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Luca Siliquini-Cinelli

Beatrice Schutte

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Article

**Conceptualizing The Schmittian ‘Exception’
In The European Union:
From the ‘Opt-Out’ Procedure(S)
To Indirect Forms Of Secessionism**

Dr Luca Siliquini-Cinelli

Dr Béatrice Schütte

Abstract

Too often, legal and sociopolitical scholars concerned with European policies and decision-making procedures focus their efforts only on the official essence of conventional opt-out forms of nonparticipation in the European integration process, such as those established in the Treaty of Lisbon. Yet, far from being just an internal matter, the independentist instances which informed the Scottish referendum had a significant impact on delicate issues of EU law, biopolitics, political anthropology, political theology, and foreign policy which deserve to be properly addressed. The necessity of conducting such an analysis is self-evident, and mainly related to the possibility that the Scottish experience may be soon replicated, with different results, in the Italian regions of Venetia, Sardinia, and Lombardy, and in the Spanish community of Catalonia. Delving into this dimension through Schmitt’s political decisionism and adopting a comparative and interdisciplinary approach that transcends the limits of pure positivistic and analytical lines of inquiry, this paper presents a country’s choice to leave the EU or stop cooperating with it through the direct opt-out mechanisms officially regulated in its Treaties, or through indirect forms of secessionism, in terms of an ‘exceptional’ act of sovereign will.

Keywords EU law, opt-out procedures, Carl Schmitt

Lecturer and Contract Law Unit Chair, School of Law, Faculty of Business & Law, Deakin University. School of Business and Social Sciences, Department of Law, Aarhus University. All rights reserved. No part of this contribution may be used, reproduced, stored in a retrieval system, or transmitted in any form or by any means without prior explicit permission in writing from the authors. Enquiries concerning any use, reproduction, and storage should be sent to l.siliquinicinelli@deakin.edu.au and beatriz_schuette@hotmail.com.

I. INTRODUCTION

This paper deals with direct and indirect, full and partial forms of nonparticipation in the European integration process for those countries that are already part of the European Union (EU) or have withdrawn from previous international agreements and decided no longer to cooperate with it, such as Switzerland. Contrary to popular thought, EU law provides Member States with several ways in which to choose whether or not to participate in the harmonization effort. In particular, occasionally Member States may negotiate exclusion from certain supranational activities or policies, or particular areas of intervention, in order to preserve strategic pieces of sovereignty over issues of national interest. As will be discussed, Denmark, Poland, Sweden, Ireland, and the United Kingdom (UK) have all opted, in different contexts and using different methodological approaches, for conventional forms of opt-out.

Delving into this dimension, and bearing in mind not only the results of the recent Swiss and Scottish referendums, but also the secessionist instances expressed by the Italian regions of Venetia, Sardinia, and Lombardy, and by the Spanish community of Catalonia, the present contribution investigates the possible consequence for a country of leaving the EU or ceasing to cooperate with it through direct and indirect, and thus “official” and “unofficial,” forms of opt-out. Our aim is to discuss these procedures unconventionally through the adoption of an approach that will transcend the limits of recursive lines of positivistic inquiry and reach the boundaries of political theology, biopolitics, and political anthropology. Attention will therefore be paid to the role of the Schmittian concepts of the “political” and “state of exception” as the key elements through which, we believe, it will be possible to uncover the socio-, bio- and geopolitical essence of the instances which characterize the opt-out phenomenon in its various presentifications.

Our suggestion that both direct and indirect opt-out procedures cannot be understood fully without the analysis of Schmitt’s thought warrants a preliminary clarification. As Jennifer R. Rust and Julia Reinhard Lupton pointed out, the fact that Schmitt’s writings “have undergone a ‘renaissance’ in the English-speaking world”¹ is anything but a coincidence and should be considered as the starting point of our inquiry. Schmitt was a – if not *the* – leading jurist and political theorist in Germany during the period after World War I. Yet he will always be remembered for his associations with the National Socialists (he joined the party in 1933 and then left it in 1936), the prelude to which was the publication, in 1921, of *Die Diktatur*, in which he argued in favour of commissarial forms of dictatorship to deal with

¹ See their *Introduction* to CARL SCHMITT, *HAMLET OR HECUBA* xv (David Pan & Jennifer R Rust trans., Telos Press 2009).

extraordinary circumstances. Aside from his controversial attitude towards the Nazi Party,² and the incessant attacks from both the academic and press worlds since 1934, there are two reasons for the current growing interest in reading Schmitt's work: (1) the recent translation into English of his major works, which must be analyzed in conjunction with the translations of Giorgio Agamben's works, whose theories owe their provenance to Schmitt; and (2) the features of the project aimed at creating an "aspatial," unlimited, and unbounded global order on which the World Trade Organization, together with the International Monetary Fund and the World Bank, have been actively working since the late 1990s and which is based on a scheme of intelligibility that transcends the legal, socio and geopolitical, and ontological presentifications of the modern nation-state. What will be expounded in the following pages takes the current interest in Schmitt's thought into pivotal account.

This paper is structured as follows: Section II sets the official and conventional perimeter of our inquiry and deals with ordinary opt-out procedures with the aim to provide the reader with a mere positivistic and notionistic overview of the relevant legislation and practical cases experienced thus far; building on the Scottish experience, Section III explores, through the same approach adopted in Section II, the essence, features, aims, and challenges related to any possible secessionist event through an independence referendum in order to verify whether, for example, it is possible for a new independent country to secure an agreement to join the EU; adopting a diametrically opposed *modus investigandi*, Section IV will provide the reader with an unconventional understanding of direct and indirect mechanisms of opt-out through, on the one hand, the lens of Schmitt's spatial thinking and his concepts of the "political" and of a "state of exception," and, on the other hand, the insight provided by biopolitics and political anthropology; finally, Section V will present some concluding remarks with the intent to combine the positivistic roadmap pursued in the early Sections with the unconventional method used in Section IV.

II. TRADITIONAL OPT-OUTS FROM EU INTEGRATION

In light of what will be argued in Section IV, it should be clarified from the very beginning that EU law contains a number of options by which

² For a compelling inquiry into the relationship that Schmitt had with the Nazi Party, see Guy Oakes's *Introduction* to CARL SCHMITT, *POLITICAL ROMANTICISM* ix (MIT Press 1986); see also Joseph W. Bendersky's *Introduction* to CARL SCHMITT, *ON THE THREE TYPES OF JURIST THOUGHT 1* (Joseph W. Bendersky trans., Praeger 2004); Tracy B. Strong's *Foreword* to CARL SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL* vii (George Schwab & Erna Hilfstein trans., Univ. of Chicago Press 2008).

Member States may opt out of the integration process; whether they leave the Union entirely or establish certain *reservations*. What will be expounded in the following pages is aimed at contextualizing the decisions that the Member States have made in this regard since the establishment, in 1948, of the Organization for European Economic Co-operation (OEEC). Our argument is that because the EU is a “top-down” legitimizing political process rather than a “bottom-up” one,³ both direct and indirect opt-out procedures are nothing other than the *exceptional* scheme through which it is possible to change the supranational “social contract” that Member States have continued to sign since 1948. This, we believe, is further demonstrated by the failure of the constitutional project due to the French and Dutch referendums in 2005 and the subsequent decisions made in Lisbon. In particular, we argue that the instances which lay behind both referendums and all direct and indirect opt-out measures have a common core which cannot be understood without addressing why – although the Charter of Fundamental Rights of the European Union,⁴ which today has the same legal effect as the EU’s Treaties, has conferred the additional ordoliberal⁵ model of ‘European citizenship’⁶ on Member States citizens – the so-called “Europe of citizens”⁷ is far from being achieved.

³ See JULIE DICKSON & PAVLOS ELEFThERiADiS, *PHiLOSOPHiCAL FOUNDATIONS OF EUROPEAN UNION LAW* (Oxford Univ. Press 2012); George Pagoulatos & Loukas Tsoukalis, *Multilevel Governance*, in ERIK JONES, ANAND MENON & STEPHEN WEATHERILL, *THE OXFORD HANDBOOK OF THE EUROPEAN UNION* 62-75 (Oxford Univ. Press 2012); Vivien A Schmidt, *Democracy and Legitimacy in the European Union*, in JONES, MENON & WEATHERILL, *supra*, at 661–75; Adrienne Héritier, *Policy Effectiveness and Transparency in European Policy Making*, in JONES, MENON & WEATHERILL, *supra*, at 676–689; POLICY-MAKING AND DIVERSITY IN EUROPE (Cambridge Univ. Press UP 1999); *New Modes of Governance in Europe: Increasing Political Capacity and Policy Effectiveness?* in *THE STATE OF THE EUROPEAN UNION* 105–26 (Tanja A. Börzel, Rachel A. Cichowski eds., Oxford Univ. Press 2003); *New Modes of Governance in Europe: Policy-Making Without Legislating?* in *COMMON GOODS: REINVENTING EUROPEAN INTEGRATION GOVERNANCE* 185–207 (Adrienne Héritier ed., Rowman & Littlefield Publishers 2002); Adrienne Héritier, Dirk Lehmkuhl, *The Shadow of Hierarchy and New Modes of Governance* 28 J. PUB. POL’Y 1 (2008); Roger J. Goebel, *Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon*, 20 COLUMBIA J. EUR. UNION L. 77 (2013); Mathias Reinmann & Daniel Halberstam, *Top-Down or Bottom-Up? A Look at the Unification of Private Law in Federal Systems*, in *THE FOUNDATIONS OF EUROPEAN PRIVATE LAW* 363–77 (Roger Brownsword, Hans-W. Micklitz, Leone Niglia, & Stephen Weatherill eds., 2011); CHARLES F. SABEL & JONATHAN ZEITLIN (eds.), *EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION* (Oxford Univ. Press 2010).

⁴ 2000/C 364/01.

