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Taking Constitutional Identities Away from the Courts

Pietro Faraguna

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TAKING CONSTITUTIONAL IDENTITIES AWAY FROM THE COURTS

*Pietro Faraguna**

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INTRODUCTION

Over the last few decades, the lexicon of European constitutional scholars has apparently changed. If the interests of European Union law scholars could be gauged through Twitter, a trending topic would likely be: #identity.¹ It is difficult to explain this development, yet this new trend is unsurprising for a number of reasons. Europe is a small continent: the smallest continent in fact. However, no other corner of the

1. In 2005, it was noted that “[t]o protect national sovereignty is passé: to protect national identity by insisting on constitutional specificity is à la mode.” J. H. H. Weiler, *On the power of the Word: Europe’s Constitutional Iconography*, 3 INT’L J. CONST. L. 173, 184 (2005).

planet bears such an intensity of difference and contrast.² Compared with the rest of the world, part of Europe's character is the richness brought by the many different languages spoken and many histories and traditions in an area of only half a million square kilometers.³

Against such a background of differences and contrasts, the history of both the EU and its neighboring regions not surprisingly experienced a rise of identity claims over the last two decades. It is no coincidence that the last remaining multiethnic states in the region—Czechoslovakia, Yugoslavia, and the USSR—disappeared during the 1990s to make room for more nationally homogeneous entities. The 1990s were ripe with multiple claims to national identity, and the EU was no exception to this trend.⁴ In 1992, in line with this trend, the principle of respect of Member States' "national identities" made it into the Maastricht Treaty.⁵

The increase of identity claims over the last two decades has been a matter of theoretical speculation. With the Euro Crisis, identity claims have changed from being matters of theory to matters of practice. At the present, Europe seems to be sitting on a ticking time bomb—loaded with identity claims—and this issue is no longer purely theoretical, but rather is manifested in issues that include: are Eurobonds compatible with the German constitutional identity?; Is the Republic of Ireland en-

2. These considerations open the formidable history of postwar Europe. TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* (2006).

3. The territory of the EU is smaller than Brazil or Australia, less than half the size of China, and equivalent to only a fraction of Russia.

4. JUDT, *supra* note 2, at 637–38. One should say that not all these States were multiethnic (Czechoslovakia was a multinational not a multiethnic State), and even if every single dissolution had its own development, the territorial fission of the late nineties was in line with the ethnic "simplification" of the European map.

5. In 1992, a national Identity Clause was first inserted in the Treaty of Maastricht. Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. (C 191) 1 [hereinafter Treaty of Maastricht]. Article F (1) TEU constitutionalized such obligation by plainly stressing that "the Union shall respect the national identities of its Member States." Article F (1) TEU of the Maastricht Treaty was later replaced by Article 6 (3) TEU of the Amsterdam Treaty, Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997, O.J. (C 340) 1 [hereinafter Treaty of Amsterdam], in 1997, which then gave way to Article 4(2) TEU of the Lisbon Treaty in 2009, currently in force, Consolidated Version of the Treaty on European Union art. 4(2), 2010 O.J. (C 83).

titled to prohibit the medical practice of terminating pregnancies, and/or to restrict the provision or advertising of this medical service when the procedure can be carried out in another Member State?; Are the family rights of a same-sex couple, validly married in France, to be recognized in the Polish legal order? This article does not address substantive questions such as these, which relate to identity issues. However, this article attempts to address the precursory question of which actor is best placed to answer these crucial questions. Is it the Court of Justice of the European Union (CJEU) that should decide identity issues? Or should the constitutional and Supreme Courts of Member States be entitled to the final word on the subject? This article argues that it should be neither.

Elements of the judicial understanding of constitutional identity will be collected in Part I. In Part II, an analysis of methods of nonjudicial neutralization of identity-related conflicts will be undertaken. Part III analyzes three possible indicators of constitutional identity-sensitive matters: a) national interests underpinning the nonparticipation of certain Member States in enhanced cooperation agreements; b) matters where the unanimity rule still applies; and c) references to constitutional identity in national Parliaments' reasoned opinions.

In conclusion, these fragments of the constitutional-identity patchwork will be put together, and a surprisingly coherent framework will emerge. By comparing the list of constitutional identity-sensitive matters that the German *Bundesverfassungsgericht* ("BVerfG") compiled in its *Lissabon-Urteil* with the substantive matters involved in the illustrated opt-outs, exemptions, and protocols, remarkable overlaps emerge. Member States and the EU are struggling widely with the same matters both in and out of European and national constitutional courts. Among highly considered national interests, many elements recur. This article will argue that empirical evidence shows that differentiated integration and flexibility are already being used as nonjudicial tools to respect (or rather, to neutralize future infringements of) national constitutional identities. This pragmatic and flexible application has stemmed from an acute need to differentiate in an expanding EU. On the basis of this pragmatic approach, this article will argue for an interpretation of Article 4(2) of the Treaty on the European Union (TEU) that demands a legal obligation to use a wide range of

differentiated integration for the purpose of respecting national constitutional identities.

I. CONSTITUTIONAL IDENTITY IN THE COURTS: AN OVERVIEW

In Part I, this article will question the judicial monopoly over the national constitutional identity that has emerged in the development of the European integration process in recent decades. To do so, the article will begin by analyzing the notion of national constitutional identity from a court-centric perspective. First, the article will identify a conceptual ambiguity, digging into the ambivalent use of the terms “national” and “constitutional” identity. Next, the article will provide a brief overview of the meaning of “constitutional identity” found in case law relating to European integration, in particular, some highly influential decisions of constitutional courts. The article will then focus on some early decisions of the CJEU, where Article 4(2) of the TEU was in play, and go on to consider the analysis on the Identity Clause in Advocate Generals’ (“AG”) opinions. On the basis of this case law, the article will argue that national constitutional identity remains an extremely vague concept. This article then argues that the indeterminacy of the concept of national constitutional identity in Article 4(2) TEU may not be a flaw within the provision but one of its most resourceful aspects. The article will then elaborate on the interpretation of this notion, moving away from the courts in Part II.

A. Article 4(2) TEU: National or Constitutional Identity?

The TEU refers to “national identity.” So, why are the shelves of law libraries weighed down by massive amounts of literature on “constitutional identity”? In short, the interpretation of the notion of “national identity” has gradually shifted toward a legal approach, moving away from a historical or sociological one.⁶ This move has been partly supported, if not caused, by the amendment of the TEU formulation with the adoption of

6. Legal scholars arrived relatively late in approaching this trending topic, following other social sciences where an interest in nations and nationalism studies came to the forefront some years earlier. *See, e.g.*, LUTZ NIETHAMMER, *KOLLEKTIVE IDENTITÄT. HEIMLICHE QUELLEN EINER UNHEIMLICHEN KONJUNKTUR* (2000). On the delay of the legal scholarship, see ELKE CLOOTS, *NATIONAL IDENTITY IN EU LAW* (2015).

the Lisbon Treaty.⁷ Nevertheless, a literal interpretation seems inadequate, considering the fact that a crucial element such as the singular or plural conjugation of the term “identity” varies in the TEU’s various translations.⁸

Although the concept of identity has always been subject to ambiguities and interpretative uncertainties, the connection between national and constitutional identity has gradually been taken as a self-evident truth.⁹ However, it seems necessary to devote some attention to this inherent connection.¹⁰ The Maastricht Treaty represented a sort of watershed moment in the legal evolution of identity in the EU. On one hand, the trea-

7. The Maastricht Treaty’s wording narrowly provided that “the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.” Consolidated Version of the Treaty on European Union art. 6(2), May 9, 2008, 2008 O.J. (C115) 13 [hereinafter TEU]. The Treaty of Lisbon added that the Union shall respect the equality of the Member States 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.

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 3a, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

8. In English, the Treaty stated that the Union shall respect national *identities*, whereas in Italian “L’Unione rispetta l’*identità* nazionale,” in German “Die Union achtet die nationale *Identität*,” in French “L’Union respecte l’*identité* nationale,” and in Polish “Unia szanuje *tożsamość narodową*.”

9. On this point, an efficient summary is found in a relatively recent AG’s opinion: “I would make it clear that the position which I propose that the Court should adopt in the present case does not mean that account is not to be taken of the national identity of the Member States, of which constitutional identity certainly forms a part.” Opinion of Advocate General Bot, Case C-399/11, Criminal Proceedings Against Stefano Melloni, ECLI:EU:C:2012:600, ¶ 137 (E.C.J.).

10. On understanding of national identity as constitutional identity, see Roberto Toniatti, *Sovereignty Lost, Constitutional Identity Regained*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 49, 49, 63, 67 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivinia eds., 2013); Leonard F. M. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 UTRECHT L. REV. 36, 42–44 (2010). *Contra* MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 29 (2009); CLOOTS, *supra* note 6, at 167–68.

ty took important steps in the way of an ever closer EU with the introduction of a European citizenship, a deeper economic and a monetary Union, and an ever closer political Union. These were steps that were able to challenge the traditional role of the nation State. On the other hand, the fear of a supra-national entity overwhelming individual nation States was tempered by the introduction of principles aimed at safeguarding Member States,¹¹ such as the principle of respect for national identities.¹²

In the EU, the process of balancing between new national claims and integrationist forces continues in the successive amendments of the Treaties,¹³ through some minor changes in the formulation of the principle of protection of national identities, and above all, through the introduction of the subsidiarity principle.¹⁴ If the Treaty of Maastricht brought vast attention to the concept of national identity, the Lisbon Treaty was a successive landmark in the evolution of the identity literature.

11. On the counterbalancing effect of the Identity Clause with respect to “on-going constitutionalization of the EU,” see Monica Claes, *National Identity: Trump Card or Up for Negotiation?*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 109, 118 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivinia eds., 2013). See also CLOOTS, *supra* note 6, at 63, 82, 179, 184.

12. TEU, *supra* note 7, art. F. The first provision in a European Treaty that explicitly mentioned national identity: “the Union shall respect the national identities of its Member States, whose system of government are founded on the principles of democracy.” *Id.*

13. The treaty of Amsterdam reformulated the principles, splitting the democratic principle and the protection of national identities. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 1(8), Oct. 2, 1997, 1997 O.J. (C340) 1 [hereinafter Treaty of Amsterdam]. The democratic principle was formulated in a separated paragraph, as a fundamental principle both of the Member States and the Union: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” *Id.* The obligation of the Union to respect the national identities was formulated in the third paragraph of the same article: “The Union shall respect the national identities of its Member States.” *Id.*

14. On the role of the subsidiarity principle (beside the dismantled pillar system and the “variable geometry” approach of closer cooperation) in these conflicts between European and national sovereignty claims, see Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 668 (1999).

Article 4(2) was the first EU-Treaty provision to codify national constitutional identity, through a reformulation of the Identity Clause, which was largely drawing from the text of the ill-fated Constitutional Treaty ("CT").¹⁵ For the first time, the wording shifted from the purely national qualification of identity to a much wider one. National identity is now inherent in Member States' "fundamental structures, political and constitutional, inclusive of regional and local self-government."¹⁶ Among the innovations of the Treaty of Lisbon in the field of identity, one should mention the preamble of the Charter of Fundamental Rights of the European Union (CFREU), establishing the obligation to respect the "national identities of the Member States and the organisation of their public authorities at national, regional and local levels."¹⁷ Against this background, it was quite clear that the concept of national identity consisted not only of a mere historical or sociological reference, but on the contrary, bore a legal meaning and more precisely, a constitutional one.¹⁸

It comes as no surprise that this constitutionalization of the concept of identity triggered an even deeper involvement of the constitutional courts in many Member States. When the Treaty of Maastricht was adopted, there had already been a number of judgments on the matter. Nonetheless, the outbreak of such

15. The Treaty Establishing a Constitution for Europe, which was approved in 2004, but never ratified by the necessary majority of Member States, stated that

[t]he 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.

Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 1 (never ratified).

16. Treaty of Lisbon art. 3a.

17. Charter of Fundamental Rights of the European Union pmb., 2010 O.J. (C 83) 02, at 391.

18. The reference to fundamental political and constitutional structures "distances the notion of national identity in Article 4(2) TEU from cultural, historical or linguistic criteria and turns to the content of domestic constitutional orders." Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1422 (2011).

judgments on the matter of constitutional identity after Maastricht and above all after Lisbon has been remarkable.

One could argue that these decisions have nothing to do with either Article 4(2) TEU or the autonomous notion of national identity in EU law. As a matter of fact, the Treaty's wording does not refer to constitutional identity but to national identity, and a literal understanding of the Identity Clause does not allow any correspondence with the domestic notion of constitutional identity. Accordingly, one should interpret the legal meaning of "nation" to determine the authentic understanding of the Identity Clause in Article 4(2) TEU. However, this reasoning would not lead very far: the very concept of "nation" is highly controversial as well as subject to ambiguities, vagueness, and indeterminacy. There are at least two radically different understandings of this notion in the last two centuries of legal thought. According to an ethnic-centered reading of "nation," the concept is related to the existence of common elements in a community: language, history, customs, and ethnicity. In contrast to this view, the civic conception of "nation" identifies the notion with a subjective sense of belonging to a community, based on very different elements, such as citizenship, law, culture, and religion. Additionally, a narrow interpretation of the concept of "national identity" would not be able to embrace the reality of the many multinational Member States in the EU.¹⁹ In particular, if the singular definition of "national identity" would be taken into consideration under this narrow interpretation, what about the Member States comprising multinational identities? A "pure national" interpretation of the notion of "national identity" would lead to a complex legal puzzle.²⁰

As a matter of fact, communal understanding of the proper meaning of "nation" greatly varies and, most importantly, "the content of what constitutes national identity . . . is determined by reference to domestic constitutional law,"²¹ which brings us back to the broader notion of "national constitutional identity."

19. Besselink, *supra* note 10, at 42–43.

20. CLOOTS, *supra* note 6, at 151–54.

21. von Bogdandy & Schill, *supra* note 18, at 1429.

B. A Court-Centered Canon

Article 4(2) TEU is frequently described as a “Europeanized counter-limit,”²² consisting of a binding obligation for the EU to respect national constitutional identities. The interpretation of the extension and implications of this obligation as a matter of positive law is crucial with respect to two of the most fundamental principles of the European constitutional order, namely primacy and uniform application of EU law. Therefore, it is not surprising that vast attention has been devoted to the judicial interpretation of the legal meaning and scope of the abovementioned provision.

The Identity Clause has been seen as a twofold “invitation to struggle”²³ involving its interpretation and the definition of the competent authority in charge of that interpretation.²⁴ Invited or not, national and supranational courts struggle with these issues.

A court-centered interpretative canon of the Identity Clause supports an “*exceptionalist* understanding”²⁵ of Article 4(2) TEU. The identity argument has been seen as a last resort “to only apply in exceptional cases of conflict between EU law and domestic constitutional law.”²⁶ This is certainly true as far as

22. GIUSEPPE MARTINICO, *THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS: THE FRUSTRATING KNOT OF EUROPE* 93 (2012); Antonio Ruggeri, “*Tradizioni costituzionali comuni*” e “*controlimiti*,” *tra teoria delle fonti e teoria dell’interpretazione*, in DIRRITO PUBBLICO COMP. ED EUROPEO 102 (2003). According to Dobbs, “the conflict is no longer technically between national and EU law, but between aspects of EU law.” Mary Dobbs, *Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance in Favour of the Member States?*, 33 Y.B. EUR. L. 298, 325 (2014).

23. An “invitation to struggle” for the direction of foreign and security policy is the image used by Corwin to describe the U.S. Constitution and its distribution of powers between the President and Congress. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 177 (5th ed. 1984).

24. Matthias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 EUR. L.J. 262 (2005); Toniatti, *supra* note 10.

25. The term “exceptionalist understanding” is drawn from Barbara Guastaferrero, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause* (Jean Monnet Ctr. for Int’l & Regional Econ. Law & Justice, Working Paper No. 01/12, 2012), <http://jeanmonnetprogram.org/wp-content/uploads/2014/12/JMWP01Guastaferrero.pdf>.

26. von Bogdandy & Schill, *supra* note 18, at 1431.

the judicial use of national constitutional identity is concerned. As a matter of fact, consequences of the application of Article 4(2) TEU to justify a relativization of EU law's primacy are difficult to predict and preferable to avoid.

C. National Constitutional Identity in the Case Law of the Member States' Constitutional Courts

The first judgment where a national court theorized domestic constitutional reservations to the primacy of EU law is the *Frontini Judgment*²⁷ of the Italian Constitutional Court. However, it is important to note that the counterlimits case law of the German *BVerfG* played a major role in this matter.²⁸

The example and model of the German *BVerfG* counterlimits doctrine has been subject to a quick evolution. The counterlimits doctrine initially consisted of a human rights proviso, then turned into an *ultra vires* test, and finally into a constitutional identity test.²⁹ The (in)famous role of the *BVerfG* as a stringent watchdog of the State-centered constitutional model was inaugurated with the *Solange I* judgment in 1974, and continued through a series of landmark decisions that include *Solange II*,³⁰ *Maastricht*,³¹ *Banana Market Decision*,³² *Lisbon*,³³ *Mangold-Honeywell*,³⁴ four judgments related to the *Euro Cri-*

27. Corte Cost., 27 dicembre 1973, n. 183, Giur. it. 1973, II, 2401 (It.). The Italian Constitutional Court did not explicitly make use of the term "identity," but followed a very similar approach to the *Solange* saga. *Id.*

28. This role has been boosted by the "overwhelming academic and political attention on the Bundesverfassungsgericht's pronouncements on EU law" and this attention "risks putting the case law of other national constitutional courts in the shade." CLOOTS, *supra* note 6, at 52.

29. Mehrdad Payandeh, *Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice*, 48 COMMON MKT. L. REV. 9, 9 (2011).

30. BVerfG, 2BvR 197/83, Oct. 22, 1986.

31. BVerfG, 2 BvR 2134/92, Oct. 12, 1993.

32. BVerfG, 2 BvL 1/97, June 7, 2000, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/06/ls20000607_2bv1000197en.html.

33. BVerfG, 2 BvE 2/08, June 30, 2009, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

34. BVerfG, 2 BvR 2661/06, July 6, 2010, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html.

sis,³⁵ and *OMT*,³⁶ which are vastly commented on in constitutional and EU-law literature. Assessing this case law in detail would take us too far from the focus of this article. Briefly, with regard to this German “obsession,”³⁷ what is notable is that the *BVerfG* played a crucial role in interpreting the issues related with national constitutional identities.

The *BVerfG* model implies that constitutional identity consists of a core that is not subject to any modification. This constitutional core sets a limit to European integration that not even a constitutional amendment can remove. The content of this core is enshrined in the so called “Eternity Clause” in accordance with Article 79.3 *Grundgesetz* (“German Basic Law” or “GG”),³⁸ which was extended to the European matters pursuant to Article 23 GG and further interpreted by the *BVerfG* itself.³⁹ Hence, within the constitutional core, the Eternity Clause includes the principle of democracy, the essence of which exists in the constitutional voting rights of German citi-

35. The German *BVerfG* pronounced four landmark judgments on the Euro Crisis, namely *BverfG*, 2 BvR 987/10, Sept. 7, 2011, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/09/rs20110907_2bvr098710en.html; *BVerfG*, 2 BvE 8/11, Feb. 28, 2012, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2012/02/es20120228_2bve000811.html; *BVerfG*, 2 BvE 4/11, June 19, 2012, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/06/es20120619_2bve000411en.html; and *BVerfG*, 2 BvR 1561/12, Jan. 28, 2014, http://www.bverfg.de/e/rs20140128_2bvr156112.html.

36. *BverfG*, 2 BvR 1390/12, Dec. 17, 2013, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2012/09/rs20120912a_2bvr139012.html.

37. The protection of national identity lies in between an “obsession” and a “serious concern.” Christian Tomuschat, *The Defence of National Identity by the German Constitutional Court*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 205, 205 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

38. Article 79.3 of the Basic Law for the Federal Republic of Germany (the “Basic Law”) states, “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 Articles 1 and 20 shall be inadmissible.” GRUNDGESETZ [GG] [Basic Law] art. 79.3, *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0409.

39. Article 23 of the Basic Law states, “The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.” GRUNDGESETZ [GG] [Basic Law] art. 23.

zens. Against this background, the *BVerfG* states that German Basic Law impedes the conferral of those competences to the EU that would bear a risk of deprivation of the right to vote and the principle of democracy of their substantive contents.⁴⁰ In the view of the *BVerfG*:

Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5) ~~and the right of coinage (6)~~⁴¹

This model has proved successful, and was the object of a wide migration of a persuasive “constitutional idea.”⁴² As a matter of fact, the EU-related case law of many Constitutional and Supreme Courts, such as Poland,⁴³ Hungary,⁴⁴ and Czech

40. On the *BVerfG* account,

[t]he principle of democracy as well as the principle of subsidiarity, which is also structurally required by Article 23.1 first sentence of the Basic Law, therefore require factually to restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner, particularly in central political areas of the space of personal development and the shaping of living conditions by social policy.

BVerfG, 2 BvE 2/08, June 30, 2009 at 251, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

41. *Id.* at 252. The right of coinage, which has always been a classical state competence in traditional theoretical models, was not mentioned in the Court’s list of the hardcore of Member State competences, and the reason for this omission is quite clear.

42. See generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., Reissue ed. 2011).

43. See Polish Constitutional Tribunal, case K32/09, Judgment of Nov. 24, 2010, http://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf.

