Values in the European Union* (n 142) 231.

[434] ibid, 232.

[435] ibid.

[436] Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (2014) 10(3) European Constitutional L Rev 385.

[437] Divisional Court, Queen's Bench Division, *Thoburn v Sunderland City Council* [2003] QB 151, para 62 (a renowned judgment for acknowledging primacy of EU law but stressing that primacy not on EU law but on domestic sources).

[438] *ibid*, para 63 (emphasis added).

[439] Paul Craig, 'Constitutional Identity in the United Kingdom. An Evolving Concept' (n 430), 292. For a critique of the reinvigorated judicial decision-making, see Aileen Kavanagh, 'Constitutional Review, the Courts, and Democratic Skepticism' (2009) 62(1) Current Legal Problems 102.

entrenched EU law within the UK jurisdiction.[440] The corollary effect was that any conflict between EU law/ECA 1972 and another constitutional principle, would be resolved by UK courts alone as a matter of purely UK constitutional law, even when the cause for the inconsistency derived from EU law. The question thus left to be answered in the future was whether subsequent EU laws that received their constitutional status through their domestication by the ECA 1972 would prevail in case of conflict with purely British constitutional statutes as well. Despite the academic value of any answer to that question after Brexit (for the UK apparently, not for the remaining Member States), British judges were about to enrich European constitutional law with a masterpiece of jurisprudence through their compelling inferences in *HS2*.

Judicial interpretations would again and again rescue UK law from its direct confrontation with EU law. But even though interpretations were in some circumstances stretched to the edges, they did have limits that were not always able to save the day. It was *HS2* that finally provided the facts which would force the British judges to confront the disquieting coexistence of more than one *constitutional* statutes being allegedly inconsistent with each other.[441] The application in *HS2* arose out of a government's plan to construct a high speed rail link from London to the north of England known as HS2. The plan was made public through a command paper entitled 'High Speed Rail: Investing in Britain's Future – Decisions and Next Steps,'[442] referred to in the proceedings as the 'DNS.' The DNS included details on the government's strategy and a summary of its decisions, and sketched the process by which it would secure development consent for HS2 through the enactment of two hybrid bills to be enacted by the Parliament. The claimants appealed in April 2012 and their claims were dismissed by a Court of Appeal that delivered its judgment in July 2013.[443]

The case brought before the UK Supreme Court focused on whether the process adopted in relation to the HS2 project – its initiation through a command paper and its introduction into the Parliament through a hybrid-bill procedure – was consonant with the secondary EU law and in particular with the degree of public participation that the EU law commanded. First, the appellants argued that the DNS fell within the range of the EC Strategic Environmental Assessment (SEA) Directive.[444] By its wording, the EC SEA Directive applied to 'plans and programs… which set the framework for future development consent of projects [and which] are required by… administrative provisions …'[445] and therefore a SEA, they argued, ought to have been carried out over the HS2 project. Second, and more importantly, they argued that the hybrid-bill procedure did not

[440] *Thoburn* (n 437), paras 58-59.

[441] House of Lords, *R (on the application of HS2 Action Alliance Limited) (Appellant) v Secretary of State for Transport and another (Respondents)* [2014] UKSC 3 (HS2).

[442] Department for Transport, High Speed Rail: Investing in Britain's Future – Decisions and Next Steps (Cm 8247, January 2012).

[443] Court of Appeal of England and Wales, *HS2 Action Alliance Ltd and Others v Secretary of State for Transport* [2013] EWCA Civ 920.

[444] Directive 2001/42/EC on the assessment of the effects of certain plans and programs on the environment (EC SEA Directive) [2001], OJ L197/30.

[445] EC SEA Directive. arts 2-3.

meet the requirements of the EU Environmental Impact Assessment (EIA) Directive[446] as had been interpreted by the CJEU. Art 1(4) of the EU EIA Directive read that:

> This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, *since* the objectives of this Directive, including that of supplying information, are achieved through the legislative process.[447]

However, the CJEU had effectively turned 'since' as essentially meaning 'provided that' and hence it required that the parliament must have available to it all the information prompted by the EU EIA Directive, as well as that the Member States' courts are required to check if all that conditionality has been satisfied or not, taking into account the entire lawmaking process including preparatory documents and parliamentary debates.[448] Apart from parliamentary whip,[449] the appellants contended that the time available for public debate between MPs was too short to enable them to give due consideration to the environmental issues presented by the project; as well as that after all some MPs were unlikely to attend the debate. In light of these arguments, the applicants concluded that the parliamentary procedure failed to meet the EU EIA Directive's requirements.

First, the Supreme Court held that the command paper fell outside the scope of the EC SEA Directive since it did not set any framework for the (forthcoming) decision to grant development consent for the HS2 project and did not constrain the Parliament in any way whatsoever.[450] It simply set out a proposal to be brought later in the Parliament as a Bill, but essentially left the Parliament free to take any decision over the project itself. There is a difference, the court said, between merely 'influencing' – as the command paper actually did – and 'setting limits' on the issues that will be considered by the MPs.[451] Second, and most importantly, Lord Reed, speaking for a unanimous court, concluded that the EU EIA Directive, correctly interpreted, does not compel any judicial scrutiny of the parliamentary procedure in a constitutionally-problematic sense. In his words:

> Turning then to the appellants' contentions, there is no doubt that the procedure by which the Secretary of State proposes to seek Parliamentary authorization for the HS2 project is a substantive legislative process. Parliament's role is not merely

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[446] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (EU EIA Directive) [2012] OJ L26/1.

[447] EU EIA Directive, art 1(4) (emphasis added.)

[448] CJEU, Case C-435/97 *WWF and others* [1999] ECR I-5613, para 57; Case C-135/09 *Boxus and others* [2011] ECR I-9711, para 37; CJEU, Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and others v Ipourgos Perivallontos, Chorotaxias kai Dimosion ergon and others* [2013] OJ C355/2, paras 78-79 (holding that from the wording of the EU EIA Directive follows that only 'where the objectives of Directive 85/337, including that of supplying information, are achieved through a legislative process, that directive does not apply to the project in question').

[449] *HS2* (n 441), paras 62-66 (explaining that a 'whip' is a MP charged with ensuring party discipline during a vote in the Parliament).

[450] ibid, paras 34-42.

[451] ibid, para 49; see also Lady's Hale dissenting opinion in *HS2* (n 441), paras 130-156 (taking a different approach to the EC SEA Directive side of the case and finally suggesting issuing a request for a preliminary ruling from the CJEU).

> formal. It will be asked to give its consent to a bill which may undergo amendment during its passage through Parliament, and not merely to give formal ratification to a prior administrative decision. There is equally no reason to doubt at this stage that appropriate information will be available to the members of the legislature at the time when decisions are taken as to whether the project should be adopted… In those circumstances, *it is unnecessary for the purposes of this appeal to consider the question whether it can ever be constitutionally permissible for the courts to enquire into the adequacy of the information placed before Parliament during the passage of a bill*.[452]

Lord Reed has probably risked second-guessing his European colleagues' thoughts by assuming that the CJEU could not have possibly been unaware of the importance that rests with the separation of powers, and of the mutual respect that pervades the relationship between courts and parliaments in the European democracies, since otherwise such disregard would lead in the long run to a direct clash between EU law and the Bill of Rights of 1689.[453]

However, Lord Reed did not stop short of considering what would actually happen in such a worst-case scenario, stating that 'If there [was] a conflict, [it could not] be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law.'[454] That conflict could not have been resolved by mere application of the primacy doctrine developed in *Costa/ENEL* and ever since applied by the CJEU, since the domestic application of the doctrine of EU law supremacy is contingent on a UK law – the ECA 1972.[455] Lord Reed went on to hold that:

> The argument presented on behalf of the appellants as to the implications of the EIA Directive, if well founded, *impinges upon long-established constitutional principles governing the relationship between Parliament and the courts*, as reflected for example in art 9 of the Bill of Rights 1689, in authorities concerned with judicial scrutiny of decisions whether to introduce a bill in Parliament… [I]t follows that the appellants' contentions potentially raise a question as to the extent, if any, to which these principles may have been implicitly qualified or abrogated by the [ECA 1972].[456]

He then referred favorably to a doctrine first developed by Germany's *Bundesverfassungsgericht*[457] which taught as part of a cooperative relationship, a decision of the CJEU should not be read by a national court as compromising the identity of the national constitutional order.[458]

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[452] ibid, paras 98-99.

[453] ibid, para 78.

[454] ibid, para 79.

[455] ibid.

[456] ibid, para 78 (emphasis added).

[457] *Lisbon* judgment (n 220).

[458] *HS2* (n 441), para 111.

Lord Reed's dictum serves as a constant reminder that the effectiveness of EU law within the UK – indeed within any Member State jurisdiction – is ultimately attributable to the ECA 1972 (or each of the EU Member States' Accession Laws). Additionally, the position of EU law inside the UK should be determined not only in the context of the ECA 1972, but also with reference to other elements of UK constitutional law that might restrain the applicability of constitutionally-suspect EU norms. This highlights the fact that the domestic status of EU law could not have possibly been resolved by *Thoburn*'s binary division between 'constitutional' and 'ordinary' laws. EU law's primacy can be accomplished through the assistance of such 'gateway provisions' as those of the ECA 1972 insofar as there is no *express* derogation from it in another UK law. But while *Thoburn* suggested that not all laws are equal, *HS2* provided the crucial information that not all *constitutional* laws are equal.

The fascinating possibility that not all constitutional laws are equal – that there might be a *ranking* of norms being integrated within the English unwritten constitution, one more sophisticated than that afforded by *Thoburn*'s binary conceptual framework[459] – is given further succor by the joint concurring opinions of Lords Neuberger and Mance. Their Lordships held that:

> Article 9 of the Bill of Rights, one of the pillars of constitutional settlement which established the rule of law in England in the 17th century, precludes the impeaching or questioning in any court of debates or proceedings in Parliament. Article 9 was described by Lord Browne-Wilkinson in the House of Lords in *Pepper v Hart* [1993] AC 593, 638, as 'a provision of the highest constitutional importance' which 'should not be narrowly construed.' More recently, in the Supreme Court case of *R v Chaytor and others* [2011] 1 AC 684, para 110, Lord Rodger of Earlsferry said this: '[I]n his *Commentaries on the Laws of England*, 17th ed (1814), vol 1, Bk 1, chap 2, p 175, under reference to Coke's Institutes, Blackstone says that the whole of the law and custom of Parliament has its original from this one maxim: 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and *not elsewhere*.'[460]

Could an EU Directive require (or be interpreted such as to require) Member States' courts to disable a fundamental principle of their constitutional law attached to their constitutions' identities? The British judges answered in the negative:

> Under the European Communities Act 1972, United Kingdom courts have also acknowledged that European law requires them to treat domestic statutes, whether passed before or after the 1972 Act, as invalid if and to the extent that they cannot be interpreted consistently with European law. That was a significant development, recognizing the special status of the 1972 Act and of European law and the importance attaching to the United Kingdom and its courts fulfilling the commitment

[459] Cf *supra* Chapter 2, section V.

[460] *HS2* (n 441), para 203 (emphasis added).

> to give loyal effect to European law. But it is difficult to see how an English court could fully comply with the approach suggested by the two Advocates General without addressing its apparent conflict with other principles hitherto also regarded as fundamental and enshrined in the Bill of Rights. Scrutiny of the workings of Parliament and whether they satisfy externally imposed criteria clearly involves questioning and potentially impeaching (i.e. condemning) Parliament's internal proceedings, and would go a considerable step further than any United Kingdom court has ever gone. The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognizes certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognized at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorize the abrogation.[461]

Therefore, *HS2*'s longer-term import was a finding within the universe of constitutional statutes of higher- as opposed to lower-ranking 'constitutional instruments'; in other words, *HS2* added to *Thoburn*'s 'constitutional statutes' an idea of hierarchy between themselves.[462] Whereas *Thoburn* explained why the parliament accorded, by means of the ECA 1972, primacy to EU law over domestic laws, including those which would be enacted in the future, by treating the ECA 1972 as a constitutional statute immune from repeal by implication; in contrast, *HS2* went a big step further by introducing the constitutional innovation that not all *constitutional* laws are equal.[463] Such (far-reaching and hence primary) laws include specifically ancient pre-Union instruments from England (such as Magna Carta, the Petition of Rights 1628, the Bill of Rights 1689), and from Scotland (the Claim of Rights Act 1689, the Act of Settlement 1701, the Act of Union 1707), and now the European Communities Act 1972, the Human Rights Act 1998, and the Constitutional Reform Act 2005.[464] Included, however, in such instruments not repealable through mere implication are not only texts, but also fundamental principles, whether contained in such instruments or not, of which the Parliament, when it enacted the ECA 1972, did not – could not – either anticipate or permit their abrogation.[465] These instruments' express provisions or implied principles can only be

[461] *HS2* (n 441), paras 206-207.

[462] The innovation is astonishing because in the UK there are no means to identify a hierarchy of norms as is possible in other jurisdictions by reference to a formal source such as specific text entitled the constitution.

[463] Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (n 436), 385-386.

[464] *HS2* (n 441), para 207.

[465] ibid.

repealed (or modified) by an *express* act of the parliament; they are too important to be repealed just by implication. In Weatherill's words:

> There is, for all the accusation that HS2 involves constitutional innovation built on meagre intellectual foundation (why are these particular instruments 'constitutional'? How many are there?), a highly agreeable implication of the claim that the ECA (and other constitutional instruments) may not be repealed by implication. It forces Parliament to use express words, making transparent the magnitude of the change, and thereby ensuring the necessary direct political engagement with the step proposed.[466]

Thus, Professor Stephen Weatherill concludes, the statutory basis for reception of EU law in the UK does not meet the CJEU's vision of reasons why EU law is supreme; still, it secures a pragmatic accommodation through statute (the ECA 1972) and judicial receptivity.[467]

The UK Supreme Court's analysis has serious implications for both the EU law and the Member States' law. On the one hand, it suggests that EU law, which has acquired through the ECA 1972 genuinely constitutional status, does not prevail over *everything*.[468] Instead, the extent of EU law's (qualified) primacy is fundamentally restricted by other constitutional instruments whose claim to fundamentality or, in other words, whose belonging to any Member State's constitutional *identity*, presents itself more compelling than that of EU law's claims. British judges built a gateway and deliberately left it open: The UK's constitutional identity may conceivably be modified through subsequent, inconsistent EU norms, properly transposed domestically, but only *explicitly* so by means of what has been sketched previously as a form of *clear statement rules*. On the other hand, we may find in Lords Neuberger's and Mance's opinion and, to a lesser extent, in Lord Reed's, a fundamentally transformed vision of the British constitution, one which exposes the outmoded status of the Diceyan orthodoxy.[469] *HS2* envisions a far richer constitutional jurisdiction; one in which, rephrasing the English lawyer, the Act of Union with Scotland *may* ultimately have *more* claim than the Dentists Act 1878 to be considered a supreme law. In such a proclamation about the UK constitutional landscape, what else may one identify than the transformation of the UK constitutional identity itself away from its previous normative flatness as a direct response to the challenges presented by EU law?

Therefore, *HS2* is not so much remarkable for the route it took to stress the identity issues that surfaced – that is, for not having requested a preliminary ruling from the CJEU; after all, the court delivered on the identity issues as just an *obiter*; but rather for its success in persuading about the *substance* of these identity claims. Indeed, it helped its audience not only *learn* a particular vision of Britain's constitutional identity, but also *comprehend* it. The CJEU, for its part, has been

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[466] Stephen Weatherill, *Law and Values in the European Union* (n 142) 233.

[467] ibid.

[468] Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (n 436), 389.

[469] ibid.

perfectly aware of these developments through the assistance of its AGs' opinions,[470] but stopped short of revising its case-law. The whole issue has been finally settled once and for all by means of a clear statement rule incorporated into the originally controversial EU law provision: The EU Directive 2014/52 erased art 1(4) of the EU Directive 2011/92, henceforth commanding the Member States to ensure that the objectives of the EU EIA Directive pertaining to the public consultation requirements are properly achieved through the parliamentary process as well.[471]

[470] CJEU, Case C-671/16 *Inter-Environnement Bruxelles ASBL and Others v Région de Bruxelles-Capitale* [2018] OJ C78/13, Opinion of AG Kokott, para 42; CJEU, Case C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín* [2016] OJ C6/16, Opinion of AG Kokott, para 82.

[471] Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1; see also Directive 2014/52/EU, recital 24 which provides a succinct justification for extending the Directive's scope of application to plans and programs adopted by acts of parliament by providing that 'In the case of projects adopted by a specific act of national legislation, Member States should ensure that the objectives of this Directive relating to public consultation are achieved through the legislative process.'

4 Religion in the Public Square

I. Introduction

In this chapter, I will explore the parameters of a potential clash that might arise between EU law and Greece's constitutional identity in the particular field of religious freedom. I have picked out the *religion in the public square* theme as the center of such a clash, since I hold religion to be largely intertwined with a state's constitutional identity. After discussing a set of controversial judgments delivered by the CJEU over nondiscrimination on religious grounds, I detect two deep-rooted but equally opposing intellectual forces, a Judeo-Christian and a *laïque* one, as lurking beneath the surface of the recent European jurisprudence. Hence, in the remainder of this chapter I will inquire into the origins of these two worldviews with special emphasis on *how* Greece's constitutional identity has, through the centuries, intertwined with religion of Eastern Christianity. On the one hand, I will revisit the centuries-old French struggle with the Catholic Church that has called for the kind of *privatization* of religion now dominant in France (and elsewhere) since the 1789 Revolution. Drawing on the very same sources I have thoroughly analyzed in Chapter 2 as telling of a constitution's identity, I have divided my analysis into four discernible sections, each referring to the *concepts* elaborated by Greece's *Symvoulio Epikrateias* (Supreme Administrative Court); the *origins* of the particular church/state arrangements that have been consolidated in modern Greece viewed *in context*, as well as against a set of deep-rooted *aspirations* calling for policy (and attitudinal) change. The conclusion is, first, that ingrained into Greece's constitutional identity is a different version of church/state relations as compared to a genuinely *laïque* (and overtly aggressive) vision of these arrangements; and, second, that the CJEU itself should be more mindful of the diversity and pluralism of the Member States' constitutional identities and should consequently treat the whole issue of religion in the public square with considerably more latitude so as to accommodate smoothly as many of these identities as possible and let them thrive. In this last chapter of Part II, constitutional identity once again presents itself as a concept that helps explain judicial outcomes that would otherwise remain obscure, and as a mechanism primarily *resisting* change but also, I argue, a mechanism *unable* to resist the wind of change blowing from the surrounding socio-political environment – the inference being that forces from within a jurisdiction or from abroad might push constitutionalism toward shaking things a bit as far as the public performance of religion is concerned.

II. The Headscarf Controversy before the Court of Justice of the European Union

A standard appeal to a country's constitutional identity usually draws on broadly shared principles such as democracy, rule of law, and human rights to come up with some potential explanations of what precisely counts as part of it. Possibilities for a constitutional conflict are thus eliminated since any disputes are confined to a level considerably abstract as well as to interpretive issues located at the edges. In the present context, one might argue, it is highly unlikely that the EU Member States will experience constitutional developments that can run unto the opposite extreme of what are universally revered as the rule-of-law and human-rights pillars of modern constitutionalism. More often, however, the real worry of anyone engaged with the constitutional identity discourse is not over the true meaning of a *single* legal provision or principle or of a *single* legal

term, but probably over those underlying criteria that finally play out in pushing the judicial outcomes toward one direction rather than another. I hereby contend that the 'religion in the public square' theme best represents the idea that invoking constitutional identity within judicial circles or in the public discourse is not about raising one particular legal outcome beyond its candidates, but about capturing its essence in the broader spectrum of its historical development within the surrounding constitutional context.

In a multi-ethnic polity divided along religious lines, it is to be hoped that there is ample room for coexistence between the majority and minority religions and between these and irreligion. However, the influx of large numbers of immigrants to Europe – mostly, but not exclusively, of Islamic religion – and in general our more frequent confrontation with people completely strange to us, have brought to the surface a rising tendency toward xenophobia, not a small part of which rests on philosophical and religious grounds. On the other hand, some symptoms of an inclination to dominate on the part of the majority religion are present, causing minority believers and non-believers feelings of inconvenience and even alienation. The question then arises as to whether, in the public square of a Western liberal-constitutional polity, religious commitments should be left at the door, hence depleting the very source of potential clashes in the public arena; or if people of every faith or of none can be their true selves, with all their particularities, when engaging in the creation and maintenance of civil society.

In Greece, there is not a large-scale public discourse over, nor some thorough academic engagement with, constitutional identity, but recent judicial developments in Europe have boost any efforts to delve into, and reflect upon, who we are, what we aspire to be, and to what extent our collective identities determine our perceptions of constitutional essentialism. As I will demonstrate, these developments serve to highlight the fact that at the heart of Greece's constitutional identity lies a version of *pluralism* that is courageous enough to build up a society through its self-critical encounter with strangers as well as a society celebrating, rather than hiding, its deepest differences. As mentioned in Chapter 1, a self's identity reveals itself best through its confrontation with the strangers. That 'stranger' will be one taken from the different worldviews derived from the contrasting versions of 'religion in the public square' theme prevailing in the French and Greek constitutional settings respectively from each of which I will begin in turn my analysis.

In November 2009, then-President of France Nicolas Sarkozy propelled a nationwide discussion over the meaning of Frenchness.[1] The finding was that it is nearly impossible to provide a single definition of Frenchness; nevertheless, it was generally acknowledged that French collective identity necessarily entails three key components. The first is its strong attachment to French history and culture. Frenchness entails taking pride in such historical French figures as their heroes, statesmen, philosophers, writers etc.[2] The second is related to the importance attributed to the French language.[3] The third is loyal attachment to a set of purely French values such as liberté,

[1] Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford University Press 2017) 92.

[2] ibid.

[3] ibid.

égalité, fraternité, and *laïcité*.[4] In the latter context, French scholar Olivier Roy claimed that Muslims present a challenge to the French collective identity, not necessarily because of Islamic faith itself, but because they are more enthusiastically predisposed to disclose their religion in the public square.[5] The French nation is built upon a *demos*, with the French *ethnos* receding to the point of becoming almost invisible.[6] The French model is thoroughly individualistic, and leaves little if any room for constitutional acknowledgment of group identities.[7] Every individual must essentially hide his or her particularities and embrace the French ideals of reason and equality among strangers – citizens must pull away from the web of their actual historical relationships, and strive for universality – based on the assumption that reason, individuality, equality, citizenship, democracy etc. have the same meaning for everyone everywhere.[8]

In that context, two cases, *Achbita* and *Bougnaoui*, both decided by the CJEU on 14 March 2017, signal a turning point in European adjudication by means of their far-reaching implications both over the court's case-law on religious nondiscrimination and, in what is of particular importance herein, on constitutional identity. In *Achbita*,[9] a Muslim employee who was wearing a headscarf while working as a receptionist was dismissed for violating the firm's policy of neutrality which essentially prohibited all employees from wearing any visible signs of their political, philosophical, or religious beliefs.[10] Reviewing the Belgian *Cour de cassation*'s request for a preliminary ruling, the CJEU was confronted with the issue whether a prohibition of wearing an Islamic headscarf as part of a private employer's policy of neutrality constituted a direct or indirect discrimination in the workplace under the terms of EU law,[11] and in either case whether there was any valid justification of it.[12] In *Bougnaoui*,[13] a judgment delivered on the same day by the Grand Chamber, the facts were similar: A Muslim woman working as a design engineer in Paris was dismissed after being asked to stop wearing an Islamic headscarf since it upset some customers and fueled complaints.[14] But the preliminary question referred to by the French counterpart *Cour de cassation* was much narrower: It merely asked whether a customer's preference to have some services provided by an employee who did not wear an Islamic headscarf amounted to 'a genuine

[4] ibid.