⁵ The ordoliberal project aims at creating an entrepreneurial society by spreading the competition everywhere. The hallmark of the so-called “*homo-oeconomicus*” is therefore no longer a person that only hopes to satisfy his needs, rather it is a person who welcomes the competition of interest as an entrepreneur.

⁶ See Articles 39, 41, 43 & 44, Treaty on the European Union (TUE).

⁷ For an introduction on this type of Europe, see generally LUUK VAN MIDDELAAR, *THE PASSAGE TO EUROPE: HOW A CONTINENT BECAME A UNION* (Liz Waters trans., Yale Univ. Press 2013).

A. Resigning From the European Union

According to Article 50 (1) of the TEU⁸ any Member State may, in accordance with the provisions of its constitution, decide to leave the EU. Earlier versions of the treaty do not contain a corresponding provision.⁹ The procedure is regulated in the following sections of Article 50. While the respective Member State has to announce its intention to the European Council, the norm provides that the EU and the Member State will jointly establish a treaty containing the details of the resignation from the EU. In light of its prerogatives and powers, the Council must then vote in favor of the resignation by a qualified majority after the Parliament has given its consent.

Basically, it is not compulsory to conclude the treaty mentioned in Article 50(2) of the TEU. The “exit strategy” depends entirely on the respective Member State’s exceptional decision. But one must take into account that such a decision would have manifold consequences. In particular, considering what will be argued in Section IV on Schmitt’s spatial ontology, it would now be prudent to clarify that not only does this decision affect the *territorial* applicability of the EU treaties and EU secondary law, but also the composition of EU institutions. Moreover, such a treaty would probably contain regulations on the future relationship between the EU and the ex-Member State.¹⁰ Consequently, if the state at some point wished to re-join the EU, it would have to go through the ordinary procedure to join as would any other candidate, according to Article 49 TEU.¹¹

This means that the applicant country must comply with what are usually known as the “Copenhagen Criteria” – a list of requirements established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.¹² In particular, these consist of both political and economic criteria as well as the acceptance of the Community *acquis*. There has to be stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. Importantly, the applicant country must also have a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union and ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.¹³

⁸ Unless further remarks are made, the version referred to is that of Lisbon.

⁹ EUROPÄISCHES UNIONSRECHT, at Article 50, marginal no. 1 (Christoph Vedder & Wolff Heintschel von Heinegg eds., Springer 2012).

¹⁰ *Id.* at Article 50, marginal no.6.

¹¹ *Id.* Article 50, marginal no. 10.

¹² *Id.* at Article 49, marginal no. 2.

¹³ *Id.* at Article 49, marginal nos. 4, 6.

Avowedly, resigning from the European Union is on the agenda on a regular basis in Britain. Provided that the conservative party wins the elections in 2015, a referendum on the country's EU membership might be held in 2017. Before putting the plan concerning a referendum into action, Prime Minister James Cameron aims at negotiating a better position for the UK within the EU. The designated president of the EU Commission, Jean-Claude Juncker, is basically open to negotiations, however "not at any price."¹⁴ A central issue for British eurosceptics is the free movement within the EU and their desire to limit migration from the EU to Britain. However, this position meets criticism, stating that trying to limit the free movement meant renegotiating one of the founding principles of the EU. The outgoing president of the EU Commission, José Manuel Barroso, says that the principle of free movement was not negotiable; particularly in light of the fact that 1.4 million British citizens lived in other Member States, it was only fair and just that other EU citizens had the same rights. Furthermore, Mr. Barroso states that an EU exit would remarkably weaken Britain's position in the world, going as far as saying that its "influence would be zero."¹⁵

B. Opting Out of Certain Measures

Member States may also opt out of implementing certain EU measures, particularly within legal cooperation. As a historical fact, the UK, Ireland and Denmark are the Member States with most opt-outs. As previously mentioned, these decisions usually take the form of a power of *reservation* on specific forms of sociopolitical, legal, and economic collaboration with the EU as a whole. By way of an example, the UK's and Ireland's reservations are made flexible through a so-called opt-in clause. That means that these two Member States can decide whether or not they want to implement a legal instrument on an act-by-act basis.

However, for present purposes, and particularly in light of what will be contended in Section IV on the exceptional intervention of the Schmittian sovereign, it is of pivotal interest that, for its part, Denmark has a general reservation on legal cooperation. Indeed, such a power of reservation is, we believe, one of the best examples within the EU of Schmitt's argument that the sovereign has the authority to decide on the exception by suspending the targeted legal norm. In particular, this is clearly demonstrated by the fact that some EU regulations contain a section stating that the term "Member States"

¹⁴ *Parliament elects 'politically ecumenical' Juncker as Commission President*, EURACTIV, <http://www.euractiv.com/sections/eu-elections-2014/parliament-elects-politically-ecumenical-juncker-commission-president> (July 15, 2014).

¹⁵ *EU exit would leave Britain with zero influence, says Barroso*, BBC (Oct. 19, 2014), <http://www.bbc.com/news/uk-politics-29680059> (last visited Oct. 26, 2014).

in that context refers to all EU Member States except Denmark.¹⁶ To fully understand the logic which lies behind this statement, we must bear in mind the following: Denmark did fully participate in civil law collaboration under the Rome Treaty. However, in the wake of Denmark's ratification of the Maastricht Treaty, the country ratified a separate agreement – the so-called Edinburgh Decision – in order to solve the problems related to the Maastricht Treaty that arose as a consequence of the 1992 referendum. Denmark then took four reservations concerning cooperation with the EU. Those refer to the defense policy, the Euro, Union citizenship and cooperation regarding law and police, the last also covering questions regarding foreigners.¹⁷ According to Article 7 of one of the protocols attached to the Maastricht Treaty, Denmark may declare that it no longer wishes to adhere to the reservations; however, this declaration must be a general one and cannot relate only to certain legal acts.

In this context, the solution adopted by Ireland and the UK is more practicable as they can decide for every act whether or not they want to implement it. If Denmark decides to adopt a certain act, there is a possibility of concluding a bilateral convention with the EU; however, Denmark is not generally entitled to such a treaty. It depends on whether the Commission wishes a separate solution for Denmark.¹⁸ The reason for Denmark's reservation is that they considered it unacceptable that the formalities of collaboration in civil law matters changed from being intergovernmental to supranational. The Danish reservation on cooperation in civil law matters refers to all acts established under the scope of Article 65 of the Nice Treaty; that is, it does not concern existing or forthcoming acts elaborated on an intergovernmental level.¹⁹ One might get the impression that Denmark completely opted out of the common immigration and asylum policy. But in fact, the country participated in a number of decisions that ultimately resulted in an obligation to implement some of the acts adopted under the scope of Part IV of the Maastricht Treaty, albeit in a different legal form than is the case in other Member States.²⁰

The switch from intergovernmental to supranational cooperation formalities not only affected collaboration on civil law matters, but also

¹⁶ BIRGITTE EGELUND OLSEN & KARSTEN ENGSIG SØRENSEN, *EUROPÆISERINGEN AF DANSK RET 72* (Djøf-forlag 2008).

¹⁷ *Id.* at 82; *EU – The Danish Deference Opt-Out*, FORSVARSMINISTERIET MINISTRY OF DEFENCE, <http://www.fmn.dk/eng/allabout/Pages/TheDanishDefenceOpt-Out.aspx> (last updated Mar. 20, 2015).

¹⁸ *Id.* at 84. OLSEN & SØRENSEN, *supra* note 16, at 72.

¹⁹ *Id.* at 83.

²⁰ *Id.* at 102.

matters related to criminal law and the mobility of persons. But just as was the case with civil law matters, Denmark is still involved in acts that are a result of intergovernmental cooperation.²¹ The possibility of opting-out was created in 1992 after a Danish referendum initially rejected the Treaty of Maastricht. In order to enable Denmark to ratify the Treaty, several exceptions were implemented into the protocols of Maastricht.²² The protocols start with an exception regarding the purchase of summer houses through foreigners in Denmark.²³ The country was allowed to maintain its existing legislation, which basically makes it impossible for foreigners without residence in Denmark to buy summer houses. People who do not reside and have not previously resided in Denmark may only acquire real estate in Denmark with the consent of the Minister of Justice. Exceptions can be made if the property is meant to serve as a full time home.²⁴ Basically, this law violates the prohibition of discrimination against other EU citizens outlined in Article 18 TFEU (ex-Article 12 TEC).²⁵

Denmark's tendency towards reservations concerning EU law revealed itself again in 2013 when the Danish Supreme Court had to deal with the question of whether the ratification of the Lisbon Treaty was in accordance with the Danish constitution. The court's decision has also been interpreted in a way that could see the Danish Supreme Court take a stricter approach to the *ultra vires* review of both EU legislation and judgments handed down by the ECJ. However, this should not automatically result in the court declaring those acts invalid in Denmark.²⁶ Furthermore, Denmark opted out of the third stage of the Economic and Monetary Union.²⁷ The third stage, beginning January 1, 1999, covered the transition from national currencies to the Euro.²⁸

²¹ *Id.* at 91.

²² <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1428937943045&uri=URISERV:l25061> (last visited Apr. 13, 2015)

²³ *The Maastricht Treaty*, EUROTREATIES.COM, at 2 (Feb. 7, 1992)

<http://www.eurotreaties.com/maastrichtprotocols.pdf> (last visited July 18, 2014).

²⁴ § 1 *Lov om erhvervelse af fast ejendom* [Danish Act on the Acquisition of Real Estate].

²⁵ Article 18 TFEU prohibits discrimination based on the citizenship. *Diskrimineringsverbod*, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/brussels/website/media/Lexikon/Pdf/Diskrimineringsverbod.pdf> (last visited June 30, 2014).

²⁶ Henrik Palmer Olsen, *The Danish Supreme Court's decision on the constitutionality of Denmark's ratification of the Lisbon Treaty*, 50 COMMON MKT. L. REV. 1489, 1503 (2013).

²⁷ Official Journal C 348, 31/12/1992, Denmark and the Treaty on the European Union.

²⁸ PAUL CRAIG & GRAINNE DE BURCA, *EU LAW 700* (Oxford Univ. Press 2011).