44. See Alkotmánybíróság (AB) [Constitutional Court of Hungary] July 12, 2010, 143/2010 (Hung.).

Republic,⁴⁵ bear resemblances to the *BVerfG*'s doctrine of constitutional identity. In some cases these resemblances are made explicit, with open references to the *Lissabon Urteil* of the *BVerfG*.⁴⁶ This is the case of the Polish Constitutional Court's decision on the Treaty of Lisbon, manifestly inspired by the German model. According to the Constitutional Court's view, the constitutional rule concerning the transfer of competences⁴⁷ protects Poland's constitutional identity, by excluding from the transfer the matters that are fundamental for the organization of a State. These are the decisions concerning the fundamental principles of the constitution, the fundamental rights, the principle of statehood, the democratic principle, rule of law, the welfare state, subsidiarity, and the competence to amend the constitution itself.⁴⁸

45. See Czech Constitutional Court, Case Pl. ÚS 19/08 [Treaty of Lisbon I], Nov. 26, 2008, <http://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i/>; Czech Constitutional Court, case Pl. ÚS 29/09 [Treaty of Lisbon II], Nov. 3, 2009, <http://www.usoud.cz/en/decisions/20091103-pl-us-2909-treaty-of-lisbon-ii-1/>.

46. See Treaty of Lisbon II, *supra* note 45, paras. 110, 137.

47. Konstytucja Rzeczypospolitej Polskiej [Constitution] Apr. 2, 1997, art. 90 (Pol.), <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>. Article 90 of the Polish Constitution does not expressly refer to constitutional identity. Article 90 states that:

The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.

Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

48. Case K 32/09, Pol. Const. Trib., Nov. 24, 2010, *reprinted in* SELECTED RULINGS OF THE POLISH CONSTITUTIONAL TRIBUNAL CONCERNING THE LAW OF

Additionally, the Polish Constitutional Court made it clear that the concept of constitutional identity is an equivalent of, or at least is very closely related with, the concept of national identity. The concept also includes the traditions and cultural heritage of the country, drawing its interpretation not only from Article 4(2) TEU but also from the preamble of the TEU, where one of the indicated objectives of the Union is to deepen the solidarity between the peoples of the Union while respecting their history, culture, and traditions. In this respect, according to the Polish Constitutional Court's view, "the idea of confirming one's national identity in solidarity with other nations, and not against them, constitutes the main axiological basis of the European Union."⁴⁹

Case law from the Hungarian Court also bears resemblance with the *Lissabon-Urteil* of the *BVerfG*, although there are no explicit references to the judgment of their German colleagues. In its decision on the compatibility of the act of promulgation of the Lisbon Treaty with the Constitution, the Hungarian judges rejected an individual complaint, but affirmed that the Parliament has an obligation to reconcile the commitment derived from Hungary's membership in the EU and the observance of the Constitution.⁵⁰

THE EUROPEAN UNION (2014–2013), at 192, 202–03 (2014), http://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf (discussing the constitutionality of the Lisbon Treaty). The Constitutional Tribunal includes the following matters in the concept of constitutional identity:

decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences.

Id. (citing KRZYSZTOF WOJTYCZEK, PRZEKAZYWANIE KOMPETENCJI PAŃSTWA ORGANIZACJOM MIĘDZYNARODOWYM 284 (2007)).

49. Case K 32/09, Pol. Const. Trib., Nov. 24, 2010.

50. Alkotmánybíróság (AB) [Constitutional Court of Hungary] July 12, 2010, MK.VII.14 143/2010/698 (Hung.).

The position of the Czech Constitutional Court is more open toward European law,⁵¹ but has some similarities to the German interpretation. The Court acknowledges the principle of an EU-conforming interpretation of constitutional law, but in case of a conflict between EU law and the Czech constitution—especially its “material core”⁵²—the latter must prevail.⁵³ Unlike the *BVerfG*, the Czech Court does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create a catalogue of nontransferable powers and authoritatively determine “substantive limits to the transfer of powers.”⁵⁴ According to the Czech Court’s view, this is not the Constitutional Court’s task. Limits to the transfer of powers exist but these “should be left primarily to the legislature to specify.”⁵⁵ This is due to its being “*a priori*, a political question, which provides the legislature wide discretion.”⁵⁶ The gap between the Czech Constitutional Court and the *BVerfG* illustrates a crucial point: Both the Czech and German judicial approach in protecting the national role of the Constitution includes substantive limits to the transfer of power. In the case of the *BVerfG*, these limits may be directly interpreted by the Constitutional Tribunal, entrusted both to write a list of nontransferable duties and to review the possible violations of these limits. In the case of the Czech constitutional system, the mere existence of substantive limits to the transfer of competence is ascertained by the Constitutional Court: the concrete individuation of these limits is left open to future develop-

51. For an up-to-date overview of the relationship between the Czech Constitution and EU integration, see generally Lubos Tichy & Tomas Dumbrovsky, *The Czech Constitution and EU Integration*, in MEMBER STATES’ CONSTITUTIONS AND EU INTEGRATION (Stefan Griller, Monica Claes & Lina Papadopoulou eds., forthcoming 2016), *manuscript at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2615617.

52. The identification of the “material core” of the Czech Constitution came to the forefront not only with respect to EU law, but also in the internal forum, with the declaration of the unconstitutionality of a constitutional amendment. See Treaty of Lisbon I, *supra* note 45, paras. 110, 120, 196, 197, 208, 215 & 216; cf. Yaniv Roznai, *Legisprudence Limitations on Constitutional Amendments? Reflections on The Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act*, 8 VIENNA J. INT’L CONST. L. 29, 31 (2014).

53. Treaty of Lisbon I, *supra* note 45, para. 85.

54. Treaty of Lisbon II, *supra* note 45, para. 110.

55. *Id.* para. 111.

56. *Id.*

ments, where the role of the court cannot be excluded, even though the Czech Court keeps for itself a higher degree of flexibility.

This approach is clearly in favor of the political process and gets the Czech Court's view closer to the French approach than to the German approach. In the framework of an *ex ante* review (Article 54 of the French Constitution), the *Conseil Constitutionnel* reviewed the compatibility of both the CT and the Treaty of Lisbon with the French Constitution.⁵⁷ In both cases the *Conseil* deemed a constitutional revision necessary in view of the ratification of the Treaties. In a few words, the *Conseil* ascertained some constitutional limits in respect to certain provisions of the Treaty, but the nature of the domestic limits is merely formal.⁵⁸ In these cases, the *Conseil* did not declare substantive limits to the development of European integration. Instead, the *Conseil* deemed necessary the revision of the French Constitution to admit the entry into force of certain new provisions of the Treaties, such as the conferral of new competences to the EU, the introduction of supranational modes of decision making, the introduction of the general bridge clause in accordance with Article 48.7 TEU, and with the new powers conferred to national Parliaments under EU law.⁵⁹ The discussion shifted back to the political spectrum, and the Parliament promptly reacted with the necessary constitutional amendments.

The French path may be seen as the opposite and alternative model to the German *BVerfG* position.⁶⁰ Unlike the German

57. See Conseil constitutionnel [CC] [Constitutional Council] decision No. 2004-505 DC Nov. 19, 2004, Rec. 173 (Fr.) (discussing the Treaty Establishing a Constitution for Europe); Conseil constitutionnel [CC] [Constitutional Council] decision No. 2007-560 DC Rec. 459 (Fr.) [hereinafter *Décision 2007*] (discussing the Treaty of Lisbon).

58. See generally JEAN-PHILIPPE DEROSIER, *LES LIMITES CONSTITUTIONNELLES À L'INTÉGRATION EUROPÉENNE: ÉTUDE COMPARÉE: ALLEMAGNE, FRANCE, ITALIE* (2015).

59. The French Conseil ruled in its decision on the Lisbon Treaty that “[a]uthorisation to ratify the Treaty amending the Treaty on European Union and the Treaty establishing the European Community requires a prior revision of the Constitution.” See *Décision 2007*, *supra* note 57.

60. For general analysis of this “relatively cooperative strategy,” see FRANCOIS XAVIER MILLET, *L'UNION EUROPÉENNE ET L'IDENTITÉ CONSTITUTIONNELLE DES ETATS MEMBRES* 25–46 (2013). Additionally, on the

judges, the *Conseil Constitutionnel* defers a much wider margin of discretion to political actors to set the constitutional limits in the future development of European integration. The *Conseil's* role has been limited to ascertaining whether a prior revision of the Constitution was necessary in cases of the ratification of new Treaties that provided clauses running counter to the Constitution. As far as constitutional identity was concerned, a landmark decision of the *Conseil* was pronounced in 2006. In a nutshell,⁶¹ the *Conseil* held that the obligation to implement EU-secondary law only encountered limits in a principle “inherent in the constitutional identity of France, except when the constituting power consents thereto.”⁶² What is to be included in the “constitutional identity of France” is not clear at all, but this notion “relates to what is not shared with other States, to what is specific of France.”⁶³

D. National Constitutional Identity in the Case Law of the CJEU

Since 1992, national identity has been included in Treaties under the formulation of Article F(1) of the Maastricht Treaty, but it became subject to the jurisdiction of the Court of Justice only after the entry into force of the Lisbon Treaty.⁶⁴ Neverthe-

French experience, see generally MARTIN QUESNEL, *LA PROTECTION DE L'IDENTITÉ CONSTITUTIONNELLE DE LA FRANCE* (2015).

61. For a broad analysis, see Marie-Luce Paris, *Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law*, 29 Y.B. EUR. L. 21 (2010).

62. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-540, July 17, 2006, ¶ 19 (Fr.), translation at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540DCen2006_540dc.pdf.

63. CLAES, *supra* note 11, at 127 (referring to the official comment of the *Commissaire du gouvernement* Gyonmar of the *Conseil d'État* published in 17 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 28–29). A commentator has proposed the “principe de laïcité” and the social character of France as part of this peculiarly French constitutional identity. See Commentaire de la décision n° 2008-564 DC – 19 juin 2008, 25 CAH. CONS. CONST. (2008), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2008564DCccc_564dc.pdf; Selma Josso, *Le caractère social de la République, principe inhérent à l'identité constitutionnelle de la France?* (2008), <http://www.droitconstitutionnel.org/congresParis/comC1/JossoTXT.pdf>.

64. Article 46 TEU pre-Lisbon outlined the boundaries of the CJEU's jurisdiction with a positive list of reviewable provisions that did not include the

less, the (then) European Court of Justice (ECJ) also made reference to the notion of national identity before the entry into force of the latter Treaty. In fact, many cases that are often referred to as ECJ milestones in the matter of national identity—such as *Omega*,⁶⁵ *Portugal v Commission (re Azores)*,⁶⁶ or *Gibraltar*⁶⁷—do not mention the Identity Clause in any of its wordings.⁶⁸ In some of these cases, the principle at stake was the recognition and respect of diversity among the constitutional systems of Member States, without any reference to national or constitutional identity.⁶⁹

However, an explicit reference to national identity and culture emerges in the ECJ's case law already before the adoption of Article F(1) in the Treaty of Maastricht. The first explicit reference emerges in the *Groener* judgment in 1989.⁷⁰ This case dealt with the denial of the appointment of a Dutch citizen as a teacher in Ireland due to her failure of an Irish language test. In its decision, the ECJ found that the provisions of the Treaty establishing the European Economic Community (ECC) do not contradict the adoption of a policy seeking the protection and

provision on national identity. See Dobbs, *supra* note 22 at 3; Leonard F. M. Besselink, *Respecting Constitutional Identity in the European Union: An Essay on ECJ (Second Chamber), Case C 208/09, 22 December 2010, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, 49 COMMON MKT. L. REV. 671, 678 (2012); Monica Claes, *Negotiating Constitutional Identity or Whose Identity is it Anyway?*, in 107 CONSTITUTIONAL CONVERSATIONS IN EUROPE 217 (Monica Claes et al. eds., 1st ed. 2012). On the other hand, another author has noted that this “scholarly fixation on the fact that identity clause was not formally included in the Court’s jurisdiction as an explanation for why the ECJ did not explicitly seek guidance from the clause when interpreting or reviewing community legislation seems exaggerated.” CLOOTS, *supra* note 6, at 165.

65. Case C-36/02, *Omega Spielhallen und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9641.

66. Case C-88/03, *Portugal v. Commission*, 2006 E.C.R. I-7145.

67. Case C-145/04, *Spain v. United Kingdom*, 2006 E.C.R. I-7961.

68. Surprisingly, none of the cases mentioned above even reference article F(1) of the Treaty of Maastricht, article 6 of the Treaty of Amsterdam, *supra* note 13, or article 4(2) of the Treaty of Lisbon.

69. Despite this fact, the cases mentioned above are often held as extremely significant with regard to constitutional identity. For example, CLOOTS, *supra* note 6, at 7, considers these cases “among the most illustrious examples of the Court’s ‘silent’ sensitivity to domestic constitutional provisions inspired by national identity.”

70. Case C-379/87, *Anita Groener and the Minister for Education and the City of Dublin Vocational Education Committee*, 1989 E.C.R. 3967.

promotion of the language of a Member State (both the national and official language) “as a means of expressing national and cultural identity.”⁷¹

The *Groener* case can be held as a sort of ancestor to the much more recent *Runevič* judgment. This case concerned a dispute regarding the spelling of foreign names in Lithuania. A Lithuanian citizen of Polish origin wanted her name to be registered under the Polish spelling rules (“Małgorzata Runiewicz Wardyn”), but the Vilnius Civil registry refused her request on the grounds that only surnames and forenames in a form that complies with the spelling rules of the official national language may be registered. The ECJ argued that the spelling restriction did not constitute a restriction of the right of free movement, and partly based its reasoning on the fact that the provisions of EU law do not preclude the adoption of a policy for the protection and promotion of a language of a Member State, which is both the national language and the first official language.⁷² The ECJ referred to *Groener*, inevitably enriching its reference with normative coordinates that occurred after *Groener*.⁷³ In this respect, the Court stated in *Runevič* that

[a]ccording to the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. Article 4(2) EU provides that the Union must also respect the national identity of its Member States,

71. *Id.* paras. 18, 19.

72. The Irish Constitution recognizes “the Irish language as the national language.” Constitution of Ireland 1937 art. 8. In *Groener*, the court noted that “the policy followed by Irish governments for many years has been designed not only to maintain but also to promote the use of Irish as a means of expressing national identity and culture.” Case C-379/87, Anita Groener and the Minister for Education and the City of Dublin Vocational Education Committee, 1989 E.C.R. 3967, ¶ 18. The court additionally noted that the then European Economic Communities Treaty “does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language.” *Id.* para. 19.

73. In *Runevič*, the Court could refer to both the CFREU, *supra* note 17, and article 4(2) TEU, *supra* note 7. None of these documents existed at the times of *Groener*.

which includes protection of a State's official national language.⁷⁴

The spelling of names was also the subject matter of a previous case, the first carried out after the entry into force of Article 4(2) TEU. The case concerned Austrian constitutional law prohibiting the use of surnames indicating a title of nobility. This impeded an Austrian citizen who had resided in Germany for fifteen years and who had acquired the surname of her adoptive father, a German citizen, to use her full name "Fürstin von Sayn-Wittgenstein." Austrian authorities required its amendment to "Sayn-Wittgenstein."⁷⁵

The applicant affirmed that a modification of her name damaged her professional capabilities, since she was known in luxury real estate under the previous full name. Therefore the applicant alleged that her freedom of movement and residence was restricted by the application of Austrian constitutional law to her name. The Austrian Government contended that the constitutional law in question reflected the principle of equality and intended to protect the constitutional identity of the Republic of Austria.⁷⁶ The court's reaction on this point was welcoming, noting that

74. Case C-391/09, *Malgožata Runevič-Vardyn v. Vilniaus miesto savivaldybės administracija*, 2011 E.C.R. I-3818, ¶ 86.

75. The Austrian Laws on the abolition of the nobility, the secular orders of knighthood and of ladies, and certain titles and ranks, GESETZ ÜBER DIE AUFHEBUNG DES ADELS, DER WELTLICHEN RITTER- UND DAMENORDEN UND GEWISSER TITEL UND WÜRDEN, STAATSGESETZBLATT [LAW ON THE ABOLITION OF THE NOBILITY, THE SECULAR ORDERS OF KNIGHTHOOD AND OF LADIES, AND CERTAIN TITLES AND RANKS], Apr. 3, 1919 [STGBL] Nos. 211/1919, 1/1920 (Austria), have constitutional status under the Austrian Constitution, BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 2/2008, art. 149(1), <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138> (Austria). These laws and their implementing provisions abolished the right to use the nobiliary particle "von" and the right to use designations of noble status, such as knight ("Ritter"), baron ("Freiherr"), count ("Graf"), prince ("Fürst"), the honorary title of duke ("Herzog"), and other relevant Austrian or foreign designations of status. For an overview of the case and the applicable legislation, see Besselink, *supra* note 64.

76. In *Ilonka Sayn-Wittgenstein*, the court stated,

The Austrian Government contends, in particular, that the provisions at issue in the main proceedings are intended to protect the constitutional identity of the Republic of Austria. The Law on the

[i]n that regard, it must be accepted that, in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law.⁷⁷

The ECJ expressly acknowledges that national identities under Article 4(2) TEU “include the status of the State as a Republic.”⁷⁸

However, the principle of national identity was used by the ECJ only as a supporting argument, since the reasoning of the court was mainly based on the existence of a legitimate restriction. According to the case law of the court “[a]n obstacle to the freedom of movement of persons can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions.”⁷⁹ In this specific case, the court held that the national provisions were not disproportionate to the legitimate objective.⁸⁰

E. National Constitutional Identity in AG's Opinions

The brief overview of the CJEU's decisions related to national constitutional identity would give a partial picture of the judicial understanding of the notion, if the opinions of the AG were not taken into account. AGs have showed, indeed, a strong in-

abolition of the nobility, even if it is not an element of the republican principle which underlies the Federal Constitutional Law, constitutes a fundamental decision in favour of the formal equality of treatment of all citizens before the law; no Austrian citizen may be singled out by additional elements of a name in the form of appellations pertaining to nobility, titles or ranks, the only function of which is to distinguish their bearer from other persons and which have no connection with his profession or education.

Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13718, ¶ 74.

77. *Id.* ¶ 83.

78. *Id.* ¶ 92.

79. *Id.* ¶ 81.

80. In the court's words, “the Austrian authorities responsible for civil status matters do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them.” *Id.* ¶ 93.

clination toward the notion of national identity.⁸¹ In the case *Spain v Eurojust*, a reference to the former Article 6(3) TEU and Article 22 of the CFREU is made with regard to linguistic diversity, being the latter “a specific expression constituting the plurality inherent in the European Union.”⁸² In *Marrosu and Sardino*, constitutional requirements were invoked by the Italian Government as the legal basis for a Member State (Italy, in that case), to prevent some unjustified fixed-term employment relationships from being converted into permanent contracts of indefinite duration. In his Opinion, the AG recognized that

national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific national features that could justify such a difference in treatment. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect.⁸³

An explicit reference to the constitutional understanding of national identity may be found in the Opinion of AG Kokott in the *UGT Rioja* case. First, it is recalled that under Article 6(3) EU, the EU must respect the national identities of its Member States. Second, AG Kokott interprets this clause to mean “that the Union cannot encroach on the constitutional order of a Member State, whether it is centralist or federal, and does not in principle have any influence on the division of competences within a Member State.”⁸⁴ Finally, a reference to the revision of that provision by the Treaty of Lisbon, with an explicit inten-

81. According to a well-informed author, “[t]he ‘objective defenders of law’ are indeed ‘identity lovers.’” See Laurence Burgorgue-Larsen, *A Huron at the Kirchberg Plateau or a Few Naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 284 (Alejandro Saiz Arnaiz & Carina Alcobarro Llivina eds., 2013). In his study, Burgorgue-Larsen gives evidence of the higher number of references to constitutional and national identity in the AGs’ opinions than the number of references in ECJ’s judgments. *Id.*

82. Opinion of Advocate General Maduro, Case C-160/03, *Spain v. Eurojust*, 2005 E.C.R. I-2101, ¶ 35.

83. Opinion of Advocate General Maduro, Case C-53/04, *Cristiano Marrosu v. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, 2005 E.C.R. I-7231, ¶ 40.

84. Joined Cases C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja v. Juntas Generales del Territorio Histórico de Vizcaya*, 2008 E.C.R. I-6747, para. 54.

tion of the Union to respect the constitutional structures of Member States, supports the constitutional understanding of the Identity Clause. The same AG referred to the former Article 6(3) in the *UTECA* case, with regard to “respect for and promotion of the diversity of its cultures.”⁸⁵

In 2008, AG Maduro delivered his much quoted opinion in the *Michaniki* case,⁸⁶ by far the most important judicial manifesto on the history and function of the Identity Clause. The case dealt with the Article 14, paragraph 9 of the Greek Constitution. This provision excluded tenderers involved in the media sector from participating in public procurement contracts, and provided a sort of presumption of incompatibility between media sector agents and public tenderers, with the purpose of ensuring equal treatment and transparency.⁸⁷ AG Maduro recognized that the “constitutional identity of the Member States can thus constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law.”⁸⁸ In fact, according to the AG’s view, the Greek legislation exceeded what was necessary so as to observe equal treatment and therefore did not satisfy the requirement of the principle of proportionality.

In June 2009, AG Colomber released the *Umweltanwalt von Kärnten* case,⁸⁹ which stated that the obligation to respect national identities plays a role in the identification of national authorities that are entitled to submit a reference for a preliminary ruling. According to Colomber’s opinion,

[i]f a Member State allocates judicial duties to quasi-judicial bodies and confirms that allocation when such a body is established, that is an expression of will closely linked to national identity and national constitutional autonomy. An expression the Court must respect. Accordingly, Article 234 EC provides

85. Opinion of Advocate General Kokott, Case C-222/07, *Unión de Televisiónes Comerciales Asociadas*, 2008 E.C.R. I-06747, ¶ 93.

86. Case C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis*, 2008 E.C.R. I-09999.

87. For further illustration of this case, see the case comment by Vasiliki Kosta, *European Court of Justice Case C-213/07, Michaniki AE v. Ethniko Simvoulío Radiotileorasis*, *Ipourgos Epikratias*, 5 EUR. CONST. L. REV. 501 (2009).