[5] Olivier Roy, *Secularism Confronts Islam* (George Holoch tr, Columbia University Press 2007) 81-82.

[6] Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 156.

[7] ibid.

[8] ibid, 157.

[9] CJEU, Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] OJ C151/3.

[10] ibid, paras 13-16.

[11] Council Directive (EC) 2000/78 on a general framework for equal treatment in employment and occupation, art 2(2); *Achbita* (n 9), paras 22-32.

[12] *Achbita* (n 9), para 21.

[13] CJEU, Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* [2017] OJ C151/4.

[14] ibid, paras 13-18.

and determining occupational requirement' under the terms of EU law.[15] The CJEU answered *Bougnaoui* in the negative, but the outcome did not have any actual 'bite' simply because the court had answered in *Achbita* that the employee can be dismissed anyway.[16]

In *Achbita*, first, the CJEU relied explicitly on art 10 CFREU which – like its counterpart art 9 ECHR – enshrines freedom of conscience and religion including a freedom to change religion or belief as well as to manifest religion or belief, in worship, teaching, practice, and observance either alone or jointly with others, and in public or in private.[17] Whilst the EC Directive was primarily concerned with nondiscrimination, the CFREU referred to freedom of religion, and hence both legal foundations were needed to be combined to bring about the specific judicial outcome.

In the first place, the CJEU found that:

> the internal rule at issue in the main proceedings… covers any *manifestation* of [political, philosophical, or religious] beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precludes the wearing of such signs.[18]

Thus, the court found no evidence of direct discrimination based on religion or belief under the EC Directive.[19] However, the CJEU assumed that the referring court might eventually find evidence of indirect discrimination 'if it is established… that the apparently neutral obligation [that the rule of neutrality] encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage.'[20] An indirectly discriminatory treatment could finally survive if, under the conditions of the EC Directive 2000/78,[21] it was found as objectively justified by a legitimate aim and if the means for achieving that aim were appropriate and necessary.[22] In that context, the court found that following a policy of political, philosophical, or religious neutrality in relation to customers represented a legitimate aim relating to the freedom to conduct business as enshrined in art 16 CFREU.[23] Such a policy was capable of bringing about the intended result if implemented 'in a consistent and systematic manner.'[24] In addition, a policy of neutrality may be strictly necessary if, for instance, it applied only to employees who usually

[15] ibid, para 19.

[16] *Achbita* (n 9), para 44.

[17] ibid, paras 27-28.

[18] ibid, para 30 (emphasis added).

[19] ibid, paras 29-32.

[20] ibid, paras 33-34.

[21] Council Directive (EC) 2000/78 on a general framework for equal treatment in employment and occupation, art 2(2)(b).

[22] *Achbita* (n 9), para 35.

[23] ibid, para 37.

[24] ibid, para 40.

interact with customers.[25] If, the court then concluded, the claimant was offered, without undue burden to her employer, the option of working away from any visual contact with customers – which was for the referring court to ascertain – and she rejected the proposal, then dismissal would be essentially proportionately legitimate.[26]

The *Achbita* case rests at least allegedly on a number of serious misunderstandings. For one thing, the court found an unequal treatment on religious grounds based on the assumption that wearing an Islamic headscarf constituted a manifestation of one's religious convictions.[27] The weak side of that finding is that there is a fundamental difference between *manifesting* one's religion and *observing* one's religious obligations.[28] Some people might equate wearing an item of clothing with making a political statement. If a Muslim woman wears a headscarf out of her (religiously independent) free choice, rather than out of religious compulsion, then there is no real difference between manifesting and observing, and there can be some well-founded argument that she does not experience an unequal treatment based on her religion.[29] If, on the other hand, a Muslim woman believes that it is her religion that commands her to wear a headscarf, then to prevent her from wearing it is not simply to prevent her from making a political statement, exercising a preference, or pursuing her personal idiosyncrasies, but to actually prevent her from *following* her religion.[30] The CJEU should have distinguished between not being allowed to announce one's belief (to make a statement), and not being allowed to observe it, or being forced to disobey it.[31] That elementary distinction should have influenced the proportionality scale when balancing the competing rights and interests of conducting one's business and freedom of religion.[32] Thus, in balancing rights and interests, the CJEU should put less weight on the freedom-of-religion scale if it concerned an ordinary (and perhaps less significant – but after all who is the final arbiter of insignificance in religious or private matters?) manifestation of religion, whilst it should put more weight if what was at stake concerned the believer's ability to observe their faith or their need to violate religion to keep their jobs.[33]

What makes the situation even more perplexing is that wearing a headscarf is not easy to see in such black-and-white terms. The law protects religion by protecting what we feel ourselves as being under religious obligation to do or refrain from doing, not what we want.[34] The more the headscarf becomes personal, the harder it is to claim that prohibiting it violates religious beliefs,

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[25] ibid, para 42.

[26] ibid, para 43.

[27] ibid, para 30.

[28] Joseph H. H. Weiler, 'Je Suis Achbita' Euro J Int'l L 2017 28(4) 991.

[29] Gareth Davies, 'Achbita v G4S: Religious Equality Squeezed between Profit and Prejudice' (European Law Blog, 6 April 2017). <https://europeanlawblog.eu/2017/04/06/achbita-v-g4s-religious-equality- squeezed-between-profit-and-prejudice/> accessed 11 December 2021.

[30] ibid.

[31] ibid.

[32] Joseph H. H. Weiler, 'Je Suis Achbita' (n 28) 992.

[33] ibid.

[34] Gareth Davies, 'Achbita v G4S: Religious Equality Squeezed between Profit and Prejudice' (n 29).

rather than simply our personal idiosyncrasies.[35] However, it is true that whatever the reason – which is something esoteric that cannot be objectively deduced – the employer or the state should respect an employee's wearing a headscarf or whatever religious action he or she might take. Last, the CJEU failed to distinguish the discriminatory effect that the firm's policy produced between different religions. Indeed, a rule of neutrality prohibiting the wearing of *visible* signs of religious beliefs would most certainly have a disparate impact on Jewish or Muslim employees for example than, say, on Christians.[36]

The CJEU has misunderstood not only the true meaning to be attached to 'religion' as a basis for unequal treatment in the workplace; it has also misunderstood the true meaning to be attached to 'neutrality.' What is neutrality and what cause do policies of neutrality serve? Do they deserve legal (or even constitutional) warrant? It is difficult to settle on the true meaning of neutrality. Is it the effort of a firm to convince its customers that the firm itself has no views on political or religious questions? Such a reason would be not only undesirable but also untrue. It is hard to believe that anyone could have been convinced that the beliefs of an employee, as expressed in their headscarf, beard or badge, reflect a firm's policy.[37] Nowadays, it is quite the contrary that holds true: Private employers encourage *diversity* without in any way implying that they may embrace or not some cause embraced by their employees.

Some may argue, first, that the efforts to reassure customers of applying a policy of neutrality may imply a need to reassure them that they will not receive mistreatment because of their own views, or because of a clash between their views and those of a Muslim, for example ('favoritism').[38] This however seems rather extraordinary: In many (if not most) situations, Professor Gareth Davies argues, one need not worry whether an engineer etc. will do their job responsibly despite the fact that they are Muslims and the customer is not.[39] To the contrary, he continues, in some corners it seems much more realistic to expect that whether, for instance, you are known to be on the right or left side of the political spectrum, might finally affect whether you get a job.[40] But let us just assume that the suspicions of some customers over religious favoritism are grounded to a certain extent. If the customer assumes that people of different (or any) religious beliefs are not trustworthy, is this really a cause for hiding them? For one thing, merely because people hide their beliefs, does not mean that they do not have any beliefs. Hiding religion does nothing at all to make any suspicions of religious favoritism go away.[41] On the contrary, one might argue that if religious belief is a threat to equality of treatment, then it is better to actually know who believes what, rather than have it hidden. In other words, one cannot justify a policy of neutrality that

[35] ibid.

[36] Joseph H. H. Weiler, 'Je Suis Achbita' (n 28) 993.

[37] Gareth Davies, 'Achbita v G4S: Religious Equality Squeezed between Profit and Prejudice' (n 29).

[38] ibid.

[39] ibid.

[40] ibid.

[41] ibid.

combats a threat that has *not* yet been revealed itself and does not do much to eliminate that threat's root cause.[42]

Neutrality, Professor Davies concludes, really rests on much more simpler grounds. It is not based on any real threat to the interests of the customers, but simply on the fact that a number of customers may *disapprove* of certain religious (or political, philosophical etc.) beliefs, and if employees follow such beliefs, then the customers are highly likely to shop *elsewhere*.[43] The CJEU refers to the right to pursue one's business, and the goal of a policy of neutrality on the part of a business is to protect its economic interests against the possibility of upsetting its customers.[44] The real problem is that when customers are disinclined to being served by a Muslim (wearing a headscarf) or any other religious observer without having any concrete justification for that, then the customer's feelings are appropriately labeled as *biased*.[45] A policy of neutrality is, Professor Davies proclaims, a policy of taking sides with customer bias so as to not damage a firm's interests.[46]

'That's all very well,' the business person may protest, 'but I cannot help the prejudices of my customers. Am I to go bankrupt in the name of some principle of equality then?' A standard legal answer would be that where one human right – the right to pursue a business – conflicts with another – religious equality – both have to be balanced against each other.[47] A possible response could be first that the EU lawmakers have already done all the balancing work between economic rights and freedom of religion. Another would be that the two conflicting rights must be balanced against each other *in casu* – perhaps considering the consequences on a firm of employing Muslim headscarf-wearing women.[48] However, what seems unprincipled is to treat the right to pursue one's business as unconditionally taking precedence.[49] That is what the CJEU accepts by holding that 'neutrality' is a justification of an – indirect or, as herein considered, direct – discrimination on religious grounds and restriction of religious rights and freedoms.[50]

Professor Weiler, for his part, criticizes the *Achbita* court too for failing to conduct a stage-III proportionality test.[51] Indeed, having established that the rule of neutrality serves a legitimate cause (stage I of the test) and that there is no less restrictive a rule available (stage II of the test); the court, in Weiler's critique, did not eventually articulate at all why the value embedded in one's legitimate interest to run their business – even at the cost of succumbing to customer prejudice –

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[42] ibid.

[43] ibid; Joseph H. H. Weiler, 'Je Suis Achbita' (n 28) 1003-1005.

[44] Gareth Davies, 'Achbita v G4S: Religious Equality Squeezed between Profit and Prejudice' (n 29).

[45] ibid.

[46] ibid.

[47] ibid.

[48] ibid.

[49] Joseph H. H. Weiler, 'Je Suis Achbita' (n 28) 998.

[50] Gareth Davies, 'Achbita v G4S: Religious Equality Squeezed between Profit and Prejudice' (n 29).

[51] Joseph H. H. Weiler, 'Je Suis Achbita' (n 28) 997.

outweighed the competing value included in the right to freedom of religion.[52] As Professor Weiler aptly put it:

> It is the ensuing balance that defines the hierarchy of values by which our societies wish to *define themselves* and, indeed, are often a marker of normative differences among such.[53]

In *Bougnaoui*, on the other hand, a Muslim woman working as a design engineer in Paris began wearing a headscarf, and some customers to whom she was assigned filed their complaints against being served by a headscarf-wearing employee. When she was recruited, her employer, *Micropole*, had made it clear that she would not be allowed to wear her headscarf all the time because as part of her duties she would be called upon to visit customers.[54] When *Micropole* raised the issue after a series of complaints, and asked her to stop wearing her headscarf, she refused and was dismissed.[55] Bougnaoui claimed to have been discriminated against on religious grounds before a Parisian labor court which dismissed her appeal.[56] On further appeal, the French *Cour de cassation* requested a preliminary reference from the CJEU, asking whether, upon finding a discrimination-against, the latter could be justified on the basis of a 'genuine occupational requirement' under the EC Directive.[57]

The CJEU's Advocate General Eleanor Sharpston maintained that a prohibition within a workplace environment against employees wearing visible signs of their religious convictions when they get into physical contact with customers is a *direct* discrimination on grounds of religion or belief and that there can be no 'genuine occupational requirement' justification of it.[58] Sharpston continued that it was hard to conceive of any circumstances, other than ones related to health or safety issues, in which a blanket ban on wearing religious attire could be justified.[59] Wearing a hijab did not in any way disturb the performance of the employee, and the employer in *Bougnaoui* appeared to be relying purely on economic reasons primarily based on customer preference.[60] Last, Sharpston denied the existence of an indirect discrimination, but even in such a case finding of proportionality was impossible.[61] Although in *Bougnaoui* it was not settled whether the employer applied a policy of neutrality similar to the one investigated in *Achbita*, the CJEU nonetheless held that if there was no such general rule and still the employee was dismissed in response to a

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[52] ibid.

[53] ibid, 996 (emphasis added).

[54] *Bougnaoui* (n 13), para 14.

[55] ibid.

[56] ibid, para 16.

[57] ibid, para 19.

[58] CJEU, Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* [2017] OJ C151/4, opinion of AG Sharpston, para 108.

[59] ibid, para 99.

[60] ibid, para 100.

[61] ibid, para 132.

customer's objection to being served by a headscarf-wearing employee, that treatment would amount to a indirect discrimination and the 'genuine and determining occupational requirement' provisions in the EC Directive 2000/78 could not have saved the dispute. Therefore, *Bougnaoui* stands as a judicial authority that a customer's preference to have IT services served by someone who does not wear a headscarf is not a genuine and determining occupational requirement under the EC Directive 2000/78;[62] IT services, then, can be equally offered by an employee wearing a headscarf!

Both of the CJEU's judgments are the outcome of a series of compromises painstakingly achieved by judges coming from diverse (and divergent) jurisdictions across Europe. In its President's words:

> reaching an outcome based on consensus is of paramount importance for the daily inner-workings of the ECJ. Accordingly, for the sake of consensus, in hard cases the discourse of the ECJ cannot be as profuse as it would be if dissenting opinions were allowed. As consensus-building requires to bring on board as many opinions as possible, the argumentative discourse of the ECJ does not take 'long jumps' when expounding the rationale underpinning the solution given to novel questions of constitutional importance.[63]

Thus, Professor J. H. H. Weiler suggests that the court's serious misunderstandings may be the product of two deeply interconnected but essentially differing and competitive civilizational forces.

The two forces that penetrate the CJEU's inner-workings are, Professor J. H. H. Weiler continues, the Judeo-Christian tradition and the French Revolution's *laïque* tradition.[64] One of the central features of the Christian Revolution was its teaching that the nature of the Covenant between God and man had fundamentally changed and that what was of utmost importance was not 'what one put into his mouth, but what came out of it.'[65] Rituals were a feature that was thrown to the dustbin as a relic of a distant era in God's universe.[66] A normative judgment came out of that development: Ritualistic Nomos was the 'skin.' The 'flesh' of religious beliefs was the 'inside' of man. As Weiler points out:

> This normative judgment was (and is) often accompanied by contempt for the primitiveness of those aspects of Islam and Judaism… The underlying blindness to the distinction emanates precisely from that intuitive, almost natural, sensibility conditioned by two millennia of Christianity that 'surely it cannot matter all that much

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[62] *Bougnaoui* (n 13), para 41.

[63] Koen Lenaerts, 'The Court's Outer and Inner Selves' in Maurice Adams, Henri de Waele, Johan Meeusen & Gert Straetmans (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013); quoted by Joseph H. H. Weiler, 'Je Suis Achbita' (n 28) 1002.

[64] Joseph H. H. Weiler, 'Je Suis Achbita' (n 28) 994.

[65] ibid, 994-995.

[66] ibid.

to [a Muslim woman] if she is asked to remove her scarf. Surely that scarf is but the peel, not the real flesh of the fruit.'[67]

The French Revolution, on the other hand, dismantled the confessional state and emancipated Jews making them '*libres et égaux*' (free and equal). But that dismantlement was accompanied by a duty to 'Be a Man Abroad and a Jew in your Tent,' in harmony with the *laïque* vision which treated religion as a private issue. 'The appropriate locus of religion,' Professor J. H. H. Weiler continues, 'is the home and Church, not the public space which must remain "neutral."'[68] If we combine these two spiritual forces which are after all the pillars of Western civilization, the court's blindness to this central distinction should not stand out as surprising.[69] It is to the French treatment of religion that I now turn, one that has developed over the centuries to form what now constitutes a uniquely French approach to the 'religion in the public square' theme.

III. The French Treatment of the 'Religion in the Public Square' Theme

The dramatic relationship between law and religion in the French history dates to far back before the 1789 Revolution to the Wars of Religion fought during the *ancien régime.* In the sixteenth century, a strong Protestant minority, mostly Huguenots, resided in southern and western France, and German Lutherans resided in Alsace, which were both persecuted by the King for most of the time, with only limited interludes of peaceful coexistence with an overwhelming majority of Roman Catholics.[70] Conflicts continued well throughout the entire sixteenth century, with the St. Bartholomew's Day massacre of 1572 marking the peak of the Protestant persecution, until King Henry IV (r. 1589 – 1610) issued in 1598 the Edict of Nantes. This last decree, marked by the King's own conversion from Huguenot Calvinism to Roman Catholicism, ended the bloody Wars of Religion by granting the Huguenots a substantial degree of religious freedom. In particular, the Edict of Nantes ceded to the Protestants a number of civil rights including a right to worship in public as well as access to education, and set up a special tribunal, the *Chambre de l'Édit*, composed of both Catholics and Protestants, charged with the responsibility of settling any disputes that would possibly arise from the Edict.[71] Protestant pastors from now on would be paid by the King and were released from some of their obligations. Last, Protestants were allowed to keep the lands they possessed until August 1597 as strongholds for a period of up to eight years, with maintenance costs taken over by the King.[72]

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[67] ibid, 995.

[68] ibid.

[69] ibid.

[70] John McManners, *Church and Society in Eighteenth-Century France: Volume 2: The Religion of the People and the Politics of Religion* (Oxford University Press 1998), ch 44 'The Huguenots: The Great Persecution.'

[71] Diane C. Margolf, *Religion and Royal Justice in Early Modern France. The Paris Chambre de l'Edit, 1598–1665* (Truman State University Press 2003).

[72] Nicolette Mout, 'Peace without Concord: Religious Toleration in Theory and Practice' in Ronnie Po-Chia Hsia (ed), *The Cambridge History of Christianity. Volume 6. Reform and Expansion 1500–1660* (Oxford University Press 2007).

Though the Edict of Nantes has been generally assumed as a political settlement, not as a decree much-aspiring toward far-reaching religious tolerance,[73] it should at least be applauded as a painful achievement of a philosophical struggle to heal the wounds of religious divisions. The medieval French philosophers had successfully discerned between the 'temporal' and the 'spiritual' domains and went so far indeed as expanding that division into the realm of law intended as a tool for entrenching royal authorities over what were considered – rightly or not – as nonreligious matters.[74] In other words, the idea of *privatizing* religion – that is, pushing religion into the spiritual domain and leave the temporal domain unencumbered by any religious traces – was recruited as part of efforts to restore sovereignty as was encapsulated by the King.[75] For example, the sixteenth-century French philosopher Jean Bodin (1530 – 1596) argued that an absolutist King, not the church, is better suited to avert the possibility of a civil war conducted on religious grounds between the Catholics and the Protestants, than either of the parties to it.[76] In contrast, if the King saw suppressing religious dissent more favorably and actually did so, he would then face a real threat of destruction.[77] As a self-imposed limitation on royal authority, religious tolerance was thus seen as sovereignty-*reinforcing*.[78] To be sure, religious assimilation – by way of proselytization – did not disappear altogether, at least on the part of the Catholics, but religious pluralism was seen as the only feasible option at the time.[79] The King, as long as he remained third party to any religious disagreements, located – at least in theory – outside of serious religious battlegrounds, could successfully preserve his ability to act as a mediator and command peace between the factions.[80]

Though the Edict of Nantes restored Catholicism as well in all areas where its observance had been interrupted, and outlawed any expansion of Protestant worship beyond what was explicitly permitted, it nevertheless met with resistance from the Catholics including Pope Clement VIII (r. 1592 – 1605) and the French clergy, as well as from certain judicial institutions known as the *parlements*.[81] Religious conflicts resumed reinvigorated at the turn of the seventeenth century with the persecution of the Huguenots by King Louis XIV (r. 1643 – 1715) – better known as the *Sun* King. A new chapter of religious violence would break out after the revocation of the Edict of Nantes in 1685 which led to outlawing Protestantism in France once again. Deprived of their civil and religious liberties, an unprecedented number of Protestants – ranging from 200,000 to 500,000 according to estimates – fled France, seeking refuge abroad in England, Prussia, the Netherlands and most of all in the fledgling North American colonies, whilst those who were left behind were

[73] ibid, 235.

[74] Stephen Holmes, 'Jean Bodin: The Paradox of Sovereignty and the Privatization of Religion' (1988) 30 NOMOS: Am Soc'y Pol Legal Phil 6.

[75] ibid.

[76] ibid, 7.

[77] ibid.

[78] ibid, 30.

[79] ibid.

[80] ibid, 33.

[81] David A. Bell, 'The Unbearable Lightness of Being French: Law, Republicanism and National Identity at the End of the Old Regime' (2001) 106(4) The Am Hist Rev 1222ff.

either imprisoned or coerced into converting to Catholicism.[82] These were the chief events that framed the general parameters of the political and societal background which gave rise to the Enlightenment critique of Christianity since roughly the last quarter of the sixteenth century onwards.[83]

People generally do not just wake up one day only to find themselves having stopped believing in God, or having switched to deism after they have been at church on Sunday. Throughout pre-Revolutionary Europe, particularly among the Protestant minorities, identifying Catholicism with tyranny had been dominant.[84] In the Protestant mind, the Catholic Kings had formed an evil alliance with the upper-class Catholic clergymen to safeguard and perpetuate their royal prerogatives. Some critics responded by presenting an idea of duplicity – reminiscent of the temporal-spiritual divide but for a different purpose – as a means of survival: Protestants were advised to do what Jews had already done to survive when they found themselves captured within hostile corners: to *privatize* their religion: When persecuted, they were counseled to hide their faith, so that religious observance was to be performed in the private sphere only.[85] Still, much more aggressive skeptics wondered, might not the problem be more systemic, lying deeply in the European mindset?[86] Unlike earlier in the seventeenth century, a new route showed up. Perhaps, the problem lay not just with inexorable religiosity, but with religion more generally.[87] Too much piety destroys decency, with the collateral damage being an increasingly stronger inclination toward fanaticism.

Indeed, the wind of change was blowing from a condition of believing in a Protestant version of Christianity which rested on privatization of religion towards a place where *Reason* was raised to the level of a freestanding value that enabled people to lead a life of decency. The possibility of thinking outside of any reference to religion and particularly to Christianity appeared in the second half of the seventeenth century in the context of a movement that historians have characterized as 'radical Enlightenment,' which later reemerged in the 1750s.[88] In Britain, for instance, a publication entitled *The Freethinker* took up the cause of *irreligion*. In the second half of the eighteenth century, a similar process of secularization had been initiated in France and the Netherlands. Eighteenth-century Frenchmen had begun to see 'death not as a mystery but as a fact.'[89] The number of

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[82] Margaret C. Jacob, 'The Enlightenment Critique of Christianity' in Stewart J. Brown & Timothy Tackett (eds), *The Cambridge History of Christianity. Volume VII. Enlightenment, Reawakening and Revolution 1660–1815* (Oxford University Press 2006) 265

[83] ibid.