Furthermore, Poland and the UK have specific reservations regarding the Charter of Fundamental Rights.²⁹ The two countries requested Protocol 30, which will also be applicable to the Czech Republic.³⁰ For present purposes, there are two main relevant points in the protocol. According to Article 1(1) of the protocol, the Charter provides neither the ECJ nor the national courts of Poland or the UK with the extended competence to find national laws, regulations or administrative rules, practices, or actions contradictory to the fundamental rights, freedoms and principles reaffirmed in the charter. The Charter does not have the power to create justiciable rights that did not previously exist. Furthermore, according to Article 2 of the Charter, references made to national laws concern the laws of Poland and the UK only to the extent to which the respective rights and practices are recognized by Polish and UK law.³¹

Importantly, other opt-outs currently in force refer to the Schengen Agreement; EU citizenship; and the areas of freedom, security and justice.

III. UNCONVENTIONAL OPT-OUTS

In addition to the conventional opt-outs that are part of EU law, one can also find unconventional opt-outs regarding membership in the EU. Yet, despite the superficial characteristics which differentiate these unofficial schemes from their official counterparts, in Section IV we will argue that indirect forms of opt-out are informed by the exceptional attempt of the Schmittian sovereign to (try to) take back its legal, socio-, and geopolitical power over issues of public concern and/or strategic interest. The essence of this claim requires us to first describe and contextualize these alternative forms of non-cooperation.

Lately, separatist movements have blossomed in parts of several Member States. Current examples of this independentist wave are Scotland, Catalonia and Venetia. Both Scotland and Catalonia have for many years had autonomous status within the United Kingdom and Spain respectively.³² These tendencies may ultimately result in unconventional opt-outs, although

²⁹ The Charter is not a part of the EU treaties, however according to Article 6 TEU it has the same legal status as the treaties, *see* CRAIG & DE BURCA, *supra* note 28, at 394.

³⁰ Steve Peers, *The Opt-Out that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights*, 12 HUM. RTS. L. REV. 375 (2012).

³¹ *Id.* at 377.

³² SCOTT L. GREER, *THE POLITICS OF AUTONOMY IN SCOTLAND AND CATALONIA 2* (State Univ. of New York Press 2007). Greer calls those regions and other comparable ones such as Basque Country, Galicia and Corsica, stateless nations.

if the regions at some point become independent states, it does not mean that they will automatically become Member States.

What is of pivotal relevance for present purposes is that EU law does not contain any rules on how to handle a secessionist part of a Member State.³³ What is now labeled “the battle for independence” raises several important questions, ranging from the essence of the so-called “national identity” issue in the age of globalization and harmonization, to the impact of the independence of an ex-country-of-membership’s economy and thus the EU’s economy as a whole. More importantly, while commenting in Madrid in December 2013 on the Catalanian decision to fix a date for a secessionist referendum, the President of the European Council, Herman Van Rompuy, clarified that any secessionist region would be considered and treated as a “new independent state.”³⁴ This basically means that the “new sovereign” will have to submit an application to join the Union according to the aforementioned Article 49 TEU.

A. The Scottish Referendum

In October 2012, the governments of the UK and Scotland concluded an agreement, the so-called Edinburgh Agreement, concerning the Scottish independence referendum set to take place on September 18, 2014. Arguments in favor of Scotland’s independence spoke of greater democracy, increased prosperity and a more equitable society. Avowedly, the fifty-three percent of the voters decided that Scotland should not leave the UK. Yet this also meant that the forty-seven percent of the voters opted for the independentist solution. A result that expresses a massive socio-, bio- and geopolitical *force* that needs to be properly addressed.

Before the referendum took place, the Scottish government made it clear that if the results would be in favor of Scotland’s independence, it would do whatever it takes to discuss with the English government, the other Member States, and EU institutions, an appropriate procedure by which Scotland may transit to an independent EU membership.³⁵ This claim should be viewed in light of Scotland’s well-known desire to remain a member of the EU independently of internal political issues. Yet this situation has neither arisen before in the history of the EU, nor was it foreseen when the European

³³ Scottish Government, *Scotland’s Future, Your Guide to an Independent Scotland* 221 (Nov. 2013), <https://www.scotreferendum.com/reports/scotlands-future-your-guide-to-an-independent-scotland/> (last visited June 30, 2014).

³⁴ *Scottish independence: Scots EU independence plan ‘now untenable’*, BBC NEWS, <http://www.bbc.com/news/uk-scotland-scotland-politics-25366706> (Dec. 13, 2013).

³⁵ *Id.*

treaties were drafted. However, since the referendum resulted in favor of Scotland remaining part of the UK, these socio-political and legal sentiments have been displaced from view. Still, there are proposals for further devolution of powers to Scotland.³⁶ Needless to say, the realization of this subsidiary design will depend on the political roadmap that the new UK government, to be elected in May 2015, will put forward.³⁷

Over the last few months, several socio- and geopolitical, economic, and legal commentators have offered their personal – and sometimes opportunistic – opinions on the Scottish desire for independence by inquiring into both Scotland's future and that of the EU if the UK loses such an important partner. However, we argue that they all failed to understand the unofficial – and, thus, “occult” – force that lies behind the independentist instance as we describe in section IV. In this regard, it is worth mentioning that, given Van Rompuy's declaration, a great deal of EU scholarship has unsuccessfully tried to examine the “true” meaning of a well-known statement made by the former President of the European Commission, José Manuel Barroso, on a visit to London in mid-February 2014. Mr. Barroso surprised everyone by saying that it would be “extremely difficult, if not impossible,”³⁸ for Scotland to secure permission to join the EU as an independent, sovereign country. According to many, the fact that Mr. Barroso was right is clearly demonstrated by the circumstance that those EU Member States that still refuse to recognize the independence of Kosovo would clearly have no difficulty in not welcoming an independent Scotland into the EU.

The foregoing must also be viewed in light of the recent declarations made by UK Prime Minister David Cameron. The UK has long wanted the EU's bureaucratic voting system to switch from majority voting to unanimous decision-making. The UK's financial-services veto collided with France's refusal on this change. And it is precisely this refusal that led Cameron to assure Britons, in a speech that he gave in January 2013, that he would be negotiating a new settlement with the EU and that “. . . by 2017, the

³⁶ Secretary of State for Scotland, *The parties' published proposals on further devolution for Scotland*, HM GOVERNMENT (Oct. 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363236/Command_paper.pdf (last visited Jan. 30, 2015).

³⁷ Scotland's Referendum, *Isn't the Scottish Parliament going to get more powers anyway if Scotland votes No?*, SCOTTISH GOVERNMENT, <https://www.scotreferendum.com/questions/isnt-the-scottish-parliament-going-to-get-more-powers-anyway-if-scotland-votes-no/> (last visited Jan. 30, 2015) (website archived Oct. 20, 2014).

³⁸ Rajeev Syal, *Independent Scotland 'would find it extremely difficult to join EU.'* THE GUARDIAN (Feb. 16, 2014), <http://www.theguardian.com/politics/2014/feb/16/independent-scotland-extremely-difficult-join-eu> (last visited Oct. 5, 2014).

British people would be given a choice in a referendum to stay in the Europe Union or to leave” should he win the elections in 2015.³⁹

Although Germany’s finance minister, Wolfgang Schäuble, has recently supported this call for change, it has once again encountered the veto of France’s President, François Hollande. At the press conference at the end of the bilateral meeting held in January 2014, Hollande said that the UK’s demands for EU treaty changes by 2017 – a prelude to the aforementioned in-out referendum over EU membership – were “not a priority for the time being.” In fact, although France is no longer as influential as it was a couple of years ago and Germany – as Angela Merkel confirmed during her recent visit to London – wants treaty change as much as the UK, any architectural revision is becoming less likely for several reasons, one of which is rising Euroscepticism.

That said, it was evident from the very beginning that the relevance of the socio-, bio- and geopolitical force that pushed for the Scottish referendum ought not be taken for granted. In particular, Mr. Barroso’s statement revealed the fear that if Scotland would have voted itself out of the UK, British Eurosceptics would have been more likely to do the same vis-à-vis the EU in 2017 should Mr. Cameron win the national elections in 2015. The recent declarations made by Mr. Cameron on why the new EC President, Jean-Claude Juncker, is the wrong person to lead the EU, have to be analyzed within this perspective. This is also the reason why the German Chancellor, Angela Merkel, who has been vehemently calling for structural treaty changes, has welcomed the news that Scotland would remain in the UK, and thus the EU.

B. Catalonia

In Catalonia, the situation regarding the independentist referendum is much more complicated. On September 19, 2014, the parliament of the autonomous community of Catalonia voted by a margin of 106 to 28 in favor of authorizing the referendum over the independence from Spain. Right after the vote, the President of Catalonia, Artur Mas, signed the decree allowing the local consultation on November 9, 2014. Not surprisingly, several socio-political scholars and commentators doubted the legitimacy of both the parliament’s approval and presidential decree. More importantly, on

³⁹ The UK’s Labour Party leader, Ed Miliband, is of a different opinion. See THE ECONOMIST’s editorial *Labour and Europe: Europhile and proud* (Mar. 15, 2014). For a summary of all declarations on the Scottish referendum quoted in this section see the special analyses in TIME, Sept. 8, 2014, and THE ECONOMIST, July 12, 2014 and Sept. 13, 2014. For an overview on how the nationalist sentiment has arisen after the referendum, see THE ECONOMIST, Dec. 13 2014.