88. Opinion of Advocate General Maduro, Case C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis*, 2008 E.C.R. I-09999, ¶ 33.

89. Opinion of Advocate General Colomber, Case C-205/08, *Umweltanwalt von Kärnten v. Kärntner Landesregierung*, 2009 E.C.R. I-11525.

for a communication channel with national authorities which *constitutionally have the power to dispense justice*. In some Member States that role is entrusted exclusively to the judiciary while in others it is divided between a number of bodies, in a lawful configuration of institutional organisation which Community law does not question.⁹⁰

In 2012, AG Bot delivered an important opinion in the *Melloni* case,⁹¹ which was submitted to the Court with the first preliminary reference by the Spanish Constitutional Court.⁹² The case concerned a European arrest warrant issued by Italy against Melloni, an Italian citizen, who was sentenced *in absentia* before an Italian judge.⁹³ Melloni challenged the case before the Constitutional Court of Spain, arguing that the sentence issued in Italy encroached upon his right to a fair trial. AG Bot affirmed that in principle “[a] Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4(2) TEU,”⁹⁴ but the facts in the *Melloni* case did not meet this criterion. According to the AG’s view, “the participation of the defendant at his trial is not covered by the concept of the national identity of the Kingdom of Spain.”⁹⁵ AG Bot finally discerned between the protection of a fundamental right and the application of Article 4(2) TEU, namely the respect of national identity or, more specifically, the constitutional identity of a Member State.

Finally in January 2015, AG Cruz Villalón released his opinion on the *Gauweiler* case. The case derived its importance from the fact that it concerned the financial operations of the European Central Bank (ECB) and that the case had been promoted with the first reference for a preliminary ruling from

90. *Id.* ¶ 47.

91. Opinion of Advocate General Bot, Case C-399/11, Criminal Proceedings Against Stefano Melloni, ECLI:EU:C:2012:600 (E.C.J.).

92. A.T.S., June 9, 2011 (A.T.C., No. 86), <http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Auto.aspx?cod=23243> (Spain).

93. For further illustration of the case, see Leonard F. M. Besselink, *The Parameters of Constitutional Conflict After Melloni*, 39 EUR. L. REV. 531 (2014); Nik de Boer, *Addressing rights divergences under the Charter: Melloni*, 50 COMMON MKT. L. REV. 1083 (2013).

94. Opinion of Advocate General Case Bot, C-399/11, Criminal Proceedings Against Stefano Melloni, ECLI:EU:C:2012:600, para. 139 (E.C.J.).

95. *Id.* para. 140.

the *BVerfG*. In its decision, the German Tribunal had flatly rejected any bridging function between the German Basic Law and EU law of Article 4(2) TEU, noting that “the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 (2) sentence 1 TEU by the Court of Justice of the European Union.”⁹⁶ AG Cruz Villalón devoted a significant paragraph of his opinion to this point. He noted that it seems,

an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as “constitutional identity.” That is particularly the case if that “constitutional identity” is stated to be different from the “national identity” referred to in Article 4(2) TEU.⁹⁷

According to the AG’s opinion, this would lead EU law toward an unacceptable subordinate position and would moreover neglect the hard work done to reconcile EU law with the constitutional traditions common to the Member States. However, Cruz Villalón posited an alternative approach that would consist in “a clearly understood, open, attitude to EU law” and “should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States.”⁹⁸

F. Article 4(2) TEU: an “Incomplete Contract”

Despite the vast attention devoted to Article 4(2) TEU by legal scholarship, the notion of constitutional identity remains unclear. “Ambiguity” is one of the adjectives that is more frequently associated with the concept of national and constitutional identity.⁹⁹ This seems to stem from the fact that identity is considered “an essentially contested concept as there is no

96. BVerfG, 2 BvR 2728/13, Jan. 14, 2014, para 29, https://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813en.html.

97. Opinion of Advocate General Cruz, Case C-62/14, Gauweiler v. Deutscher Bundestag, ECLI:EC:C:2015:7, ¶ 59 (E.C.J.).

98. *Id.* para. 61.

99. See, e.g., CONSTANÇE GREWE & JOËL RIDEAU, L’IDENTITÉ CONSTITUTIONNELLE DES ÉTATS MEMBRES DE L’UNION EUROPÉENNE: FLASH BACK SUR LE COMING-OUT D’UN CONCEPT AMBIGU (2010); Dobbs, *supra* note 22, at 9; CLOOTS, *supra* note 6, at 137.

agreement over what it means or refers to.”¹⁰⁰ The controversial nature of identity challenges constitutional theorists, whose interests have been focused on reducing the ambiguity of the concept.¹⁰¹ One could argue, however, that a certain degree of indeterminacy of the notion may have a positive effect on the constitutional system. The EU represents an innovative model, and innovation always brings about risks and unpredictable developments. Against this background, loose concepts may play the role of a safety valve and avoid ultimate constitutional crashes. Such an experience is not uncommon in the constitutional developments of pluralistic polities. Ambiguity may be the optimal trade-off to neutralized precise disagreements, which are invisible in the formulation of general constitutional principles that are prone to different readings and understandings. This *praxis* is familiar in the postwar constitutional experience. Disagreements are settled through “incompletely theorized agreement,” to use the language of Cass Sunstein,¹⁰² or “irregular contracts,” using the language of transaction-cost economics. The use of these theoretical “tricks,” blunts, or at least delays in potential conflicts, insofar as the formulation of the agreed upon principles is broad enough to welcome different interpretations preferred by the negotiators.

Empirical evidence of an identity disagreement may be found in the analysis of the working documents of the European Convention, dealing with the provision set out in Article I-5 of the ill-fated CT. Indeed, the current formulation of Article 4(2) TEU is built on the same wording of the so-called Christophersen clause of the CT. Therefore the *travaux préparatoires* of the European Convention remains a meaningful source to discuss the above mentioned misunderstanding.¹⁰³

As a matter of fact, a cleavage emerged between the Member States’ representatives and the European Commission’s repre-

100. Michel Rosenfeld, *Constitutional Identity*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 756 (2013).

101. See generally, e.g., ROSENFELD, *supra* note 10; GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY (2010).

102. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

103. See Guastaferrero, *supra* note 25, at 271. It is noted that “expediency and self-interest seem to be what motivated the drafters” and that “politics rather than principle lay at the root of the identity clause’s incorporation into the Treaties.” CLOOTS, *supra* note 6, at 82–83.

representatives in the proceedings of the Working Group V, chaired by Mr. Hennig Christophersen.¹⁰⁴ The Working Group mandate dealt with a clearer delimitation of competence between the EU and the Member States, but formally covered the narrower issue of a better definition and regulation of complementary competences in the CT.¹⁰⁵ Among the members of the working group, both Members States' and the Commission's representatives shared one common concern, namely the necessity to contain EU competence creep. The means used to address this shared concern were nonetheless subject to a deep disagreement. The Member States' main worry was the "delimitation of the EU scope of action vis-à-vis those of the Member States."¹⁰⁶ Some of the proposals of the Member States' representatives drew on the *Lamossoure Report*¹⁰⁷ of the European Parliament, where the problem of the distribution of competences between the EU and Member States had been addressed through a tripartite classification: a) competences of the EU, b) exclusive competence of the Member States, and c) EU's and Member States' shared competences (concurrent and complementary).

In the Member States' representative views, the delimitation of the EU competence was the main concern of Working Group V.¹⁰⁸ Conversely, the Commission representatives focused

104. The Working Group V of the European Convention worked on "complementary competencies." *Revised Draft Report from the Secretariat to Working Group V*, Working Doc. No. 30 REV 1, at 1 (Oct. 25, 2002), <http://european-convention.europa.eu/docs/wd5/4044.pdf>. The tight connection between this issue and national identities of the Member States is already stressed in the introductory section of the Working Group's Report. *Id.* at 2 ("Complementary competence in the TEC is a part of the general system of Union competence and covers national policy areas of significance for the identity of the Member States.").

105. See *Guideline Paper for Discussion of Areas of Assisting Measures from the Secretariat to Working Group V*, Working Doc. No. 29 (Oct. 2, 2002), <http://european-convention.europa.eu/docs/wd5/3354.pdf>.

106. Guastafarro, *supra* note 25, at 18.

107. Alain Lamassoure (Rapporteur), Comm. on Constitutional Affairs, *Report on the Division of Competences Between the EU and the Member States* (Apr. 24, 2002), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2002-0133+0+DOC+PDF+V0//EN>.

108. See *Notes of Member States' Representatives Among the Documents of Working Group V of the European Convention*, EUROPEANCONVENTION.EUROPA.EU (July 10, 2011) EN&Content=WGV&splang=. See, in particular, *Working Group V, Note from Michael Frendo on Classification of Competences and Interpretation by the*

much more on other aspects, namely the specification of the scale of intervention and the exercise of EU action.¹⁰⁹ A catalogue of Member States' exclusive competences, possibly bearing the core of Member States' constitutional identity in the *Lissabon-Urteil* manner, was therefore incompatible with the Commission's view. According to the latter, a classification of competences was far too rigid and simplistic.¹¹⁰

The Member States interpreted the Christophersen clause as a sort of competence clause protecting Member States' powers under the guise of respect for national identities, exactly as the Commission was determined not to. The terms of the disagreement were rather clear on the position of the Commission, where it clarified that an Identity Clause ought "not lead to the limitation of the scope and exercise of the competencies allocated to the Union to take account of the specific requirements of each Member State, for this would jeopardize the distribution of competencies established by the Treaty."¹¹¹

On the other side of the fence, Member States were reluctant to advocate for the introduction of national exclusive competences because this could have implied that the sovereign au-

ECJ (Working Group 5 of the European Union Convention, Working Doc. 8, July 15, 2002), <http://european-convention.europa.eu/docs/wd5/1898.pdf>; Peter Altmaier, *Note on "the Division of Competencies Between the Union and the Member States"* (Working Group 5 of the European Union Convention, Working Doc. 9, July 15, 2002), <http://european-convention.europa.eu/docs/wd5/1909.pdf>.

109. See *Note from the European Commission on "Delimitation of Powers: A Matter Scale of Intervention"* (Working Group 5 of the European Union Convention, Working Doc. 4, July 10, 2002), <http://european-convention.europa.eu/docs/wd5/1722.pdf>; *Note on "The European Union's Complementary Powers: Scope and Limits"* (Working Group 5 of the Eur. Convention, Working Doc. No. 7, July 29, 2002), <http://european-convention.europa.eu/docs/wd5/1887.pdf>; David Heathcoat-Amory, *Note on the Convention* (Working Group 5 of the Eur. Convention, Working Doc. No. 14, July 10, 2002), <http://european-convention.europa.eu/docs/wd5/1975.pdf>.

110. It was noted that "in the Commission's view – much more defensive of the *status quo* – there was no space for any explicit or more nuanced enumeration of Member States' reserved powers – what the 'Christophersen clause' actually represented for the Member States' Representative." For a broad analysis of the *travaux préparatoires* regarding the Identity Clause, see Guastaferrero, *supra* note 25, at 24.

111. Paolo Ponzano, Commission's Representative, *Combining Clarity and Flexibility in the European Union's System of Competencies* (Working Group V European Convention, Working Paper No. 5, Sept. 30, 2002), <http://european-convention.europa.eu/docs/wd5/3134.pdf>.

thority allocating competences was the Union. This approach would have been inconsistent with the zealously preserved idea of the Member States as masters of the Treaties and the principal of conferral.

In summation, the Commission refused the idea of the Identity Clause as a “counter-limits’ clause” in the sense of the *BVerfG*’s Lissabon-doctrine; the Member States’ representative interpreted the clause as a sort of list of Member States’ reserved powers, even if they were reluctant to the idea of introducing such an enumeration of powers in the CT.¹¹²

The final wording of the Christophersen clause (now Article 4(2) TEU, with the addition of a final sentence) did not draw any list of Member States’ exclusive competences, and avoided to specify that its application was limited to the cases of EU competences exercise.¹¹³ Finally, the drafting of the “Identity Clause” met the Commission’s and Member States’ representative expectations, although for very different reasons.

In this context, it is hardly surprising that the interpretation of Article 4(2) TEU is controversial. This controversy is not necessarily linked to bad drafting of the Treaty. Ambiguity may not be an unintended character of the national constitutional Identity Clause.¹¹⁴ Article 4(2) TEU possesses some elements that may answer the question of sovereignty in the EU and in the Member States, but not enough to determine an ultimate answer. When the Treaty drafters tried to give such an answer, they failed. Even in the ill-fated CT, a proper supremacy clause was missing—if compared with Article 6 of the U.S. Constitu-

112. Guastafarro has noted that “the idea of enumerating Member States’ exclusive powers” was finally shared by the Member States’ and the EU commission’s representatives “although resting on different reasons.” Guastafarro, *supra* note 25, at 27.

113. In an earlier stage of drafting, the Christophersen clause had an incipit that stated “*when exercising its competencies*, the Union shall respect the national identities.” See Note by Peter Altmaier on “*The Division of Competencies Between the Union and the Member States*” (revised version) to Working Group V, Working Doc. No. 20 (Sept. 4, 2002), <http://european-convention.europa.eu/docs/wd5/2341.pdf>; Guastafarro, *supra* note 25, at 283. However, in subsequent drafting, the incipit was removed.

114. One could say the uncertainty of the concept of national identity constitutes its most striking aspect. JUDT, *supra* note 2, at 637 (quoting Milan Kundera, who said of the existence of the Czech nation, “The existence of Czech nation was never a certainty, and precisely this uncertainty constitutes its most striking aspect.”).

tion—and after Lisbon the only point the parties managed to agree upon was an almost illegible declaration, adopting an opinion of the Council’s legal service.¹¹⁵

G. In Search of a New Canon: Constitutional Identity out of the Courts

The overview of the CJEU’s case law related to Article 4(2)—and to Article 6(3)/F(1) TEU before Lisbon—shows an enormous discrepancy between the understanding of national identity “in the books” and national constitutional identity in action. Despite the “excess of literature on constitutional identity,”¹¹⁶ the CJEU rarely referred to the Identity Clause.

Nonetheless there are good reasons to welcome the CJEU’s reluctance to use the identity argument, being “left between a rock and a hard place in relation to the scope of the provision.”¹¹⁷ Under a narrow interpretation of the Identity Clause, the CJEU exposes EU law to the risk of rejection of the principle of primacy from the Member States’ constitutional and Supreme Courts. However a broader interpretation of the clause that welcomes the national constitutional courts’ counterlimits doctrines, would consist of a strong concession to Member States’ sovereignty claims, equally undermining the CJEU’s understanding of the principle of primacy.

This is why the Identity Clause works much better if it remains a dead letter of the Treaties and goes unused, at least in courts. As a judicial “nuclear weapon,” a concrete application of

115. The Declaration adopted the Council’s legal service opinion, which substantially referred to the CJEU’s settled case law:

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 6/644) 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.

Opinion of the Legal Service on the Primacy of EC Law, E.C. Doc. No. 11197/07 (June 22, 2007), http://europa.eu/rapid/press-release_DOC-07-3_en.doc.

116. Burgorgue-Larsen, *supra* note 81, at 275.

117. Dobbs, *supra* note 22, at 333–34.

the national constitutional identity argument would probably trigger violent reactions from CJEU and/or Member States. The CJEU would react if the notion is used by the Member States' constitutional courts to protect the national legal order from European constitutional spillovers. While the Member States would react, if the notion of Member States' national identity is used or misused by the CJEU.

Despite the risks of a judicial nuclear "cold-war" between the CJEU and the Member States' constitutional and Supreme Courts, for a long time the most reputable legal literature placed great confidence in the miraculous effect of judicial dialogue.¹¹⁸ The Europeanization of counterlimits under Article 4(2) TEU was supposed to defuse any risk of nuclear war between courts.

Recent developments of the judicial interactions around the notion of identity present quite a different reality. The *BVerfG* (a sort of commander-in-chief of the national constitutional courts' army in this respect) first adopted a swinging approach between sovereigntist temptations (*Lissabon-Urteil*) and *Euro-parechtsfreundlichkeit* (openness towards European law) (*Mangold-Urteil*).¹¹⁹ Then, after a long lasting reluctance to en-

118. On the global (and particularly European) judicial dialogue see, generally and among many others, Francis G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 TEX. INT'L L. J. 547 (2003); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (1999); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GA. L.J. 487 (2004); Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, 6 EUR. CONST. L. REV. 175 (2010); ANNE-MARIE SLAUGHTER, ALEC STONE SWEET & J. H. H. WEILER, *THE EUROPEAN COURTS AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE* (1998); GIUSEPPE MARTINICO & ORESTE POLLICINO, *THE INTERACTION BETWEEN EUROPE'S LEGAL SYSTEMS: JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS* (2012).

119. On these developments, see Theodore Konstadinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order Within the Framework of National Constitutional Settlement*, 13 CAMBRIDGE Y.B. EUR. LEGAL STUD. 195 (2012). Mr. Konstadinides's considerations on the use of constitutional identity "as a sword" are largely borne out by the successive case law of the *BVerfG*, particularly with regard to the OMT case, *BVerfG*, 2 BvR 2728/13, Jan. 14, 2014, http://www.bverfg.de/e/rs20140114_2bvr272813en.html.

gage directly with the CJEU, the *BVerfG* finally submitted its first preliminary reference question to the CJEU in the Outright Monetary Transactions (“OMT”) case in 2012.¹²⁰ The OMT case concerned the decision of the ECB to establish a framework for the purchase of the secondary market of a potentially unlimited amount of government bonds from (only) certain Member States.¹²¹ When the *BVerfG* submitted its reference, the program had only been announced, and still has not been put into effect. Nonetheless, the sole announcement of the Program triggered two remarkable reactions: it calmed down the financial markets and drew the anger of the *BVerfG*.

The Federal Constitutional Tribunal in Karlsruhe heard four separate *Verfassungsbeschwerde* (individual constitutional complaints)¹²² and a complaint through *Organstreitverfahren*. The complaints contested, above all, that the nonmonetary but economic nature of the Program, was forbidden by Articles 119,¹²³ 123,¹²⁴ 127, and 282¹²⁵ Treaty on the Functioning of the

120. *BVerfG*, 2 BvR 2728/13, Jan. 14, 2014, http://www.bverfg.de/e/rs20140114_2bvr272813en.html. Regarding the OMT reference, see Daniela Caruso, *Lost at Sea*, 15 GER. L.J. 1197, 1201–02 (2014); Mattias Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court’s OMT Reference*, 10 EUR. CONST. L. REV. 263 (2014).

121. Press Release, European Cent. Bank, Tech Features of Outright Monetary Transactions (Sept. 6, 2012), http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

122. The constitutional complaints were on an individual basis, provided that the action was joined by 37,000 German citizens. See *BVerfG*, 2, BvR 1390/12, Mar. 18, 2014, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/03/rs20140318_2bvr139012.html. For a related comment, see Wendel, *supra* note 120, at 267.

123. Consolidated Version of the Treaty on the Functioning of the European Union art. 119, 2012 O.J. (C 326) 47 [hereinafter TFEU]. Article 119(1) and (2) TFEU addresses the much debated issue of the activities that the Union and the Member States may adopt through economic or monetary policies:

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

European Union (TFEU). In its decision to submit the reference to the CJEU, the *BVerfG* expressly assumed that the decision of the ECB was *ultra vires* and infringed the constitutional identity of Germany. Nonetheless, instead of directly declaring the decision *ultra vires* and/or violating German constitutional identity, the German Federal Tribunal submitted a reference for a preliminary ruling to the CJEU. Ultimately, the ECJ opted for a largely diplomatic decision. The court considered the program compatible with EU law but filled its motivation with reassurances and reasons for the *BVerfG* to welcome the judgment as a victory of the German Federal Constitutional Court's approach.

Regarding to the protection of the German constitutional identity, the *BVerfG*'s approach was far from cooperative. On the contrary, in its reference, the German Tribunal noted that "the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Article 4(2) sentence 1 TEU by the Court of Justice of the European

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

Id. art. 119(1), (2).

124. Article 123 aims to encourage the Member States to follow a sound budgetary policy, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets:

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 favour 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.

TFEU art. 123

125. TFEU arts. 127, 282 ("[T]he primary objective of the European System of Central Banks shall be to maintain price stability.").

Union.”¹²⁶ The point did not go unnoticed by the AG, who objected that such interpretation of national constitutional identity as an absolute reservation would put EU law in a subordinate position.¹²⁷ Unlike the AG, the ECJ preferred not to address this point in its decision. At the time of writing, the decision is pending again before the German *BVerfG*, which in principle might still declare the program unconstitutional as being a violation of the German constitutional identity. The effort made by the ECJ to defuse this judicial crisis makes this scenario quite implausible, but nonetheless the OMT case shows that the so-called judicial dialogue “in action” may not have the hoped for results when constitutional identity is at stake. Whatever the follow-up of the ECJ’s decision, the OMT case reveals all the dangers and shortcomings of the judicial dialogue. A dialogue, when identity issues and vital interests of a Member State are at stake, that seems likely to turn into a deaf ultimatum.

II. CONSTITUTIONAL IDENTITY AND DIFFERENTIATED INTEGRATION

The previously summarized judicial developments suggest that blind faith in judicial dialogue may fall short of providing viable solutions when identity-related issues are at stake. Moreover, this is not the only reason to dismiss the myth of the miraculous effect of judicial dialogue. Another reason stems from the problem of framing constitutional identity. In fact, an orthodox conception of this controversial concept usually focuses on broadly shared principles such as democracy, rule of law,

126. The *acquis* of the 1985 Schengen Treaty on the gradual abolition of common border checks was integrated in the EU framework by Protocol B to the Treaty of Amsterdam, *supra* note 13, signed in 1997 and entered into force in 1999. *BVerfG*, 2 BvR 2728/13, Jan. 14, 2014, para. 29.