[84] ibid.

[85] ibid, 267.

[86] ibid, 270.

[87] ibid, 272.

[88] R. Emmet Loughlin, 'The radical Reformation' in Ronnie Po-Chia Hsia (ed), *The Cambridge History of Christianity. Volume 6. Reform and Expansion 1500–1660* (Oxford University Press 2007) 37-55.

[89] Daniel Roche, *France in the Enlightenment* (Arthur Goldhammer trans) (Harvard University Press 1998) 585; quoted by Margaret C. Jacob, 'The Enlightenment Critique of Christianity' (n 82) 279.

men who sought ordination to the priesthood declined, and where in the past men flowed massively into the various confraternities, they now preferred to join the masonic lodges.[90]

Both the conceptual possibility and the political desirability of a 'civil religion' were first treated theoretically in Jean-Jacques Rousseau's *The Social Contract* (1762). Rousseau (1712–1778) devoted Chapter 8 of his work's Book IV entitled *De la Religion civile* (Of Civil Religion) to addressing the potential tensions issuing from the encounter of religion with politics, for which the Genevan philosopher puts the blame on religion and particularly on Christianity. Prior to Christianity, political communities revered their own gods, so that there were hardly any opportunities for religious wars. Rousseau developed his critique against Christianity based on several complaints. Most importantly, Christianity is charged with maintaining a sharply divided citizenry by granting believers a power which appears in the long run to be competing with public authorities. Being confronted with a set of rival claims derived from religion and the nation, the citizens are eventually deceived by religion into either being too 'mild' to care about their nation altogether, or too radical to treat the (differing) faith of their fellow citizens with equal respect. Therefore, Christians are found by Rousseau to be too intolerant to bear, as well as more inclined toward repressing minority religions or willing to proselytize their believers, by force if necessary.

But at the same time, Rousseau strives to ease his fierce attack against religion. Even though, throughout the centuries, Christianity has been destroying any attempts toward peaceful coexistence, religion has by no means been made redundant. Historical knowledge leads him to conclude that 'No state has ever been founded without religion at its base.'[91] Rousseau appears confident enough to argue that if the kind of polity he envisions is to going to proceed with the requisite degree of cohesion, that cohesion must build on nothing less than a form of a '*civil* religion.'[92] In other words, faith is a precondition for any political community to prosper. After all, on what conditions could a nation expect its citizens to even sacrifice their lives for it, other than on their *faith* in something? Christianity, then, is undesirable not because religion itself is undesirable, but because it is another religion, a civil one, that is preferable for the French nation to go ahead.

The Genevan philosopher acknowledged the fact that Thomas Hobbes (1588–1679) had been driven by the same intellectual force when pursuing in his *Leviathan* (1651) a compromise between the temporal and the spiritual domains by putting the head of state in charge of the Anglican Church too.[93] But Rousseau also discredited Hobbes's proposal on the assumption that Hobbes attempts to change Christianity which Rousseau finds as underestimating its force.[94] Still, what are the alternatives? Rousseau described three potential substitutes for Christianity as a (civil) religion: First, a religion consistent with Rousseau's description of true gospel Christianity; second, a return to the ancient religions that animated Sparta and Rome, or a third,

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[90] Margaret C. Jacob, 'The Enlightenment Critique of Christianity' (n 82) 279.

[91] Jean-Jacques Rousseau, *The Social Contract and other Later Political Writings* (Victor Gourevitch ed & trans; Cambridge University Press 2003) bk IV ch 8 146.

[92] ibid, 142ff.

[93] ibid, 146.

[94] ibid.

> more bizarre sort of religion which, by giving men *two* legislations, *two* chiefs, *two* fatherlands, subjects them to contradictory duties and prevents their being at once devout and Citizens.[95]

Pursuant to that latter type of religion, two separate worlds are set-up, one spiritual and one temporal. Finally, however, Rousseau rejects all these forms of civil religions, including the third one as exemplified by Roman Catholicism itself, based on the understanding that 'all institutions which put man in contradiction with *himself* are worthless.'[96] Instead, he favors his own 'religious' innovations. There must be, the French philosopher advocates, a civil appearance of the faith, *wrought* by a sovereign hand, that is able to distinguish who is a *loyal* member of the body politic from whom is not.[97] Anyone disassociated with that civil faith can, and should be, legitimately exiled.[98] What, then, does Rousseau suggest as the new civil creed?

'The dogmas of civil religion,' he suggests:

> must be simple and few in number, expressed precisely and without explanations or commentaries. The existence of an omnipotent, intelligent, benevolent divinity that foresees and provides; the life to come; the happiness of the just; the punishment of sinners; the sanctity of the social contract and the law – these are the positive dogmas. As for the negative dogmas, I would limit them to a single one: no intolerance. Intolerance is something which belongs to the religions we have rejected.[99]

Every nation must have a distinct 'character,' meaning its true essence; if not, one would have to be *invented*. That character must be cultivated into the common psyche. But how could that collective mindset be reached anyway? This can be accomplished through education, law, and culture:

> It is national institutions which form the genius, the character, the tastes, and the morals of a people, *which make it be itself and not another*, which inspire in it that ardent love of fatherland founded on habits impossible to uproot.[100]

Love of country, then, – that is, *patriotism* – is the real gist of Rousseau's message.

The French Revolution led not only to a schism within the Roman Catholic Church, but also to a state-sponsored head-on assault against Christianity itself unlike anything experienced in the European continent since the Roman Empire. In its final stages, it produced the first separation of

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[95] ibid, 146-147.

[96] ibid, 147 (emphasis added).

[97] ibid, 150.

[98] ibid.

[99] ibid.

[100] ibid, 183 (emphasis added). See *supra* Chapter 2.

church and state in the modern era.[101] Although some of these conflicts were withdrawn under Napoleon's rule, the Revolutionary memories by way of antireligious sentiments and anticlerical movements persisted well into the nineteenth and twentieth centuries. *Laïcité*, particularly, as part of the French constitutional identity, was born in the five years following the 1789 Revolution, as well as from 1879 through to 1905.[102] Therefore, it did not emerge during times of tolerance, neutrality, and equality, as Rousseau had envisioned, but of conflict and hostility that mostly targeted the Roman Catholic Church as was established in France.[103]

Though it had been seriously challenged during the Wars of Religion and later on, the Gallican Church had succeeded in making a remarkable recovery in the eighteenth century, and by the twilight of the *ancien régime* it resumed its domination within the French society, with tens of thousands of churches, chapels, monasteries, denominational schools, and hospitals throughout the kingdom.[104] Compared to the limited role of the Calvinist pastors and the Jewish rabbis, the Catholic clergy had been running the most successful corporatist efforts to exert a powerful influence across a wide range of economic, social and political segments of the French polity.[105] Thus, when the *Estates-General* met at Versailles on 5 May 1789, the representatives of the clergy, the aristocracy, and the Third Estate – that increasingly numerous group of wealthy commoners, also called the *bourgeoisie*[106] – were unanimous in their desire to assist (and be assisted by) the established religion based on their understanding that religion was still indispensable for maintaining social cohesion and political stability.[107] Moreover, their *cahiers de doléances* (statements of grievances), which they carried over with them to Versailles and had been drafted mostly by intellectuals, generally called for only moderate reforms of church abuses, and disclosed no appeal for radical transformation of the religious affairs.[108]

However, also at play in roughly the same period were at least four forces fueling aggression not only against the clergy and the Catholic Church in France but against religion more generally. First, royal magistrates, imbued with an ideology of Gallicanism that advocated far-reaching powers favoring the courts over church affairs, were ready to intervene in such diverse issues as church benefices, lands, tithing rights and clerical salaries.[109] Thus, the French courts were enthusiastically predisposed toward the idea of a 'revolt against the tithes' and played central part in the

[101] T. Jeremy Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France' (2004) B Y U L Rev 432

[102] ibid.

[103] ibid, 433.

[104] Timothy Tackett, 'The French Revolution and Religion to 1794' in Stewart J. Brown & Timothy Tackett, *The Cambridge History of Christianity. Volume VII. Enlightenment, Reawakening and Revolution 1660–1815* (Cambridge University Press 2006) 536-537.

[105] ibid, 538-539.

[106] ibid.

[107] ibid, 542.

[108] ibid, 542.

[109] ibid, 539.

expulsion of the well-known Catholic order of the Society of Jesus – the Jesuits – from France.[110] Second, the dissolution of the Jesuits triggered a major scrutiny and rearrangement of the clergy in France by a royal 'Commission on Regulars' inaugurated in 1768.[111] It led also to a rearrangement on the field of education, previously dominated by the Jesuits, and even to a decline of religious instruction in school curricula.[112] Third, there was a growing competition between many *curés* (parish priests) and the upper-class clergy over their share in church revenue.[113] Some activist *curés* drew on a French version of a 'Christian Enlightenment,' to emphasize the principal role they exercised in fostering the well-being of their parishioners, and to reprimand the distant, wealthy upper-class clergy, the monks, and others who were treated as unduly attached on the parish resources.[114] Fourth, actual policies were determined by Revolutionary exigencies too as these evolved over time.[115] The church revenues in 1789 were estimated at an immense amount of 150 million *livres*.[116] The Gallican Church owned around six percent of all French lands, and its abbeys, churches, and monasteries, including the schools and hospitals it operated, persisted as a constant reminder of its prominent role within the French polity.[117] The Gallican Church was also permitted to gather the *tithe*, worth one-tenth of the overall agricultural production, and enjoyed a tax-exempt status.[118] Thus, it was the ensuing fiscal turmoil, not just hostility towards religion, that guided the *Estates-General* in their resolution to take over the church resources.[119]

The Revolutionary *Assemblée nationale* (National Assembly) accomplished the abandonment of feudalism, initiated equality, and made large part of the adult male population eligible to vote.[120] Its resolution to take over the French lands as possessed by the Gallican Church in order to pay off any public debts led to a widespread wealth reallocation, of which the *bourgeois* and the peasants were the main beneficiaries.[121] Having seized her resources, the *Assemblée* was then confronted with the urgent need to create a new financial and administrative framework for the Gallican Church, which it did by enacting a *Constitution Civile du Clergé* (Civil Constitution of the Clergy) on 12 July 1790.[122] Pursuant to its terms, the number of bishops was substantially reduced from 135 to 83 in order to suit the administrative units as were set up by the *Assemblée*, the *départements*; enfranchised citizens were authorized to elect their bishops and parish priests; and last, and

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[110] ibid.

[111] ibid, 540.

[112] ibid.

[113] ibid.

[114] ibid, 540-541.

[115] ibid, 542.

[116] ibid.

[117] ibid.

[118] ibid.

[119] ibid.

[120] ibid, 545.

[121] ibid.

[122] ibid.

most importantly, newly appointed bishops were under a requirement to take an oath of allegiance to the state and their salaries were subsequently to be paid by the state alone.[123]

Although passed by the *Assemblée nationale* with a large majority, and formally sanctioned by King Louis XVI (r. 1774 – 1792) a month later, the *Constitution Civile du Clergé* soon gave rise to much opposition and led to a new period of conflict inciting what historians considered as a 'Holy War.'[124] Many clergymen disagreed with what they perceived as a blind subordination to earthly power and with the containment of the Pope's jurisdiction to spiritual matters only.[125] On 27 November 1790, the *Assemblée nationale* once again prompted the clergy to take the oath and hence to indirectly validate the updated structure of the Gallican Church.[126] Priests were subsequently faced with the dilemma of standing before their flocks on Sunday morning and reaffirming their fidelity to the *Constitution Civile* in the exact words dictated by the *Assemblée*, or of losing their parishes altogether (and their salaries too). Only seven bishops and about one-half of the parish priests took the oath.[127] What is unexpected is that a vast majority of parish priests were probably willing to declare their acquiescence to the Revolutionary cause at least in principle, and almost all were reconciled with the idea of taking some oath anyway;[128] but some 48 per cent of a total of 51,000 *curés* (parish priests) and *vicaires* (vicars) insisted on improvements to the innovations introduced by the *Constitution Civile*, mostly pointing to the fact that their political loyalty could not be misunderstood as extending to spiritual matters too.[129] Thus, the Gallican Church was split between 'jurors,' that is priests eager to take the oath, and 'nonjurors,' which were stubbornly hostile against any possibility of taking an oath whatsoever.[130] The reforms, the jurors argued, had in no way affected the spiritual part of religion, but were only intended with eliminating the abuses in the church administration.[131] The nonjurors, by contrast, viewed the *Assemblée*'s decrees which introduced the lay election of bishops and rearranged the districts without deliberation with the ecclesiastical authorities as being an invasion into matters purely spiritual over which the state lacked any power whatsoever.[132]

An extension of the encounter became inevitable when Pope Pius VI (r. 1775 – 1799) rejected the *Constitution Civile du Clergé* in the spring of 1791.[133] Revolutionary governments took harsh measures against nonjurors as being state enemies although, especially in western France, they

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[123] ibid.

[124] ibid.

[125] ibid.

[126] ibid.

[127] ibid.

[128] ibid.

[129] ibid.

[130] ibid, 546.

[131] ibid.

[132] ibid.

[133] ibid, 550.

enjoyed broad popular support.[134] However, hostility towards nonjurors increased dramatically after April 1792 when France engaged in war with Austria and Prussia.[135] Many Revolutionaries were then convinced that some nonjurors might indeed be foreign agents.[136] With the defeat of the monarchy in the summer of 1792, the Revolutionary government restored the expatriation law previously vetoed by Louis XVI, and an estimated 35,000 clergymen and laymen were exiled to Spain, Britain, Switzerland, and the German and Italian states.[137] Nevertheless, the Revolutionaries additionally performed a number of measures that affected even those priests who had finally submitted to taking the oath of allegiance, in disregard of the fact that they had a record of championing the Revolutionary cause.[138] A list of decrees was enforced to disable the *curés* from registering births, marriages, and deaths in their parishes; to prohibit them from wearing clerical attire in public; and to dismiss any laymen that were still serving in schools and hospitals run by the Gallican Church.[139]

Nevertheless, war and internal divisions alone cannot elucidate the shift away from religion and toward anticlericalism and eventually to irreligion. Clearly, the movement of de-Christianization must be located within the political context of *la Terreur* (The Reign of Terror) with which it was closely associated.[140] In fact, the period beginning in 1792 or 1793 matched the most sweeping stage of the Revolution, in which a whole set of values were subject to a process of blind *revisionism*.[141] Over the next few years, a group of anticlerical deists and atheists, who had run impatient with Catholicism and Christianity, came up and gained increasing influence.[142] The new Revolutionary ethos aspiring to replace the Christian religion in the public square was stimulated by an atheistic inspiration and initiated some unheard rituals honoring 'Reason,' or 'Nature.'[143] Therefore, it was in a quasi-millenarian framework that overtly antireligious attitudes, advocated by a marginal group of eighteenth-century philosophers, as well as by a minority of Parisian intellects, acquired for a short period of time heavier political gravity.[144] For *bourgeois*, whose commitment to Christianity had been seriously deteriorating in the last decades of the *ancien régime*, de-Christianization now became both an interesting idea and an appealing option.[145] But equally interestingly the same option was embraced by peasants, particularly in the larger cities, most notably within the circles of the *sans-culottes*.[146] The Revolution can thus be seen as having arisen up to a

[134] ibid.

[135] ibid.

[136] ibid.

[137] ibid, 550-551.

[138] ibid, 551.

[139] ibid.

[140] ibid.

[141] ibid, 547.

[142] ibid.

[143] ibid, 553.

[144] ibid, 552.

[145] ibid.

[146] ibid.

new evolutionary stage in Western civilization, one marked by a compelling push towards the masses to either set aside their religious convictions, or develop a new, patriotic ethos closely related to the Rousseauian civil religion.[147] As many historians have pointed out, de-Christianization involved both attacks against religious teachings and symbols as well as a variety of efforts to generate a brand-new Revolutionary ethos, substantiated on an innovative, but invented and hence bizarre, civil religion.'[148]

But it is equally apparent that intimidation and fear also played their role in the instigation of de-Christianization.[149] In many parts of rural France, where Catholicism had a stronger grip, de-Christianization was openly attacked by outside forces issued from Paris.[150] Attacks on Christianity were significantly reduced after the fall of Robespierre and the end of *la Terreur* in July 1794, although there were still isolated incidents of state-sponsored anticlericalism over the following years.[151] National leaders, for their part, did not succeed in coming up with a set of consistent religious policies.[152] Most of them insisted on being suspicious with Catholicism – at worst, as an ally of the monarchy or an agent of counter-revolution; at best, as stimulating zealotry.[153] In February 1795, the *Convention thermidorienne* or *Réaction thermidorienne* (Thermidorian Convention), a stage of the French Revolution beginning after the fall of Robespierre on 27 July 1794 and the inauguration of *le Directoire* (the Directory) on 2 November 1795, taking a more distant approach to the radical de-Christianization reactions previously exhibited by the Jacobins, commenced a new policy. To bend resistance in the counter-revolutionary bastions such as in the *Vendée* county in Western France by people still stubbornly attached to Catholicism, they introduced for the first time a hybrid scheme of church/state separation: The state would no longer recognize nor fund any religion, but it would only allow religious congregations in *private*.[154] Echoing an *Assemblée nationale* resolution of April 1792 under which priests were prohibited from wearing any clerical attire in public,[155] and apparently presaging the headscarf controversy in the late twentieth and early twenty-first century, the separationist legislation barred anyone from wearing 'religious ornaments or clothing' in public.[156] A series of laws enacted in 1795 allowed the citizens to reopen their churches, and the clergy who updated their oath were again allowed to provide their

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[147] ibid.

[148] ibid.

[149] ibid.

[150] ibid.

[151] Suzanne Desan, 'The French Revolution and religion, 1795–1815' in Stewart J. Brown & Timothy Tackett, *The Cambridge History of Christianity. Volume VII. Enlightenment, Reawakening and Revolution 1660–1815* (Cambridge University Press 2006) 557.

[152] ibid.

[153] ibid.

[154] ibid.

[155] T. Jeremy Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France' (n 101) 438 (citing Patrice Higonnet, *Goodness beyond Virtue. Jacobins during the French Revolution* (Harvard University Press 1998) 235.)

[156] ibid.

services.[157] But the newly inaugurated *Directoire* persistently encouraged the republican festivals and calendar and policed the Catholic activities.[158] Still, headstrong priests, religious demonstrations, bell-ringing, were still illegitimate.[159]

After the autumn of 1797, when the Revolutionary leadership took a major leftward shift, the *Directoire* initiated a second de-Christianization operation that equally energetically put into action many of the goals of the 1793-1794 Revolutionary program.[160] The Directors worked hard to replace Sunday worship with a series of civil festivals, the *culte décadaire*, which was to be celebrated every tenth day of the civil calendar.[161] These festivals were designed to imbue to the people a set of extra-religious values. Their subjects ranged from youth, marriage, or agriculture to more overtly political celebrations, such as the 9 Thermidor of Year II (27 July 1794) marking the ousting of Robespierre.[162] On the counsel of Director Louis Marie de la Révellière-Lépeaux, the administration promoted a new cult known as *Théophilanthropie*.[163] The latter was basically an effort to *convert* deism into a religion that would be readily available for everyday practice.[164] Its believers proclaimed their faith in one God and the immortality of the soul, which (beliefs) were also perceived at the same time as being instrumental for political stability and individual well-being.[165] Its ceremonies attempted to simplify the Catholic rituals based on a combination of moral teachings from sources as diverse as Confucianism and Calvinism.[166] With few exceptions, neither the *fêtes décadaires* nor *Théophilanthropie* met with great success.[167] Their observance was remarkably low, especially in rural areas, dominated by more Catholic-minded populations.[168] But the full-fledged attempts to enforce a Revolutionary calendar and republican festivals nonetheless made things harder for Catholics.[169]

The turn of the century found large parts of both the Catholic and Protestant ministries having been disbanded, incarcerated, or displaced, and their churches shut down or ruined.[170] For months, and in some cases for years, free observance was impossible.[171] In the years that followed, the French priesthood managed to restore a number of the churches of both Catholic and Protestant

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[157] Suzanne Desan, 'The French Revolution and religion, 1795–1815' (n 151) 558.

[158] ibid.

[159] ibid.

[160] ibid.

[161] ibid.

[162] ibid.

[163] ibid.

[164] ibid.

[165] ibid.

[166] ibid.

[167] ibid.

[168] ibid.

[169] ibid.

[170] ibid, 559.

[171] ibid.

denominations. Indeed, the dawn of the nineteenth century witnessed the outbreak of powerful movements toward religious revival, driven largely by a reaction to the Revolutionary aggression.[172] That revival was first and foremost an agonizing effort to recover the local church and have the bells ring again.[173] After all, Catholicism had always drawn its strength from its presence in the public square and its public manifestation of faith. Parishioners persistently pressed the local authorities and the central government in Paris with petitions begging them to rebuild their churches, and to take priests out of prison.[174] Particularly in areas that generally supported the Revolutionary cause, some Catholics proclaimed loyalty to the nation next to religion and used the very same Revolutionary language to preach religious freedom.[175] Popular struggle toward religious revival presented its claims as originating from a Rousseauian 'general will' of the body politic.[176] Still, the Revolutionary era had traumatized the church.[177] The bitter memories it left generated a legacy of separation and enmity between the Catholic Church and French liberals that would persist in France and in parts of Europe well into the twentieth century.[178] But it is important for the present purposes to distinguish a repeating demand that citizens necessarily choose between their faith and the state.[179] The *Assemblée nationale* had gone to great lengths to command a choice between religion and the Revolution. It was as if an individual could not be an observant Catholic and a loyal Frenchman, both at the same time.[180]

The schism within the Roman Catholic Church finally came to an end under Napoleon's rule with the enactment of the Concordat of 1801. When Napoleon conquered the *Directoire* with his coup of 9 November 1799, the French state of religious affairs was still deeply problematic, with most believers pressing for normalcy – in terms of both uninhibited practice and a clear legal status for their religions.[181] As Napoleon sought to calibrate his powers in the early years of *le Consulat*, he recognized an urgency to achieve a new religious arrangement.[182] The First Consulate (1799 – 1804) sought to garner public support by launching a reset of religious affairs and to eradicate any link between Catholicism and royalism.[183] Without being driven by any spiritual or religious motivations, Napoleon believed much like his predecessors that religion was instrumental in instilling

[172] ibid.

[173] ibid.

[174] ibid.

[175] ibid.

[176] ibid.

[177] Timothy Tackett, 'The French Revolution and Religion to 1794' (n 104) 554.

[178] ibid.

[179] T. Jeremy Gunn, 'Religious Freedom and Laïcité' (n 101) 438.

[180] T. Jeremy Gunn, 'Religious Freedom and Laïcité' (n 101) 439.

[181] Suzanne Desan, 'The French Revolution and religion, 1795–1815' (n 151) 564.

[182] ibid.