September 29, 2014, Spain's Constitutional Court deemed the referendum unconstitutional. Mr. Mas has nevertheless declared that the vote would take place as an act of sovereign freedom. He then set up a committee of seven political scientists and lawyers elected by the local parliament to administer the independence referendum. More than eight hundred mayors, representing ninety-six percent of Catalonia's municipalities, who have publicly asked for the taking place of the secessionist initiative, supported the decision. According to the most recent and accurate poll as described by the sources mentioned above, fifty-percent of the eighty-percent of Catalans who want the referendum would vote yes. However, what matters here is that as a consequence of the Constitutional Court's decision, the November 9th vote was a non-binding consultation conducted by volunteers and held only in Catalanian regional government buildings.⁴⁰ The Spanish government announced that it is also considering legal action against the alternative consultation to be undertaken in Catalonia if its government violates the national law again. It is usually maintained that the government ensured compliance with the law and guaranteed the citizens' rights.⁴¹

That said, it is worth mentioning that, in pure economic terms, Catalonia represents one-fifth of Spain's economy.⁴² Being one of the more prosperous regions of Spain, its secession would certainly be detrimental to the rest of the country. Yet there are also skeptical voices saying that Catalonia would suffer economically after secession. According to a study released by the anti-sovereign movement, Societat Civil Catalana, Catalanian independence might result in an unemployment quota as high as thirty-four percent and the loss of roughly 447,000 workplaces.⁴³ Economists argue that an independent Catalonia not being a member of the EU is economically not manageable.⁴⁴ In the broader context, it is worth mentioning that the rejection of the independentist wave is influenced by the sentiment against the so-called Franco era. Indeed, current separatist tendencies in Catalonia and other Autonomous Communities in Spain have their roots in the post-war pre-

⁴⁰ Al Goodman, *No Catalonia independence referendum for now, president says*, CNN (Oct. 14, 2014), <http://edition.cnn.com/2014/10/14/world/europe/spain-catalonia-referendum/> (last visited Oct. 27, 2014).

⁴¹ Francesco Manetto, *El Gobierno encarga informes para ver si recurrid al Constitucional el 9-N*, EL PAÍS (Oct. 24, 2014), http://politica.elpais.com/politica/2014/10/24/actualidad/1414156796_655037.html (last visited Oct. 27, 2014).

⁴² Goodman, *supra* note 40.

⁴³ EL PERIÓDICO POLITICA, *Societat Civil pronostica el "colapso" de una Catalunya independiente* (Oct. 24, 2014), <http://www.elperiodico.com/es/noticias/politica/societat-civil-pronostica-colapso-una-catalunya-independiente-3628941> (last visited Oct. 27, 2014).

⁴⁴ Sergio Fidalgo, *"Una Cataluña independiente no es económicamente viable,"* CRONICA GLOBAL (Mar. 21, 2014), <http://www.cronicaglobal.com/es/notices/2014/10/gay-de-liebana-una-cataluna-independiente-no-es-economicamente-viable-12293.php> (last visited Oct. 27, 2014).

monarchic historical period, during which much of the cultural and linguistic diversity that is typical of Spain was suppressed. Regional languages such as Catalán, Basque or Galician were prohibited, and the symbolic elements of the regions, such as flags and nationalist anthems, were banned.⁴⁵ After Franco's death, a new Statute of Autonomy for Catalonia came into force in 1979. Yet *Artículo 2* of the Spanish Constitution⁴⁶ states "the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards."⁴⁷ Through the adoption of the "united in our differences" strategy, Section 2 further maintains that this unity is achieved by recognizing and guaranteeing "the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all."⁴⁸ The fact that the Constitution itself was enacted after a legitimizing national referendum weakens all secessionist instances. However, the ongoing tension between these two principles has hampered full recognition of Spain as a pluri-national democracy, or a nation without a state, like Scotland, rather than a "multi-national" state. In light of what will be argued in Section IV, it would now be prudent to specify that Montserrat Guibernau defines nations without states as entities that do not identify with them, despite having their territories within the boundaries of one or more states.⁴⁹ Even the new King Felipe VI sees the danger here; upon his ascension to the throne, he pointed out in a speech that diversity in language and culture is an important part of Spain as a whole.⁵⁰

Considering all relevant news, and in particular that those in favor of Catalonia's independence argue that the public consultation process is necessary to reset the sovereign relationship between Catalonia and Spain,⁵¹ it is not surprising that Catalonians were able to vote and express their opinion on November 9, 2014; yet this was merely a public consultation with a considerable socio-political impact over issues of national and EU law. This is why the forthcoming regional and national elections will reveal more about the extent and impact of the secessionist sentiment. Their outcome will have to be evaluated while bearing in mind that the Spanish Parliament rejected a petition on the transfer of power to hold a referendum as outlined in *Artículo 150(2)* of the Spanish Constitution, according to which the state basically can

⁴⁵ Montserrat Guibernau, *Prospects for an independent Catalonia*, 27 INT'L J. POL. 1, 10 (2014).

⁴⁶ BOE No 311, Dec. 29, 1978.

⁴⁷ *Id.* at Article II.

⁴⁸ *Id.*

⁴⁹ Guibernau, *supra* note 45, at 5.

⁵⁰ LA VANGUARDIA, *Felipe VI: "En España, unida y diversa, cabemos todos"* (June 19, 2014),

<http://www.lavanguardia.com/politica/felipe-vi/20140619/54410102982/felipe-vi-en-espana-unida-diversa-cabemos-todos.html> (last visited June 30, 2014).

⁵¹ CATALONIA VOTES, *Why a vote?*,

<http://www.cataloniavotes.eu/why-a-referendum/> (last visited June 26, 2014).

transfer or delegate certain powers to the Autonomous Regions. Should an official referendum take place, according to what was publicly stated by the referendum promoters, the consultation as such would consist of two questions. First, “Do you want Catalonia to be a state?” Second, “If so, do you want Catalonia to be an independent state?” If the majority of voters answer both questions negatively, there will be no change to Catalonia’s political and legal status. If the majority answers both questions affirmatively, the secession process will have to start and all necessary steps will be taken accordingly. However, it is also possible that the first question may be answered affirmatively while the second one may be answered negatively. This would mean that the majority of Catalonians wish their region to be a state, but not an independent one – rather, a state within the larger kingdom of Spain.⁵²

Recently, the conflict has been taken to another level as the Supreme Court of Catalonia accepted the criminal prosecution of members of the Catalan government for authorizing and co-organizing the consultation on November 9th. Critics say that the authorization and co-organization was not illegal because the Constitutional Court had only temporarily suspended the vote but not declared it illegal.⁵³ In addition to that, no dialogue has taken place between the Catalan president Artur Mas and the President of the Government Mariano Rajoy in six months.⁵⁴

Early regional elections have been scheduled for September 27, 2015, seven months later than people expected. According to Mr. Rajoy, who hopes that economic recovery will push national pride and stop the secessionist plan, the call for these elections, the third within five years, clearly indicates the failure of Mas and the Catalan government.⁵⁵ Other regions and municipalities will hold elections in May. The landscape is thus very confusing. This is why the parties in favor of Catalonia’s independence

⁵² CATALONIA VOTES, *The 9N Vote*,

<http://www.cataloniavotes.eu/referendum/#what> (last visited June 26, 2014).

⁵³ CATALONIA VOTES, *Supreme Court accepts prosecution of Catalan President for symbolic vote on independence* (Jan. 8, 2015),

<http://www.cataloniavotes.eu/tsjc-formally-charges-mas-ortega-and-rigau-for-9n/> (last visited Jan. 30, 2015).

⁵⁴ *Mas y Rajoy no hablan desde hace seis meses*, EL PAÍS (Apr. 5, 2015),

http://ccaa.elpais.com/ccaa/2015/01/16/catalunya/1421400585_349779.html

(<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1428937943045&uri=URISERV:l25061> (last visited January 30, 2015)).

⁵⁵ *Rajoy dice que el Adelanto de las elecciones evidencia el fracaso de Mas*, EL PAÍS (Apr. 15, 2015),

http://politica.elpais.com/politica/2015/01/15/actualidad/1421332146_825187.html (last visited Jan. 30, 2015).

expect the regional ones to be a clear indicator on how the process regarding self-determination will develop.⁵⁶

Just like in Scotland, or related to a possible EU exit of the UK, there are questions in regards to the economic and political consequences of Catalonia's independence.

C. Venetia, Lombardy and Sardinia

A third example of the extent of current secession tendencies in Europe is the northern Italian region of Venetia. In a privately organized, non-binding referendum held in March 2014, eighty-nine percent of votes were in favor of Venetia's independence. The percentage of participation in the poll was 62.3 percent of all those eligible to vote.⁵⁷ Critics have noted that a substantial portion of votes came from outside Italy; for instance ten percent came from Chile. Despite the criticism of the informal poll, organizers have requested an official binding referendum on the secession of Venetia. The regional council of Venetia recently approved a bill concerning such a referendum.⁵⁸ As a next step, a corresponding law has to be approved by the national government.⁵⁹

Two other examples are the Italian provinces of Lombardy and Sardinia. Several organizations have arisen over the last few years in both territories to promote the independence of each from Italy, i.e., *Pro Lombardia Indipendenza* and *Partito Indipendentista Sardo*. As of this writing, consultations are underway to organize possible referendums along the exceptional exit-strategy path undertaken by Venetia. It is worth mentioning that in Sardinia, a province of 1.6 million people, more than 27,000 signatures were collected in April 2014, far surpassing the 10,000 required to schedule a referendum. The date for the referendum will be set shortly.

⁵⁶ CATALONIA VOTES, *Catalans to have 'de facto' referendum on independence via early election on 27 September* (Jan. 15, 2015),

<http://www.cataloniavotes.eu/catalans-to-have-de-facto-referendum-on-independence-via-early-elections-on-27-september/> (last visited Jan. 30, 2015).

⁵⁷ *Referendum Di Indipendenza Del Veneto: I Risultati*, PLEBISCITO.EU, <http://blog.plebiscito.eu/news/referendum-di-indipendenza-del-veneto-i-risultati/> (last visited June 28, 2014).

⁵⁸ *Indipendenza del Veneto, via libera del consiglio regionale al referendum*, CORRIERE DEL VENETO, <http://corrieredelveneto.corriere.it/veneto/notizie/politica/2014/12-giugno-2014/indipendenza-veneto-via-libera-consiglio-regionale-referendum--223385301837.shtml> (last updated June 13, 2014).