127. AG Cruz Villalón observed that it seemed

an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as “constitutional identity.” That is particularly the case if that “constitutional identity” is stated to be different from the “national identity” referred to in Article 4(2) TEU.

Opinion of Advocate General Villalón, Case C-62/14, *Gauweiler v. Deutscher Bundestag*, ECLI:EU:C:2015:400, para. 59.

and fundamental rights. Chances for a constitutional clash are scarce and lie more on interpretative rather than substantive grounds. Indeed, it is rather unlikely that the development of the European integration will move in the opposite direction of the basic principles of constitutionalism. In many cases, the real issue with constitutional identity-related questions is with the outcomes of a balancing process. It is extremely implausible, to put it mildly, that an EU regulation shall suddenly declare elections illegal, entrust all jurisdictional competences to Governments, or enact other similar infringements of basic principles of constitutionalism.

Those principles are deeply rooted and widely shared by all Member States, and with regard to those principles, the European orchestra of EU institutions and Member States can count on a symphonic musical score. Dissonances that may arise due to different readings of those basic constitutional principles would be linked to musical execution rather than the composition of the musical score.

A different case may arise when certain elements of a Member State's constitutional identity are part of a particular legal tradition of that Member State. In this respect, the emergence of legal conflicts is much more plausible. Under these circumstances no symphony can be played, given the substantial "cacophony"¹²⁸ of the musical score. Such a perspective would take into account those elements of the constitutional identity that distinguish a particular constitution from another,¹²⁹ focusing on a heterodox conception of the notion of national constitutional identity. This notion emphasizes non-shared elements of the Member States' constitutional identities, and as an added value, opens the door to different interpretations, rather than adding a supplementary analysis to the massive amount of scholarly investigation on the judicial understanding of the Identity Clause. Empirical evidence demonstrates that, in this respect, differentiated integration has already played a role. As a result, Part II of this article argues that the current state of

128. The image of a "danger of constitutional cacophony in relation to national identity" is drawn from von Bogdandy & Schill, *supra* note 18, at 1435.

129. For an analysis of this constitutional conception of the identity concept, in opposition to the concept of the identity of the people, see José Luis Martí, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 17 (2013).

European integration calls for a more central role for differentiated integration and that differentiated integration can serve as an efficient instrument of preventive neutralization of ultimate conflicts between EU law and particular (non-shared) elements of national constitutional identity.

A. An Analytical Approach: Constitutional Differentiated Integration in the EU

The accommodation of increasingly variegated national preferences in the European project is far from novel. On the contrary, differentiated integration is a concept that was not alien to the very first steps of European integration.¹³⁰ The Treaty of Rome of 1957 was not a flinty body of norms as it was equally applicable in every corner of the EEC. It admitted the perpetuation of preexisting forms of regional cooperation among the Benelux countries, acknowledging a sort of primitive form of enhanced cooperation.¹³¹ Part Four of the Treaty was devoted to the “Association of the Overseas Countries and Territories,” recognizing a special status and a limited application of the norms of the treaties to the territories having special relations with Belgium, France, Italy, the Netherlands, and the United Kingdom.¹³² Special provisions were provided to compensate for the economic disadvantages caused by the division of Germany,¹³³ and transitional *ad hoc* arrangements and derogations

130. See Dominik Hanf, *Flexibility Clauses in the Founding Treaties, from Rome to Nice*, in *THE MANY FACES OF DIFFERENTIATION IN EU LAW* 3 (2001).

131. See Treaty Establishing the European Economic Community art. 233, Mar. 25 1957, 298 U.N.T.S. 3, at 91 [hereinafter EEC Treaty] (“The provisions of this Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty.”). Similarly, a Nordic regional cooperation agreement between Denmark, Finland, Iceland, Norway, and Sweden survived and was explicitly mentioned in the Accession Treaties of the States that successively joined the Union. See Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland, and the Kingdom of Sweden, *Joint Declaration on Nordic Cooperation*, Aug. 29, 1994, 1994 O.J. (C 241) 9, 392.

132. Hanf, *supra* note 130, at 65–67, 118–99.

133. Article 82 of the Treaty establishing the European Economic Community in 1957 stated that:

The provisions of this Title shall not form an obstacle to the application of measures taken in the Federal Republic of Germany to the

were commonly introduced in the Accession Treaties of new Member States.¹³⁴

Since the signature of the first European Treaties, things have changed significantly. From a small group of relatively homogeneous Member States, the European integration project has advanced considerably. The six founding Member States formed a small and homogeneous club in postwar Europe: the gap in GDP per capita between richer and poorer economies was much smaller in 1951 than today.¹³⁵ The political homogeneity is also incomparable, considering that all six foreign ministers who signed the Treaty of the European Steel and Coal Community in 1951 were members of their respective Christian Democratic Parties.¹³⁶

A growing internal heterogeneity in the EU is well captured by a comparison with the United States. Regional inequality is today much greater in the EU than in the United States.¹³⁷ The average per capita income is immensely more disproportionate

extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division.

EEC Treaty, *supra* note 131, art. 82. Article 92(2) stated:

The following shall be compatible with the common market: . . . c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division

Id. art. 92(2).

134. More than half of the protocols on the Treaty of Rome provided derogations. The same was true for most of the Accession's treaties. *See* Hanf, *supra* note 130.

135. In 2007, when Romania accessed the EU, German GDP *per capita* was four times the Romanian GDP. In 1951, the lowest GDP *per capita* amounted to more than half of the biggest GDP accounted for, despite the very different impact of war on national economies. As a matter of fact, this gap was even smaller in 1957, when the Treaty of Rome was signed by the same six Member States. Data is obtained from Jutta Bolt & Jan Luiten Zanden, THE MADDISON PROJECT (2013), The Maddison-Project, <http://www.ggd.net/maddison/maddison-project/home.htm> (last visited Jan. 15, 2016).

136. JUDT, *supra* note 2, at 157.

137. GIANDOMENICO MAJONE, RETHINKING THE UNION OF EUROPE POST CRISIS: HAS INTEGRATION GONE TOO FAR? 39 (2014).

between Luxembourg and Romania than between the States of New York and Mississippi. The ratio amount at more than ten times in the first case and less than two times in the latter.¹³⁸ The enlargement of the EU certainly had an important impact on this picture, but a growing diversity was already a settled trend before 2004.¹³⁹ In fact, theories of integration, disintegration, and differentiated integration trace back to the 1970s.¹⁴⁰

138. The comparison of the GDP *per capita* in Luxembourg and Romania is striking but may be dismissed as inaccurate, as long as it considers extreme examples. Nonetheless, it is remarkable that Romania's GDP *per capita* amounts to less than half of the GDP per capita in no less than fifteen Member States. Similar outcomes would result if GDP *per capita* of Bulgaria, Hungary, or Croatia were used for the comparison. *Regional Data*, BUREAU ECON. ANALYSIS, http://www.bea.gov/iTable/index_regional.cfm (last updated June 10, 2015); *Gross Domestic Product at Market Prices*, STAT. OFF. EUR. COMMUNITIES, <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tec00001> (last visited Oct. 21, 2015).

139. To put it in another way,

[t]he levels of economic development are very different from one Member State to another. Taking into account the figures available for the year 2009 and with 100 as the index average for the EU-27 GDP per capita, seven Member States were below 65% of this average and two of them were around 45% of this average. . . . As a comparison, for the USA and for the same year 2009, no State was less than 70% of the average national index.

The analysis is based on EUROSTAT data, see Jean-Claude Piris, *It is Time for the Euro Area to Develop Further Closer Cooperation Among its Members* 31 (Jean Monnet Ctr. for Int'l & Regional Econ. Law & Justice, Working Paper No. 05/11) (2011), <http://jeanmonnetprogram.org/wp-content/uploads/2014/12/110501.pdf>. This growing heterogeneity does not emerge only from a comparison with the United States, but also from a comparison between the economic picture of Europe at the very first steps of the integration project with today's picture. In 2007, when Romania accessed the EU, German GDP *per capita* was four times the Romanian GDP. Bolt & Zanden, *supra* note 135. In 1951, the lowest GDP *per capita* amounted to more than half of the biggest GDP *per capita*, despite the very different impact of the war on national economies. *Id.* As a matter of fact, this gap was even smaller in 1957, when the Treaty of Rome was signed by the same six Member States. *Id.*

140. This debate has been characterized by "an excess of terminology, which can give even the most experienced specialist of European integration a severe case of semantic indigestion." See Alexander C.G. Stubb, *A Categorization of Differentiated Integration*, 34 J. COMMON MKT. STUD. 283, 283 (1996). This article will refer to "differentiated integration" in the meaning of a term used to "denote variations in the application of European policies or varia-

One of the first models of differentiated integration emerged from a series of articles published in 1973 by Ralph Dahrendorf, European Commissioner at that time.¹⁴¹ His proposal of “*integration à la carte*” was based on the idea that no Member State must participate in everything, an idea which has occasionally recurred in more recent years.

Only a few years later, in 1975, Tindemans, the European federalist and Belgium Prime Minister, elaborated on a “multi-speed Europe.” His report on the future of European integration considered differences among the (at that time) very large nine Member States.¹⁴² Therefore, Tindemans held that whatever European target would be set in the future, different Member States would never be able to reach them at the same speed.

tions in the level and intensity of participation in European policy regimes,” as specified by Helen Wallace, *Differentiated Integration*, in *ENCYCLOPEDIA OF THE EUROPEAN UNION* 137–40 (D. Dinan ed., 1998). For a thorough analysis of differentiated integration until 1996 and a very complete categorization, see Stubb, *supra* note 140. For a more updated analysis, see generally WHICH EUROPE?: THE POLITICS OF DIFFERENTIATED INTEGRATION (Kenneth Dyson & Angelos Sepos eds., 2010).

141. The articles were published in “Die Zeit” under the pseudonym “Wieland Europa.” Dahrendorf’s idea of a *Europe à la carte* is summarized in his “Jean Monnet Lecture” held at the European University Institute in Florence, on November 26, 1979. Many parts of the lecture are not only very inspiring, but in hindsight, prophetic:

I have often been struck by the prevailing view in Community circles that the worst can happen is any movement towards what is called *Europe à la carte*. This is not only somewhat odd for someone who likes to make his own choices, but also illustrates that strange puritanism, not say masochism which underlies much of Community action: Europe has to hurt in order to be good.

Ralf Dahrendorf, Professor and Director of the London School of Economics, *Third Jean Monnet Lecture at the European University Institute in Florence: A Third Europe?* 19–20 (Nov. 26, 1979), <http://aei.pitt.edu/11346/2/11346.pdf>.

142. *Report by Mr. Leo Tindemans to the European Council*, *BULLETIN OF THE EUROPEAN COMMUNITIES* Supplement 1/76 (1976), http://bookshop.europa.eu/en/european-union-pbCBNF76001/downloads/CB-NF-76-001-EN-C/CB/NF76001ENC_001.pdf;pgid=Iq1Ekni0.11SR00OK4MycO9B000sDOBx6S2;sid=w_fvM0k3l1HvNx0PyZNxlCsSYTSTY-v0v6c=?FileName=CBNF76001ENC_001.pdf&SKU=CBNF76001ENC_PDF&CatalogueNumber=CB-NF-76-001-EN-C.

The further “concentric circles” model is based on the idea of a highly integrated European hard core and raised some interest since 1994, when France’s prime minister referred to it,¹⁴³ followed by the “*Schäuble-Lamers-Paper*,”¹⁴⁴ which has been adopted by the Christian Democratic Union / Christian Social Union Parliamentary Group in the German Parliament and referred to a *Kerneuropa*. Aspects of this approach resurfaced in 2000 in the avant-garde project favored by Joschka Fischer,¹⁴⁵ whose challenge was accepted by Delors¹⁴⁶ and Chirac¹⁴⁷ and relaunched by Chirac and Schröder some years later.¹⁴⁸

Another possible response to a growing heterogeneity of Europe is built on a European declination of James Buchanan’s theory of clubs.¹⁴⁹ Majone’s Europe as a “club of clubs”¹⁵⁰ has been theorized as a model of differentiated integration, which aims at reducing the so-called costs of uniformity through a variety of institutional arrangements.¹⁵¹ One of the most relevant implications of the application of this model would be the un-

143. See Interview of Edouard Balladur, French Prime Minister by *Le Figaro* (Aug. 30, 1994) (on file with author) (setting forth this idea for the first time).

144. See Wolfgang Schäuble & Karl Lamers, *Reflections on European Policy*, in BUILDING EUROPEAN UNION 255, 255–63 (Trevor Solomon & William Nicoll eds., 1997).

145. In a famous speech held in Berlin in 2000, Fischer reflected, among other things, on a “centre of gravity” for Europe. Joschka Fischer, Speech at the Humboldt University in Berlin (May 12, 2000), in FROM CONFEDERACY TO FEDERATION: THOUGHTS ON THE FINALITY OF EUROPEAN INTEGRATION 13–14 (2000).

146. Jacques Delors, *Europe Needs an Avant-Garde, But . . .*, CTR. FOR EUR. REFORM (Oct. 2, 2000), <http://www.cer.org.uk/publications/archive/bulletin-article/2000/europe-needs-avant-garde>.

147. Jacques Chirac, Address to the Bundestag: Our Europe (June 27, 2000), *translation* at http://www.cvce.eu/en/obj/address_given_by_jacques_chirac_to_the_bundesta_g_entitled_our_europe_berlin_27_june_2000-en-6a747c46-88db-47ec-bc8c-55c8b161f4dc.html.

148. French President Chirac and German Chancellor Schröder referred to the concept of a “core Europe” as a threat to move forward if the talks on the draft of the CT would not be completed by the end of 2004. See WALTER VAN GERVEN, *THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES* 6 (2005).

149. See generally James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1 (1965).

150. MAJONE, *supra* note 137, at 113–17, 316–22.

151. See *id.* at 318.

derstanding of the European Monetary Union as a “club good” rather than a “collective good.” In other words, the Euro should be transformed from a collective good imposed to all European Members to a good from whose benefits and burdens the Member of the European club may be excluded or may choose to be excluded.

Lately the possibility (and desirability) of a concentric development of the EU was envisaged in the proposal of a “Euro Area avant-garde” group.¹⁵² This de facto group is already imposing itself on the developments of the Euro crisis. The idea includes both elements of the concentric circles model and the temporariness of the multispeed Europe model.

Whichever model of differentiated integration one considers, a common denominator deserves attention: all the above mentioned examples (and many other models that have been theorized) are based on the assumption that flexibility is needed in an ever larger and more socioeconomically heterogeneous union. The prescribed therapies may vary greatly, but there is a broad agreement on the diagnosis: since Member States are strikingly diverse in terms of socioeconomic conditions and political preferences, the one-size-fits-all model of European integration is too strict and largely inadequate. In this picture the *legal* and *constitutional* diversity of the twenty-eight Member States is hardly considered, and the diversity of constitutional identities rarely appears as a possible source of differentiated integration.

Comparing 1951 or 1957 Europe with 2015 Europe, the differences are not limited to the economic or political dimension. The gap also grew also in constitutional terms, in particular with regard to the unamendable core of Constitutions. The constitutional cultures of the six founding countries experienced an unprecedented development, and the Union progressively welcomed an increasing number of new members. New members whose constitutional traditions have very different roots if compared with the ones of the founding countries, or whose constitutional texts belong to very different constitutional generations. A growing constitutional variety has been registered on two fronts. Under a static horizontal perspective, it is undeniable that the legal tradition of the six founding Member States expressed more homogeneous legal cultures, when com-

152. See Piris, *supra* note 139, at 23.

pared with the Member States that joined the Union in successive enlargements. When the latest enlargements of the EU occurred in 2004 and 2007, the EU gradually embraced the common law traditions of the United Kingdom, the Nordic models of social State, and many postsocialist countries. Moreover, this diversity has to be combined with a vertical stratification of constitutional diversity. After World War II, a “flowering time”¹⁵³ began, in which constitutional clauses provided substantive limitations to constitutional amendment power. Although both the idea and problem of limiting constitutional amendment power was not new, it took a more centralized role in postwar constitutional developments. In many cases the “counter-limits” doctrines were founded upon the achievements of these new developments in the field of the limits to constitutional amendment power.¹⁵⁴ Against this background, “constitutional identity” has gradually developed as a unitary category that encompasses both limits to constitutional amendments and counterlimits. This experience developed by means of explicit constitutional adjustments in very few countries. This was the case of Europa-Artikel in the German Basic Law,¹⁵⁵ which was introduced by means of a constitutional amendment in 1992 and provides an explicit referral to the limits of constitutional amendment power.¹⁵⁶ Essentially, according to these combined provisions, the German Basic Law opposed the same ultimate limits it opposed to the constitutional amendment power to EU law. In several other Countries, the challenge to unconditional normative freedom of constituted powers developed in the absence of Eternity Clauses.¹⁵⁷ In the silence of the constitution, constitutional limits to the constitutional amend-

153. For an overview of the time of flowering Eternity Clauses (the A. refers to a “*Blütezeit*” in the original text), see KLAUS STERN, *DAS STAATSRRECHT DER BUNDESREPUBLIK DEUTSCHLAND* BD. III/2. 1094 (1st ed. 1994).

154. See generally Patricia Popelier, “*Europe Clauses*” and *Constitutional Strategies in the Face of Multi-Level Governance*, 21 *MAASTRICHT J. EUR. COMP. L.* 300 (2014).

155. GRUNDGESETZ [GG] [BASIC LAW] art. 23, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html. (Ger.).

156. GRUNDGESETZ [GG] [BASIC LAW] ART. 79.3.

157. On these developments, see, for example, Yaniv Roznai, *Towards a Theory of Unamendability* (N.Y.U Sch. of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 15-12, 2015), <http://papers.ssrn.com/abstract=2569292>.

ment power have been an interpretative outcome of many constitutional courts' case law.

The combination of these horizontal and vertical developments enhanced both the constitutional diversity and the constitutional rigidity of the untouchable cores of the Member States' constitutions. Alongside socioeconomic factors and political preferences, these constitutional developments deserve consideration in the framework of differentiated integration.

B. Opt-outs, Derogations, and Legal Guarantees: a Europe of Bits and Pieces?

It is against this background that differentiated integration may be considered as a viable means of accommodation of non-shared features of Member States' national constitutional identities. Empirical evidence of the application of differentiated integration with this purpose may be drawn from the European experience and some pragmatic development in the last twenty years. After decades of academic speculation and political debate, the Treaties of Maastricht and Amsterdam represented a significant turning point in the practice of differentiated integration in the EU. Indeed, enhanced cooperation was incorporated in the structure of the treaties. Here, this article not only refers to the proper institute of closer and enhanced cooperation (firstly regulated in Article K.12 of the Treaty of Amsterdam, later amended by the Nice and Lisbon Treaties), but to a broader concept. This includes "in-built" forms of enhanced cooperation: (in)famously the Euro and the Schengen Area.

These forms of enhanced cooperation started with the participation of a limited number of Member States, but were aimed at including all EU-Member States.¹⁵⁸ Legally speaking, decisions adopted in the Schengen¹⁵⁹ and euro areas¹⁶⁰ are part of

158. For a brief overview of these developments, see Carlo Maria Cantore, *We're One, but We're Not the Same: Enhanced Cooperation and the Tension Between Unity and Asymmetry in the EU*, 3 PERSP. ON FEDERALISM 1, 1–21 (2011).

159. The *acquis* of the 1985 Schengen Treaty on the gradual abolition of common border checks was integrated into the EU framework by Protocol B to the Treaty of Amsterdam, which was signed in 1997 and entered into force in 1999. See Protocol Integrating the Schengen *Acquis* into the Framework of the European Union, Treaty of Amsterdam, *supra* note 13, at 93.

the *acquis communautaire*. The Schengen cooperation aims at removing the checks on persons at internal borders and granting access to the Schengen Information System. In 1985, the Schengen Area was founded outside of the European Community by means of an international agreement by five out of the ten EU-Member States *ratione temporis*. It was incorporated in the EU Treaties through the Amsterdam Treaty in 1999 and has been an “in-built” mechanism of enhanced cooperation ever since.¹⁶¹ Twenty-two out of the twenty-eight EU-Member States have thus far joined. Four out of the six EU-Member States, which are not part of the Schengen Area—Bulgaria, Croatia, Cyprus, and Romania—are legally bound and wish to join the area. Eventually, only Ireland and the United Kingdom will maintain opt-outs.¹⁶²

By contrast, the first steps towards a euro area were taken within the framework of EU institutions. The Euro was meant to become the common currency of the EU. The reluctance of some Member States made things more complicated and, as widely known, Denmark and the United Kingdom obtained a permanent opt-out through the Treaty of Maastricht, whilst Sweden obtained a *de facto* opt-out.¹⁶³ All other Member States are subject to the general principle that the Euro is the single currency of all EU-Member States, although the participation

160. According to the Treaties, all Member States are obliged to adopt the Euro. Only Member States benefiting from an opt-out (the United Kingdom and Denmark) are excluded. Sweden benefits from a *de facto* opt-out. Member States that joined the EU after the establishment of Economic and Monetary Union (“EMU”), these Member States have committed to joining the euro area as soon as they fulfill the entry conditions. When this is the case, the “derogation” is “abrogated” by a decision of the Council, and the Member State concerned adopts the euro.

161. On the absorption of the Schengen agreement into the Maastricht Treaty and its meaning in terms of a policy of differentiated integration in the EU, see Emek M. Uçarer, *The Area of Freedom, Security and Justice*, in EUROPEAN UNION POLITICS 281, 286 (2016).

162. See *infra* pp. 538–544.

163. Under the 1994 Treaty of Accession, Sweden is obliged to join the Eurozone once it meets the requirement laid down by the Treaties. But Sweden obtained that joining the second step of European Exchange Mechanism (ERM) should be voluntary and subject to approval by a referendum. As accession to ERM is a condition to adopt the single currency, Sweden is *de facto* still master of its own monetary destiny.

in the Euro is conditional upon the fulfilment of the mandatory convergence criteria,¹⁶⁴ and subject to a decision of the Council.