[183] ibid.

moral behavior and socio-political stability.[184] A renowned pragmatist, Napoleon later claimed that he aimed:

> to govern as the majority desires to be governed. That, I believe, is the best way to recognize popular sovereignty. By turning Catholic I ended the war in the Vendée, by becoming a Moslem I established myself in Egypt… If I governed a people of Jews, I would rebuild the temple of Solomon.[185]

To sum up, the 1801 Concordat enabled a retrieval from the devastating developments of the 1790s and steered a new era in the church/state relationship.[186] In the *laïque* version of the state that emerged after the Revolution, the clergy became a group of paid civil servants.[187] They no longer held a privileged standing nor did they possess their lands as they did in the *ancien régime*.[188] In 1804, Napoleon pressured Pope Pius VII (r. 1800 – 1823) into taking part in his coronation ceremony at Notre Dame, Paris.[189] Yet, although Napoleon worked to bring about a new kind of Gallicanism and a coalition between 'throne and altar,' the Concordat and Napoleon's religious maneuvers in the long run helped nurture the ultramontanism of the French Catholic Church.[190]

Even as some degree of disconnection became obvious during the Napoleon's era, the Concordat had nonetheless paved the way for a retrieval of increasing religious visibility.[191] Confraternities that were outlawed reappeared as potentially powerful groups especially in the south-east of France. Napoleon grew so suspicious of their increasing power that he eventually outlawed them in the twilight of his reign.[192] Investing the new religious energy, teams of priests organized missions, which drew thousands into attending church again.[193] In sum, by the 1810s, while some French remained either uninterested or opposite to religion and generally the church, Catholicism had once again managed to become an appreciable parameter in the French polity.[194]

After the Restoration (1814 and 1830), and especially after the 1848 Revolution, a separationist idea, defended by a number of politicians and intellectuals, gradually prevailed against the opposing attitudes of the French Catholic Church.[195] Between 1880 and 1905, a series of laws enforced

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[184] ibid.

[185] ibid.

[186] ibid, 566.

[187] ibid.

[188] ibid.

[189] ibid.

[190] ibid.

[191] ibid, 569.

[192] ibid.

[193] ibid.

[194] ibid.

[195] T. Jeremy Gunn, 'Religious Freedom and Laïcité' (n 101) 440.

laïcité by means of a number of aggressive measures ranging from enforcing disqualifications on those who had received religious education to preventing religious demonstrations in funerals.[196] The Dreyfus affair, for one thing, that outspread between December 1894 until its resolution in 1906, helped overwhelm the strong pressure exerted by a powerful clergy and signaled a political rupture in church/state relations.[197] A 1901 law that guaranteed freedom of association enabled the government to restore control of religious associations too and, notably, to diminish their impact on education.[198] After heated debates that were prolonged in a total of 21 legislative sessions held between November and early December, the *Assemblée nationale* finally adopted on 9 December 1905 the *Loi concernant la séparation des Églises et de l'État*,[199] widely celebrated ever since as *laïcité*'s 'birth certificate.' The law in effect regulated religious associations, governed by local councils known as 'consistories.' It stipulated that religious assets acquired or built prior to 1905 were expropriated, but the state continued to raise any maintenance costs whilst permitting the Catholic Church to use them for worship.[200] Bell-ringing and processions were henceforth regulated by municipalities;[201] political gatherings were forbidden in places of worship;[202] religious education was only permitted outside of schools;[203] any religious symbols were barred from being displayed on public monuments.[204] Last, the law struck down the 1801 Concordat under whose terms the state had undertaken to pay clerical salaries in exchange for church assets seized during the Revolution.[205] In the law's aftermath, as governmental officials sought to enforce the law and seize the church property, violent riots burst out across France.[206] Though all religious associations were bound to register anew, the Catholic Church declined to do so, which essentially left it without a formal legal status until well after World War I.[207] The 1905 law is still very much in force – with few modifications – up to the present.[208]

Ever since the 1789 Revolution, the church/state relationship and more generally the relationship between religion and the state has been one of contestation and debate. Throughout the years, and over multiple regime changes, a peculiar republican vision of *vivre ensemble* has emerged to

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[196] ibid (citing Émile Poulat, *Notre Laïcité Publique* (Berg International éditeurs 2003) 88-89 (in French)).

[197] Myriam Hunter-Henin, *Why Religious Freedom Matters for Democracy Comparative Reflections from Britain and France for a Democratic 'Vivre Ensemble'* (Hart Publishing 2020) 40-41.

[198] Loi du 1er juillet 1901 relative au contrat d'association (FR) (Law of 1 July 1901 on the contracts of association) <https://www.legifrance.gouv.fr/ loda/id/LEGITEXT000006069570/> accessed 22 December 2022.

[199] Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'État (FR) (Law of 9 December 1905 on the separation of Churches and the State) <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000 508749/> accessed 22 December 2022.

[200] T. Jeremy Gunn, 'Religious Freedom and Laïcité' (n 101) 441.

[201] ibid.

[202] ibid.

[203] ibid.

[204] ibid.

[205] ibid.

[206] ibid.

[207] ibid.

[208] ibid, 420-421 (n 2).

incrementally develop into what is nowadays treated as an integral part of the French national and constitutional identity. The agents of the 1905 law may have been driven by particularly hostile inclinations toward the Catholic Church or religion more generally, but not really toward commanding the expulsion of religion from the public square. Such an inference would have constituted a literal contradiction of the law's own terms, which declared freedom of conscience and religion. Bearing witness to that very proposition, a series of *Conseil d'Etat* judgments were delivered shortly after the law's enactment in 1905. In a 1909 case, the *Conseil d'Etat* struck down a municipal decree prohibiting a number of clergymen, dressed in their sacerdotal robes, from providing public service to a funeral procession following the local customs and traditions.[209] In essence, the *Conseil* found that the 1905 law did not in any way intend to upset such local customs and traditions, but rather to respect them, and permitted imposing limitations to religious demonstrations only to the extent strictly necessary for maintaining *l'ordre publique* (the public order).[210] The court had already reached a similar conclusion in a 1908 bell-ringing case.[211] Therefore, the *Conseil d'Etat* categorically dispersed on time any suspicion that, because priests were dressed in their attire and hence stood out from the rest of the population, religious clothing and religion in general could offend the 1905 law's separationist ethos.

Along with the process of growing that derivative separationist ethos between church and state, drawing inspiration from a preceding separation between what is 'temporal' and what is 'spiritual,' a peculiar republican vision gradually emerged that advocated enforcing an *assimilationist* agenda based primarily on education. Indeed, since the early decades of the nineteenth century, when the French government embarked into a process of aggressively secularizing education, 'education became almost a *substitute* for religion; belief in its virtues reached exceptionally high levels.'[212] The renowned French historian Mona Ozouf, for example, refers to a state-sponsored project of having schools 'baptized in confessional neutrality.'[213] Thus, schools became often the heated battlegrounds for testing new admixtures of republican values, including ones related to the most appropriate governmental treatment of religion.[214] As former Socialist Prime Minister Laurent Fabius put it:

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[209] Conseil d'État, 19 February 1909, req 27355, *Abbé Olivier c/ Maire de Sens* <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007633387/> accessed 23 December 2022; see also Conseil d'État, 11 Mai 1938, *Méneteau*, req 408.

[210] ibid.

[211] Conseil d'État, 5 August 1908, *Leclercq et Gruson*, Leb., 862.

[212] T. Jeremy Gunn, 'Religious Freedom and Laïcité' (n 101) 453 (quoting Theodore Zeldin, *France, 1848-1945: Anxiety and Hypocrisy* (Oxford University Press 1981) 262 (emphasis added)).

[213] ibid (quoting Mona Ozouf, *L'École, l Église et la République: (1871-1914)* (Armand Colin Éditeur) 74 (in French)).

[214] ibid.

> The school is not just one among many places; it is the place where we mold our little citizens. There are three legs: laïcité, Republic, school; these are the three legs on which we stand.[215]

The combined operation of all of these forces resulted in an exceptionally *français* conception of integrating diversity within the French political community as preferentially attainable through *assimilation*, and of pursuing state neutrality in religious matters as attainable through the withdrawal of religion from the public square. The 'religion and the state' theme was going to finally resurface in the last decade of the twentieth century. In 1989, three Muslim girls were temporarily barred from attending public school because they insisted on wearing their Islamic headscarves.[216] Against a growing public outcry to settle the controversy, the then Minister of Education, and later Prime Minister, Lionel Jospin formally requested an opinion from the *Conseil d'Etat* over whether the wearing of religious clothing in schools could be consistent with *laïcité*.[217] The *Conseil* answered in the positive reminding him that:

> According to recognized constitutional and legislative texts, as well as the international obligations of France, the principle of *laïcité* in state education… required that teaching be conducted with respect for the principle of neutrality by the teachers and their programs on the one hand and with respect for the freedom of conscience of the students on the other…. Such freedom for the students includes the right to express and to manifest their religious beliefs inside the schools, while respecting pluralism and the freedoms of others…. The wearing of signs by students in which they wish to express their membership in a religion is not by itself incompatible with the principle of *laïcité*.[218]

Thus, the French supreme administrative court sided with those arguing that to observe one's faith by means of wearing a piece of clothing in public, including in public schools, does not itself qualify as unduly violating a policy of neutrality such as the one grasped by *laïcité à la française*.

To the extent that since 1989 there had been a sense of calm, it was only a calm before the storm.[219] By December 2003, a high percentage of the French people criticized Islamic headscarves and put heavy pressure on the government to ban them from schools, with a clear majority even calling for a universal ban in public places.[220] On 17 May 2003, a deputy in the *Assemblée nationale* and former Prime Minister with the Socialist Party, Laurent Fabius, addressed a party congress where he advocated enacting a prohibition of displaying religious symbols, including

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[215] ibid, 454.

[216] ibid.

[217] ibid.

[218] ibid, 455.

[219] ibid, 458.

[220] ibid, 459.

religious clothing, in public schools.[221] Despite acknowledging that the *Conseil d'Etat* had adamantly constructed its arguments and delivered a convincing judgment taming the headscarves controversy back in 1989, Fabius insisted that a judicial institution, even one holding the gravity of the *Conseil d'Etat* itself, was ill-suited to make policy choices about such contested issues as wearing religious clothing in schools.[222]

Driven by a growing level of religious uprising, the French President Jacques Chirac set up on 3 July 2003 a Commission named the 'Stasi Commission' after its chairman, and French ombudsman at the time, Bernard Stasi, to deliver on the perceived threats to *laïcité* deriving from wearing religious clothing in public place.[223] After conducting a number of interviews, the Stasi Commission held that wearing headscarves in France is mostly due to unwarranted coercion of Muslim girls who were thus found to be victims of the oppressive religious communities whose members they were.[224] Drawing on public safety considerations, as well as on the administrative difficulties that would be raised by school officials if they were subjected to complicated directives,[225] the Stasi Commission made a number of recommendations,[226] of which President Jacques Chirac accepted only one, by eventually introducing a law prohibiting conspicuous religious clothing. In his efforts to defend the prohibition, colored with dramatic overtones, he said in a speech on 17 December 2003:

> Laïcité is inscribed in our traditions. It is at the heart of our republican identity… the cornerstone of the Republic, the bundle of our common values of respect, tolerance, and dialogue, to which I call all of the French to rally…. Its values are at the core of our uniqueness as a Nation. These values spread our voice far and wide in the world. These are the values that create France…. Laïcité guarantees freedom of conscience…. It assures everyone the possibility to express and practice their faith peaceably, freely, though without threatening others with one's own convictions or beliefs…. [It is] one of the great accomplishments of the Republic. It is a crucial element of social peace and national cohesion. We can never permit it to weaken.[227]

However, French assimilationist policies came with a vengeance. While it is true that Jews and Protestants have historically been very submissive to this peculiarly French vision of religion, and

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[221] ibid, 461.

[222] ibid.

[223] Bernard Stasi, *Commission de réflexion sur l'application du principe de laïcité dans la République : rapport au Président de la République*, 1 December 2003 <https://www.vie-publique.fr/rapport/26626 -commission-de-reflexion-sur-application-du-principe-de-laicite> accessed 23 December 2022.

[224] T. Jeremy Gunn, 'Religious Freedom and Laïcité' (n 101) 469.

[225] ibid, 467.

[226] For a thorough critique of the Stasi Commission report see ibid, 468-479.

[227] Jacques Chirac, Président de la République, Discours sur le respect du principe de laïcité dans la République, 17 December 2003 <https://www.elysee.fr/jacques-chirac/2003/12/17/discours- de-m-jacques-chirac-president-de-la-republique-sur-le-respect-du-principe-de-laicite-dans-la-republique-paris-le-17-decembre-2003> accessed 23 December 2022.

the post-Vatican II Gallican Church finally swallowed the new separationist agenda;[228] nevertheless, Muslim immigrants, especially coming from North Africa and the Arab peninsula, have found it impossible to fit such a coercively assimilationist ethos of *vivre ensemble*. Republicans, for their part, appeared to be equally unable to uproot the fundamental flaws of such an ethos – why it is not working, why Muslim immigrants appear unable or unwilling to compromise with that degree of religious freedom they were accorded in exchange for submitting to a religion-free public arena, why they are unable to cope with antireligious criticism by the press, and why they are stubbornly rejecting what Catholics – following Protestants and Jews – have finally submitted to. As with other religious minorities, Muslim immigrants have a heritage full of bitterness, but one essentially ignorant of the abuses of the French Catholic Church that date back to the *ancien régime*. In response to a dramatic increase of Islamic attacks on French territory in both their numbers and death toll, French politicians have acted in concert with their predecessors. On the 1905 *Loi*'s 116th anniversary, the *Assemblée nationale* introduced, and on 24 August 2021 it subsequently enacted, a *Loi confortant le respect des principes de la République*, known as 'the anti-separatism law.'[229] Within the law's stipulations there is nothing in principle controversial. For example, it is perfectly reasonable to subject religious associations to stricter conditions of financial accountability, including with respect to funds received from abroad, as a means to eradicate religiously inspired radicalism.[230] However, accompanying these provisions with measures related to wearing 'controversial' religious clothing in public suggests that the law may perhaps be suspect for producing, against its wordily pretensions to the contrary, the unintended result of separating, rather than of *anti*-separating, those that keep dressing in a religiously 'controversial' way.

The underlying idea is that anyone can join the French nation if they accept its republican values – race or birth are irrelevant. Anyone can be 'one of us,' insofar as they are submissive enough to become 'us.'[231] Whereas freedom of conscience and religion is one of these republican values, there is an additional but opposing force calling for a public square free of all religious tokens, based on a sense of neutrality that circumscribes religion to the private sphere. Depending on the observer, the French model may have been a success – at least until newcomer Muslim immigrants shook things up with their discomfort over any interference with their religious identities –, a source of pride and an object of veneration, or not. But what then about polities which see things differently?

There might be most certainly a number of EU Member States' courts or Parliaments attached to a contrasting view, in the *Achbita* and similar contexts, that customer prejudice is not a legitimate aim for (directly or indirectly) discriminatory company policies. Do these, Professor Gareth

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[228] Joseph H. H. Weiler, 'Je Suis Achbita' (n 28) 995.

[229] Loi n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République (FR) (Law no. 2021-1109 of 24 August 2021 on respecting the principles of the Republic) <https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000042635616/> accessed 22 December 2022.

[230] ibid, 'Chapitre II: Dispositions relatives aux associations, fondations et fonds de dotation (Articles 12 à 23)' (Chapter II: Provisions relating to associations, foundations and endowment funds (Articles 12 to 23)).

[231] Joseph H. H. Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001) 19.

Davies wonders, still have the freedom to deviate?[232] The tight formulations of the *Achbita* judgment point to a negative answer to the latter question, since the interest of a business in pursuing neutrality vis-à-vis its customers has been essentially elevated to the level of a right that automatically precedes over religious freedom.[233] The CJEU seems not just allowing the Member States to permit employers to have religious clothing eclipsed from the workplace, Davies contends, but denying them any option *not* to.[234] 'Will any states,' Davies wonders,

> rebel against this aspect of *Achbita*, or at least read the judgment differently? They might give more thought to what neutrality means and challenge the view that it entails banning religious clothes, or they might question whether respect for prejudice can justify discrimination. It is to be hoped that some do, and a challenge to the judgment could be justified, either using the argument that the Court exceeds its jurisdiction in ruling so definitively on factual questions, or using constitutional values. Is there perhaps a state whose constitutional *identity* puts equality above profit?[235]

IV. The Greek Treatment of the 'Religion in the Public Square' Theme

My investigation may now shift to whether Greece can be considered as a candidate of a group of EU Member States that see things differently against the conclusions reached by the CJEU in *Achbita* (and to a lesser extent in *Bougnaoui*.) I have divided my analysis such as to roughly match what I have thoroughly analyzed in Chapter 3 as the process of discovering a nation's constitutional identity. Hence, the following sections expand across a number of such diverse issues as the law *concepts* configured by *Symvoulio Epikrateias*, Greece's supreme administrative court; the *origins* found in the Greek historical socio-political heritage; how these origins have played out in the *context* of the church/state relations and how these have evolved over time; and last how all the preceding assumptions should be evaluated through the prism of Greece's constitutional *aspirations* in the field of religious freedom within an educational environment and elsewhere.

A. Concepts: The Symvoulio Epikrateias's Case-law

Identity issues have been recently implicated in a series of judgments delivered by Greece's supreme administrative court, *Symvoulio Epikrateias*, which involved some far-reaching but also deeply controversial findings in the field of the constitutional guarantees of religious freedom. In what follows, I will delve more deeply into the judicial arguments constructed in the judgments

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[232] Gareth Davies, 'Achbita v G4S: Religious Equality Squeezed between Profit and Prejudice' (n 29).

[233] ibid.

[234] ibid.

[235] ibid.

reached in the cases nos. 660/2018 and 1749/2019, concerning religious education in elementary and middle-high schools.

In what can be labeled as a Religious Education series, *Symvoulio Epikrateias* reviewed a number of ministerial decrees that outlined the school curriculum with reference to religious education in elementary and middle-high schools.[236] The applicants blamed the updated syllabi for producing an undue compromising effect of the Eastern Orthodox Church teachings that were said to be, and by means of constitutional *presumption* actually were, predominant throughout contemporary Greece.[237] A majority of justices were eventually convinced by the applicants and were resolved to struck down the decrees.[238] To do so, they heavily relied on the fact that the constitution itself commences with a Trinitarian cast and includes a formal declaration of the predominance of the Eastern Orthodox Church among the population,[239] to then infer that by requiring the development of religious consciousness, the supreme law can prescribe nothing less than that (most) students who are presumably believers of the Eastern Orthodox Church must be instructed the exact religious teachings that match their religious beliefs.[240] In other words, the only argument was that since most people now living in Greece are members of the Eastern Orthodox Church, and insofar as it is the parental convictions that determine – at least to a certain degree – their children's religious education, art 16's 'religious consciousness,' must build on a form of religious education that is tailored so as to suit the Eastern Christianity teachings only.[241] The court's majority successfully maneuvered over contrary allegations of discrimination-against by crucially adding that students of minority religions or none were fully entitled to either a religious education matching their own (read: their parents') religious convictions, or to a perfectly enforceable opt-out.[242] Insofar as *differentiated* religious education is warranted for students of different religions, the government is then free to provide additional instruction of a non-confessional spirit that aims at

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[236] Symvoulio Epikrateias (plenary session), judgments in cases nos. 660/2018 and 1749/2019 *In Re Religious Education in Elementary & Middle-high Schools*, [2020] To Syntagma 1-2, 688; see also Symvoulio Epikrateias (plenary session), judgments in cases nos. 926/2018 and 1750/2019 *In Re Religious Education in High Schools*.

[237] Symvoulio Epikrateias, case no. 660/2018 (n 236), para 14.

[238] ibid, para 19.

[239] Greece's Constitution, art 3 para 1 that reads 'The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ.'

[240] Symvoulio Epikrateias, case no. 660/2018 (n 236), para 14.

[241] ibid. In the court's own words,

> ... ως αποστολή της Παιδείας, η, υπό την προεκτεθείσα έννοια 'ανάπτυξη της θρησκευτικής συνειδήσεως' αποτελεί συνταγματική υποχρέωση του Κράτους, επιτελείται δε κυρίως με τη διδασκαλία του μαθήματος των θρησκευτικών, το οποίο για να υπηρετεί τον εν λόγω σκοπό, πρέπει να διδάσκεται επί ικανό αριθμό ωρών διδασκαλίας εβδομαδιαίως … και να περιλαμβάνει οπωσδήποτε, με σαφήνεια και πληρότητα, τα δόγματα, τις ηθικές αξίες και τις παραδόσεις της Ανατολικής Ορθοδόξου Εκκλησίας του Χριστού, χωρίς να καλλιεργεί αμφιβολίες ως προς τα εν λόγω στοιχεία που συγκροτούν την ορθόδοξη χριστιανική πίστη, ούτε να προκαλεί σύγχυση με τη διδασκαλία άλλων δογμάτων και θρησκειών.

(citations omitted).

[242] ibid.

educating students about religious pluralism, as well as about atheism, agnosticism and other forms of belief or nonbelief.[243]

The judicial resolution was marked by a concurring and a dissenting opinion of a total of 8 justices. Under the concurring opinion of 3 justices, the constitution prohibited a confessional approach to religious education in favor of one that introduced students to a number of worldviews of religious and spiritual import leaving it up to them to embrace or not.[244] The dissenting opinion, for its part, emphasized what is considered as an *interpretive* approach to religious education. Differentiating implicitly between knowledge and faith, and assuming that religious education should primarily teach about the former and leave the latter to the students' (and conditionally their parents') private idiosyncrasy, it argued for an interdisciplinary approach to teaching religion with the engagement of such a diversity of disciplines as history, literature, fine arts, philosophy, etc.[245] Such a school curriculum is primarily intended to cultivate a multiplicity of educational and civic virtues: basic knowledge of religious pluralism and diversity between and within religions; respect and tolerance for the human right to adhere to a religion or not; the ability to peacefully combat religious intolerance and discrimination-against.[246]

The general idea that divided the justices along these hard ideological lines, revolved around whether the school curriculum should be designed upon a *confessional* approach to religious education, amounting to nothing less than religious indoctrination, or not. What is most intriguing is that in framing their arguments neither the majority and its concurring opinion nor the minority disagreed against each other over the validity of either the Trinitarian forefront or of art 3's finding of overwhelming popular membership in the Eastern Orthodox Church.[247] They did not even disagree that these constitutional sources exert a certain interpretive influence, as demonstrated by their continuing ability to guide such policy outcomes as those providing a number of public holidays in perfect match with Christian celebrations.[248] Instead, most strikingly, they diverged on what is constitutionally the most befitting approach to religious education in elementary and middle-high schools.[249] As pointed out earlier, a majority of justices insisted that religious education must be *confessional*; that is, it must be designed to match the religious convictions of students (and their parents'), but allowing a full-fledged opt-out for anyone inclined to follow such a course of action for whatever reason.[250] In contrast, the dissenters were predisposed toward a more inclusive religious education that would address every student, irrespective of their religion or absence thereof, and that, pursuant to the constitutional requirement of nondiscrimination, would be confessional to *none*. All religions would be lectured according to that scheme, with the Eastern

[243] ibid.

[244] ibid.

[245] ibid.

[246] ibid.

[247] ibid.

[248] ibid.

[249] ibid.

[250] ibid.