⁵⁹ *Test-Referendum: Venezier stimmen für Loslösung von Italien*, SPIEGEL ONLINE (March 22, 2014), <http://www.spiegel.de/politik/ausland/separatisten-in-venetiens-stimmen-fuer-unabhaengigkeit-von-italien-a-960144.html> (last visited June 30, 2014).

IV. UNDERSTANDING THE SCHMITTIAN 'EXCEPTION' IN THE EUROPEAN CONTEXT

All direct forms of opt-out and indirect schemes of unconventional secessionism from the European project discussed thus far cannot be understood fully by only looking at their positivistic and official presentations. In particular, we contend, such an approach would be unable to address their “occult” – and yet powerful – essence. Comparative law teaches us that, as lawyers, our efforts should always be directed at discovering the unofficial, or figuratively “impossible,” by combining traditional notions with unexplored conceits of law and legal reasoning through a multi-disciplinary approach.⁶⁰ Only in this way is it possible to understand the sociopolitical, legal, and ontological exceptional essence of the mechanisms with which this paper deals. Given the scope of our inquiry and the unavoidable relationship among law, society, and culture,⁶¹ political theology, biopolitics and political anthropology are of significant help. A few words on their notions are therefore necessary.

Bearing in mind Schmitt's claim that “all significant concepts of the modern theory of the state are secularized theological concepts,”⁶² political

⁶⁰ For an introduction, see EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW (Mark Van Hoecke ed., Hart Publishing 2004); MAURICE ADAMS AND JACCO BOMHOFF, PRACTICE AND THEORY IN COMPARATIVE LAW (Cambridge University Press 2010); METHODS OF COMPARATIVE LAW (PIER GIUSEPPE MONATERI ed., Edward Elgar Pub. 2012); MATHIAS SIEMS, COMPARATIVE LAW (Cambridge University Press 2014).

⁶¹ Yet we believe that this delicate relationship is instrumentally manipulated most of the time. See ALAN WATSON, LEGAL TRANSPLANT: AN APPROACH TO COMPARATIVE LAW (University of Georgia Press 1993) (1974); *id.* *The Importance of “Nutshells”* 42 AM. J. OF COMP. LAW 1 (1994); *Contra*, see Pierre Legrand, *The Impossibility of “Legal Transplant”* 4 MAASTRICHT J. OF EUROPEAN AND COMP. LAW 111 (1997).

⁶² CARL SCHMITT, POLITICAL THEOLOGY 36 (George Schwab trans., Univ. of Chicago Press 2005) (1922, 1934).

Finally, for an understanding of Schmitt's thoughts increasing relevance within legal and political theory, see

MARIANO CROCE & ANDREA SALVATORE, THE LEGAL THEORY OF CARL SCHMITT (Routledge 2012); WILLIAM HOOKER, CARL SCHMITT'S INTERNATIONAL THOUGHT: ORDER AND ORIENTATION (Cambridge University Press 2009); THE CHALLENGE OF CARL SCHMITT (Chantal Mouffe ed., Verso 1999); ELLEN KENNEDY, CONSTITUTIONAL FAILURE: CARL SCHMITT IN WEIMAR (Duke Univ. Press 2004); JEFFREY SEITZER, COMPARATIVE HISTORY AND LEGAL THEORY: CARL SCHMITT IN THE FIRST GERMAN DEMOCRACY (GREENWOOD PRESS 2001); WILLIAM RASCH, NIKLAS LUHMANN'S MODERNITY: THE PARADOXES OF DIFFERENTIATION (Stanford Univ. Press 2000); *id.*; *Human Rights as Geopolitics: Carl Schmitt and the Legal Form of American Supremacy*, (2003), 54 CULTURAL CRITIQUE 120 (2003); LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM (David Dyzenhaus ed.; Duke Univ. Press 1998); JOHN P. MCCORMICK, CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY (Cambridge Univ. Press 1997); DAVID DYZENHAUS, LEGALITY AND LEGITIMACY. CARL SCHMITT, HANS Kelsen, AND HERMANN HELLER IN WEIMAR (Clarendon Press 1991); PAUL EDWARD GOTTFRIED, CARL SCHMITT: POLITICS AND THEORY (Greenwood Press 1990);

theology may be defined as a social science that, in Paul W. Kahn's words, "understands politics as an organization of everyday life founded on an imagination of the sacred."⁶³ That is to say, "political theology traces the genealogy of political concepts and explores analogies between the political and the religious in the social imaginary."⁶⁴

On the other hand, the emergence of biopolitics and its current relevance within legal discourse has to be related to the birth and spread of the modern geopolitical and anthropological⁶⁵ theme of "population" and to the difficulties of providing a useful and feasible definition of it. Credit for having brought attention to the implications of the term "biopolitics" is usually attributed to Michel Foucault. In particular, as Agamben writes whilst inquiring the intersection between the juridico-institutional and biopolitical schemes of power, "at the end of the first volume of *The History of Sexuality*, [Foucault] summarizes the process by which, at the threshold of the modern era, natural life begins to be included in the mechanism and calculations of State power, and politics turns into *biopolitics*."⁶⁶ However, it is noteworthy that it was Hannah Arendt who inquired, in *The Human Condition*, published in 1958, the entry of *zoē* into the dimension of the *polis* as the process that led to the centrality for modern politics of the so-called *homo laborans*. And it is the combination of Foucault's and Arendt's suggestions that shows not only why and how, as Agamben claims, the "production of a biopolitical body is the original activity of sovereign power,"⁶⁷ but also why and how this activity

GEORGE SCHWAB, *THE CHALLENGE OF THE EXCEPTION: AN INTRODUCTION TO THE POLITICAL IDEAS OF CARL SCHMITT BETWEEN 1921 AND 1936* (Greenwood Press 1989); JOSEPH W. BENDERSKY, *CARL SCHMITT: THEORIST FOR THE REICH* (Princeton Univ. Press 1983).

⁶³ PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 23 (Columbia Univ. Press 2011); *see also* the definition of political theology offered by Jürgen Moltmann in his *THE CRUCIFIED GOD* 62 (SCM Press Ltd. 1974).

⁶⁴ Kahn, *supra* note 63, at 124. It was Karl Marx who first coined the term "political theology." Yet, as Harold J. Berman has persuasively argued in his masterpiece *Law and Revolution*, political theology is rooted in Gregory VII's Papal Revolution. In particular, Berman demonstrated that the word *theology* "was applied for the first time by Abelard to the systematic study of the evidence of the nature of the divinity." *See* *LAW AND REVOLUTION. THE FORMATION OF THE WESTERN LEGAL TRADITION*, I, 175 (Harvard Univ. Press 1983).

⁶⁵ For an introduction to the significance of an anthropological approach to law and legal reasoning, *see* *LEGALISM: ANTHROPOLOGY AND HISTORY* (PAUL DRESCH & HANNAH SKODA eds., Oxford Univ. Press 2012).

⁶⁶ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 3 (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1995).

⁶⁷ *Id.* at 6. Not surprisingly, Agamben is of the idea that "the concept of 'life' . . . must constitute the subject of the coming philosophy" and that this "genealogical inquiry . . . will demonstrate that 'life' is not a medical and scientific notion, but a philosophical, political, and theological concept." *See* Giorgio Agamben, *Absolute Immanence*, in *POTENTIALITIES* 238-39 (Daniel Heller-Roazen ed. & trans., Stanford Univ. Press 1999).

would be meaningless should it not also be aimed at further protecting *that* biopolitical body. Biopower understands the “occult” essence of the (modern) entity that we call “population” as the ultimate goal of the science of political and decisive government. This is the reason why the essence of Schmitt’s decisionism cannot be understood completely without a parallel investigation into the notion of biopolitical power.

For present purposes, it is worth mentioning that Schmitt’s critique of Machiavelli’s decision not to enter the biopolitical dimension of modern power, and hence his inability to understand the link between, on the one hand, sovereignty and the life and death of the single individual, and on the other one, disorder and protection of order,⁶⁸ demonstrates that biopower works according to the double implication that renders every “political” concept a “spatial” concept and *vice versa*.⁶⁹ In other words, the fact that politics makes sense only when represented within a tangible space of sociopolitical representation means nothing more than that the ontological notion of “space” needs politics to make sense from a sociological perspective. Through the emergence of disciplines and concepts such as biopolitics and biopower, the concept of “population” has indeed witnessed an ontological and sociopolitical shift: from being the “object” of the sterile act of government, it has become a specific, living “subject” in perpetual need of particular biopolitical attentions that ought not to be taken for granted.

Delving into this discourse, the following pages are aimed at demonstrating that both direct and indirect forms of opt-out from the EU reveal the exceptional attempt of the Schmittian sovereign to (try to) take back its legal, socio-, and geopolitical power over issues of public concern and/or strategic interest. This is done by drawing the boundaries and purview of the ‘friend/enemy’ antithesis. Hence, it is our suggestion that what is at stake when direct opt-outs and indirect schemes of non-participation in the European process take place is, on the one hand, the intimate essence of Schmitt’s notion of sovereignty, and on the other one, the socio-, bio- and geopolitical representation⁷⁰ of the unconventional essence of the concept of

⁶⁸ GIORGIO GALLI, LO SGUARDO DI GIANO. SAGGI SU CARL SCHMITT 83 (ilMulino 2008).

⁶⁹ In *Writings on War*, Schmitt claimed that “there are neither spaceless political ideas nor, reciprocally, spaces without ideas or principles of spaces without ideas.” CARL SCHMITT, WRITINGS ON WAR 87 (Timothy Nunan trans. & ed.. Polity Press 2011) (1937-1945).

⁷⁰ Political representation is a key-concept in Schmitt’s thought. This clearly emerges from his *Constitutional Theory* and *Legality and Legitimacy*, which, although differently, are both aimed at demonstrating that representation, in terms of “acclamation of the people,” is the canon of democratic politics. In particular, in Schmitt’s words, “The dialect of [representation] is that the invisible is presupposed as absent and nevertheless is simultaneously made present.” The act of representation

“force-people” which was first investigated, as Andrea Cavalletti notes,⁷¹ by Giovanni Botero.