That being said (also in light of some successive adjustments), the Treaty of Maastricht could be considered a qualitative leap from an older conception of the European integration process to a newer one. Opt-outs and derogations can be seen as inevitable side effects of this progress. Such an interpretation would give only a very partial picture of the 1992 European moment of truth.

As a matter of fact, the Treaty of Maastricht has also been a turning point in the constitutional narrative of the European integration process. As already mentioned, the Maastricht Treaty included, for the first time, the respect of national identities in the wording of EU Treaties. The appearance of national identity in the Treaty of Maastricht was part of a more comprehensive balance between supranational achievements and fears of a supranational entity overcoming the national State. Against this background, it is not a matter of coincidence that the Treaty of Maastricht marked a decisive milestone also in the field of differentiated integration.¹⁶⁵ The Treaty introduced a set of protocols and declarations that addressed specific needs of certain Member States, allowing for limited exemptions from the *acquis communautaire*.¹⁶⁶ This fragmentation has been de-

164. See TFEU art. 140; TFEU, Protocol No 13 on the Convergence Criteria, at 281.

165. On the trade-off between enlargement of EU competences and flexibility, see Matej Avbelj, *Revisiting Flexible Integration in Times of Post-Enlargement and the Lustration of EU Constitutionalism*, 4 CROAT. Y.B. EUR. L. POL'Y 131, 139 (2008). For an assessment of the same trade-off after Lisbon, see Dobbs, *supra* note 22.

166. Nineteen protocols and thirty-three declarations were attached to the Treaty of Maastricht. Many of these addressed specific matters concerning one or more specific Member States. See, e.g., *Protocol on the Acquisition of Property in Denmark*, in TREATY ON EUROPEAN UNION 146 (Council and Commission of the European Communities eds., 1992); *Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland*, in TREATY ON EUROPEAN UNION 191 (Council and Commission of the European Communities eds., 1992); *Protocol on Certain Provisions Relating to Denmark* in TREATY ON EUROPEAN UNION 194 (Council and Commission of the European Communities eds., 1992). Full-text of the most important EU treaties are easily accessible at the europa.eu website. For the Treaty of Maastricht and its Protocols and Declarations, see <http://europa.eu/eu-law/decision->

scribed as a “significant blow to the vision of integration espoused by the classical narrative,”¹⁶⁷ and a threat to the uniform application of EU law.¹⁶⁸ In a more catastrophist view, opt-outs and exemptions were able to open a Pandora’s Box that could lead to the undesirable destiny of a “Europe of bits and pieces.”¹⁶⁹ Other commentators predicted no less than a destructive disintegration of the EU.¹⁷⁰ On the other side of the fence are scholars who welcomed opt-outs as the necessary means of building a new path towards differentiated integration.¹⁷¹ According to this view, there should be no single supreme authority (neither the national State nor the EU). Integrative and disintegrative dynamics should be accommodated within the EU legal order and perspectives of differentiated integration in a multilevel dimension are welcomed as a desirable and necessary development of a “post-sovereign” model.¹⁷²

Whatever opinion one may have on these issues, the opt-outs annexed to the Treaty of Maastricht have not been an isolated experience of the recent European integration’s developments. The negotiations between more or less integrationist Member States frequently led to deadlocks, where “braking actors” may operate as veto players. In these circumstances, there are three

mak-

ing/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf.

167. Matej Avbelj, *Questioning European Union Constitutionalisms*, in *COMPARATIVE LAW AS TRANSNATIONAL LAW: A DECADE OF THE GERMAN LAW JOURNAL* 389, 395 (Russell A. Miller & Peer Zumbansen eds., 2012).

168. Gráinne de Búrca & Joanne Scott, *Introduction to CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY* 2, 3 (Gráinne de Búrca & Joanne Scott eds., 2000).

169. See generally Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 *COMMON MKT. L. REV.* 17 (1993). The metaphor already emerged in the EUI Working Paper by Joseph H.H. Weiler, *Supranationalism Revisited, a Retrospective: the European Communities after 30 years*, in *NOI SI MURA: SELECTED WORKING PAPERS OF THE EUROPEAN UNIVERSITY INSTITUTE* 341, 356–57 (Werner Maihofer ed., 1986).

170. Svein S. Andersen & Nick Sitter, *Differentiated Integration: What is it and How Much Can the EU Accommodate?*, 28 *J. EUR. INTEGR.* 313, 314 (2006).

171. See Jo Shaw, *European Union Legal Studies in Crisis? Towards a New Dynamic*, 16 *OXFORD J. LEGAL STUD.* 231 (1996). See generally Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Polity*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* (Joseph H.H. Weiler & Marlene Wind eds., 2003).

172. See generally NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW STATE AND NATION IN THE EUROPEAN COMMONWEALTH* (1999).

possible ways out of the deadlock: 1) the controversial measure may be abandoned, 2) the avant-garde states may accommodate the rearguard states by granting them opt-outs, exemptions, or derogations (a clear example is the Eurozone), or 3) the avant-garde may step out of the EU framework and conclude a separate treaty (such as in the case of the Fiscal Compact and the European Stability Mechanism (ESM)).

The following sections will analyze a number of the most significant examples of differentiated integration. The analysis is not exhaustive of all derogations in force, but rather aims at addressing a reasonable number of case studies. The analysis will mainly concentrate on authentic opt-outs. Where appropriate, other forms of derogations will be taken into account. However, the analysis is limited to primary law. Due to the fact that authentic opt-outs are currently in place in favor of the United Kingdom, Ireland, and Denmark, we will proceed with a country-by-country analysis.

1. United Kingdom

The United Kingdom is commonly recognized as an opt-out champion. This idea is partly based on the United Kingdom's overall rough reputation as a euro-cynical-in-nature Member State, and in part based on an accurate picture of the legal reality. The United Kingdom benefits from a special status in many areas of the EU, and at least two of them lie in the core of the integration project: Schengen and Euro.

The negative British attitude towards the border-free zone dates back to the time of the conclusion of the (then) international agreement that Margaret Thatcher refused to sign.¹⁷³ Since then, the stance has changed in many respects, but what seems still today to be a total taboo is the very core of Schengen, namely the common border policy. In 1997, a more pro-European attitude of the British government allowed the incorporation of the Schengen *acquis* into the Amsterdam Treaty.¹⁷⁴ This move came at a price in favor of the United Kingdom, namely its nonparticipation. The United Kingdom

173. See Rebecca Adler-Nissen, *Organized Duplicity? When States Opt Out of the European Union*, in SOVEREIGNTY GAMES: INSTRUMENTALIZING STATE SOVEREIGNTY IN EUROPE AND BEYOND 81, 95 (Rebecca Adler-Nissen & Thomas Gammeltoft-Hansen eds., 2008).

174. *Id.*

was indeed granted an opt-out Protocol from Schengen, with a limited degree of flexibility. The British Government could not just pick the measures in which it considered to participate, but could only request to take part in some or all of the provisions of the Schengen *acquis*.¹⁷⁵

In March 1999, the United Kingdom applied to participate in several measures, including the police and judicial cooperation provisions and part of the Schengen Information System. This request was approved by a Council Decision in 2000, and fully implemented by a Decision of the Council of the EU starting on January 1, 2005.¹⁷⁶

Nonetheless, the core of the Schengen idea—the free border zone—remained untouched and far over the Channel: “[a] significant majority on the domestic scene, led by Conservatives and other eurosceptics, have ‘securitized’ the British Schengen protocol to the extent that it appears to constitute a guarantee of the survival of the British nation.”¹⁷⁷

A second remarkable exemption obtained by the United Kingdom concerns the single currency. Protocol No. 11 was annexed at the Treaty of Maastricht (now renumbered Protocol No. 15) and recognizes “that the United Kingdom shall not be obliged or committed to move to the third stage of Economic and Monetary Union (“EMU”) without a separate decision to do so by its government and Parliament.”¹⁷⁸ Later, during the negotiations of the Amsterdam Treaty of 1997, the United Kingdom was granted an opt-out from what was the Justice and Home Affairs (“JHA”) Pillar.¹⁷⁹ The character of this derogation was extremely flexible, allowing the United Kingdom to participate in EU measures on a case-by-case basis. After the dismantling of the three-pillars structure, the opt-out was re-

175. See Treaty of Amsterdam, *supra* note 13, Protocol on the Position of the United Kingdom and Ireland arts. 3, 4.

176. See Council Decision 2000/365 of May 29, 2000 Concerning the Request of the United Kingdom of Great Britain and Northern Ireland to Take Part in Some of the Provisions of the Schengen *acquis*, 2000 O.J. (L 131) 43 (EC).

177. Rebecca Adler-Nissen, *Behind the Scenes of Differentiated Integration: Circumventing National Opt-outs in Justice and Home Affairs*, 16 J. EUR. PUB. POL’Y 62–80 (2009); see also Antje Wiener, *Forging Flexibility: The British “No” to Schengen*, 1 EUR. J. MIGR. LAW 441, 446–47 (2000).

178. *Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland*, in TREATY ON THE EUROPEAN UNION 191 (Council and Commission of the European Communities eds., 1992).

179. See Council Decision 2000/365, *supra* note 176, at 99.

newed in the area of freedom, security, and justice (“AFSJ”) with the Treaty of Lisbon (Protocol No. 20). Additionally, according to Protocol No. 36,¹⁸⁰ the United Kingdom had an all-or-nothing choice to opt out of all acts of the Union in the field of police and judicial cooperation in criminal matters that have been adopted before the entry into force of the Treaty of Lisbon.¹⁸¹ At which point, the United Kingdom would have been able to opt in again in single measures on a case-by-case basis. This all but plain procedure¹⁸² led to a full opt out of the United Kingdom from the approximately 130 “ex-third-pillar” measures in July 2014, after which the United Kingdom declared¹⁸³ its wish to opt back into thirty five of these measures, six of which are included in the Schengen *acquis*.¹⁸⁴ Among these are the chapters of the Schengen Convention on police and judicial cooperation in criminal matters and the Schengen Information System (SIS II, which is the police/justice body of the Schengen data base). The remaining twenty-nine non-Schengen measures include the European Arrest Warrant, Europol, and Eurojust.¹⁸⁵

180. Whereas Protocol No. 20, Treaty of Amsterdam, *supra* note 5, at 293, concerns the application of certain aspect of the AFSJ to the United Kingdom and Ireland, Article 10.4–5 of Protocol No. 36, *id.* at 326–27, is only applicable to the United Kingdom. As a consequence, the Irish and British position with regard to the possibility of opting-out and opting back in shall be considered separately.

181. *Id.* at 326.

182. On the details of the opt-out and in procedure, see Alicia Hinarejos, John R. Spencer & Steve Peers, *Opting Out of EU Criminal Law: What is Actually Involved?* (Ctr. for Eur. Legal Stud. Working Paper, New Series, No. 1, 2012), http://resources.law.cam.ac.uk/cels/working_papers/eu_criminal_law_optout.pdf.

183. Council of the European Union Release 15398/14, Gen. Secretariat of the Council, Notification of the United Kingdom under Article 10(5) of Protocol 36 to the EU Treaties (Nov. 27, 2014), <http://data.consilium.europa.eu/doc/document/ST-15398-2014-INIT/en/pdf>; Council of the European Union Release 12750/13, Gen. Secretariat of the Council, UK Notification According to Article 10(4) of Protocol No 36 to TEU and TFEU (July 26, 2013), <http://data.consilium.europa.eu/doc/document/ST-12750-2013-INIT/en/pdf>.

184. Council Directive 2014/857, art. 1, 2014 O.J. (L 345) 1 (EC).

185. Comm. of the Regions, *Opinion on the “Proposal for Guidelines for Member States’ Employment Policies 2000,”* COM (1999) 441 final; List of Union Act Adopted Before the Entry into Force of the Lisbon Treaty in the Field of Police Cooperation and Judicial Cooperation in Criminal Matters

A different case is the United Kingdom's opt-out in social policy. Its peculiarity lies in the fact that the British opt-out from the social chapter is a ceased one. The opt-out was included in Protocol No. 14 to the Maastricht Treaty, excluding the United Kingdom from the EU decision-making procedures on social rights' implementation.¹⁸⁶ Any legislation adopted in these fields would not apply to the United Kingdom. Ultimately, the differentiation terminated for a very simple reason, the Labor Party won the elections, and the opt-out did not match the United Kingdom's new political orientation.¹⁸⁷

2. Ireland

Ireland shares more than one opt-out with the United Kingdom. However, Ireland's underlying reasons not to participate in the concerned matters are very different from those of the United Kingdom's.¹⁸⁸ The Irish position with regard to the Schengen Agreement has always been strongly influenced by the British reluctance to join the free-borders area. Irish accession to the Schengen Area without the United Kingdom would have caused the end of the long established Common Travel

Which Cease to Apply to the United Kingdom as from 1 December 2014 Pursuant to Article 10(4), Second Sentence of Protocol (No 36) on Transitional Provisions, 2014 O.J. (C 430) 17 (EC); List of Union Acts Adopted Before the Entry into Force of the Lisbon Treaty in the Field of Police Cooperation and Judicial Cooperation in Criminal Matters Which have Been Amended by an Act Applicable to the United Kingdom Adopted After the Entry into Force of the Lisbon Treaty and Which Therefore Remain Applicable to the United Kingdom as Amended or Replaced, 2014 O.J. (C 430) 23 (EC).

186. *Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland*, in TREATY ON THE EUROPEAN UNION 191 (Council and Commission of the European Communities eds., 1992); see *Protocol on Social Policy*, in TREATY ON THE EUROPEAN UNION 196, para. 2 (Council and Commission of the European Communities eds., 1992).

187. The European Social Chapter took center stage in the British political debate, both during its negotiation and adoption in 1991/92 and during the electoral campaign in 1997. See SUSAN L. KANG, HUMAN RIGHTS AND LABOR SOLIDARITY: TRADE UNIONS IN THE GLOBAL ECONOMY 149 (2012).

188. This dependency has long caused a lack of scholarly interest in Irish opt-outs and derogations, because "so far Ireland mainly follows the UK" (Adler-Nissen, *supra* note 177 at 64.) and deserves little consideration. However, things changed after the Irish stated "No" to the Lisbon Treaty and the subsequent negotiation of an "authentic" Irish protocol (see below in the body of the text).

Area¹⁸⁹ between Ireland and the United Kingdom. This would have imposed exit and entry controls on persons traveling through the two countries, including the land frontier between the Republic of Ireland and Northern Ireland.

As a result, Ireland was granted an opt-out with the United Kingdom from the Schengen Area in a Protocol to the Amsterdam Treaty.¹⁹⁰ The same Protocol provided both countries with the possibility to request to take part in some or all of the provisions of the Schengen *acquis*.¹⁹¹ As far as police and judicial cooperation provisions of the Schengen *acquis* are concerned, Ireland applied to participate in June 2000. The Irish request was approved by a Council Decision in 2002,¹⁹² but has not yet been implemented.

Ireland joined the United Kingdom in Protocol No. 21 as well, being granted an opt-out in the AFSJ.¹⁹³ The Irish position with regard to the AFSJ differs from the British position only with regard to Article 10(4)(5) of Protocol 36. These provisions, carrying out the complicated procedures of opting-out and selective opting back in at the end of the transitional period, only apply to the United Kingdom.¹⁹⁴

That being said, the most interesting position regarding Ireland is the Irish Protocol on the Lisbon Treaty. This Protocol forms part of the agreement reached between the Heads of State or Government after the negative Irish outcome in the referendum on the Lisbon Treaty. To cut a long story short, the Irish “No” seemed to cast the ill-fated CT’s shadows on the ratification procedure of the Lisbon Treaty. The “concerns of the

189. The Common Travel Area is a travel zone comprising Ireland, the United Kingdom, the Isle of Man, and the Channel Islands, where internal borders are subject to minimal or non-existent border controls.

190. See Treaty of Amsterdam, *supra* note 13, Protocol on the Position of the United Kingdom and Ireland.

191. See *id.* arts. 3, 4.

192. See Council Decision 2002/192 of 28 Feb. 2002 Concerning Ireland’s Request to Take Part in Some of the Provisions of Schengen Acquis, 2002 O.J. (L 064) 20 (EC).

193. See, Dáil Éireann, Vol. 642 No. 2, HOUSE OF THE OIREACHTAS (Oct 24, 2007), <http://oireachtasdebates.oireachtas.ie/>. See also Maria Fletcher, *EU criminal justice: beyond Lisbon*, in CRIME WITHIN THE AREA OF FREEDOM, SECURITY AND JUSTICE: A EUROPEAN PUBLIC ORDER 10, 26 (Christina Eckes & Theodore Konstadinides eds., 2011).

194. See *supra* note 182, on transitional provisions annexed to the TFEU.

Irish people”¹⁹⁵ were addressed with three instruments (informally called “the Guarantees”): a decision of the Heads of State or Government of EU-Member States acting in their capacity as sovereign states; a solemn declaration by the European Council on workers’ rights, social policy, and other related issues; and a National Declaration by Ireland on Irish security and defense policy.¹⁹⁶ The first instrument was a legally binding international agreement and was adopted with the intention of transforming the decision into a protocol to the EU treaties with the adoption of the next Accession Treaty.¹⁹⁷

The Protocol included three “clarifications.” First, it clarified that the provisions of the Irish Constitution on the protection of the right to life,¹⁹⁸ family, and education would not be affected by the Lisbon Treaty or the provisions of the CFREU. Second, the Protocol confirmed that nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the competence of the EU in relation to taxation. Third, the Protocol provided a clarification that Ireland’s traditional policy in military neutrality will remain un-

195. These concerns were collected in the findings of a government-commissioned public survey about the reasons for the “No” vote in the Irish Referendum. The survey was conducted six weeks after the vote, and indicated among these reasons, a “lack of knowledge/information/understanding” of the Treaty; concerns about the “loss” of an Irish commissioner after the planned reduction of the number of Commissioners; the threat to the traditional Irish neutrality and possible military implications, such as a conscription to a European army; and finally the threats to the right to life of the unborn. In the same survey, the Irish electorate held as very important the protection of workers’ rights, the national control over public services, and corporation taxation rates. See DAVID PHINNEMORE, *THE TREATY OF LISBON: ORIGINS AND NEGOTIATION* 190 (2013).

196. For an overview of the content of the “Guarantees”, see INST. OF EUROPEAN AFFAIRS, *LISBON: THE IRISH GUARANTEES EXPLAINED* (2009), <http://www.iiea.com/publications/lisbon-the-irish-guarantees-explained>.

197. The Protocol was approved in Section 2 of the Treaty of Accession of Croatia, Act Concerning the Conditions of Accession of the Republic of Croatia and the Adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty Establishing the European Atomic Energy Community, Apr. 24, 2012, 2012 O.J. (L 112) 21, and was then drafted as a separate document, entering into force on December 1, 2014.

198. Note that the Irish Protocol on abortion constitutional policies, which has been in force since 1993, remains unaffected.

changed and unaffected by the Treaty.¹⁹⁹ Additionally, a separate agreement was reached among the Member States to reassure Irish concerns about the possible loss of a Commission representative, along with the planned reduction in its size.²⁰⁰

3. Denmark

Denmark was granted a number of exemptions and derogations from Maastricht to Lisbon, so many to the extent that it has been described as “a smart state handling a differentiated integration dilemma.”²⁰¹ In 1991, the final draft of the Maastricht Treaty gave Denmark the right to decide if and when they would join the Euro.²⁰² An initial referendum was called on the entire Maastricht Treaty at the beginning of the following year, and resulted in a narrow “No.” Afterwards, a national compromise established that the Social Democratic Party, the Socialist People’s Party, and the Social Liberal Party would agree on a position that claimed the opt-out from single currency as the highest national priority.²⁰³ This position proved successful, and the agreement on the Euro opt-out was included in the 1992 Edinburgh Agreement, a Council decision that followed the Danish negative outcome on the Maastricht referendum.²⁰⁴ Actually, the agreement granted Denmark four opt-outs, concerning not only the third stage of the EMU but also

199. See Protocol on the concerns of the Irish people on the Treaty of Lisbon, art. 3, 2013 O.J. (L60/132).

200. The agreement to maintain the number of Commissioners equal to the number of Member States was reached in the European Council at its meeting on December 11 and 12, 2008.

201. Lee Miles & Anders Wivel, *A smart State Handling a Differentiated Integration Dilemma?*, in DENMARK AND THE EUROPEAN UNION, 228, 237 (Lee Miles & Anders Wivel eds., 1st ed. 2014).

202. For an overview of the troubled relation between Denmark and the single currency, see Martin Marcussen, *Denmark and the Euro opt-out*, in DENMARK AND THE EUROPEAN UNION 47, 49 (Lee Miles & Anders Wivel eds., 1st ed. 2014).

203. See Morten Kelstrup, *Denmark’s Relation to the European Union*, in DENMARK AND THE EUROPEAN UNION 14, 17 (Lee Miles & Anders Wivel eds., 2014).

204. The “Edinburgh Agreement” is an agreement reached at a European Council meeting held in Edinburgh on December 11 and 12, 1992, that granted Denmark four exemptions to the Treaty of Maastricht. See Presidency Conclusions, Edinburgh European Council (Dec. 11–12,, 1992), http://www.europarl.europa.eu/summits/edinburgh/b3_en.pdf.

the Common Security and Defense Policy, the JHA, and the citizenship of the Union.²⁰⁵

A new referendum on the Maastricht Treaty was called on May 19, 1993, resulting in an approval by 56.7 percent of voters. As far as the Euro opt-out is concerned, when the third stage of EMU started on January 1, 1999, the Danish Government decided to call for a new referendum on the abolition of the opt out.²⁰⁶ However, the Danish voters rejected once more the full participation to the EMU.²⁰⁷ Since the beginning of the Euro Crisis in 2008, full Danish participation in the EMU seems a far-off prospect.