Orthodox Church presented such as to be able 'to (re)gain momentum.' Anyone wishing to enhance their religious education could seek further guidance *at home* or church. As has been suggested:

> ... A religious education with such an orientation is not inconsistent with art 9 para 1 of the ECHR that provides for freedom of thought, conscience, and religion as a foundation of 'democratic society' … since it does not impose a particular worldview as the only one admitted or valid; instead, it is consistent with a principle of neutrality, it sets in motion the conditions necessary for students to develop freely their personalities and reflect critically on a worldview of their own, whereas such a curriculum is objective, critical, and pluralistic without being catechetical.[251]

So whereas most of the justices were first inclined towards a separate, confessional syllabus, and would only then license an inclusive approach to religious education being addressed to all students independently of their religious convictions; in contrast, a minority of them partly reversed their holding in favor of an *overinclusive* syllabus that would offer less input on one's own religion, but considerably more on a wider variety of world religions, thus enabling students to choose for themselves.[252] Those wishing to find out more about their own religions could do so perfectly well *in private* – that is, at home or church. The dissenting opinion, then, echoes the French posture towards religion that in effect holds people responsible for leaving their religions at home. The fact that, for the majority of justices, an exceptional place is reserved for the Eastern Orthodox Church – and, I argue, for religion more generally – in Greece's public square by being assigned to the 'standard' rather than to the 'opt-out' part of the judicially constructed norm demonstrates that religion is seated more *visibly* in Greece than elsewhere. The key word over which the dissenting justices raise their objections, and the common thread between the Religious Education series and the 'religion in the public square' theme, that I draw upon to further my analysis, is *neutrality*.

Before I turn to the historical connotations of the church/state relations in Greece, I will pay a concise reference to a couple of judgments in which *Symvoulio Epikrateias* also took up the 'religion in the public square' theme. In its judgment in case no. 942/2020, the court was confronted with whether common prayer and church attendance for K-12 students were consistent with the constitutional guarantees for freedom of religion.[253] The judicial setting was very much similar with its school curriculum antecedent and the justices from both ends of the spectrum were heavily occupied with what they considered as the constitutionally most befitting style of religious education. Their answers for common prayer and church attendance for students of nursery and elementary schools were perfectly in concert with the ones already provided in the context of the elementary and middle-high school curricula. A group of justices argued in favor of *confessional* religious

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[251] Symvoulio Epikrateias (plenary session), case no. 1749/2019 (n 236), para 18 (dissenting justice Michalis Pikramenos.)

[252] See especially the thorough analysis provided by dissenting justice Michalis Pikramenos in Symvoulio Epikrateias (plenary session), case no. 1749/2019 (n 236), para 18.

[253] Symvoulio Epikrateias (plenary session), judgment in case no. 942/2020 *In Re Common Prayer & Church Attendance in Nursery & Elementary Schools*, (2020) To Syntagma 1-2, 738.

education followed by an effective opt-out for whatever reason, with common prayer and church attendance holding a central place of religious education.[254] On the other hand, a minority of justices could not submit to the accommodation of common prayer and church attendance within a school curriculum aspiring – and constitutionally sanctioned – to include all students, regardless of their religious convictions.[255] The application was finally upheld, and the court annulled the provisions of the impugned ministerial decree on the grounds that they did not include any effective means of opting-out for children who (themselves or their parents) were believers of different faiths, or none.[256]

One last judgment offering useful insights for visions of Greek constitutional identity is the one delivered as an interlocutory order in its case no. 71/2019 that can be named as the Greek 'Crucifix' case.[257] The applicants in a lawsuit submitted a collateral request to displace religious symbols from the courtroom where judges were about to hear their case, itself related to freedom of religion.[258] Against the familiar background of a long-established tradition, dating at least from Independence, of placing religious symbols in public view, including courts, classrooms etc.,[259] the court found that there was no substantial threat to the impartiality of justice as a result of the presence of religious symbols inside the courtroom and dropped the request.[260] The majority of justices also invoked the fact that the law designates specific dates of the calendar, which correspond to celebrations of Saints, as public holidays;[261] likewise, the court concluded, it rests with the parliament to enact legislation to the effect of removing religious symbols from courtrooms or public places altogether.[262]

The majority opinion of the Religious Education series – including the Greek 'Crucifix' case – implies a predisposition toward the Eastern Orthodox Church that bespeaks an exceptional place reserved for 'religion' as part of the 'religion in the public square' theme – if only under the veil of an *established* church. Still, the court's reasoning lacks the depth of analysis and reflection that are key in any endeavor, followed in the manner designated in Chapter 2, to find a valuable piece of constitutional identity. However, the immediate response of the judicial majority to the contrary allegations by testing a textually and transcendentally *structuralist* interpretation, their reliance on such constitutional sources as the Trinitarian cast, which (sources) indeed 'lose' on standard normativity but can 'win over' a(n otherwise dormant) interpretive force, as well as their scratching at least the surface of a Greek constitutional *narrative*, are all manifestations of an affirmative

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[254] ibid, paras 14-15.

[255] ibid, para 14.

[256] ibid, para 17.

[257] Symvoulio Epikrateias (plenary session), interlocutory order no. 71/2019 (concerning the withdrawal of religious symbols from within the courtroom where the case would be heard) in joined cases 1759/2020 & 1760/2020 *In Re Non-disclosure of Religious Beliefs in School Certificates*, (2020) To Syntagma 1-2, 758.

[258] ibid.

[259] ibid.

[260] ibid.

[261] ibid.

[262] ibid.

judicial predisposition toward the 'religion in the public square' theme, in sharp contrast with what is by now standard in the French jurisdiction and elsewhere. Herein I do not intend to criticize any further either the majority or the minority opinions; rather, I seek to argue that the judicial reception of religion as part of Greece's constitutional identity calls for a different posture on the part of the CJEU, one that would grant the Member States, as a matter of *identity respect*, more interpretive latitude to manage conflict within and around (the core of) their constitutional identities.

The inference derived from these and other judgments about Greece's constitutional identity is certainly not that *Symvoulio Epikrateias* has been perfectly convincing in its reasoning, nor that the specific judicial outcomes are beyond any controversy, or that they engage a field that should be resolved exclusively inside the courtrooms; but that they affirmatively argue for a more privileged place for religion in the 'religion in the public square' theme – and perhaps for spirituality more generally which also spills over to other religions in addition to the Eastern Christianity – one that is in direct contradiction with the place reserved for it by the CJEU in its recent line of judgments in *Achbita*.[263] Interestingly, but not unexpectedly, *Symvoulio Epikrateias* did not – because it could not – take up the challenge of framing a lengthier and more appealing constitutional narrative that would throw ample light on the contextual dimension of the issue and its incorporation, as I argue, of constitutional identity elements. In the remainder of this chapter, then, I will tentatively attempt both to fill in the judicial lacunae and make an in-depth analysis of a constitutional narrative that will disentangle the Greek vision of 'religion in the public square.'

B. Origins: The Historical Socio-political Heritage of Church/State Relations in Greece

If the proposition that alignment with a particular religion, or a church, bespeaks much about the way a nation perceives itself and defines its identity is true,[264] then there is definitely great merit in scrutinizing the historical circumstances that culminated in such an alignment. In what follows I will investigate the historical influence that the Eastern Orthodox Church has exerted over the centuries on Greek socio-political development.

The beginning of the second millennium CE had found the Eastern Orthodox Church, seated in Constantinople – capital of the Eastern Roman (later called the *Byzantine*) Empire – at the peak of its popular influence. Throughout the entire Byzantine era, the Eastern Orthodox Church had been notably successful not only in its expansion, but also in its extension across a large missionary penetration far beyond the Empire's borders. The Eastern form of the church/state relations prevailing in the Byzantine polity has often been characterized as one marked by *caesaropapism*, implying that the Church was strictly subordinate to imperial rule and nearly disqualified from opposing it.[265] However, the latter characterization rests on at least two misunderstandings. First, it assumes that the Byzantine Emperor was entitled to settle religious matters, and possessed

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[263] See *supra* section II. The Headscarf Controversy before the Court of Justice of the European Union

[264] Richard Trigg, *Religion in Public Life: Must Faith Be Privatized?* (Oxford University Press 2007) 13.

[265] Steven Runciman, *The Great Church in Captivity: A Study of the Patriarchate of Constantinople from the Eve of the Turkish Conquest to the Greek War of Independence* (Cambridge University Press 1968) 3.

powers comparable to the ones exercised by the Patriarch; and, second, it downplays the power of the Church, which was effective by itself without any real need for legal (read: the Emperor's) assistance.[266] But Byzantines themselves deliberately avoided a precise delineation of the church/state relations insofar as no urgency dictated otherwise, and deliberately left the whole issue to be ultimately resolved by the combined operations of such forces as tradition, public opinion, popular will, and the idiosyncratic performance of the political figures involved.[267] In fact, there was a more or less precise, substantive limit which neither side perceived itself as entitled, or 'dared,' to overstep.[268] The patriarch ought not to hamper with politics; writing about the iconoclastic eris, for example, Steven Runciman observes that:

> The final arbiter between Church and State was *public opinion*, which tended to be swayed by the monks and lower clergy. The Iconoclastic Emperors succeeded for a while in forcing their controversial doctrine upon the Church by working through subservient Patriarchs and for a time controlling the whole upper clergy. They failed in the end because the people would not follow their views. Later Emperors were to face similar difficulties when they tried to enforce union with Rome.[269]

Modern historians depict the Emperors and the Patriarchs of the Byzantine Empire as constituting a *dyarchy* – that is, a *common* governmental body with *dual* authority, one temporal, one spiritual.[270] That temporal-spiritual alliance rested on a relationship of *symphony*, or harmony, between the civil and the religious authorities of the Empire.[271] In practice, the emperor had final authority over most of the church's *administrative* staff, although strong patriarchs were still able occasionally to exert powerful political influence.[272] To be sure, the Byzantine mix of the church/state relations may has not been without major flaws; but the common assumption that these relations were governed by some form of *caesaropapism* is, in its absolute conceptualization, a deceitful exaggeration. Perhaps the best formulation of the church/state relations in the Byzantine

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[266] ibid.

[267] ibid, 63-64.

[268] ibid.

[269] ibid, 64 (emphasis added.)

[270] Deno J. Geanakoplos, 'Church and State in the Byzantine Empire: A Reconsideration of the Problem of Caesaropapism' (1965) 34(4) Church History 386 (citing approvingly for the term 'dyarchy' Georg Ostrogorsky, 'Relations between Church and State' (1933) 121ff, but with the warning that 'dyarchy' is not necessarily equal to a 'fifty-fifty' partnership).

[271] ibid.

[272] ibid, 387. As Geanakoplos points out:

> Control over these various aspects of what might be called the 'external' side of the church, was in case of conflict the last analysis by the emperor. It must be emphasized, however, that the church hierarchy normally *shared, or the emperor let it believe it shared,* in this control, in a sensitive interplay of authority and influence.

ibid (emphasis added).

Empire was offered by the renowned twelfth-century canonicist and later Patriarch of Antioch, Theodore Balsamon (1130 or 1140–1195; r. 1185–1195):

> The service of the emperors includes the enlightening and strengthening of both *body* and *soul*. The dignity of the Patriarchs is limited to the benefit of *souls*, and that *alone*.[273]

Or, as one of the foremost Byzantine scholars and Yale Professor Deno J. Geanakoplos has once put it:

> [T]he ideal relationship of *imperium* and *sacerdotium* [is] a kind of symphonic *duet* between two divinely ordained institutions, the primary function of which is to preserve order and maintain harmony…. This constitution of two divinely appointed and in a sense parallel authorities is, it is clear, far from the concept of Caesaropapism or complete subordination of one power to the other.[274]

In the West, after the fall of the Roman Empire, the Roman Catholic Church, with the Pope at its head, established an operation offering social and hence political cohesion that no other individual or public institution would or could fulfill.[275] Eventually, under the controversial authority handed over to them, the Popes assumed *civil* authority in what would later constitute the (Western part of) Christendom. In the East, by contrast, the Empire hardly resisted its enemies until 1453, thus enabling – and, at the same time, recruiting – Eastern Christianity to exercise its unifying role within the political framework of a separate, but still Christian, Empire.[276]

The Ottomans, themselves nomadic warriors from their very roots, faced the task of ruling a mass of people of various faiths that were spread throughout much of the Balkan peninsula, north Africa and the Middle East. They succeeded in their task by assembling these people into *millets* (literally nations) on the basis of their religion rather than of their ethnic origins. Besides the dominant Muslim *millet*, there was the Jewish *millet*, the Gregorian Armenian *millet*, the Catholic *millet* (even, in the nineteenth century, a Protestant *millet*) and finally the Orthodox *millet*, the second largest next to the Muslims. These *millets* possessed a considerable degree of internal *autonomy* and were governed by their own religious leaders.[277] After the fall of Constantinople to the Ottomans in 1453, Christians were advised to submit to the Muslim political rule and abide by their tax-paying obligations in *exchange* for the freedom to observe their religion.[278] Of course, any Christian act of proselytism against the Muslims was outlawed. In fact, Christians were formally

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[273] Steven Runciman, *The Great Church in Captivity* (n 265) 61 (citing Theodore Balsamon, Opera, M.P.G., cxxxviii, col. 93, 1017-1018 (emphasis added)).

[274] Deno J. Geanakoplos, 'Church and State in the Byzantine Empire' (n 270) 382 (emphasis added on the word 'duet').

[275] Steven Runciman, *The Great Church in Captivity* (n 265), 82-83.

[276] ibid, 75-81.

[277] ibid, 167-168.

[278] ibid.

reduced to a ghetto existence: They were after all the *Rūm millet* (Roman nation), defeated by Islam but nonetheless they possessed a degree of group autonomy.[279] In January 1454, the Sultan Mehmed II allowed the election of a new Patriarch, who was going to become a *millet-bachi* – that is, head or *ethnarch* of the *Rūm millet* – hence empowered to levy taxes, and to deliver justice over the entire community of Christians subjected to Ottoman rule.[280] The Patriarch had now to use his religious (but also multi-faceted) authority to see to it that his Christian flock acquiesced to the Ottoman political authority and abstained from disorders.[281] The new state of affairs involved the Eastern Orthodox Church in a number of activities far more diverse than it had ever experienced, which had previously been performed by lay Byzantine officials.[282] Therefore, under the Ottomans, the Patriarch of Constantinople witnessed his jurisdictional reach, including his formal powers, experiencing both an *extension* and an *expansion*: On the one hand, through the privileges granted him by the Sultan, he could practically sidestep any of his brethren of the rest of the ancient Patriarchates; on the other hand, and most importantly for the present purpose, his powers ceased to be confined to spiritual matters only, but became entangled with the entire *Rūm millet*'s *political* affairs as well.[283] Enslaved Romans saw their Patriarch not only as a successor of the Byzantine Patriarchs, but also of the Byzantine Emperors.[284] Still, for the Ottomans, the Patriarch was only an official limited to running the religious and civil affairs of his *Rūm millet*.

The new religious operating system produced a number of far-reaching consequences. First, it enabled the Eastern Orthodox Church itself to survive as a religious institution throughout four centuries of violent Ottoman rule. In fact, the Church succeeded in actually raising her prestige by undertaking functions that it lacked previously, such as education, and in addition it was the only institution offering opportunities for social improvement. In addition, the new arrangements under Ottoman rule gradually produced a veritable equation of religion with ethnic identity. Third, since the entire *Rūm millet* was managed by the Patriarch of Constantinople and his staff, it guaranteed to the Phanariotes, the Greek-speaking *bourgeoisie* of Constantinople's Phanar district, a monopoly in the episcopal elections.[285] Thus, the ancient Patriarchates, especially of the Middle East, were handed over to the Phanariotes at their head, whereas parts of the Eastern Orthodox Church paying service to ethnic Serbians and Bulgarians were increasingly alienated from the Greek-dominated Ecumenical Patriarchate.[286] Greek domination, actively encouraged by the hated Ottomans, met with increasing resentment from Christians in the Balkan peninsula as the Ottomans, over time, turned more and more despotic and imposed heavier taxes. This precipitated the debut appearance of modern *religious nationalism*.[287]

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[279] ibid, 180-185.

[280] ibid, 172.

[281] ibid.

[282] ibid, 181.

[283] ibid, 182.

[284] ibid.

[285] ibid, 360-384.

[286] ibid, 177-178.

[287] ibid, 178.

Relations with the West, especially after the seventeenth century, deteriorated dramatically as a consequence of the deep corruption that was prevalent within the Ottoman administration. The Ottomans secured to the Orthodox their immunity against unwanted intrusions by Catholics from abroad.[288] Indeed, a pervasive *anti*-Latin attitude was, at the time, predominant within the Eastern Orthodox Church and more so among the Ottomans, and was coupled with growing suspicion and hostility against Europeans who were determined enough to go to great lengths to penetrate as deeply as possible within the Ottoman Empire.[289] Against Western diplomats who were flagrantly boosting their favorite candidacies for the Patriarchate by financing the *kharāj* – that is, the tax requested by the Sultan at each patriarchal election – the Ottomans responded with a number of resourceful stratagems aimed at preserving their authority. For instance, French and Austrian agents favored candidates who would actively encourage a Roman Catholic penetration into their flock, while their competitors from Great Britain and the Netherlands favored patriarchs who were more congenial to Protestant ideas.[290] A conservative coalition of Ottoman rulers and the Eastern Church joined their efforts in forming a powerful alliance of 'throne and altar' against the *evil* West. The protection warranted to the Church against Catholic propaganda, as well as against the innovations heralded by Protestant-minded Enlightenment intellectuals, provided strong reasons for the *Rūm millet* to swear allegiance to their Ottoman rulers.[291] In addition, the religious policy of 'rendering unto Caesar what is Caesar's' aligned with a political tradition that would be invoked three centuries later by a number of hierarchs in their struggles against the Enlightenment calls for Greek independence.[292]

For the most part, Western-educated Enlightenment-driven intellectuals sought to preach Western ideas and transplant Western institutions using a language replete with romantic nationalism, but kept ignoring the fact that the Greek-speaking 'body politic' under Ottoman rule had solidified into a mass that was quite distinct from that of the Western European nations.[293] The traditionalist elites, on the other hand, having dominated most rural areas since the pre-revolutionary period, were iron-willed in their determination to preserve their prerogatives under *any* new regime.[294] In fact, they thought of independence in terms of *substituting* their own (authoritarian) administration for that of the Ottomans.[295]

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[288] Paschalis M. Kitromilides, *Enlightenment and Revolution: The Making of Modern Greece* (Harvard University Press 2013; first printed in Greek as *Neoellinikos Diaphotismos. Oi Politikes kai Koinonikes Idees* (Cultural Foundation of the National Bank of Greece 1996)) 25.

[289] ibid; Steven Runciman, *The Great Church in Captivity* (n 265) 81-82.

[290] Steven Runciman, *The Great Church in Captivity* (n 265) 203-204. A most dramatic example of the role exerted by European nation-states in their efforts to expand their sphere of influence is provided by the tragic death of a Western-educated and Western-minded Patriarch, Cyril Lucaris, who was elected and deposed five times between 1620 and 1638. His stormy reign had been marked by the publication in Geneva of his *Confession of Faith* (1629 CE), which was purely Calvinistic. The episode ended with Patriarch's strangulation by Turkish soldiers at the instigation of pro-Catholic agents of the French and Austrian governments.

[291] Paschalis M. Kitromilides, *Enlightenment and Revolution* (n 288) 25.

[292] ibid.

[293] Richard Clogg, *A Concise History of Greece* (4th edn, Cambridge University Press 2021) 37.

[294] ibid.

[295] ibid.

In 1821 the Greek War of Independence against the Ottomans was finally proclaimed by *Germanos* (1771–1826; r. 1806–1826), Bishop of Old Patras. By contrast, the Ecumenical Patriarchate, acting as the official state-sponsored agent for the *Rūm millet*, renounced the revolution, as much anticipated, and was pushed to issue an *anathema* against the Greek insurgents.[296] To be sure, these and other moves failed to convince anyone of their truly anti-revolutionary spirit, not least of all the Ottomans, who on Easter Day of 1821 had the Patriarch Gregory V (1746–1821; r. 1797–1798, 1806–1808, 1818–1821) hanged from the main gate of his residence to serve as a bloody reminder to anyone interested in raising the revolutionary flag.[297] Still, many Orthodox prelates and local priests assumed a leading role in the Greek Revolution and played a crucial part not only in religious but also in political and military affairs. As a consequence, an arm of the Eastern Orthodox Church operating in insurgent Greece had many of her best men killed or seriously wounded, and much of its wealth spent for the revolutionary cause.[298] The early successes of the revolution quickly raised the question of how the conquered territories would be governed. Within a short time span, a sum of three local governments had made their appearance and, early on in 1822, the Greek delegates who were meeting at Epidaurus, Návplion, adopted a Constitution, the first in a series of aspirational post-revolutionary constitutional ventures.[299] Against its background, their handiwork was a highly liberal document and its framers clearly intended to appeal to enlightened Europeans for assistance.[300] In particular, the predominance of religion in the fledgling polity can by no means be overstated: No louder presence can be found than in the efforts made by the Greek statesmen, together with a number of clergymen sitting in the Epidaurus assembly as delegates, to define citizenship through a constitutional language that bound it inseparably with religion in the following formulation:

> All those indigenous inhabitants of the Greek territory who believe in Christ are Greeks and are entitled without discrimination of all their civil rights.[301]

In 1823, the Constitution was modified and the three local governments were merged into one.[302] But centralization brought in its wake factional divisions which by the next year had degenerated into civil war with alliances keeping constantly fluctuating.[303] The factionalism that formed the socio-political background to the war can broadly be interpreted in terms of a struggle for leadership between the 'military,' or 'democratic,' party and the 'civilian,' or 'aristocratic,' party respectively.[304] This division also represented a deep gulf between liberals and conservatives

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[296] Charles A. Frazee, *The Orthodox Church and Independent Greece, 1821–1852* (Cambridge University Press 1969) 29.

[297] Richard Clogg, *A Concise History of Greece* (n 293) 36-37; 277.

[298] Charles A. Frazee, *The Orthodox Church and Independent Greece, 1821–1852* (n 296) 69.

[299] Richard Clogg, *A Concise History of Greece* (n 293) 35.

[300] ibid.

[301] *Prosorinon Politeuma tis Ellados*, s B, para 2.

[302] Richard Clogg, *A Concise History of Greece* (n 293) 35.

[303] ibid, 37.