Yet before going any further, we should specify that this claim cannot be understood fully without a reference to the postmodern and neorealist phases of what Siliquini-Cinelli labeled the “Europeanization of Europe”⁷² as the process aimed at creating a supranational entity in which classic forms of law and politics – and thus the Member States themselves – will play an increasingly weak role. In particular, the “Europeanization of Europe” and its statelessness fantasy are the mythical, and yet powerful, representation of something that has never existed in geopolitical and ontological terms (Europe) and may be further seen as the continental paradigms of the process aimed at achieving the formal “depoliticization” and “dejuridification” of the world. The final goal of this process is to transform the “Europe of trading” into the uniformed and formally apolitical “Europe of rights,” while passing through a single market and a monetary economic union (the EU) with common fiscal policies supported by a banking union. From a pure politico-theological perspective, the “Europeanization of Europe” represents, then, a threat to classic forms of political and legal power because it displaces the necessity of the “miracle” by promoting a sterile world of uniformity and regularity in which there is neither need for a *nomos* in terms of “division,” “allocation,” and “appropriation” (*Nahme*) of rights, interests, obligations and duties,⁷³ nor space for the exceptional decisive will of the Schmittian sovereign. Consequently, in the European *Oikoumene* there is no need for the Schmittian concept of the “political” as manifested by the earthly and democratic “friend/enemy” dichotomy either.⁷⁴ While the impact of the

(or signification), then, may be defined as the device that signifies and makes visible and extant what is invisible and absent. See CARL SCHMITT, *CONSTITUTIONAL THEORY* 243 (Jeffrey Seitzer trans. and ed.; Duke Univ. Press 2008).

⁷¹ LA CITTÀ BIOPOLITICA. MITOLOGIE DELLA SICUREZZA 33 (Mondadori 2005).

⁷² See EUROPE AND ITS (TRAGIC) STATELESSNESS FANTASY: THE LURE OF EUROPEAN PRIVATE LAW, POST-NATIONAL GOVERNANCE AND POLITICAL ORDER (Vandeplas Publishing 2014). On the “Constitution of Europe,” see JOSEPH H. H. WEILER, THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” (Cambridge Univ. Press 1999); *id.*; *A Constitution for Europe? Some Hard Choices*, 40(4) J. OF COMMON MKT. STUDIES 563 (2002); See also EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J. H. H. Weiler & Marlene Wind eds., Cambridge Univ. Press 2003); Joseph HH Weiler, Gràinne de Búrca (eds.), THE WORLDS OF EUROPEAN CONSTITUTIONALISM THE STATE (Gràinne de Búrca & J. H. H. Weiler eds., Cambridge Univ. Press 2012).

⁷³ See *infra* note 82.

⁷⁴ According to Schmitt, the canon of the concept of the “political” is the distinction between “friend” and “enemy.” It is indeed only this distinction that is capable of denoting, in Schmitt’s words, “the utmost degree of a union or separation, of an association of dissociation.” This powerful capacity is ultimately rooted in the fact that the “friend/enemy” (or “us/them”) distinction “can exist theoretically and practically, without having simultaneously to draw upon all those moral, aesthetic, economic, or other distinctions.”

federalist projects that have occurred over the last few years within the EU are another testament to this,⁷⁵ the independentist instances at the center of this contribution may be considered as the rejection of the totalizing trend in the continent.

A. Schmitt's State of Exception (*Necessitas Non Habet Legem*)

Schmitt is a complicated thinker and writer. Both his personal and professional lives are a reflection of Germany's, and thus Europe's, traumatic experience over the last century. He developed his theory of the state of exception and concept of the "political" several years before publishing *The Nomos of the Earth* – which began between 1942 and 1945 and thus after the failure of Operation Barbarossa and the entry of the US into the war. However, credit for turning the attention of a great deal of legal scholarship to Schmitt's geographies of the *nomos* and exceptional ways to protect the political domain of the sovereign over them is generally given to Agamben's recasting of Schmitt's original notion of the sovereign as he "who decides on the exception." Yet to understand Schmitt's complicated thought fully would require extended treatment, certainly more than can be provided here. Our intention is therefore merely to highlight what is relevant for our purpose. It is indeed only through the combination of Schmitt's pre-war politico-theological inquiry and post-war spatial thinking that we can try to understand why classic, conventional forms of opt-out from the EU and their indirect counterparts are both aimed at re-affirming the authority of the political sovereign by claiming the significance of "democracy" as, on the one hand, biopolitical and anthropological "identity" between "governor" and "governed," and, on the other, distinction from the "other."

In *Political Theology*, Schmitt challenges Austin and Kelsen's legal positivism and the doctrine underpinning liberalism. In particular, Schmitt argues against the liberal (norm-based) theory of law and justice, and thus liberal neutrality and its political sin – that is, according to Kahn, "the belief that it can always be inclusive because talk will lead to understanding, and

See THE CONCEPT OF THE POLITICAL 26 (George Schwab trans. and ed., Univ. of Chicago Press 2007) (1927, 1932). See also Luca Siliquini-Cinelli, "The Age of 'Depoliticization' and 'Dejuridification' and its 'Logic of Assembling': An Essay Against the Instrumentalist Use of Comparative Laws Geopolitics 37 LOY. L.A. INT'L & COMP. L. REV. (forthcoming 2015).

⁷⁵ In federal systems there is no exceptional power-center, but rather a plurality of institutions sharing power. See Yishai Blank *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance* 37 FORDHAM URB. L. J. 509 (2010); Jeffrey Goldsworthy, *The Debate about Sovereignty in the United States: A Historical and Comparative Perspective*, SOVEREIGNTY IN TRANSITION 423-48 (Neil Walker ed., Hart Publishing 2003).

understanding to agreement.”⁷⁶ He also promoted a notion of sovereign power that is revealed *by* and *in* the decision on “the state of exception.” In particular, while joining the debate on the so-called *Methodenstreit* – the “conflict of methods” that kept European analytical jurisprudence busy throughout the nineteenth century – Schmitt claimed that the true sovereign is only revealed when “the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule.”⁷⁷ The juxtaposition of the law is evident: on the one hand, there is the dominant form of legal theory in the prewar era (that is, “statutory legal positivism,” promoted by Gerber, Laband and Anschütz) and thus the utopian neo-Kantian conception of a pure theory of law; and, on the other, there is liberalism (and its promotion of endless negotiations) and romanticism (and its belief in aesthetic occasionalism).

The exception (*Ausnahmefall*) to which Schmitt refers is the case of extreme peril that threatens the survival of the legal order and yet cannot be overcome by the sterile, positivistic application of the norm, because, strictly speaking, it is not regulated by it. Such an exceptional situation can thus only be approached and managed through unlimited political authority. The decision regarding the exception is, in this sense, the revolutionary and decisive act by which the true, democratically legitimated sovereign *suspends* the targeted norm to save the legal order unconventionally from its own death (*necessitas non habet legem*).

From a practical perspective, such a revolutionary suspension is characterized by the inclusion in the (momentarily inactive) order of something that officially lies outside its normative confinements.⁷⁸ The paradox of the Schmittian notion of sovereignty is therefore clear: non-judicial “disorder” is included within the juridical order through the doors of the exception, which are opened with the political suspension of the norm.⁷⁹ Importantly, the true sovereign guarantees the persistence of this exceptional situation as long as it is necessary for the survival of the legal order.

⁷⁶ Kahn, *supra* note 63, at 135. The same strategy is followed by (political) romanticism, whose aesthetic, subjected occasionalism, and metaphysics of absolute individualism (mainly based on Fichte’s absolute ego and philosophy of science and Schelling’s philosophy of nature and notion of external reality) was merely aimed at opening the “self” to a world of possible realities. See Schmitt, *supra* note 2, at 52–108.

⁷⁷ Agamben, *supra* note 66, at 18.

⁷⁸ Agamben claims that the exception is “an *inclusive exclusion*, an *ex-ceptio* in the literal sense of the term.” See GIORGIO AGAMBEN, *THE TIME THAT REMAINS: A COMMENTARY TO THE LETTER TO THE ROMANS 104–08* (Patricia Dailey trans., Stanford Univ. Press 2005).

⁷⁹ In Schmitt’s words, “Pure decisionism presupposes a disorder that can only be brought into order by actually making a decision.” See Schmitt, *supra* note 2, at 62. See also Kennedy, *supra* note 62, 54–91.

Thus, the exception cannot be subsumed. This is further demonstrated by the fact that, as discussed while analyzing the Scottish referendum, the founding fathers of the EU did not foresee the indirect possibility of any secessionist instances. As Agamben's topological approach to Schmitt has revealed, "the state of exception separates the norm from its application in order [to introduce] a zone of anomie into the law [and then] make the effective regulation of the real possible."⁸⁰ In particular, the fact that the exceptional power (only) *suspends* – and not fully *eliminates* – the norm with the aim of saving it explains why, according to Schmitt, the sovereign is at the same time "outside and inside the juridical order." This not only means that the sovereign recognizes the existence of the norm (as the supporters of an independent Scotland do with respect to the treaties through which it came to form the UK), but also that the decision cannot, and should not, be seen as a moment of chaos and/or anarchy.

The revolutionary essence of the Schmittian decision as an exceptional act of complete, and yet democratic, freedom and authority may therefore only be understood if we acknowledge that, in Kahn's words:

Like Heidegger's authentic individual . . . [t]he sovereign is the political being characterized by [the] consciousness of the possibility of its own death. The state must first come into being; it must achieve its own existence, it must continue to will itself to be in the face of the acknowledgement of its own mortality. To flee from confronting the possibility of the death of the state is a kind of inauthenticity, to take up that knowledge is to achieve a kind of political authenticity.⁸¹

This is why, as Schmitt claimed from the very beginning of his politico-theological inquiry, "[t]he state suspends the law in the exception on the basis of its right to self-preservation."⁸² It is only in this way, as we shall see, that the interaction of the spatial (*Ortung*) and juridical (*Ordnung*) components of the socio-, bio- and geopolitical order takes place.