The repeated rejection to join the third phase of the EMU bears some peculiarities and merits special attention. For many years, governing parties have all been in favor of overcoming the Euro opt-out²⁰⁸ and it has been considered “technically unproblematic for Denmark to sign up for the Euro-philosophy.”²⁰⁹ The reluctance to join the EMU was the result of a combination of factors, which gave birth to the Danish approach to important EU-related decisions, requiring an open and wide debate and eventually a referendum. This should be the way to manage essential EU-related issues, “irrespective of the attitude of the majority of the parliament.”²¹⁰

The economic dimension of the opt-out or in policy, obviously played an important role, but it was not the only factor that was taken into consideration, since there was no one right answer to the matter. Besides the economic dimension of the decision, other forces pushed in the direction of the opt-out, namely the fact that the euro was not seen “only as a mean of payment” but also “as an expression of national identity and sovereignty.”²¹¹

205. This article will not elaborate on all the Danish opt-outs, but will focus only on the Euro and the AFSJ opt-outs.

206. A referendum on the termination of the Euro opt-out was called in 2000. For an overview of the political debate raised by the referendum, see Marcussen, *supra* note 202, at 49.

207. Only a minority of 46.8 percent of the voting population supported Danish full participation in the EMU. See data reported by Morten Kelstrup, *Denmark's Relation to the European Union*, in DENMARK AND THE EUROPEAN UNION 14–29, 16 (Lee Miles & Anders Wivel eds., 2014).

208. Marcussen, *supra* note 202, at 52.

209. *Id.* at 48.

210. *Id.* at 48.

211. *Id.* at 55.

A similar feeling still seems to pervade the Danish understanding of the opt-out from the (then) JHA.²¹² The opt-out was included in the Edinburgh package and survived through the “semi-permanent Treaty revision process.”²¹³ Nonetheless, the European normative framework in the area has changed significantly and against this new background the opt-out takes on an entirely new significance.

The 1992 opt-outs were an expression of the refusal of a federal Europe and left the door open to intergovernmental cooperation, which was in any case the rule in the form of third pillar matters. Indeed, Denmark’s full participation in cooperating on JHA was expressly stated in the Edinburgh Agreement.²¹⁴ The turning point came in 1997 with the Amsterdam Treaty and the supranationalization of important matters, such as asylum, immigration, border control, and civil law policies. Except for criminal law and police cooperation, areas where the intergovernmental method still applied, Denmark was left out from many JHA policy areas.

With the adoption of the Lisbon Treaty, the potential impact of the Danish opt-out had dramatically increased. The dismantling of the pillars’ system had the consequence of excluding Denmark from the areas where intergovernmental methods still applied before Lisbon. The former JHA opt-out currently appears under Protocol No. 22 to the treaties.²¹⁵ First of all, it provides that Denmark is bound by the Schengen rules (Den-

212. According to Adler-Nissen, “[t]he opt-out remains an important symbol of autonomy for large parts of the Danish population.” Rebecca Adler-Nissen, *Justice and Home Affairs: Denmark as an Active Differential European*, in DENMARK AND THE EUROPEAN UNION 65, 67 (Lee Miles & Anders Wivel eds., 2014); see also Lene Hansen, *Sustaining Sovereignty: The Danish Approach to Europe*, in EUROPEAN INTEGRATION AND NATIONAL IDENTITY: THE CHALLENGE OF THE NORDIC STATES 50–87 (Lene Hansen & Ole Wæver eds., 2002).

213. Bruno de Witte, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 39–59 (P. R. Beaumont, Carole Lyons & Neil Walker eds., 2002).

214. Section D of TFEU Annex 1, which is entitled, “Decision of the Heads of State and Government, Meeting within the European Council, Concerning Certain Problems Raised by Denmark on the Treaty on European Union,” provides that “Denmark will participate fully in cooperation on Justice and Home Affairs on the basis of the provisions of title VI of the Treaty on European Union.” See Denmark and the Treaty on European Union, 1992 O.J. (C 348) 1, 2.

215. See TFEU Protocol No 22 on the Position of Denmark, at 384, art. 2.

mark joined the Schengen Agreement in 1996), but only under international law (which means that CJEU's jurisdiction does not apply).²¹⁶ Conversely, Denmark is not bound by any other provision of (or adopted pursuant to) Title V of Part Three of the TFEU (immigration and asylum law, or civil cooperation).²¹⁷ Denmark is bound by acts of the Union in the field of police and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon, but it is not bound by acts in these areas if adopted after the entry into force of the Treaty of Lisbon.

Finally, the opt-out protocol is coupled with an "auto-termination clause" that allows Denmark to renounce the opt-out, or even transform it into a selective opt-out or opt-in, following the British and Irish Model.²¹⁸ The opt-in needs referendum approval, which recent Danish history has shown to be insidious. The Danish Prime Minister has recently announced such a referendum, considering the fact that Europol reform would have excluded the Country's participation from that measure, in virtue of the provisions of Protocol 22.²¹⁹ The referendum was held on December 3, 2015 and 53 percent of Danes

216. According to article 2 of protocol number 22, "[N]o decision of the Court of Justice of the European Union interpreting" any provision "of Title V of Part Three of the Treaty on the Functioning of the European Union," any measure "adopted pursuant to that Title," any "provision of any international agreement concluded by the Union pursuant to that Title," "or any measure amended or amendable pursuant to that Title shall be binding upon or applicable in Denmark." See TFEU, Protocol No 22 on the Position of Denmark, at 384, art. 2.

217. Denmark concluded parallel agreements with the EU in some of these areas, such as the Dublin rules on asylum applications, the Brussels Regulation on civil and commercial jurisdiction, and the Regulation on service of documents.

218. According to article 7 of protocol number 22,

[a]t any time Denmark may, in accordance with its constitutional requirements, inform the other Member States that it no longer wishes to avail itself of all or part of this Protocol. In that event, Denmark will apply in full all relevant measures then in force taken within the framework of the European Union.

See TFEU, Protocol No 22 on the Position of Denmark, art. 7.

219. The referendum was called by the Danish Prime Minister Lars Løkke Rasmussen on August 21, 2015. See Kirk Lisbeth, *Danes to Vote on EU Relations in December Referendum*, EU OBSERVER (Aug. 21, 2015 7:29 PM), <https://euobserver.com/beyond-brussels/129950>.

voted “No” to joining EU JHA policies, confirming the insidious character of opt-in referendums.²²⁰

According to the outlined framework, Denmark seems like one of the most mistrusted and reluctant Member States. Denmark certainly “profited” from some of its arrangements of differentiated integration, mainly through different policies on certain issues. In particular, with regard to the asylum and immigration conundrum, the opt-out left room to adopt strict policies regarding asylum and family reunification.

However, an in-depth analysis of the Danish policies in many other fields where Denmark retained an opt-out showed the opposite. In almost every aspect of the former JHA pillar, Danish authorities adopted legislative policies that are perfectly consistent with EU law policies. A “systematic mimicking and copying of EU legislation”²²¹ has been revealed in many areas, making Denmark an “active copycat.”²²² Informal harmonization, parallel agreements, and mimicking EU regulation makes Denmark more of “a rule-taker” than “a rule-maker.”²²³

4. The Curious Case of the United Kingdom, Poland, Czech Republic, and the CFREU

It is not uncommon to find in the category of opt-outs, the British and Polish Protocol concerning the CFREU. During the negotiations on the Lisbon Treaty, the United Kingdom and Poland insisted upon a special Protocol to the Treaties regarding the EU Charter of Fundamental Rights (EUCFR), which was finally annexed to the Treaty (Protocol No. 30).²²⁴ The

220. Results showed 53.1 percent had voted “no,” while 46.9 percent had voted “yes.” See *Folkeafstemning Torsdag 3. December 2015*, DANMARKS STATISTIK, <http://www.dst.dk/valg/Valg1664255/valgopg/valgopgHL.htm> (last updated Dec. 4, 2015).

221. Adler-Nissen, *supra* note 212, at 69.

222. *Id.* at 69.

223. *Id.*

224. The Czech Republic was not initially included in Protocol 30. After the insistence of President Václav Klaus—who affirmed that Czech Republic would have refused to ratify the Treaty unless the Country would have been added to the Protocol, see David Charter, *I will not sign Lisbon Treaty, says Czech President*, TIMES (Oct. 13, 2009), <http://www.timesonline.co.uk/tol/news/world/europe/article6871365.ece>—EU leaders agreed to amend the protocol at the time of the next accession Treaty (Croatia). The amendment was drafted and the procedure started, see Council of the European Union meeting held in Brussels Oct. 29–30, 2009 (Conclu-

wording of the Protocol consisted in a normative puzzle, including a relatively long preamble and two substantive provisions, aiming at limiting the application of the EUCFR in the United Kingdom and Poland.²²⁵

The situation is partially different when compared with previous opt-outs. Indeed, qualification of the Protocol as a proper opt-out has been controversial from the outset. Nowadays a major part of the legal literature,²²⁶ supported by and support-

sions available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf), but successively the very Czech Republic withdrew the request. In May 2014, the Council formally acknowledged the Czech withdrawal for a quasi-opt-out from the EUCFR. See Council of the European Union Press Release 9545/14, 3313th Council Meeting (May 13, 2014), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/142581.pdf. On these developments, see Miloš Kulda, *Charter of Fundamental Rights of the European Union and the Legal Order of the Czech Republic*, I CHARLES UNIV. PRAGUE FAC. LAW RES. PAP. (2015), <http://papers.ssrn.com/abstract=2596764>.

225. The United Kingdom and Poland were guaranteed by the following provisions:

Article 1: 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

Article 1: 2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2: To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

Consolidated Version of the Treaty on European Union, *Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom*, May 9, 2008, 2008 O.J. (C115) 13, 314.

226. 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, 384 (2012); Ingolf Pernice, *The Treaty of Lisbon and Fundamental Rights*, in THE LISBON TREATY 235, 244–49 (Stefan Griller & Jacques Ziller eds., 2008); Catherine Barnard, *The "Opt-Out" for the UK and Poland from*

ing the CJEU²²⁷ case law, tends to exclude that Protocol No. 30 provides an opt-out from the EUCFR in favor of the United Kingdom and Poland.

Nonetheless, it is interesting to investigate the reasons behind the negotiation of the Protocol. Simply put, the Protocol to the Charter has been “an exercise in smoke and mirrors.”²²⁸ In the “British Protocol,” No. 30 has been presented to the Euro-sceptic audience as a proper opt-out, but has never been interpreted in this manner by the British Government. Official statements of the Government’s branches openly stated that “the UK Protocol does not constitute an ‘opt-out’.”²²⁹ In this respect, it has been noted that “these opt-outs imply an outright rejection of political integration”²³⁰ and seem to be “purely political phenomena.”²³¹ This is, however, questionable. As a matter of fact, the (then) Prime Minister Tony Blair’s words seem to refer to something more serious than a political tantrum. Explaining the reasons for the opt-out, Blair referred to the “long and difficult memories of the battles fought to get British

the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?, in THE LISBON TREATY 257, 276–80 (Stefan Griller & Jacques Ziller eds., 2008); PAUL CRAIG, THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM 237–40 (2010).

227. The CJEU clearly stated that Protocol No. 30 “does not call into question the applicability of the Charter in the United Kingdom or in Poland” and that “it does not intend to exempt the Republic of Poland or the UK from the obligation to comply with the provision of the Charter.” Case C-411/10, N.S. v. Secretary of State for the Home Department, 2011 E.C.R. I-13991, ¶¶ 119–20.

228. Barnard, *supra* note 226, at 281.

229. House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report of Session 2007-08, HL Paper 62-I, para. 5.86. In fact, the exact words, “the UK-specific protocol is not an ‘opt-out,’” were used by Jim Murphy, the Minister for Europe in his address to the House of Commons’ European Scrutiny Committee. See European Union Intergovernmental Conference, House of Commons Eur. Scrutiny Comm., *Thirty-fifth Report of Session 2006–07*, para. 57, <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/1014/1014.pdf>.

230. GIANDOMENICO MAJONE, EUROPE AS THE WOULD-BE WORLD POWER THE EU AT FIFTY 217 (2009).

231. This article will dwell on the category of “purely political phenomena” more deeply. See *infra* Conclusion.

law in proper order”²³² in the areas addressed by the Charter, and not to his Government’s political preferences. As a matter of fact, the opt-out may come as a surprise, if one considers that negotiations have been conducted by a government run by the Labor Party, whose origins lie in the workers movement.²³³ This would suggest that British concerns were not “purely political phenomena,” but that they expressed a deeper constitutional understanding.

The paradoxical position of Poland was even more evident. The most recent history of the country was deeply rooted in the struggles of the social movement solidarity for social and labor rights. Therefore, the Polish Government’s reluctance in front of the CFREU could be considered inconsistent with Polish recent national history, provided that Title IV of the Charter aimed at further developing these rights in the EU. The Government expressed its embarrassment in a declaration enclosed to the Lisbon Treaty:

Poland declares that, having regard to the tradition of social movement of “Solidarity” and its significant contribution to the struggle for social and labor rights, it fully respects social and labor rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.²³⁴

This suggests that the Polish position on the EUCFR was not a “purely political phenomena,” or at least that the Polish quasi opt-out was not expressing a political preference in the field of social and labor rights. In the opinion of an authoritative part of the legal scholarship, this apparent paradox is explained by Poland’s fear residing in other areas, such as family law, specifically with regard to same-sex couple regulation.²³⁵

232. The British position was summed up by Tony Blair in his Cardiff Speech of November 2002. See FINN LAURSEN, *THE RISE AND FALL OF THE EU’S CONSTITUTIONAL TREATY* 211 (2008).

233. For a detailed history of the British Labor Party, see ANDREW THORPE, *A HISTORY OF THE BRITISH LABOUR PARTY* (2008).

234. See Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Declaration by the Republic of Poland Concerning the Protocol on the Application of the Charter of Fundamental Rights of the European Union in Relation to Poland and the United Kingdom*, 2012 O.J. (C 236) 1, 360.

235. According to Barnard, “Poland’s concerns are not with social and labor rights. Poland’s real fears lie with subjects such as gay marriage and abortion

5. Identity-tailored Protocols?

Besides the relatively (in)famous opt-outs previously analyzed, various protocols, opt-outs, and derogations have been adopted in the history of European integration. Nonetheless, they have little or no effect on understanding Member States' constitutional identity. Protocol No. 3 on the Treaty of Accession of Sweden, granting to the Sami people an exclusive right to reindeer husbandry, certainly provides a derogation of fundamental freedoms of the Treaty.²³⁶ This does not automatically mean that reindeer husbandry is part of the constitutional identity of Sweden.

The matter seems to have been treated differently with respect to the Treaty of Maastricht, which introduced a set of protocols. Some of these addressed national interests of certain Member States, and one could argue that the protocols consisted of preventative measures to avoid future conflicts. The ease with which narrowly tailored Protocols had been conceded in the Maastricht agreements was severely criticized at that time.²³⁷ As a result, a potential hijacking of the *acquis communautaire* has been denounced and a "Europe of bits and Pieces"²³⁸ has been deplored. However, three of the protocols were questioned more than the others.²³⁹

Protocol No. 17 (the "Grogan Protocol") provided that "nothing in the TEU, 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."²⁴⁰ This provision originated from the famous *Grogan* judgment of the

but the Protocol (and the Charter) do not touch on these." See Barnard, *supra* note 226, at 276.

236. Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union is Founded, *Protocol No. 3 on the Sami People*, 1994 O.J. (C 241) 21, 352.

237. See, e.g., Curtin, *supra* note 169.

238. Curtin, *supra* note 169.

239. For an analysis of these protocols against the background of national constitutional identity, see Giuseppe Martinico, *What Lies Behind Article 4(2) TEU?*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 93, 100 (2013).

240. Treaty on European Union and to the Treaties establishing the European Communities, Protocol, 1992 O.J. (C 224) 130.

ECJ.²⁴¹ The case dealt with student organizations publishing in the Republic of Ireland—whose Constitution protects the right to life of the unborn—the names, addresses, and phone numbers of abortion clinics in Great Britain. The ECJ had neither reason, nor jurisdiction to decide on the legality of abortion, but the Court held that the medical termination of pregnancy constituted a service within the meaning of Article 60 of the Treaty. Nonetheless, the ECJ held that it is not contrary to EU law for Ireland to prohibit distributing information about abortion clinics. According to the ECJ's view, Member States are allowed deference to restrict free movement of services for “justified public policy reasons.” Nonetheless, this judicial saga pushed Ireland to negotiate a permanent protocol to protect its constitutional protection of the right to life of the unborn. Protocol No. 17 was the European response to Irish fears.²⁴²

A similar path was followed by Denmark in regard to the *Danish Second Home* Protocol. Protocol No. 1 of the Treaty of Maastricht neutralized any possible clash with Danish legislation, prohibiting acquisitions of second homes in Denmark by non-Danish people and Community law. The protocol provided that “notwithstanding the provisions of this Treaty, Denmark may maintain the existing legislation on the acquisition of second homes,”²⁴³ granting a permanent derogation from the principle of nondiscrimination on the basis of citizenship. Three years earlier, in 1989, the ECJ held that restrictions applied by a Member State to nationals of other Member States in regard to the acquisition and enjoyment of rights in immovable property are contrary to Community law.²⁴⁴

Finally, Protocol No. 2 (the *Barber* Protocol), introduced a very specific and permanent derogation from the *acquis communautaire*.²⁴⁵ The Member States that pushed most to intro-

241. Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and Others*, 1991 E.C.R. 4685.

242. As mentioned above, the Protocol was renewed and confirmed in the Lisbon Treaty, and the same issue was the object of reassurances in “the Guarantees” after the Irish “No” in the referendum on ratification.

243. Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. (C 191) 1, Protocol No. 1 (regarding the acquisition of property in Denmark).

244. Case C-305/87, *Commission v. Greece*, 1989 E.C.R. 1476; Case C-186/87, *Cowan v. Trésor Public*, 1989 E.C.R. 195.

245. Protocol No. 2 states that

duce the Protocol were those States where the impact of a decision that the ECJ²⁴⁶ delivered some years earlier could have been financially remarkable.

These examples illustrate that protocols not only have been used to accommodate disagreements on the participation of Member States in entire policies (such as the single currency, the free-border zone, or the former third pillar), but also to address very specific concerns. Although the *Grogan* Protocol may be considered the only Protocol with an evident connection with constitutional values, the tailoring method adopted in the aforementioned three cases is highly significant as a plausible means of conflict neutralization.

C. Opt-Outs, Declarations, and Legal Guarantees: Between Political Opportunism and Sincere Constitutional Concerns

As far back as 1984, Claus-Dieter Ehlermann drew a fundamental distinction in the analysis of flexibility arrangements in the (then) Community law. Ehlermann discerned between economic and social factors on the one hand, and purely "political phenomena"²⁴⁷ on the other. According to his view, only the former could in principle justify differentiation. The author chose only one example, which reveals itself as extraordinarily telling thirty years later: "for instance, the fact that the British government (or the majority in Parliament or even public opinion in the United Kingdom) is opposed to joining the European

for the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.

Council Directive 96/97, 1997 O.J. (L 46) 20, 20 (EC) (amending Directive 86/378, 1996 O.J. (L 225) 40 (EEC) (regarding the implementation of the principle of equal treatment for men and women in occupational social security schemes)).

246. Case C-262/88, Douglas Harvey Barber v. Guardian Royal Exch. Assurance Grp., 1990 E.C.R. I-01889, ¶¶ 1-5.

247. Claus-Dieter Ehlermann, *How Flexible Is Community Law? An Unusual Approach to the Concept of "Two Speeds,"* 82 MICH. L. REV. 1274, 1289 (1984).

monetary system would not be a valid argument for differentiation.”²⁴⁸

Almost thirty years later, the United Kingdom did not join the third stage of the EMU, precisely because the British Government, the majority of the Parliament, and public opinion in the United Kingdom opposed the single currency. It may be that Ehlermann was right and the EU was wrong. In other words, it can be argued that the differentiation conceded to the United Kingdom was unjustified from the outset. Alternatively, perhaps Ehlermann was mistaken in the sense that what he identified as a purely political phenomenon (the U.K. opt-out from the single currency) was not. In the second scenario, we should reformulate his words and assume that the fact that in one Member State the government, the majority in Parliament, or even public opinion opposes a further step in the process of European integration should be held as a valid argument for differentiation.

What deserves special attention is the identification of what accounts for “purely political phenomena.” It is certainly true that special arrangements in favor of specific Member States are based on very different justifications. For purposes of this article, it is highly significant to discern the diverse nature of the “valid argument for differentiation.” Beside socioeconomic factors and “purely political phenomena,” this article argues for the possible existence of valid constitutional arguments for differentiation. It may not be easy to discern between political and constitutional reasons for differentiation, especially in the case of the United Kingdom, where there is no formal document to look toward. Nonetheless, the assumption that the British opt-out from the single currency is a purely political phenomenon is highly debatable. If the opposition to the single currency was a purely political phenomenon, twenty-five years of changing governments would have at some point led the United Kingdom in the opposite political direction. A political change of mind regarding the single currency issue would have resulted in the same outcome as when the United Kingdom opted out of the social chapter. This opt-out was certainly based on a purely political phenomenon. As a matter of fact, in 1997, when the Labour Party’s victory in the general elections caused the over-

248. *Id.*

turning of the contingent decision to opt-out of the social chapter, the United Kingdom opted back in.²⁴⁹

Nonetheless, one could still argue that specific Member States, which were granted an opt-out on the basis of “purely political phenomena,” are impeded to opt back in even if governments and political preferences change, because some opt-outs become a totem in public opinion. In these cases, Member States have developed extensive experience in “circumventing” the opt-outs. If the structure of the specific opt-out is flexible enough to admit case-by-case opt-ins, Member States extensively use opt-ins to erode their nonparticipation in the policy areas in question. The United Kingdom has been a champion in “getting the best of both worlds.”²⁵⁰ For example, in regard to the opt-out from the former third pillar, the United Kingdom opted into most civil law measures, asylum matters, and measures on illegal immigration. When the opt-out is rigid and does not allow for a “picking and choosing” strategy, internal legislation mimicking EU regulations or parallel intergovernmental agreements, have been widely used to void opt-outs in substance.²⁵¹

249. See, e.g., Adler-Nissen, *supra* note 177 at 68; JOSÉ MARÍA BENEYTO JULIA BAQUERO, BELÉN BECERRIL, MICHAEL BOLLE, MARISE CREMONA, SÖNKE EHRET, VICENTE LÓPEZ-IBOR, JERÓNIMO MAILLO, UNITY AND FLEXIBILITY IN THE FUTURE OF THE EUROPEAN UNION: THE CHALLENGE OF ENHANCED COOPERATION 43 (2009).