[304] ibid.

in what marked the first time in the modern Greek political era that political parties were labeled in such a way.[305] Despite the pervasive force of religion throughout the entire political sphere, but most importantly among the people at large, as the conflict progressed it became apparent that liberals were pushing toward depriving the Church of her pre-revolutionary influence.[306] Secular ideas, imported from the West and nurtured domestically by the tireless efforts of Western-minded intellectuals, sought to diminish the role of religion within the polity.[307] The Eastern Orthodox Church could (and, one might add, should) now relinquish many of her pre-revolutionary activities, such as education and justice, and let the newly-secularized political authorities take on these functions that already comprised in the West the standard operations of a free government.[308]

The Bavarian bureaucracy of King Otto's (1832–1862) regency showed little sympathy for the aspirations felt so deeply by the Greek insurgents.[309] No wonder then that when charged with the responsibility for coming up with institutions able to drive the fledgling nation, they turned a blind eye to centuries-old traditions and practices.[310] This reality, coupled with the inability of the Revolutionaries to engage in any communication with their Mother Church in Constantinople, led the delegates gathered at Návplion to declare an autocephalous part of the Eastern Orthodox Church seated in the liberated Greek lands and to subject it to a governing *Synod* of serving hierarchs.[311] Through the tireless efforts of Georg von Maurer, the 1833 religious settlement severed any ties between the Ecumenical Patriarchate and the Eastern Orthodox Church, which was declared autocephalous, but simultaneously was subordinated to strict governmental control.[312] Relations with the Patriarchate were not formally restored until 1850, when the Ecumenical Patriarchate finally yielded and officially recognized through granting a *patriarchal tómos* (charter of autocephaly) – what was by then a *fait accompli* – the autocephalous Eastern Orthodox Church of Greece.[313]

The board of royal regents underestimated the value of, and the calls for, transplanting their Western European ideas as *fittingly* as possible into the complex web of Greek socio-political idiosyncrasies.[314] Therefore, although Greeks were, early on, equipped with at least the façade of a liberal, and later constitutional, democracy, a number of problems arose from the very outset because they had imported without any guidelines a Western constitutionalist ethos together with its organizational patterns – which had been shaped through centuries of experimentation in societies with distinct social, political, religious etc. experiences – into an old-fashioned society, whose values had the imprint of four-centuries of Ottoman suzerainty and therefore differed dramatically

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[305] ibid.

[306] Charles A. Frazee, *The Orthodox Church and Independent Greece, 1821–1852* (n 296) 69.

[307] ibid, 70.

[308] ibid.

[309] Richard Clogg, *A Concise History of Greece* (n 293) 49.

[310] ibid.

[311] ibid.

[312] ibid.

[313] ibid.

[314] ibid.

from those prevailing in the industrializing societies of Western Europe.[315] What I imply by that, which I will delve into more deeply in the remainder of this chapter, is that the post-revolutionary political arrangements of the church/state relations in Greece were *not* fundamentally driven by the hostility toward the Church, if not toward religion itself, that were characteristic of the French Revolutionary ethos. There is a plethora of reasons and a number of intriguing implications, of which an in-depth investigation will certainly shed ample light on the different circumstances that formed the two nations' divergent institutions; that lent them their particular constitutional identities which are still manifest, I argue, in the political and legal developments we are witnessing two centuries later.

C. Modern Greek Church/State Relations in Context

If no Reformation has actually occurred in the Eastern Christendom, it is because there was no reason for one.[316] Throughout four centuries of Ottoman rule, the Eastern Orthodox Church has at least allegedly never lost her grasp among the people, or probably not to such a degree that would almost deterministically set in motion a process leading up to an Eastern form of Reformation.[317] The parish priest used to be selected from among his parishioners, so that the only difference between the priest and his parishioners was that he had received the training necessary for providing religious service.[318] The parish was a solid community, deriving its strength from the broad popular participation in the worship of a common religion; and after the Ottoman conquest, communion survived by raising awareness of, and forging a common front against, the evil tyrant.[319] These Christian communities were then able to maintain their social fabric against their Ottoman rulers – the *aga* – or the Sultan's agents sent from Constantinople.[320] For one thing, there had always been a risk that 'rural' religion could effortlessly be subverted into a mix-and-match of religion *and* magic.[321] If rural religion was to mean anything more than magic, it had to be subjected to a network of hierarchical *supervision*.[322] Supervision, however, came near to exhaustion with the passage of time.[323] For instance, whereas in the centuries immediately after the Ottoman conquest, the Patriarchic court had been filled with dedicated clergymen who, apace with their rise into higher ranks, were influenced by intrigue but remained essentially men of honor;[324] eighteenth-century observers, by contrast, highlighted the fact that the clergymen not only lacked any

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[315] ibid, 51

[316] Steven Runciman, *The Great Church in Captivity* (n 265) 385.

[317] ibid.

[318] ibid.

[319] ibid.

[320] ibid.

[321] ibid.

[322] ibid.

[323] ibid, 386.

[324] ibid.

notable knowledge of Christian teachings, but were also drenched in greed and corruption, which was widespread particularly amongst the higher clergy.[325]

However, with a progressive take-over of *nonreligious* activities, the Patriarchate had to recruit men who would serve not only as clergymen, but as administrators too. As the renowned Byzantinologist Steven Runciman put it, 'Wordly laymen were more useful for the work than spiritually minded ecclesiastics.'[326] No better candidates for the post could be found than the rich and well-educated Greek residents of the Phanar district of Constantinople, the *Phanariotes*. With the passage of time, the rich merchants of Phanar filled the Patriarchal court and, at least from the seventeenth century onwards, they began to make use of their lay offices for advancing their political ends, and established a growing *laicization*.[327] Despite their notorious cosmopolitanism, the Phanariotes never lost touch with their Roman origins, but their Western education and mindset made them unfamiliar and increasingly more unsympathetic toward religion.[328] By the eighteenth century, they had grown strongly acquainted with Western philosophy and, most importantly, the Enlightenment ideas that were so far-reaching in the West at the time.[329] Few clergymen at the Patriarchal court dared to confront the Phanariotes by protesting against the 'strange' intellectual winds blowing from the West.[330] By contrast, however, there was a strong reaction across the Ottoman provinces against these alien 'fashions,' which gradually led to a suspicion against all learning – or at least against Western-oriented learning – and to a 'defiant obscurantism.'[331] For instance, the attempt of the controversial Patriarch Cyril V (–1775; r. 1748–1751, 1752–1757) to establish an Athonite academy showed by its failure that the monks in Mount Athos were far from willing to receive the kind of education that the Patriarch under the pressure of the Phanariotes was openly promulgating.[332]

To be sure, critics did not escape exaggerations. Primarily, the Athonite Republic was probably (and by definition) trying to distance itself (not just from the West but more generally) from the infections of a worldly power struggle that represented an Orthodox ethos that was prevalent in the provinces as well.[333] The Athonite monks were trying to keep their loyalty toward the original Orthodox traditions, by concentrating, for example, on eternal values unharmed by man-made philosophies and science.[334] For the most part, rural Greeks could not have possibly comprehended the political subtleties and delicate strategies that the Patriarchate had used to ensure its own and

[325] ibid.

[326] ibid.

[327] ibid, 387.

[328] ibid.

[329] ibid.

[330] ibid.

[331] ibid.

[332] ibid, 388.

[333] ibid.

[334] ibid.

their *millet*'s survival of Ottoman authoritarianism.[335] Instead, peasants looked to their village priests, or to their local bishops, or to whoever appeared to be able to offer them hope and courage against the Ottomans; in exchange they granted them their loyalty.[336]

In the Ottoman Empire's heyday, Greek nationalism could be kept secret,[337] but by the eighteenth century, the Ottoman administration was beginning to fall apart.[338] A growing number of fugitives took to the mountains; in Greece, they were called the *Klephts*.[339] The latter could almost always count on Orthodox villagers for support; they could equally seek refuge from the Ottomans in local monasteries.[340] Therefore, prior to the War of Independence, Greek peasants had formed a spiritual and a seemingly *political* communion with their local parishes at its center and an alliance with *Klephts* and *Armatoloi* – that is, a militia commissioned to enforce Ottoman authority within a designated territory called *Armatoliki* – against their Ottoman rulers. No wonder then that they showed stunning hostility to the Phanariotes, from whom they felt estranged due to their Western-oriented ideas and their narrow entanglement with the Ottoman sovereign.

The 1789 French Revolution, by which the French nation scratched its peak of global influence and through which a historical period paved the way for a new one to follow, was felt throughout the entire European continent as a loud manifestation of Enlightenment ideas. Still, the French Revolution divided Europeans along the sharp ideological lines it induced, and forced all interested parties to take sides.[341] To its foes, it was a blind attack against the *ancien régime* destroying indistinguishably whatever preexisting structures and ideas had bound the body politic together for centuries.[342] To its friends, it represented the triumphal victory of reason against the various – religious, among others – superstitions of the *ancien régime* and projected a model of liberty readily available to anyone interested in realizing their own political aspirations.[343] In a similar vein, the lines of a confrontation between two rival but irreconcilable outlooks on the deepest concerns of the Greek affairs, were already clearly discernible. The French Revolution, which succeeded in offering concrete political form to the Enlightenment's aspirations, provided a catalyst for such a confrontation in the rebellious Greek provinces too.[344] If Enlightenment agents in France had championed a revolutionary upheaval, their counterparts in the Greek-speaking world could be content with nothing less.[345]

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[335] ibid, 391.

[336] ibid.

[337] ibid.

[338] ibid.

[339] ibid.

[340] ibid.

[341] Paschalis M. Kitromilides, *Enlightenment and Revolution* (n 288) 175.

[342] ibid.

[343] ibid, 175-176.

[344] ibid, 189.

[345] ibid.

Indeed, a revolutionary spirit was expanding within the educated circles in the Greek-speaking provinces of the Ottoman Empire.[346] The French conquest of Venice in 1797 brought French revolutionary ideas within the reach of Greeks through the Ionian islands.[347] The herald of such ideas among the Greeks was a man called Adamantios Korais (1748–1833).[348] In France, he had made contact with the French *encyclopédistes* (Encyclopedists), from whom he obtained an antipathy toward tradition and a posture toward anticlericalism.[349] From the English historian Edward Gibbon he had been convinced that Christianity had initiated a dark age for the European civilization.[350] Driven by the German philosopher Karl von Schlegel to identify nationality with language, he went so far as reforming the then-popular language into what would be later known (and officially applied) as the *katharevousa*, a language closer to its classical Greek model.[351] He saw in the Byzantine era of Greek history, and of the Eastern Orthodox Church, a dark, best-be-forgotten interval between ancient glory and modern ambitions.[352] His works were enthusiastically read by young intellects at the Phanar and all over Greece.[353]

On the other hand, the religious authorities were well aware of revolutionary ideas spreading among the enslaved Greeks, and that they were met with sympathy by many of them, especially the younger Phanariotes.[354] They were also aware that the sharpest of Greek minds were increasingly turning away from religion, and that they had found support in the class of clergymen who were highly critical of their hierarchy.[355] Such literary attacks as appeared in popular treatises – *The New Geography*, written by two monks, and *The Hellenic Nomarchy*, or *A Word about Freedom*, ranking among the most recognizable – lured many members of the Patriarchal court into thinking that maybe the Ottoman rule with all its vicissitudes was more favorable to a true religious life than any outcome of this new revolutionary spirit would be.[356] For all its improperness, a treatise entitled *The Paternal Exhortation*, probably written by Patriarch Gregory V, was not theologically unsound.[357] It was perhaps unnecessary (and undesirable) for its shadowy writer to exhibit so much sympathy to the Ottoman ruler; but his views were not unreasonable, at least for a cleric who believed that the church should keep distance from politics and who (cleric) had presumably promised to guarantee, under the terms of his appointment, his *millet*'s loyal subordination to the Ottoman rulers.[358] Korais hurried to reply in a work entitled *The Fraternal Exhortation*

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[346] Steven Runciman, *The Great Church in Captivity* (n 265) 391.

[347] ibid, 392.

[348] ibid.

[349] ibid.

[350] ibid, 393.

[351] ibid.

[352] ibid.

[353] ibid.

[354] ibid.

[355] ibid.

[356] ibid, 394.

[357] ibid, 395.

[358] ibid, 395-396.

in which he declared that *The Paternal Exhortation* did not reflect the sentiments that were prevalent among the Greek population, but rather it was the artifact of a prelate 'who is either a fool or has been transformed from a shepherd into a wolf.'[359] At the same time, the older Phanariotes were confident enough that time was ripe, and that the Ottoman Empire would soon fall apart to their – personal and *national* – advantage.[360] Their sons too were running impatient.[361]

What is for the present purposes particularly remarkable about religion within the preceding narrative, however, is that, despite occasional attacks against ecclesiastical misconduct, there were no conditions in the pre-revolutionary Greek-speaking provinces calling for the kind of aggressive policies against the Church that had already been promulgated during and after the French Revolution. Probably aware of this nuance, and of Eastern Christianity's power and legitimacy among the people, Korais showed himself a clever politician. He deliberately avoided stirring up a direct confrontation with Christianity or the Eastern Orthodox Church itself.[362] He could engage himself in religious controversies and perceive himself as entitled to discredit religious arguments while deliberately avoiding any outright confrontation with the Church, with which he by no means intended to compete and thus run the risk of making the cause of independence appear *irreligious*.[363] For instance, just as his French associates were allegedly seeking to restore the Gallican Church to its original status,[364] Korais resorted to divine argumentation when insisting that the Holy Scriptures, no less than human reason, sanctioned obedience to *legitimate* rulers only.[365] Last but not least, his critique increasingly revolved around the clergymen as a powerful obstacle in the course of nationally-oriented struggles for independence.[366]

On the whole, the Greek version of Enlightenment was in principle neither anti-Christian nor anti-religious. Anticlericalism may indeed have been a reasonable reaction to a more or less widespread corruption among the clergymen, but a substantial critique of faith remained beyond the scope of most heralds of Greek Enlightenment.[367] As Steven Runciman aptly put it, 'If [Orthodox leaders] often indulged in intrigue and often in corruption, such is the inevitable fate of second-class citizens under a government in which intrigue and corruption flourish.'[368] The conflict then over religious issues that intermingled with the diffusion of Enlightenment ideas and revolutionary claims was not religious but somewhat 'political.'[369] To put it succinctly, whereas the politicization of the Roman Catholic Church in France and elsewhere had been a symptom of its propensity to

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[359] ibid, 396.

[360] ibid.

[361] ibid, 397.

[362] Paschalis M. Kitromilides, *Enlightenment and Revolution* (n 288) 193.

[363] ibid.

[364] ibid, 250.

[365] ibid, 195.

[366] ibid.

[367] ibid, 317; Evangelos Venizelos, *Οι Σχέσεις Κράτους και Εκκλησίας ως Σχέσεις Συνταγματικά Ρυθμισμένες* (Thessaloniki, Greece: Paratiritis 2000) 50.

[368] Steven Runciman, *The Great Church in Captivity* (n 265) 412.

[369] Paschalis M. Kitromilides, *Enlightenment and Revolution* (n 288) 195.

dominate the temporal; the counterpart process of politicization that burdened the Eastern Orthodox Church under the Ottomans and which Enlightenment figures aspired to leave behind was only a means of *survival* under a ruthless overlord.

Still, even as proponents of a reformed Church had left faith untouched, they managed to build an administrative apparatus for the fledgling Greek polity on the models they had brought with them from abroad. The arduous task of nation- and state-building produced, at the end of the War of Independence, a constitutional edifice, endowed with a number of institutions that were transplanted from contemporary European states.[370] Most notably, the founding fathers had turned the local Church into an arm of the government by severing any administrative ties it had with the Ecumenical Patriarchate in Constantinople, which remained subject to the Ottomans.[371] The newly established Kingdom of Greece made a big step toward 'going secular' by way of distancing itself from the – harmonious or not, leave it open to debate – arrangements molded in the Byzantine era, and of turning the Eastern Orthodox Church located in the liberated provinces into a *state-sponsored* Church – thereby initiating a Western-oriented 'state religion' – in much the same fashion as the Protestant European nations had done before.[372]

Meanwhile, the post-revolutionary innovations in the governmental structure of the church that were envisioned to assist her fulfill her mission in society, including taking measures of financial support, combined to gradually bring the Church under the aegis of civil authority and turn it into a vital instrument within a web of state-run policy-making.[373] The head of the new autocephalous department of the Eastern Orthodox Church of the Kingdom of Greece was the King, a Roman Catholic himself, and its administration had been performed by clerical officials appointed by the crown.[374] That was pure *caesaropapism*, which was either a regression or at least quite foreign to the local customs and conventions to swallow. The ecclesiastical regime thus imposed on the Greek Church was dictated in large measure by political concerns that aimed at strengthening both national aspirations and monarchical authoritativeness.[375] But these aims were enforced by applying an Erastian arrangement of Protestant origins, which meant transposing to Greece a model of church establishment – a state religion particularly widespread in the German Protestant nations and in Scandinavia – which was alien to the newly liberated nation.[376]

Another outcome was that the Church was handed over to the dictates of nationalism that formed the then prevailing political ethos as associated with the modern state.[377] The power and legitimacy of Christian religion in the Greek-speaking world provided fertile ground for the nationalist aspirations of the modern state to flourish, once she was enlisted as one of government's

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[370] ibid, 317.

[371] ibid, 318.

[372] ibid.

[373] ibid, 232.

[374] ibid, 235.

[375] ibid.

[376] ibid.

[377] ibid, 234.

arms. Paradoxically, then, the Church was granted *autocephaly* – literally meaning autonomy – only to be subjected to a new ruler. Secular subjection had two far-reaching consequences for both the Mother and her daughter Churches in the long-run: There was, first, a sacrifice of at least some of their Christian values and, second, a growing entanglement with politics and especially nationalistic passions.

As may have already been evident from the preceding analysis, political controversies of religious issues viewed in their historical overview have become increasingly both *complicated* in their causation and *sophisticated* in their overcoming across most Western polities, now that the 'church' part of the 'church/state relations' issue is no longer confined to a Christian church, but includes a Muslim Mosque, a Buddhist or a Hindu temple, a Sikh gurdwara etc. Modern liberal constitutional democracies have responded to religious diversity and pluralism with policies derived from a tripartite set of constitutional principles framing the church/state relations in a way that has now become very much commonplace. First, the constitutional church/state blueprint provides that the government be *prohibited* from unduly curtailing the rights of individuals to practice their religion – that is, it is forced to provide for the 'free-exercise' of religion. Second, the government should *not* itself *adopt* nor *embrace* any particular religion so that it does not end up lifting a particular religion (or religion in general) to a more privileged position in comparison with other religions (or irreligion.) Constitutional democracy must rest on some degree of 'non-establishment' of religion. Last, the government, and in some circumstances private parties, should avoid both *discriminating* against or between religions, or between religion and irreligion, and treating individuals differently based on their religious beliefs or absence thereof. In other words, the government must adopt in its policies a principle of 'non-discrimination' on religious matters.

Non-establishment and non-discrimination, in particular, demonstrate a strong inclination toward the adoption of a governmental policy of *neutrality* in the official treatment of religion. Even though neutrality itself, in much the same fashion as any vague law concept and political claim, tends to mean different things to different people, it is generally assumed to mean that laws should have a *nonreligious*, or secular, purpose. In other words, a government should neither promote nor inhibit religion with the assistance of the laws or other instruments it enacts, and should not engage in excessive entanglement with religion. Pursuing neutrality is intended to achieve a number of prominent political aspirations. In its *noninterventionist* formulation, for example, neutrality builds on the individual's entitlement to live free from any governmental *interference*, to emphasize the value in pursuing policies that leave individuals free to determine their own conceptions of the good and to run their lives based on these conceptions. In addition, noninterventionists are also sympathetic to a dichotomy between a public and a private sphere, which (dichotomy) they raise primarily by holding that the government must be blind toward religion(s), even when that may lead to being apathetic or even hostile toward any public manifestation of religion(s). On the other hand, *equal-promotionists* urge the government to adopt measures that even-handedly promote *all* conceptions of the (common) good, including religious ones, based on an understanding that all these worldviews are not only equally worthy or valuable in themselves but also *instrumental* in promoting public welfare. Still, equal-promotionists share with noninterventionists a *nonpreferentialist* principle, as they are sympathetic to the idea of publicly acknowledging and even actively encouraging religion, but only under the strict proviso that no religion gets more favorable treatment than the others.

The common assumption, then, between the differing views is that a policy of neutrality toward religion commands (to varying degrees) that a government must *step back* from excessive interference with any particular religion. French *laïcité*, for instance, as an example of a policy of extreme neutrality, has built on effectively driving religion *out of* the public square. To do that, it has relied on a wholesale division between a private sphere, where religion is held to properly belong, and a public one, in which each individual is permitted (and required too) to show up as a citizen 'free' from any of their ethnic, religious, or other identities. History is a great teacher, and one of its lessons is that when religion and the state intermingle too intimately with each other, bad things follow. But what is missing from a *laïque* agenda is an understanding that the church/state separating walls that were meant to foster neutrality are necessarily unable to prevent *cracks* through which each of them may penetrate the other. True, religious inquiries originate from what has been widely assumed as constituting the people's private lives, but they tend to spill over to 'color' our public performance, and we cannot just avoid them by *hiding* them. Religion is for church and home, it is held, not for public life. But equally for believers and nonbelievers, religious worldviews will inevitably shape personal behaviors, not only at home but also in public. Faith is indeed personal, but *not private*. The concept of dividing one's personal behavior into a private part that can legitimately accommodate religious elements and a public part that cannot, being largely alien in the pre-industrial West, was later introduced by the French Enlightenment, which treated religion as a subjective idiosyncrasy and relegated it to one's private life. The bond between public performance and personal beliefs was finally broken with the rise of industrialization and urbanization. The puzzle then arises as to whether a public square wiped clean, as the French *laïque* tradition dictates, of any religious evidence is *actually* neutral.

That a religion-free public square is actually neutral is itself controversial, or perhaps even flawed, when seen through the prism of reason, does not negate the fact that it is perhaps defensible or at least intelligible when seen through the prism of a nation's constitutional *identity*. For one thing, the formation of American church/state relations was fundamentally different from that of its twin process in Europe precisely because of its colonial establishment by pilgrims coming from Europe, as well as of its distinct political tradition driven by the Scottish, rather than the French, Enlightenment.[378] The pilgrim heritage of modern America attests to the fact that a uniquely American freedom *of* religion is equal to freedom *for* religion. In contrast, freedom *for* religion in continental Europe, and in particular in revolutionary France, meant freedom *from* religion. French *laïcité* is, contrary to public declarations, not so much religion-neutral as it is *anti*-religious with a view to guaranteeing freedom *for* religion. Be that as it may, I do not hereby intend to defend or criticize any one of the proposals available for the treatment of religion in the public square. What I intend is to acknowledge the fact that ingrained into the constitutional heritage of the European states – into their constitutional identities, indeed – are at least two contrasting notions of neutrality; as well as to argue that, in a well-reasoned judgment of such a far-reaching judicial institution as the CJEU, that pluralism of constitutional heritage and that diversity of likely constitutional outcomes should have been somehow compensated for as a matter of identity respect. Touching issues that cut across the EU Member States' constitutional identities, but failing to do them justice

[378] Daniel Walker Howe, 'Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution' (1989) 31(3) Comp Stud Soc'y & Hist 31(3) 572.

by yielding enough latitude for their courts to maneuver throughout such questions, cannot but constitute a *disregard* on the part of the CJEU of its duty to enforce EU law's Identity Clause.