The fact that the sovereign must act in such an exceptional way to preserve the existence of both the legal order and identity that express it explains why the norm maintains itself in relation not to the regularity of cases, but to the exception. Within this perspective, the conflict between Schmitt and Walter Benjamin provides us with the argumentative instruments

⁸⁰ GIORGIO AGAMBEN, STATE OF EXCEPTION 36 (Kevin Attell trans. and ed., Univ. of Chicago Press 2005); Kennedy, *supra* note 62, at 85 ("Schmitt's understanding of the relationship between legal form and decision can still be read within the boundaries of an established constitutional order.")

⁸¹ Kahn, *supra* note 63, at 60.

⁸² *Id.*; Schmitt, *supra* note 62, at 12. See also McCormick, *supra* note 58, 249–289.

that we need in order to understand the Schmittian paradox of sovereignty, and in particular, why “[t]he sovereign, having the legal power to suspend the validity of the law, legally places himself outside the law.”⁸³ In his 1921 essay *Critique of Violence*, Benjamin tried to demonstrate that the real essence of a particular form of “divine” or “pure” violence (*Gewalt*) is absolutely incompatible with any possible attempt at juridical legitimation and/or recognition. As Agamben writes, “[W]hat the law can never tolerate . . . is the existence of a violence outside the law; and this is not because the ends of such a violence are incompatible with law, but because of its mere existence outside the law.”⁸⁴ Consequently, according to Benjamin, the law cannot, and ought not to, tolerate any “state of exception” broadly understood – even that of “self-defense” (well-accepted today), which may eventually lead to so-called “justifiable homicide.” As a response, Schmitt has instead tried to “capture Benjamin’s idea of a pure violence and to inscribe anomie within the very body of the *nomos*.”⁸⁵ That is to say, while affirming the sovereign act in terms of extreme political decisions, and hence trying to overcome the Benjaminian paradox of violence – according to which, “in deciding on the state of exception, the sovereign must not in some way include it in the juridical order.”⁸⁶ And which renders the baroque sovereign “constitutively incapable of deciding.”⁸⁷ – Schmitt identifies a place that is “neither external nor internal to the law [because it] is the necessary consequence of the attempt to neutralize pure violence and ensure the relation between anomie and the juridical context.”⁸⁸

B. Introducing Schmitt’s Spatial Ontology

It is our suggestion that both direct and indirect opt-out procedures from the EU entail the full realization of the concept of “space” in Schmittian terms. Schmitt’s spatial thinking and notion of the *nomos* of the earth have recently received much-deserved attention on both sides of the Atlantic. As mentioned, this is largely due to the recent translation into English of his major works, which must be analyzed in conjunction with the translations of

⁸³ Agamben, *supra* note 66, at 15.

⁸⁴ Agamben, *supra* note 80, at 53.

⁸⁵ *Id.* at 54.

⁸⁶ *Id.* at 55; see also Samuel Weber, *Taking Exception to Decision: Walter Benjamin and Carl Schmitt* 22 *DIACRITICS* 1, 5 (1992).

⁸⁷ Agamben, *supra* note 80, at 55.

⁸⁸ *Id.* at 54. Agamben correctly notes that, through Benjamin’s shift, “[T]he paradigm of the state of exception is no longer the miracle, as in *Political Theology*, but the catastrophe.” *Id.* at 56.

Agamben's works. In this sense, although some authors deny the possibility of an autonomous spatial, and thus geographical, ontology in Schmittian terms (Elden, Chandler, Legg, and Vasudevan),⁸⁹ others (Hooker, Rasch, Levinson, Odysseos, Petito, and, in part, Galli) accept its existence and delve into it through a critical approach.

The truth is that after completing his works on Hobbes, Schmitt turned to international law and relations to develop his political theology from the broader perspective of spatial ontology.⁹⁰ Consequently, as Kam Shapiro and William Hooker have correctly argued,⁹¹ Schmitt's work not only "involves a complex theory of political territory," but his "bold vision of the importance of spatial concepts in shaping the possibility of political order" may qualify him as a geopolitical thinker." This is due to the circumstance that, shifting from his previous pre-war concerns, in *The Nomos of the Earth*,⁹² Schmitt "reinterpreted nomos, drawing upon its Greek etymology,⁹³ as referring to something both more concrete, and transcendental, than the law [which is] constituted by three processes: [those] of appropriation, distribution and production."⁹⁴ In this way, Schmitt was eventually able to define his spatial thinking by explaining the essential role played in any legal order by the interaction of the spatial component (*Ortung*) and the juridical one

⁸⁹ Other scholars (among whom is Rowan) think instead that radical indeterminacy is a constant feature in all Schmitt's works.

⁹⁰ Mika Ojakangas correctly divides Schmitt's thinking into three phases: decisionism (Weimar), movement (Nazism), and concrete-order thinking (*nomos*). See A PHILOSOPHY OF CONCRETE LIFE: CARL SCHMITT AND THE POLITICAL THOUGHT OF MODERNITY (Peter Lang 2006). Yet Schmitt had been interested in the essence of concrete-order thinking since 1934, as is clear from the content of his *On the Three Types of Juristic Thought*, *supra* note 2. In this sense, it should be borne in mind that, although they may seem the same thing, law and *nomos* are ontologically different. For a recent and compelling inquiry into this difference, of which Schmitt was well aware, see PIER GIUSEPPE MONATERI, I CONFINI DELLA LEGGE. SOVRANITÀ E GOVERNO DEL MONDO (Bollati Boringhieri 2014); *id.* GEOPOLITICA DEL DIRITTO. GENESI, GOVERNO E DISSOLUZIONE DEI CORPI POLITICI (Laterza 2013). See also Georgy Kantor, *Ideas of Law in Hellenistic and Roman Legal Practice*, in Paul Dresch and Hannah Skoda (eds.), *supra* note 65, 55–83.

⁹¹ KAM SHAPIRO, CARL SCHMITT AND THE INTENSIFICATION OF POLITICS. MODERNITY AND POLITICAL THOUGHT 14, 68 (Rowman & Littlefield 2010); *supra* note 62, at 196.

⁹² CARL SCHMITT, THE *NOMOS* OF THE EARTH IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPAEUM* (G. L. Ulmen trans., Telos Press Publishing 2005).

⁹³ The Greek term *nomos* is derived from the other Greek term *nemein* which, depending on the context, means "to divide," "to pasture," "to distribute," or "to possess." The noun *nomos* is therefore a *nomen actionis* whose action and process are that of *nemein*. On the difference between *lex* and *nomos*, see HANNAH ARENDT, THE HUMAN CONDITION 63 (Univ. of Chicago Press 1998); *id.*; ON REVOLUTION 178–86 (Penguin 2006); *ibid.*; *Imago Veritas Falsa: For a (Post-)Schmittian Decisionist Theory of Law, Legal Reasoning, and Judging*, 39 AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY 118 (2014). See also *supra* note 70.

⁹⁴ Stephen Legg & Alexander Vasudevan, *Introduction: Geographies of the nomos, SPATIALITY, SOVEREIGNTY AND CARL SCHMITT 2* (Stephen Legg ed., Routledge 2013).

(*Ordnung*). Since the sixteenth century, the *nomos*, Schmitt argued, has indeed ceased to be imagined as the objectification of the *polis*, and has begun to be theoretically conceived and practically signified as the structuring combination of *Ordnung* and *Ortung*. As this study tries to demonstrate, the socio-, bio- and geopolitical force that lies behind both direct and indirect forms of nonparticipation in the European integration process is ultimately aimed at transcending the supra-natural neutralization of this combination.

In this regard, it should be borne in mind that, according to Schmitt, the reason why modern socio- and geopolitical scholars have come to define the *nomos* as an “original spatialization” is related to the aforementioned emergence of the modern European nation-state as an “exception” to the Holy Roman Empire. More precisely, the idea (and further perspective) from which the concept of the *Jus Public Europaeum* was examined in *The Nomos of the Earth* is that European states have to be viewed as individual units that stably coexist within a complex international order. Consequently, given Europe’s spontaneously autonomous society,⁹⁵ the European state-building process has to be interpreted, according to Schmitt, as the artificial, exceptional attempt to encapsulate the local dimension of the sociology of law, historicity of politics, and logic of memory in a deliberative act of signification. The spirit of the description that Schmitt offers in *Constitutional Theory*⁹⁶ of the dialectic “constitutive power-constituted power,” together with his account on the concept of *Großraum*, are testaments to this.⁹⁷ If the above, as we think, is correct, it means that because EU integration is a “top-down” legitimizing political process, all direct and indirect opt-out schemes discussed in this contribution should be seen as an attempt to limit, through an exceptional constitutive act of sovereign freedom, the impact that this trend has over issues of national interest.

1. The Constitutive Essence of the ‘Boundary’

We would not understand the instances which stand behind the conventional and unconventional forms of opt-out from the European

⁹⁵ NORMAN DAVIES, *EUROPE. A HISTORY* (Oxford University Press 1996); FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION* (2011).

⁹⁶ Schmitt, *supra* note 70.

⁹⁷ The *Großraum* is a large-scale unit of *territorial* unity (literally “big space”) in which extra-regional (*raumfremde*) powers may not interfere and which results from the unification of terms such as ‘land’, ‘people’ and ‘idea’; it stands in opposition to liberal internationalism. Importantly, the *Großraum* is also the device through which the “social identity” of a community is defined according to its (racial, religious, spiritual, intellectual, etc.) *differentia specificam* and then grouped within a common (both ideal and territorial) space whose boundaries delimit their ethnic membership.

integration which we have discussed in this contribution if we first do not understand that, in exercising his/her power to suspend the norm and decide freely on the exception to save the legal order, the Schmittian sovereign decides both “for and against” someone or something. The recent referendum in which Switzerland decided to bring back strict immigration quotas for Europeans by pushing the Agreement on the Free Movement of Persons⁹⁸ aside is a clear example of how the Schmittian sovereign informs the opt-out procedures.