250. It was Prime Minister Tony Blair who affirmed on October 25, 2004, that

there is no question of Britain giving up our veto on our border controls. In the Treaty of Amsterdam seven years ago we secured the absolute right to opt in to any of the asylum and immigration provisions that we wanted to in Europe. Unless we opt in, we are not affected by it. And what this actually gives us is the best of both worlds. We are not obliged to have any of the European rules here, but where we decide in a particular area, for example to halt the trafficking in people, for example to make sure that there are proper restrictions on some of the European borders that end up affecting our country, it allows us to opt in and take part in these measures.

Blair Defends EU Plans to Drop Asylum Veto, TELEGRAPH (Oct. 25, 2004, 9:47 AM), <http://www.telegraph.co.uk/news/1475025/Blair-defends-EU-plans-to-drop-asylum-veto.html>. On “getting the best” British attitude, see generally Andrew Geddes, *Getting the Best of Both Worlds? Britain, the EU and Migration policy*, 81 INT'L AFF. 723 (2005).

251. The Danish experience offers a good example of this substantial circumvention of opt-outs. See *supra* Part II.

III. CONSTITUTIONAL IDENTITY BETWEEN COOPERATION, MISTRUST, AND SUBSIDIARITY

Insofar, this article has investigated differentiated integration as a means to neutralize conflicts between EU law and certain characteristics of a Member State's national constitutional identity. This approach revealed unexplored aspects of both the concept of national constitutional identity and of differentiated integration. The latter seems able to play a role as a method of "self-enforcement"²⁵² of the Identity Clause. Nevertheless, differentiated integration is only one of many possible methods of "self-enforcement," or to be more exact, of nonjudicial enforcement of the Identity Clause. In the present section, we will investigate three further alternatives: the rule of unanimity as a safeguard of Member States' interests in identity-sensitive policy areas; enhanced cooperation as a way out of political deadlocks when identity-related interests of certain Member States are at stake; and the principle of subsidiarity as a privileged forum to investigate the understanding of national constitutional identity by nonjudicial national players.

A. Unanimity: a Clue of Constitutional Identity-Sensitive Matters

The increasing application of majority voting has been widely considered one of the indicators of successful European integration. Starting from the Single European Act in 1986, a set of reforms gradually extended the field of qualified majority voting ("QMV") within the Council of Ministers.²⁵³ Lately, the Treaty of Lisbon further extended the application of the QMV.²⁵⁴ Against the background of these developments, the rule of unanimity voting has been held as an obstacle to the desirable target of an efficient decisional process. The rule of unanimity implies rigidity and has been considered an expression of mutual mistrust between Member States. In regard to

252. This terminology is excerpted from CLOOTS, *supra* note 6, at 39.

253. For an overview of the gradual extension of QMV, ANDREAS DUR ET AL., *NEGOTIATION THEORY AND THE EU: THE STATE OF THE ART 28* (2013); PHILIPPA SHERRINGTON, *COUNCIL OF MINISTERS: POLITICAL AUTHORITY IN THE EUROPEAN UNION* 175 (2000).

254. For a detailed analysis of areas where QMV applies after the adoption of the Treaty of Lisbon, see generally Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 VA. J. INT'L L. 919–96 (2010).

constitutional identity, one should take into account this “mistrust argument.” It is in fact plausible that Member States can be very reluctant to extend majority voting to fields that are, even if only indirectly, sensitive with regard to their constitutional identities. In these circumstances, unanimity—as an expression of Member States’ mistrust towards one another—should be considered a clue to identify possible constitutional identity-sensitive areas, insofar as the Member States have considered keeping control of the decisions taken by the Council in these fields.

Even though the Lisbon Treaty extended the QMV further, unanimity is still required for many important decisions,²⁵⁵ for example in several institutional matters,²⁵⁶ where Member States agreed to govern unanimously on the development of European institutions. Some of the decisions subject to the unanimity rule are so crucial that it is hardly surprising to find them on the list: this is valid for the accession of new members in the European Club,²⁵⁷ for the Accession of the EU to the European Court of Human Rights,²⁵⁸ and for the authorization to proceed with enhanced cooperation.²⁵⁹ To some extent, a similar justification lies behind the application of unanimity voting for the adoption of a multiannual financial framework²⁶⁰ and for decisions laying down the provisions relating to the system of the Union’s own resources.²⁶¹ Unanimity applies to those decisions that may affect the equality of Member States in European institutions,²⁶² with a special regard to important symbols,²⁶³ and the use of languages in these institutions.²⁶⁴ In the list of institutional matters subject to unanimity voting, we find decisions that prove possibly problematic, such as the use

255. See Piris, *supra* note 139, at 5.

256. JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* (2010).

257. *Cf.* Treaty of Lisbon art. 49.

258. *Cf. id.* art. 6(2); TFEU art. 218(8).

259. TFEU art. 329.

260. *Id.* art. 312(2).

261. *Id.* art. 311.

262. See TEU, *supra* note 7, art. 14(2) (requiring unanimity on decisions regarding the composition of the European Parliament).

263. See TFEU art. 341 (requiring unanimity for decisions concerning the seat of EU institutions).

264. *Id.* art. 342.

of the flexibility clause²⁶⁵ and the conferral of jurisdiction on the CJEU in certain disputes related to European intellectual property rights.²⁶⁶

The most interesting suggestions come from the persistent application of unanimity in substantive matters. A common unanimous agreement in the Council is still required for: any decision taken under the chapter on the common foreign and security policy (Article 31 TEU) and the common security and defense policy;²⁶⁷ the conclusion of certain types of international agreements; the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property as well as foreign direct investment;²⁶⁸ any decision concerning direct or indirect taxes;²⁶⁹ most of the measures concerning social security, specifically social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defense of the interests of workers and employers, and conditions of employment for third-country nationals legally residing in Union territory;²⁷⁰ any provision strengthening or adding to the list of European citizenship's rights;²⁷¹ actions to

265. *Id.* art. 352.

266. *Id.* art. 262.

267. TEU, *supra* note 7, art. 42(2).

268. TFEU art. 207(4).

269. *Id.* art. 113, 192(2)(a), 194(3).

270. *Id.* art. 153(2).

271. *Id.* art. 25. The list of citizenship's right is provided by article 20(2) TFEU, according to which citizens of the Union

shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; [and] (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

In this respect, empirical evidence of the national concerns may already be found in the Danish positions with regard to the Maastricht Treaty. Following the first Danish rejection of the Treaty of Maastricht, the so-called Edinburgh Agreement granted Denmark four exceptions. Section A of the "Heads

combat discrimination based on sexual, racial, or ethnic origin, religion or belief, disability, age, or sexual orientation;²⁷² provisions primarily of a fiscal nature;²⁷³ some measures in the field of protection of the environment²⁷⁴ and measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply;²⁷⁵ measures concerning family law with cross-border implications;²⁷⁶ any decision identifying aspects of criminal procedure not expressly listed in the Treaties that may be the legal basis to adopt directives facilitating mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension;²⁷⁷ the establishment of a European public prosecutor;²⁷⁸ measures concerning operational cooperation between Members states' police, customs, and other specialized law enforcement services;²⁷⁹ provisions laying down the conditions and limitations under which the Member States' competent authorities (judiciary, po-

of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union" stated that the provisions of part two of the EC Treaty (Citizenship of the Union) "do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned." This position was reaffirmed in the "Unilateral declarations of Denmark." With regard to the adoption of any provision to strengthen or to add EU citizens' rights, the Declaration stated that "[i]n Denmark, such adoption will, in the case of a transfer or sovereignty, as defined in the Danish Constitution, require either a majority of 5/6 of Members of the Folketing or both a majority of the Members of the Folketing and a majority of voters in a referendum." For the text of both declarations, which are attached at the Conclusion of the Presidency of the European Council, see *European Council in Edinburgh*, *EUR. PARLIAMENT*, http://www.europarl.europa.eu/summits/edinburgh/default_en.htm (last visited Apr. 9, 2016).

272. TFEU art. 19(1).

273. *Id.* art. 192(2)(a).

274. Unanimity is required for measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, and land use, with the exception of waste management. *Id.* art. 192(2)(a).

275. *Id.* art. 192(2)(c).

276. *Id.* art. 81(3).

277. *Id.* art. 82(3).

278. *Id.* art. 86(1).

279. *Id.* art. 87(3).

lice, custom, and other specialized law enforcement services) may operate in the territory of another Member State in liaison and in agreement with the authorities of that State; and provisions concerning passports, identity cards, residence permits, or any other such document.²⁸⁰

It is not hard to identify some *leit-motiv* in the substantive matters where unanimity is still required, and therefore, a higher degree of mutual mistrust between Member States still persists. The rule of unanimity still expresses prudence and caution in matters that are traditionally located in the core of State sovereign powers: 1) foreign affairs and internal defense and security; 2) taxation; 3) criminal law and procedure, including matters related to the monopoly of use of force and law enforcement; and 4) citizenships' rights and provisions directly or indirectly connected with the status of citizen.

Besides these areas, which are traditionally linked to essential State sovereign powers, the list of matters where unanimity is still required consist of matters that are expressions of the fundamental social dimension of the postwar constitutional state, namely social security and nondiscrimination. Finally, unanimity is required in possibly ethically-sensitive matters like family law, particularly aspects related to protection of the environment and energy policies, and certain aspects in the field of property rights.

In the framework of social security matters, the unanimity required by Article 154(2) 3rd subparagraph is not the only point worthy of attention. According to another paragraph of the same Article, provisions unanimously adopted in the field of social security "shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof."²⁸¹

Finally, a twofold guarantee is provided in regard to the addition of new rights for EU citizens. In this matter, not only is unanimity required, but the TEU also states that any provision unanimously adopted, which strengthens or adds new rights for EU citizens, shall enter into force after the "approval by the

280. *Id.* art. 77(3).

281. *Id.* art. 153(4).

Member States in accordance with their respective constitutional requirements.”²⁸²

Therefore, it could be argued that unanimity may serve as an indicator of constitutional identity-sensitive matters, which are better kept under unanimous control by Member States. However, this does not mean that every area where unanimity is still being applied indicates a constitutional identity-sensitive matter. Member States can decide to apply unanimity for a variety of reasons, regardless of any constitutional identity-related concern. Furthermore, unanimity cannot be considered as an ultimate guarantee of respect for Member States’ constitutional identity, or as an exclusive indicator of constitutional identity-sensitive fields. Indeed, an automatic protection of constitutional identity through the mere application of the rule of unanimity may be excluded in two alternative scenarios: a) the Council could unanimously adopt a decision violating the constitutional identity of a Member State or b) constitutional identity could be violated in one of the fields where QMV applies.

B. Enhanced Cooperation: Dribbling Through National Concerns?

Enhanced cooperation is another fragment of the European mosaic that²⁸³ consisted of an overall tension, reaching its apex around 1992, between a centripetal force of deeper supranational integration and a centrifugal national backlash. In short, enhanced cooperation is an institutional arrangement that makes possible for a certain number of Member States—but not all—to further integrate their policies within the EU. Enhanced cooperation has been thought of as a tool to overcome political deadlocks. Under certain conditions, Member States that agree on a project of further integration may not be

282. *Id.* art. 25.

283. The adoption of the Treaty of Maastricht represented a decisive moment in the history of European integration, carrying ambivalent innovations. On the one hand, an ever closer EU was established through several means: the introduction of a European citizenship, a deeper economic Union and a monetary Union, and an ever closer political Union. On the other hand, fears of Member States were tempered through the introduction of counterbalancing principles, such as the principle of respect of national identities and the principle of subsidiarity. On the 1992 watershed for Europe, see *supra* Introduction.

blocked by the substantial veto of Member States that do not agree. These certain conditions have been changing under successive Treaty amendments, from the introduction of the first set of rules in the Treaty of Amsterdam, to the regulatory framework provided by the Treaty of Lisbon, currently in force.²⁸⁴

According to the discipline currently in force, enhanced cooperation may be established in all sectors that do not fall within the EU's exclusive competence.²⁸⁵ At least nine Member States are entitled to submit a request to the Commission, and the Commission may submit a proposal to the Council. The latter has the power to authorize proceedings with the proposal by QMV, after obtaining the consent of the European Parliament.²⁸⁶ A slightly different procedure applies within the framework of the common foreign and security policy.²⁸⁷ Leaving aside procedural details, enhanced cooperation is based on two main pillars: the principle of transparency and the principle of openness. The former requires that all Member States' representatives are authorized to sit in the Council meetings where deliberations on enhanced cooperation shall be adopted. Member States' representatives that are not part of the relevant enhanced cooperation agreement are simply not entitled to the right to vote on those matters.²⁸⁸

The principle of openness is implemented by Article 331 TFEU, which provides conditions for third parties to subsequently join established cooperation agreements. Significantly, the competent authority on third party application is the Commission and not the original member of the enhanced cooperation, with a sort of "appeal" to the Council, in case of a rejection by the Commission.

Enhanced cooperation has initially been viewed suspiciously. The Treaty of Amsterdam provided very strict rules²⁸⁹ that

284. TEU article 20 sets forth general provisions concerning the establishment of enhanced cooperation between a subset of Member States, whereas detailed arrangements are provided by articles 326 to 334 TFEU.

285. TEU, *supra* note 7, art. 20.

286. TFEU art. 329(1).

287. TFEU art. 329(2).

288. TEU, *supra* note 7, art. 20(3); TFEU art. 330.

289. This was, at least, the position of a significant part of the legal scholarship. See, e.g., Claus Dieter Ehlermann, *Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty*, 4 EUR. L.J. 246, 269 (1998).

have likely been the reason why the (then) closer (now enhanced) cooperation provisions have never applied. Rules have been progressively softened, but traces of the original caution toward enhanced cooperation are still present in the current set of regulations. The Treaties spell out very clearly that enhanced cooperation may be adopted only as a last resort and that it may not lead to a deviation in the integration process in the EU, but shall rather “further the objectives of the Union, protect its interest and reinforce its integration process.”²⁹⁰ Furthermore, enhanced cooperation “shall comply with the Treaties and Union law” and “shall not undermine the internal market or economic, social and territorial cohesion” nor shall it “constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.”²⁹¹

Despite the permanent subtle mistrust of enhanced cooperation, the new—and less complicated—set of procedural rules introduced with the Treaty of Lisbon finally led to the first concrete experiences of enhanced cooperation. In 2012 and 2013 respectively, enhanced cooperation agreements on divorce law and on unitary patent entered into force. It would be too much a digression to focus on the details of these agreements.²⁹² It is enough to note that, in both cases, the agreements followed a discussion of the projects at the European level, even though each agreement is a different story. In both cases, reasons for a comprehensive European regulation were self-evident: in the case of the enhanced cooperation on divorce law, a significant and constantly increasing number of nationally mixed families;²⁹³ in the case of the enhanced cooperation on unitary patent, the high cost of the preexisting system of inventions’ pro-

290. TEU, *supra* note 7, art. 20(1).

291. TFEU art. 326.

292. For further details, see, for example, Aude Fiorini, *Harmonizing the Law Applicable to Divorce and Legal Separation—Enhanced Cooperation as the Way Forward?*, 59 INT'L COMP. L.Q. 1143–58 (2010); Steve Peers, *Divorce, European Style: The First Authorization of Enhanced Cooperation*, 6 EUR. CONST. L. REV. 339 (2010); Enrico Bonadio, *The EU Embraces Enhanced Cooperation in Patent Matters: Towards a Unitary Patent Protection System*, 3 EUR. J. RISK REG. 416 (2011).

293. On this trend, see generally, for example, Giampaolo Lanzieri, *Mixed marriages in Europe, 1990-2010*, in CROSS BORDER MARRIAGE: GLOBAL TRENDS AND DIVERSITY 88 (Kim Doo-Sub ed., 2012).

tection.²⁹⁴ Nevertheless, harsh disagreements on the policy to adopt on these issues soon emerged. In the case of a European regulation on family law, the disagreement had many facets, and was based on very different approaches, traditions, and domestic regulations in the matter of family law.²⁹⁵ A first proposal for a Council regulation was issued by the Commission in 2006.²⁹⁶ First, the proposal encountered the opt-out of Denmark and the decision of the United Kingdom and Ireland not to participate in the measure. Second, the discussion on the single policies made clear the remarkably different positions of various Member States on the matter. It has been reported that Sweden was primarily responsible for the collapse of the negotiations, since they were not available to apply foreign divorce rules that would possibly be less liberal than the domestic regulations in place.²⁹⁷

With regard to the project of a European Patent with unitary effect, the disagreement did not break out on decisions on substantive policies, but on the prerequisite language.²⁹⁸ A common EU regulation establishing a Community patent had been proposed in 2000.²⁹⁹ In the following years, political hurdles and never-ending amendments to the Treaties' provisions on the legal basis made a decision on the proposal impossible. The

294. The system of European Patent of the European Patent Office, established by the European Patent Convention in 1973, consists of a mere sum of the individual countries' patents, requiring the validation in every single European country. This process is long and expensive, primarily because of translation costs. Compared with the U.S. patent system, "it has been estimated that protecting an invention using the current EPO procedure in all twenty-seven EU-Member States would cost applicants roughly €32,000, of which €23,000 would be incurred for translation fees alone. On the other hand, a US patent costs €1,850 on average." See Bonadio, *supra* note 292, at 416.

295. Regulations may vary largely from Member State to Member State in the area of family law. In some states, divorce is prohibited (Malta); in other states, it is restrictively regulated (Poland); and in yet other states, such as the Nordic States, regulations are inspired by much more liberal views.

296. See *Commission Proposal for a Council Regulation Amending Regulation*, 2201/2203, COM (2006) 399 final (July 17, 2006).

297. Fiorini, *supra* note 292, at 1144.

298. Before the enhanced cooperation adoption, the EU had been attempting to innovate this field for several decades. For an overview of that background, see generally Peers, *supra* note 292.

299. *Commission Proposal for a Council Regulation on the Community Patent*, COM (2000) 412 final (Aug. 1, 2000).

discussion was relaunched in 2008–2009 after the adoption of the Treaty of Lisbon,³⁰⁰ the Council reached an agreement on a revised text of the EU patent regulation, providing terms and conditions for obtaining a unitary patent right and its legal effects. Provisions on the delicate issue of translation—where unanimity was required in the Council—had been left aside from this agreement and were finally proposed by the Commission in June 2010. The model was linguistically inspired by the European Patent Office (EPO) system: EU patent claims would only have to be translated into one of the three EPO languages.³⁰¹ On this proposal, where unanimity was needed, Spain and Italy objected with a firm opposition, due to concerns about the status of the Spanish and Italian language. This deadlock was challenged by many Member States, which soon suggested proceeding without Italy and Spain. The Commission proposed an enhanced cooperation agreement, which was shortly afterward approved by the Council. All Member States except Italy and Spain agreed to participate in this enhanced cooperation.³⁰²

300. The Treaty of Lisbon conferred on the Union the explicit power “to establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized Union-wide authorization, coordination and supervision arrangements.” TFEU Article 118 (in the formulation following the amendments to the TFEU provided by the Treaty of Lisbon). The delicate language issue was addressed in a specific paragraph. Article 118, para. 2, TFEU, provides that any rules to “establish language arrangements for the European intellectual property rights must be adopted by a form of ‘special legislative procedure’,” requiring unanimity in the Council and the consultation of the European Parliament. *Id.* art 118, para. 2.

301. More precisely, according to the Commission’s proposal, applications not filed in English should have been translated into one of the other two languages. During a transitional period of at most twelve years, patents filed in French or German should have been translated into English, and patent applications submitted in English should have been submitted into any official language of the participating Member State that is an EU official language.

302. Italy and Spain’s opposition also found a judicial follow-up. These States submitted several complaints to the ECJ, challenging the authorization of enhanced cooperation and the subsequent measures implementing it. All complaints have been so far dismissed by the Court. *See* Joined Cases C-274/11 and C-295/11, *Spain and Italy v. Council*, [2013]; Case C-146/13, *Spain v. European Parliament & Council*, [2015]; Cases C-147/13, *Spain v. Council*, [2015].

These first experiences in the fields of divorce law and European patent show that enhanced cooperation is a flexible mechanism within EU architecture, which may be capable of playing different and changing roles. It may not be excluded that its application aims also at enacting a further step in the integration process excluding one or more Member States, neutralizing possible conflicts with the domestic legal order. Enhanced cooperation usually stems out from EU projects that initially comprised all Member States, and that found strong opposition from a few Member States, expressing concerns that are not shared by other Member States. These concerns may be related to national features, constitutional values, and other elements that can be easily traced back to the constitutional identity of Member States not participating in the enhanced cooperation. Experience garnered from the first two examples of enhanced cooperation lead to subject matters that are usually connected with national constitutional identity, namely family law and the protection of national language.