What do all these have to do with religious education in twenty-first century Greece? Apparently, what is needed for an educational policy to suit the constitutionally sanctioned balance, and then to generate a religiously neutral outcome, is neither commanding the bearing of religious symbols, nor prohibiting such symbols altogether; instead, and closer to the standard Anglo-Saxon way of treating religion, neutrality perhaps implies that everyone be allowed to bear – or not – any symbol of religious (or philosophical, or whatever) appearance whatsoever. Accordingly, then, neutrality towards religion and religious neutrality within an educational environment, has no essential meaning of its own without some reference to the specific 'criteria' which determine our judgments over what we mean when we say that policy X is neutral, whereas policy Y is not. One might by now expect that the 'French-specific' criteria, as deeply ingrained in the tumultuous French past, point favorably toward a religion-free school curriculum, or at least one not privileging a particular religion over another. The 'Greek-specific' criteria, on the other hand, point toward a different direction. For one thing, the post-revolutionary Greek polity has been formed neither by the mass of persecuted pilgrims that fled to the New World to establish the American colonies on the religious foundations of free-exercise and non-establishment; nor has it suffered (at least to the same degree) the religious atrocities that culminated in the French version of religious neutrality known worldwide by the term '*laïcité*.' The Eastern Orthodox Church, in performing her service during the Byzantine era and later under the Ottoman rulers, did not come anywhere near to engaging in the abuses of the Roman Catholic Church. Her post-independence nationalistic divorce with her Mother Church in Constantinople, and the immediate establishment of the Greek Orthodox Church as official branch of a secularized government, in no way represented the popular ethos.[379] Instead, it amounted to a set of transplanted innovations introduced by a Western-minded, Protestant-dominated royal regency, largely alienated from their native subjects.[380] The consequence was no less than a caesaropapism-lite political ideology that is visible up to the present in the context of the religious education syllabus of the school curriculum.[381] I argue that the implication is that the judicial outcome in the Religious Education series, though by no means uncontroversial or beyond some drawbacks, is at least *not incomprehensible* if seen through the prism of Greece's constitutional identity; an identity that is deeply compounded with religion by way of an Eastern Orthodox Church that assisted the Greek nation in its survival throughout four centuries of Ottoman rule, later in its war of independence and subsequently by way of an established Greek Orthodox Church which kept it from falling apart.

D. Aspirations: Towards Religious Freedom

Still, a theoretical cornerstone of the constitutional identity debate as has been outlined in Chapter 2 is that constitutional identities are subject to change over time. More often than not, a nation's

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[379] Steven Runciman, *The Great Church in Captivity* (n 265), 385-406.

[380] Evangelos Venizelos, *Οι Σχέσεις Κράτους και Εκκλησίας* (n 367) 23, 50.

[381] ibid, 56.

confrontation with people or ideas alien to it offers a unique chance to reflect on itself and its identity – that is, on constitutional 'identity' and 'difference' – and on how it has evolved over time.[382] Against an increasingly multi-ethnic and multi-religious societal background, the divisions that cut across such issues as school curricula, school holidays (roughly matched with public holidays too), and classroom prayer have taken on new dimensions in twenty-first century Greece.

Much like the two opposite groups of justices in the Religious Education series, there are those who advocate a relatively stronger form for religious education that is able to accommodate religious instruction and classroom prayer.[383] But confronted with powerful calls for *neutrality* in anticipation of an increasingly multi-religious student body, they are not ready to come up with persuasive answers to such questions as *whose* religious instruction and *whose* prayer exactly should be hosted in a school where not only Christians, but also Muslims, agnosticists, atheists, or just apathetic students are (or will be in the years to come) *all* part of a single student body.[384]

On the other end of the spectrum, there are those who argue that a broad knowledge of the many religious traditions that have played their part in world history forms essential part of modern education. Teaching *about* religion is good, but teaching *of* religion (religious *instruction*) as well as any substitute or disguised form of religious *indoctrination* is not. Proponents of such an inclusive form of religious education offer a set of guidelines too: The school's approach to religion must be academic, not devotional.[385] The school must boost religious awareness, but should not proselytize.[386] The school may expose students to a number of diverse religions, but should not compel them to embrace any one of them.[387] Religious symbols such as the Holy Cross, the Star of David, or the Buddha can be demonstrated for teaching purposes, but they are not permitted as classroom decorations.[388]

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[382] See *supra* Chapter 2.

[383] For the various approaches of teaching about religion from legal perspectives, see generally Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles on Teaching About Religions and Beliefs in Public Schools* (2007) <https://www.osce.org/odihr/29154> accessed 25 February 2023. See also the essays included in (2020) To Syntagma 1-2 on religious education: Giorgos Stavropoulos, 'Η Θρησκευτική Ελευθερία και η Εκπαιδευτική της Διάσταση' (2020) To Syntagma 1-2, 42; Michalis Pikramenos, 'Το Μάθημα των Θρησκευτικών σε μια Σύγχρονη Φιλελεύθερη Δημοκρατία' (2020) To Syntagma 1-2, 439; Kyriaki Topidi, 'Εκπαίδευση και Θρησκεία: Ο Ρόλος του Κράτους και οι Νέες Προκλήσεις' (2020) To Syntagma 1-2, 465; Evi Zampeta, 'Ο Χαρακτήρας του Μαθήματος των Θρησκευτικών: Κοσμικός ή Ομολογιακός;' (2020) To Syntagma 1-2, 481; Stergios Kofinis, 'Το Μάθημα των Θρησκευτικών ενώπιον του Δικαστή' (2020) To Syntagma 1-2, 495; Charalampos Kouroundis, 'Θρησκευτική Ιδεολογία και Δικαστική Ιδεολογία: Οι Περιπέτειες της Διδασκαλίας του Μαθήματος των Θρησκευτικών στο Συμβούλιο της Επικρατείας' (2020) To Syntagma 1-2, 513; Eleni Zervogianni, 'Θρήσκευμα του Παιδιού και Γονική Μέριμνα' (2020) To Syntagma 1-2, 537; Chara Kafka, 'Θρησκευτικά Σύμβολα στις Δικαστικές και τις Σχολικές Αίθουσες με Αφορμή την Απόφαση 71/2019 της Ολομέλειας του Συμβουλίου της Επικρατείας' (2020) To Syntagma 1-2, 559. From an American perspective, see Matthew D. Donovan 'Religion, Neutrality, and the Public School Curriculum: Equal Treatment or Separation? (2004) 43(1) Cath Law 187.

[384] For an identitarian approach toward the judgments delivered in the Religion Education Series, see Christos Rammos, 'Το Πρόβλημα της Θρησκευτικής Ετερότητας στην Ευρώπη – Η Λησμονημένη Καθολικότητα του Πολίτη' (2020) To Syntagma 1-2, 1; Antonis Manitakis, 'Η Διάκριση του "Πιστού" από τον Πολίτη και του "Λαού της Πολιτείας" από τον "Λαό της Εκκλησίας,"' (2020) To Syntagma 1-2, 25.

[385] See 'Today's Challenges. Encounter in the Public Schools' (*The Pluralism Project*) <https://pluralism.org/encounter-in-the-public-schools> accessed 25 February 2023.

[386] ibid.

[387] ibid.

[388] ibid.

Within the universe of the constitutional requirements of free-exercise and nondiscrimination, public authorities have broad powers in experimenting, designing, and implementing various form of religious education in their jurisdictions. In the Religious Education series, driven unconsciously or not by what I have hereby presented as the Greek Constitution's identity, the majority justices read between the lines of art 16(2)'s terms of 'religious consciousness' the idea of a syllabus animated by the teachings of Eastern Christianity. For them, the ideal blend of religious education, one attentive to the claims made by the Greek constitutional identity, must necessarily include a degree of religious instruction; that is, teaching students in perfect accordance with the religious convictions of Eastern Christianity based on the assumption over what (convictions exactly) they are deemed to have by means of constitutional inference. But it is not denied that some students will not share these same religious beliefs, hence they derived the constitutional necessity for a full-fledged right to opt-out. Accordingly, then, the Greek Orthodox students will not be needlessly cut off from what are considered to be their *roots*, but will learn how to live together in peace with people of different religions and generally to respect diversity. Minority believers on the other hand will be fully entitled to learn about their own religious convictions and thus be safeguarded against alienation and identity theft. Therefore, the Greek constitutional identity, the judges held, dictates a model of religious education that rests on religious instruction in the teachings of Eastern Christianity coupled with a full-fledged opt-out for dissenters. In addition, it disfavors what has been in the ascendant across a number of European nations and is echoed in the dissenting opinions; that is, a *pluralist* school curriculum, more *inclusive* of religious diversity, that is compulsory for *all* students, irrespective of their faith or non-faith, but essentially one that does not come close enough to giving students religious instruction in any great depth.

That such a conceptualization of religious education is beginning to meet sturdy opposition, based on the assertion that a multi-faith educational system can easily end up respecting the faith of no one and diminishing the very concept of religion which it originally intended to foster, opens up a *post-secular* debate that is so multi-dimensional that should not, and could not, be exhausted inside a courtroom. It also suggests that any *speculation* about a transformed constitutional identity may indeed be invoked and upheld (or not) within a judicial setting perhaps of the highest rank, but most often, I assume, it will echo the general contours of the broader public *discourse* – that is, in Professor Robert Post's term, it will not be 'jurisgenerative.'[389] By that, I mean that a hypothetical judicial pronouncement of a norm based on what a constitution's identity is, or how it has transformed over time, will more probably have a *derivative* and acknowledging, rather than a generative, character.

Symvoulio Epikrateias has delivered its judgments on a policy field – education – that is not included in the list of powers delegated to the EU. Still, a firm position of this work is that most, if not all, subject-matters to be regulated tend to experience various conversions when transposed into different contexts, and also that insights derived from reserved policy areas in large degree color our judgments over policy-areas that have been perfectly well delegated. Accordingly, then, the tight embrace by the Greek constitutional identity of religion *writ large* may not be a direct source of insights for a policy field delegated exclusively to, or shared with, the EU but it can

[389] See *supra* Chapter 2.

certainly generate indirect conflicts in such fields. A policy area exposed to the silent operation of identity forces from within the EU Member States is occupied, I argue, by the CJEU's jurisprudence about EU nondiscrimination law – the very source, after all, that produced the preceding 'religion in the public square' controversy.

Does religious freedom include a right to leave of absence from work to enable participation in religious celebrations? Should an employer's refusal to grant such requests be treated as a violation of religious freedom by means of free-exercise? What impact does EU nondiscrimination law exert on these matters within a multi-religious workplace environment? The facts in the CJEU's *Cresco* judgment[390] offer valuable insights calling for reflection on how some reckless jurisprudential choices by a supreme court of the EU can easily fail to do justice to whatever constitutional identity concerns the Member States may have in particular with reference to their religious affairs.

In Austria, thirteen paid public holidays, including Christmas, Epiphany, Easter Monday, etc., are applicable to *all* employees, irrespective of their religion.[391] Good Friday has been, until recently, an additional paid holiday *only* for members of four Protestant denominations, the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the Evangelical Methodist Church.[392] If a member of one of these Protestant denominations was called to work on that day, he or she would be entitled to double pay.[393] Markus Achatzi was an employee of Cresco Investigation, a private detective agency, who was not a member of any one of these denominations, but did not disclose his religious convictions throughout the entire judicial process either.[394] Achatzi claimed that he suffered discrimination-against on religious grounds by being denied double pay for working on Good Friday of 2015, and filed a lawsuit against his employer to receive a compensation.[395] Austria's *Oberster Gerichtshof* (Supreme Court of Justice) stayed the proceedings and sent a preliminary reference request to the CJEU asking whether the Austrian legislation at issue was compatible with EU nondiscrimination law as included in both the CFREU and Directive 2000/78/EC.[396] In its judgment, the CJEU ruled that the applicable Austrian legislation amounted to direct discrimination on grounds of religion. In particular, it held that under the terms of EU nondiscrimination law, a national legislative measure which, first, establishes Good Friday as a public holiday for employees who are members of certain Christian denominations only and, second, rules that only those employees, if they are called upon to work on that day, are entitled to double pay, amounts to *direct* discrimination on grounds of religion.[397] The impugned legislation could not have possibly been valid either as being necessary for the protection of rights

[390] CJEU, Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* [2019] OJ C93/6.

[391] ibid, para 15.

[392] ibid, paras 9, 16.

[393] ibid.

[394] ibid, para 13; ibid, Opinion of AG Michal Bobek, para 48.

[395] ibid.

[396] ibid, para 28.

[397] ibid, paras 40, 51.

and freedoms of others or as specifically tailored to compensate for disadvantages related to religion.[398]

What is mostly important from the perspective of identity respect is the CJEU's predisposition in selecting what it distinguished as the most appropriate scheme of comparison. Three comparators had been proposed.[399] First, a 'narrow comparator' would have Achatzi compared to other employees 'for whom Good Friday is the most important religious festival of the year.'[400] Hence, one might find a direct discrimination if employees of different denominations who also celebrated Good Friday (perhaps some millions of Roman Catholics residing in Austria) were not legally entitled to a paid holiday or double pay if they had to work on that same day. Second, an 'intermediate comparator,' proposed by the European Commission, would have Achatzi compared to employees of different denominations and other religions that celebrated religious festivals that were equally important to Good Friday but were essentially excluded from a paid day-off on that day of religious importance or double pay. Achatzi's argument then would stand if he was able to prove that *as believer* he was not entitled to a paid day-off or double pay for working on a day of equal religious importance, but apart from declaring that he was *not* a member of the four Protestant denominations he did not disclose his religious beliefs if any in any stay of the proceedings. Last, under a 'broad comparator,' proposed by Advocate General Michał Bobek and eventually applied by the CJEU itself, an employee who was a member of the four Christian denominations had to be compared against *all* other employees who did actually work on that same Good Friday (instead, perhaps, of taking a day-off) but as a matter of fact did not receive any double pay.[401] In AG Bobek's words:

> As a result of the indemnity benefit, a select group of individuals working on Good Friday is paid double specifically because of their religion. Other people working on that day are paid the normal wage despite the fact that they may be doing exactly

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[398] The court also found that:

> art 21 of the Charter [of Fundamental Rights of the European Union] must be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day, and, consequently, to recognize that those employees are entitled to public holiday pay where the employer has refused to approve such a request

ibid, para 89.

[399] CJEU, Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* [2019] OJ C93/6, Opinion of AG Michał Bobek, para 56. On the specific issue of the most appropriate comparator, see Megan Pearson, 'Religious Holidays for the Non-religious? Cresco Investigations v Achatzi' (2019) 48(3) ILJ 468, esp 470-473. See generally Andrew Hambler, 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from Achbita and Bougnaoui' (2018) 47 ILJ 149; Erica Howard, 'Islamic Headscarves and the CJEU: Achbita and Bougnaoui' (2017) 24 Masst J Eur & Comp L 348; Lucy Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8 ELJ 232.

[400] ibid.

[401] ibid.

> the same job. There is no relevant distinguishing factor between those groups in the light of that benefit. Levels of remuneration and faith are, in principle, unconnected.
>
> That conclusion is in my view unaffected by the stated aim of the national legislation to protect freedom of religion and worship. I simply do not see how paying a specific, religiously defined group of employees double on a given day has anything to do with that aim. *Indeed, it might be argued – admittedly not without a pinch of cynicism – that the right to double pay for members of the four churches who work on Good Friday constitutes an economic incentive not to use that day for worship*.[402]

That double-pay may serve as a disincentive for the employers to easily command their Protestant employees to work on Good Friday or as a reimbursement to them for having worked on that day (of religious importance to them) has probably slipped Bobek's mind. The CJEU has aligned with AG's Bobek considerations and relied on an understanding that the law in question did not in any cognizable sense aim at safeguarding worship on Good Friday, since there was no formal requirement that the employee had *actually* fulfilled his or her religious duties on that day – put simply, go to church – or feel compelled to do so; rather, the law 'encouraged,' as both the court and the AG put it, the Protestant employees to work on Good Friday since then they would receive extra money. As the court stated:

> As is apparent from the documents before the court, the grant of public holiday pay to an employee who is a member of one of those churches and is required to work on Good Friday is dependent only on whether that employee is formally a member of one of those churches. Accordingly, that employee is entitled to such public holiday pay even if he worked on Good Friday *without feeling any obligation or need to celebrate that religious festival*. Therefore, his situation is no different from that of other employees who worked on Good Friday without receiving such a benefit.[403]

Confronted with the court's finding, the Austrian government came up with a proposal to introduce a personal holiday for all employees.[404] This meant that all employees could choose one day of the year as a holiday and use it for religious or any other purpose.[405] For employees who

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[402] ibid, paras 68-69 (emphasis added).

[403] *Cresco* (n 399), para 50 (emphasis added).

[404] *Bundesgesetz über die wöchentliche Ruhezeit und die Arbeitsruhe an Feiertagen* (Federal Act governing weekly rest periods and rest from work on public holiday), ch 2 'Weekend rest, weekly rest, substitute rest and rest on public holidays,' para 7a (providing for an *Einseitiger Urlaubsantritt ('persönlicher Feiertag')* (Unilateral Commencement of Holidays ('personal Holiday')) <https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1983_144/ERV_1983_144.html> accessed 10 January 2023.

[405] ibid.

were members of one of the four Protestant denominations, the newly enacted law meant that henceforth they would be deprived of their own additional day-off on Good Friday.[406]

In her shadow opinion on the most recent 'headscarf' cases of *WABE* and *MH Müller Handels GmbH*,[407] former Advocate General Eleanor Sharpston blacklisted the *Cresco* ruling as part of what she considers to be a defective process of 'secularization' of the CJEU's jurisprudence.[408] Indeed, the CJEU seems extremely self-confident to apply a 'broad comparator' based on the understanding that the Protestant employees of the designated denominations are legally permitted to attend Good Friday rituals but are not *compelled* to actually do so. Instead, as the court put it, under the legal conditions applicable they are free to stay home if they want to or receive double pay which is after all what makes them indistinguishable from all other employees.[409] Nevertheless, the court is missing that being a believer or a nonbeliever usually comes with no official certificate – indeed, it is a personal matter; church attendance cannot, and should not, be subject to certification by means of official documents and, last but not least, feelings and emotions calling for a religiously conceived duty or a religiously felt need to attend a service are issues that lie far beyond any legal sanction or judicial affirmation. An audience postured differently toward 'religion in the public square,' by means of their constitutional identities (shaped, for example, by Greek constitutional identity) would not have picked such an incomprehensible scheme of comparison so recklessly. Granting an extra day-off or double pay for working on a day of religious importance for a certain religious group may go *too far or not* in the proportionality scale in paying due respect to free-exercise, and may even constitute discrimination against believers of other

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[406] In the aftermath of the *Bundesgesetz über die wöchentliche Ruhezeit und die Arbeitsruhe an Feiertagen*, Protestants in Austria protested against an indirect identity theft they arguably suffered by declaring that:

> In view of the persecution, oppression and disadvantages [the four Protestant denominations] suffered up until the First Republic (from 1919), it is the most important public holiday for Protestants when it comes to defining their *identity*.

Resolution of the Synod of the Evangelical Church of the Augsburg Confession in Austria (*Evangelische Kirche in Österreich*, 13 March 2019) <https://evang.at/synode-verabschiedet-resolution-zum-karfreitag/> accessed 10 January 2023 (emphasis added).

[407] CJEU, Joined Cases C-804/18 & C-341/19 *IX v WABE eV & MH Müller Handels GmbH v M* [2021] OJ C349/2 (holding that a prohibition of wearing any visible sign of political, philosophical or religious beliefs as part of a private employer's policy of *neutrality* amounts to an indirect discrimination in the workplace that can be justified, first, if the policy of neutrality satisfies a genuine need on the part of the employer taking into consideration among others the customers' expectations and the adverse consequences that noncompliance with such a policy of neutrality may cause and, second, if that policy is pursued consistently; as well as that such a prohibition constitutes an indirect discrimination only insofar as it covers *all* visible forms of political, philosophical or religious belief; if by contrast such a prohibition covers only conspicuous, large-sized signs, then it amounts to a direct discrimination that fails to pass the justification test of the EU nondiscrimination law).

[408] Eleanor Sharpston, 'Shadow Opinion of former Advocate-General Sharpston: Headscarves at Work (Cases C-804/18 and C-341/19)' (*EU Law Analysis*, 23 March 2021) <http://eulawanalysis. blogspot.com/2021/03/shadow-opinion-of-former-advocate.html> accessed 10 January 2023, para 185. See also Erica Howard, 'Headscarves return to the CJEU: Unfinished business' (n 399) 10; Ronan McCrea, '"You're all individuals!" The CJEU rules on special status for minority religious groups' (*EU Law Analysis,* 26 January 2019) <http://eulawanalysis.blogspot.com/2019/01/youre-all-individuals-cjeu-rules-on.html> who points out that the ruling in *Cresco* is telling of the CJEU's preference for an *individualistic* view of religion and its antipathy of rules that provide people with benefits (or burdens) by way of religious criteria.

[409] *Cresco* (n 399), para 50.

religions if the latter are deprived of the same provisions. But that Christians working on Good Friday or Muslims on Eid or Sikhs on Diwali are all comparable to anyone else working on that same day is fundamentally flawed and bespeaks a radically different posture toward 'religion in the public square,' one misrepresentative of some EU Member States' – and probably Greece's – constitutional identities.

E. Toward a Post-secular Era

Throughout the world we are witnessing a reentering of 'religion into the public square' and into the arena of political contestation. Those leading this reappearance have a clear aspiration to make it deeply-felt, by way of participating in such struggles as to define boundaries between the private and the public, between the individual and its societal background, and to push toward whatever they preach is the ideal blend of legality and morality. Thus, whereas religion can be seen particularly in certain jurisprudential records as becoming ever more privatized, at the same time one can also discern the outlines of a broader canvass of what can be considered as a process of *deprivatization* of religion.

These circumstances, then, enable a(n EU Member) state like Greece, that has not followed the same path as other states, to participate in the ongoing discourse. Building on a distinctively *Greek* way of seeing things and coming to terms with the modern world, Greek public discourse is able to reflect on, and provide its unique answers to, such intriguing but thorny law-and-religion questions as the following that are already present in the rest of the West but have not yet arrived in Greece: Should a *crèche* be displayed in the Christmas season on public property?[410] Can a Muslim schoolteacher wear her *hijab* while working as a public school teacher?[411] Is a Christian salesman constitutionally compelled to provide his or her services to a same-sex couple?[412] Can a Sikh student wear the *kirpan*, the dagger all initiated Sikhs are required to carry, to school, or a Sikh worker wear a *turban* in manifest breach of safety regulations?[413] And so on.

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[410] For the 'nativity scene' controversy which has yet to arrive in Greece, see Deborah Thebault, 'Who Ever Said That the Nativity Scene Was Religious?, (2017) 6(2) O J L R 399.

[411] See 'Today's Challenges. Encounter in the Public Schools' (*The Pluralism Project*) <https://pluralism.org/encounter-in-the-public-schools> accessed 25 February 2023.

[412] U.S. Supreme Court, *Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Commission, et al.*, 584 U.S. _ (2018) (reversing a decision made by the Colorado Civil Rights Commission which the court found had violated religious neutrality by refusing to acknowledge a Colorado baker an opt-out from selling a wedding cake for a same-sex couple based on religious grounds, a First-Amendment right that the Commission presented in religious hostility overtones by equating it with a defense of slavery or the Holocaust).

[413] Canada's Supreme Court, *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 2006 SCC 6 (voiding an order of a Quebec school authority prohibiting a Sikh student from wearing a *kirpan* in school, as a violation of religious freedom under s 2(a) of the Canadian Charter of Rights and Freedoms).

Conclusion

In the aftermath of World War II, France, Germany and the Benelux countries established the European Coal and Steel Community. They did so in an effort to recuperate from the destruction they had suffered and resume their economic growth, but also, most importantly, to make war between them, in the exalted language of its founding father Jean Monnet, 'not merely unthinkable, but materially impossible.'[1] Driven by their achievements in the limited fields of coal and steel, these same countries decided to expand their cooperation by laying the foundations for a common market for goods, labor, services and capital, and a customs union across all Member States by means of a European Economic Community that was established by the 1957 Treaty of Rome.