In particular, the Swiss experience confirms that the sovereign’s decision contextualizes the aforementioned “friend/enemy” antithesis, which, according to Schmitt, makes politics possible.⁹⁹ Indeed, for the decision to have concrete effects, the sovereign must also delimit the geo and biopolitical boundaries of his or her intervention. This is the reason why Schmitt’s claims on the concept of the “political” and “state of exception” cannot be understood fully without referring to his compelling spatial ontology.

As previously mentioned, such an investigation requires us to deal with Ratzel’s biogeography and biopolitics. Indeed, while investigating the creation of the modern European nation-state in his *Politische Geographie* and *Anthropogeographie*,¹⁰⁰ Ratzel carefully explained why the “boundary,” from being conventionally conceived as the *periphery* of the population, has become one of the *constitutive elements* of it. Practically speaking, this means the spatial boundary of the population may change and evolve as the population itself does, according to its social needs and interests. From a narrower legal perspective, this means that the population may use the boundary to distinguish itself from within, and hence from another population, in conflicting and yet juridical terms.¹⁰¹ It is helpful to unite these

⁹⁸ The agreement was signed in 1999, along with six other agreements, and came into force in 2002. In a 2009 referendum, the Swiss electorate approved both the agreements and their two protocols.

⁹⁹ Liberalism’s utopistic belief in the perpetual inclusive capacity of negotiations neutralizes the ‘friend/enemy’ distinction. In Schmitt’s words:

Just as liberalism discusses and negotiates every political detail, so it also wants to dissolve metaphysical truth in a discussion. The essence of liberalism is negotiation, a cautious half measure, in the hope that the definitive dispute . . . can be transformed into a parliamentary debate and permit the decision to be suspended forever in an everlasting discussion.

See Schmitt, *supra* note 62, at 63. See also Kahn, *supra* note 63; *id.* OUT OF EDEN. ADAM AND EVE AND THE PROBLEM OF EVIL 53–60 (Princeton Univ. Press 2007).

¹⁰⁰ Respectively, POLITISCHE GEOGRAPHIE ODER DIE GEOGRAPHIE DER STAATEN, DES VERKEHRS UND DES KRIEGES (Oldenbourg 1903) (1897) and ANTHROPOGEOGRAPHIE ODER GRUNZÜGE DER ANWENDUNG DER ERKUNDE AUF DIE GESCHICHTE (Engelhorn 1899). See also Cavalletti, *supra* note 71, 203–20; GIORGIO AGAMBEN, THE OPEN. MAN AND ANIMAL (Werner Hamacher ed., Kevin Attell trans., Stanford Univ. Press 2004).

¹⁰¹ According to Rouland, the “conflict” is one of the fundamental conditions of human creation and evolution. See NORBERT ROULAND, LEGAL ANTHROPOLOGY (Philippe G. Planel trans., Stanford Univ. Press 1994).

considerations with what was previously investigated regarding the ontological and sociopolitical turn witnessed by the concept of “population” and the role of the political “friend” in defining itself through the recognition of, and further protection from, what Schmitt would define as the “enemy,” the “stranger,” or the “other.” This helps illustrate why the modern notion of “boundary” demonstrates that “[t]he principle of nativity and the principle of sovereignty, which were separated in the *ancien régime* . . . are . . . irrevocably united in the body of the ‘sovereign subject’ so that the foundation of the new nation-state may be [first] constituted”¹⁰² and then further protected.

Hence, the sovereign’s exceptional decision territorializes bio- and sociopolitical and legal forms of signification within the representative space of the population as expressed by the ‘boundary’. This process of “spatial movement” (*Bewegung*) is aimed at creating the sense of “identity” by integrating what lies within the constitutive boundary of the constitutive boundary with what lies outside of it. Yet it is our opinion that the recent history of the “Europeanization of Europe” makes it evident that it would be an unforgivable mistake to understand the concept of “boundary” only in pure “geographical,” and thus, “spatial” terms. If the sovereign is the one who decides on the exception by suspending the norm, the free, decisive act, which determines the positioning of the boundary, has the capacity to frame the purview of the sovereign’s intervention, and not just from a geographical perspective. Indeed, this intervention might as well be established over commercial, economic, and legal issues, for instance. In this sense, the Swiss referendum, along with the Danish, Irish, Swedish and all other experiences analyzed thus far demonstrate that the sovereign’s individualization of the “friend” – and of the “boundaries” of his/her political action – through the projection of the “enemy” may not only assume several *topological* dimensions, but is a key component of the instances against the Europeanization trend.

V. CONCLUSION

The aim of the above comparative and multi-disciplinary discussion is to reflect on the circumstance that the “occult” essence of both traditional forms of opt-out and particularistic, indirect schemes of non-participation in the Europeanization trend raise delicate questions whose reach transcends the limits of positivistic lines of inquiry. Our understanding of these phenomena

¹⁰² Agamben, *supra* note 66, at 128.

cannot be evaluated, and eventually criticized, through conventional approaches of analytical jurisprudence.

In particular, in light of what is discussed in Section II on the Europeanization trend as a “top-down” legitimizing political process rather than a “bottom-up” one, we suggest that any attempt to opt-out of the EU as a whole, – whether direct or indirect – or out of any of its policies and/or international agreements signed with non-EU members (*i.e.*, Switzerland’s referendum), cannot be understood fully without the help of the Schmittian theory of sovereignty as a theory of exceptional suspension of the given universalist order of sterile, apolitical uniformity.

As discussed, Schmitt is of the idea that the concept of the political, and hence politics itself, are made possible by the democratic antithesis “friend/enemy”: the permanent presence of the conflict lies at the origin of the politico-juridical order, which is ultimately achieved through the free and sovereign decision over the exception. Such a decision “suspends” the targeted norm, and hence creates “disorder,” in order to prevent the death of the legal system as a whole by allowing politics to do its part. Politics and law thus find a true and powerful zone of interaction in Schmitt’s paradoxical concept of sovereignty as described by Agamben. Through the lens of this perspective, both direct and indirect forms of opt-out from the European integration process may be interpreted as the exceptional attempt of the Schmittian sovereign to take back legal, socio-, and geopolitical power over issues of public concern and/or strategic interest. This is done in two steps: by suspending EU law, and thus the Europeanization trend, through the decision on the state of exception, and by drawing the boundaries and purview of the “friend/enemy” antithesis.

Far from just offering a genealogical perspective, Schmitt’s political theology may serve as diagnosis, prognosis, and therapy for all non-regulative and apolitical tendencies of liberal modernity. Yet to understand completely the utility of having a Schmittian approach to EU opt-out procedures, it should be borne in mind that the state of exception is the conflict that expresses the absolute and unique origin of the politico-juridical form of the true, unified *Volk*. The decision over this origin is what determines the beginning of the new political, juridical, and representative order. The decision over the exception thus expresses the will of the true sovereign to suspend the existing order and create a dimension characterized by “identity” and “representation.” Instances of biopolitics and political anthropology therefore lay at the core of such a revolutionary decision. Within the EU, this exceptional result of absolute yet democratic freedom may be achieved by directly “suspending” EU law or international agreements between the EU and non-EU countries (Poland, Sweden,

Denmark, UK, Switzerland), or by indirectly “neutralizing” its impact on the essence and trajectory of strategic political decisions through a procedure also aimed at achieving independence from the community of states regulated by EU law (Scotland).

Sebastian McEvoy has correctly claimed that one day “it will be paradoxical to argue against the harmonization and even the unification of the laws around the globe: legally, here will be everywhere.”¹⁰³ We suggest that it is precisely the dialectic between “open indeterminism and closed order,”¹⁰⁴ and thus the unification of the apolitical essence of Siliquini-Cinelli’s “Europeanization of Europe” with the lessons taught by biopolitics, political anthropology, and the Schmittian politico-theological paradox of sovereignty, that makes it evident that both direct, conventional schemes and indirect, alternative forms of opt-out are the sovereign’s attempt to re-establish his or her political, normative, and ontological right of self-affirmation and conservation against the global and European process aimed at his or her dissolution.

Yet we are perfectly aware that our claim brings the Schmittian concepts of the “political,” “state of exception,” and “sovereign decision” to a level that has never been reached before. Indeed, as Agamben writes, according to Schmitt, “the functioning of the juridical order ultimately rests on an apparatus—the state of exception—whose purpose is to make the norm applicable by temporarily suspending *its* efficacy.”¹⁰⁵ Hence, Schmitt has tried to understand and describe in politico-theological terms the functioning of the modern apolitical and legally neutral order from within; before the writing of *The Nomos of the Earth*, he was not concerned with the structure and features of the possible interaction between two or more different legal orders.¹⁰⁶

On the contrary, in our case, the Schmittian sovereign decides to suspend a norm, – EU law in cases of direct opt-outs; a specific international agreement in cases of indirect forms of secessionism – that only indirectly belongs to the juridical order (national law) which he or she tries to preserve through his or her political and exceptional intervention. Consequently, the free, decisive will of our *post*-Schmittian sovereign operates not only *from within*, but rather, *from the outside*, although his or her decisive will and

¹⁰³ *Descriptive and Purposive Categories of Comparative Law*, in Monateri, *supra* note 60, at 162.

¹⁰⁴ Legg & Vasudevan, *supra* note 94, at 16.

¹⁰⁵ Agamben, *supra* note 80, at 58 (emphasis added).

¹⁰⁶ This, among other reasons, is why Blumenberg has defined it in terms of ‘political metaphysics’ rather than political theology. See HANS BLUMENBERG, *THE LEGITIMACY OF THE MODERN AGE* (Robert M. Wallace trans., MIT Press 1985).

activity have direct consequences also for what rests *within* his or her political domain.