C. Subsidiarity

As previously mentioned, differentiated integration has always existed as a legal tool, by being able to accommodate special national interest in the European integration process. Nonetheless, the Treaty of Maastricht offers good reasons to be considered a turning point in this respect. A considerable widening of the EU competences has been balanced not only with the introduction of the principle of respect of national identities, but also—and perhaps more significantly—with the principle of subsidiarity. This triangle—European integration, national identity, and subsidiarity—may be reasonably considered a unique picture, carrying new alternatives to the sovereignty narrative in the EU.³⁰³

Since its introduction in Treaties, subsidiarity has always been a fundamental principle of EU law. Subsidiarity emerges in another normative triangle picture in Article 5 TEU, beside the principles of conferral and proportionality. In the current

303. Alejandro Saiz Arnaiz & Carina Alcoberro Llivinia, *Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 1, 4 (2013).

formulation, subsidiarity applies in areas of nonexclusive EU competence and implies that

the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.³⁰⁴

The principle of subsidiarity has been mostly read as a “competence valve,” determining when the EU is competent to legislate, and aiming at displacing the regulation power as closely as possible to the citizen. Nonetheless, subsidiarity bears an extraordinary potential with regard to national constitutional identities.

In this respect, recent studies have emphasized the versatile role that the principle of subsidiarity may play in the EU. Some of these studies have focused on the possible link between the implementation of the principle and the legal duty to respect national identities.³⁰⁵ This reinterpretation revealed interesting aspects of subsidiarity, and enlightened its possible application as a nonjudicial way to express concerns related to constitutional identity. Indeed the Protocol on the application of the principles of subsidiarity and proportionality defines the implementation of the principle and introduces several mechanisms to control and monitor its application. The Protocol was first attached to the Treaty of Amsterdam and successively amended by the Lisbon Treaty. The latter innovated these mechanisms and strengthened the role of national Parliaments, which have the right to police subsidiarity through the

304. TEU, *supra* note 7, art. 5(3).

305. See Barbara Guastaferrro, *Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, 21 MAASTRICHT J. EUR. COMP. L. 320 (2014); Nicola Lupo, *National Parliaments in the European Integration Process: Re-aligning Politics and Policies*, in DEMOCRACY AND SUBSIDIARITY IN THE EU: NATIONAL PARLIAMENTS, REGIONS AND CIVIL SOCIETY IN THE DECISION-MAKING PROCESS 107–132 (Marta Cartabia, Nicola Lupo, & Andrea Simoncini eds., 2013); Marco Goldoni, *The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation*, 10 EUR. CONST. L. REV. 90 (2014). An unexpected flexibility of the Principle of Subsidiarity and its implementation through the Early Warning System (“EWS”) has already been proven. See generally PHILIPP KUIVER, *THE EARLY WARNING SYSTEM FOR THE PRINCIPLE OF SUBSIDIARITY: CONSTITUTIONAL THEORY AND EMPIRICAL REALITY* (2012).

so-called “Early Warning System” (“EWS”).³⁰⁶ By virtue of the procedure provided by the Subsidiarity Protocol, national Parliaments may send to the Presidents of the European Parliament, the Council, and the Commission a reasoned opinion stating why it considers the draft in question not in compliance with the subsidiarity principle.

If a “qualified minority” of the Member States’ Parliaments acting together is met, a legislative draft proposed by the Commission may be temporarily stopped by means of a so-called “yellow” or “orange card.”³⁰⁷ National Parliaments have only carded twice so far, even though many reasoned opinions have been raised.³⁰⁸ Simply put, the experience of the EWS still seems to be open to a variety of purposes, and it may not be excluded that national Parliaments will use the principle of subsidiarity to raise concerns related to their constitutional identi-

306. On the role of national parliaments in the EWS, see KATARZYNA GRANAT, NATIONAL PARLIAMENTS AND THE POLICING OF THE SUBSIDIARITY PRINCIPLE (2014). With regard to the specific experience of the commission proposal for an EU regulation on the right to strike, see Federico Fabbrini & Katarzyna Granat, “Yellow card, but no foul”: *The Role of the National Parliaments Under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike*, 50 COMMON MKT. L. REV. 115–43 (2013).

307. The regulatory framework for “yellow” and “orange” cards is provided by Protocol No. 2 annexed to the Treaty of Lisbon, on the Application of the Principles of Subsidiarity and Proportionality. The qualified minority for a “yellow card” consists of one third of the votes (a quarter in the area of JHA, Article 7(2) of Protocol No. 2). An “orange card” is raised when more than half of the national Parliaments oppose a legislative draft on grounds of subsidiarity (Article 7(3) of Protocol No. 2). In the first case, the Commission may decide to maintain, amend, or withdraw the legislative draft, being only obliged to motivate its decision (Article 7(2) of Protocol No. 2). In case of the “orange card,” the draft legislation must be reviewed and in case the Commission decides to maintain its proposal, it has to justify its decision with a reasoned opinion. The Council, by a majority of 55 percent of its members, and the European Parliament shall decide on the basis of the Commission’s reasoned opinion whether or not to adopt the act. The threshold is calculated by taking into account the fact that each Parliament has two votes, and one vote is accorded to each chamber in the thirteen bicameral Parliament States (Article 7(3) of Protocol No. 2).

308. *Annual Report on Relations Between the European Commission and National Parliament*, at 5 n.5, COM (2014) 507 final (Aug. 5, 2014); *Annual Report on Relations Between the European Commission and National Parliament*, annex at 1 COM (2015) 316 final (July 2, 2015).

ties. Some empirical evidence has already been proven in the above mentioned study.

Explicit references to Article 4(2) TEU may be found in the Austrian Parliament's reasoned opinion on the Commission proposal on the award of concession contracts. The Commission initiative was based on Article 114 TFEU, enabling the adoption of harmonization measures to ensure the functioning of the internal market. Since the draft directive was also related to services of general economic interest, the Austrian Parliament evoked in its reasoned opinion a number of Treaty provisions—and Article 4(2) was one of these—to emphasize the risk of a compression of the flexibility granted to the Member States in the area of services of general economic interest.³⁰⁹

Similar concerns were expressed in the reasoned opinion delivered by the German Bundesrat on the same proposal of the Commission. The Bundesrat specially underlined the need to safeguard local self-government when regulating the award of service connection, with an explicit reference to Article 4(2) TEU.³¹⁰

With respect to the proposal for a directive on the award of concession contracts, the two mentioned reasoned opinions seem to interpret the flexibility clause in Article 4(2) TEU as a

309. Guastaferrero, *supra* note 305, at 329.

310. The German Bundesrat expressed its concerns in regard to the creation of a general regulatory framework in the area of concessions of services, referring in its passage to Article 4(2) TEU:

Durch den zum 1. Dezember 2009 in Kraft getretenen Vertrag von Lissabon ist der Spielraum der EU, eine allgemeine Regelung für Dienstleistungskonzessionen zu schaffen, die auch Kommunen betrifft, nochmals eingeschränkt worden. Denn die EU hat nach Artikel 4 Absatz 2 Satz 1 EUV die jeweilige nationale Identität der Mitgliedstaaten zu achten, die in ihren grundlegenden politischen und verfassungsmäßigen Strukturen, einschließlich der regionalen und lokalen Selbstverwaltung, zum Ausdruck kommt.

Beschluss des Bundesrates: Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über die Konzessionsvergabe [Proposal for a Directive of the European Parliament and Council Decision on the Award of Concessions], COM (2011) 897 final (Mar. 2, 2012), *translation at* http://www.bundesrat.de/SharedDocs/downloads/EN/uebersetzungen/0874-11b-en.pdf;jsessionid=423994919C4BE400E86FDBC7CEA02A15.2_cid339?__blob=publicationFile&v=1.

safeguard of national autonomy.³¹¹ Conversely, two reasoned opinions delivered by the Dutch and Swedish Parliaments on the Commission's proposal on the decree for the purpose of providing common rules regarding the temporary reintroduction of border controls at internal borders in exceptional circumstances refer to Article 4(2) in a much vaguer sense. These opinions interpret the Identity Clause as a provision protecting national competences, such as national security. The Dutch Parliament referred to Article 4(2) in connection with other provisions of TEU and TFEU, with the aim of challenging the legal basis of the Commission proposal.³¹² Similarly, the Swedish Parliament assumed that the Commission's proposal of providing new rules regarding the temporary reintroduction of border controls affected national security and the maintenance of law and order.³¹³ In the view of the Swedish Parliament, these matters should remain under the responsibility of each Member State, by virtue of Article 72 TFEU and Article 4(2) TEU.³¹⁴

In summation, national Parliaments started to use their power to have a say in the legislative process of the EU through the use of the principle of subsidiarity.³¹⁵ In this re-

311. Guastaferrero, *supra* note 305, at 332.

312. *Reasoned Opinion (Subsidiary) On the Decree for the Purpose of Providing Common Rules Regarding the Temporary Reintroduction of Border Controls at Internal Borders in Exceptional Circumstances*, COM (2011) 560 (Nov. 8, 2011).

313. See Reasoned Opinion of the Riksdag, 2011/2012:JuU13 (Swed.), *unofficial translation at* <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20110242/serik.do>; Committee on Justice 2011, Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (ec) No. 562/2006 in Order to Provide for Common Rules on the Temporary Reintroduction of Border Control at Internal Borders in Exceptional Circumstances (Swed.), <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20110242/serik.do>.

314. *Id.*

315. Every national parliament is indeed "free to interpret the functions conferred upon it by EU law in the manner which it retain to be the most beneficial," by virtue of the political nature of national parliaments. Lupo, *supra* note 305, at 127. That being said, it comes as no surprise that

the way in which the early warning mechanism develops in each national parliament tends to be influenced, to some degree, by its national characteristics, by its political and institutional culture [. . .], by the configuration of the parliamentary groups and committees, as well as the influence of the parliamentary bureaucracy. All these el-

spect, some Parliaments made use of Article 4(2) as a valid means of objecting on the basis of identity-related concerns.

CONCLUSION

As previously evidenced, a vast amount of legal scholarship has been devoted to the analysis of constitutional identity. Most of the literature has adopted a court-centric canon of interpretation, even though the judicial epiphanies of the notion are extremely rare at the EU-law level and often ambiguous in the case law of the Member States' constitutional courts. The combination of these two aspects—a shortage of judicial material and vagueness of the concept—has been the starting point to embark on a nonjudicial investigation of constitutional identity. At the present stage of the analysis, it is time to reassemble the collected fragments of this highly controversial notion. Elements of the judicial understanding of constitutional identity were collected in Part I. In Part II, an analysis of methods of nonjudicial neutralization of identity-related conflicts was undertaken. Part III analyzed three possible indicators of constitutional identity-sensitive matters: a) national interests underpinning the nonparticipation of certain Member States in enhanced cooperation agreements; b) matters where the unanimity rule still applies; and c) references to constitutional identity in national Parliaments' reasoned opinions.

If these fragments of the constitutional-identity patchwork are put together, a surprisingly coherent framework emerges. By comparing the list of constitutional identity-sensitive matters that the *BVerfG* compiled in its *Lissabon-Urteil* with the substantive matters involved in the illustrated opt-outs, exemptions, and protocols, remarkable overlaps emerge. Member States and the EU are struggling widely on the same matters both in and out of European and national constitutional courts. Among highly considered national interests, many elements recur. First, the decision of family law emerges multiple times in the *Lissabon-Urteil* list,³¹⁶ in one of the enhanced cooperation agreements,³¹⁷ in the Irish guarantees,³¹⁸ and behind the

ements can be easily traced back to the constitutional identity of each Member State.

Id. at 132.

316. See *supra* Part I.

317. See *supra* Part III.

Polish quasi-opt-out from the CFREU.³¹⁹ Second, the general consideration of the protection of the welfare state emerges several times, in the *Lissabon-Urteil*, in the decision of the Polish Constitutional Court on the Lisbon Treaty, and in more than one reasoned opinion of the national Parliaments.³²⁰ Third, the form of State emerges in the CJEU's case law³²¹ and in a more specific declination, comprising local self-government, in one reasoned opinion of the German Bundesrat.³²² Fourth, peculiar national concerns regarding foreign and military policy underpin a part of the Irish guarantees³²³ and the Danish opt-out from decisions with defense implications, which are not specifically addressed in this article. Fifth, among national constitutional identity concerns, a recurrent element is the protection of the national language.³²⁴ Sixth, fiscal autonomy emerges as part of constitutional identity in the *Lissabon-Urteil* list and in the Irish Protocol on the Lisbon Treaty.³²⁵ Lastly, overlapping concerns may be found in the *BVerfG* inclusion among the constitutional identity-sensitive matters of fundamental decisions on substantive and formal criminal law and on the use of force by the police. The significant opt-outs in the field of the AFSJ confirm the inclination of certain Member States to retain the highest possible level of autonomy in these areas.³²⁶

Most of the matters that result in constitutional identity-sensitive concerns are comprised in the traditional understanding of essential State functions, such as the ability to shape social conditions including family regulation, protection of the national language, form of the State, fiscal autonomy, defense and military policy, criminal law, and monopoly of the use of force. Less obvious is the fact that greatly overlapping claims to retain a high grade of national autonomy have been managed

318. *See supra* Part II.

319. *See supra* Part II.

320. *See supra* Part III.

321. *See supra* Part I.

322. *See supra* Part III.

323. *See supra* Part II.

324. The CJEU's case law concerning the use of national languages and name spelling requirements is addressed in *supra* Part I. The reasons behind the nonparticipation of Italy and Spain in the European Patent with Unitary Effect are discussed in Part III, *supra*.

325. *See supra* Part II.

326. *See supra* Part II.

in very different manners throughout the latest developments of the European integration.

In some cases, these claims have been left to judicial struggle. In others, they have been managed through a previous political neutralization by means of opt-outs, protocols, declarations, and other political guarantees. Judicial struggles with identity-related cases often yield possible disastrous outcomes, whereas the accommodation of highly considered national interests through differentiated integration did not result in the dissolution of the Union. Therefore, a less timid use of the latter seems to be highly recommended.

Indeed, the judicial monopoly of the interpretation of national constitutional identity issues did not clarify the notion of national constitutional identity and seems inefficient in terms of avoiding dangerous outcomes. The so-called judicial dialogue proved to be more of a judicial fight. Such dialogue seems highly unfit as a method of settlement for ultimate constitutional disputes. Under these circumstances, other methods need to be developed, both conceptually and practically. This article argues that differentiated integration is already one of the alternative methods that needs to be further developed.

Indeed, in particular after 1992, the outbreak of identity issues in the EU had been accompanied by a parallel growth of differentiated integration, both in theory and in practice. This article argues that these two trends should be seen as closely linked to each other. According to a coordinated view of identity and differentiated integration, Article 4(2) TEU may be interpreted in the sense that it establishes a legal duty for the EU and Member States to neutralize any possible conflict before it breaks out by using opt-outs, interpretative declarations, exemptions, and any other suitable means. The respect of national identities spelled out in Article 4(2) TEU, includes a duty to differentiate as long as differentiation prevents a violation of constitutional identity.

What if things go wrong? What if a differentiated integration would have successfully neutralized an infringement of a peculiar character of the constitutional identity of Member States, but none of the actors entitled to negotiate such an arrangement acted? In other words, if Article 4(2) imposes a legal duty to accommodate national constitutional identity claims through differentiated integration arrangements, what is the chosen sanction in case of breach of this duty?

It is highly implausible for the CJEU to impose the introduction of a mechanism of differentiated integration, even if the latter would solve the legal problem. This does not mean that Article 4(2) provides a differentiation duty with no sanction. The point is that the sanction in question is not applicable by the CJEU or by any national constitutional court.

In fact, an applicable sanction exists and consists of the accommodation of the disagreement outside of the EU framework. If a strong resistance from a limited number of Member States impedes an agreement on a certain matter, and no tool of flexibility is put into effect to accommodate these reluctances in the EU framework, under certain circumstances a Member State's avant-garde may seek out international law.

This seems to be the picture that emerged with the Treaty on Stability, Coordination, and Governance (TSCG):³²⁷ all of its parties are Member States of the EU; the only Member States that did not sign the Treaty were the United Kingdom and Czech Republic (Croatia was not a Member of the Union yet). The TSCG introduced new stringent forms of budgetary surveillance in (and over) the current euro zone, improving the monitoring, surveillance, and coordination of economic policies and providing enforcement measures to correct excessive macroeconomic imbalances. The procedures laid down in the TSCG involve a fundamental role of the European institutions.³²⁸ The TSCG sets some specific targets for the signatory countries that, in short, may be summarized as follows: to achieve a balanced (or in surplus) budget, to avoid an excessive government deficit, and to correct macroeconomic imbalances. Even though the TSCG provides rules on stability, coordination, and govern-

327. Formally the Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union, 2013 O.J. was signed on March 2, 2012 by all Member States except for the Czech Republic and the United Kingdom. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Mar. 2, 2012 [hereinafter TSCG], http://europa.eu/rapid/press-release_DOC-12-2_en.htm

328. Each part of the Treaty submits a stability program to the Economic and Financial Affairs Council and the Commission and sets a "medium-term budgetary objective" to be assessed by the Council. For a concise analysis of the Treaty in relation to both the authentic enhanced cooperation model and the threat of disintegration, see Carlo Maria Cantore & Giuseppe Martinico, *Asymmetry or Dis-integration? A few considerations on the new "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union,"* 19 EUR. PUB. L. 463 (2013).

ance in the EMU,³²⁹ its application extends to Members States that benefit from a permanent de jure opt-out (Denmark), a de facto opt-out (Sweden), and to "Member States with a derogation."³³⁰

In summary, the Stability Treaty looks more like an EU Treaty with the opt-out of the United Kingdom and Czech Republic than an international agreement between most of the EU-Member States.³³¹ However, there is one significant difference, an international treaty enjoys the protection from referendum that is usually granted to diplomatic acts.³³² This is not a small difference, in particular after the referendum fears that followed the French and Dutch "No" to the CT in 2005 and the Irish "No" to the Lisbon Treaty in 2008.

Once again, this scenario supports the idea that the judicial monopoly on national constitutional identity through the myth of the so-called judicial dialogue is an unsuitable institutional arrangement. Moreover, it draws a rather dangerous picture. These are sufficient reasons to argue in favor of a need to reform these inappropriate institutional arrangements. Such prospects for reform are far from being new in the European

329. The TSCG states,

This Treaty shall apply to the Contracting Parties with a derogation, as defined in Article 139(1) of the Treaty on the Functioning of the European Union, or with an exemption, as referred to in Protocol (No 16) on certain provisions related to Denmark annexed to the European Union Treaties, which have ratified this Treaty, as from the date when the decision abrogating that derogation or exemption takes effect, unless the Contracting Party concerned declares its intention to be bound at an earlier date by all or part of the provisions in Titles III and IV of this Treaty.

TSCG, *supra* note 327, art. 14(5).

330. Member States with a derogation are those Member States that have not adopted the euro yet, but are legally obliged to do so as soon as they meet the requirements.

331. The so-called Fiscal Compact provides the obligation to codify the budget rule in national law "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to." This provision has been criticized as excessively intrusive on the national State constitutional autonomy, and its compatibility with the EU law principle of respect for the national identity and constitutional structure of EU-Member States has been questioned. Cantore and Martinico, *supra* note 328, at 464–65.

332. Majone, *supra* note 137, at 246, 247.

debate.³³³ From the “Constitutional Council”³³⁴ to the “European Conflicts Tribunal,”³³⁵ there is a relevant common denominator in many of the reform proposals of the Union, namely the awareness of the present inadequacy of the given judicial system of resolution of “ultimate conflicts” between the supranational and the national level.³³⁶

A promising starting point for any proposal should be the awareness that “not all legal problems can be solved legally.”³³⁷ Conflicts related to constitutional identity certainly belong to the category of legal problems that will likely not be solved legally. That being said, the proposed model of a European Conflicts Tribunal could have a successful impact not only with respect to conflicts between EU and Member State competences, but also with respect to national constitutional identity-related issues. Lindseth’s proposal is based on the above mentioned MacCormick admonition. In a nutshell, the Tribunal should be comprised of judges from supreme and constitutional courts and presided over by the president of the CJEU. The Tribunal should have competence a) on norm control upon reference by a Member State or an EU institution and b) on conflicts of jurisdiction submitted by national courts or individual litigants, as long as all other available legal remedies have been exhausted.

As far as constitutional identity-related conflicts are concerned, the most promising aspect relies upon the proposed ad-

333. The debate exploded around the turn of the century. *See, e.g.*, Franz C Mayer, *Die drei Dimensionen der Europäischen Kompetenzdebatte*, 61 Z. FÜR AUSLÄNDISCHES ÖFFENTL. RECHT VÖLKERR. ZAÖRV Z. FÜR AUSLÄNDISCHES ÖFFENTL. RECHT VÖLKERR. 577–638 (2001).

334. Joseph H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order-Through the Looking Glass*, 37 HARV. INT’L L.J. 411 (1996).

335. Lindseth, *supra* note 14, at 726.

336. As a matter of fact,

the ECJ is an EU institution and has often been depicted as a major engine of the European integration process. The Court might therefore be expected to be more receptive to integration-based arguments. Secondly it cannot be excluded that the Court may not feel very comfortable with certain identity-related arguments, especially if they are inspired by national aims which are not, as such, shared by the EU.

CLOOTS, *supra* note 6, at 211.

337. Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L. J. 259, 265 (1995).

ditional political safeguards, to be guaranteed to Member States dissatisfied with a ruling of the Conflicts Tribunal. In these cases, the Tribunal should refer the matter to the European Council for consideration. As a last option, in the case that a Member State is dissatisfied with the Conflicts Tribunal ruling and cannot find any political arrangement in the European Council, that Member State should be allowed to opt-out of the legislation incompatible with its constitutional identity.³³⁸

338. In the same sense, see Lindseth, *supra* note 14, at 732.