Time has passed since then, but maintaining *peace* among the now twenty-seven Member States, through a cooperative relationship of primarily economic character, remains the central purpose of the European Union. The fact that Europeans often overlook the achievement of such a long-standing peace, or take it for granted, is telling of how successful the EU has been in fulfilling its purpose. Indeed, no two EU Member States have ever been engaged in armed conflict against each other. The EU has also been successful in making war '*materially* impossible' by fostering the world's largest economic integration. More than half a century after its establishment, the EU is exhibit A of a far-reaching integration of sovereign states, a reality that includes 450 million people living in twenty-seven countries. European integration has involved the establishment of supranational structures and harmonization across a wide spectrum of policy-making in fields previously exclusively controlled by the Member States: economics, agriculture, energy, money, foreign policy and defense, as well as science, technology and innovation. The vast majority of barriers to trade in goods, services, and capital between the Member States have been effectively removed, and the movement of people across the continent has been released from any notable constraint. This has stimulated economic competition and interdependence and fostered economic stability and growth. Despite its economic focus, European integration since the 1990s has also pursued a political partnership by 'laying the foundations of an ever-closer union among the peoples of Europe,' a statement of aim which is in fact present in all the EU Treaties since the 1957 Treaty of Rome,[2] but was taken to the next level through the provisions of the Treaty on European Union signed in Maastricht in 1992.[3] Today, all EU citizens are guaranteed directly by

[1] The Schuman Declaration in Paris, 9 May 1950 <https://european-union.europa.eu/principles-countries -history/history-eu/1945-59/schuman-declaration-may-1950_en> accessed 12 February 2023.

[2] Treaty establishing the European Economic Community (Treaty of Rome), preamble which read that: 'Determined to lay the foundations of an ever closer union among the peoples of Europe….'

[3] Treaty on European Union (Treaty of Maastricht) [1992] OJ C191/1, preamble which read that:

> RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.

EU law a set of human rights and freedoms independent of where they live or which Member State's nationality they have.

Yet hardly any achievement is entirely beyond critique. Arguably, the economic and monetary union is incomplete and unfair. The EU has exhibited an institutional inability to speak with one voice on hard political issues pertaining to foreign policy and defense. Its decision-making complexity puzzles Europeans and seems to perennially beg improvement. But most importantly the EU has also suffered a number of seismic events over the last couple of decades. The sovereign debt crisis in 2009 shook the very foundations of the EU and its administrative apparatus. The economic downturn that began in Greece soon spread to disturb Portugal, Ireland, Italy, and Spain, thereby challenging the existence of the single currency, if not the EU itself. As markets were reassured about the EU's readiness 'to do whatever it takes,'[4] and the imminent danger to the eurozone area began to fade away, the attention of EU leaders shifted to boosting their countries' economies and driving the eurozone area back to economic stability and growth.

In the midst of its economic upswing, the EU experienced an immigration crisis, during which more than one million refugees and immigrants, mostly from Syria and Afghanistan, entered its territory. Here, the Schengen passport-free provisions proved insufficient to tackle an imminent humanitarian upheaval. The unexpected, massive influx of people from culturally diverse areas pushed to the surface a number of underlying defects. The Member States' diverse histories and traditions fed deeply divergent attitudes toward immigration. The Northern European countries, for instance, with a long-standing experience of integrating large numbers of immigrants initially adopted a welcoming policy, whereas the Central European countries preferred that immigrants be prohibited from entering their territories. Equally serious were the tensions deriving from geography. The Southern European states, which were confronted with the largest numbers of refugees, complained about a lack of solidarity being shown by the Northern European states, while the latter, where most refugees ended up or certainly intended to do so, criticized their southern neighbors for not fulfilling their obligations to process the requests of asylum-seekers in their territories. Right-wing parties took advantage of the growing anti-immigration sentiments and gained considerable momentum in several of the Member States.

Political opposition to the EU has increased in recent years originating from such countries as France, Poland and Hungary. A diffuse Euroscepticism has appeared, in particular, as an umbrella term covering a wide array of more or less hostile attitudes towards the EU, ranging from opposing the EU institutions and policies and seeking policy reforms, to seeing the EU as unable to reform and opposing EU membership and European integration altogether. Euroscepticism in its harder version has also been a central reason for the United Kingdom's decision to leave the EU. These sentiments threaten the reliability and stability of the EU and, by failing to address them, the EU is getting weaker and weaker. The main targets of Euroscepticism have been the fact that European integration has weakened Member States' sovereignty and the nation-state, that the EU lacks democratic legitimacy and transparency, that it encourages the inflow of large numbers of immigrants,

[4] Mario Draghi, & Vítor Constâncio, President & Vice-President of the European Central Bank, Press Conference of 2 August 2012 <https://www.ecb.europa.eu/press/pressconf/2012/html/ is120802 .en.html#qa> accessed 25 November 2022; European Central Bank, 'Monetary policy decisions,' Press Release of 2 August 2012 <https://www.ecb.europa.eu/press/pr/date/ 2012/html/ pr120802.en.html> accessed 25 November 2022.

and that it is elitist and runs its policies more or less in disregard of the interests of workers. A pioneer in setting new visions for the European Union and the role of the EU Member States therein, French President Emmanuel Macron delivered, on 26 September 2017, a Sorbonne speech in which he called for 'refounding' a European Union that a number of destabilizing crises – financial, migration and Brexit – had severely weakened. He said that:

> I have come to talk to you about Europe…. Because this is where our battle lies, our history, our identity, our horizon, what protects us and gives us a future.… It was the lucidity of the founding fathers to transform this age-old fight for European hegemony into fraternal cooperation or peaceful rivalries. Behind the Coal and Steel Community, or the Common Market, the project forged a promise of peace, prosperity and freedom…. [B]ut the barriers behind which Europe could blossom have disappeared. So, today, it finds itself weaker, exposed to the squalls of today's globalization and, surely even worse, the ideas which offer themselves up as preferable solutions. These ideas have a name: nationalism, identitarianism, protectionism, isolationist sovereignism….[5]

What has been of key interest for my thesis is that Eurosceptics attack European integration for having diminished what they consider to be their nations' *identities*. To be sure, what they mean is that EU policy-making presents a serious risk to the ability of Member States to pursue a set of policies in line with their own people's collective identities as formed through long coexistence. But the controversy over the relationship between the EU and the Member States' identities has penetrated constitutional law, and that is precisely the starting point for my research. Much as Jean Monnet believed that 'Europe would be built through crises, and that it would be the sum of their solutions,'[6] I likewise suggest that it is equally the sum of its Member States' constitutional identities, and that building on a reasonable theory of respect to these identities is an essential means to overcome the crisis from the perspective of both the European Union and its Member States.

First, I have realized that the most pertinent contemporary approach to the treatment of (personal but mostly) collective identities is not only non-interference with, but also acknowledging, them. Doing so can be crucial to advancing common well-being and defending a set of collective identities that people see as either constitutive of, or constituted by, their own personal identities. On a larger scale, states are advised to accommodate and acknowledge group rights, so as to ensure that people have continued access to sources they crucially need to animate their personal and collective identities. Throughout the twentieth century, *national* identities – that is, the sort of collective identities *par excellence* – have received a bad name. Nonetheless, I argue, things do not have to be this way. National identities built around a set of liberal-democratic values are powerful enough to cut across any existing divisions and provide the necessary framework for socio-culturally diverse states to prosper. Carried over to the field of European integration,

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[5] Emmanuel Macron 'Initiative pour l'Europe,' Sorbonne 26 September 2017 <https://www.elysee.fr/ emmanuel-macron/2017/09/26/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique> accessed 12 February 2023.

[6] Jean Monnet, *Memoirs* (Richard Mayne tr; first published 1978, Third Millenium Publishing 2015) ch 16.

respecting Member States' constitutional identities can serve a number of valuable goals not only (as is apparent) for the Member States themselves but also for the EU (as is not so apparent).

Throughout Chapter 1, I have thoroughly investigated the values served by the duty of the EU to respect Member States' constitutional identities. For instance, it honors diversity by assisting pluralism; it provides the Member States with '*Voice*,' not vetoes, by encouraging participation against mere observation; it motivates an EU-wide marketplace of ideas and empowers accountability by enabling people to check their representatives at the level (EU or Member State) that is most responsive to them, depending on the circumstances. Here, however, I would like to highlight the fact that by identifying within its jurisdictional universe a number of normative *enclaves* of Member-State prerogative, the EU can rescue itself along with its much-acclaimed effectiveness against the risk of fragmentation. By that proposition, which in isolation may sound strange and far-fetched, I do not mean to imply that fears of weakened uniformity or effectiveness of EU law against *identity* appeals from the Member States are ungrounded. To the contrary, they are; but seeking uniformity and effectiveness through *assimilation* is not only parochial but mostly inadequate. Respecting the Member States' constitutional identities in accordance with the terms of a reasonable theoretical background is, I argue, powerful enough to break the stalemate.

In Chapters 2 and 3, I have respectively engaged with the 'identity' and the 'respect' parts – that is, the conditional and the consequential parts – of the Identity-Respect mechanism. A constitution's identity, as I have demonstrated, is located within the conceivable borders enclosed by the triad of its origins, concepts, and aspirations, all bound together through the terms of a narrative that lends it its inner unity. A constitution occupies perhaps the greatest part of a constitutional identity, but it is not coterminous with it. In addition, threats to constitutionalism are different from threats to a constitution's identity. A constitution is something that evolves through time and place to suit a people's changing circumstances, thus performing a function of responsiveness to native sources that is telling of its own identity. Constitution-makers may have integrated into their handiworks both 'inventions' and 'discoveries': A constitution's language may indeed indicate a commitment on the part of its authors to *invent* – to build from scratch – a political and constitutional identity, or to *discover* one that is already out there, but until it is confirmed that such inventions or discoveries are comprehended by, or resonate in, the collective mindset of the body politic, their enterprise will remain unfinished. Both sources of 'raw materials' for constructing one's own constitution highlight the fact that a constitutional charter cannot be viewed independently of the perspective of an 'unending dialectic of becoming and overcoming.'[7] A constitution's text usually fails, by design or not, to provide straight answers to hard constitutional questions. The joint efforts of constitutional authors to provide a coherent volume of constitutional provisions would then remain unfulfilled if exclusively confined to the exact words used. The only option therefore appears to be to read a constitution as including a message that springs from its overall structure, express or implied, or from outside its four corners, but implicit in the overall political establishment. After all, to constitute is to take disparate parts and mold them into a more or less *cohesive* whole. Such a reading helps us to get to the origins of the 'very essence' (Justice Benjamin N.

[7] Anne Norton, 'Transubstantiation: The Dialectic of Constitutional Authority' (1988) 55 U Chi L Rev 463.

Cardozo) or the 'totality of the constitutional scheme' (Justice William O. Douglas) where a constitution's *identity* lies.

Instead of insisting too much on a mere aggregation of vague clauses, lawyers should focus on the constitutional document in its entirety in the search for general interpretive patterns, if not a background political philosophy, that permeate the constitution. These patterns, then, and the document's identity they elucidate are the glue that holds a constitution's different parts tightly together. Lawyers should also look 'outward,' toward that rich socio-political background lying outside of the constitutional document but generating its overarching principles in the first place, or even abroad, seeking constitutional borrowing or just inspiration. Constitutional interpretation is not free from the onerous task of having to measure and balance a set of human rights and freedoms against each other. The outcome appears to be a ranking unspecified by, but implicit in, the text, allowing us to cautiously distinguish between what is 'timeless' and what is 'ephemeral' (or at least lower in the rank of 'timelessness') in the constitutional setup. Revisiting the debate over the possibility of unconstitutional constitutional amendment, from the early twentieth century American jurisprudence to interwar Germany's *Verfassungsidentität*, has exposed the richest source of insights for constitutional identities because, as Professor Gary J. Jacobsohn has best put it, 'proximity to the abyss [of constitutionally controversial amendments] has a way of concentrating the mind on the essentials of constitutionalism.'[8] That there are forces within a constitution that fall into 'hibernation' in times of constitutional maintenance but 'wake up' to face threatening challenges to their 'very essence' helps catch the idea of some implied limitations to constitutional transformation. That idea rests on a double assumption: First, that the power to amend (*pouvoir constitué*) derives from the power to make a constitution (*pouvoir constituant*), and constitutional amendments should accordingly not be permitted to produce constitution-making results. Second, that not all parts of a constitution are equally fundamental, and hence some additions or variations to a constitution may be found guilty of threatening those features that rank higher on the scale. As the eighteenth-century philosopher Edmund Burke best put it, 'No arguments of policy, reason of state, or preservation of the constitution, can be pleaded in favor of [a proposition that laws can derive their authority (*auctoritas*) merely from the fact of their institution independently of their substance (*veritas*).]'[9]

An outside observer might be under the impression that constitutional identity represents a hard limit to radical constitutional change, or that simply invoking it triggers a standard juridical investigation of proposed amendments that would ordinarily lead to their invalidation. In fact, what should be inferred from a theory of implied limits is that, with the self-evident exception of constitutional parts explicitly designated as beyond amendment, there are some things within a constitution that – although amendable by design – should be treated as 'harder-to-amend.' In Professor Jacobsohn's words, a condition of 'harder-to-amend' 'establishes… a strong presumption in favor of practices deeply engrained in constitutional experience that ought not to be overcome by

[8] Gary J. Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 59.

[9] Edmund Burke, 'Tracts Relating to Popery,' in Robert Brendan McDowell (ed), *The Writings and Speeches of Edmund Burke, Vol. IX, I: The Revolutionary War, II: Ireland* (Oxford University Press 1991) 352.

a simple showing of present popular inclination.'[10] This is so because, as Professor Michael J. Perry has best encapsulated it, they:

> … have become such fixed and widely affirmed and relied upon (by us the people of the United States now living) features of the life of our political community that they are, for us, constitutional bedrock – premises that have, in that sense, achieved a virtual constitutional status, that have become a part of our fundamental law, the law constitutive of ourselves as a political community of a certain sort.[11]

Understanding that some constitutional parts are 'harder-to-amend' – with 'harder' meaning that interference by way of addition or variation rests on more formidable requirements than a mere demonstration that they are not expressly designated as unamendable – does not prescribe a particular remedy. Perhaps, the immediate reaction, at least one deeply influenced by the teachings of continental European law, might to be to entrust courts with the responsibility of 'saving' us. That solution depends on a number of parameters, not least important of which is the relative ease or difficulty of amending a constitution in the first place. Anyway, it is wiser, and certainly more convenient, to keep all options open, including one involving judicial invalidation.

Keeping all options open is a matter of expediency if the whole issue is seen through a non-transnational prism; by contrast, that route is one-way as far as European integration is concerned. Indeed, appeals to Member States' constitutional identities cannot but be uttered by those States' (supreme) courts. A judicial apparatus for Member States to press their claims to constitutional identity against the Court of Justice of the EU has been thoroughly investigated in Chapter 3. After revisiting the poor jurisprudential record of the CJEU, I have traced the origins of art 4(2) TEU integrating the Identity Clause. Drawing on Professor J. H. H. Weiler's analysis, I contend that throughout the decades of European integration, EU law has been constitutionalized by issuing against the Member States a set of perfectly binding norms both on and within their jurisdictions; the Member States, for their part, have experienced a serious deterioration in their institutional ability to speak their own *Voice* in EU decision-making by way of designating certain areas of policy-making as particularly sensitive and, to at least a degree, immune from EU law. Hence, the Identity Clause has emerged as an avenue for dissenter Member States to channel their dissent when confronted with EU policies that threaten their constitutional identities.

In Chapter 3, I have suggested a number of guidelines that would enable the operation of identity respect within EU law. The Identity Clause is EU law and thus it is applicable in policy fields legitimately exercised by the EU. The CJEU, then, should be held responsible for at least setting the general parameters of identity review. A finding that some piece of constitutional law is part of its overall identity presupposes settling on a mechanism that enables one to uncover the presence of a constitutional identity. The CJEU is certainly responsible for this part of the process, as well as for designing a balancing test of the competing values. The political process, either at the EU or the Member State level, may happen to come across a piece of constitutional identity, but the

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[10] Gary J. Jacobsohn, *Constitutional Identity* (n 8) 266.

[11] Michael Perry, 'What is 'The Constitution'?' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 2001) 107.

sort of reflection and elaboration needed can mostly be performed by the courts. From there, Member States' courts should take over and find compelling evidence for their constitutional identities as grounds for non-compliance.

In holding both the EU and the Member States' courts as sharing the responsibility for conducting identity review, I opt, first, for inter-departmentalism – that is, for an attitude that favors dividing interpretive power among more than one institution when matters of greater import are at stake; and, second, for interpretive pluralism which teaches subordination, on the one hand, to a commonly authoritative text (herein, art 4(2) TEU) and, on the other, to potentially diverse law interpretations derived by multiple institutions (the CJEU; Member States' courts) none of which could effectively claim their unqualified supremacy over the others. The kind of loyal opposition that interpretive pluralism fosters allows both EU law to integrate more smoothly the parameters of identity respect, and the Member States to effectively pursue their identity claims against the EU, without any of the contrasting values being unduly compromised.

Contemporary constitutional thought has turned against 'invalidation norms' that insist on drawing lines that the federal (read: the EU) or the (Member) state governments are unable to cross. Rather, it focuses on 'resistance norms' which, free from outdated 'binary' models, draw on a set of techniques for resolving inter-jurisdictional conflicts. These techniques include, first, a strategy of 'constitutional avoidance' which suggests that federal courts should refuse to rule on a constitutional issue if the case can be perfectly resolved without involving constitutional interpretation; and, second, the enforcement of 'clear statement rules,' which means that courts will not interpret a law as bringing about a result that its authors did not *expressly* and *unequivocally* intend. Adversely, clear statement rules allow federal law-makers to bring about a compromising outcome against state law, but compel them to do so *explicitly*. Transposed into the EU context, an effective judicial strategy of identity respect involving an avoidance canon and clear statement rules appears as follows: A Member State (supreme or constitutional) court refers a preliminary question to the CJEU over an imminent clash between EU law and national law pertaining to its constitutional identity. The CJEU should, in all cases, ensure respect for the bedrock principles of EU law such as its uniformity and effectiveness, but, depending on the circumstances, it can follow either of two courses of action. First, it might pursue an avoidance canon – that is, *avoid* ruling on the most 'superfluous' level of EU law and resolve the case on sub-constitutional grounds. Second, if statutory construction of secondary EU law is unable to settle the clash, then EU courts should apply a clear statement rule under which an express and unequivocal statement of intention on the part of its European authors is needed to resist the identity appeals against EU (secondary) law. Absent such statement, the EU act should be invalidated, leaving intact (but politically hazardous) the ability of EU policy-makers to repeat the act – but this time making clear their intention to act in disregard of the Member States' constitutional identities.

Is there any policy field where a clash has actually occurred or could potentially occur between EU law and Greece's constitutional identity? I have identified in Chapter 4 the field of law and religion as a potential battleground between EU law and Greece's constitutional law. In a recent line of jurisprudence, the CJEU has ruled in favor of occupational policies of neutrality prohibiting employees from wearing any visible signs of political, philosophical or religious affiliation. That case-law is flawed from some perspectives, not least because it rests on a miscalculation of the depth of meaning of the term 'neutrality.' By wearing a sign of their religious beliefs, are employees manifesting or merely *observing* their religion? Is it an accurate application of a policy of

neutrality to request employees not to wear any sign of their religious beliefs? Or instead, would it be an accurate application of neutrality to permit all employees *irrespective of their religious beliefs* (or non-belief) to observe their religious duties however these beliefs command them to do so?

These and similar issues were not elaborated upon by the CJEU with the requisite degree of latitude in order to observe its duty of respect for the diverse constitutional traditions (and *identities*) of the Member States. It is true that, by implicitly understanding that the right place for religion is the home and the church, not the public space which must remain 'neutral' (meaning *void* of any religious sign), the court appears to have submitted to a *laïque* vision of law and religion and a militant approach to the theme of 'religion in the public square.' The CJEU's near-hostility toward religion in the public square is mostly evident in its nondiscrimination jurisprudence. For instance, in its judgment in *Achatzi* it demonstrated a narrow-minded attitude in selecting the most appropriate scheme of comparison for finding or not a discrimination-against on religious grounds. The CJEU was drawn in this direction by the Advocate-General's needlessly aggressive and anyway reckless opinion that:

> … a select group of individuals working on Good Friday is paid double specifically because of their religion. Other people working on that day are paid the normal wage despite the fact that they may be doing exactly the same job. *There is no relevant distinguishing factor between those groups in the light of that benefit.* Levels of remuneration and faith are, in principle, unconnected.[12]

> That conclusion is in my view unaffected by the stated aim of the national legislation to protect freedom of religion and worship. *I simply do not see how paying a specific, religiously defined group of employees double on a given day has anything to do with that aim.* Indeed, it might be argued – admittedly not without a pinch of cynicism – that the right to double pay for members of the four churches who work on Good Friday constitutes an economic incentive not to use that day for worship.[13]

From the overall analysis of the subject-matter, two visions of constitutional identities stand out: First, they are defensive; they resist change. For instance, it is clearly the case that Greece's (and other Member States') constitutional history includes nothing even close to the polemic against religion that has left its unique mark on France's modern history, in which, over the course of at least two centuries, the shape of a *laïque* way of considering and treating religious issues has been developed. In contrast, the Judeo-Christian tradition includes nothing forcing people so relentlessly to choose anyway between their duties to religion and the state, nor does it sponsor a religion-free public square that has experienced a process of far-reaching *assimilation*, such as the French have sought consistently since at least the nineteenth century through their public institutions and particularly education. Even so, this vision is also double-faced: Constitutional identities

[12] CJEU, Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* [2019] OJ C93/6, Opinion of AG Michał Bobek, para 68 (emphasis added).

[13] ibid, para 69.

do resist change, but they are not themselves immune to change. Greece's constitutional identity might be in the course of change as far as religious education is concerned by stressing a need to teach more *about* religion and less *of* religion; that is, by substituting some form of religious instruction for religious indoctrination that is currently the standard from of religious education. Change, then, will most often than not appear quietly as the collective identities of the people that frame a polity's general socio-political background experience a transformation. The idea is as old as Aristotle, who said that:

> The sameness of the state consists chiefly in the sameness of the constitution, and may be called or not called by the same name, whether the inhabitants are the same or entirely different.[14]

Second, the term 'identity' or 'constitutional identity' might never appear throughout the entire process without in any way diminishing the identitarian forces, pushing toward change or not depending on the circumstances. Their value is primarily of an *analytical* nature. The idea of constitutional identity as a barrier to, or an engine of, constitutional change serves mostly as a conceptual framework that is necessary to uncover the most hidden aspects of constitutional evolution and make constitutional outcomes that differentiate themselves between jurisdictions sound comprehensible enough to their audience. Applying my suggestions on the circumstances of *Achatzi*, I assume that the CJEU's Advocate General 'simply [does] not see how paying… [a group of] employees double on [Good Friday] has anything to do with [the] aim [of protecting freedom of religion and worship],' because he is firmly attached in, and draws his inspiration from, a particularly *laïque* vision of approaching conflicts between law and religion, one that sees religion as a private matter rather than, more accurately, as a personal matter. The CJEU, then, should have been more cognizant of the pluralism and diversity of constitutional traditions across the European continent, and should have accordingly adapted its jurisprudential assumptions such as to respect the Member States' constitutional identities

[14] Politics of Aristotle, bk III, pt III (Benjamin Jowett tr) <http://classics.mit.edu/Aristotle/politics.3. three.html> accessed 12 February 2023.

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